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Jimma University Legal aid Center

About the Law School

The Law School commenced its academic work on the 19th of December 2002 as the Faculty of Law of Jimma University. Later, the Faculty of Law and the Faculty of Humanities and Social Sciences were merged to form the College of Social Sciences and Law in 2009. As of 2014, it has been restructured as College of Law and Governance and it is joined by the Department of Governance and Development Studies.

The Law School has been producing high-caliber and responsible graduates since its inception in 2002. For the first year, it accepted 158 advanced diploma students who graduated three years later. Then, the School has been accepting and teaching students in four first degree programs, namely, in the regular, evening, summer, and distance programs. Thus far, it has graduated thousands of students in these programs. Moreover, the Law School is currently offering **LL.M** in **Commercial and Investment Law** and **LL.M** in **Human Rights and Criminal Law**. These are two years of programs. Indeed, the School will open new postgraduate programs in the future.

In addition to its teaching jobs, the Law School has been publishing its law journal, **Jimma University Journal of Law** since 2007/2008. It is a journal published at least once a year.

Finally, the Law School is making its presence in the community felt by rendering legal services to the indigent and the vulnerable parts of the society (such as children, women, persons with disabilities, persons with HIV/AIDS, and old persons) in Jimma town, Jimma Zone and the surroundings through its Legal Aid Centre. Currently, the Centre has ten branches and they are all doing great jobs to facilitate the enjoyment of the right of access to justice for the indigent and the vulnerable groups. Of course, this also helps equip our students with practical legal skills before they graduate.

At the Moment, the School has the following full-time staff for its undergraduate and postgraduate programs.

Full-time Staff Profile:

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Law and Economics Analysis of Ethiopian Negligence and Strict Liability Law

Alekaw Dargie Assefa+

> *Economic Analysis of Law fuse's is "lit by Coase and fanned by Calabresi, ignited in US law schools with the work and views of Richard Posner in the 1970's".*[1]

Abstract

The application of microeconomics principles to analyze a range of laws dubbed as "Economic Analysis of Law" is the most innovative legal reasoning. Law and Economics notion of tort law stipulates that accident costs constitute negative externalities. Harm is an externality that reduces the utility of injured parties. As harm is a downward shift in victims' utility function liability rules should be designed to maximize total welfare through internalization of externality via incentives. The economic analysis of tort law concerns cost minimization to maximize social wealth. Optimal care and optimal activity maximize society's wealth. The purpose of this article is to examine the economic analysis of Ethiopian Negligence and Strict liability law using economic efficiency as an explanatory tool to study the incentive these liability laws offer to individuals to alter their behavior. This Article contributes suggestions for the amendment endeavor of the Extra-Contractual Liability portion of the Civil Code. Furthermore, it provides suggestions to courts to entertain economically informed decisions employing law and economics insights to practically resolve a case. It is argued that Ethiopian liability law adopts uniform reasonable man standard to avoid tertiary cost. In doing so, the author employs a doctrinal research methodology.

Key-Words
Externality, harm, transaction cost, optimal care, optimal activity, incentive, Hand formula, Cassation Bench, social utility, Ethiopia
JEL-Code- *K12, K1, K13*

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[1] Cento Veljanovski, (2006). *The Economics of Law, 2nd Edition*. Hobbs the Printers, Great Britain, p.6.

Part One-Introduction

Ethiopia has adopted extra-contractual liability in Civil Code which is also dubbed "law of delict", "law of civil wrongs" and "law of torts".[2] The Civil Code provisions starting from Articles 2027 to 2178 deal with extra-contractual liability. Article 2027 enumerates the sources of extra-contractual liability and they are classified as fault-based liability (negligence-based liability), strict liability, and vicarious liability. This piece only examines negligence-based and strict liability laws from law and economics analysis of law approach employing efficiency as a normative criterion. Negligence and strict liability laws do have different classifications and offer various incentives to individuals. However, the Civil Code lumps different species of negligence and strict liability laws under the heading negligence and strict liability laws. The various liability laws incorporated in the realm of tort law are subject to rigorous economic analysis including strict liability and negligence as well as strict and negligence rules combined with various defenses. Decoupling of lumped negligence and strict liability laws help to understand the incentive each rule offers to individuals.

Law and economics describe law as "a cathedral-a large, ancient, complex, beautiful, mysterious and sacred building and behavioral science resembles the mortar between the cathedral's stones which support the structure everywhere."[3] Most of the time judges consult their intuition, facts, and laws to solve legal challenges without consulting economics principles. However, recently there is a new field of study that examines laws by using economics principles as an explanatory tool and makes law scientific discipline surpassing intuition and common sense. Borrowing Richard Posner quote elucidates:

> *"To me, the most interesting aspect of the law and economics movement has been its aspiration to place the study of law on a scientific basis, with coherent theory, precise hypothesis deduced from the theory and empirical tests of the hypotheses.*

[2] The Civil Code of The Empire of Ethiopia, Proclamation No.165/1960, 19th Year No.2, Addis Ababa 5th May 1960..See also G Felote.(2012). A Guide to the Zimbabwean Law of Delict. Roman-Dutch Law refers to the Law of Delicts whereas in England and American law they refer to the Law of Torts. The author employs extra-contractual liability and tort law interchangeably in this Article.

[3] Robert Cooter& Thomas Ulen. (2016). *Law and Economics, 6th Edition*. Pearson Education, Boston, USA.p.3.

> *Law is a social institution of enormous antiquity and importance, and I can see no reason why it should not be amenable to scientific study. Economics is the most advanced of the social sciences, and the legal system contains many parallels to and overlaps with the systems that economists have studied successfully."*[4]

"Incentives are the essence of economics."[5] Economics offer ample opportunity to predict the effects of legal sanction as incentives are the tenet of economics on individuals' behavior.[6] "Law and economics" or "economic analysis of law" is "never again would Law and Economics be thought of as exclusively the domain of…corporate law" rather the domain is the very heart of the legal system.[7] Microeconomic models can be successfully applied to tort law. The economic analysis of tort law concerns cost minimization to maximize social wealth. The purpose of this article is to critically analyze Ethiopian negligence and strict liability laws from Law and Economics perspective using economic efficiency as an explanatory tool to examine the incentive these liability laws offer to individuals to alter their behavior. Posner's tort law opinions referred to the same legal concepts but "displace, adjust, or rationalize them, using economic concepts like cost-benefit matrices, incentive effect, and least-cost avoidance models."[8] He contributes to the law an economic tool, in a form more resembling a rule than a standard that judges can use.[9] Thus, this Article introduces an economic analysis of negligence and strict laws and how individuals are induced to take incentives in different forms of liability rules as well as whether Ethiopian negligence and strict liability law are amenable to an economic analysis of law. Evaluating law from a law and economics perspective employing efficiency is uncharted water of the legal system in Ethiopia. Thus, economic analysis of law in general and tort law, in particular, has no introduction in Ethiopia in the academic writings and courts' practice which compels the author to rely on foreign sources. To meet this objective, this article is structured as follows. Part one is allotted to the introduction and highlights the roadmap of the article. Part two is devoted to law and economics analysis of negligence and strict liability

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[4] Richard A. Posner: In Michael Faure & Roger Van den Bergh, (eds.). (1989). Essays in Law and Economics.
[5] E.P. Lazaar, Incentive Contract: in J. Eatwell, et al. (ed.) (1998). *The New Palgrave- A Dictionary of Economics, Vol.2*. Macmillan, London, pp.744-748.
[6] Cooter&Ulen (supra note 3)p.3.
[7] Sophie Harnay& Alain Marciano. (2008). Posner, Economics and the Law: From Law and Economics to an Economic Analysis of Law. *Forthcoming in the Journal of the History of Economic Thought*, p.3.
[8] Lawrence A. Cunningham.(2010). Traditional Versus Economic Analysis: Evidence From Cardozo and Posner Torts Opinions. *Florida Law Review*, **62**, pp.667-720, p.669-670.
[9] Cunningham, Id.p.679.

law and how law and economics would offer incentives to parties to the accident. It decouples lumped negligence and strict liability laws and examines which species of law offers what incentives to parties to an accident to increase the wealth of the society. Part three, taking part two as hindsight, examines Economic Analysis of Negligence-based and strict liability Law under the Civil Code. Finally, a conclusion and recommendation are provided.

Part Two-Law and Economics Analysis of Negligence and Strict Liability Law

Economists describe harm as externalities (the action of a party imposes a cost on another person without price) because it is outside of the private agreement.[10] The liability rule is centered on the internalization of external effects based on the behavior of parties. Thus, the essence of the economic notion of liability law states that accident costs constitute negative externalities that should be internalized by the wrongdoer.[11]Calabresi stipulates that "our society is not committed to preserving life at any cost".[12] Liability law considers cost-benefit analysis as Calabresi argued that "we use relatively safe equipment rather than the safest imaginable because-and it is not a bad reason-the safest costs too much".[13]

Potential wrongdoers have incentives to invest in safety at an efficient level to internalize the externality they cause.[14]As harm is a downward shift in victims' utility function liability rules should be designed to maximize total welfare.[15] The objective of any society is assumed to be wealth maximization which could be advanced by liability rules. Optimal care and optimal activity maximize society's wealth.[16] To maximize society's wealth liability rules target the goal of minimization of social costs namely minimization of primary costs to deter (comprises the sum of accident avoidance measures and harm due to the accident), secondary costs (optimal risk spreading and risk-bearing of risk-averse parties) and tertiary accident costs (administrative costs comprises expenses in time and money of litigants and the state).[17]

[10]Cooter&Ulen(supra note 3)p.189.
[11] Michael Faure (ed.) (2009). *Tort Law and Economics, Encyclopedia of Law and Economics, Volume 1*, 2nd edition, Edward Elgar, Cheltenham, UK, p.xxiv.
[12]Guido Calabresi, (1970). *The Cost of Accidents: A Legal and Economic Analysis*. New Haven, Yale University Press,p.17.
[13]Calabresi, Id.p.18.
[14]Cooter & Ulen (supra note 3)p.189.
[15]Cooter &Ulen, Id.p.190.
[16] Richard A. Posner. (1972). A Theory of Negligence. *J. Legal Stud*.**1**, pp.29-96, p.40-91.
[17] Guido Calabresi, (1977). The Cost of Accidents: A Legal and Economic Analysis, 5th edition. New Haven, Yale University Press. See also Louis T. Visscher, Tort Damages: in Michael Faure (ed.) (supra note 11).

Tort is mostly committed between or among strangers that yield external costs. Coase expounded that irrespective of the liability rules regarding accidents (external costs) the law does not affect the efficient solution in the world of zero transaction costs that enables using the marketplace.[18] However; transaction cost is prohibitively high (positive transaction cost) because there is no market for an accident.[19] This leads to a lack of internalization of externalities via contractual agreement. Transaction costs such as bargaining costs, emotions, cognitive imperfections, private information, and strategy are obstacles to an efficient solution.[20] The presence of high transaction costs calls for the allocation of the legal entitlement to achieve efficiency.[21] Thus, "the economic essence of tort law is its use of liability rule to internalize negative externalities created by high transaction cost."[22]

Parties ought to take efficient precaution measures and they differ regarding the cost of care. This demands that the allocation of liability burden relies on the behavior of parties engaged in the accident. Tort law addresses relationships affected by high transaction costs and the allocation of legal entitlements based on efficiency. Therefore, the economic model of tort is based on the efficiency of liability rules concerning the care and activity levels of potential wrongdoer and victim.[23]

Law and economics uses "the principle of economic efficiency as an explanatory tool by which existing legal rules and decisions may be rationalized or comprehended."[24] Posner articulates the essence of economic analysis of law at length:

> *"One of the major contributions of economic analysis to the law has been simplification, enabling enhanced understanding. Economics is complex and difficult but it is less complicated than legal doctrine and it can serve to unify different areas of law. We shall demonstrate how economics brings out the deep commonality, as well as significant differences, among the various fields of…law…Economics can*

[18]Veljanovski (supra note 1) p.4.
[19]Veljanovski, id.p.5.
[20]Cooter&Ulen(supra note 3) p.189.
[21] Tim Friehe.(2008). *Precaution Incentives in Accident Settings*. Dissertation Universitat Tubingen, ISBN 978-3-8349-1292-3, p.7.
[22]Cooter&Ulen(supra note 3) p.190.
[23] Harold Winter.(2002). An Economic Analysis of a Hybrid Liability Rule. *Economic Inquiry*, **40**(4), pp.704-710, p.704.
[24]J.L.Coleman, (1980). Efficiency, Exchange and Auction: Philosophical Aspects of the Economic Approach to Law. *California Law Review*, **68**, pp.221-249, p.221.

reduce mind-boggling complex statutes, amendments, and judicial decisions to coherence. By cutting away the dense underbrush of legal technicalities, economic analysis can also bring into sharp definition issues of policy that technicalities may conceal."[25]

The goal of economic analysis of tort law is concerned with how forward-looking incentive analysis of economics can be married with legal reasoning. This only happens when tort law generates incentives for individuals that help alter their behavior. Economic approach considers "tort law as a set of loss (cost) allocation rules that shift (internalize) accident losses selectively with the implied objective of efficiently deterring wrongs."[26] Before examining Law and Economics Analysis of Ethiopian Negligence and Strict Liability Law, the Article tries to examine incentives for precaution under liability rules.

2.1 Efficiency of Incentives for Precaution

Incentives for taking efficient precautions rely on who can take precautions against accidents and how the law assigns the cost of harm. To have efficient incentives, tort law should align the private benefits and costs of the parties with the social benefits and costs.[27] Liabilities are designed to send signals to potential victims and injurers to behave efficiently. Thus, different liability rules offer various incentives by allocating the cost of harm, and one liability rule may be preferred to the other.

The risk of accident could be influenced by a single party (unilaterally) or both parties (bilaterally or jointly) assuming that only the injurer and victim engaged in the accident. *Unilateral precaution* describes the situations whereby one party to an accident can take precaution as it influences the risk of an accident whereas *bilateral precaution* requires both the injurer and the victim should take efficient precaution as both parties influence the risk of an accident.[28] In a bilateral accident setting both the injurer and a victim could influence to produce the accident. If efficiency justifies unilateral precaution taking then "strict liability" is as efficient as negligence rule whereas if efficiency demands bilateral precaution taking negligence rule

[25]W.Landes& R.A. Posner, (2003). The Economic Structure of Intellectual Property Law. MA, Harvard University Press Publisher, p.10.
[26]Veljanovski (supra note 1) p.181.
[27]Cooter & Ulen (supra note) p.201-202.
[28]Cooter & Ulen, Id.p.205.

offers more efficient incentives for precaution than strict liability.[29] Negligence and strict liability laws are the dominant rules but they do have species under each of them. Below, incentives under each liability rule are examined from the law and economics approach.

2.1.1 Incentives for Precaution under Simple Negligence Liability Law

In this article, unless otherwise expressed, it is assumed the models of an accident whereby two parties namely injurer and victim (both of them are risk-neutral) take care and engaged in a certain level of activities. Negligence liability law offers efficient incentives both to the victim and the injurer. All negligence laws lead to socially optimal result under restrictive assumptions provided that due care standard is set optimally. Negligence law imposes a legal standard of care to comply to exonerate oneself from liability. Here it is assumed that courts apply a legal standard of care that is equal to efficient precaution.[30]Assuming each legal standard of precaution and perfect compensation are equal to the efficient level of care every species of negligence liability law offers both injurer and victim incentives for optimal precaution.[31]The rational injurer will continue unabatedly taking more precautions until he reaches the optimal care where liability falls to zero.

As discussed, negligence law takes the assumption that the legal standard of precaution equals the efficient level of precaution. The first person to describe a legal standard of care (reasonable care) is Judge Learned Hand (1947). The Learned Hand formula shows how the court determines negligence. Hand formula translates legal principles into economic terms. However, it is argued that the Hand formula is more persuasive in evaluating reflective decisions about precautions in advance of accidents than evaluating more spontaneous decisions (lacked practical flavor when applied to a momentary lapse when the injury was imminent).[32] He coined the symbolic (algebraic) representation of an efficient level of care when setting the legal standard to hold someone liable or exonerate from negligence liability.[33] It is debatable whether Hand's formula variables refer to marginal values or total values.[34]The following representation seems applicable in a unilateral case whereby the injurer's precaution taking behavior affects the expected accident losses. According to the "Hand Test",

[29]Cooter & Ulen, Id.p.212.
[30]Cooter & Ulen, Id.p.204&206.
[31]Cooter & Ulen, Id.p.209.
[32]Cunningham (supra note 8)p.679.
[33]Cooter & Ulen (supra note 3) p.213.
[34]Cooter & Ulen, Id.p.214.

"The defendant's liability is determined by the 'BPL formula' which balances 'the burden of adequate precautions' (B) against 'the likelihood of an accident' (P) multiplied by the 'gravity of the harm should the accident occur' (L). The defendant is at fault only if accident avoidance is the cheapest solution. More specifically, a defendant is liable if B is less than PL, and not liable (at fault) if B is greater than or equal to PL."[35]

The expected total accident costs are C= B(x) +P(x) L

Where *C* is the total expected social cost, *x* is the optimal care, *B(x)* is the total cost of care (precaution cost), *P(x)* is the probability of risk and assumed to fall when more care is exercised and L is the magnitude of the loss. This illustrates the economic model of tort law is made up of the cost of harm and the cost of avoiding harm. Judge Hand mathematically defined a *reasonable person standard* to determine negligence liability on the cost-benefit analysis method.[36] Thus, one is negligently liable when the injurer fails to take action for which the expected benefit (P multiplied by the size L of the injury) from preventing an accident is greater than the cost (B).[37]

The Hand Test illustrates the basic ingredients of negligence, not factors relevant to setting the standard of care.[38] Courts' case-by-case analysis could help to set legal standard care or regulators could specify legal standard precaution through safety regulations equaling the efficient level of precaution.[39] It is argued that courts might be armed with better information to set efficient precautions rather than regulators because regulators may set low standards to exempt or avoid liability to powerful businesses or set a high standard to stifle competition.[40] In this case, the standard of care set by courts may efficiently function; however, once the regulator fixes standards courts must follow these standards. Posner argues that regulators too; not only courts, utilize the Hand formula to set a statutory duty of care.[41]The other method is the law is reliant on a community of people who established the social norm and best practice in the

[35]Veljanovski (supra note 1) p.187.
[36]Jeonghyun Kim.(2013). Revisiting the Learned Hand Formula and Economic Analysis of Negligence. *Journal of Institutional and Theoretical Economics*, **169**, pp.407-432, p.408.
[37] Kim, Ibid.
[38]Veljanovski (supra note 1) p.188.
[39]Cooter & Ulen (supra note 3) p.215.
[40]Cooter & Ulen, Id.p.236.
[41] Posner (supra note 16) p.39.

industry to set efficient precaution.[42] However, when the legislators adopt these community standards they evaluate cost and benefit.[43]The due care standard is set by "balancing the total costs of care against the total expected accident losses, with the implication that there has been complete avoidance of accident cost."[44]

Care is a continuum that reduces the likelihood of an accident.[45] Economists claim that precaution is a continuous variable which denotes that a larger variable corresponds to higher levels of precaution.[46] The Hand Test consists of three principal ingredients namely risk, precautions, and gravity of loss. When the costs of precaution (cost of accident avoidance) are low the liability is sure to follow.[47] Precaution is hence any behavior reducing the probability or magnitude of an accident.[48]

Economic analysis of tort law assumes that rational individuals respond to an increase in expected costs by substituting lower (net) cost alternatives.[49] For example, when the costs of accidents increases due to compensations go up, the potential tortfeasor is assumed to raise his level of care that leads to a cost-saving taking assumption that care is inversely related to the probability and severity of accidents which means more careless accident loses, however; probability and severity of accidents are directly related with the frequency of activity parties engage in.[50]

Adding the cost of precaution a little more (marginal cost) reduces the expected cost of harm (marginal benefit) which is called the *marginal* Hand Test.[51] The economic version of the *marginal* Hand Test stipulates that the injurer is liable if and only if at the level of care taken, the

[42]Cooter & Ulen (supra note 3) p.216.
[43]Cooter & Ulen, Ibid.
[44]Veljanovski (supra note 1) p.191.
[45]Veljanovski, Ibid.
[46]Cooter & Ulen (supra note 3) p.190.
[47]Veljanovski (supra note 1) p.189.
[48]Cooter & Ulen (supra note 3) p.201.
[49]Veljanovski (supra note 1) p.190.
[50]Veljanovski, Ibid.
[51]Cooter & Ulen (supra note 3) p.201.

marginal cost of care is less than marginal expected damages.[52] For instance, the cost of care should be increased so long as one birr spent on greater safety avoids expected accident losses of more than one birr. When incremental cost of care would have cost ten birr and reduced the risk of ten thousand birr loss to the victim by one in 500, therefore, the injurer would be liable because the additional cost of ten birr saves twenty birr in expected losses that is a probability of accident (P) is equal to 1/500 and the loss (L) is equal to ten thousand, therefore, PxL=1/500x10, 000= 20 birr.[53] Thus, *change in* B<*change in* PL[54] yields liability by taking the additional care cost balanced against the incremental reduction in risk. The *change in total accident cost = change in B(x)+change in P(x)L*.

Negligence liability law has categories comprising of simple negligence, negligence with the defense of contributory negligence, and comparative negligence which achieves optimal efficiency in different circumstances. These standards of liability rules efficiently function when due care is set at an efficient level and are detailed below.[55]

Liability rules	**Injurer Care**	**Victim Care**	**Liability Allocation**
Simple negligence	At Fault	Not Decisive	Full injurer liability
Simple negligence	Faultless	Not Decisive	Injurer is not liable
Negligence with the defense of contributory Negligence	At Fault	Faultless	Full injurer liability
Negligence with the defense of contributory Negligence	Faultless	At Fault	Injurer is not liable
Negligence with the defense of contributory Negligence	Faultless	Faultless	Injurer is not liable
Negligence with the defense of contributory Negligence	At Fault	At Fault	Injurer is not liable
Comparative Negligence	At Fault	Faultless	Full injurer liability
Comparative Negligence	Faultless	At Fault	Injurer is not liable
Comparative Negligence	Faultless	Faultless	Injurer is not liable
Comparative Negligence	At Fault	At Fault	In a proportion of Negligence

[52] J. Brown, (1973). Toward an Economic Theory of Liability.*Journal of Legal Studies*, **2**, pp.323-349, p.340: cited in Veljanovski (supra note 1) p.191.
[53]Veljanovski (supra note 1) p.191.
[54] Change means symbolically denoted by delta and denotes the marginal gains/losses
[55]Friehe (supra note 21) p.13.

As discussed, negligence rule efficiently works when the court or the law sets the level of due care equal to a socially optimal level of precaution. In addition to this assumption, when the compensation equals the harm actually caused (perfect compensation) and the level of activity was assumed constant negligence law produces the following result.[56] In this situation, the rational individuals would choose the optimal level of care to minimize private costs because excessive due care above optimal would be costly without reducing the costs of compensation as due care is enough to exonerate from liability. Similarly, taking a low level of due care entails the risk of bearing the entire amount of expected compensation.

However, different results emerge when these assumptions are violated. For example, when courts set due care level below (above) socially optimal care, induces exercising low due to caretaking and exercising greater care by individuals respectively.[57] In a similar vein, when perfect compensation is relaxed that is when overcompensation occurs; over-deterrence happens when the standard of due care is "muddy" however; if the level of due care is optimal the injurer escapes paying compensation liability.[58] Furthermore, injurers do not hold activity level constant when the total social net utility of risky activity would be positive.[59] If the injurer increases the level of activity, it will yield a proportional increment in expected accident damages in a given level of care.[60]

The activity level of the injurer influences his utility. In this case, the social objective formula comprises the total amount of utility subtracting(minus) the total costs of care assuming to be equal to the level of the activity denoted by *a*, multiplied by the level of care, x and the total amount of damages, represented by *d;* mathematically as: *max u(a)-ax-ad(x)*
Thus, the injurer raises his activity as long as the marginal increase in utility he derives from raising activity exceeds the increment to total costs.[61] The following example elaborates on a mathematical representation. Assume that the injurer derives 100 utility from risky activity; the cost of efficient precaution is 80 and the total compensation is 30. As long as injurer exercises

[56] Hans-Bernd Schäfer& Frank Müller-Langer. Strict liability versus negligence: in Michael Faure (supra note 11)p.7.
[57]Schäfer& Müller-Langer, Ibid.
[58]Schäfer& Müller-Langer, Id.p.8.
[59]Schäfer& Müller-Langer, Id.p.9.
[60]Schäfer& Müller-Langer, Ibid.
[61]Schäfer& Müller-Langer,Id.p.9.

due care (80), he escapes liability and benefits 20 from engaging in activity, however, the net utility of the activity is negative (minus 10) that requires injurer not to engage in this activity.[62] Therefore, from this, it is understood that the negligence rule creates incentives to take an optimal level of care but fails to guarantee that the social utility of activity is positive.

So far it has been shown how negligence liability rule creates incentive under unilateral situation setting whereby the injurer alone influences the risk of an accident. Now let us examine under bilateral accident settings whereby both injurer and victim influence the risk of accident through the cost of caretaking and activity level. The social objective function is designed to minimize the cost of accident and is min $c(x) + c(y) + d(x, y)$

Where c(x) denotes the *level of care taken by the injurer*, c(y) represents *the level of care exercised by the victim,* and $d(x, y)$ denotes the t*otal amount of expected damages dependent on the level of care exercised by both parties*.[63] Therefore, the marginal cost to each party increasing his level of care should be equal to the marginal benefit of an expected reduction in accident cost given that he chooses a socially optimal level of care. Calabresi argued that in a bilateral accident setting the person with the least cost of taking care (cheapest cost avoider) should be held liable.[64] However, the problem with this argument is that due to prohibitive transaction cost it is difficult to know *ex ante* who is the least cost avoider unless the courts are duty-bound to identify who were the cheapest cost avoiders after accident *ex post*. When the court sets a legal standard of due care and meeting this standard injurer escapes from liability and the victim bears the accident cost plus precaution cost in simple negligence rule. There is no need to establish a legal standard of care for a victim.[65] The following negligence liability rules emerge under bilateral accident settings.

2.1.2 Incentives for Precaution under Negligence with the defense of Contributory Negligence Rule

[62]Schäfer& Müller-Langer, p.9.
[63]Schäfer & Müller-Langer, p.15.
[64]Schäfer & Müller-Langer,p.16.
[65]Schäfer & Müller-Langer,p.18.

Under this liability rule, the injurer will be held liable if and only if he doesn't exercise optimal care while the victim does. The injurer should not be liable when he takes optimal care or if the victim doesn't take optimal care as observed in the table above. The victim is barred from obtaining compensation because he failed to take optimal due care. The assumption of contributory negligence is an all-or-nothing liability rule that induces victims to take precautions against harm to themselves.[66]The contributory negligence rule operates efficiently when it is assumed that there exists the least cost avoider in an accident setting.[67] This helps to avoid excessive (wasted) investment in care by both parties in an alternative caretaking system, not in a joint care model where both parties simultaneously influence the accident risk.[68] Contributory negligence functions well when there is perfect information possessed by parties and courts because it induces the least cost avoider to adopt care. However, different justification convinced both judicial and statutory intervention to substitute contributory negligence by comparative negligence rule.[69]

2.1.3. Incentives for Precaution under Comparative Negligence Rule

This negligence rule dictates that when both the injurer and victim are negligent, accident costs are shared between them in proportion to the extent of their negligence. Comparative negligence makes a comparison, by observing deviation from optimal precaution, the fault of a victim with that of injurer and for division or sharing of compensation.[70] The sharing of compensation between two negligent parties is the puzzle that is not settled by scholarship.[71] On top of that jury determination of comparative fault of the victim lacks precision.[72]

The following example elaborates on how to apportion costs between the parties in the case of comparative negligence.[73]Assume that accident can be prevented by X(injurer) and Y(victim)

[66]Mireia Artigoti Golobardes & Fernando Gómez Pomar. Contributory and comparative negligence in the law and economics literature: in Michael Faure (supra note 11) p.49.
[67]Golobardes & Pomar, Id.p.46.
[68]Golobardes & Pomar, Id.p.54.
[69] Oren Bar-Gill &Omri Ben-Shahar. (2003). The Uneasy Case for Comparative Negligence. *American Law and Economics Review*, **5** (2), pp.433-469, p.434.
[70]Golobardes & Pomar (supra note 66) p.52.
[71]Giuseppe Dari-Mattiacci& Eva S. Hendriks. (2013). Relative Fault and Efficient Negligence: Comparative Negligence Explained. *RLE***9**(1), pp.1-40, p.2.
[72]Mattiacci & Hendriks, Ibid.
[73]Mattiacci & Hendriks, Id.p.2-3.

spend 60 birr each on care and care taken by only one party does not affect when an accident occurs damages amount 100 birr. Under comparative negligence, the loss is shared say 50% and if one party believes that the other may not take care that costs 60 birr hence, not to take care is the best choice. In such a case comparative negligence leads to equilibrium when both parties are efficiently negligent. Let's extend the example further.[74] An accident can be prevented if both the injurer and victim take care and care taken by one party doesn't' have any effect. Injurer bears 30 birr cost while victim bears 90 birr cost of accident avoidance when an accident occurs compensation amounts to 100 birr. *Dobson vs. Louisiana Power and Light Company* concluded that the injurer should bear a greater share of a liability than the victim.[75] The court lacked precise calculation of shares but any sharing rule that assigns more than 50% of the damages to injurer would induce both parties to take care which compels injurer to prefer to take care of 30 birr rather than paying compensation share of 50 birr or more. Furthermore, the victim would choose to spend 90 birr on care to prevent an accident rather than bearing accident loss of 100 birr.

The sharing rule that apportions compensation to the relative fault of each parties' departure from due care implies to implementation of optimal sharing.[76] In this case, the court has tasks of assessing relative fault and setting the due-care standards. Having discussed negligence law the next part is devoted to the rule of strict liability.

2.2.1 Incentives for Precaution under Simple Strict Liability

We begin the discussion assuming that the activity is held constant and courts set compensation equals to harm. The courts are not compelled to set a level of due care because the injurer is liable regardless of his precaution. In strict liability, the injurer has the advantage of automatically setting the optimal activity level. A strict liability rule is significant when the injurer's activity level is important to be controlled. He is obliged to minimize private cost which equals social cost and the algebraic representation is: $c(x) + d(x)$ where $c(x)$ is accident prevention cost and $d(x)$ is the total amount of expected damages.[77]Therefore, under a unilateral accident setting, the injurer takes optimal care to minimize total accident costs. Injurer is at his

[74]Mattiacci & Hendriks, Id.p.3.
[75]Mattiacci & Hendriks, Id.p.4.
[76]Mattiacci&Hendriks, Ibid.
[77]Schäfer&Müller-Langer (supra note 56) p.10.

liberty to decide for optimal precaution and activity level. When compensation fails to equal the actual harm, the injurer is not induced to take the incentive, unlike the simple negligence rule where the injurer escapes liability as long as he exercises optimal due care.

When we relax constant activity level under strict liability results different from simple negligence rule occur. Injurer bears both the total precaution cost and the total accident damages without considering the level of precaution exercised and activity level taken. Hence, the injurer engages inactivity when the net utility of that activity produces a positive result. In simple strict liability rule, the victim's incentive to take care is zero levels of care and not a socially optimal rule.[78]

2.2.2 **Incentives for Precaution under Strict Liability with the defense of Contributory Negligence**-

This rule is a socially optimal rule that induces both parties to take precautions if and only the courts set due care for the victim equals a socially optimal level of care.[79] When the victim's level of precaution is lower than the level of care of the injurer; the injurer is not liable. This liability rule will encourage activity level shift of the injurer by providing incentive, however, the negligence rule encourages the activity level of the victim.

2.2.3 **Strict Liability with the Defense of Comparative Negligence**

It demands sharing of the cost of an accident in proportional to parties' departure from optimal precaution. Both strict liability and negligence rule results in an optimal case where the victim's care doesn't influence the probability of an accident. In joint care, different outcomes are observed in different liability rules.

Part Three-Economic Analysis of Negligence-based and strict liability Law under Civil Code

Economic analysis of tort law is a device to deter activity based on economic efficiency ground. In this Article, Ethiopian Extra-contractual liability law will be examined to test the hypothesis developed in the law and economic analysis of extra-contractual liability. To meet this objective, this Article will use the previous economic analysis of tort law discussion as hindsight.

[78]Schäfer&Müller-Langer (supra note 56) p.19.
[79]Schäfer & Müller-Langer, p.20.

Economic Analysis of Negligence-Based Law

3.1 Simple Negligence Rule

Under Ethiopian law, the general liability rule relates to negligence liability laid in Articles 2028 to 2037. There are two categories of negligence-based liabilities which are the infringement of law which is expressly stated under Article 2035 and the breach of a general duty of care which is embodied in other provisions. It is argued economic analysis demands measuring the exact costs of compliance with statutes.[80]

Article 2030 is indifferent whether "usual standards of good conduct" is violated either by acting or forbearing because the fault is committed in both ways.[81] The injurer shouldn't absolve by depicting his conduct conformed the usage unless the conduct is usual standards of good conduct which is inseparable from reasonable man.[82]

Most of the fault-liability cases fall under the infringement of law. Individual infringes general as incorporated under Article 2030 or professional standard of conduct according to Article 2031. Conduct that violates the general duty of care must be examined by reference to the standard of the so-called *behavior of reasonable man* under Article 2030(2). *Reasonable man* conduct normally refers a careful and prudent person who performs things with care and diligence. Article 2030(1) states that a person commits fault (considered negligent) when he commits or refrains from doing something in a manner or in conditions that offend morality or public order. A person is considered to be negligent when he fails to meet the general usual standard of good conduct (usage).[83] Judge Hand approach requires individuals to take the level of care that a reasonable person would take considering three parameters namely the probability of an accident, the cost of the accident, and the cost of adopting the necessary care to avoid an accident.

The following statement from Lord A.P. Herbert captures the essence of "The Reasonable Man"

> *"The Common Law of England has been laboriously built about a mythical figure- the figure of 'The Reasonable Man.' He is an ideal, a standard, the embodiment of*

[80]Cunningham (supra note 8) p.692.

[81] George Krzeczunowicz. (1965). *Extra-Contractual Liability Commentary*. Faculty of Law Haile Sellassie, Addis Ababa University, p.15.

[82]Krzeczunowicz, Id.p.20.

[83]NigatuTesfaye.(1999). *Extra-Contractual Liability and Unlawful Enrichment, 2nd Edition*,p.14. (Amharic book on Ethiopian Extra-Contractual Liability and Unlawful Enrichment, translation mine)

all those qualities which we demand of a good citizen….It is impossible to travel anywhere or to travel for long in what confusing forest of learned judgments which constitutes the Common Law of England without encountering the Reasonable Man… The Reasonable Man is always thinking of others; prudence is his guide, and 'Safety First' is his rule of life. He is the one who invariably looks where he is going and is careful to examine the immediate foreground before he executes a leap or bound; who neither stargazes nor is lost in meditation….[He] stands like a monument in our Courts of Justice, vainly appealing to his fellow-citizens to order their lives after his example."[84]

Posner details the standard of negligence. He argues that negligence is an objective standard, not a moral standard (condemnation or moral disapproval) as insane persons are liable despite they are not capable of behaving carefully.[85] This means the liability rule doesn't make care standards type-specific rather reasonable person (Article 2030/2) standard is applied to all non-identical individuals (it only depends on the action taken) regardless of age, mental status, and so on.[86] The reasonable man's standard of care is objective and uniform and behaving as a reasonable man helps escape from liability.[87] The Restatement (Second) of Torts states that "the negligence standard must be an objective and external one, rather than that of the individual judgment, good or bad, of the particular individual. It must be the same for all persons since the law can have no favorites…"[88] It is an optimal standard of care minimizing total social cost which is the sum of costs of accidents (accident costs) and the costs of precaution (precaution costs). Judge Learned Hand formulation offered economic meaning of the reasonable man concept coining mathematically symbolizing as discussed elsewhere. Posner articulated that the Hand formula implicitly embodied negligence standard for the victim and if accident avoidance cost is lower in comparison with injurer's, a victim should take care.[89]

George Krzeczunowicz stated that fault liability is *general* and measured by the *objective* standard as per Article 2030.[90] Hence, Article 2030(3) fits well to Posner's description of an *objective*

[84] Lord A. P. Herbert, The Reasonable Man cited: in Cooter & Ulen(supra note 3) p.198.
[85]Posner (supra note 16) p.31.
[86]Friehe (supra note 21) p.20.
[87] Charles R. Korsmo.(2013). Lost in Translation: Law, Economics, and Subjective standards of Care in Negligence. Penn State Law Review, **118**(2), p.287.
[88]Korsmo, Id.p.298 at footnote 43.
[89]Posner (supra note 16) p.33.
[90]Krzeczunowicz (supra note 81) p.14.

standard of negligence, not a moral standard because the fault is assessed regardless of age, physical disability, and mental status of the injurer (madman) but only compensation is reduced under Article 2099. The insane, senile, minor, patient or mentally ill persons are liable by shifting the loss even though it does not create incentive; it protects a victim's compensation interest. These groups of persons are liable even though they couldn't meet the due care standard of the average normal citizen set by court or law.

Even though objective reasonable man standard generates inefficiency, it is justified on Calabresi's costs of accidents namely "costs of administering the tort system" because the negligence standard of reasonable man exempts courts from assessing each individual's capabilities to tailor the due care standard.[91] Prohibitive information and administrative costs associated with more tailor standards necessitate swamping any allocative efficiency gains by having objectively reasonable man standard.[92]The appreciation of precaution taken by a reasonable man is done in the abstract (fictitiously). For instance, professional liability demands an average careful standard of professional conduct not the average standard of a citizen under Article 2031(2).[93] The injurer is not liable when his action is defensible in the eyes of a reasonable person under Article 2039(e). The compensation must equal harm as a rule according to Article 2091 which incorporates perfect compensation. The principle of equivalence between damage and compensation dictates that weighing together harm against compensation.[94] Thus when courts stick to "compensation-equal-to-damage" the problem of under deterrence and over deterrence problem could be solved.

3.2 Comparative Negligence Rule- Apportionment Principle

Comparative negligence rule is proportionally dividing (sharing) the loss between the injurer and the victim when both committed the fault according to each individual's negligence. Comparative negligence allows a negligent victim to get compensation from a negligent injurer. This demands both the injurer and victim to take efficient care incentive to avoid loss. Each party's deviation from the standard of care is the point of reference to allocate compensation.

[91]Korsmo (supra note 87) p.302.
[92]Korsmo (supra note 87) p.302.
[93]Tesfaye (supra note 83)p.33.
[94] Jerzy (George) Krzeczunowicz. (1977). *The Ethiopian Law of Compensation for Damage*. Faculty of Law Addis Ababa University, p.41.

Article 2098(1) states that when the victim commits fault his right to be compensated will be reduced to the extent of his contribution to the accident. Article 2098(1) applies *ex ante* precaution taken by the victim. This is identical to the comparative negligence rule discussed in the first part of this Article. The fault of the victim happens in a concurrent cause of harm inflicted on the victim himself.[95] This fault affects the compensability and the extent of compensation of the harm already done to the victim. The injurer can raise the victim's fault as a defense. Article 2097(2) also extends denial of compensation when the victim fails to take *ex post* precaution after the accident occurred. These provisions offer an incentive to the victim to take optimal precautions to avoid the accident or minimize the effect of an accident.

Due to the harsh consequence of contributory negligence on the victim, it is concisely explained by the Roman Law Maxim "whosoever suffers harm through his own fault, is deemed to suffer no harm", this maxim later changed to "the less guilty party could fully recover from the party guilty of a more serious faulty" is adopted and Ethiopia also incorporates.[96] Article 2098 dictates compulsory partial mitigation of perfect compensation (harm equals to compensation) to offer an incentive to the victim to take due care.[97] Article 2098(2) wordings "respective faults" and "gravity of each fault" depict that both the injurer and victim are at fault.[98] As the phrase "partly by the fault of the victim" is different from when the victim is the sole cause of the harm and illustrates the injurer is also at fault. The phrase "gravity of each fault" under subjective "morality test" weighs intentional injury is graver than negligence injuries.[99] Under the objective "good usage test" individuals who deviate from reasonable man's "usual standards of good conduct" is the graver of the respective fault.[100]As depicted in the table, comparative negligence liability is applied when both the injurer and victim are both at fault.

Here there is a question one may ask to what extent the contribution of the fault of the victim is compensated, say for example is 60% of fault contribution by a victim is worth compensating or is it 50% or below 50% contribution of the fault should be compensated?

[95]Krzeczunowicz, Id.p.115.
[96]Krzeczunowicz, Id.p.155.
[97]Krzeczunowicz,Id.p.159.
[98]Krzeczunowicz, Ibid.
[99]Krzeczunowicz, Id.p.169.
[100]Krzeczunowicz, Ibid.

Pure comparative negligence rule allows the victim to recover compensation from the negligent injurer despite the fact that the victim's negligence is greater than the injurer's negligence.[101] On the other hand, the modified comparative negligence (blend of pure comparative negligence and contributory negligence[102]) rule bars the negligent victim's entitlement to compensation when his fault is greater than the injurer's fault. The following quote elaborates on the species under the modified rule.

> *"The '50 percent rule' allows a negligent plaintiff to recover only if her fault is less than or equal to the defendant's. The '49 percent rule' allows a negligent plaintiff to recover only if her fault is less than the defendant's fault. Finally, the 'slight gross rule' allows a negligent plaintiff to recover only if her fault is considered 'slight' in comparison to the defendant's. In all of these cases, if the plaintiff's fault is below the cut-off, then she will be able to recover damages that are reduced in proportion to the fault attributable to her.*"[103]

Looking at the contribution of the fault of the victim and if his fault is above the cutoff point, modified comparative negligence shares the attributes of contributory negligence placing a greater burden on the victim than the injurer.

George argued that Articles 2086 and 2098 provide no clue whatever as to whether objective standard (reasonable man) generally laid down in Article 2030 to assess victim's fault or another standard differing from normal reasonable man.[104] He suggested that individuals should be granted to rely on the reasonable behavior of the potential victim.[105] Article 2098 dictates consequences of the fault should be shared between victim and injurer according to sub Article 2 stipulating reduction of compensation. However; while reducing compensation, the court should perfectly assess the amount to provide an incentive to each party. However, if the injurer committed a causal fault, however small, the injurer is only liable partly (partly relieved) based on Article 2098(2).[106]

[101]Golobardes&Pomar (supra note 66) in Michael Faure (ed.) (supra note 11) p.52.
[102]Golobardes&Pomar, Id.p.53.
[103]Golobardes&Pomar, Ibid.
[104]Krzeczunowicz (supra note 81) p.28.
[105]Krzeczunowicz (supra note 81) p.28.
[106]Krzeczunowicz (supra note 94) p.125.

The word in Article 2098 (2) "partly" offers no hint to this question to what extent the contribution of the fault of the victim is compensated. Examining the Supreme Court Cassation Bench decision offers a partial solution to this question of how comparative negligence liability is entertained in Cassation Bench which has precedential value. The Supreme Court Cassation Bench in Volume 18, file number 106450 between applicant Ethiopian Electricity Power Utility Meki District and respondents W/ro Besa Nanama, Ato Banke Measo and W/ro Ayulie Megersa has dispensed the case as follow.

The relevant fact of the case is translated as follows. Ethiopian Electricity Power Utility planted power transmission transformers 2.85 meters away from the deceased's house even though the law obliges 4 meters away to prevent accidents. There was a tree which might contact with the power that yields accident. This made the person extremely worried about the safety of his family and repeatedly applied to the applicant to cut the tree in order to prevent the accident risk. Having his repeated applications turned down by the applicant, the deceased tried to cut the tree, in which incident, he was injured by electric power and eventually died.

The Supreme Court Cassation Bench said that both parties were at fault because the applicant transgressed the law while planting electric lines and the victim also committed fault because he tried to cut a tree by himself to prevent an accident. The Cassation Bench reasoned that according to Article 2098(1) both parties contributed to the occurrence of the accident. While affirming the calculation of material compensation based on equity and set the amount 76800 birr (as already calculated by lower courts) and apportions this amount for the injurer and the victim. What the courts do is first calculate legally entitled compensation for the claimants based on equity then sharing this material damage compensation into two equal parts. Hence, the victim was entitled to half of 76800 birr which is 38400 birr. The Supreme Court Cassation Bench, however, extricates itself to calculate the extent to which each party's fault contributed to the accident. Cassation Bench leaves murky and incomplete legal interpretation as the victim's fault contribution and injurer's fault contribution effect on entitlement to compensation.

Regardless of the victim's fault contribution, the victim is entitled to half of the compensation. However, Posner argued that to assess comparative fault "the required comparison is between the respective costs to the [two sides]…of avoiding the injury. If

each could have avoided it at the same cost, they are each 50 percent responsible for it."[107] Posner illustrated the calculation as follows.[108] The victim could have prevented the accident at the cost of 1 birr and the injurer could have avoided the accident at the cost of 2 birr and the cost of injury accident occurred amounted 10 birr. The victim's comparative fault ration is 2:1 and his compensation is reduced by two-thirds which means he would bear 6.66 birr in loss and recover 3.33 in compensation. The court has departed from the economically informed analysis. As it is analyzed in the judgment the court only considers the respective fault of the victim and injurer. However, the economic analysis of tort law dictates that tort law is all about cost minimization that is a minimization of social costs namely minimization of primary costs to deter that comprises the sum of accident avoidance measures and harm due to the accident), secondary costs that is optimal risk spreading and risk-bearing of risk-averse parties and tertiary accident costs that comprise of administrative costs comprises expenses in time and money of litigants and the state. The court doesn't analyze the case based on who is the least cost avoider of primary costs rather it simply identified who was at fault the analysis of which doesn't provide an incentive to future parties in a tortuous transaction. Judicial decisions should be designed to increase the wealth of society by providing incentives. However, the court swerves out of this path and fails to offer incentives to the parties.

3.3 Contributory Negligence

Contributory negligence is a defense asserted by the injurer to bar the victim from getting compensation for harm caused by the victim's negligence regardless of the injurer also caused the harm negligently. Victim's role in causing harm, no matter how small this role is in comparison to the injurer's negligence, contributory negligence defense entirely exonerates the injurer from liability. The contributory negligence rule offers an incentive to the negligent victim to take precautions.

As discussed in the previous section, the injurer is exempted from liability when the victim's level of precaution is lower than the level of care of the injurer. Contributory negligence is hence called an all-or-nothing approach. The contributory negligence rule will incentivize the injurer to shift activity level, however; the simple negligence rule

[107] Cunningham (supra note 8)p.669-678.
[108]Cunningham, Ibid.

encourages the activity level of the victim. As observed in the table, the liability allocation of contributory negligence is designed as follows. When the injurer is at fault and at times when the victim is faultless, the injurer is fully liable; however, when the injurer is at fault and at the same time the victim is at fault, the injurer is not liable. The difference between contributory negligence from comparative negligence is that the injurer escapes from liability though he is at fault and when the victim is at fault. This type of liability is not explicitly incorporated in Civil Code. Article 2098 governs the situation when both the injurer and the victim are at fault, and compels partial compensation (apportionment of the damages) award to the victim rather than exonerating the injurer from liability. It explicitly states that liability is allocated in proportion to their fault not barring of compensation. From this, it is obvious that contributory negligence isn't a defense for injurer under Ethiopian Civil Code when both parties are at fault.

3.4 Simple Strict Liability

Strict liability shifts both prevention and damage costs to the injurer. Strict liability is limited to dangerous *activities* (Articles 2066, 2067, 2069) or *things* (Articles 2071, 2077, 2081, 2085) listed by law. The legislative framework takes "activity" as a central criterion to impose strict liability. Strict liability compels actors who create dangerous activities and benefit from such activities should take adequate protection. High expected accident costs, the impossibility that more care by the injurer would reduce the accident probability; the difficulty of constraining victim's activity in favor of the injurer's and finally the need to reduce the risk by activity level change of injurer are factors for the introduction of strict liability.[109]

Simple strict liability is unilateral in nature by which the actions of the injurer but not of the victim are assumed to affect the probability or severity of losses. Under simple strict liability, the injurer is compelled to pay for losses whenever he caused an accident; he is induced to consider the effect on accident losses of both his care and activity level. Because the injurer will be liable for losses sustained by the victim, the injurer will decide

[109] Michael Faure & Roger Van den Bergh. (1987). Negligence, Strict Liability and Regulation of Safety under Belgian Law: An Introductory Economic Analysis. *The Geneva Article on Risk and Insurance*, **12**, pp.95-114, p.98.

not only to exercise due care but also to engage in activity only when the utility gained from it outweighs expected liability payments to the victim. Thus, the amount of care taken and the level of the activity are two dimensions to economic behavior that affect the number of accidents.

Activities that increase accident risk are governed by regulation. For example, road transport traffic control regulation details the following activities are prohibited.[110] Drivers may not receive and send text, watching TV, fail to fasten the belt, chewing chat while driving. Article 78 states that any driver shall decrease speed and provide an audible warning sound for a vehicle approaching from the front. Article 16 also states that a driver may not turn to the left of a road when visibility is limited or obstructed. In addition, Article 14 obliges that every driver who drives behind another car shall keep sufficient distances.

In bilateral cases, it is assumed that potential victim and injurer influence the probability of accidents by their choice of both levels of care and level of activity and discussed below.

3.4.1 Strict Liability with the Defense of Comparative Negligence

When the victim is at fault claims for compensation instituted against the faultless defendant under the strict liability is not legally tenable as per Articles 2066(2), 2067(2), and 2086(2).[111] From these provisions, it is understood that a faultless defendant's total exemption depends on whether the victim is the "sole" cause of his harm.[112] Article 2086(2) articulates that the defendant is *wholly* exempted (no compensation is awarded) if and only if the harm is caused *solely* by a fault of the victim.[113] George argued and hinted that the fault of the victim should be assessed in strict liability as per Articles2086.[114] As discussed, the due care level of the injurer isn't assessed rather the due care level of the victim is assessed by the court to assess compensation. Economic analysis of tort law demands the judge put himself in the ex ante position and examines whether the cost of additional care by the victim could have led to a favorable reduction of accident risk. If the

[110]*Road Transport Traffic Control Council of Ministers Regulation No. 208/2011*, 17th Year No.89, Addis Ababa, 26th August 2011.
[111]Krzeczunowicz (supra note 94) p.123.
[112]Krzeczunowicz, Id.p.123.
[113]Krzeczunowicz, Ibid.p.123.
[114]Krzeczunowicz (supra note 81) p.28.

victim is exposed to the costs of his activities (which is reduction of compensation), this would provide appropriate incentives for taking optimal care to prevent accidents.

When concurrent faults of drivers happened half-half rules of compensation is employed under Article 2084. George stressed that "each of the causal faults is 'wholly' (but not solely) a cause of the accident which would not have occurred without it."[115]

Conclusion

Traditional legal analysis is indispensable and contemporary economic analysis can reinforce rather than supplant traditional legal principles. Economic explanations of law such as efficiency, incentive, least-cost avoidance models, and cost-benefit analysis can support legal judgments. The economic analysis clarifies legal principles and avoids obfuscation making law scientific. In sum, it offers a formula exuding clarity and predictability.

Under unilateral accident, negligence rule injurer only looks at the utility as long as due care is taken which may make the net social welfare negative. The negligence rule creates incentives to take an optimal level of care but fails to guarantee the social utility of activity is positive**.** Only strict liability leads to optimal activity level.

Under a bilateral accident setting, an increase in the activity level of either player leads to a proportionate increase in expected accident losses. In strict liability with defense, the injurer chooses the correct activity level and the victim engages when utility exceeds care costs so often. Under the negligence rule, the injurer will take due care, so the victim will bear the losses, thus, the victim chooses the correct activity level, injurer engages when utility exceeds care costs so often. In sum, under strict liability with defense, the victim will engage too often, under negligence injurer will engage too often. Therefore, the choice depends on whose activity level is more important to control. In Ethiopia, simple negligence, comparative negligence, simple strict liability, and comparative strict liability are recognized but no explicit recognition of contributory negligence.

Ethiopian liability law adopts uniform reasonable man standard to avoid tertiary cost. That means, objectively reasonable man standard generates inefficiency, however; it is justified on

[115]Krzeczunowicz (supra note 94) p.160-161 at footnote 85.

Calabresi's costs of accidents namely "costs of administering the tort system" because the negligence standard of reasonable man exempts courts from assessing each individual's capabilities to tailor the due care standard. This article provides suggestions to courts to entertain economically informed decisions by employing law and economics insights. The court doesn't analyze the case based on who is the least cost avoider of primary costs rather it simply identified who was at fault the analysis of which doesn't provide an incentive to future parties in a tortuous transaction. Judicial decisions should be designed to increase the wealth of society by providing incentives. However, the court swerves out of this path and fails to offer incentives to the parties. If each could have avoided the accident at the same cost, they are each 50 percent responsible for losses. This cost base method is preferred to fault contribution percentage to offer incentives to parties to accident setting. This Article examined the (in)efficiency of each liability rules by decoupling the lumped ones and which law provides care and activity level incentives which could be taken as an input to revise tort law currently underway.

Interest-free Banking and Taxation in Ethiopia: A Critical Analysis

Awet Halefom[♣]

Abstract

Barely a decade ago, Ethiopia adopted a directive that lay the ground for the operation of interest-free banking. The existing tax laws were developed within a framework of conventional financial transactions. Analyzing the Mudharabah and Murabaha services, this paper found out that there is a legal lacuna in the taxation of interest-free banking services in Ethiopia. In Mudharabah services, the status of the relationship between the bank and the customer, and the treatment of the profit gained from the contract on the income tax part as well as the VAT status of managerial service fee collected is not clear. In respect of Murabaha services, questions on whether profit received from Murabaha is treated as the interest in a conventional loan transaction or just as profit per se, the tax on the income status of the mark-up gain from the purchase or repurchase process of the Murabaha agreements as well as the VAT aspect thereof are not settled yet. Apart from other general solutions proffered, the article ends with a recommendation that a clear guideline/directive on interest-free banking be urgently put in place to take care of the tax aspect of these services in Ethiopia.

Keywords: Interest-free banking, *Mudharabah*, *Murabaha*, Income Tax, Value Added Tax

1. Introduction

In 2008, the Ethiopian Banking Business Proclamation No.592/2008 was amended to include a provision for Interest-free Banking (hereafter IFB). Following the amendment, in 2011, the National Bank of Ethiopia issued a directive, SSB/51/2011, to authorize the business IFB. The legislator's objectives are hammered out under the 'whereas' clause of the directive. Accordingly, the directive stamped down the objective affirming that there 'has been increasingly strong public demand for interest-free banking products in Ethiopia' which

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necessities to have a framework for this banking system, and hence such products have to be carried out safely and soundly.

The directive has outlined mandatory provisions, which are general and undetailed, about the general operational direction of IFB. Accordingly, only IFB windows are permitted[1], no fully-fledged interest-free banks were authorized, IFB entities need to follow Sharia law and IFB windows need to follow the same regulations as any other commercial bank except on the interest rate, which does not apply to IFB[2]. With the strict requirement for authorization, the directive prohibits that "banks shall not alter the maximum share of interest-free banking business in their consolidated balance sheet without prior approval of the National Bank." By setting up the major principles of the IFB, the directive leaves out the germane details of interest-free banking businesses *interalia*, mobilizing or advancing funds, to adhere to and in a manner consistent with Islamic finance principles.[3]

Following this, there are some legal issues unanswered under the current IFB legal frameworks which include but not limited to compatibility of the IFB and its compliance to sharia laws (standards of Islamic finance to use the word of the directive), the setting and frameworks of

[1] An IFB is simply a window within a conventional bank via which customers can conduct business utilizing only Shariah compatible instruments. According to Juan, Islamic banking in a country doesn't move on to the full-fledged level at the first inception. At the inception of the Islamic window, the products typically offered are safekeeping deposits—on the liability side of the bank—and Islamic trade-finance products for small and medium companies—on the asset side of the bank.. Then, after ascertaining the profitability of their Islamic business lines, they may expand to the level of considering segregating the window into a separate subsidiary and then to full-fledged Islamic banking industry. This has been a common practice in South East Asia and Western countries. In the Middle East, the tendency is establishing standalone Islamic banks. See, *Juan Solé, Introducing Islamic Banks into Conventional Banking Systems*,IMF Working Paper WP/07/175, July 2007, p.8.

[2] Almost seven years ago, *ZemZem*, a prospective new bank, asked to join the banking industry as a full-fledged interest-free bank, but was unable to start operations because of NBE's directives indicated that the service must be provided using a separate window along with other conventional banking services. Recently, however, the National Bank of Ethiopia (NBE) has issued the long-awaited directive on the formation of full-fledged interest-free banking (IFB) on June 18, 2019. So far, four share companies have passed the pre-application stage and received permissions from the central bank to open bank accounts and start selling shares. According to Fortune newspaper, four share companies have passed the pre-application stage and received permissions from the central bank to open bank accounts and start selling shares. While Zad, Zemzem, Hijira and Nejashi are in the process of formation, two others, Kush and Huda, have initiated a process to organize an interest-free bank. *Fortune Newspaper*, Published on Jul 13, 2019,VoL 20, NO 1002Available at Interest Free Banking available at https://addisfortune.news/central-bank-relaxes-interest-free-banking-rules/ accessed September, 2019.

[3] See *Licensing and Supervision of Banking Business Directives to Authorize the Business of Interest Free Banking Directives Number SBB/51/2011*, Article 2(2.2.).

Supervisory Board,[4] the jurisdiction of courts in disputes related to IFB, and the tax treatment of IFB. However, it is not the purpose of this paper to address these issues. Instead, this article will stick to the tax aspect of IFB in Ethiopia taking the Ethiopian value-added tax and Income tax laws.

Taxation systems differ from country to country as to the taxation of IFB. Usually, Islamic banking presents a challenge for tax systems developed within the framework of conventional financial transactions. This article will explore, then, the legal mantra surrounding the taxation of IFB in Ethiopia taking VAT and Income tax laws. This article inquires whether there are compatible tax provisions to IFB services. Accordingly, this article discusses some of the generic challenges that IFB transactions pose for tax systems. It then discusses how these challenges are being addressed by the Ethiopian tax laws.

So far, the majority of commercial banks are providing IFB services.[5] Time and space will not allow covering all the IFB services and the respective tax aspect of these services. Hence *Mudharabah and Murabaha*IFB services, which are common in banks introduced IFB in Ethiopia, are taken as a case study for this article.

Methodologically, this article employs primarily a document-based analysis of the legal and policy frameworks connected to financial services in Ethiopia. To substantiate this, an interview has been made with concerned experts at the Ministry of Revenue and Ministry of Finance. From the banking sector, an interview was conducted with legal as well as financial experts of NIB Bank and Commercial Bank of Ethiopia. Besides, the experiences of other countries with a similar tax setup have been taken into account while addressing the taxation of IFB in Ethiopia.

The structure of this paper is as follows. It begins with brief introductory concepts and a description of interest-free banking. The next part contains a discussion on taxation of

[4] Advisory board is a common trend in countries that have IFB. Having an adequate Shari'a Advisory board guarantees a product is compliant with Shari'a principles. In Ethiopia, no directive or guidelines supervises and authenticates the Shari'a validity of an IFB product. In fact, there are reports that Banks that are rendering IFB services have advisory board to watch over its compliance to Shari'alaws. Therefore, there is a need to address how IFB products can be controlled at the product development stage but also monitored on a regular basis to ensure that they continuously comply with Shari'a principles.

[5] Two banks started IFB services as window services in 2013(Commercial Bank of Ethiopia and Cooperative bank of Oromia). This day, among the 17 privately and state-owned banks, 11 have secured a license to operate IFBs, and 10 of them have already commenced the service. *Fortune Newspaper, Published on Jul 13, 2019 [Vol. 20, NO 1002]* Available at https://addisfortune.news/central-bank-relaxes-interest-free-banking-rules/. Accessed on 16 July, 2019.

conventional financial services in Ethiopia taking income and value-added taxes into consideration. Followed to this, more in-depth consideration is given to the tax treatment of interest-free banking services under the VAT and Income Tax Laws of Ethiopia. Finally, the article ends with some concluding remarks.

2. Describing Interest-free Banking

Legal systems vary as to the nomenclature of Interest-free Banking. The name Islamic Banking, Islamic Finance, Sharia Compliant Banks, and Interest-free Banks have been usually used in countries that have IFB systems.[6] However, there is no consensus on the nomenclature of banking services provided according to the Sharia laws. For example, the term Interest-free Banking is criticized by some as misleading. Prohibition of interest (usury) being the distinguishing feature of Islamic finance, interpreting the Islamic financial system simply as free of interest, however, does not capture the true picture of the system as a whole. Because Islamic fiancé is supported by other principles of Islamic doctrine advocating social justice, risk sharing, the rights and duties of individuals and society, property rights, and the sanctity of contracts.[7] In other words, this banking service is not only meant to prohibit interest but it is abided by other Islamic principles like the prohibition of economic activities involving speculation (*gharar*); the obligation of paying the *zakat*; the discouragement of the production of goods and services which contradict the value pattern of Islam, and the prohibition to invest in activities forbidden by the *Qur'an*.[8]For this purpose, five religious features are required to be followed in this system:

> *"*ribais prohibited in all transactions; business and investment are undertaken on the basis of halal (legal, permitted) activities;maysir(gambling) is prohibited and transactions should be free from gharar(speculationor unreasonable uncertainty); zakat is to be paid by the bank to benefit society;all activities should be in line with

[6]Fuad Al-Omar & Mohammed Abdel-Haq, Islamic Banking: Theory, Practice & Challenges, Oxford University Press, Karachi: ZED Books, 1996.
[7]Hennie van Greuning and ZamirIqbal, *Risk Analysis for Islamic Banks*, The International Bank for Reconstruction and Development / The World Bank, 2008
[8]Claudio Porzio, Islamic Banking Versus Conventional Banking (pp91-106), in M. Fahim Khan *and* Mario Porzio,*(Ed), Islamic Banking and Finance in the European Union: challenge*, p.92.

> Islamic principles, with a special shari'aboard tosupervise and advise the bank on the propriety of transactions."[9]

That is why the expression "Islamic banking" suggests two competing forces at work. The noun "banking" suggests that there is a financial service like conventional banking. However, these services are required to comply with the Islamic principles of financial services.[10]However, the name to adopt depends on the nature of government and the religious reflections of each nation.[11]Having these conceptions, introducing IFB to a country -with conventional banking experience-with a tax system adorable of the conventional banking system- a new challenge to the existing tax law is expected.

3. Tax Framework of Conventional Banking Services in Ethiopia

3.1. Income Tax Laws

The banking business proclamation authorized only share companies to involve in the banking business.[12] As companies, therefore, they are subject to the income tax provisions which are devised to tax "Body" according to income tax proclamation (hereafter ITP).[13]Based on this, 'bodies' are subject to tax on schedule B, C, and D of the ITP.[14] Unless Banks are involved in rental services, which they can't, schedule B will not apply to banks. Hence, Schedule C and D

[9]Latifa M. Algaoud and Mervyn K. Lewis, Islamic Critique of Conventional Financing, in M. Kabir Hassan and Mervyn K. Lewis, *Handbook of Islamic Banking*, Edward Elgar Publishing Limited, 2007, *p, 38*.

[10] Mahmoud A. El-Gamal, *Islamic Finance: Law, Economics, and Practice*, Cambridge University Press, 2006, p.64.

[11] It seems that the Ethiopian legal framework has adopted the Phrase Interest free banking to show its neutrality in the sense that IFB is introduced not in the religious sense but to offer optional banking service to the community in need of but not limited to those who follow the Religion of Islam.

[12] According the Banking business proclamation definition "bank" means a company licensed by the National Bank to undertake banking business or a bank owned by the Governmentand consequently, a company defined to include only " a share company as defined under the Commercial Code of Ethiopia, in which the capital is wholly owned by Ethiopian nationals and organizations wholly owned by Ethiopian nationals and registered under the laws of, and having its head office in, Ethiopia" see Banking Business Proclamation No. 592/2008, *Federal Negarit Gazette*, 14th Year, No 57, Article 2(1) and Article 2(5).

[13] Unlike the previous tax frameworks, the current income tax Administration, presumed to apply to all Tax laws in the country including the income tax proclamation, defined 'body' as "a company, partnership, public enterprise or public financial agency, or other body of persons whether formed in Ethiopia or elsewhere." Tax Administration Proclamation No. 983/2016, *Federal NegaritGazeta,* 22th year, No. 103, Article 2(5).

[14] The Ethiopian Income tax law follows a scheduler income tax system and accordingly adopts five schedules which are applicable to separated source of income. Schedules A is levied on Employment income, Schedule B for Rental income, Schedule C for Business income, Schedule D for "other" incomes and Schedule E for Exempted income. Schedule A of the ITP exclusively applies to employment income whereas schedule B, C, and D applies to 'Body' and other persons defined under the tax administration proclamation. See Income Tax Proclamation No. 979/2016, *Federal NegaritGazeta,* 22th year, No. 104.

of the income tax law seem the most important provisions applicable to companies rendering banking services. Though all provisions of Schedule C seem relevant to any company, for this article, only provisions which could create a difference in the conventional and interest-free banking in general and the two IFB services, *Mudharabahand Murabaha,* in particular, are discussed.[15] Accordingly, the income tax rate for companies is 30 percent.[16] This is calculated by "the total business income of the taxpayer for the year reduced by the total deductions allowed to the taxpayer for the year."[17] Another essential legal provision in the proclamation is the deductible expenses part. Generally, the proclamation allows a taxpayer to deduct "any expenditure to the extent necessary incurred […] in deriving, securing, and maintaining amounts included in business income." Coupled with this general limp of deduction, 'the cost of trading stock disposed of", "the amount by which the depreciable assets and business intangibles of the taxpayer declined in value during the year through use in deriving business income" and a loss in the disposal of a business asset are included.[18]Specific to interest, the proclamation provided that interest incurred by a taxpayer is deductible if the benefits of the debt or other instruments or agreements that give rise to the interest are used to derive business income.[19]

The other important article of the proclamation related to financial services is the taxation of interest on deposits. Under schedule D of the ITP, 5 and 10 percent tax rates are imposed on the gross amount of interest on saving deposits in financial institutions and others respectively.[20] These are the provisions that are directly linked to financial services whether they are conventional or interest-free banking services. The ITP inserted a way out article if an income doesn't fall within the four schedules of the income tax proclamation. Thus, any income derived

[15] Under the income tax proclamation Business is defined broadly to include:

> "a. Any industrial, commercial, professional, or vocational activity conducted for profit and whether conducted continuously or short-term, but does not include the rendering of services as an employee or the rental of buildings
> b Any other activity recognized as a trade under the commercial code; or
> c. Any activity, other than the rental of buildings, of a share company or private company whatever the objects of the company" see Article 2(2) of the Income Tax Proclamation.

[16] Ibid, Article 19(1) of the Income Tax Proclamation

[17] Ibid, Article 20(1) of the Income Tax Proclamation. Accordingly, Business income includes "the gross amounts derived by the taxpayer", "a gain on disposal of a business asset" and other amount included as a business income under the proclamation.

[18] Ibid, Article 25(1)

[19] Ibid, Article 23.

[20] Ibid, Article 56.

but not taxable under the schedules of the ITP will be subjected to an income tax rate of 15 percent on the gross amount of the income. [21]

Before leaving this topic, the term interest needs to be clarified. To begin with, the breakthrough directive on IFB doesn't define the word interest. However, the definitional part of the directive signaled that "interest-free banking business refers to banking business …[that] avoids receiving or paying interest." As part of this, under part 7.1 of the directive, banks are bounded to comply mutatis mutandis with all regulatory and supervisory requirements except the National Bank's directives on the interest rate. The definition of interest is not clear here and thence we need to refer to other definitions in the tax laws.

Unlike the former Income Tax Proclamation, the current ITP has included a definitional sub-article designed to avoid previous ambiguity on the term.[22] Accordingly, Article 2(16) of the proclamation defined interest as *"a periodic or lump sum amount, however, described as consideration from the use of money or being given time to pay, and includes a discount, premium, or other functionally equivalent amounts."* The definitional part of this article has limited itself to the literal meaning of interest as the usual trend of defining interest in conventional banking services.

To search further and as part of the broader legal framework of the tax system, definition of interest under the Model Double Taxation avoidance treaty prepared by the then Ministry, Ministry of Finance and Economic Development and Tax treaty between Ethiopia and the UK ha presented below respectively. The anti-tax avoidance treaty defined interest as:

> income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures. Penalty

[21] Ibid Article 63. This article is aimed at narrowing the possible gaps of the scheduler system which divided taxable incomes into four schedules.
[22] Ibid, article 2(16).

> charges for late payment shall not be regarded as interest for the purpose of this Article.[23]

A similar definitional article is inserted in the Double Taxation Avoidance Treaty between Ethiopia and the United Kingdom. Accordingly, interest is defined as:

> income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures. Penalty charges from late payment shall not be regarded as interest for the purpose of this article. The term shall not include item which is treated as a dividend under the provisions of article.[24]

Based on these definitions, it is possible to discern that the definition of interest in the Ethiopian legal system is compatible with the conception of the term in conventional banking services. In some jurisdictions, interest is defined broadly to include payments: 'in the nature of interest', 'in substitution of interest' or dividends paid in respect of non-equity shares to accommodate IFB services.[25]

3.2. Value Added Tax (VAT)

Taking deposits and making loans are core banking services. In recent years, there has been an explosion in the number of different financial products offered by financial institutions and brokerage companies, some combining financial and nonfinancial products into a single product, or combining multiple financial products in a single product.[26]Colloquially, services commonly identified as financial services fall into three broad groups: "loan intermediary services provided to lenders (including persons making deposits in financial institutions) and borrowers; insurance

[23]*Ministry of Finance and Economic Cooperation (Formerly Ministry of Finance and Economic Development) Model Convention on Double Tax Avoidance Treaties*, Article 11(4).
[24]*Convention Between the Government of the Federal Democratic Republic of Ethiopia and the Government of United Kingdom of Great Britain and Northern Ireland for the avoidance of double taxation and the prevention of Fiscal evasion with the Respect to taxes on income and capital gains*, available at the Ministry of Finance and Economic cooperation. Article 11.
[25] See the Australian law in Salim Farrar, Accommodating Islamic Banking and Finance in Australia, *UNSW Law Journal Volume 34(1)*, March 2012, P.433
[26] Alan Schenk and Oliver Oldman (2001), *Value Added Tax: A Comparative Approach*, Cambridge University Press, 2007, pp.305-307.

and gambling pooling services; and the provision of intangible investment instruments."[27] With some very limited exceptions, almost all jurisdictions treated all these financial services as exempt supplies not subject to VAT.[28]

The primary debate in the financial sector is what constitutes value-added in these sectors, i.e. how to determine the tax base.[29] Charges for services often do not reveal their full price except for specific services such as the provision of safe deposit. The charges for many services are reflected in the interest rates charged on loans and paid to depositors. Thus, the difficulty lies essentially in distinguishing a tax upon the financial services from a tax upon the return of the capital.[30] Taxation of the full amount of interest charged would amount to taxing the depositors for the use of capital in addition to the value of services rendered by the financial institution.

Besides, the difficulty arises for services charged in the margin between the return paid to lenders and that charged to borrowers.[31] The aggregate value-added created can be identified to the extent that the financial services are used by registered firms but it needs further to allocate the aggregate value added between the two sides of the transaction. This margin-based income comes not only from the acceptance of deposits and the granting of credit but also includes

[27] Robert F. Van Brederode and Richard Krever, Theories of Consumption and the Consequences of Partial Taxation of Financial Services in Robert F. van Brederode, Richard Krever (eds.) - *VAT and Financial Services: Comparative Law and Economic Perspectives*, 2017, Springer Singapore.

[28] New Zealand is the only jurisdiction to have adopted zero rated treatment for intermediary loan supplies. See MariePallot and Thomas Allen, Loan Intermediary Services: New Zealand, in Robert F. van Brederode, Richard Krever (eds.) *VAT and Financial Services: Comparative Law and Economic Perspectives*, 2017, Springer Singapore.

[29] Glenn P. Jenkins, *Value Added Taxation: The Policy Issues*, Harvard Institute for International Development (1994), p.24.

[30] Ibid.

[31] Alan Schenk and Howell Zee, *Financial Services and the Value Added Tax in* HoweellH.Zee (ed.), *Taxing the Financial Sector: Concepts, Issues and Practices,*2004, pp. 61-63. The function of financial intermediation can be divided into four distinct types:

1) intermediation between suppliers and users of financial capital (deposit-taking intermediation);
2) intermediation between persons with different exposures and/or tastes for risk (risk intermediation);
3) intermediation between persons with exposure to similar risks (the insurance function); and
4) Intermediation between buyers and sellers of commodities, currencies, and/or debt and equity securities (brokerage services). See Tim Edgar, "Exempt Treatment of Financial Intermediation Services under a Value-Added Tax: An Assessment of Alternatives", *Canadian Tax Journal*, *Vol*. 49, No.5, 2001, p.1137. This intermediation process might not problematic if it is to the final consumers. The problem is when there is another registered firm. Hence, the administrative difficulty VAT on financial services lead to the exemption of financial intermediation. See also Alan D. Tait, *Value Added Tax: International Practice and Problems*, 1988, p. 92.

trading in equities, debts, and other instruments, as well as foreign exchange transactions.[32] A unique and identifiable margin relating to an individual transaction between a single borrower and a single lender might be hypothetically conceivable but practically it is not workable.

The difficulty of taxing financial services is not measuring the value-added tax created or considerations received by the service provider.[33] However, quantifying the consideration on the transaction by transaction basis is no straight forward which is necessary for drawing upon invoice recording, the services supplied and giving the recipients of the services the right to deduct the corresponding tax as input tax.

Concerning the invoice credit method which the Ethiopian VAT laws adhered to, the operational requirement cannot readily be satisfied in the financial institutions because the invoice credit method works by charging tax at each level in a chain of transactions which is then invoiced to the individual purchasers. Some recent technological changes like internet banking cause a mix of activities and relationships more complex which is not easier to measure them.[34] Unlike conventional financial services, on the contrary, the complication of value addition seems not apparent in the IFB because there no interest and loan with interest services in the sector.

Hence, in principle, under the Ethiopian Value Added Tax Proclamation (hereafter VATP), financial services are exempted[35]. The Value Added Tax Regulation (hereafter VATR) has listed down the financial services which are exempted. Exemptions of these financial services are justified to avoid problems of complex administration. The fact remained behind the exemption or otherwise of financial sectors is administrative difficulty embodying this sector to the value-added tax base.

However, the dichotomy of exempting financial services doesn't imply that all services of financial institutions are exempted. That is why the VATP has employed the phrases 'exempted

[32]Arthur Kerrigan, the Elusiveness of Neutrality: Why Is It so Difficult to Apply VAT To Financial Services? 2010, Munich Personal Repec Archive paper number 22748, available at http://mpra.ub.uni-muenchen.de/22748/, p.2 accessed on May 23, 2018.
[33] Ibid.
[34] Readers are advised to consult TaddesseLencho's article on the exemption of financial services pinpointed the applicability of VAT on Foreclosure. TaddeseLencho, *To Tax or Not To Tax: Is That Really the Question? VAT, Bank Foreclosure Sales, and the Scope of Exemptions for Financial Services in Ethiopia*, Mizan Law Review, Vol. 5, No.2, December, 2011, pp. 264-310.
[35] Value Added Tax Proclamation No. 285/2002, *Federal Negarit Gazette*, 8th year, No. 33, Article 8(2)(b)

transactions', 'supply of goods', or 'rendering services' in the exemption part of the proclamation. Based on this presupposition, the VATR clearly outlined services which are exempted,[36] non-exempted services [37], and zero-rated services.[38]At the same time, the regulation distinguished services related to export or at least services that possibly fall in the realm of zero-rating to be treated as zero-rating financial services.[39]

4. Tax Treatment of Interest-free Banking Services

4.1. Experiences of other Countries

Inherent in evaluating changes to the tax law is the need to ensure that facilitating Islamic banking does not distort the operation of the market. In this case, the stand of legislations differs based on the nature of tax laws of countries(form or Substance) and the nature of the tax legislation(whether the adjustments can be made with the existing tax frameworks rather than the development of specific provisions directed solely at Islamic finance.)[40]Experiences of different jurisdictions based on these classifications is presented below.

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[36] See Council of Ministers Value Added Tax Regulations No. 79/2002, *Federal Negarit Gazette*, 9th year, No. 19, Article 20(2) which lists exempted financial services.

[37] The Regulation listed down services which are not exempted "whether or not they are rendered in connection with an exempt financial service". These are: Legal, accounting and record package services, actuarial, notary, and tax agency services (including advisory services) when rendered to a supplier of financial services or to a customer of that supplier of financial services; Safe custody for cash, documents or other items; Data processing and payroll services; Debt collection or factoring services; (e) Management services, such as management of a superannuating fund; (t) Trustee, financial advisory, and estate planning services, and (g) Leases, licenses, and similar arrangements relating to property other than a financial instrument. Article 20(6) of the VATR.

[38] The regulation used the word services not financial services in the sub article that listed down services which are not exempted or zero-rated. Services that are zero-rated are related to exports compatible with the main exemption limb of the proclamation under Article 7(2) (a) of the VATP. Zero rating (also referred to as 'exempt with credit' or GST-free in some jurisdictions) has the result that financial services will be totally relieved from tax. No VAT will be due on the supply of these services, whereas full input tax credits will be granted to financial institutions regarding their purchases. However, definition complexities may remain when determining which services are subject to the zero rate competing with the exemption, particularly given the rapid pace of product innovation in the financial sector industry. (See Robert Supra note 26, p.24). In some Jurisdictions like New Zealand Zero rating of financial services is reserved for services to registered businesses and only those business customers for which taxable supplies constitute at least 75% of total supplies made.(Ibid, p.25)

[39] As per article 20(9) of the VATR, Zero-rated exports of financial services includes the following:
"(a) financial services rendered in connection with an export of goods;
(b) financial intermediation services rendered in connection with a loan to an unregistered, non-resident person to finance the export of goods; and
(c) fees imposed by an Ethiopian bank on banking services rendered to a non-resident who is outside Ethiopia when the banking services are rendered"

[40] Review of the taxation treatment of Islamic finance: Discussion Paper, Australian government (the board of taxation), 2010 available at http://www.ag.gov.au/ccaaccessed on December, 2018.

Countries differ on the treatment of taxing the IFB based on their inclination to the form or substance dichotomy. In the tax literature, the phrase 'form and substance' is often discussed in the context of tax avoidance. There the question often arises whether the legal form of the transaction or the economic substance of the transaction is relevant in determining the tax treatment.[41] In this context, "form" is used to describe putting significant emphasis upon the legal form of a transaction i.e. how is the transaction classified from a legal perspective. In contrast, "substance" is used to denote an approach of basing the tax treatment primarily upon the economic reality or the real legal nature of a transaction. So if a country favors applying the substance-over-form doctrine, one looks to the objective economic realities of a transaction rather than to the particular form the parties employed and does not regard the simple expedient of drawing up papers as controlling for tax purposes where the objective economic realities are to the contrary.[42] The substance over form also impels many more specialized doctrines in the literature including the economic substance and step transaction doctrines. the point of economic substance doctrine is to look beyond the form of a transaction and to determine whether its substance is of such a nature that it should be recognized to protect the intent of the legislature or purpose embodied in the laws whereas the step transaction allows a court to treat a series of closely related transactions as one for tax purposes and to disregard the independent tax effects of intermediate steps.[43]

Then the effect of inclination of countries towards form or substance may have an implication on the adaptability of tax legislations to IFB services. It has been said that:

> Whether or not a conventional tax system is able to cope with Islamic finance transactions without a need for specific legislation will depend broadly on the extent to which it follows the economic substance or the legal form of transactions: the closer the alignment of conventional tax rules with economic substance, the less adjustment is likely to be needed for Islamic finance transactions. The U.K. is an example of a country which has needed to introduce

[41] Dar, H. A. and Moghul, U. E. (eds), *The Chancellor Guide to the Legal and Shari'a Aspects of Islamic Finance,* 2009, (Chapter five). London: Chancellor Publications Limited.
[42] Ibid
[43]Philip Sancilio,Clarifying (Or Is It Codifying?) The "Notably Abstruse": Step Transactions, Economic Substance, and the Tax Code, Columbia Law Review, Vol, 113, 138, No. pp.143-162.

> — and has done so — significant changes to overcome obstacles for Islamic finance within its general tax system.[44]

If we took changes within the existed tax formworks or new frameworks, countries differ based on the approaches in implementing tax changes to facilitate IFB. Countries that adopt a total absorption method stand for measures that commonly supplant conventional finance law with Sharia commercial and tax law.[45] Whereas countries that adhere to the dual model method "recognizes the integrative duality of financial systems in which Islamic finance exists parallel with conventional finance."[46] A parallel tax system is required to be adopted in this modality. Another modality of tax treatment is the integrative approach which targets selective changes to tax law and financial laws to facilitate the development of Islamic finance within the economy. In this modality, legal impediments inherent in tax and financial regulations are separated for special consideration to allow integration of Islamic financial practices within conventional banking to maintain the integrity of existing prudential laws *ex-ante*.[47]Based on these categorizations, countries may follow any of these systems taking the specific realities of their tax policy or frameworks. In the UK, the legislation which is set out in the Finance Act 2005 does not mention the Sharia or use any Islamic finance terms or it does not make provision specifically for Islamic financing or Shari'a compliant' transactions nor will one find words such as *Murabahah* or *Mudarabah*. Instead, the legislation creates a freestanding set of definitions for use in UK tax law which is entirely neutral regarding religion.[48] For transactions that fall within

[44] Organization for Economic Co-operation and Development (OECD), Background paper, International Tax Dialogue (ITD) Global Conference on Financial Institutions and Instruments – Tax Challenges and Solutions, 2009.

[45] A total absorption model refers specifically to the commitment by a country to initiate efforts to completely Islamize its banking systems. Countries such as Sudan and Iran have adopted this approach and associated measures to completely supplant conventional finance law with Shari'ah commercial law. See, Brett Freudenberg and MahmoodNathie, Islamic Finance in Australia:Methods of Tax Reform, *Asia Pacific Journal of Taxation*, Vol. 15 No. 1, Spring/Summer, 2011. P.79

[46]Ibid, p.80.

[47]Ibid, p, 81. This modality can be implemented using different mechanisms. The first method is Listing Method. This involves identifying and then "listing" all requirements that may impede the introduction of Islamic finance. Tax and regulatory reform is then targeted in terms of priority and necessity. This could include widening definitions or clarification of terms applicable for conventional services. The second method is called exceptions method. This method assumes that Islamic financial instruments and practices substantially conform to their conventional equivalents albeit with important *exceptions* that may require special attention. Legislators therefore need only to address "exceptional" issues and only in situations where deviations from acceptable norms and standards are significant.

[48] See, *the Development of Islamic Finance in The UK: The Government's Perspective.* Available at http://www.hmtreasury.gov.uk/d/islamicfinance101208.pdf accessed on may, 2019.

these definitions, the legislation specifies how to determine the finance cost and how that finance cost is treated by both the payer and the recipient.

In some other countries, they have specific laws that addressed the taxation of IFB in their respective laws. In Australia, for instance, the Australian *Income Tax Assessment Act* has extended the definition of 'interest' to include payments: 'in the nature of interest', 'in substitution of interest' or dividends paid in respect of non-equity shares which possibly accommodates the taxation of IFB parallel to interest in the conventional banking services. As result, the majority of IFB based on deferred payments and tend to shadow their price rates (profit margins) are likely to be deemed 'interest' and thus subject to the tax rate specified in the laws of the country.[49]

Within this spectrum, Malaysia, a key global player in Islamic finance, has enacted tax legislation to ensure that IFBservices are taxed in the same manner as conventional arrangements. For tax purposes, the profits of Islamic financial arrangements and the payment of profits are generally treated as interest. Malaysian tax legislators introduced different amendments to address the tax treatment of Islamic financial instruments.[50]

In South Africa, the existed tax laws are amended to level the playing field for conventional and Islamic banking. Accordingly, the amended law incorporated definitions on sharia arrangements; *Mudaraba,Murabaha,* and diminishing *Musharaka.* Specific articles are extended to accommodate the tax aspect of interest-free banking services.[51]

[49]Salim Farrar, Accommodating Islamic Banking and Finance in Australia, *UNSW Law Journal Volume 34, No.1*, March 2012.

[50]WalidHegazy, *Islamic Finance in Malaysia:A Tax Perspective***,** Proceedings of the Second Harvard University Forum on Islamic Finance: Islamic Finance into the 21st CenturyCambridge, Massachusetts. Center for Middle Eastern Studies, Harvard University, *1999.Pp.215-224.*

[51] Omar Salah and Christa Rautenbach, Islamic Finance: A Corollary to Legal Pluralism or Legal Diversity in South Africa and the Netherlands? *The Comparative and International Law Journal of Southern Africa,* Vol. 48, No. 3, November 2015, pp. 488-515, p.508. According to this article, in South Africa, the *Mudharabah*Agreement is taken to be equivalent with conventional savings account and hence an amount received by or accrued to a client in terms of a *Mudharabah*agreement, is regarded as interest. Accordingly, theIncome Tax law allows for a basic interest exemption. Any profit earned by a natural person in termsof a *Mudharabah*agreement is regarded as interest and qualifies for the sameinterest exemptions as its conventional counterpart.

4.2. The Ethiopian Tax Laws

The main attribute of interest-free banking is that no interest is imposed on the services whereas, in conventional banking services interest is subject to income tax Under the VAT laws, financial services are exempted not because they are necessities but simply because it is difficult to impose a value-added tax on the intermediaries. Such intermediaries are not a challenge for interest-free banking. So the next issue will be, then, how do the income tax laws and VAT laws treat interest-free banking.

So far, almost all commercial banks have received licenses for IFB windows from NBE. Besides, these banks are delivering IFB services at a full-fledged level. IFB services may be grouped into Deposit Account Services and Trade partnership/investment financing. Under the deposit account services, *WadiahAmanah*, *Amanah,* and *Mudharabah*are the most common services.[52]With the trade partnership/investment IFB services, *Murabaha*, *Musharakah,* Salam, *Istisna*and*Ijara* are the most common services in Ethiopia.[53]Since time and space will not allow addressing all these services, to show the tax loopholes or tax challenges of these services, *Mudharabah* and *Murabaha* IFB services are taken as case studies. The analysis limits itself to VAT and Income tax laws only.

4.2.1. *Mudharabah*

Mudharabah[54]is a contract conducted between two parties, a capital owner [depositor] and an investment manager [financial institution].[55] In other words, the *Mudharabah* is a deposit account for customers who wish to maintain a regular (or irregular) saving pattern. Under the Sharia principles, this type of account is based on a profit or loss sharing concept, with a risk that

[52] A simple look at the websites of Ethiopian commercial banks signifies that these are the most shared customer deposit account services even though some banks add special account within these services while others are rendering limited services. A detailed definitions and classifications are available in the website of Commercial Bank of Ethiopia, available at *www.combanketh.et accessed on July, 2018*

[53] Id.

[54] In this article from the list of *Mudharabah* services, profit sharing saving account is taken for analysis. This IFB services is a type of investment partnership where a customer deposits money for unspecified length of time and the Bank shares both the profit and loss with her/him. The customer may withdraw his/her deposit at any time, but the Bank may impose some restrictions on the amount to be taken out as this arrangement is both profit and loss sharing partnership.

[55]Said M. Elfakhani, Imad J. Zbib and Zafar U. Ahmed, Marketing of Islamic Financial Products in M. Kabir Hassan and Mervyn K. Lewis, *Handbook of Islamic Banking(*116-127, Edward Elgar Publishing Limited, 2007, *p,119.*

customers may lose their initial capital saved with the Islamic finance provider.[56] The financial institution pools its customers' funds with its funds to invest in Sharia-compliant investments assets and charges a fee (management fee),[57] which is often explicitly identified along with other profit components. Each month, the bank calculates the actual profit and credits its customers' accounts based on previously agreed profit-sharing ratios. As noted, in the case of losses, customers may lose some or all of their initial capital.[58]If there are profits from the bank's operations, those profits are shared between the bank and the customer on an agreed basis. Presumably, the customer obtains a return similar to market interest rates while the bank keeps any excess return as a reward for organizing the transactions.

- **Income tax and VAT Issues**

It is crystal clear that the profit from the *Mudharabah* contract is part and parcel of the business income, on the bank side, under schedule C of the ITP. The *Mudarib* fees, profit, and loss from the *Mudharabah* should be included in the financial institution's business income. It will be necessary to examine the legal nature of the relationship between the financial institution and the customer. Unlike the trend of treating this relationship as a partnership in some jurisdiction, in the Ethiopian case, the relationship does not fulfill the legal requirement of partnership or any other business organization in the commercial code[59] or the definition of the body in the tax administration proclamation or there is no way that the customer is considered as a shareholder of the banks. If this is so then, there is no possibility that the profit distributed by the bank to the

[56] Id.

[57] According to the model *Mudharabah* Agreement prepared by the commercial bank of Ethiopia, the managerial fee is defined as fees payable to the bank because of the profitable investment it endeavors.

[58] A sample contract prepared for a customer deposits money for unspecified length of time by the commercial bank of Ethiopia in one of its article reads as follows
"ደንበኛውበዚህስምምነትመሰረትገንዘብማስቀመጡበቻያስቀመጠውንገንዘብሙለበሙለስለመከፈለወይምትርፍስለመጋራቱዋስትናሆኖየማይቆጠርመ ሆኑንተስማምታል" which indicates saving by itself doesn't guarantee repayment of the money (Draft agreement prepared by the Commercial bank of Ethiopia article 6).

[59] In the commercial code of Ethiopia, a business organization is defined as "any association arising out of a partnership Agreement" and Partnership agreement is in turn defined as "a contract whereby two or more persons **who** intend to join together and to cooperate undertake to bring togethercontributions for the purpose of carrying out activities of an economic nature and of participating in the profits and loss arising out thereof, if any." Since formation of any business organization other than a joint venture is mandatorily required to be made in writing and fulfill the requirements under the Ethiopian commercial code, it seems not legible to treat*Mudharabah* contract as partnership. The Commercial Code of the Empire of Ethiopia, proclamation No.166/1960, *NegaritGazeta* Gazette Extraordinary, Article 210, 210 and 211.

Customer could be considered as a dividend[60] to tax under Schedule D of the ITP. The last resort we have in the tax law is the definition of interest in the ITP.

As it is described in the preceding topics, article 2(16) of the income tax proclamation defined interest as "a periodic or lump sum amount, however, described as consideration from the use of money or being given time to pay, and includes a discount, premium, or *other functionally equivalent amounts*" (emphasis added). The "other functionally equivalent amount" phrase of this definition might be interpreted as the 'interest in substance' conception in other counters. In the UK, for instance, for corporation taxes, interest applies to interest paid on securities paid on "securities under which the consideration is given [..]is dependent on the results of the company business" which this provision would most likely apply to the profit-sharing payments which the bank makes to its customer under the*Mudharabah* contract.[61] In the Australian tax laws, there is an extended definition of 'interest' to include payments 'in the nature of interest', 'in substitution of interest', or dividends paid in respect of non-equity shares to avoid ambiguity created by these relations.

All in all, from the income tax perspective, the *Mudharabah* service may have the following tax implications. If we took the 'substance' of the service, it seems equivalent to a savings account. Like a conventional savings product, the purpose of *Mudharabah*serviceis to offer investors an agreed return on their investment. The bank pools the money with that of other investors and it is subsequently invested in *shari'a*-compliant transactions. The income is then shared between the client and the bank following the agreement and after deduction of bank charges. Any profit earned by a natural person in terms of a *Mudharabah*agreement may be regarded as interest and qualifies for the same tax rate as a conventional banking counterpart.

Besides, within this thinking, if the tax laws are not clear in this matter, IFB services may pose challenge for the VAT laws. In fact, according to the VATR "transactions concerning money…, deposit, savings, and current accounts, payments, transfers, debts, cheques, or negotiable

[60] Article 2(7) (C/ of the ITP has defined dividend broadly to include "the amount of loan payment for an asset or services, value of any asset or series provided, or any debt obligation released, by a body to, or in favor of, a member or related person of a member to the extent that the transaction is *in substance*, a distribution of profit"(emphases mine).

[61] Dar, H. A. and Moghul, U. E. (eds), *The Chancellor Guide to the Legal and Shari'a Aspects of Islamic Finance,* 2009, (Chapter five). London: Chancellor Publications Limited.

instruments, other than debt collection and factoring" are exempted.[62] However, the bank has agreed in advance that it will invest the money in the permissible activities. Unless these investments are non-taxable transaction under the law, there is no law which proscribes imposition of VAT on these activities.

Furthermore, taking the model*Mudharabah* contract prepared by the commercial bank of Ethiopia, the Bank is entitled to collect a 'Managerial service fee' for the profitable investment it undertakes. In this case, issues could arise that this fee may be considered as to manager's fee and, therefore, subject to VAT. It may fall under "management services" stipulated in Article 20(6) (e) which are not exempted. Following the introduction of the IFB services in Ethiopia, the concerned authority was expected to hammer out guidelines or directives to address the taxation issues of IFB. This far, however, there is no guideline/ directive for this matter.[63] For all these purposes, it seems that the law needs amendment or some other arrangement to consider these transactions.

4.2.2. *Murabaha*

In conventional banking, when a person needs capital to finance a business he makes a request to the bank for a loan. Bank issues loan at a certain interest rate after making risk assessment and calculating the time value of money. In this way, the person receives the money to finance capital and pays back the actual loan with interest over a certain period in monthly installments. Islamic banks have different procedures and processes to execute a transaction similar to the one mentioned above. Of these services of the IFB, is *Murabaha* contract is commonly cited. *Murabaha* means "sale on profit". It is technically a contract of sale in which the seller declares his cost and profit."[64] In other words, it is a contract between a buyer and a seller in which the seller sells the commodity to the buyer at an agreed price.[65]

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[62] See VATR Article 20(2) (b).

[63] Interview made with Tax policy experts at the Ministry of Finance and Interview made with Legal office head of Ministry of Revenue, September, 2019.

[64]Fuad Abdullah and Mohammed Kayed, *Islamic Banking: Theory, Practice and Challenges*, Zed Books, 1996, Glossary part.

[65] The same conception is provided at the website of the commercial bank of Ethiopia. Accordingly, *Murabaha* "involves a request from a customer to the Bank or by the initiative of the Bank to purchase and then on sell to the customer certain goods and/or assets not banned by Shari'a." The sale by the Bank to the customer is at cost plus on an agreed margin. Payment by the customer is in one or more pre-determined instalments at agreed points in time.

In *Murabaha*, a bank acquires a specified product to resell it to one of its customers for a price that reflects the cost of acquiring the product plus a reasonable amount of profits for the bank. The sale by the Bank to the customer is at cost plus on an agreed margin. Payment by the customer is in one or more pre-determined installments at agreed points in time. Ownership of the goods passes to the customer upon delivery by the Bank. The contract is valid on the condition that the price, costs, and, profit margins of the seller are stated at the time of the agreement.[66]

The main difference between *Murabaha* and the corresponding conventional bank service is that in the latter the bank advances cash based on a loan against which it earns interest. In the case of IFB, the bank first purchases[67] an item, and by taking its possession assumes the risk of that item. Thereafter, the bank sells it for a specified profit. In the case of conventional banking, the bank collects principal plus interest on debt documented as a loan. In contrast, the *Murabaha* model of Islamic finance is predicated on the permissibility of charging a credit price that is higher than the spot price of a property.[68]

- **Income Tax and VAT Issues**

From the financial institution's perspective, the *Murabaha* service will not pose a tax challenge to the current income tax laws. The question of whether the profit received from *Murabaha* is treated as the interest in a conventional loan transaction or just as profit *per se, however,* persists. In the UK for example, the approach followed by the legislators was to look into the economic substance of the transaction rather than its legal form. In other words, the profit derived from

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Ownership of the goods passes to the customer upon delivery by the Bank. Such a sale contract is valid on condition that the price, other cost and the profit margins of the seller are stated at the time of the agreement of sale. The asset/good remains as a mortgage with the Bank until the default is settled. The Bank may ask for collateral, if necessary, for this financial service. Services included under the *Murabaha* banking services are:

- *Murabaha* fixed-time financing(For production inputs, purchase of machinery or short-term project)
- *Murabaha* revolving financing (For purchase of production inputs)
- *Murabaha* LC financing (For purchase of production inputs from abroad or for buying machinery)
- *Murabaha* pre-shipment and Murabaha post-shipment financing (for purchase of goods to be exported)

See interest free banking in the website of the commercial bank of Ethiopia at www.combanketh.et accessed on *July, 2018*

[66] WalidHegazy, supra note 49, p.224.

[67] This can be done by the client himself as agent of the bank to purchase on its behalf.

[68] Mahmoud A. El-Gamal, Islamic Finance: Law, Economics, and Practice, Cambridge University Press, 2006, p.64

Murabaha is treated the same way as interest in a conventional loan transaction. *Murabaha*, therefore, has been treated as if it was an interest-bearing instrument and consequently the tax treatment is equivalent to that of interest-bearing products.[69]

If the issue is the timing of recognizing the profit where the term is more than a year, uncertainty may arise regarding when a financial institution would be required to include in taxable income-the gain on sale of the asset—at the time of sale of the business assets or over the payment period. In a conventional loan scenario, the economically equivalent "interest" would be recognized over the term of the loan (for example, five years).[70] Generally, a taxpayer should include in the business income the difference between the cost of a good and the amount it was sold to the customer in the year of sale.

From the customer perspective, according to article 23(1) of the ITP, a taxpayer is entitled to deduct "for any interest incurred by the taxpayer in a tax year to the extent that the taxpayer has used the proceeds or benefit of the debt or other instrument or agreement that gives rise to the interest to derive business income." An important element that the law should address is whether the profit collected by the bank will be considered as interest so that it will fall beneath this article or not. In countries like Malaysia, "interest paid on borrowed money is a deductible expense if it is employed in the basis period in the production of gross income or laid out on the purchase of assets used, or held, for the production of gross income."[71]

As it is pointed out above, in *Murabaha* the bank purchases the property from a third party for the benefit of its client, and the purchase is based on the terms and conditions agreed upon by its client and the third party. The bank then resells the property to the client with a mark-up agreed upon by the bank and the client. So according to the existed income laws, this income can be treated in two ways. First, the mark-up can be characterized as interest generated for the bank and interest incurred by the client so that the rate on interest in the schedule D of the income tax

[69]TareqMoqbel, The UK Islamic Finance Taxation Framework and The Substance VsForm Debate in Islamic Finance, Legal Ethics, Vol.18, No.1, 2015, pp.84-86.
[70] Under the Ethiopian Income Tax Proclamation, in long-term contracts, "a taxpayer accounting for business income tax on accrual basis shall include amounts in business income and claim deductions for expenditures arising under a long-term contract for a tax year based on the percentage of the contract completed during the year." Article 32.
[71]WalidHegazy, supra note 49, p.224.

and the deductible expense on interest under schedule C will apply. Second, if this marked margin/profit margin is formally considered as profit then it will be included in the profit and loss balance sheet of the bank and then the 30 percent rate on business income will apply.

On the VAT side, under the conventional arrangement, the sale of a good is subject to VAT regardless of the kind of institution. In the case of the *Murabaha*, the institution purchases and resells the good through an arrangement that is typically structured to generate a return in line with conventional financing rates. As there is a second transaction on an increased amount (i.e., the price of the good plus the profit), a higher VAT is exigible. However, in substance, if the profit amount could be viewed as a financing cost or interest and, thus, as a financial service, VAT would not arise. However, the demarcation among the exempted, taxable, and zero-rated financial services under the VATR does not appear to support this interpretation. As a result, there seems to have a legal foundation to impose VAT on this service. If so, consumers will face higher costs under a *Murabaha* than under a conventional financial instrument, increasing the risk that *Murabaha* products would be unattractive in the marketplace.

According to the experts in the Ministry of Finance and Ministry of Revenue, to this date, no guideline or directive is issued for this purpose. On an individual basis, however, the writer of this article has found out that the ministry, Ministry of Finance, on banks own request has sent a letter to avoid "double" VAT on *Murabaha*which states that banks are not required to collect VAT from their customers except the input tax from the sellers of the property.[72]VAT will not be imposed on the customer of the IFB and thence no output tax on the side of the bank while VAT will be imposed during the purchase of the property from the seller. This is how the Ministry of Finance's ruling aimed at avoiding the multistage nature of VAT. This does not, however, bring the equal treatment of the same transactions to get through the conventional and Interest-free Banking services. At least this policy choice disallows banks to offset the input tax imposed on the property by the seller. Besides, it is questionable on what legal ground and authority does the ministry exempted banks from collecting VAT from their customers. The VATP has empowered the Ministry to exempt 'other goods and services' through a directive. Plus, it is authorized to

[72] Advance ruling made to the NIB bank Share Company on issue of VAT collection from Interest Free Banking services.

pass binding private rulings upon the application of the taxpayers.[73]However, the issue of taxation or exemption of IFB needs a thorough policy decision, not private or public ruling, on all possible tax issues.

Conclusion

In conventional banking, when a person needs capital to finance a business, he makes a request to the bank for a loan. Bank issues loan at a certain interest rate after making risk assessment and calculating the time value of money. In this way, the person receives the money to finance capital and pays back the actual loan plus interest over a certain period in monthly installments. Islamic banks have different procedures and processes to execute a transaction similar to the one mentioned above. As Sharia does not allow trading of money and receiving money without efforts, therefore, Islamic banks do not lend money or deposit money with interest. They usually deal in commodities through buying and selling contracts which are known as *Murabaha*or deposit money using like *Mudharabah* contract.

On the deposit side, the usual trend of conventional banking is that upon receipt of funds from their customers, banks credited interest to their customers based on their agreements. However, in IFB, since interest is prohibited there are arrangements, like *Mudharabah and Murabaha,* and such financial services are required to be sharia-compliant.

On the other hand, in countries like Ethiopia, most tax laws are arranged to be compatible with conventional financial services. Thus, the introduction of Interest-free banking usually poses a challenge to the tax system until countries hammer out Guidelines or laws for that purpose. Accordingly, the core issue in the taxation of IFB products, in general, is that these transactions require additional steps when compared to their conventional counterparts to achieve the same economic benefits. Hence, if each step were to be considered separately, this would give rise to additional tax costs. In *Murabaha*, there are more transactions and documentation and hence, VAT may arise at each step of the *Murabaha* arrangement though there are some attempts to settle the issue from the ministry of Finance side. At the same time, the profit margin of the transaction poses a question of whether it should be treated as interest or profit *per se* for the

[73]VAT Proclamation, Supra note 35, article 8(4) and Tax Administration Proclamation, Supra note 13, article 71.

income tax purpose. In the *Mudharabah* financing, too, whether the profit or managerial service (depending on their agreement) is part of the definition of interest under the income tax laws or whether this service is treated as VAT Exempted in the VAT laws is questionable. Due to this, the resulting tax treatment, taxing or exempting the services, may put IFB at a competitive disadvantage or advantage compared to conventional banking services.

Therefore, this time, it could be deduced that the tax aspect of IFB is still a virgin area yet to be addressed by the Ethiopian tax laws. Neither the National bank directive nor any other tax law that regulates company activities in Ethiopia provides a solution for the tax aspect of the Islamic financial products. The current 'here and there' advance ruling of the Ministry of Finance may reduce the problem but it needs long-lasting legal solutions. The problem demands the enactment of a guideline or amendment of the existing tax laws in Ethiopia.

Substantive Scope of the Duty to Notify and Consult planned Measures under International Watercourse Law: The Case of Grand Ethiopian Renaissance Dam (GERD)

Haile Andargie Wondalem*

ABSTRACT

There exist uncertainties about the essence and substantive scope of riparian states' duty on planned measures under international watercourse law. Absence of an all-inclusive legal and institutional framework to regulate the duty, even more, complicate the issue in the Nile river basin. Since 2011, Ethiopia and Egypt have been in dispute over the construction of the Grand Ethiopian Renaissance Dam (GERD). The controversies over Ethiopia's duty to cooperate, inform and consult about GERD are among the heart of the dispute. This article examines the substantive scope of the riparian duty to inform on planned measures in the context of GERD. After an analysis of relevant literature, international watercourse law, and the practice of Egypt and Sudan, the article argues that Ethiopia has no treaty obligation to inform its projects to other riparian states. The practices of Egypt and Sudan also affirm the prevalence of unilateral measures on planned projects. Finally, the article suggests the establishment of the legal and institutional framework is of utmost importance to settle riparian states' duty of planned measure in the Nile basin.

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Keywords: - Utilization, Notification, Significant harm, Treaty, State practice, Renaissance Dam

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1. Introduction

Procedural Rules of the duty to inform on planned measures have been included in many international watercourse conventions[2], regional agreements[3], in the work of governmental and non-governmental organizations[4] , and international case law on international watercourse dispute.[5]The UN Convention on the Law of the Non-navigational Uses of International Watercourses (hereinafter referred to as UN watercourse Convention) provides detailed provisions related to the notification, consultation, and cooperation on *planned measures.*[6]Those legal frameworks oblige the state to plan a measure that may have *significant adverse effects* of planned measures upon other riparian states to provide such states with timely notification,

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[2] United Nation General Assembly, Resolution 51/299, Convention on the Law of the Non-navigational Uses of International Watercourses (1997, opened for signature May 21, 1997, 36 I.L.M. 700) Art. 8, [hereinafter referred as UN Watercourse Convention). Articles 11-19 explain the applicable procedures to encourage cooperation between riparian states when "planned measures" may adversely affect other riparian states.

[3] In Africa, the Revised Protocol on Shared Watercourses in the Southern African Development Community (2001), [hereinafter SADC Protocol] included a duty to inform on planned masseurs. The Revised Protocol was signed by Angola, Botswana, Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe. For more information and to see the text of the protocol, visit the SADC website athttp://www.sadc.int/overview/treaty.htm last visited on October 8, 2013). Article 4(b) of the SADC protocol provides 'before a State Party implements or permits the implementation of planned measures which may have a significant adverse effect upon the other Watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information, including the results of any environmental impact assessment, to enable the notified States to evaluate the possible effects of the planned measures'. In Europe, we have the United Nations Economic Commission for Europe Convention on the Protection and Use of Transboundary Watercourses and International Lakes(hereinafter referred, UNECE) adopted in Helsinki, Finland on 17 March 1992 and entered into force on 6 October 1996. The convention under article 2(h) envisioned the establishment of joint bodies with the tasks to serve as a forum for the exchange of information on existing and planned uses of water and related installations that are likely to cause transboundary impact.

[4] Notification is also envisioned in the work of the International Law Association (ILA) that has provided further commentary on the issue of notification, International Law Association (ILA), the Helsinki Rules on uses of waters of International River. International law association Report of 52nd conference, Helsinki (14-20 August 1966), Art. 29(2)-(4), Report of the fifty-second conference held at Helsinki 484, 518-19 (1966) [hereinafter Helsinki Rules].."

[5] Lake Lanoux Arbitration (1957), Spain vs. France, 24 I.L.R. 101, 111-12 [hereinafter referred to as Lake Lanoux Arbitration]. The tribunal believed that France was under obligation to provide information to and consult with Spain to take Spanish interest into account in planning and carrying out the projected works.

[6] Whilst "planned measures" are not defined by the Convention, it is generally taken to mean any intended projects or program which may cause some form of significant adverse effect (s) on a watercourse, directly or indirectly. UN Watercourses Convention User's Guide Fact Sheet Series: Number 6 Notification Process for Planned Measures available at http://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-6-Notification-Process-for-Planned-Measures.pdf (accessed on 7/20/2013)).

accompanied by available technical data and related information, and to allow six months for a response.[7]

In the Nile river basin, there is no comprehensive and binding basin-wide treaty regulating the obligation of basin ' states. Therefore, the substantive scope of the duty to inform, consult, and cooperate remained unsettled. In the negotiation of the Nile basin Cooperative Framework Agreement (CFA), procedural rules regarding notification, consultation, and cooperation of planned measures were controversial.[8] Early at the beginning of the negotiation of the CFA, Ethiopia retained a reservation on the inclusion of the rules of planned measures in the framework text that is a reflection of its long-held stand back during the adoption of the UN Watercourse Convention.[9]When the UN General Assembly adopted the Charter on Economic Rights and Duties of states in 1974, the Ethiopian representative made a reservation to the 'provision of the charter'[10] that requires prior consultation and information in the exploitation of natural resources shared by two or more countries.[11]

Later on, during the diplomatic negotiation in Kigali, Rwanda and Ethiopia ventured a new strategy to carryout notification of information on planned measures, consult and cooperate through a third-party mechanism instead of bilaterally between the riparian states.[12] For them, the Nile basin commission, which would be established with the adoption of the CFA, would serve such a purpose.[13] Quite the opposite, downstream states wanted to strengthen the wording of the CFA to put the more onerous obligation of notification, consultation, and cooperation before upper riparian states venture any kind of project on the Nile River.[14]In the

[7] UN Watercourse Convention (1997), supra note 1, Article, 11-19.
[8] Musa Mohammed, 'How do the work of ILC and General Assembly on the International watercourse contribute towards a legal framework agreement for the Nile Basin?', Master thesis (unpublished),(2009), p.7.
[9] Musa Mohammed, 'The Nile River cooperative Framework agreement: contentious legal issues and future strategies for Ethiopia', a paper presented at the national consultation workshop on the Nile, (2009), p.14.
[10] UN General Assembly Resolution on Charter of Economic Rights and Duties of States, Res/3281/ (xxix), UN GAOR, 29th Sess. Supp. No. 31 (1974). Article 3 of the charter reads: 'In the exploitation of natural resources shared by two or more countries, each State must co-operate based on a system of information and prior consultations to achieve optimum use of such resources without causing damage to the legitimate interest of others.
[11] Gebre Tsadik Degefu, 'Nile Historical, Legal and Developmental Perspectives', Trafford Pub., New York, (2003), pp.133-114.
[12] Girma Amare,'Contentious issues in the negotiation processes of Cooperative framework agreement on the Nile: paper presented in the consultative meeting to be held in Addis Ababa, Ethiopia,(2009), p.10.
[13] Girma Amare (2009), Supra note 11.
[14]Id., p.11.

end, the CFA stipulates the principle under article 8 that lays down the obligation of Nile basin states to exchange information on planned measures through the Nile River Basin Commission.

When a bilateral or multilateral framework is not available to regulate the matter, as mentioned before, the resort could be made to customary international law to evaluate the essence of the duty to notify, consult and cooperate under international watercourse law. Indeed, there are few rules on the use of international watercourse such as the principle of reasonable and equitable utilization that has attained the status of a customary rule of international law, but the substantive scope of the duty to notify, consult and cooperate on planned measures has not yet attained the status of international customary law.[15] In terms of reasonable and equitable utilization, the assertion could be backed by the practice of states, which are found mainly in the treaties[16] concluded by them and decisions of international and national tribunals over conflicts on uses of shared waters[17], and the writings of lawyers in the field.[18] The only exception in this regard is the obligation to give notice in an emergency that has entered the realm of customary international law.[19]

Coming to the GERD, the dam precipitated renewed international legal squabble among the major riparian states of the Nile Basin, notably Ethiopia and Egypt. At the significant part, on the Egyptian side, inter alia, is the allegation that the Ethiopian government failed to inform, consult, and cooperate about the project that will harm the overall uses of Nile. Egypt strongly insists on Ethiopia's duty, as an upper riparian state, to provide prior notification documents about the technical details of the dam consult and cooperate on the construction and operation of the dam

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[15] Abiy Chelkeba, Notification and Consultation of Projects in Transboundary Water Resources: Confidence Building rather than Legal Obligation in the Context of GERD, Mizan Law Review, Vol. 11, No.1, September (2017), p. 125. Contribution of the UN Convention on the Law of the Non-Navigational Uses of International Watercourses', International Journal of Global Environmental Issues, Volume, 1, No.3, 2001, p.260.

[16]. See for example the early treaty of 11 January 1909 between Great Britain and the United States of America relating to boundary waters and questions concerning the boundary between Canada and the United States (British and Foreign State Papers, 1908-1909 (London), vol. 102 (1913).

[17]Gabcikovo-Nagymaros project case, (Hungary Vs Slovakia) ICJ judgment of 25 September 1997. The majority of judges, in this case, underlined that the principles of equitable and reasonable utilization of shared water resource as envisioned in the UN watercourse convention is a codification of international customary law and decided that Slovakia infringed the principles of equitable utilization while it appropriates between 80 and 90 percent of the waters of the Danube although the Danube is shared international water.

[18] For instance, in his explanation to Article 5 of the UN Watercourse Convention, Stephen McCaffrey pointed out that the rule of equitable and reasonable was the codification of norms of customary international law. See also Professor Kinfe Abraham, The issue of Nile: the quest for Equitable water allocation, (Amharic), 2005, P33-34

[19] Cosgrove, W.J 'Water security and peace' Syntheses of studies prepared under the UNESCO - water for peace processes, 2003, p25-26.

that would have possible adverse effect[20] In so doing, Egypt bases its claim on general international watercourse law, treaties[21], and customary international law.

Ethiopia, on the other hand, argues that the dam would instead benefit riparian states through flood and sediment control and regulation of the river flow and generate electricity that could be sold cheaply to other Nile riparian states. It also reiterates that Ethiopia does not have any binding obligation of notification, consultation, and cooperation nor the practice of Nile riparian countries has shown the same gesture.[22] If at all, according to Ethiopia's argument, it will be out of goodwill and courtesy.

Therefore, the problem remains as to whether or not international water law lays down duty on the Ethiopian government to inform, consult, and cooperate on planned projects like the GERD. The overall purpose of this article is thus to shed a light on the essence of the duty to inform, consult and cooperate under international law and in the Nile basin and then to draw conclusions in the context of the GERD.

The discussions are presented in the following chronological order: Part II explores principles of riparian duty to inform, consult, and cooperate under international watercourse law. Part III analyses the existing Nile River basin treaties and state practice on issues of riparian duty to inform, consult, and cooperate on planned measures. Part IV discusses GERD in the context of the principle of the duty to notify consult and cooperate. Lastly, the article ends with a conclusion and ways forward under Part V.

2. Notification, Consultation, and Cooperation under the UN Convention on the Law of Non-Navigational Uses of International Watercourse

As water is one of the most widely shared resources of the planet that often constitutes a border between states or flows across different countries, it can be a factor for cooperation among

[20]s. Habtamu Alebachew, 'International legal perspectives on the utilization of trans-boundary rivers: the case of the Ethiopian Renaissance (Nile) dam', paper presented to the ninth iucn colloquium, northwest university of south Africa, Eastern Cape town, (2011), P.23.

[21]Egypt today: Egypt slams Ethiopia for Renaissance dam remarks available at https://www.egypttoday.com/Article/2/82175/Egypt-slams-Ethiopia-for-Renaissance-dam-remarks last visited 3 March 2020.

[22] Downstream states have never notified Ethiopia while constructing giant projects in the Nile basin. In projects including the Aswan High Dam, Toshka project, and the Peace Canal (in Egypt), and Al-Rosaries, Khashm al-Girbah, and Merowe dams (in Sudan), the downstream states have never notified Ethiopia.

watercourse states. The principle of Cooperation stems from the broader and somewhat elusive principles of good-neighborly relations under international law.[23]Indeed, good-faith co-operation between states concerning the utilization of an international watercourse is an essential basis for the attainment and maintenance of an equitable allocation of the uses and benefits of watercourses. Cooperation is also necessary to enable watercourse states to take all appropriate actions for the fulfillment of the 'due diligence' obligation not to cause significant harm. Consequently, broad support for this general obligation is found in the UN watercourse convention, treaty practice states, and case law.[24]

The UN Charter recognizes international economic and social cooperation to create conditions of stability and well-being, which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights.[25] Moreover, the Charter of Economic Rights and Duties of states call for prior consultation among states in respect of shared natural resources to achieve optimum use of such resources without causing damage to the legitimate interest of others.[26] For water is the most shared natural resource in the world, Article 3 of the resolution embraces cooperation in the utilization of international watercourse law as an essential principle of international water law.[27]

In 1970, the UN General Assembly commissioned the International Law Commission (ILC) to draft a set of articles to govern Non-navigational Uses of Trans-boundary Water.[28] After 21 years of extensive work, in 1991, the ILC prepared the draft text of the UN Watercourses Convention. A considerable discussion had been made during 1991–1997 on the ILC's draft. Moreover, on 21 May 1997, the UN General Assembly adopted the Convention on Non-Navigational Uses of

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23 UN-Water Conference, 'the Interregional Meeting of International River Organizations convened by the UN in Dakar', Senegal 1981 underlines the importance of inter-State co-operation and the necessary organizational structures both at the international and regional levels and for specific watercourses.

24 International law Association, Report of the fifty-second conference held at Helsinki 484, 518-19, 1966 [hereinafter Helsinki Rules]. (Articles XXIX [1], XXIX [2], XXXI), the UN Watercourses Convention note 1 (Articles 5.2, 8, 9, 11, 12, 24.1, 25.1, 27, 28.3, 30), 1960 Indus Waters Treaty (Articles VI-VIII), 1995 SADC protocol on shared watercourse systems (Articles 2–5), 1995 Mekong Agreement (Preamble, Articles 1, 2, 6, 9, 11, 15, 18, 24, 30), 2004 Berlin Rules (Chapter XI, Articles 10, 11, 56, 64) and 1992 UNECE Water Convention (Articles 6, 9, 11, 12, 13, and 16)

25 The Charter of the United Nations, (1945), San Francisco, Article 55 available at Charter of the United Nations, 26 June 1945, San Francisco, available at http://:www.un.org accessed on 23 February 2013

26 General Assembly resolution on Economic and Social cooperation, resolution, 3281 (XXIX) of 12 December (1974),Art.3

27 International Law Commission (1979), Yearbook international law Vol.2. No, p. 171,

28 Report of the International Law Commission on the Work Forty-Six Session U.N.GAOR, 49th Sess., Supp.No.10, at 195, U.N.Doc.A/49/10/1994 an available at http://www.un.org/law/ilc/index.htm accessed on 12 January 2020

International Watercourses.[29]According to Article 36(1) of the Convention, 35 instruments of ratification, approval, acceptance or accession are necessary to bring the Convention into force. Some of the principles such as equitable and reasonable utilization have become norms of international legal practice and are cited in many international watercourse disputes. The principle of equitable and reasonable utilization has also been endorsed in ICJ's decision concerning the Gabcikovo-Naymaros Project case.[30] In this particular case, the Court decided that Czechoslovakia, by unilaterally assuming control of a shared resource, violated the generally accepted rules of equitable and reasonable utilization of the natural resource of an international watercourse and in turn deprived Hungary of its right to an equitable and reasonable share of the natural resources of the Danube River.

2.1. Scope of Notification of Planned Measures

Article 12 of the UN watercourse convention provides that a watercourse 'state should before it implements or permits the implementation of planned measures which may have a 'significant adverse effect' upon other watercourse states, provide those states with timely notification thereof. Such notification shall be accompanied by available technical data and information, including the results of any environmental impact assessment, to enable the notified states to evaluate the possible effects of the planned measures.

In its commentary on Article 12, the International Law Commission (ILC) pointed out that the threshold established in the article is intended to refer to *significant adverse effects*,' not to refer merely to some effects.[31]As a result, the position taken by the ILC is that notice of a planned measure must be furnished only when their implementation may have *a significant adverse effect u*pon the other watercourse state and not for every measure with little or no adverse effect on the other watercourse state. Besides, the obligation under the same provision concerning notification is accompanied by the duty to provide *available technical data and information*. The basin state in question cannot be called upon to or cannot be put to the expense and trouble of securing

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[29] Report of the International Law Commission on the Work Forty-Six Session (1994), U.N.GAOR, 49th Sess., Supp.No.10, at 195, U.N.Doc.A/49/10/1994 an available at http://www.un.org/law/ilc/index.htm accessed on 12 January 2020, p. 123. Out of 133 nations, 103 nations votes in favor (including Bangladesh, Finland, Jordan, Syria, USA, Mexico Slovakia, and Nepal), 27 nations abstained (including Egypt, Ethiopia, India, Israel, Rwanda, and France) and three nations voted against the Water Convention (Burundi, China, and Turkey).

[30] Gabcikovo-Nagymaros project (Hungary Vs Slovakia)(1957), Supra note 16.

[31] Charles B. Bourne, 'International Law and Pollution of International Rivers and Lakes', 6 U.BRIT. COLUM. L. REV. vol. 115, (1971), pp, 172-176.

statistics and data which are not already at hand or readily obtainable. In case a state which has been notified requests data or information that is not readily available, but is accessible only to the notifying state, it is deemed appropriate for the former to cover the expenses incurred in producing the additional material.[32]

The phrase 'implements or permits the implementation of' is intended to make clear that Article 12 of the convention covers not only measures planned by the state but also those planned by private entities. Thus, in the case of measures planned by a private entity, the watercourse state in question is under an obligation not to authorize the entity to implement the measures and not to allow it to go forward with their implementation before notifying other watercourse states as provided in Article 12 of the UN Watercourse Convention. Here, notifying other states should become effective not only where the riparian state plans new constructions, projects that may cause adverse effects to the rights or interests of another watercourse state, but also where alterations of or additions to existing constructions, projects, or use may cause such harm.[33]

2.2. Consultation and Negotiation Concerning Planned Measures

The obligation of the planning state to enter into the consultation will arise in consequence of two circumstances. First, the obligation arises if the notified state objects to the planned measure on the ground that it would be inconsistent with the provisions of Articles 5 or 7 that the measure is against reasonable and equitable utilization and likely to cause significant harm to other riparian states.[34] Second, the obligation arises when the planning state fails to notify and another watercourse state has reasonable grounds to believe that state is planning measures that may have a significant adverse effect upon it, and requests the planning state to comply with the processes of consultation and negotiation.[35]

In both cases, the purpose of consultation and negotiation is to arrive at an *equitable resolution* of the dispute involving the planned measure. The term 'equitable resolution' includes, among other things, modification to the initial plan to eliminate its potentially adverse effect, adjustment of other uses being made by either of the states, or the provision by the notifying state of

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[32] Report of the International Law Commission on the Work of its Forty-Sixth Session, UNGARO, 49th Secession, Supp (No. 10), UN Doc A/49/10 (1994), Art 12 para .5

[33] International Law Commission), 'Yearbook of the International Law Commission', vol. 2., No. 1, 1983, pp.175

[34] UN watercourse convention (1997), supra note 1, Art. 17.

[35] Id., Art. 18, para1.

compensation (monetary or other) acceptable to the notified state.[36] This does not mean removing all harms. As Prof. MacCaffrey expressed the rule does not require modification and change to the extent of removing all harm to the other watercourse state, but only such changes as will avoid impermissible appreciable harm.[37]

Sub Article 2 of Article 17 concerns how the consultations and negotiations are to be conducted. They shall be pursued on the basis that each state must in good faith pay reasonable regard to the rights and legitimate interests of the other states. Negotiating in good faith 'implies honesty, fairness, tolerance, lack of prejudice; consideration for the position, interests, and needs as well as flexibility, willingness to seek a solution, and, above all, cooperation.[38] It implies to act in good faith to carry out an act with honest intent, fairness, and sincerity, and with no intention of deceit.[39]Charter of Economic Rights and Duties of States also addressed the manner of consultation and negotiation in its article 3 as 'a processes of good faith consultation and negotiation purported to achieve optimum use of shared resources without causing damage to the legitimate interest of others.' The award of the tribunal in the Lake Lanoux Arbitration has also inspired the concept. The Tribunal believed that watercourse states should undertake consultation and negotiation according to the rules of good faith to seek to give them every satisfaction compatible with the pursuit of its interests and to show that in this regard it is genuinely concerned to reconcile the interests of the other states with its own.[40]

Sub article 3 of Article 17 requires the notifying state to suspend the implementation of the planned measures during the period of consultation and negotiation. The suspension seems reasonable since going ahead with the planned measures during the period of consultations and negotiations would not be consistent with the concept of 'good faith' required by sub-article 2 of Article 17. In the Lake Lanoux case, the arbitrator decided that the fact that there is a dispute between two states is not in itself enough to require suspension of a project by an implementing state.[41] In the UN Watercourse Convention, the notifying state shall, if so requested by the notified state at the time it makes the communication, refrain from implementing or permitting

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[36] Id., Art.18.
[37] International Law Commission, 'Year Book of International law Commission', (1987), Vol. 2, No.1, P.123
[38] N Zawahri, Dinar, and G Nigatu, 'Governing International Freshwater Resources: An Analysis of Treaty Design' Paper presented at, New Orleans, (2010), p.23.
[39] Id., p.24
[40] Lake Lanoux arbitration(1957), Supra note 4, p.281.
[41] Lake Lanoux arbitration(1957), supra note 4, p.39.

the implementation of the planned measures for six months unless otherwise agreed.[42] The restriction in the UN Watercourse Convention is the agreement of parties; if the planning state and notified state agree otherwise, the planned measure may be continued during the processes of consultation and negotiation. If, however, the state failed to agree on it the planning state is duty-bound to suspend the implementation for six months.

Once this period has expired, the notifying state may proceed with the implementation of its plans in line with reasonable and equitable use and without causing significant harm to other states. It is also important to note that, under the UN Watercourse Convention, the obligation to consult and negotiate does not imply an obligation to *require prior consent*. This understanding is in line with Lake Lanoux arbitration that stipulates that international practice prefers to resort to less extreme solutions [than requiring prior agreement].[43] In the case, the tribunal underlined that it did not find clear and convincing evidence that either customary international law or the regime was established by the Treaty that restricted sovereign states to the extent of subjecting the execution of works on transboundary watercourses upon consent.[44] Thus, the arbitral tribunal concluded that prior consultation is neither a right to veto the use nor a unilateral right to use water by any riparian without taking into account other watercourse states' rights.

2.3. Exceptions to the Duty to Notify Planned Measures

In some instances, the planning states are not required to adhere to the notification of the strict requirement of planned measures. The real needs of these exceptions are premised on balancing the undeniable interest of the planning state to retain confidentiality in sensitive circumstances or to protect the interest of overriding importance that require immediate implementation without awaiting the expiry of the period allowed for reply to the notification, consultation, and negotiations.[45]

The first exception is found in Article 19 of the convention, which provides that a watercourse state may immediately proceed with measures that are of the utmost urgency. The article refers to highly exceptional cases in which interests of overriding importance require the immediate

[42] UN WatercourseConvention(1997),supra note 1, art.17 (3).
[43] Lake Lanoux (1957), Supra note 4, p.128, para. 11.
[44] Yearbook International Law Commission (1987), supra note 32, para. 1065
[45] Charles Bourne(1971), Supra note 26, p.192.

implementation of planned measures. The interest involved in this exception includes the need for protecting public health, public safety, or other equally important interests such as protecting the population from the danger of flooding.

The other exception is provided in Article 31 of the UN Watercourse Convention that the notifying state is not required to divulge data or information that is vital to its national defense or national security. This exception involves information ranging from strategic or military types of information to matters of a trade secret.[46]The exception may further be widened to include the protection of any major facility such as a power plant, or factory as subjects of national security.[47] Recognizing the subjectivity of this exception, the Convention had attempted to narrow the scope by requiring the planning state to cooperate in good faith with other watercourse states to provide as much information as possible under the circumstances.[48] Hence, the does not automatically excuse the watercourse state to furnish information or data by a mere showing of a municipal law or regulation bars disclosure of information. The state planning the project has to show the real need none disclosure.

2.4. Effect of Failure to Comply with Notification

Sometimes the planning state may proceed with the execution of a project without complying with notification. The effect of failure to comply with its obligation on the part of the planning stage is not explicitly provided under the UN Watercourse Convention. However, the 1966 Helsinki Rules of the International Law Association attaches some legal significance to a failure to give that notice.[49]The prescription of the Helsinki Rules is that a utilization undertaken without notices shall not be given the weight normally accorded in the event of a determination of what is a reasonable and equitable share of the waters of the basin. Thus, it prevents an important factor from being placed on the scales used to weigh the equities of competing utilization.

The other watercourse state would thus normally be compensated for the value of its sacrifice; such compensation might be financial, or it might be in the form of electricity supplies, flood

[46] International Law Commission (1982), Yearbook of international law commission vol.2, No.1, p. 65,
[47] Ibid.
[48] UN Watercourse Convention (1997), note 1, art. 31
[49] International law Commission yearbook of international law vol. 2, no.1, 1982, p. 67

control measures, enlargement of another use, or other goods, provided that such damage could have been avoided if a timely notice of the danger had been given.[50]

3. Normative Framework of Notification, Consultation, and Cooperation of planned Measure in the Nile Basin

3.1. The 1902 Treaty

Several attempts have been made to regulate the Nile during and after the colonial era.[51]On 15 May 1902, Britain signed a frontier delimitation agreement with Ethiopia.[52] The agreement was the outcome of the British pursuit of such a broad strategy to guarantee the unimpeded flow of the Blue Nile to downstream states.[53]Although the treaty had been framed as a border arrangement aimed at delineating the boundary between Ethiopia and Anglo-Egyptian Sudan, a water provision was included in the third article which requires the prior consent of Great Britain and Sudan. Article III of the treaty has a nexus to notification and consultation on planned measures for it requires not only prior notification but also authorization. According to Article V, the treaty was drawn up in the Amharic and English languages; both languages are equally authentic and official. Article III of the English version of the treaty reads as follows:

His Majesty Emperor Menelik 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 Sobat which would arrest the flow of their water into the

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[50] Ibid

[51] These agreements include the Protocol between the UK and Italy government for the demarcation of their respective share of influence in East Africa from Ras Kasar to Blue Nile (15 April 189); Treaty between Ethiopia and the UK Relative to the Frontier between Sudan, Ethiopia, and Eritrea, Addis Ababa(May 1902), London Printed for his Majesty's stationery office, Harrison and Sons, St. Martins Lane, (hereinafter called the Anglo-Ethiopian treaty); Treaty between the United Kingdom and Independent state of Congo to define their respective sphere of influence in Eastern and Central Africa, London (9 May 1906); Agreement between the UK, France, and Italy respecting Abyssinia (9 May 1906) (these agreements can be found in E. Hertslet, The Map of Africa by Treaty, 3rdedn. (London, Frank Cass 1967), (noted in 'The River Nile in the post-colonial age', edited by T. Tvedt. London: I.B. Tauris, 161-178); 1925 Exchange of Notes between the UK and Italy respecting concession for a barrage at Lake Tana and Railway across Abyssinia from Eritrea to Italy Somaliland 50 LNTS (1925; the Exchange of Notice between his Majesty's government in the United Kingdom and the Egyptian government concerning the use of the Water of the River Nile For irrigation purpose, Cairo(1929).

[52] Treaty between Ethiopia and the UK Relative to the Frontier between Sudan, Ethiopia, and Eritrea, Addis Ababa(May 1902), London Printed for his Majesty's stationery office, Harrison and Sons, St. Martins Lane, (hereinafter called the Anglo-Ethiopian treaty).

[53] Yacob Arsano,' Ethiopia and the Nile: Dilemmas of National and Regional Hydro politics', thesis Center for Security Studies, Swiss Federal Institute of Technology, Zurich ETH Zentrum SEI, Seilergraben, 2004), P.97

Nile except in agreement with his Britannic Majesties and the Government of Sudan.[54]Whereas the Amharic version reads as follows:

፫ተኛ ፡ ክፍል ።።

ቋንሆይ ፡ ጻግማዊ ፡ ምኒልክ ፡ ንጉሠ ፡ ነገሥት ፡ ዘኢትዮጵያ ፡ ከጥቱር ፡ ዓባይና ፡ ከባሕረ ፡ ፃና ፡ ከሶባት ፡ ወንዝ ፡ ወደ ነጭ ፡ ዓባይ ፡ የሚወርደውን ፡ ውሀ ፡ ከእንግሊዝ ፡ መንግሥት ፡ ጋራ ፡ አስተድሞ ፡ ሰይሰማሙ ፡ ወንዝ ፡ ተጻር ፡ እጻር ፡ የሚደ ፍን ፡ ሥራ ፡ እንዳይሰሩ ።። ወይም ፡ ወንዝ ፡ የሚደፍን ፡ሥራ ፡ ለማሠራት ፡ ለማንም ፡ ፈቃድ ፡ እንዳይሰጡ ፡ በዚህ ፡ ውል ፡ አድርገዋል ።።

Successive governments, both in Great Britain (and later Sudan) and in Ethiopia construed Article III of the accord as stipulating contrasting scales of obligation; the word ***arrest*** surfaced as a controlling and contentious part of the treaty.[55] Great Britain had naturally advocated the wider view that obliges Ethiopia not to arrest the flow of the rivers in whatsoever way without prior notification and consultation and even authorization by it. In fact, Great Britain deduced from the treaty and pursued its policies on the assumption that Ethiopia had been bound to completely refrain from laying any water control on the Nile and its tributaries without prior notification and subsequent authorizations by its government, the scale of the construction or its impact on the sustained flow of the watercourse notwithstanding.[56] For example, in the course of 1922 when the Lake Tana dam concessions negotiation was being undertaken, Major Dodds, the British delegate in Ethiopia reminded Ethiopia of its obligation not to construct any work 'which would diminish the volume of water flowing into the Nile without consultation with the British government.[57]

On the other hand, Ethiopia's argument, both the past and now, largely deviated from the reading mentioned above. Firstly, Ethiopia contested the very validity of the 1902 agreement on various

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[54] The Anglo-Ethiopian treaty (1902), note 218, Art. 3. See also Edward Ullendorff (1967), The Anglo-Ethiopian Treaty of 1902 Bulletin of the School of Oriental and African Studies, University of London, Vol. 30, No. 3, Fiftieth Anniversary Volume, Pp 641-654.

[55] Tadesse Kassa Woldetsadik), International watercourse law in the Nile basin: Three States at Crossroad, Routledge Taylor and Francis, London and New York, 2013, p.58

[56] Ibid.

[57] Id, p.63

grounds. It was asserted that the treaty's conclusion had involved coercion manifested in a political environment where there were perceived threats to Ethiopian sovereignty over its natural resources. To use a catching expression by one author, '*the glowing state of inequity instituted by the treaty gravely jeopardized Ethiopia's development prospect, and hence could afford a legal ground for calling the nullity of the arrangement'* on several legitimate grounds.[58] Besides, the validity of the 1902 treaty has been contested by Ethiopia based on a fundamental change of circumstances as stipulated under the relevant provisions of the Vienna Convention of the Law of Treaties.[59]

Among others, the establishment of Sudanese self-rule in the mid-twentieth century had represented a radical transformation of the status quo that fundamentally affects the position of the parties to the original accord. The very purpose of the 1902 treaty is upholding the welfare of the British colonial establishment in the Sudan and Egypt and the friendly relationship between Great Britain and Ethiopia could not any longer be fulfilled through the same treaty scheme.[60]Besides, by operation of the rules of state succession, Ethiopia would now be required to discharge the obligation to an essentially different party, a fact which itself depicts fundamental changes from the original anticipations of Great Britain and Ethiopia within the framework of the 1902 treaty.[61] Consequently, Ethiopia can base its claim for calling the abrogation of the agreement based on a fundamental change of circumstances.

Ethiopia also defended a wider construction of the treaty-based on technical interpretation. It submitted that under the 1902 treaty, the agreed-upon obligation under article III was about *not stopping* the entirety of the waters of the Abay, Lake Tana, and Sobat. The ordinary meaning of the text therefore does not prevent any Ethiopian uses that merely diminish (and do not completely obstruct) the water's flow. Substantiating the position of Ethiopia, one author noted the following.[62]

> *'In 1907, a few years after the conclusion of the treaty, Emperor Menelik was engaged in negotiation for the insertion of an interpretative note into the Anglo-*

[58] Tadesse Kassa (2013), Supra note 54, p.112
[59] United nation Vienna Convention on the Law of the treaty (1966), Vienna UN Treaty serious Vol .1155, 331, Art.62
[60] Tadesse Kassa (2013) note 54, p.117
[61] Ibid.
[62]Id.,p.64

Ethiopian treaty, which he computed would water down its own beating implication. Then, the Emperor succeeded in retaining Lord Cromer's guarantee that the terms of Article III of the treaty do not imply any intention of interfering with local rights, so long as no attempt is to be made to arrest or interfere in any way with the flow of this river.'

This line of interpretation entails that Ethiopia did bound itself neither to inform nor to secure the consent of Britain and later Sudan for any contemplated projects of a nature that *do not totally arrest* the flows of the aforesaid rivers and Lake Tana. Overall, it would appear from the above discussion that the riparian duty to inform, consult, and cooperate cannot be inferred indisputably from the contents of the 1902 Anglo-Ethiopian treaty. Nor does it provide details of the procedure to be followed in case of contemplated projects.

3.2. The 1929 and 1959 Agreements

The 1929 agreement was concluded between the UK - acting on behalf of Sudan and its Eastern African colonies (Kenya, Uganda, and Tanzania), and Egypt concluded to satisfy long-standing downstream interests. The agreement officially recognizes the 'natural and historical right of Egypt to the waters of the Nile' and vests in it a right to veto water development works undertaken by upstream riparian states that could jeopardize Egyptian interests.[63]

The Treaty also provided for upstream waterworks to be administered 'under the direct control of the Egyptian Government and left Sudan's water allocation subordinated to Egypt's water needs.[64]Consequently, without previous notification and agreement of the Egyptian government, no irrigation or power works or measures are to be constructed on the River Nile and its branches, or on the lakes from which it flows, as far as all these are in Sudan or countries under British administration.[65]This way of interpretation by Egypt would mean that Ethiopia should not entail any prejudice to the interests of Egypt, either reduce the quantity of water arriving in Egypt, or modify the date of its arrival, or lower its level.

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[63] Exchange of Notes between His Majesty's Government in the United Kingdom and the Egyptian Government on the Use of Waters of the Nile for Irrigation, Cairo, 7 May 1929, 93 LNTS p. 43 (hereinafter the 1929 Agreement).

[64] The 1929 Agreement, the Exchange of Notice between his Majesty's government in the United Kingdom and the Egyptian government concerning the use of the Water of the River Nile For irrigation purpose, Cairo(1929). para, 4(ii) and 4(iv).

[65] The 1929 Agreement, Supra note 63, para,4(b).

Upon independence, however, Sudan declared that it was not bound by the 1929 agreement - objecting to Egypt's veto rights and the restriction on Sudan's development.[66] Consequently, after rounds of intensive negotiation, Egypt and Sudan signed the 1959 Agreement for the full utilization of the Nile waters in which Sudan recognizes Egypt's historical rights; the waters were allocated to the two states only.[67] The agreement if after the Aswan High Dam becomes operational, Sudan would receive 18.5 Billion Meter Cube (BMC) and Egypt would receive 55.5 BMC as long as Nile yield remains the same.[68] The two downstream states have also presumed future demands of other riparian states and agreed to present a unified view in any other negotiation concerning the Nile water.[69]

Ethiopia was not a party to both the 1929 and 1959 agreements, and hence could not be bound by the terms of those agreements. Article 34 of the Vienna Convention on the Law of Treaty clearly states that a treaty does not create either obligations or rights for a third State without its consent.' Hence, whatever the procedural or substitutive provisions that may have been stipulated in those agreements regarding notification on planned measures will not bind Ethiopia. In summary, the 1929 and 1959 agreements only gave Egypt a veto power in the basin and imposed an obligation on other parties to get authorization for any development enterprise on the river, hence going beyond the commitment of notification on the contemplated project.

3.3. State Practice in the Eastern Nile on Notification, Consultation, and Cooperation of Planned Measure

Article 38(1) (b) of the ICJ Statute presents two traditional elements important in the formulation of international customary law: general state practice and *opinion juris*. Customary law emanates from the past conduct of states and comes into existence if a practice is extensive, virtually uniform, and supported by a sense of legal obligation (*opino juris*).[70] Mr.Michal wood**,** in his ILC's custom draft conclusions on the identification of customary international law, stated that to determine the existence and content of a rule of customary international law, it is necessary to

[66] Dellapenna, 'The Nile as a Legal and Political Structure', in E.H.P. Brans, E.J. de Haan and A. Nollkaemper, eds., The Scarcity of Water: Emerging Legal and Policy Responses (London, Kluwer Law International p. 125.
[67] Agreement between the Republic of Sudan and the United Arab Republic for the Full Utilization of the Nile Waters, Cairo, 8 November 1959, 453 UNTS p. 6519 (hereinafter the 1959 Agreement).
[68]Id., at article 2(3)
[69]Id., Art. 5.
[70] Kelly Patrick, 'Twilight of customary law', Virginia Journal of International Law, Vol.40, No.2 (1970), p.450-544

ascertain whether there is a general practice that is accepted as law (*opinio juris*).[71] In assessing evidence to ascertain whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found.[72] The state practice needs to satisfy some requirements to consider it as a general practice. The requirement of general practice, as a constituent element of customary international law, refers primarily to the practice of States that contribute to the formation, or expression, of rules of customary international law.[73] In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law. The conduct of other actors is not practiced that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice of state and international organizations.[74]State practice consists of the conduct of the State, whether in the exercise of its executive, legislative, judicial, or other functions. The practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.[75]

Evidence of acceptance as law (*opinio juris*) may take a wide range of forms. Forms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.[76]Failure to react

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[71] Sir Micheal Wood, 'Draft conclusions on the identification of customary international law, available at https://legal.un.org/ilc/texts/1_13.shtml last visited 6 November 20220.
[72]Ibid.
[73]Ibid.
[74]Niles Blokker, 'International Organization and Customary International Law', *International Organization Law Review*, Vol.14, Issue.1 available at https://doi.org/10.1163/15723747- , last visited 1 January 2021.
[75]Ibid.
[76] Ibid.

over time to practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction.

More importantly, the significance of treaties, resolutions of international organizations and intergovernmental conferences, decisions of courts and tribunals, and the teaching of scholars has also helped in the identification of customary international law. A rule outlined in a treaty may reflect a rule of customary international law if it is established that the treaty rule:

(*a*) codified a rule of customary international law existing at the time when the treaty was concluded;(*b*) has led to the crystallization of a rule of customary international law that had started to emerge before the conclusion of the treaty; or(*c*) has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law.[77]

Though most rules relating to shared watercourses envisioned in treaty instruments, custom nevertheless plays an important role in understanding the perception of states to the certain principle of international watercourse law. The practice of states becomes even more important where the relations between states are not subject to any specific treaty regime. The relationship between Sudan, Egypt, and Ethiopia has that element and character. Not *all* the Nile basin states have signed the CFA and none of them is a party to the UN Watercourse Convention. Thus, comprehensive treaty regimes in the Nile basin do not provide a clear normative basis concerning the principle of the duty of notification, consultation instead of state practice to some extent shed light.

3.3.1. The Practice of Egypt

Egypt has undertaken giant projects in the Nile River on different occasions. In 1970, for example, Egypt completed the construction of the Aswan High Dam.[78] A question that should be raised is whether or not Egypt had ever provided appropriate notification to upstream nations, from whence the entirety of the waters comes.

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[77] Micheal Wood, supra note 70.

[78] Aswan High Dam, Arabic Al-Sadd al-ʿĀlī, rockfill dam across the Nile River, at Aswan, Egypt, completed in 1970 (and formally inaugurated in January 1971) at a cost of about $1 billion. The dam, 364 feet (111 meters) high, with a crest length of 12,562 feet (3,830 meters) and a volume of 57,940,000 cubic yards (44,300,000 cubic meters), impounds a reservoir, Lake Nasser, that has a gross capacity of 5.97 trillion cubic feet (169 billion cubic meters) available at http://www.britannica.com/EBchecked/topic/40203/Aswan-High-Dam: accessed on 13January 2020.

Concerning the construction of the Aswan High Dam which was undertaken within the framework of the negotiations between Egypt and Sudan for full utilization of the Nile waters, Egypt proceeded with the building of the construction without prior information, consultation, and participation of the upstream nations.[79] The unilateral action of Egypt also attempted to transfer water outside of the natural basin without any regard to the interest of the upstream states. For example, Ethiopia has protested the construction of the dam itself, as well as other beyond-basin transfer initiatives by Egypt several times arguing that such a project could affect its equitable and reasonable shares. The downstream response was contrary to Ethiopia's request to the extent of ignoring the projects that were built on the shared watercourse. This is particularly evident from the fundamentals of Egypt's national policy on the subject - which is influenced by the following reported statement by its late president Anwar Sadat.[80]

> *'Once I have decided to divert the Nile waters into Sinai I will not try to get permission from Ethiopia …. if they do not like our measures, they can go to hell.'*

The statement shows Egypt was not willing to listen to the concern of upper riparian states. Thus, Ethiopia protested against such an extra-basin transfer. However, Sudan has started to protest against a transfer of water from its natural basin by Egypt, saying: "The use of waters of the Nile and other shared water resources should be the exclusive right of the co-riparian countries alone, and no transfer should be permitted to any non-riparian country.[81]

Moreover, since 1997 Egypt unilaterally has adopted the implementation of grandiose schemes of water diversion out of the natural valley of the Nile River for new resettlements and urbanization. The plan includes horizontal expansion of projects over the Nile water to increase agriculture by 35 percent as a result of the expansion of two mega projects in Toshka and Sinai.[82] These projects purport to create a home for over 20 percent of the population.[83]Indeed Egypt's unilateral measures on the otherwise shared water resources underscore the nation's long-range water strategy because of which participation or support of upstream states was not considered essential.[84]

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[79] YacobArsano (2004), Supra note52 P.220
[80]Id., (noted from Anuar Sadat speech written on the Egyptian Gazette, June 5, 1980)
[81]Ibid.
[82] National Water Resource plan of Egypt, National Water Resource Plan for Egypt 2005, P. 21
[83]National Resource Plan(2005), , p.25
[84] YacobArsano (2004), Supra note 54 p.202.

In so doing, Egypt has never notified and consulted the upstream states in any way but has argued, quite consistently, that it is acting within its 1959 shares.[85] The unilateral measures, in fact, show that Egypt has not adhered to the principles of notification and consultation of planned measures. Besides, Ethiopia made its position very clear t the UN-Water Conference held in Argentina in 1977 stating that it was "…the sovereign rights of any riparian state, in the absence of an international agreement to proceed unilaterally with the development of water resources within its territory"[86]

3.3.2. The Practice of Sudan

Likewise, in line with the authorization provided under the 1959 treaty, Sudan carried out several projects without consulting and notifying other riparian states of the Nile basin, including Ethiopia. After the 1959 bilateral agreement with Egypt, Sudan started the construction of Rosaries Dam in 1961 and completed the same in 1966 - again without giving due regard to the interest of Ethiopia and other upstream states.[87] As recently as in 2013, the Sudanese government inaugurated the heightening of the Al-Rosaries Dam which would enable the nation to increase its irrigable land to 2 million hectares, power generation by 50%, and water storing capacity from 3 to 7.4 billion cubic meters, without any official consultation and notification to Ethiopia.[88]

Concisely, major projects by downstream states have been constructed unilaterally without notification and consultation to upstream states especially Ethiopia whence more than 85 percent of the Nile floods flow. Embarking on projects without notification, consultation, or participation of the upstream states is partly attributed to the monopolistic mindset instituted by the colonial and post-colonial treaties and subsequent practices, and most importantly, the erroneous belief that riparian states' duty to inform on planned measures applies only in upstream-downstream relationships and not the vice versa. Harm is generally perceived as emanating only from the actions of upstream states. Evidently, such perception has no support under the rules of international watercourse law. Indeed, the rule on notification and cooperation on planned

[85] Girma Amare (2009), Supra note11, P.9
[86] YacobArsano (2004), Supra note 54 p.202.
[87] Al-Rossires Dam Encourages Agriculture in Blue Nile State available at http://news.sudanvisiondaily.com/details.html?rsnpid=199448, accessed on 14 January 2020
[88] http://www.diu.gov.sd/en/index.php/home_en/show/94#.UtTsgrQQSXs, accessed on 14January 2014

measures can operate to both upstream and downstream states. Downstream development creates facts on the ground and that obviously affects the future use of the river by up-stream states; in light of this, downstream states have to notify and consult upstream states of such planned measures if argued it is common practice. Moreover, the UN Watercourse Convention does not at all make a distinction on riparian duty to inform on planned measures based on the state's geographical location.

3.3.3. The Practice of Ethiopia

For a long time, Ethiopia has consistently opposed the inclusion of a provision on riparian duty to inform on the planned measure in agreements that sought to regulate Trans-boundary Rivers. Ethiopia's stand can be inferred from the position it took at different international and regional negotiation forums regulating shared watercourses. During the 1974 United Nations Water Conference in Mar Del Plata, Argentina, for example, Ethiopia made it clear that 'it is the sovereign right of any riparian state, in the absence of any international agreement, to proceed *unilaterall*y with the development of water resources within its territory.'[89]Following the conclusion of the negotiation on the UN Watercourse Convention, Ethiopia protested the inclusion of some provisions and later abstained from voting in favor of the Convention alleging, among others, that Part III of the Convention, which deals with notification, consultation, and cooperation, puts an onerous burden on the upper riparian state.[90]This is consistent with ILC's draft conclusion on the identification of custom as mentioned before. The requirement, as a constituent element of customary international law, that the general practice is accepted as law (*opinio juris*) means that the practice in question must be undertaken with a sense of legal right or obligation. Quite to the contrary, Ethiopia opposes the practice saying that it is the sovereign right of any riparian state in the absence of international agreement to unilaterally proceed with the development of water resources within its territory.

Ethiopia reaffirms its position saying that any state has the right to take unilateral action on watercourse unless there is a valid treaty. Therefore, during the CFA negotiation Ethiopia has

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[89] Gebre Tsadik Degefu,'Nile Historical, Legal and Developmental Perspectives,' Trafford Pub., New York), (2010) pp.133-134

[90] Mohammed Abdo, The relevance and contribution of UN watercourse convention towards resolving the problems in the Nile basin available at http://www.dudee.ac.uk/cepmlp/journal/html/Vol15/Vol15 8.pdf accessed on 7/22/2019

taken the view that the exchange of information on planned measures should be made through third-party mechanisms than through bilateral arrangements involving the riparian states directly.[91]Ethiopia accepts the provision of notification of planned measures as envisioned in the CFA and must be conducted through the Nile Basin Commission and not via individual states. Moreover, it becomes clear that from the recent venture Ethiopia becomes more willing to consult and cooperate with downstream countries about the Renaissance dam out of goodwill and good neighborhood.

4. Contextualizing GERD in terms of the Notification, Consultation, and Cooperation

4.1. Divergent Perceptions Relating to the GERD

Ethiopia's unilateral decision to construct the GERD has naturally created divergent opinions between the main Nile riparian states Egypt, Sudan, and Ethiopia- and the international community at large. The Ethiopian government has argued that it has the sovereign right to exploit its water resources for the developmental needs of the nation.[92] Further, the government has outlined that the project will be beneficial not only for Ethiopia but also for the downstream countries in many aspects. The flow of the Nile waters will be regulated from season to season and hence water hazards emanating from flooding will decrease, especially in Sudan; floods and silt accumulation have challenged Sudan, and the excessive water lost through evaporation on the Lake Nasser troubles Egypt.[93] Ethiopia has repeatedly declared that clean and cheaper energy will be supplied from the Dam and will be made available to the region that would foster cooperation in Africa.

However, most Egyptian media outlets and official government statements put forward pessimistic opinions on Ethiopia's unilateral measures and about the potential benefits of the dam. Among other issues, Egypt argued that it was not formally informed by Ethiopia about the dam. Egypt insists that despite its entitlement to receive information about the dam, it did so only from the media. Egypt submitted that Ethiopia should tender notification about the project before

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[91] Girma Amare (2009), Sura note 11, p.10

[92] Interview by Aljazeera with late PM Meles Zenawi, Struggle over the Nile, Part I: Masters no More', documentary, broadcasted 7 June 2011, available at http://english.aljazeera.net/programmes/struggleoverthenile/2011/06/2011667594146703.htm accessed on 20 December 2019

[93] Interview by Aljazeera with late PM Meles Zenawi (2011), Supra note 77.

launching any construction.[94] Most recently, even Egypt went as far as claiming "*all three countries shall reach an agreement on the rules of filling and operating the dam before starting the process of filling the reservoir with water*[95]Ethiopia countered the argument that this would happen only through the CFA.[96] Still, Egypt also raised its concerns that the GERD will reduce its share of the Nile that has been explicitly recognized under the 1929 and 1959 treaties. On one occasion, Egypt's ex-president Mursi blatantly announced his confirmation that 'all options are open to deal with this subject and if a single drop of the Nile is lost, their blood will be the alternative.'[97]

4.2. Substantive Scope of Ethiopia's Duty in the Context of GRED

Across the Nile basin, there is no single comprehensively binding treaty regime that imposes a duty on Ethiopia to notify, consult, and cooperate with downstream states. Nor did state practice in the region support the same obligation on planned measures. As discussed before, the 1902 Anglo-Ethiopian agreement stipulated that the Ethiopian will not 'construct, or allow being constructed, and work across the Blue Nile, Lake Tana or the Sobat which would arrest the flow of their waters into the Nile except in agreement with His Britannic Majesty's Government and the Government of Sudan [the English version]. Whether this provision binds Ethiopia to notify and consult planned projects or even more, to obtain prior consent from Sudan to construct the GERD is subject to interpretative dilemmas involving the treaties and the continuing validity of the agreement itself.[98] For one thing, it was argued earlier, that the glowing state of inequity instituted by the treaty has gravely jeopardized Ethiopia's 'natural rights and in turn Ethiopia's development prospect which could serve as a legal ground for calling the nullity of the arrangement. Second, by operation of the rules of state succession, Ethiopia would now be

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[94] Ethiopian Reporter, weeklyVol. 1254, No 3, 2013

95 Egypt today, Egypt slams Ethiopia for Renaissance dam remarks available at https://www.egypttoday.com/Article/2/82175/Egypt-slams-Ethiopia-for-Renaissance-dam-remarksaccessed on 3/3/2020

[96] Kendie, Daniel, 'Egypt and the Hydro-Politics of the Blue Nile River Northeast African Studies', Volume 6, Number 1-2, 1999 (New Series), pp. 141-169 (Article) Published by Michigan State University Press, p.12.An interview with Fekeahmed note 49. In the interviews, the official affirmed the researcher that the Egyptian public diplomacy group had submitted a request to the late PM Melese Zenawi about the Renaissance dam and the PM responded that would happen only through the Nile basin cooperative Framework agreement.

[97] Perry and Alastair Macdonald, President Mursi said that 'all option is open to Egyptian over Ethiopia dam available online at http://www.gulf-times.com/Opinion/189/details/356859/Egypt-and-Ethiopia-must-settle-dam-row-through-dialogue accessed on 18 January 2020

[98]TadesseKassa(2013), supra note 54, p.112.

required to discharge the obligation to an essentially different party, Sudan, a fact which itself represents fundamental changes from the original stipulation of the Anglo-Ethiopian agreement.[99]Hence, the treaty could be considered as null as a result of a change of circumstance under the stipulation of Article 62 of the Vienna Convention on the Law of Treaties.

Even the technical interpretation of the 1902 Anglo-Ethiopian treaty does not clearly imply Ethiopia's obligation to inform and consult the GERD to Sudan or Egypt in the contemporary setting of the Nile basin legal discourse. Under the 1902 treaty, the agreed-upon obligation under article III *was about not stopping the entirety of the waters*. The construction of the GERD that purports to generate hydropower will *not stop the flow of the river in its totality and forever*. Now, it is also important to note that the 1902 treaty has empowered only Sudan to get consulted by Ethiopia. Sudan, however, has all along been positive about the shared benefits of the GERD and has not strongly claimed a right to be notified about the project in pursuance of the 1902 treaty. The foregoing discussion suggests that Ethiopia's duty to inform, consult, and cooperate with downstream countries concerning the construction of the GERD cannot be premised on any specific treaty framework.

In the case where there is no all-inclusive legally binding treaty or where the existing treaty is disputed, resort may be made to the rules of general international law on the non-navigational uses of international watercourses. The relevant works of the Institute of International Law (IIL), International Law Association (ILA), and the UN Watercourse Convention have made a vital contribution to the development of the principle of the duty to inform and consult on planned measures. All these would help to shed light on the question of whether Ethiopia has a duty to notify and consult the GERD to other watercourse states.

The IIL explored the riparian duty to notify on planned measures during its session in Salzburg held from 4-13 September 1961; among other things, it provides for a riparian duty of notification and consultation of planned measure if it *seriously* affects other states.
Similarly, the Helsinki Rule of the ILA under Article XXIX, paragraph 2 provided that a 'state, regardless of its location in a drainage basin, should in particular furnish to any other basin State, the interests of which may be substantially affected, a notice of any proposed construction.' More importantly, the UN Watercourse Convention, the most cited set of rules regulating non-

[99]Ibid.

navigational uses of international watercourse envisages the principles of notification of planned measures in a detailed fashion. In specifics, Article 12 of the Convention provides a duty to inform on planned measures that may have '*a significant adverse effect'* upon other watercourse states. According to the wording of all aforementioned authorities, it is evident that the scope of the obligation of the planning State is not applicable for all planned measures as such. Instead, the obligation law would arise only when a planned measure might cause *substantial injury, seriously affects or cause significant adverse effect* to other watercourse states. What constitutes a *serious* or *substantial injury* is often disputable and is decided on a case by case basis.

However, it clear that the duty of the state to inform on planned measures that may have a significant effect does not apply in the context of GERD as Ethiopia is not a member. The next questions that need to be explored are therefore whether the GERD, assuming Ethiopia becomes a member of the UN watercourse convention, has a significant adverse effect on other watercourse states, especially Sudan and Egypt. How does one constitute a 'significant adverse effect' in the context of GERD? What criterion applied to determine the effect of the GERD on other watercourse states?

The exact meaning of the significant adverse effect is still a point of difference between Ethiopia and Egypt. However, it must be shown that there is a real impairment of use as a result of unreasonable use of watercourse by planning States. What are to be avoided are, concerning a particular project or use, those, which have a significant adverse effect upon other watercourse states and not every minor effect. For example, in 1957 the Arbitral Tribunal in the Lake Lanoux case, in which Spain insisted upon delivery of Lake Lanoux water through the original system, found that:

> *'... at the lowest water level, the volume of the surplus waters of the Carol, at the boundary, will at no time suffer a diminution; in the absence of any assertion that Spanish interests were significantly affected tangibly, the tribunal held that Spain could not require maintenance of the natural flow of the waters'.*[100]

Elucidating the substantive scope of adverse trans-boundary effect, one author listed some instances that include that trans-boundary damage embodies a certain category of environmental

[100] Lake Lanoux (1957), *Supra note* 4 p. 123, para. 6

damage, including physical injury, loss of life and property, or impairment of the environment, or *diversion of an undue amount of shared water* (emphasis added).[101]

However, there are no justifiable reasons under international water law that purports that the construction of a hydropower dam by itself causes a significant adverse effect on downstream states. As affirmed by Ethiopia repeatedly, the GERD is a hydroelectric project that would benefit riparian states in many aspects than causing adverse effects.[102] The increased power availability for the entire region will also enhance regional power trading among the three countries, Ethiopia, Sudan, and Egypt. The claims raised by Egypt have not been based on concrete scientific facts conducted at the site of the dam. Therefore, as far as the GERD is destined to generate electric powers, its construction could not have a significant adverse effect on downstream states of Sudan and Egypt. All this would lead to conclude that although Ethiopia has abstained from voting on the UN Watercourse Convention and hence is not bound by it, the provisions of the Convention would still favor Ethiopia for they only require prior notification and consultation of planned measures that cause a significant adverse effect on other watercourse states.

Some scrutiny of state practice in the Eastern Nile states has revealed a lack of practice supporting the duty to notify planned measures. As mentioned before, the state practice in the region does not exhibit the requirement of general practice to be accepted as law (*opinio juris*) means that the practice in question must be undertaken with a sense of legal right or obligation.

The downstream states of Sudan and Egypt have never notified and exchanged information with Ethiopia. Likewise, the voting record of Ethiopia indicates that the country has never supported the principles of riparian duty to inform and consult on a planned project. Ethiopia rather

[101]HanquinXue, transboundary damage under international law Cambridge university press',2003 p,4

[102] Alemayehu Tegenu, the former Ethiopian Minister of Water, Irrigation, and Energy told the Associated Press that Egypt should not worry about a diminished water share from the Nile, (2013). Alemayehu, said that we don't have any irrigation projects around the dam. The dam is solely intended for electricity production … So there should not be any concerns about a diminished water flow," "Even during the period when we would be filling the reservoir, we are going to employ a careful and scientific water impounding technique to make sure the normal flow is not significantly affected," the minister added. available at http://bigstory.ap.org/article/official-dam-will-not-significantly-affect-egypt accessed on 18 January 2020.

considers that reasonable and equitable use of shared watercourse is a sovereign right of states. Ethiopia did not vote in favor of the UN watercourse Convention, it actually abstained.[103]

In light of these essential facts, it could be concluded that the principle of notification and consultation has no support among the Eastern Nile basin states. And under these circumstances, Ethiopia does not have a legal obligation to provide notification on its planned measures and execution of the projects, at least not in the scale and type anticipated by Egypt - except that which it may choose to do in the interest of good neighborliness and cooperation.

5. Conclusion

The treaty practice of states, case laws, and the works of international governmental and non-governmental organizations widely envisages the principle of prior notification and consultation of planned measures. These authorities of international watercourse law have agreed that a watercourse state should or is at least recommended to provide notice of planned measures that could potentially *cause significant adverse effects or substantial effects on other riparian states*. It is also demonstrated that authorities are not unanimous concerning the scope of the obligation. Authorities differ highly on issues of whether the principle of notification on planned measures is legally binding or simply constitutes a mere aspiration and on the effects of failure to comply with notification of planned measures.

The UN Convention on the Law of Non-Navigational Uses of International Watercourse stipulates a very elaborate set of procedural rules applicable to states in the implementation of planned measures on an international watercourse. The Convention sets forth procedures that a watercourse state may take before implementing or permits the implementation of measures that may have a *significant adverse effect* upon other watercourse states. The obligation of the planning state is, it was shown, to give a timely notice of planned measures that should be accompanied by available technical data and information when the contemplated plan may have *a significant adverse effect* and not just any sly type of effect.

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[103] Eckstein Gabriel, 'Study and analysis on voting records of states on the UN Watercourse Convention available at http://hdl.handle.net/10601/952. The convention was adopted by a UN General assembly in May 1997 by a vote of 103 for, against with 27 abstentions and 3 abstentions. Ethiopia is among those states that abstained. For the latest list of countries that submitted instruments of ratification see here: http://www.internationalwaterlaw.org/documents/intldocs/watercourse_status.html accessed on 23 January 2020

In the Nile river basin, it is demonstrated the existing legal framework has failed to regulate riparian duty to inform, consult, and cooperate on planned measures. Principally, the 1902 Anglo-Ethiopian treaty provided an obligation on Ethiopia to inform and consequently get the consent of British and later Sudan as a successor state before implementing or permitting the implementation of projects across the Blue Nile, Lake Tana, or the Sobat which *would arrest* the flow of their waters into the Nile. Nonetheless, the nature of this obligation and continued validity of the agreement has sparked argumentation, challenged both based on its own merit and technical interpretations.

It is also concluded that practice among the Nile basin only shows the prevalence of unilateral measures than notification and consultation. Lower riparian states have undertaken giant projects on the Nile River at different times without notification and consulting the upstream nations, from whence almost the entirety of the waters comes from. Ethiopia had consistently opposed the formulation of a principle that prescribes riparian duty to notify in various international negotiation forums. It has been found that recently, Ethiopia adopted a new approach to carry out the obligation of notification on planned measures through third party mechanisms instead of bilateral procedures involving the riparian states directly.

It is founded that the unilateral decision to construct the GERD has engendered divergent opinions across the basin - and the international community at large. Egypt has submitted it has a right to get prior information and consultation about the project. Egypt argued the unilateral announcement by Ethiopia as unfair and against international law of good neighborliness and cooperation in good faith. Equally, it is demonstrated that Ethiopia has made an essential contribution in complying with the principle by taking its own initiative on the establishment of a tripartite panel of experts.

Finally, Ethiopia has no treaty obligation to furnish information about its projects to other riparian states including Sudan and Egypt. Neither customary international law nor general principles of law oblige a state to get permission for damming an international river from downstream countries unless stipulated in a treaty between the concerned states.

ሦስተኛው የሸሪዓ ምንጭ፣ አመክንዮኣዊ የሕግ ምርምር (ኢጅቲሓድ)፦ ምንነቱና መገለጫዎቹ

አልዩ አባተ ይማም*

አህጽሮተ-ጽሁፍ

የኢፌዲሪ ሕገ-መንግሥት ከመጽደቁ በፊት ሲሰራባቸው የነበሩ ሃይማኖታዊና ባህላዊ ፍ/ቤቶች፣ በፌዴራል እና የክልል ሕግ አውጪ ምክር ቤቶች እውቅና ሊሰጣቸውና ሊደራጁ እንደሚገባ የኢፌዲሪ ሕግ መንግሥት አንቀጽ 78(5) በሚያስገድደው መሠረት፣ ከግማሽ ምዕተ-ዓመት በላይ በሃገሪቱ ሲሰራባቸው የነበሩ የሸሪዓ ፍ/ቤቶች፣ በፌዴራል እና በክልል ደረጃ የአቋም ማጠናከሪያ አዋጆች ወጥተው፣ ከመጀመሪያ ደረጃ እስከ ጠቅላይ ፍ/ቤት ድረስ እንደገና ተደራጅተው በመሥራት ላይ ይገኛሉ፡፡ ፍ/ቤቶቹ በባለጉዳዮች ፈቃድ ላይ የተመሠረተ የዳኝነት ሥልጣን ያላቸው ሲሆን፣ የሚቀርቡላቸውን የግልና የቤተሰብ ግጭቶችን የሸሪዓ ሕግን ተፈጻሚ በማድረግ እልባት ይሰጣሉ፡፡ የሸሪዓ ሕግ ምንጮች በጥቅሉ ሦስት ናቸው፤ እነሱም ቁርአን፣ ሱናሕ እና ኢጅቲሓድ (አመክንዮኣዊ ምርምር) ናቸው፡፡ የመጀመሪያዎቹ ሁለት የሸሪዓ ቀዳሚ ምንጮች በመለኮታዊ ራዕይ (ወሂይ) የተገለጹ ሲሆን፣ በግልና በቤተሰብ ግንኙነቶች ላይ ቁጥራቸው ጥቂት የሚባሉ ዝርዝር ድንጋጌዎችን ያካተቱ ሲሆን፣ አብዛሃኞቹ የቁርአንና የሱናሕ ሕጎች የጥቅልነት ባህሪ ያላቸው እና በልዩ ልዩ የሕግ ዘርፎች ላይ አጠቃላይ እና ንዑስ የሸሪዓ ዓላማዎችን የሚቀይሱ ናቸው፡፡ ይህ ገጽታቸው፣ ዝርዝር የሸሪዓ ሕግ ማዕቀፍ (ፊቅሕ) እንደ ወቅቱ እና ማህበረሰቡ ተጨባጭ እውነታ፣ በሕግ ምርምር (ኢጅቲሓድ) አማካይነት እንዲዳብር መሠረት ጥሏል፡፡ በመሆኑም፣ ኢጅቲሓድ፣ በየትኛውም የሕግ መስክ ላይ የሸሪዓ ዝርዝር ሕግጋት ለመቅረጽ ዋነኛ ምንጭ በመሆን ሰፊውን ድርሻ ይይዛል፡፡ ስለዚህ፣ ኢጅቲሓድ ዋነኛ የሸሪዓ ሕግ ምንጭ ከመሆኑ ጋር ተያይዞ ምንነቱን እና መሠረታዊ መገለጫዎቹን በተመለከተ በመስኩ ምሁራን የሚነሱ ፍሬ-ሐሳቦች እና ጭብጦች በዚህ ጽሁፍ ተዳሰዋል፡፡ ከኢትዮጵያ ሸሪዓ ፍ/ቤቶች የሕግ አተረጓጎም ጋር በተያያዘ፣ የሃገሪቱን ሙስሊም ማህበረሰብ ነባራዊ ሐቆች እና አካባቢያዊ እውነታዎች ያገናዘበ ትክክለኛና ተገቢ የሆነ የሸሪዓ ሕግ አተረጓጎምና አፈጻጸም እውን ለማድረግ፣ እንዲሁም እንደ አስፈላጊነቱ በኢጅቲሓድ አማካይነት ማሻሻያዎችንና አዲስ የሸሪዓ ብይኖችን ለማስተዋወቅ ይቻል ዘንድ፣ በኢጅቲሓድ እና በመርሆዎቹ ዙሪያ በቂ ግንዛቤ መጨበጥ ያስፈልጋል፡፡ ሸሪዓን በትክክል ለመረዳት፣ ገዘናቱ በጊዜ እና በሕብረተሰብ እውነታዎች ሳይገደብ፣ ተለማጭነቱን ማረጋገጥና የፍትሕ ዓላማዎቹን ማሳካት የሚቻለው በኢጅቲሓድ አማካይነት በመሆኑ፣ እንዲሁም ለኢትዮጵያ የሕግ ሥርዓት አግባብነት ያላቸውን የሸሪዓ የግልና የቤተሰብ ሕጎችን፣ እንዲሁም የኢስላም የፋይናንስና የባንክ ድንጋጌዎችና አሰራሮችን ከሃገሪቱ ተጨባጭ ጋር እንዲጣጣሙ በማድረግ ረገድ ወደፊት ለሚደረገው የሕግ አወጣጥ፣ ዳኝነትና ግጭት አፈታት እነዲሁም ጥናትና ምርምር ምንጭ እና መሪ በመሆን የሚያገለግለው ኢጅቲሓድ በመሆኑ፣ ይህ ጽኁፍ በዚህ ወሳኝ የሸሪዓ ሕግ ምንጭ ዙሪያ መሠረታዊ ግንዛቤ የሚያስጨብጭ ማብራሪያ ያቀርባል፡፡

ቁልፍ ቃላት

ኢጅቲሓድ፣ ሸሪዓዊ የሕግ ምርምር፤ አመክንዮ፤ የሸሪዓ ምንጭ፣ የግል አስተያየት፤ ሸሪዓ፤ ፊቅሕ፤ ሙጅተሒድ፣

1. መግቢያ

ሸሪዓዊ የሕግ ምርምር (ኢጅቲሓድ) ሦስተኛው የሸሪዓ ምንጭ መሆኑን እና ዝርዝር የሸሪዓ ሕግጋትን በመቅረጽ ረገድ ሰፊ ድርሻ ያለው ከመሆኑ አንጻር ምንነቱን፣ ንድፈ-ሐሳቦቹን፣ የምርምር ዘዴዎችንና ሥነ-ሥርዓት እንዲሁም ሌሎች በርዕሱ ሥር የሚነሱ መሠረታዊ ፍሬ-ሐሳቦችንና ጭብጦችን የሚዳስስ ጽኁፍ ለኢትዮጵያ የሕግ ሥርዓት ያለው አግባብነትና ጠቀሜታ ምንድን ነው የሚል ጥያቄ ሊነሳ ይችላል፡፡ ለዚህ ምላሹ ደግሞ የኢትዮጵያ ፌዴሬሽን ማቋቋሚያ ሠነድ ከሆነው የፌዴራል ሕገ መንግሥት አንቀጾች የሚገኝ ነው፡፡[1] በኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ ሕገ መንግሥት አንቀጽ 34(5) እና 78 (5) እንደተደነገገው፣ ከኦፌሴላዊ የመንግሥት የሕግና ፍትሕ ሥርዓት በተጓዳኝ እውቅና ሊሰጣቸው የሚችሉ የሕግ ሥርዓቶች አሉ፤ እነሱም ባህላዊ እና ሃይማኖታዊ ሕጎች ናቸው፡፡ በሕብረተሰቡ ውስጥ ለሚነሱ ግላዊና የቤተሰብ ግጭቶች፣ በባለጉዳዮቹ ፈቃድ በባህል ወይም በሃይማኖት ሕጎች መሠረት ሊዳኝ እና እልባት ሊሰጣቸው እንደሚችል ሕገ-መንግሥቱ ይደነግጋል፡፡

* ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም. በባህር ዳር ዩኒቨርሲቲ በሕግ እጩ ዶክተር፣ ጸሐፊውን በኢ-ሜይል አድራሻ alyuabate09@gmail.com ማግኘት ይቻላል፡፡

[1] የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ (ኢፌዲሪ) ሕገ-መንግሥት፣ 1987 ዓም፣ ፌዴራል ነጋሪት ጋዜጣ፣ ቁጥር 1

ሸሪዓዊ የግጭት አፈታት ተቋማዊ አደረጃጀትን በተመለከተ፣ በሕገ-መንግሥቱ አንቀጽ 78(4) ላይ እንደተመለከተው፣ የግልና የቤተሰብ ግጭቶችን የመዳኘት ሥልጣን ያላቸው ሃይማኖታዊና ባህላዊ ፍ/ቤቶችን የማቋቋም ሥልጣን ለፌዴሬሽኑ የሕግ አውጪ አካላት፣ ማለትም በፌዴራል ደረጃ ለሕዝብ ተወካዮች ምክር ቤት፣ በክልሎች ደረጃ ደግሞ ለክልል ምክር-ቤቶች ተሰጥቷል። በዚህ የሕገ-መንግሥት ድንጋጌ መሠረት፣ የባህል እና የሐይማኖት ፍ/ቤቶችን የማቋቋም ጥያቄዎችን ተቀብሎና ገምግሞ፣ በቂ ፍላጎት ያለና አስፈላጊነቱ የታመነበት ከሆነ፣ በሕግ አውጪዎቹ ይሁንታ ባህላዊና ሃይማኖታዊ ፍ/ቤቶች ተቋቁመው የሕግ ብዝኃነቱ አካልና ተዋናይ እንዲሆኑ ሊደረግ እንደሚችል መረዳት ይቻላል። ከመደበኛ ፍ/ቤቶች ውጪ ያሉ የዳኝነት አካላት የሚቋቋሙበት ይህ ሥርዓት፣ ለሸሪዓ ፍ/ቤቶች ተፈጻሚ አይሆንም፤ ምክንያቱ ደግሞ በአንቀጹ ንዑስ 5 ይገኛል። ይኸውም ሕገ-መንግሥቱ ከመጽደቁ በፊት በመንግሥት እውቅና አግኝተው ሲሰራባቸው የነበሩ የባህል ወይም የሃይማኖት ፍ/ቤቶች እውቅና አግኝተው እንዲደራጁ የሚያስገድድ በመሆኑ ነዉ። በኢትዮጵያ የሕግ ሥርዓት ታሪክ ደግሞ፣ ሸሪዓ ፍ/ቤቶች ከአጼ ሐይለ-ሥላሴ ሥርዓተ-መንግሥት በፊት ጀምሮ በሥራ ላይ የነበሩ በመሆኑ፣[2] በንጉሱ ዘመን የቃዲና የናኢባ ፍ/ቤቶች ተብለው በ1934 እና በ1936 በወጡ የማቋቋሚያና የማሻሻያ አዋጆች ተደራጅተው ሲሰሩ የነበሩ ናቸው።[3] ስለሆነም ሸሪዓ ፍ/ቤቶች፣ ከመንግሥታዊ የዳኝነት ተቋማት በተጓዳኝ በመሥራት ከሕገ-መንግሥቱ መጽደቅ በፊት ሲሠሩ የነበሩ በመሆኑ እነዚህን ፍ/ቤቶች በፌዴራልና በክልል ደረጃ አቋቁሞ ሥራቸውን እንዲቀጥሉ ማድረግ በሕግ አውጪዎች ፈቃድ ላይ የተመሠረተ ሳይሆን፣ ሕገ-መንግሥቱ ራሱ ያቋቋማቸው እና እውቅና ማግኘታቸው በሕግ አውጪ አካላት ላይ የተጣለ ሕገ-መንግሥታዊ ግዴታ መሆኑን ይገነዘባል።

የፌዴራል ሕግ-መንግሥቱን አስገዳጅ አንቀጽ መሠረት በማድረግ፣ የፌዴራልና የክልል ም/ቤቶች የሸሪዓ ፍ/ቤቶችን አቋም የሚያጠናክሩ እና እንደገና የሚያደራጁ አዋጆችን አዉጥተዋል። የሕዝብ ተወካዮች ም/ቤት፣ ‹የፌዴራል ሸሪዓ ፍ/ቤቶችን አቋም ለማጠናከር የወጣ አዋጅ ቁጥር 188/1992› የተሰኘ አዋጅ አውጥቶ፣ ፍ/ቤቶቹ በይበልጥ ተጠናክረውና ተደራጅተው እየሰሩ መሆናቸው የታወቀ ነው። በተመሳሳይ የክልል መንግሥታትም በበኩላቸዉ የፌዴራል ሕገ መንግሥቱን አንቀጽ 78(5) መነሻ በማድረግ፣ ክልላዊ ተፈጻሚነት ያላቸው የየራሳቸውን የሸሪዓ ፍ/ቤቶች ማጠናከሪያ አዋጆች አውጥተው፣ በሃገሪቱ ዙሪያ በወረዳ፣ በዞንና በክልል ደረጃ፣ የመጀመሪያ፣ ከፍተኛና ጠቅላይ ሸሪዓ ፍ/ቤቶች ተደራጅተው በተከራካሪዎች ፈቃድ ላይ ተመርኩዘው በግልና በቤተሰብ ጉዳዮች ላይ ሸሪዓዊ ፍትሕን በማድረስ ላይ እንደሚገኙ ይታወቃል። ይህም ሕጋዊ እውቅና ያገኘ የሕግ ብዝኃነት (*Legal Pluralism*) የሃገሪቱ የሕግ ሥርዓት አካል እንደሰፈነ የሚያሳይ እውነታ ነው።[4]

በፌዴራል ሸሪዓ ፍ/ቤቶች ማጠናከሪያ አዋጅ አንቀጽ 3 መሠረት፣ ለሸሪዓ ፍ/ቤቶች የሚቀርቡ ጉዳዮች በሸሪዓ ሕግ መሠረት እንደሚዳኙ ይደነግጋል። የሸሪዓ ሕግ ደግሞ በጥቅሉ ሁለት ምንጮች አሉት፤ እነሱም *ራዕያዊ (ነቅሊያሕ/revealed)* እና አመክንዮኣዊ *(ዐቅሊያሕ/rational*) ምንጮች ናቸው፤ *ራዕያዊ* ምንጮች በመለኮታዊ *ራዕይ (ወሂይ)* የተገለጹ ሲሆኑ፣ ቁርአን እና *ሱናሕ* በዚህ ምድብ ስር ይወድቃሉ።[5] በአመክንዮኣዊ የሸሪዓ ምንጮች ሥር ደግሞ በ*መዛሒብ* (የሕግ ት/ቤቶች)

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[2] ዛኪ ሙስጠፋ፣ በኢትዮጵያ ውስጥ በሚገኙት የእስላም ፍርድ ቤቶች የሚሰራበት ሕግ፤ ለሸሪዓ ሕግ በሥራ ላይ መዋል መቀጠል ምክንያት የሆኑ ነገሮች፣ የኢትዮጵያ ሕግ መጽሔት፣ ቅጽ 9፣ ቁጥር 1፣ 1965፣ ገጽ 173 ይመለከቷል። See also: Mohammed Abdo, Legal Pluralism, Sharia Courts, And Constitutional Issues in Ethiopia, Mizan Law Review, Vol. 5 No.1 (2011), p. 78.

[3] የቃዲ ፍ/ቤቶች ማቋቋሚያ አዋጅ ቁጥር 2/1934 እና የቃዲዎችና የናኢባ ምክር-ቤቶች አዋጅ ቁጥር 62/1936።

[4] በሕግ እውቅና ካገኘ የሕግ ብዝኃነት *(De-jure)* በተቃራኒ፣ ሕግ ያልፈቀደውና እውቅና ያልተሰጠው፣ ነባራዊ የሕግ-ብዝኃነት *(De-facto)* አለ። ይህ የብዝኃነት ጽንሰ-ሐሳብ፣ በአንድ የሕግ ሥርዓት ውስጥ በተጨባጭ የሚታየውን፣ ከመንግሥታዊ የፍትሕ ሥርዓት በተጓዳኝ የግለሰቦችንና የማህበረሰብ ባህርይ እና ምግባር የሚቀርጹና የሚመሩ ሕጎች ተግባራዊ የሚሆኑበትን ተጨባጭ እውነታ የሚያመለክት ነው። ለምሳሌ፣ በኢትዮጵያ የሸሪዓ ሕግ ወይም ባህላዊ ሕጎች በባህላዊ እና ኃይማኖታዊ የፍትሕ ተቋማት አማካይነት ከተፈቀዱበት ወሰን አልፈው በፍትሐ-ብሔራዊ፣ በንግድ እና በወንጀል ጉዳዮች ላይ ተፈጻሚ የሚደረጉ መሆኑ የማይካድ ሐቅ ነው። ከሕግ እውቅና ውጪ የሆነው ነባራዊ ብዝኃነት፣ በሃገራዊ የፍትሕ ሥርዓት፣ በጸታ እኩልነት እና ሰብዓዊ መብት፣ በልማታዊ የፖሊሲ አፈጻጸም እርምጃዎች ላይ የራሱ የሆኑ አሉታዊ ሚናዎች ያሉት ሲሆን፣ ለባህላዊና የሃይማኖት የሕግ ሥርዓቶች የተሰጣቸው የእውቅና ደረጃና የተፈጻሚነት መጠን የተወሰነው፣ ግጭቶችን ለመፍታት ካላቸው ውጤታማነት *(Instrumental Function)*፣ በሰብዓዊ መብቶች፣ በእድገት እና ሥልጣኔ ላይ የሚጋርጧቸው ችግሮች እና ሌሎች ታሳቢዎች ግምት ውስጥ ገብተው መሆኑ ይታወቃል። ከነዚህ እሳቤዎች አንጻር ደጋፊ ወይም ነቃፊ የመከራከሪያ ሐሳቦች ሊቀርቡ የሚችሉ መሆኑ እና እየቀረቡ ያሉ መሆኑ ሊታወቅ ይገባል።

[5] Ahmad Hasan, The Sources of "Fiqh": A General Survey, Islamic Studies, Vol. 29, No. 2 (1990), p.114.

መስራቾችና (*ኢማም/አኢማሕ*) እና የኡሱል ኣል-ፊቅሕ (የሸሪዓ መሠረተ-ሐሳቦች) ሊቃውንት የተቀረጹ፣ ለሕግ ምርምር መንደርደሪያና ለዝርዝር ሕጎች ምንጭ የሆኑ ጥቅል የሕግ መርሆዎች ይገኛሉ። ከእነዚህ የኢጅቲሓድ መርሆዎች መካከል ምስስሏዊ አመክንዮ *(ቂያስ/analogy)*፣ የሕዝብ ጥቅም *(መስላሃሕ/Public Interest)*፣ ከምንጩ ማድረቅ (*ሰድ ኣዙ ዘራኢዕ/* Blocking the Means)፣ ርትዕ *(ኢስቲሀሳን/Equity)* ወዘተ. ይገኙበታል።[6]

የዚህ ጽሁፍ ዓላማ እነዚህን *የኢጅቲሓድ* ንድፈ-ሐሳቦች መተንተን ሳይሆን፣ የራሱን *የኢጅቲሓድ*ን ምንነት እና ከሕግ ምንጭነቱ ጋር ተያይዞ በመስኩ የሚነሱ አጠቃላይ ነጥቦችን መዳሰስ ነው። በቁርአንና ሱናሕ የሚገኙ የዝርዝር ድንጋጌዎች አተረጓጎም እና አዳዲስ ሕግጋት ለመቅረጽ መነሻ የሆኑ ኢጅቲሓዳዊንድፈ-ሐሳቦች ምናልባትም በሌላ ጽኑፍ የሚዳሰሱ ርዕሰ-ጉዳዮች ይሆናሉ፡
፡

2. የኢጅቲሓድ ምንነት

የሸሪዓ ሕግ ምንጮች ራዕያዊ እና አመክንዮኣዊ ተብለው በሁለት ጥቅል ምድቦች ሥር ሊጠቃለሉ ይችላሉ፤ ራዕያዊ የሚባሉት ምንጫቸው ከአምላክ ነው ተብለው የሚታመኑትን ቁርአን እና *ሱናሕን* የሚይዝ ሲሆን፣ በእነዚህ ቀዳሚ መለኮታዊ የሕግ ምንጮች በግልጽ ያልተሸፈኑ ወይም ከነአካቴው ያልተነሱ ጉዳዮች ላይ ጥቅል የሕግ መርሆዎችና እና ገዢ የሆኑ ዝርዝር ድንጋጌዎች የሚለዩበት ዘዴ ወይም ምንጭ አመክንዮኣዊ የሸሪዓ ምርምር ወይም ኢጅቲሓድ ይባላል። በሌላ አገላለጽ፣ ኢጅቲሓድ ማለት ከቀዳሚ የቁርአንና ሱናሕ የሕግ መርሆዎችና ልዩ ድንጋጌዎች በመነሳት አዳዲስ ሕጎች የሚቀረጹበት፣ የነባር ሕጎች አተረጓጎምና አፈጻጸም የሚታረቅበት ምሁራዊ የሕግ ምርምር ጥረት ነው።[7] ኢጅቲሓድ *ሥርወ-ቃሉ ‹ጀሕዳሕ›* ሲሆን ትርጉሙም ጥረት፣ ልፋት፣ ትግል ማለት ሲሆን በሸሪዓ የሕግ ጥናት ውስጥ ጥቅም ላይ ሲውል ደግሞ ከቋንቋዊ ትርጓሜው በጠበበ መልኩ፣ ሕግጋትን ለመተርጎምና ለመቅረጽ የሚደረግን አዕምሯዊ ጥረት ያመለክታል። ኢጅቲሓድ ማለት በምንጮች ላይ በመመርኮዝ ግልጽ የሸሪዓ ድንጋጌ በሌለባቸው የሕግ ጭብጦች ላይ ገዢ የሆነውን ድንጋጌ ለመለየት የሚደረግ ከፍተኛ የሕግ የምርምር *(ኢስቲንባጥ)* ሒደት ነው።[8]

ኢጅቲሓድ ማለት ለአዲስ ጭብጥ የሕግ እልባት ለመስጠት ቀዳሚ የሸሪዓ ምንጮችን በማጣቀስ ልዩ ድንጋጌ (ድምዳሜ - *ሁክም*) ላይ ለመድረስ የሚደረግ አመክንዮኣዊ የሕግ ምርምር ወይም ሕግን የመቅሰም ጥረት እንደሆነ ከላይ ተገልጿል። ይህ ትርጓሜ፣ ሸሪዓዊ ምርምር የዘመኑን ሙስሊም ማህበረሰብ ተጨባጭ እውነታዎች ያገናዘበ መሆን ያለበት ከመሆኑ አኳያ፣ በቀደመው ኡሱል ኣል-ፊቅሕ ጥናት ውስጥ ለኢጅቲሓድ ይሰጠው የነበረውን ትርጓሜ ሊሻሻል እንደሚገባ፣ በተለይም ከዚህ ከነባራዊነት ገጽታው በተጨማሪ፣ በግለሰብ ሊቃውንት ይዞታነት በተጨማሪ በሕብረት ሊተገበር የሚችል *(ኢጅቲሓድ ጀማዒ)* እንደሆነ የሚያስረዳ አዲስ ትርጓሜ ሊሰጠው እንደሚገባ ፕሮፌሰር ከማሊ፣ *Shariah Law: An Introduction* በተሰኘ መጽኃፋቸው ያስገነዝባሉ።[9] ይበልጥ ግልጽ ለማድረግ፣ ከነባሩ የኢጅቲሓድ አረዳድ በተጨማሪ ሁለት ምልከታዎች የትርጓሜው አካል መደረግ ይኖርባቸዋል፤ እነዚህም አንደኛ፣ ኢጅቲሓድ በቀደሙት ዘመናት በዋናነት በግለሰብ ደረጃ በሸሪዓ ሊቆች ሲተገበር የነበረ በመሆኑ፣ በመንግሥት የአስተዳደር መዋቅር ውስጥ ተቋማዊ አደረጃጀት ያላገኘና በየዘመናቱ የነበሩ የኡሱል እና የፊቅሕ ሊቃውንት በግላቸው የየራሳቸውን ምርምር በማድረግና *ፈትዋ* (ድምዳሜ) በመስጠት ላይ የተወሰነ ስለነበር ዘመናዊው የመንግሥት አወቃቀር፣ የሕግ አወጣጥ እና የዳኝነት ሥርዓት ጋር ተጣጥሞ ይተገበር ዘንድ የሕብረት *ኢጅቲሓድ (ኢጅቲሓድ ጀማዒ)* ወይም ተቋማዊ ማዕቀፍ ያለው ሸሪዓዊ የሕግ ምርምር ሂደት ሊዳብር ይገባል፣ የትርጓሜውም አካል መሆን አለበት። ሁለተኛ፣ የ21ኛው ክፍለ-ዘመን ሙስሊም ማህበረሰቦችን ዘርፈ-ብዙና ውስብስብ ግንኙነቶችን የሚገዛ የሕግ ማዕቀፍ ለመቅረጽ የሚቻለው በሁሉም ግላዊና ማህበረሰባዊ መስተጋብሮቸ ላይ ጥልቅ ጥናት ሲደረግ እና በቂ እውቀት ሲኖር ነው። ይህ በሌለበት ሕብረተሰቡን ወደ ተሻለ ሁኔታ የሚመራ የሕግ ማዕቀፍ ማበጀት የማይቻል በመሆኑ፣ ሸሪዓዊ የሕግ

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[6] Ibid., p. 115.

[7] Mohamed Abdel-Khalek Omar, Reasoning in Islamic Law: Part Two, Arab Law Quarterly, Vol. 12, No. 4 (1997), p. 355.

[8] Mohammad Hashim Kamali, Sharia Law: An Introduction, Oxford:Oneworld Publications, Oxford, 2008, pp. 162-163.

[9] Ibid., p. 165. See also: Mohammad Hashim Kamali, Issues in the Theory of Ijtihad: A Reappraisal, Bulletin on Islam and Cntemporary Issues, No. 29 (2015), International Institute of Advanced Islamic Studies (IAIS) Malaysia, pp. 3-4.

አተረጓጎም እና የሕግ አወጣጥ ሂደት ከጥንታዊ የኢጅቲሓድ መርሆዎች እና ሥነ-ሥርዓት ግንዛቤ ባሻገር፣ ተመራማሪው *(ሙጅቲሒድ)* ኢጅቲሓድ በሚያደርግበት ዘርፍ ላይ ልዩ ሙያዊ እውቀት (Expertise Knowledge) ሊኖረው ይገባል፣ አሊያም የዘርፉን አጥኚዎችና ባለሙያዎች ድጋፍ ማግኘት ይኖርበታል። ሁለተኛ፣ በኢጅቲሓድ አማካይነት የሸሪዓ ሕግን ከተለዋዋጭ ነባራዊ እውነታዎች ጋር ማጣጣም፣ እንዲሁም አግባብነቱ እና ገዢነቱ ቀጣይ እንዲሆን ማድረግ የሚቻለው የምርምር ሂደቱ ሃገራዊ፣ ማህበረሰባዊ እና ግላዊ እውነታዎችን ያገናዘበ ሲሆን ነው። ይህ የነባራዊነት ገጽታ፣ ምንም አንኳ በቀደሚው የሑሱል ጥናት ላይ ተጠቅሶ የሚታለፍ ቢሆንም፣ የትርጓሜው አካል ሊደረግና እና አጽንኦት ሊያገኝ እንደሚገባ ከማሊ ያስገነዝባሉ።[10] እነዚህ እይታዎች ባከተተ መልክ፣ ከማሊ ኢጅቲሓድን እንደሚከተለው ተርጉመውታል፡-[11]

> ኢጅቲሓድ ማለት በአንድ አዲስ ጭብጥ ላይ ሸሪዓዊ ብይን ላይ ለመድረስ፣ የሸሪዓ ምንጮችን መሠረት ያደረገ፣ ተጨባጭ ማህበረሰባዊ እውነታዎችን ያገናዘበ፣ ሁሉ-አቀፍ የሆነ እና ጥልቅ ፈጠራዊ እሳቤ የተሞላበት፣ ብቁ በሆኑ ሊቆች በቡድን ወይም በግል የሚደረግ ሁለ-ገብ አመክንዮኣዊ የምርምር ጥረት ነው።[12]

በራዕያዊ የሸሪዓ ምንጮች (ቁርአን እና *ሱናሕ)* እና *በኢጅቲሓድ* መካከል ያለው ልዩነት፣ ከላይ በትርጓሜው ውስጥ እንደተመለከተው፣ መለኮታዊ እና ነቢያዊ ድንጋጌዎች በሙሀመድ ሕልፈት የተቋረጡ እና ከዚያ በኋለ መለኮታዊ ነው ሊባል የሚችል የሕግ ድንጋጌ የሌለ ሲሆን፣ ኢጅቲሓድ በሕግ ምንጭነቱ ቀጣይ የሆነና በጊዜ ሂደት እየዳበረ፣ እየተሻሻለ የሚሄድ ነው፡ ፡ ኢጅቲሓድ የሸሪዓ ሕግን ከተገለጹ ምንጮች ተቀብሎ፣ አግባብነቱና ተፋጻሚነቱ በጊዜ፣ በቦታ እና በሁኔታ ሳይገደብ ለዘመን እና ለትውልድ ተስማሚ እንዲሆን የሚያደርግ እጅግ ጠቃሚ የሕግ መሣሪያ ነው።[13]

ሌላው የኢጅቲሓድ መገለጫ፣ በግልጽ ባልተሸፈኑ ጉዳዮች ላይ የሚደረግ አመክንዮኣዊ ምርምር እንደመሆኑ፣[14] ተቃራኒ ሐሳብ ሊቀርብበት የሚችል፣ አስገዳጅ ያልሆነ ድምዳሜ ላይ የሚያደርስ *(ዞኒ)* የምርምር ሂደት መሆኑ ነው።[15] በተጨማሪም፣ ኢጅቲሓድ ማድረግ የሚችለው ግለሰብ በቀዳሚ የሸሪዓ ምንጮች ላይ ጥልቅ እውቀት ያለው ከመሆኑ በተጨማሪ፣ ከዚህ እውቀት ላይ በመንደርደር የሐሳብ ትንታኔ *(ኢስቲንባጥ)* ማድረግ በሚችል ተመራማሪ ሊቅ *(ሙጅተሒድ)* ወይም ሊቆች *(ሙጅተሒዱን)* እንጂ የፊቅሕ እውቀት ያለው ነገር ግን ዘዴያዊ የሕግ ትንታኔ ማድረግ የማይችል፣ አዋቂ *(ዐሊም)* የተባለ ሁሉ የሚያከናውነው አለመሆኑን መረዳት ያስፈልጋል።[16]

ኢጅቲሓድ በምንጭነቱ ከቁርአን እና *ሱናሕ* በጥብቅ የተሳሰረ እና መንደርደሪያ መርሆዎቹ ከቀዳሚ ምንጮች የተገኙ በመሆናቸው ሁሉም የሸሪዓ ምንጮች እርስ-በርስ የተቆራኙ ናቸው። በተለይም ቀዳሚ እና ተከታይ፣ ወይም የተገለጹ እና

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[10] Ibid.

[11] Ibid., p. 4

[12] ይህ ትርጓሜ ኢጅቲሓድ በዘመኑ የዓለም ሙስሊም ማህበረሰብ ውስጥ ሊኖረው የሚገባውን ሚና የሚያመለክት ነው። እነዚህ አዳዲስ የኢጅቲሓድ ገጽታዎች፣ ለሑሱል ኣል-ፊቅሕ መስክ አዲስ የእውቀት ጭማሬዎች በመሆናቸው፣ በተለይም *ሙጀተሒዶች* የሸሪዓ ምንጮችን አጣቅሰው ኢጅቲሓድ ለማድረግ ሲነሱ፣ የሕጎቹን ዓላማዎችን ያገናዘበ እና ግቦችን የሚያሳካ ምርምር የሚያደርገባቸውን ዘዴዎች መቅረጽ አዲስ የሑሰል ኣል-ፊቅሕ እይታ ሲሆን የዘመኑን የሸሪዓ ሊቃውንት የጥናት ትኩረት የሳበ ርዕሰ-ጉዳይ ነው። በሸሪዓ ዓላማዎች *(መቃሲድ)* ላይ መሠረታዊ ግንዛቤ ለመጨበጥ፣ አልዩ አባተ፣ *የሸሪዓ ሕግ ዓላማዎች (መቃሲድ ኣሽ-ሸሪዓሕ)*፣ Bahir Dar University Journal of Law, Vol. 7 No. 2, pp. 261-281) ያንብቡ።

[13] Mohammad Hashim Kamali, Principles of Islamic Jurisprudence, Cambridge፡The Islamic Texts Society, 1991, p. 366.

[14] ኢጅቲሓድ፣ በስፋት ከሚስተጋባው ኢስላማዊ ‹ጂሓድ› ጋር፣ ከአንድ ሥርወ-ቃል የተወሰደ ሲሆን፣ ኢጅቲሓድ አዕምሯዊ ምርምርንና ጥረትን ሲወክል፤ ጂሓድ ደግሞ በብዙኃኑ ዘንድ ‹‹ቅዱስ ሃይማኖታዊ ጦርነት›› ከሚለው ትርጓሜው በሰፋ ሁኔታ የአምላክን ቀረቤታ ለማግኘት እና የሰውን ልጅና ማህበረሰብ ለማገልገል የሚደረግ እና ሐቁን ለማሳየት የሚደረግ ጥረት ሁሉ ጂሓድ (ጥረት፣ ትግል) ይባላል። ሁለቱም ቃሎች በተለያየ መንገድ እውነቱን አጉልቶ ለማሳየት እና መልካም እሴተችን ለመትከል የሚደረጉ ትይዩ ጥረቶች ከመሆናቸው አንጻር ተመሳሳይ ናቸው ሊባል ይችላል፤ ከዚህ አተያይ አንጻር፣ ኢጅቲሓድ የጂሓድ መቀናጆ ነው *(Ijtihad is the ally of jihad)* በማለት ይገልጹታል። (Taha Jabir Al-Alwani On Issues In Contemporary Islamic Thought፣ The International Institute Of Islamic Thought፣ 2005፣ pp. 66-67). በዚህ ረገድ የሚነሱ ነጥቦችን ለመቃኘት የሙሀመድ ሀሽም ከማሊን፣ Issues in the Understanding of Jihad and Ijtihad፣ Islamic Studies, Vol. 41, No. 4 (2002), pp. 617-634 ይመለከቷል።

[15] Kamali, Principles, *supra* note 13, p. 367.

[16] Ibid.

አመክንዮኣዊ በሚል የሚደረገው የሸሪዓ ምንጮች ክፍፍል ለጥናት አመቺነት እና መልክ ለማስያዝ ካለሆነ በስተቀር ተጨባጭ ልዩነትን አያመላክትም። አመክንዮኣዊ የሒጅቲሓድ መርሆዎች መነሻቸው ከቁርአን እና ከሱናሕ በመሆኑ፣ በእነዚህ መርሆዎች መሠረት የሚቀረጹ ዝርዝር ሕግጋት በተዘዋዋሪ ከቁርአን እና ከሱናሕ የመነጩ ናቸው ማለት ይቻላል። ስለዚህ አንደ ሒጅማዕ (የሊቃውንት ወጥ አቋም)፣ ቂያስ (ምስስሏዊ ድምዳሜ)፣ ኢስቲህሳን (ርትዕ)፣ የሕዝብ ጥቅም *(መሰላሃሕ)* ወዘተ. የመሳሰሉ መርሆዎች በሒጅቲሓድ ስር የሚካተቱ እና በሒጅቲሓድ አማካይነት ከቁርአን እና ከሱናሕ ጋር የተዛመዱ ናቸው። በሸሪዓ ምንጮችና በሒጅቲሓድ መርሆዎች መካከል ያለው ልዩነት የቅርጽ መሆኑ አንዱ ማሳያ፣ የአንዱ መርሆ ጽንሰ-ሐሳብ ወሰን ከሌላው ጋር የሚቀላቀልበት እና በሁሉቱ መርሆዎች መካከል ግልጽ የልዩነት መስመር ለማስመር የሚቸግር መሆኑ ነው። ለምሳሌ፣ የሊቃውንት ሥምምነት ሌሎቹን የሒጅቲሓድ መርሆዎች መሠረት ያደረገ ሊሆን ይችላል፤ ማለትም በቂያስ ወይም በመሰላሃሕ ላይ ተንተርሰው ሊቃውንት አንድ አቋም ሊያንጸባርቁ ይችላሉ። በተመሳሳይ ኢስቲህሳንእና ቂያስ ተቀራርቢ ሐሳብ አላቸው፤ ከሁለት ቂያሳዊ ድምዳሜዎች መካከል አንዱ ለርትዕ አስፈላጊ ሆኖ ሊመረጥ ይችልና የኢስቲህሳን ቅርጽ ሊይዝ ይችላል። ባጠቃላይ በሒጅቲሓድ መርሆዎች መካከል ያለው ልዩነት በአብዛህኛው ሥነ-ሥርዓታዊ እንጂ የይዘት አለመሆኑን ይገነዘቧል።[17]

ሒጅቲሓድ የሚደረግባቸው ጉዳዮች ቀድሞ በተገለጹ የሸሪዓ ምንጮች ሥር ያልተሸፈኑ ጭብጦች ላይ በመሆኑ፣ ተፈጻሚ ነው በሚል የተለየው ድንጋጌ *(ሁክም ኣሹ ሸርዒ)* ትክክል ሊሆንም ላይሆንም ስለሚችል የአሻሚነት *(ዞኒ)* ደረጃ የሚይዝ ይሆናል። ስለሆነም ሒጅቲሓድ በተፈጥሮው አስገዳጅ ሊሆን አይችልም። ሒጅቲሓድ የሚያደርገው ግለሰብ በእውቀቱም ሆነ በምርምር አቅሙ ብቁ የሆነ ሊቅ *(ፈቂሕ)* መሆን አለበት፤ ይህ ግለሰብ *(ሙጅተሒድ)* ሙሉ አቅሙን አሟጦ ተጠቅሞ የመጨረሻ ነው የሚለው *ሁክም*ላይ እስካልደረሰ ድረስ፣ በግል የደረሰበት ድምዳሜ የአስረጂነት ዋጋ አይኖረውም። በተጨማሪም፣ የሸሪዓውን የሕግ አቋም ለመረዳት ከሕግ ባለሙያ በመጠየቅ ወይም አግባብነት ያላቸው የፊቅሕ *ሥራዎች*ን በማጥናት *ሁክምን* ማወቅ ሒጅቲሓድ ሊባል አይችልም፣ ከዚህ ባህሪው ሒጅቲሓድ በግል እይታ ላይ የተመሠረተ የመጀመሪያ ምርምርና እና ጥናት ማድረግ እንጂ የሌሎች *ሙጅተሒዶች*ን ወይም *መዝሓቦች*ን አቋም ማንጸባረቅ ሒጅቲሓድእንደማይባል እንረዳለን።[18]

ሒጅቲሓድ በዘፈቀዳዊ የግል እይታ ላይ እንዳይገነባ እና ተገማች ሥርዓት ይኖረው ዘንድ ሁለንተናዊ የጥናት ማዕቀፍ ተበጅቶለታል፤ ይኸውም ሑሱል ኣል-ፊቅሕ (የሸሪዓ መሠረተ-ሐሳቦች) ይባላል። ሑሱል ኣል-ፊቅሕ እንደ ጥናት መስክ ከጥንት ከነቢዩ ሙሀመድ ባልደረቦች በኋላ፣ በታቢዑን (ተከታይ የሙስሊም ማህበረሰብ(እንዲሁም ሰፋ ባለቅርጽ ደግሞ ከዚያ በኋላ በመጣው ትውልድ *(ታቢዕ ኣት-ታቢዑን)* መሠረታዊ ቅርጹን ይዞ፣ ከዚያ በኋላ በመጡት ተተካኪ ትውልዶች መሐከል በተነሱ የሸሪዓ ሊቃውንት ይበልጥ እየሰፋና የተለያዩ አተያዮችን እያዳበረ የመጣ የእውቀት ዘርፍ ነው። መስኩ፣ ከላይ እንደተወሳው፣ በጥቅል አነጋገር ከራዕያዊ ምንጮች ቀጥሎ የሚገኘውን፣ በዝርዝር የምንጮች ተዋረድ ደግሞ ሦስተኛ ላይ የሚገኘውን ምክንያታዊ የሕግ ምርምር ለመምራት የዋለ የአቀራረብ እና የዘዴ *(Methodology)* እውቀት ማዕቀፍ ነው።[19] የሒጅቲሓድ ዘዴዎች ሲባል አንድም በቀዳሚ ምንጮች ውስጥ ያሉ የጥቅል የሕግ ድንጋጌዎችን አተረጓጎም ሊመለከት ይችላል፤ በዚህ የሕግ ምርምር ዘዴ፣ የቁርአንና የሱናሕ ድንጋጌዎችን አተረጓጎም የሚመሩ ደንቦች በመስኩ ምሁራን ሊዳብሩ ችለዋል። ሌላኛው የሒጅቲሓድ ቅርጽ ደግሞ ትርጉም ሳይሆን ኢዲስ ሕግጋት የሚቀረጹባቸው መንደርደሪያ ንድፈ-ሐሳቦችን የሚመለከት ነው፤ ከእነዚህ የሕግ መርሆዎች መካከል ምስስሏዊ አመክንዮ *(ቂያስ)*፣ ርትዕ *(ኢስቲህሳን)*፣ የቀጣይነት ግምት *(ኢስቲሰሃብ)* እና ሌሎችም ይገኙበታል።[20] ከቁርአን እና ከሱናሕ ቀጥሎ ያሉ የሸሪዓ መርሆዎች እና ምንጮች ሁሉ በሒጅቲሓድ ሥር የሚወድቁ ናቸው።[21]

3. ሒጅቲሓድ የሚደረግባቸው ጉዳዮች

ከሒጅቲሓድ የትርጓሜ ክፍሎች መካከል አንዱ በተነሳው አዲስ ጭብጭ *(ፈርዕ)* ላይ የሚደረገው የሕግ ምርምር በቀዳሚ የሸሪዓ ምንጮች ላይ የመሠረተ ሊሆን የሚገባ መሆኑ ነው። በዚህም መሠረት ቀድመው በመለኮታዊ ራዕይ *(ወህይ)* የተገለጹ ሕጎችንና

[17] Ibid., pp. 366-367.
[18] Ibid., pp. 315-316
[19] Mohammad Hashim Kamali, Methodological Issues in Islamic Jurisprudence, Arab Law Quarterly, Vol. 11, No. 1 (1996), p. 3.
[20] Ibid.
[21] Ibid.

መርሆዎችን መሠረት ያላደረገ ማንኛውም የሕግ ወይም ሌላ ምርምር ሒጅቲሓድ አይባልም። በሒጅቲሓድ የጽንሰ-ሐሳብ ወሰን ውስጥ የማይካተቱ የምርምር አይነቶች መካከል፣ ሙሉ በሙሉ ንድፈ-ሐሳባዊ *(ዐቅሊ)* የሆነ አመክንዮዊ ምርምር፣ በፍሬ-ነገር ወይም ሕዋሳዊ መረጃ ላይ ብቻ የተመሰረተ *(ሂሲ)* ተሞክሯዊ ምርምር፣ በልማድ ላይ የተመረኮዘ *(ዑርፊ)* ምርምር ሊጠቀሱ ይችላሉ። ለምሳሌ፣ ስለፈጣሪ ህልዉና ወይም ስለ ሥነ-ፍጥረት መነሻ የሚደረግ ምርምር በንድፈ-ሐሳብና በተጨባጭ እውነታዎች ላይ የተመረኮዘ በመሆኑ ሒጅቲሓድ አይባልም። ስለሆነም፣ በቀዳሚ ምንጮች ውስጥ በቀጥታ ያልተዳሰሱ የሕግ ጉዳዮች ላይ አንድ ለአካለ-መጠን የደረሰን ሰው ምግባር እና ባህሪ የሚገዙ ዝርዝር ሕግጋትን ለማውጣት የሚደረግ ሒጅቲሓድ በቁርአን እና/ወይም በሱናሕ ቀድመው የተደነገጉ መለኮታዊ ድንጋጌዎችን ወይም የሕግ መርሆዎችን ያጣቀሰ *(ሒስቲንባጥ)* መሆን ይኖርበታል። በቀዳሚ የሸሪዓ ምንጮች ያልተመራ፣ በ*ወሀይ* ማዕቀፍ ሥር ያልሆነ የትኛውም ምርምር ሒጅቲሓድ የማይባል መሆኑን ይገነዘቧል።[22]

በቁርአንና *ሱናሕ* በግልጽ ተለይተው በተዳሰሱና ዝርዝር የሕግ ሽፋን በተሰጣቸው ጉዳዮች ላይ *(ኑሱሰ)* ምርምር ማድረግ አስፈላጊ ባለመሆኑ፣ እነዚህ ጉዳዮች ለሒጅቲሓድ ተገዢ አይደሉም።[23] በቁርአን እና *ሱናሕ* የተካተቱ የሕግ አስረጂዎች *(አዲላሕ)* ለሒጅቲሓድ ካላቸው አግባብነት አንጻር ለአራት ተከፍለው ሊታዩ ይችላሉ፡-[24]

i. የተዓማኒነት እንከን ወይም የግልጽነት ችግር የሌለበት አስረጅ

የቁርአን ወይም የ*ሱናሕ* አስረጂው የተዓማኒነት ወይም የግልጽነት ችግር የሌለበት *(ኑሱሰ)* ከሆነ ሒጅቲሓድ ሊደረግበት አይችልም። ለምሳሌ፡- በወራሾች መካከል ያለውን የውርስ ድርሻ የሚወስኑት የቁርአን ልዩ ድንጋጌዎች፣ ከግልጽነት አንጻር ለትርጉም ያልተጋለጡ በመሆናቸው ሒጅቲሓድ አይደረግባቸውም። ይህ በጥንታዊ የኡሱል አረዳድ የተረጋገጠ ቢሆንም፣ ቁርአን ወይም *ሱናሕ*፣ በወንጀል፣ በቤተሰብ ወዘተ. ጉዳዮች ላይ ያካተቷቸው ዝርዝር ድንጋጌዎች ከወቅቱ ሕብረተሰብ አኳያ ለአፈጻጸም አስቸጋሪ ከሆኑ የዘመኑን ማህበረሰብ ተጨባጭ እውነታዎች እንዲሁም የሸሪዓ ዓላማዎች *(መቃሲድ)* አንጻር እንደገና ሊቃኙ ይገባል በማለት፣ ሐሺም ከማሊን ጨምሮ ሌሎች የዘመኑ የሸሪዓ ሊቃውንት ይከራከራሉ።[25]

ii. ተዓማኒ የሆነ ነገር ግን የግልጽነት ችግር ያለበት አሻሚ አስረጅ

ቁርአን በጠቅላላው የተዓማኒነት እንከን የሌለበት መሆኑ በሁሉም ምሁራን ዘንድ የታመነ ነው።[26] ነገር ግን የሕግ አንቀጾቹ ግልጽ ያልሆኑ ከሆነ ለትርጉም የተጋለጡ ሊሆኑ ይችላሉ። ለምሳሌ፣ በ2፡228፣ ከፍቺ በኋላ፣ ሴቷ ለሦስት ‹*ቁሩእ*› (የብቸኝነት ጊዜ) ሳታገባ እንድትቆይ ተደንግጓል። ‹*ቁሩእ*› የሚለው ቃል ከአንድ በላይ ትርጉም ያለው አሻሚ ቃል በመሆኑ አንቀጹን *ዞሂ* ያደርገዋል፤ በመሆኑም ለሒጅቲሓድ የተጋለጠ ያደርገዋል። *ቁሩእ* የሚለው ቃል የወር አበባ ወይም የንጽህና ጊዜያት በሚል ሊተረጎም ይችላል። አቡ-ሀኒፋና ኢብን-ሀንበል ‹የወር አበባ› በሚል ሲተረጉሙት አሽ-ሻፊዒ እና ማሊክ ደግሞ ‹ሦስት የንጽህና

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[22] Kamali, Principles, *supra* note 13, p. 368

[23] ዝርዝር ቁርአናዊ ወይም የ*ሱናሕ* ድንጋጌዎች ባረፉባቸው የፍትሐ-ብሔር ወይም ወንጀል ጉዳዮች ላይ ሒጅቲሓድ ማድረግ ተገቢነት የለውም የሚለው በመርሕ ደረጃ የማይካድ ቢሆንም፣ ከሒጅቲሓድ መርሆዎች መካከል አንዱ የሆነው የርትዕ ወይም አፈጻጸም ምርጫ *(ሒስቲሀሳን)* ልዩ የቁርአን ወይም የ*ሱናሕ* ድንጋጌዎችን ተግባራዊ በማድረግ ሒደት ውስጥ አስከፊ ወይም አፍራሽ ውጤት የሚያስከትል ከሆነ፣ ዳኛው የአፈጻጸሙን ቅርጽ እንዲለውጥ የሚፈቅድ መርሆ ነው። ስለዚህ፣ ከግልጽነታቸው አንጻር ለሒጅቲሓድ ያልተጋለጡ የሚመስሉ የሕግ ጉዳዮች ሌላው ቢቀር በአፈጻጸማቸው ረገድ ሒጅቲሓድ ሊደረግባቸውና ለውጥ ሊደረግባቸው እንደሚችል *ይሒስቲሀሳን* ጽንሰ-ሐሳብ አስረጂ ሆኖ ሊቀርብ ይችላል። አንዳንዳድ ቁርኣናዊ የውርስ እና የወንጀል ድንጋጌዎች ግልጽ ከመሆናቸው አኳያ የሕግ ትርጉም የማያስፈልጋቸው በመሆኑ በቀጥታ ለአፈጻጸም ዝግጁ ናቸው ቢባልም እንኳ፣ የሸሪዓ ዓላማዎች *(መቃሲድ)* እና ዘመነኛ የኡሱል እይታዎች ማቆጥቆጣቸውን ተከትሎ በእነዚህ ልዩ ድንጋጌዎች ላይም ቢሆን በሒስቲሀሳን አማካይነት በእያንዳንዱ ጉዳይ ላይ ከሚደረገው የአፈጻጸም ለውጥ በተጨማሪ፣ ጥቅል የአፈጻጸም እገዳ ሊጣልና በምትካቸው የሕብረተሰቡን አወቃቀርና እሳቤ ያገናዘቡ አዳዲስ የቤተሰብ እና የወንጀል ድንጋጌዎችና ቅጣቶች የሚቀረጹበት ሸሪዓዊ መሠረት እንዳለ የዘመኑ የሸሪዓ ሊቃውንት ያስረዳሉ። ለአብነት ያህል ጣሪቅ ረመዳን፣ Has political Islam failed? Head to Head Al Jazeera English፣ published on Apr 22, 2016 https://www.youtube.com/watch?v=KlVHPflOljY ይመለከቷል።

[24] Kamali, Principles, *supra* note 13, pp. 316-317.

[25] Ibid., pp. 173-174

[26] Ibid., p. 11

ወቅቶች› በሚል ተርጉመውታል፡፡ በዚህ *የኢጅቲሓድ* ልዩነት ምክንያት የተለያየ የብቸኝነት ጊዜ አቆጠጣር እና የውጤት ልዩነት ይገኛል፡፡

iii. ተዓማኒነቱ አጠራጣሪ ሆኖ በመልዕክቱ አሻሚ የሆነ አስረጅ

ይህ አይነቱ አስረጂ የሚገኘው ሁለተኛ የሸሪዓ ምንጭ በሆነው በ*ሀዲሰ* ላይ ብቻ ነው፤ ምክንያቱም ተዓማኒነቱ አከራካሪ ሆኖ የግልጽነት ችግር ሊኖርበት የሚችለው *ሀዲሰ* ብቻ ነው፡፡ በ*ሀዲሰ* የዘገባ *ሥርዓት* ተላልፈው ለመጨረሻው ትውልድ የደረሱት *ሀዲሶች*፣ ከጥቂቱ በስተቀር ሁሉም ማለት ይቻላል በአንድ የነቢዩ ባልደረባ በኩል የተላለፉ - *አሀድ* (ነጠላ) ዘገባዎች ናቸው፡፡[27] *አሀድ* ዘገባዎች በአንድ የዘገባ ሰንሰለት ብቻ የወረዱ በመሆናቸው ተዓማኒነታቻው አጠራጣሪ *(ዞኒ)* ነው፡፡ እነዚህ *ሀዲሶች* በይዘታቸው ግልጽ ቢሆንም ከተዓማኒነት አኳያ (ከአስተላላፊዎቹ *ታማኝነት* ወይም የዘገባው *ቀጣይነት (ኢሰናድ)* አንጻር *ኢጅቲሓድ* ሊደረግባቸው ይችላል፡፡ በ*አሀድ* ዘገባዎች ላይ ምሁራን ተፈጻሚ የሚያደርጓቸው የታማኝነት *መመዘኛዎች*ና የሚሰጧቸው የተዓማኒነት ደረጃ የተለያየ በመሆኑ በአስረጂነታቸው ላይ የተለያየ *ኢጅቲሓድና ሁክም* (ፍርድ) ላይ ይደርሳሉ፡፡[28]

iv. በተዓማኒነቱም እና በፍሬ-ሐሳቡ አከራካሪ የሆነ አስረጅ

ይህም ቢሆን በ*ሱናሕ* ላይ ብቻ የሚገኝ የአስረጅ አይነት ሲሆን፣ አንድ *ሀዲሰ* በአዘጋገቡ *አሀድ* (ነጠላ) ሆኖ በፍሬ-ሐሳቡ ደግሞ አሻሚ በሚሆን ጊዜ ነው፡፡ ለምሳሌ፣ ያለ *ሱራሕ አል-ፉቲሃሕ ሶላሕ* የለም *(ላ ሶላተ)* የሚለው *የሀዲሰ* ዘገባ ነጠላ ከመሆኑ በተጨማሪ ‹*ላ ሶላተ*› የሚለው አገላለጽ፣ *ፉቲሃ* ሳይነበብ ቢቀር ውጤቱ *ሥግደቱን* ውድቅ ማድረግ ይሁን ወይስ ጽኑእነቱ እንደተበጠቀ ሆኖ *ሥርዓቱ* ጎዶሎ እንዲሆን ብቻ ማድረግ ይሁን ግልጽ አይደለም፡፡ እንደ አሽ-ሻፊዒ እይታ *ፉቲሃ* ባልተነበበበት *ሥግደቱ* ዋጋ የለውም ሲሉ፣ *ሀነፊዎች* ደግሞ *ሥግደቱ* እንከን ያለበት እንጂ ሙሉ በሙሉ ውድቅ አይሆንም የሚል አቋም አላቸው፡፡[29]

ባጠቀላይ፣ *ኢጅቲሓድ* ሁለት አይነት ቅርጽ ሊይዝ ይችላል፣ አንደኛው የትርጉም ሲሆን ሌላኛው ደግሞ ሕግ የማውጣት ነው፡፡ በቀዳሚ ምንጮች *(ኑሱስ)* ውስጥ ያሉትን አስረጂዎች ከላይ በተገለጹት አኳኋን *ዞኒ* በሚሆኑ ጊዜ *ኢጅቲሓድ* የትርጉም ቅርጽ ይኖረዋል፡፡ በተያዘው ጭብጥ ላይ ምንም አይነት አስረጂ የሌለ ከሆነና ጉዳዩ ሙሉ በሙሉ ያልተሸፈነ ከሆነ፣ *ኢጅቲሓድ* አዲስ ሕግጋትን የመቅረጽ ሚና ይኖረዋል፡፡[30] አዲስ የሕግ ጭብጦች ላይ ዝርዝር ሕግጋት የሚቀረጹት በ*ኢጅቲሓድ* መርሆዎች ላይ በመመርኮዝ ነው፡፡ ከእነዚህ መርሆዎች መካከል *ቂያስ፣ ኢስቲህሳን* እና *መስላሃሕ* የሚገኙበት መሆኑ ቀደም ሲል ተገልጿል፡፡ ከላይ ከተጠቀሱት አራት ሸሪዓዊ የአስረጂ አይነቶች መካከል፣ *ኢጅቲሓድ* በመጀመሪያው (**i**) ላይ ተፈጻሚ የማይሆን ሲሆን፣ በቀሪዎቹ ማለትም ከ **ii-iv** በተጠቀሱት የአስረጂ አይነቶች ላይ ሊተገበር ይችላል፡፡[31]

4. *ኢጅቲሓድ* የማድረግ ሸሪዓዊ ግዴታ

ኢጅቲሓድ ማድረግ በሸሪዓ እይታ ያለው የግዴታ ደረጃ ምን ያህል ነው ለሚለው ጥያቄ፣ አንደ ጭብጥ በተነሳው የሕግ ጉዳይ የአንገብጋቢነት ደረጃ ላይ የሚወሰን ነው፡፡ ጉዳዩ በአፋጣኝ ምላሽ የሚያሻው ጉዳይ ከሆነ፣ ሁልጊዜ የሕብረተሰብ የሸሪዓ ሊቆች *ኢጅቲሓድ* በማድረግ ሸሪዓዊ ብይን *(ሁክም)* የመስጠት ግለሰባዊ ግዴታ *(ፈርድ ዐይኒ)* አለባቸው፡፡ በተለይ ደግሞ ብዙ *ሙጅተሒዶች* በሌሉበት ማህበረሰብ ውስጥ የሚገኝ *ሙጅተሒድ*፣ አስቸኳይ የሕግ ምላሽ የሚያሻው ጉዳይ ካጋጠመ፣ ምርምር የማድረግ ግለሰባዊ ግዴታ ይኖርበታል፡፡ ጉዳዩ አጣዳፊ ካልሆነ በዚህ አይነቱ ጉዳይ ላይ ሁሉም የሕብረተሰቡ *ሙጅተሒዶች*

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[27] አልዩ አባተ፣ *ሱናሕ*፦ ሁለተኛው የሸሪዓ ሕግ ምንጭ፣ Hawassa University Journal of Law, Vol. 2, p. 185 (2018). የዚህ ጽኑፉ አጠቃላይ ይዘት የሀዲስ ተዓማኒነትን ጥያቄ ውስጥ ያስገቡ *ታሪካዊ* ምክንያቶች ላይ፣ በመስኩ ሊቃውንት በተዘረጋው የተዓማኒነት ምዘና *ሥርዓት* ላይ፣ የሀዲስ አስረጂነት ደረጃዎች እና ሌሎች ከሀዲስ ዘገባዊ ምንጭነት እና የ*ሱናሕ* አስረጂነት ጉዳዮች ላይ *መሠረታዊ* ግንዛቤ ያስጨብጣል፡፡

[28] Kamali, Principles, *supra* note 13, pp. 368-369

[29] Ibid., p. 369

[30] Ibid.

[31] Ibid., p. 368

ምርምር በማድረግ የሕግ መፍትሔ የማበጀት የጋራ ግዴታ *(ፈርድ ከፋኢ)* አለባቸው፡፡ *ዋጂብ ከፋኢ* አለባቸዉ ሲባል ግዴታዉ ባሉት *ሙጅቲሒዶች* መካከል በአንዱ ከተከወነ የሁሉም ሊቆች ግዴታ ይወርዳል፡፡ *ሙጅቲሒዱን* በግል የሚመለከተው ጉዳይ ከሆነ፣ ኢጅቲሓድ በማድረግ የራሱን አቋም የመያዝ እና የመከተል ግዴታ *(ዋጂብ ዐይኒ)* ሲኖርበት፣ በተመሳሳይ ጉዳይ ላይ ሌሎች *ሙጅቲሒዶች* ያላቸውን *ፊቂሓዊ* አቋም መከተል *(ተቅሊድ)* አይፈቀድለትም፡፡ ተከታይነት ለተራው ሕዝብ እንጂ ከምንጮች ላይ ተንተርሶ የራሱን የሕግ ምርምር በማድረግ *ሁክም* ላይ መድረስ ለሚችል *ሙጅተሒድ* አይፈቀድም፡፡ በተጨማሪም አንድ ልዩ ጉዳይ ለአንድ *ሙጅተሒድ* ወይም ዳኛ *(ቃዲ)* የተመራ በሆነ ጊዜ፣ ኢጅቲሓድ ማድረግ የ*ሙጅተሒዱ* ግለሰባዊ ግዴታ ይሆናል፡፡[32]

ኢጅቲሓድ ግዴታ *(ዋጂብ)* ባልሆነባቸው ሁኔታዎች ላይ ሁሉ የሚበረታታ *(መንዱብ)* ይሆናል፤ ማለትም ጉዳዩ አጣዳፊ ባልሆነበት ወይም ሌሎች *ሙጅተሒዶች* ባሉበት ማህበረሰብ ውስጥ ኢጅቲሓድ ማድረግ *ዋጂብ ከፋኢ* (ማህበረሰባዊ ግዴታ) ነው፡፡ የተነሳው የሸሪዓ ጭብጥ በተጨባጭ ያላገጠመና ንድፈ-ሐሳባዊ ብቻ በሆነ ጊዜ፣ በእነዚህ መላምታዊ ጉዳዮች ላይ ሸሪዓዊ የሕግ ምርምር ማድረግ የሚበረታታ ነው፡፡[33]

እንደ ጭብጥ ሆነዉ የሚነሱት የሕግ ጉዳዮች በቁርአን ወይም *ሱናሕ* ውስጥ ተለይተው ግልጽ ድንጋጌ ያረፈባቸው ከሆነ፣ በእነዚህ ጉዳዮች ላይ ኢጅቲሓድ ማድረግ ፈጽሞ የተከለከለ ነው፡፡ የኢጅቲሓድ ዓላማ ግልጽ የሸሪዓ ሽፋን ባላገኙ ጉዳዮች ላይ ከቀዳሚ ምንጮቹ ያልራቀ የሕግ ምርምር በማድረግ ፍትሓዊ የሸሪዓ ሥርዓት መዘርጋት እንጂ፣ ግልጽ መለኮታዊ ድንጋጌዎችን ወደ ጎን በማለት ከመለኮታዊ ቁጥጥር እና አመራር ውጭ የሆነ የሕግ ማዕቀፍ መቅረጽ አይደለም፡፡[34]

አንድ *ሙጅተሒድ* በአንድ የሕግ ጭብጥ ላይ ኢጅቲሓድ አድርጎ የራሱ ድምዳሜ ላይ ከደረሰ በኋላ በተመሳሳይ ጉዳይ ላይ ሌሎች *ሙጅተሒዶች* የያዙትን አስተያየት መከተል እንደማይፈቀድለት ሁሉም የኡሱል *ዑለማእ* ይስማሙበታል፡፡ ኢጅቲሓድ ያልተደረገባቸው ጉዳዮች ቢገጥሙት እንኳ ሌሎች የደረሱበትን *ሁክም* ከመከተል ይልቅ የራሱን ኢጅቲሓድ እንዲያደርግ ይገደዳል የሚል አስተያየት በብዙሓኑ ዘንድ ተንጸባርቋል፡፡ ይህም ምንጮችን ተንተርሶ የራሱን የሕግ ምርምር ማድረግ የሚችል አማኝ ሁሉ ምርምር እንዲያደርግ የሚበረታታ መሆኑንና ሌሎችን በጭፍን ከመከተል *(ተቅሊድ)* ይልቅ ግላዊ እሳቤን በመጠቀም የተያዘ አቋም ከውስጣዊ እምነት የመነጨ በመሆኑ፣ ትግበራውም ቢሆን ቀላልና ፍሬያማ እንደሚሆን ያመለክታል፡፡ *ተቅሊድ*የሚፈቀደው ኢጅቲሓድ ማድረግ ለማይችል ለተራ አማኝ *(ዐሚ)* ብቻ ነው፡፡

ለንድ ሙጅተሒድ በአንድ ወቅት የያዘውን ኢጅቲሓዳዊ አቋም፣ በሁኔታዎች መለወጥ ምክንያት ወይም የተለየ አረዳድ በመያዙ ምክንያት የመቀየር ሙሉ ነጻነት እና ግዴታ አለበት፡፡ በዳኝነት መደብ ላይ የሚገኙ *ሙጅተሒዶች* ከሆኑ በሚሰጡት ፍርድ መካከል የበላይና በታችነት የለም ምንም እንኳ በዘመናዊ የፍርድ ቤት አደረጃጀት የይግባኝ ሥርዓት ሊኖርና የበታች ፍ/ቤት ውሳኔዎች በበላይ ፍ/ቤቶች ሊሻር ወይም ሊታረም ቢችልም፣ ይህ ሲባል በመርህ ደረጃ በዳኛ *ሙጅተሒዶች* መካከል ያለው ሸሪዓዊ አስተያየት የተለያየ የአሳማኝነት ደረጃ ሊኖራቸው ቢችልም፣ በዚህ *መመዘኛ* አንዱ ከሌላው ሊመረጥ ቢችልም፣ ኢጅቲሓድ በአስረጂነቱ *ዞኒ* (አሻሚ/ወሳኝ ያልሆነ - *Speculative)* በመሆኑ፣ በምሁራዊ ወይም በዳኝነት *የ*ኢጅቲሓድ ድምዳሜዎች መካከል የበላይነትና የበታችነት የለም፡፡ ይህም ኢጅቲሓድ አስገዳጅ ባለመሆኑና እንደ ዳኛ አስተያየት (*ዞኒ* አስረጂ) እኩል የአስረጂነት ሚና ያለው በመሆኑ ነው፡፡[35] የኢጅቲሓዳዊ ድምዳሜዎች የአስረጂነት እኩልነት፣ ‹አንድ ኢጅቲሓድ በአምሳያው አይሻርም *(ኣል-ኢጅቲሓዱ ላ ይንቀድ ቢ ሚስሊሒ)*› በሚለው የሸሪዓ ሕግ ቀኖና *(Legal Maxim)* ይወከላል፡፡[36]

5. የኢጅቲሓድ አስረጂነት (የሕግ ምንጭነት)

ኢጅቲሓድ የሸሪዓ ምንጭ መሆኑ በቁርአን፣ በሱናሕ እና በአመክንዮኣዊ አረዳድ *(ዐቅል)* የተደገፈ ነው፡፡ ከቁርአን ብንነሳ፣ በሱራሕ ኒሳእ 4፡59፣

[32] Ibid., pp. 369-370
[33] Ibid., p. 318
[34] Ibid., p. 370
[35] Ibid., p. 371
[36] Ibid., p. 372

> ‹‹እናንተ ያመናችሁ ሆይ! አላህን ተገዙ፡፡ መልክተኛውንና ከእናንተም የሥልጣን ባለቤቶችን ታዘዙ፡፡ በማንኛውም ነገር ብትከራከሩ በአላህና በመጨረሻው ቀን የምታምኑ ብትሆኑ (የተከራከራችሁበትን ነገር) ወደ አላህና ወደ መልዕክተኛው መልሱት፡፡››[37]

በዚህ አንቀጽ የመጀመሪያው ዐረፍተ-ነገር፣ የሸሪዓ ወይም በአጠቃላይ የኢስላም የእውቀትና የሕግ ምንጭ፣ አምላክ በመልዕክተኛው በኩል የገለጸውን ቅዱስ ቃሉን - ቁርአንን፣ እና ነቢይ ሆነው የተላኩትን የሙሀመድን አረዓያነት - *ሱናሕ* መሆናቸውን የሚያስረዳ ነው፡፡ ሁለተኛው የአንቀጹ ክፍል ደግሞ አንደ ጭብጥ ሆኖ በሙስሊም ማህበረሰብ ውስጥ የተነሳ አንድ ጥያቄ ወይም ያጋጠመ ችግር ቢኖር፣ በቁርአንና *ሱናሕ* መሠረት መፍትሔ ሊያገኝ እንደሚገባ ይደነግጋል፡፡ ይህ አገላለጽ፣ ነገሩ በቀጥታ በቁርአንና በ*ሱናሕ* ባይዳሰስ እንኳ በእነዚህ ቀዳሚ ምንጮች ውስጥ የተገለጹ መሪ የሕግ መርሆዎች፣ የድንጋጌ ምክንያቶች፣ የሕግ ዓላማዎችና ግቦችን መሠረት በማድረግ ሌሎች አዳዲስ ወቅታዊና ከባቢያዊ ችግሮችን መቅረፍ ይችላል፤ የ‹መመለስ› ትርጓሜው የሕግ ፍንጮችን እና መርሆዎችን ተንተርሶ ለችግሮች የሕግ መፍትሔ መቅረጽ ማለት ነው፤ ይህን ማድረግ የሚቻለው ደግሞ በቁርአንና በ*ሱናሕ* የሕግ ክፍል ላይ ጥልቅ ምርምር በማድረግ በመሆኑ የኢጅቲሓድን አስረጂነት ያመለክታል፡፡ (ተመሳሳይ ሐሳብ በቁርአን፣ 2፡105 ይገኛል፡፡)[38]

ኢጅቲሓድ ከግልጽነት አኳያ ከቁርአን ይልቅ የ*ሱናሕ* ድጋፍ አግኝቷል፡፡ ‹የሙዐዝ *ሀዲሰ*› በሚል በሚታወቀው እውቅ ዘገባ መሠረት፣[39] *ኢጅቲሓድ*፣ ከቁርአንና ከ*ሱናሕ* ቀጥሎ የሚገኝ የሸሪዓ ምንጭ ወይም አስረጅ እንደሆነ ያረጋግጣል፡፡ *ኢጅቲሓድ* በውጤቱ ምንም ቢሆን አላፊነትን አያስከትልም፤ እንደውም የኢጅቲሓድ ስሕተት ቢፈጸም ኃይማኖታዊ ምንዳ እንደሚያስገኝ *ሀዲሱ* ያስረዳል፡፡ ሌሎች የሃይማኖት ጥናት ማድረግ *(ተፈቂሕ)* በአምላክ ዘንድ በመልካም አይን የመታየት ምልክት እንደሆነ፣ እና ሌሎች እውቀትን መፈለግ አስረጂነቱንና ጠቃሚነቱን የሚያስረዱ የ*ሀዲሰ* ዘገባዎች በሙሉ የኢጅቲሓድ አብነቶች ተደርገው ሊጠቀሱ እንደሚችሉ ተገልጿል፡፡[40] *ኢጅቲሓድ* በየዘመናቱ ባሉት የኢስላም ሊቃውንት ሲተገበር የኖረ መሆኑ፣ ብሎም በሙሀመድ ባልደረቦች በአስረጂነት ጥቅም ላይ ሲውል እንደነበር የሚያስረዱ፣ በብዙ የዘገባ መስመር የተዘገቡ ተዓማኒ *(ተዋቱር)* ዘገባዎች መኖራቸው፣ በኢጅቲሓድ የእውቀትና የሕግ ምንጭነት ላይ ሊቀርብ የሚችል ታሪካዊ ደጋፊ ማስረጃ ተደርጎ ሊቀርብ ይችላል፡፡[41]

በመጨረሻም፣ የኢጅቲሓድ አስረጂነት በአመክንዮኣዊ እሳቤ የተደገፈ ነው፡፡ በቁርአንና በ*ሱናሕ* በግልጽ ያልተሸፈኑ አዳዲስ የሕግ ጭብጦች መፍትሔ ሊቀመጥላቸው እንደሚገባ አከራካሪ አይደለም፡፡ ከሕብረተሰቡ የሥልጣኔ ለውጥ ጋር ተያይዞ ለሚፈጠሩ አዳዲስ ጉዳዮች አግባብነት ያላቸው ዝርዝር የሕግ ድንጋጌዎችን መቅረጽ ያስፈልጋል፡፡ ይህን ለማድረግም፣ ቁርአንና *ሱናሕ* መሠረትነታቸው እንደተጠበቀ ሆኖ፣ ሸሪዓ በኢጅቲሓድ አማካይነት ተራዝሞና ተዘርዝሮ ከጊዜ ሒደትና ከማህበረሰብ የሥልጣኔ ለውጥ ጋር ተያይዞ የመጡ ዘርፈ-ብዙ ችግሮችና የሕግ ጭብጦች ምላሽና መፍትሔ የሚሰጡ የሕግ ማዕቀፎች ሊዘረጉለት ይገባል፤ በውጤቱም ሸሪዓ ተለማጭነቱና ቀጣይነቱ ሊረጋገጥ ይገባል፡፡ ስለዚህ፣ ኢጅቲሓድ በንድፈ-ሐሳባዊም ሆነ በተጨባጭ አመክንዮኣዊ እሳቤ አስፈላጊነቱ የማይካድ ነው፡፡[42]

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[37] ቁርአን፡- 4፡59፣ የቅዱስ ቁርአን የአማርኛ ትርጉም፣ ሸህ ሰይድ ሙህመድ ሳቢቅ እና ሐጅ ሙህመድ ሳኒ ሀቢብ፣ ነጃሺ አሳታሚ ድርጅት፣ 1997 ዓ.ል.

[38] Kamali, Principles, *supra* note 13, p. 373

ሌሎች ቀጥተኛ ያልሆኑ፣ ነገር ግን በተዘዋዋሪ መንገድ የኢጅቲሓድ አስረጂነትን (የሕግ ምንጭነትን) የሚያስረዱ *(ዘዋሒር)* በርካታ የቁርአን አንቀጾች ይገኛሉ፡፡ ከእነዚህም መካከል፣ በ*ሱራሕ አሉ-ተውባሕ* (9፡122) በጦርነት ጊዜ ሁሉም የሕብረተሰቡ ክፍሎች መውጣት እንደሌለባቸው፣ ይልቁንም የመዋጋት አቅም ባይኖራቸውም እንኳ ወደ ኋላ ቀርተው የኃይማኖት እውቀት ማጥናት *(ሊየተፈቀሑ ፊ ዲን)* እንዳለባቸው ይደነግጋል፡፡ በተመሳሳይ፣ እነዚያ በኛ መንገድ ላይ የሚታገሉ/የሚጥሩ *(ወ ለዚነ ጀሓዱ ፊና* - 29፡69) የሚለው አገላለጽ ሃይማኖታዊ ጥናትና ምርምርን ያካትታል፡፡ ከእነዚህና መሰል የቁርአን አንቀጾች *(ዘዋሒር)* ላይ በመነሳት ኢጅቲሓድ ቁርአናዊ መሠረት እንዳለው ሊቃውንት ያስረዳሉ፡፡

[39] Sunan Abu Dawud (Hasan's Trans.), Vol. III, Hadith No. 3585 and 3585.

[40] Kamali, Principles, *supra* note 13, pp. 373-374

[41] Ibid., p. 374

[42] Ibid.

6. የኢጅቲሓድ ተከፋፋይነት

የኢጅቲሓድ ተከፋፋይነት ሲባል በአንድ የሸሪዓ ሕግ መስክ ላይ ብቻ የእውቀት ባለቤት የሆነ ግለሰብ፣ ባጠናበት ዘርፍ ላይ ብቻ ኢጅቲሓድ ማድረግ የሚችል መሆኑን የሚያመለክት ጽንሰ-ሐሳብ ነው፡፡ ከፊቅሕ የሕግ ዘርፎች መካከል፣ ለምሳሌ፣ በውርስ ወይም በንግድ ሕግ ላይ ልዩ አጥኚና ተመራማሪ በመሆን *ሙጅቲሒድ* መሆን ይቻላል፡፡ ይህ ማለት በአንድ የፊቅሕ መስክ *ሙጅተሒድ* ሆኖ በሌሎች ላይ *ሙቀሊድ* መሆን የሚቻል ከመሆን ጋር ተያይዞ የሚነሳ ጭብጥ ነው፡፡ ብዙኃኑ *ዑለማእ*፣ ኢጅቲሓድ ተከፋፋይ አይደለም፤ ስለሆነም ኢጅቲሓድ ማድረግ የሚችለው ሊቅ በሁሉም የሸሪዓ ሕግ ዘርፎች ላይ ሰፊና ጥልቅ እውቀት ያለው፣ ሁለ-ገብ ምሁር መሆን ይገባዋል የሚል አስተያየት አንጸባርቀዋል፡፡ ከብዙኃኑ በተለየ፣ ጥቂት የማሊኪ፣ የሀንበሊ እና ዚሒሪ ሊቃውንት ደግሞ ኢጅቲሓድ ተከፋፋይ ነው በማለት ይከራከራሉ፡፡[43]

የኢጅቲሓድ አንድነት ሐሳብ ምናልባት፣ በቀደምት የሙስሊም ሥልጣኔዎች የማህበረሰቡ እድገት ደረጃ ውስብስብ መስተጋብሮች ያልነበሩት ከመሆኑ አኳያ አግባብነት ሊኖረው የሚችልና፣ አንድ *ሙጅተሒድ* በሁሉም የሸሪዓ መስኮች ላይ ብቁ ምሁር መሆን ይችል ይሆናል፡፡ ይህ በራሱ አከራካሪ እንደሆነ ቢታወቅም የኢጅቲሓድ አንድነት ሐሳብ ባለንበት ዘርፈ-ብዙና ውስብስብ የሕብረተሰብ ሥልጣኔ ደረጃ ላይ ከፍተኛ የመረጃ ፍሰትና ቴክኖሎጂ ምጥቀት ባለበት የሉላዊነት የዓለም ተጨባጭ ላይ አንድ ግለሰብ በሁሉም ዘርፎች እውቀት እንዲኖረው የማይጠበቅ መሆኑን ከማሊ ያስረዳሉ፡፡[44] በተጨማሪም፣ ከታች እንደተብራራው *ሙጅተሒዶች* ከኢጅቲሓድ ከሚያደርጉበት የእሳቤ እርከን አኳያ፣ መስራች/ቀዳሚ ኢጅቲሓድ *(ኢጅቲሓድ ፊ ሸሪዕ)*፣ በ*መዝሓብ* (የሸሪዓ ት/ቤቶች) ሥር ያለ ኢጅቲሓድ፣ የአፈጻጸም/ልዩ ኢጅቲሓድ በተሰኙ ምድቦች የሚመደቡ መሆኑ፣ ለኢጅቲሓድ የተከፋፋይነት ሐሳብ ላይ የተገነባ መሆኑን ከማሊ አክለው ይገልጻሉ፡፡[45]

እውቀትን ኢስላማዊ ማድረግ *(Islamization of Knowledge)* የዘመናችን ታላቁ የሥነ-እውቀት ንቅናቄ ነው፡፡ ይህ የምሁራን ንቅናቄ፣ ቁሰ-ዓለማዊ የሳይንስ እውቀት በኢስላም እውቀት ማዕቀፍ ሥር (*Tawhidic Epistemology)* እንደገና የሚያድግበት የጥናትና ምርምር ጅማሮ ነው፡፡[46] በተለያዩ ሳይንሳዊ የእውቀት ዘርፎች በመታገዝ የሕግ ቁጥጥር የሚያስፈልጋቸው ተጨባጭ ሕብረተሰባዊና ሃገራዊ ችግሮች ላይ ዝርዝር የሕግ እና የአፈጻጸም ሥርዓት ለመዘርጋት በሁሉም የሳይንስ መስኮች ላይና የሕግ ዘርፎች ላይ ባለእውቀት መሆን የማይታሰብ ነው፡፡

በይዘቱ አዲስ (ኦርጅናል) እና ፍሬያማ ምርምር ለማድረግ ሁሉም የእውቀት ዘርፎችን ከማማተርና ከመነካካት አንዱን በጥልቀት ማጥናትና (ማድማት) ለሕግ ምርምር የበኩሉን እሴት በመጨመር *ሙጅተሒዶች* ምሁራዊ ግዴታቸውን መወጣት ይገባቸዋል፡ ፡ ስለዚህ የኢጅቲሓድ ተከፋፋይነት ከዘመኑ ሉላዊነት እና ሁለንተናዊ የመረጃ ሥርጭት እውነታ አኳያ የሚደገፍና ተመራጭ የሆነ ሐሳብ ነው፡፡ *ሙጅተሒዱ* የአንድ ሳይንስ ልዩ እውቀት ባለቤት ከመሆን በተጨማሪ የሸሪዓ ሕግ መርሆዎችና ዘዴዎች *(ኡሱል)* የተካነ መሆን ይገባዋል፡፡ ይህ ሲባል በሁሉም የዝርዝር ሕግጋት ክፍሎች *(ፊቅሕ)* ላይ ጥናት ማድረግ አለበት ማለት ሳይሆን ለሕግ ምርምር የሚረዳውን መሠረታዊ የሕግ መሠረተ-ሐሳቦችና መርሆዎች እውቀት ከያዘ በኋላ በአንድ የእውቀት መስክ ላይ ብቻ *ሙጅተሒድ* ሊሆን ይችላል፡፡[47]

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[43] Ibid., p. 378

የኢጅቲሓድ ተከፋፋይነትን ሐሳብ ከሚደግፉ ሊቃውንት መከካል አቡል ሁሰይን አል-በስሪ፣ አል-ገዛሊ፣ ኢብን አል-ሁማም፣ ኢብን ተይሚያሕ፣ እና ተማሪዎቻቸው ኢብን አል-ቀይም እና አሽ-ሸውካኒ ይገኙበታል፡፡ (ከማሊ፣ ገጽ፡. 378-379)

[44] Ibid., p. 379

[45] Ibid.

[46] Rosnani Hashim & Imron Rossidy, Islamization of Knowledge: A Comparative Analysis of the Conceptions of AI-Attas and AI-Faruqi, Intellectual Discourse, 2000, Vol. 8, No I, pp. 21-22. See also: Osman Bakar, The Identity Crisis of the Contemporary Muslim Ummah፡ The Loss of Tawhidic Epistemology as its Root Cause, Islam and Civilisational Renewal, Vol 3 No 4: July 2012.

[47] በኢጅቲሓድ ሥርዓት ውስጥ የሕግ ሊቃውንት *(ሙጅተሒዶች)* በአንድ የሳይንስ እውቀት ሊኖረው ስለማይችል የመስኩን ድጋፍ ማግኘት የግድ ይሆንበታል፡፡ ይህ በእንዲህ እንዳለ፣ በየሳይንስ መስኩ ያሉ ምሁራን ደግሞ ኡሱል ግንዛቤ እስካላቸው ድረስ በየጥናት ዘርፋቸው ኢጅቲሓድ ማድረግ የሚችሉ መሆኑን እንረዳለን፡፡ ከዚህ አንጻር ኢጅቲሓድ ሁለት ቅርጽ ሊይዝ ይችላል፡- የሕግ ኢጅቲሓድ እና የሳይንስ እውቀት ኢጅቲሓድ፡፡ የሕግ ቁጥጥር በሚያስፈልጋቸው ማህበራዊ፣ ኢኮኖሚያዊ፣ ፖለቲካዊ ጉዳዮች ላይ አግባብነት ባለው የሳይንስ እውቀት ላይ በመመርኮዝ፣ በእውቀት ላይ የተመሠረተ ሕግ መቅረጽ ይቻላል፡፡ ለዚህም የሕግ ተመራማሪዎች *(ሙጅተሒዶች)* ለሕግ

7. ማጠቃለያ

የሸሪዓ ምንጮች በጥቅሉ ራዕያዊ (ተገለጸ) እና አመክንዮኣዊ (በምርምር የተደረሰበት) በሚል በሁለት ሊመደብ ይችላል፡፡ ራዕያዊ የሸሪዓ ምንጮች የሚባሉት አንደኛው፣ በቀጥታ ከአምላክ ወደ ነቢዩ *ሙሀመድ* የተገለጸው መለኮታዊ ራዕይ - ቅዱስ ቁርአን ሲሆን፣ ሌላኛው ደግሞ በፍሬ-ሐሳባዊ ምንጩ ከአምላክ ሆኖ አገላለጹ የሙሀመድ የሆነው፣ *ሱናሕ* ነው፡፡ ሦስተኛው የሸሪዓ ምንጭ *ኢጅቲሓድ* ነው፤ ይህም የቁርአንና የ*ሱናሕን* ይዘት መሠረት አድረጎ በቀጥታ ያልተሸፈኑ ጉዳዮች በአመክንዮኣዊ የሕግ ትንታኔ የሚሸፈኑበትን የምርምር ዘዴዎች የሚመለከት ነው፡፡ በመጀመሪያዎቹ የሸሪዓ እድገት ዘመናት የተመሠረቱት የሕግ ት/ቤቶች የተቀረጹት የ*ኢጅቲሓድ* ንድፈ-ሐሳቦች አጠቃላይ የቁርአንን የሕግ ፍልስፍና የሚወክሉ ሲሆን፣ ንደፈ-ሐሳቦቹ ዘመንና ትውልዶችን ተሻግረው በየወቅቱ ለሚነሱ አዳዲስ የሕግ ጭብጦች የሕግ መፍትሔ ለማበጀት መንደርደሪያ በመሆን ያገለግላሉ፡፡ በተለይ በቁርአንና በ*ሱናሕ* ተለይተው የተቀመጡ ዝርዝር ድንጋጌዎች በቁጥር አናሳ በመሆናቸው፣ እና ቁርአንና *ሱናሕ* በዋናነት የሕግ ጠቅላላ መርሆዎችን የሚያቀርቡ በመሆኑ፣ ዘርፈ-ብዙ የሕግ ርዕሰ-ጉዳዮችን ለመግዛት ዋነኛው ሸሪዓ ምንጭ የሊቃውንት *ኢጅቲሓድ* ሆኖ እናገኘዋለን፡፡ እንደ ቀደምት የ*መዝሃብ* መስራቾች፣ በቀጥታ ከቁርአንና ከ*ሱናሕ* በመነሳት ኦርጅናል የሕግ መርሆዎችንና ድንጋጌዎችን መቅረጽ የሚችል የለም የሚል እሳቤ የዓለምን የሙስሊም ማህበረሰብ ለውድቀት የዳረገ፣ ለቀደመው የሸሪዓ እሳቤዎች ጭፍን ተገዥ *(ሙቀሊድ)* እንዲሆን ያደረገ፣ እንዲሁም የሸሪዓን እድገት የገታ መሠረት አልባ የሕግ ባህል ነው፡፡ የሸሪዓ ምሁራን ይህን ተጨባጭ እውነታ ለመቀየር እና የቀደመው የ*ኢጅቲሓድ* ባህል በሕግም ሆነ በልዩ ልዩ የሳይንስ መስኮች ላይ ያለው ከፍተኛ የምንጭነት ሚና እንዲያንሰራራ ርብርብ በማድረግ ላይ ይገኛሉ፡፡ ጥረቱን ተከትሎ፣ በሙስሊም ሃገሮችና ሙስሊም ዜጎች የሚገኙባቸው የዓለም ሃገራት፣ ሸሪዓን ከወቅቱ የሙስሊም ማህበረሰብ አስተሳሰብና ነባራዊ እውነታ አኳያ እያጋጠሙ ላሉ አዲስ ጭብጦች እልባት ለመስጠት እና ነባር ድንጋጌዎችን ለማሻሻል ሲባል ሸሪዓዊ የሕግ ምርምር *(ኢጅቲሓድ)* በተለያየ ደረጃ ተግባራዊ በማድረግ ላይ ይገኛሉ፤ በተለይም *ኢጅቲሓድ* የሚያደርጉ እና ወቅታዊ የሸሪዓ ጥናት የሚያደርጉ ከፍተኛ የትምህርት ተቋማት ጀምሮ እስከ አስገዳጅ ወይም ምክረ-ሐሳብ የሚያቀርቡ የ*ሙጅተሒድ* ምክር ቤቶች፣ ብሎም በሕግ አውጪ ደረጃ፣ ተቋማዊ ቅርጽ አግኝቶ ተግባራዊ እየተደረገ ይገኛል፡፡

ፍ/ቤቶችና ዳኞች ራሳቸውን በማሻሻል የሕግ አረዳዳቸውና አተረጓጎማቸው ከዘመኑ *ኢጅቲሓድ* እድገት ጋር እንዲጣጣም ማድረግ፣ በተለይም የሸሪዓን ተለማጭነት በመረዳት ከሃገራችን ማህበረሰብ እና ከሚቀርቡ ልዩ ጉዳዮች አንጻር *ኢጅቲሓድ* ማድረግ ይችሉ ዘንድ ራሳቸውን በእውቀት የማብቃት ሥራ መስራት ይገባቸዋል፡፡ በተጨማሪም፣ ከሕገ-መንግሥታዊ ሰብዓዊ እሴቶች ጋር ተጻራሪ ናቸው የሚል ሥጋት በተፈጠረባቸው የሸሪዓ ቤተሰብ ድንጋጌዎች ላይ አስፈላጊውን *ኢጅቲሓዳዊ* ማሻሻያዎችን ለማምጣትና እና በዚህ ረገድ ወጥ የሆነ የሸሪዓ አተረጓጎም እንዲኖር ይቻል ዘንድ አንድ ማዕከላዊ የሸሪዓ *(ኢጅቲሓድ)* ምክር ቤት ወይም ብሔራዊ የ*ኢጅቲሓድ* ጥናትና ምርምር ማዕከል ማቋቋም ለችግሩ አይነተኛ መፍትሔ እንደሆነ አንደ ሱዳን፣ ማሌዥያ እና ፓኪስታን ያሉ ሃገሮች ተሞክሮ ያሳያል፡፡[48]

የሸሪዓ ጠቅላይ ፍ/ቤት በበታች ፍ/ቤቶች ያለውን የሕግ አተረጓጎም ወጥ በማድረግ፣ እንዲሁም አስፈላጊውን *ኢጅቲሓድ* በማድረግ ማሻሻያ አዳዲስ የሕግ ምልከታዎች ሊዘርጋ የሚችል ቢሆንም፣ ከይግባኝ በዘለለ የሰበር *ሥ*ልጣን ያለው ስለመሆኑ የሚያመላክት የሕግ አንቀጽ በሸሪዓ ፍ/ቤቶች ማጠናከሪያ አዋጅ አልተመለከተም፡፡ ያም ሆኖ የበላይ ሸሪዓ ፍ/ቤቶች የይግባኝ *ሥ*ልጣናቸውን በ*ኢጅቲሓድ* የተመራ የሕግ አተረጓጎሞችን በመከተል ተግባራዊ ካደረጉት የሰበሩን ያህል የአስገዳጅነት ደረጃ ባይኖረውም ሸሪዓ ሕጉን ከወቅታዊ ሁኔታዎች ጋር በማጣጣምና የዳኞች የ*ታቅሊድ* እሳቤዎችን በማረም፣ እንዲሁም ወጥ አተረጓጎም በማስፈን ረገድ የራሱ የሆነ አስተዋጽኦ ይኖረዋል፡፡

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*መ*ርሆዎችና ዘዴዎች በተጨማሪ በአንድ ማህበራዊ፣ ኢኮኖሚያዊ፣ *ፖ*ለቲካዊ አጀንዳ ላይ የመጨረሻውን የሳይንስ እውቀት *መ*ሠረት በማድረግ ሕግጋትን ይቀርጻሉ፤ ያስፈጽማሉ፤ ይህ ማለት በአንድ የሳይንስ መስክ ላይ ጥልቅ እውቀት ሊኖራቸው ይገባል ማለት ነው፡፡ በዚህ የጥናት ሂደት ሕግ እና ሌሎች የሳይንስ መስኮች ተቆራኝተው የሚጠኑበትን አቀራረብ ይመለከታል፤ ለምሳሌ፣ ሕግ እና ኢኮኖሚ፣ ሕግ እና ጤና፣ ሕግ እና ቤተሰብ/ግለሰብ ወዘተ. ሁለተኛው *ኢጅቲሓድ* ቅርጽ ፍጹም ሳይንሳዊ የሚሆንበት ነው፡፡ እዚህ ላይ የ*ኢጅቲሓድ* ሚና ተገቢነት ያለው የሕግ ማዕቀፍ በመዘርጋት የግልና የሕብረተሰብ ባህሪና ምግባር *መ*ግራትና *መ*ምራት አይደለም፡፡ ይልቁንም ሳይንሳዊ እውቀት ኢስላማዊ *መ*ሠረቱን ሳይለቅ እና በኦሪጅ ተደግፎ እንዲያድግ ለማድረግ የሚያስችል ምርምር ነው፡፡ ይህ የ*ኢጅቲሓድ* ገጽታ እውቀትን ኢስላማዊ ማድረግ *(Islamization of Knowledge)* እየተባለ በሚጠራው አዲስ ኢስላማዊ-ሳይንሳዊ የእውቀት ምርምር ላይ ዋነኛው የምርምር *መ*ሣሪያ ነው፡፡

[48] Kamali, Sharia Law, *supra* note 8, p. 175, 237 & 253

በተጨማሪም፣ በሸሪዓ ፍ/ቤቶች ሊኖር የሚገባው ሒጅራህድ እንቅስቃሴ፣ በከፍተኛ የትምህርት ተቋማት የሸሪዓ ጥናትና ምርምር ሊታገዝ ይገባል፡፡ በኢትዮጵያ የኢትዮጵያ የሕግ ሥርዓት ውስጥ ሸሪዓ ሕግ የነበረው ድርሻ፣ የየማህበረሰቡን የግልና የቤተሰብ ግንኙነት እንዲገዛ እና በዚህ ረገድ የሚነሱ ግጭቶች በሕጉ አማካይነት እንዲዳኙ ካገኘው አስገዳጅ ሕገ-መንግሥታዊ እውቅና በተጨማሪ፣ መንግሥት የሙስሊሙን ማህበረሰብ የወለድ-ነጻ የባንክ አገልግሎት ፍላጎት ለማርካት የተከተለውን አበረታች የፖሊሲ ውሳኔ ተከትሎ፣ የኢትዮጵያ ብሔራዊ ባንክ በ2011 (እ.አ.አ) ባወጣው *መመሪያ መሠረት*፣[49] በሃገሪቱ እየሰሩ ያሉ ንግድ ባንኮች የወለድ ነጻ አገልግሎት እንዲያቀርቡ ሕጋዊ የፈቃድ አሰጣጥ ሥርዓት ተዘርግቷል፡፡ በመመርያው በግልጽ እንደተመለከተው፣ የባንክ ሥራውን በመምራትና በመቆጣጠር ተፈጻሚ የሚሆነው ኢስላማዊ የፋይንስ ሕጎች እና ወጥ አሠራር ደንቦች እንደሆነ ተመልክቷል (አንቀጽ 2(2))፡፡ ይህም ሸሪዓ በኢትዮይያ የሕግ ሥርዓት ተፈጻሚ የሚሆንበትን ወሰን አስፍቶታል፤ ወደፊትም የዘርፉን እድገት ተከትሎ የተፋጸሚነት ወሰኑ እየሰፋ እንደሚሄድ መገመት ይቻላል፡፡ ቤተሰባዊ ግኙነቶችን እና ኢስላማዊ የባንክ ግብይቶችን የሚገዛው የሸሪዓ ሕግ ዋነኛ ምንጭ የአመክንዮኣዊ የሕግ ምርምር ወይም ሒጅራህድ እንደሆነ በዚህ ጽኑፍ አጽንኦት ተሰጥቶታል፡፡ ታዲያ የሸሪዓ የፍርድ ሥርዓቱን እና የወለድ ነጻ የባንክ ሥራውን በማጠናከር፣ በማሻሻል እና በማስፋፋት ረገድ፣ እንዲሁም ሒጅራህድና ሌሎች የሸሪዓ ምንጮቸን ከሃገራዊ እና ማህበረሰባዊ እውነታዎች ጋር አጣምሮ በማጥናት ተግዳሮቶችን መለየትና መፍትሔዎችን በመጠቆም ረገድ የከፍተኛ የትምህርት ተቋማት ቀዳሚውን ድርሻ ሊይዙ ይገባል፡፡

በኢትዮጵያ ዩኒቨርሲቲዎች ያለውን የሸሪዓ ሕግ ትምህርት አቀራረብ ስናይ፣ የኢስላም ሕግ (*Islamic Law)* አማራጭ የትምህርት አይነት *(elective course)* ተደረጎ ለቅድመ-ምረቃ የሕግ ተማሪዎች በመሰጠት ላይ ይገኛል፡፡ የሸሪዓ የፍትሕ ሥርዓቱን ሉሱል እና ፊቅሕ ጥናቶች በሰለጠኑ ባለሙያዎች ይመራ ዘንድ፣ እንዲሁም የወለድ-ነጻ የባንክ ቁጥጥሩ እና አገልግሎቱ በሰለጠነ የሰው ኃይል መራመድ ይችል ዘንድ ከጀርባ ያለው የሃገራችን የከፍተኛ ትምህርት ሥርዓት ተፈላጊውን ብቁ ባሙያዎች ማቅረብ ይጠበቅበታል፡፡ በሕግ ትምህርት መስክ የሚሰጠው የሸሪዓ ሕግ ትምህርት በይዘቱም ሆነ በአቀራረቡ *መሠረታዊ* ማሻሻያ ሊደግርበት ይገባል፡፡ ስለ ሒጅራህድ ምንነትና መገለጫዎች፣ እንዲሁም ለዝርዝር የቤተሰብ እና የፋይናንስ ሕጎች *መሠረት* የሆኑ የሸሪዓ *መሠረተ-ሐሳቦች* የሚያጠናው *ሉሱል ፈል-ፊቅሕ (Islamic Jurisprudence)* እውቀት ዘርፍ ራሱን ችሎ ሊቀርብ ይገባል፡፡ የሸሪዓ ኢስላማዊ የግልና የቤተሰብ ሕግ *(Islamic Personal and Family Law)*፣ እና የፋይናንስ ዝርዝር ሕጎች ጥናት *(ፊቅሕ) (Islamic Finance and Banking Law)* ደግሞ ከሉሱል ጥናት ተነጥለው ለብቻቸው የሚሰጡበት የትምህርት ቀረጻ የቅድመ-ምረቃ የሕግ ትምህርት ሥርዓት አካል ቢደረግ በዘርፉ በተጨባጭ እያጋጠሙ ያሉ የብቃት እና የሰለጠነ የሰው ኃይል እጥረት ችግሮችን ማቃለል ይቻላል፡፡

[49] Directives to Authorize the Business of Interest Free Banking, Directive Number SBB/51/2011. Available at: http://www.nbe.gov.et/pdf/directives/bankingbusiness/sbb-51-11.pdf, Accessed on 10th April, 2017).

Jimma University Legal Aid Center 2019/2020 Report: The Success Stories and Challenges

Beki Haile Fatansa, Director of the Legal Aid Center

Introduction

It is believed that peoples' right to human rights in general and rights to due process, fair and right to speedy trial and hearing in particular, should not depend on an individual's pocket power. On the other hand, justice has never been equal for the rich minority and the poor majority as they are unable to hire a lawyer for their case. What makes the problem bad to worse is that it is women, children, prison inmates, HIV/AIDS victims, and veterans who are unable to seek and enforce their basic constitutional and human rights.

Jimma University School of Law Legal Aid Center hereinafter 'JUSL-LAC') was established to nut out the gap between access to justice and indigence as its main objective among others. Although it is a long-aged experience in the developed world to help the poor by establishing such kind of centers, JUSL-LAC is the first of its kind in South, Southwest, and West Ethiopia, and is one of a handful number of pioneers in the nation.

In addition to the academic staff of Jimma University School of Law and the full time employed lawyers for the centers outside of Jimma town, JUSL-LAC runs its daily business by utilizing clinical students and volunteers who study law at the University. Each volunteer and the clinical student is expected to contribute four hours per week and academic staff members are expected to handle and supervise clients' cases.

Currently, JUSL-LAC is rendering legal services at ten centers in Jimma Zone namely, *Jimma main office, Jimma Woreda Court, Jimma High Court, Jimma Zone prison administration, Agaro, Gera, Shabe, Dedo, Kersa, and Omo Nada,* and is keen to keep up the already started good work. JUSL-LAC is also on the verge of opening three new centers in *Manna, Limu Seka, and Sokoru Woredas.*

1. **Background**

Jimma zone is one of the largest zonal administrations in Oromia regional state with an estimated total population of three million. Half of the total population are women. Jimma University (hereinafter 'JU') is a public higher educational institution established in December 1999 by the amalgamation of Jimma College of Agriculture (founded in 1952) and Jimma Institute of Health Sciences (established in 1983) to contribute its best to the academia world and serve the population of the zonal administration in many spheres. The two campuses are located in Jimma city 335 km southwest of Addis Ababa with an area of 167 hectares.

Jimma University is Ethiopia's first innovative Community-Oriented Education Institution of higher learning. In line with this philosophy, Jimma University School of Law Legal Aid Center (hereafter JUSL-LAC) was established based on the unanimous decision of the Academic Commission of the then Law Faculty (now School of Law) on Dec 25, 2008, primarily with the vision of providing free legal services to indigents and *vulnerable groups like the poor, women, veterans, HIV/AIDS victims and children in and around Jimma town on one* hand, and to expose students Law School to the practical aspect of the law on the other hand.

Justice is the major concern of our democracy that we cannot take for granted. Our laws guarantee basic rights and protection for all of us – not just those who can afford to hire a lawyer. The Constitution also requires that justice should be available without unnecessary delay. By contrast, we usually find family cases in which women's rights are violated, children abused by trafficking and domestic ill-treatments, and other classes of the society adversely affected by the system. On the contrary, the people have failed to defend the injustice, and even when they want to do so, they face many tackles. These problems resulted because of the deep-rooted financial problem the society is drenched in. Indeed, vulnerable people who have the means to pay for a lawyer also face the problem of getting access to justice. Providing free legal service to these vulnerable groups means the difference between food on the table and hunger, life and death penalty, shelter and homelessness, economic stability and insolvency, productive work, and unemployment.

The initiative to establish JUSL-LAC came up because of this apparent growing need of our society to have access to justice. The Civil Procedure Code and FDRE Constitution have

attempted to help the poor to have access to justice by allowing suit by pauper and bestowing the right to get appointed council respectively.

But this attempt alone does not suffice to watch justice in motion. First, allowing suit by pauper in a civil matter by itself alone is not a guarantee to have access to justice. It simply means that one can bring his/her claim to courts without paying court fees. Although it is one step in creating access to justice, it is way far from creating access to justice in its full sense. The person should be able to effectively defend his/her rights upon initiating a civil suit. This can be done if the person gets legal support even after s/he institutes her claim. In civil matters, our laws (like the laws of other nations) do not provide a duty that the government shall appoint a counsel for a needy person in civil matters. Therefore, the attempt to create access to justice for the needy in civil matters is very limited.

Secondly, the Constitutional guarantee that accused persons have the right to be represented by a state-appointed counsel if they do not have financial means and thereby a miscarriage of justice may happen is hampered by the government's limited resource. Besides, the law provides legal assistance when the accused has no sufficient financial means – it does not address other vulnerable groups such as women, children, HIV/AIDS victims, veterans, and disabilities who are usually underserved. Therefore, the constitutional guarantee to ensure access to justice in criminal matters is hampered by a lack of resources and a comprehensive focus on all types of vulnerability. It is to achieve these objectives that the JUSL-LAC is established.

Apart from helping the society, the JUSL-LAC would help the students to know how the law is being practiced. Law students should be able to acquire practical knowledge to be able to serve society in the future and be able to cope up with the dynamic world under a tornado of change. Traditionally, law students were not exposed to the practice of law. This had been making the students unable to live up to what is expected from them. The Justice and Legal Systems Reform Institute of Ethiopia (which is renamed the Federal Justice and Legal Research and Training Institute in 2018) has also noticed this problem and has spearheaded the inclusion of practical courses in the Ethiopian Law School Curriculum.

For prospective law graduates, trying to serve society without having a glimpse of the legal practice could be like trying to walk while you don't have one leg. Providing free legal service to

society without equipping graduates of law with practical legal knowledge would not solve the legal problems of the society in the long run. Doing so would be like '*hitting a snake on the tail – not on the head'.*

Indeed, creating access to justice for the needy should be coupled with producing competent legal professionals who work in the justice system. The last decade's practice in legal education in Ethiopia shows that law students were being taught merely based on theory. In this type of legal education, it is difficult to produce law graduates who understand the legal problems of society and who put their effort into solving those problems rather than watching as a passerby. When graduates are theory-based, they will have a reduced capacity to create access to justice and play a role in the democratization process of the nation.

Indeed, this is why the vision of JUSL-LAC should be both creating access to justice for the needy and equipping law graduates with practical legal knowledge. The experience law students acquire by working at JUSL-LAC would make them agents of change in the Ethiopian legal system, and would give them the exposure to see legal problems of the society ahead and makes them aspire to solve the problems upon their graduation.

To remedy the problems stated in the above paragraphs, and reach out to the ardent hope and fervent desire of the society, a further justice for all initiative is still required. The best, actually the prominent, initiative is to employ the ripe and talented skill of the Junior lawyers, law school instructors, and students to cast this prevailing problem aside. Thus, organizing to make use of this skilled manpower by sustaining, the existing centers, and opening new legal aid centers has paramount importance in the lives of hundreds of thousands of people JUSL-LAC aspires to serve.

Having these multifaceted goals JUSL-LAC has been rendering its cherished legal service at eleven centers including the one at the head office. Initially, service delivery was started by opening two centers at Jimma Zone High Court and Jimma Woreda Court. However, the number of centers was increased to *six* in the year 2003 E.C by opening new centers in Agaro, Dedo, Serbo, and Jimma Zone Prison Administration. In 2008 EC new centers have been opened at Gera, Omo Nada, and Shabe Woreda courts. Currently, the center has a total of ten (10) centers

2. Organizational Structure of the Center

To enable the center to attain its objective and contribute effectively to the furtherance of access to justice, the organizational structure of JUSL-LAC was framed to different structures. On top of the organizational structure is the director who is empowered to supervise the day-to-day activities and operation of the Center. Under the director, there are two vice directors, one vice director for service provision and quality management with the power and the duty to manage and coordinate the different activities of the Centers and the other vice director for research and capacity building with the power and duty to direct and conduct capacity building activities for service providers, beneficiaries, and organs involved in the administration of justice; to direct and conduct researches related to the vision and mission of the Center, and to conduct promotions about the availability of free legal service and build the public image of the Center.

3. Partners

JUSL-LAC is currently working with Addis Ababa University Center for Human Rights, Ethiopian Human Rights Commission, Oromia Supreme Court, and Oromia Justice Bureau as its partners. Addis Ababa University Center for Human Rights is working on Joint Project with the center as a funder on Human Rights Protection and Promotion, while the Ethiopian Human Rights Commission has also been the main funder of the center. The Oromia Supreme Court also supports the center with service delivering offices and some finance. Oromia Regional State Attorney General supports the center by giving and renewing of advocacy license.

4. Linkages with the Stakeholders

To be effective, legal aid service requires the cooperation and coordination of various stakeholders. Accordingly, JUSL-LAC has many stakeholders with which its cooperations are vital in the accomplishment of the center's objectives. Accordingly, Jimma zone high court, different woreda courts, Jimma zone Justice office, different woreda justice offices, Jimma zone prison administration, police offices, woreda labor, and social affair offices, women and children affairs offices, Ethiopian human rights commission Oromia branch office and kebele administrations are among the main stakeholders with which JUSL-LAC has a linkage.

5. The Services provided by the Center

There are three main activities that JULAC provides. These are legal services, legal education and research, and capacity building.

1. Legal Services

These services are those services which in one way or another connected with justice sectors and administrative government organs. Through its legal services, the Center provides the following major services to its clients

- Free Legal Counsel
- Writing Statement of Claim
- Writing Statement of Defense
- Writing r different applications to the court and other organs
- Advocacy (Representation before the court)
- Mediation (with the view to reaching amicable solutions)

So far the Center is offering these legal services to the population in its ten (10) service centers located in seven towns (Dedo, Serbo, Agaro,Shebe, Gera,Omo Nada, and Jimma). In six of the service centers, at Dedo, Serbo Shebe, Gera,Omo Nada and Agaro, the Center has managed to employ a junior lawyer to run the services. The Center however relies on School of Law students to run the services at Jimma Woreda Court, Jimma zone High Court, and Jimma Zone prison Administration. The students are assisted by the academic staff of the School. The Center's office located in the JU Main campus functions as a coordinating center for all the services and functions.

2. Legal Education (Awareness Raising Program)

The Center understands that majority of abuses and human rights violations suffered by the vulnerable parts of the population are the result of a lack of awareness especially of the rights of these groups. Accordingly, it strongly believes that ensuring respect for their rights can better be realized through effective and broad-based community legal education programs. Thus far the Center has relied on the Jimma University Community Radio in which it has been able to run

four hours-long awareness-raising program per week in two languages (Amharic and Afan Oromo) but there are critical limitations both in terms of the structure, breadth, effectiveness and sustainability of running the program through this medium.

Accordingly, different laws related to Prisoners' Rights, Child and Woman's Right, Human Rights Laws, Procedural law and Self-Advocacy skill, Oromia Land Law, Family Law, Law of Property and Succession, Employment and Labor Law, Tort Law, Anti-Corruption Law, Administrative law and good governance, Law of Contracts and Commercial Laws have been broadcasted through the community radio to enhance the society's basic knowledge on those subject matters.

The Center also aims to run the program effectively by utilizing various available means and media such as community organizations, centers, and other channels with broad audiences but this requires the availability of adequate financial and infrastructure (including transportation) supports.

On the other hand, the center has been providing legal awareness in the court compound morning from 2:30-3:00 twice a week and many people have become beneficiaries of the incidental legal awareness while waiting for the court adjournment.

However, the awareness creations at community gatherings and in the court compound have been canceled due to the COVID-19 pandemics in the fourth quarter of the year. As result, the center primarily relies on the community radio program to reach out to the community.

3. Research and Capacity Building

Legal service and legal education programs at the Center must be supported by appropriate evidence. Research is therefore a critical part of its strategic approach as it helps to identify the need and areas of focus for its services. Besides, it also helps engage with the community and stakeholders in addressing the problems more effectively and sustainably. Also, research also plays a crucial role in empowering and building the capacity of the community, stakeholders, and the Center itself in dealing with the root causes of the problem of human rights violations and lack of access to justice to the vulnerable members.

Thus far there is no baseline research conducted not just in Jimma Zone but in the whole country in relation to the state of need for free legal aid service. There is also no standard developed in relation to providing the service. In fact, the level of awareness of the idea of free legal aid and its role is at a critically low level in the Country. The Center aims to address these problems by using research and capacity building as its strategic approach. To this end the following are areas in which the Center needs strong support for its areas of activities

- organizing thematic and generic conferences and workshops and training programs
- publication
- conducting a baseline survey for legal aid service need in Jimma Zone
- developing standards and guidelines for the provision of services

In this regard, due to high budgetary constraints, the center has only managed to develop standards and guidelines for service provision and publication of pamphlets.

6. Service Delivery Mode and Service Quality Management System

JUSL-LAC employs different modes of service delivery. The service delivery model varies purposely to attain the objectives of the center, which are community services and equipping law students with practical skills. For centers found in Jimma city, JUSL-LAC uses fourth and fifth-year law students to deliver the services and in those centers outside of Jimma town, the center uses junior lawyers as they are at a distant place from the university.

Besides, the center also uses volunteer law school staff and licensed lawyers. The center doesn't compromise the service quality and employs different service quality controlling mechanisms to these ends. Accordingly, the center has a daily and weekly meetings with the students and it has also developed a strict reporting mechanism.

7. Summary of overall activities

The JUSL-LAC service shows tremendous progress from time to time in quality and accessibility and currently, thousands are benefiting from the service of the center annually. Resisting all the challenges it faced, the center has managed to reach 5,691(Five Thousand Four Hundred Ninety-One), excluding the awareness creation program through community radio. The

service distributions were counseling 501, ADR/ mediation 26, document preparation 1280, and representation 125, and awareness creation in the court compound 3759. Out of the total cases it represented and disposed of by the court, the center won the majority of it while some cases are still pending. The cases the center won were represented and litigated by fifth-year law students in four centers existing Jimma town and legal experts of the center working in six woredas. The service fee the center provided is estimated to 8,236,500 (Eight million two hundred thirty-six thousand Five Hundred Birr). The winning rate of the center is 99.5 %. This is mainly due to the fact clients who come before the center have strong cases but lack only the financial capacity to litigate before the court. An estimated 460,000 peoples have benefited from the Radio program and over 2,000 brochures were distributed on various legal issues. The types of the services rendered and the beneficiaries together with the centers that have provided the legal service have been summarized as follows.

Type of legal Service	**Jimma Woreda**	**Jimma High Zone**	**Head Office**	**Jimm Zone Prison**	**Agaro**	**Serbo**	**Dedo**	**Gera**	**Shebe**	***Omo Nada***	***Total***
Counseling	12	13	31	5	64	38	45	115	7	171	**501**
ADR	-	-	6	-	-	6	4	8	-	2	**26**
Awareness Creation	-	-	-	200	144	2107	102	830	-	378	**3759**
Documents	40	22	115	11	304	135	120	152	36	345	**1280**
Representation	51	15	12	6	12	5	4	16	-	4	**125**
Total	103	50	164	222	524	2291	275	1121	43	898	**5691**

7.1. Subject matters on which legal awareness education has been delivered through JUFM

Based on the assumption that at least 10% of the population the FM Radio reaches would listen to the broadcast, the total number of beneficiaries are estimated to be about 460,000.

No.	Subject Areas Broadcasted	Languages of Broadcasting		Total hours of broadcasting
		Afan Oromo	Amharic	
1	Promotion of the center and the project	2	2	4
2	The Rights of persons with disability	2	2	4
3	Human Trafficking	2	2	4
4	Labor Law	4	4	8
5	Child Rights	2	2	4
6	The rights of women	2	2	4
7	Bail Rights	3	2	7
8	Prisoners' Rights	2	2	4
9	Economic, social and cultural rights	3	4	7
10	Civil and Political Rights	3	3	6
11	HTP and the rights of women and children	2	2	4
12	COVID-19 and Human rights	2	2	4
13	State of Emergency proclamation on Covid9	2	2	4
14	Covid-19 and Consumers Rights	2	2	4
15	Labor rights amidst COVID-19: With Focus on Unlawful Termination	2	2	4
16	Protection of the Rights Available to Persons Under	2	2	4

	Custody			
17	Protection of Women's and Children's Right Amidst COVID 19	4	3	7
18	Regulation of Inflation of Price in some Basic Goods and Rights of Customers Amidst COVID-19	2	2	4
Total		43	42	85

7.2. Some of the Cases the Center Represented and Won in 2018/19

Our center, in its different centers, has represented hundreds of cases on behalf of its clients some of which are disposed of while the rest are still pending. The numbers of cases have been increasing year to year and this year too. In the year 2019/2020 alone, until the time of the report about 80 cases have been decided in our favor. These cases were those whom our fifth-year law students and lawyers in different centers have represented the clients and won at Jimma Woreda Court, Jimma Zone High Court, Agaro Woreda Court, Kersa Woreda Court, Shabe Woreda Court, and Omonada Woreda Court. *The followings are some of the cases entertained by the center:*

S.N	Name of the client and the story of his case	Sex	Type of the case	Court entertained	File no.	Judgment/award
1	**Haji A/Fogi** ✓ Our client was a farmer whose land has been taken forcefully by the defendant ✓ Our Center represented him in the litigation claiming for the cessation of the unlawful intrusion	M	Property	Karsa Woreda Court	53624	It is adjudicated that our client is entitled to the two plots of land that has been unlawfully taken from him.

2	**Abdulaziz A/Dura** ✓ Abdulaziz was denied his right to succeed his late father by the rest co-heirs ✓ As soon as he approached our center, our lawyer prepared pleadings and represented Abdulaziz on the litigation	M	Property, Succession	Karsa Woreda Court	51972	Disposed totally in our favor and the client is entitled to the succession of his father legatee (7 plots farmland about 50 seeds of coffee)
3	**Sore Saman** ✓ Sore was a young lady who gave birth to a child without being in a wedlock ✓ The claimed father disown the baby and is not interested in providing maintenance ✓ Our center takes the case to court claiming a proof of paternity and then for an adequate maintenance	F	Family	Gera Woreda Court	13903	The defendant is declared to be the father of the baby and he shall provide maintenance
4	**Abdalla Tarfasa** ✓ Abdella was a permanent worker at the defendant's office ✓ The defendant terminated the contract unlawfully ✓ Our Center represented him in the litigation claiming different payments against the employer (defendant)	M	Labor	Gera Woreda Court	13080	Disposed totally in our favor and the client is entitled to an award of **13000** Birr.
5	**Ahmed Shifa** ✓ Ahmed was a farmer whose land farm has	M	Property,	Gera Woreda	12988	Mr. Ahmed is entitled to get

	been taken by the government in 2000 EC and for which they gave him land that belongs to another person as a replacement. ✓ Later the real possessor of the land appears, sues him in a court of law, and took the land under Ahmed's possession. ✓ Then, Ahmed approached our center and we direct our suit towards the government bureau which has taken his land 10 years ago.		Land	Court		another replacement land or an equivalent amount of compensation.
	Abdulkerim Awol ✓ Our client was a Bajaj driver who causes a car accident that resulted in the death of the victim. ✓ Our center represented him on a criminal bench as his defense attorney	M	Criminal	Goma Woreda Court	27443	Our client also is found guilty based on the evidence there, we were able to reduce the sentence from 5 to 4 and 15000 ETB to 3000 ETB.

7.2. Challenges

Despite the challenges surrounding it, JUSL-LAC is rendering exemplary community service and equipping law students with practical skills. Several challenges hinder the center's service delivery. The followings are the major challenges, among others.

- ❖ Financial Constraints - the existing finance is not sufficient, timely, and is not sustainable
- ❖ High turnover- there is a high turnover of center lawyers due to a very low salary
- ❖ Transportation – lack of adequate transportation for students and supervisors
- ❖ Lack of phone service- particularly for center lawyers to communicate with their clients

- Absence of secretaries- specifically outside Jimma city where lawyers are carrying out the legal service and other jobs (particularly typing and reporting) lonely
- Busy schedule- from the coordinators of the center and the service providers, compared to the increasing number of service seekers
- Lack of responsiveness from some stakeholders

Summary

The center is providing legal services such as counseling, preparation of pleadings, and representation on litigations for children, women who are victims of domestic violence, peoples living with HIV, people living with disabilities, etc. Besides, the center admits students for clinical courses and externship programs and they acquire basic knowledge of the practical world. Moreover, the center is providing basic legal education to hundreds of thousands of residents of Jimma Zone via Jimma Community FM Radio. Capacity building training is also one of the functions of the center to enhance the knowledge of the center lawyers.