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MESSAGE FROM THE EDITORIAL COMMITTEE

The Editorial Committee is delighted to bring Volume 7, No. 2 of *Bahir Dar University Journal of Law*. The Editorial Committee extends its gratitude to those who keep on contributing and assisting us. We are again grateful to all the reviewers, the language and layout editors who did the painstaking editorial work of this issue.

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

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

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

Disclaimer

The views expressed in this Journal do not necessarily reflect the views of the Editorial Committee or the position of the Law School.

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Legal and Practical Aspects of Divorce, Compensation and Liquidation of Pecuniary Relation between Spouses: A Case Study in SNNPRS Courts

Nigussie Afesha[*]

Abstract

Family is the natural and fundamental unit of a society. Marriage is one of the essential ways to form a family and it is usually concluded with the assumption that it will last a lifetime. However, in reality, many marital relations end up with divorce. The legal process of divorce, at a minimum, involves filing of petition and making financial arrangements. This article examines the practices of courts regarding divorce, compensation and liquidation of property with specific reference to courts in the Southern Nations, Nationalities and Peoples' Regional State (SNNPRS) of Ethiopia. To this end, a qualitative research approach has been undertaken using case review, observation, and literature and legislative reviews methods. The overall tendency observed in the courts is that the rules governing divorce, liquidation of property and determination of compensation are not consistently applied. Most of the courts have developed their own definition of what constitutes fault and how they assess the amount of compensation. There is a wrong association between faults and modes of compensation and inconsistency in assessing the extent of the damage and its equivalent compensation that ranges from 52% to 66% of the common property for the same kind of fault. Such variations also existed in the process of liquidation of property. There are problems in identifying a personal and common property. In one case, the court makes the income obtained during the marriage a personal property, and in another case, the court decided a property, which is given to one of the spouses by donation as a common property of the spouses. In a few cases, the court decided that property, which belongs to a third party, as the common property of the spouses. In a different case, the court pends division of common property arguing that

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such properties are useful for the upbringing of children. Most decisions of the courts lack precision, which in turn expose the spouses for further litigation.

Keywords: Common property, divorce, family law, marriage, personal property

Introduction

'Family' has been understood as an essential element to a complete human life.[1] It is of great legal interest because of the decisive role it has historically played in raising and socialization of children and in mutual economic support of its members.[2] In this sense, family is considered as "the natural and fundamental unit of a society."[3] Among others, marriage is one of the ways to form a family.[4] Moreover, the institution of marriage is found in all human societies "without which there would be neither civilization nor progress."[5] For this reason, several marriages are entered into with a belief that the relationship will last a lifetime.[6] Nevertheless, several marriages end up in divorce, i.e. it may be dissolved when spouses agree to divorce by mutual consent[7] or either or both of the spouses petition for divorce.[8] Divorce is a personal decision, which can be done without the approval of social institutions like the church or the mosque or even with the objection of the other spouse.[9] Since divorce ends the marital relation, to formally end

[1] Bruce W. Frier & Thomas A.J. McGinn, *A Casebook on Roman Family Law*, Oxford University Press, Inc., New York, 2004, [Hereinafter Frier & Thomas A Casebook on Roman Family Law]

[2] *Id*.

[3] See, for example, The Constitution of Federal Democratic Republic of Ethiopia, Proclamation 1/1995, *Federal Negarit Gazette*, 1995, Article 34 (3), [hereinafter referred as, the FDRE Constitution].

[4] Frier and McGinn, A Casebook on Roman Family Law, *supra* note 1, at. 25

[5] Shoshana A Grossbard-Shechtman, *Marriage and the Economy Theory and Evidence from Advanced Industrial Societies*, Cambridge University Press, Cambridge, 2003, [hereinafter, Grossbard-Shechtman, *Marriage and the Economy Theory*].

[6] Lloyd Cohen, Marriage, Divorce, and Quasi Rents; Or, "I Gave Him the Best Years of My Life", *The Journal of Legal Studies*, Vol.16 No. 2, 1987, p. 267 [hereinafter, Marriage, Divorce, and Quasi Rents]

[7] See for example, SNNPRS Family Code, Article 85 (a), Proclamation No 75/2004, DEBUBE. Neg. Gaz., 9th Year, No. 8, 2004, [hereinafter, SNNPRS Family Code].

[8] *Id*., Art., 85(b).

[9] Alison Clarke-Stewart & Cornelia Brentano, *Divorce: Causes and Consequences*, Yale University Press, New Haven and London, 2006, p. 12, [hereinafter, *Divorce: Causes and Consequences*].

such a relationship, it is likely pronounced by court.[10] The legal process of divorce, at a minimum, involves two main steps: filing for divorce and making financial settlements.[11]

This article examines practices of courts regarding divorce, determination of compensation and liquidation of property in line with pertinent provisions of the Revised Family Code of 'the Southern Nations, Nationalities and Peoples' Regional State (SNNPRS) of Ethiopia. This study employed doctrinal legal research method. To this end, a qualitative research approach has been undertaken using case review, observation, and literature and legislative reviews to depict the practices that courts in SNNPRS follow in handling cases that involve divorce, determination of compensation and liquidation of property. Three first instance courts and one high court from SNNPRS were selected based on purposive sampling to access family benches and courts with a larger number of family related cases. The cases analyzed in this study were selected using simple random sampling.

To meaningfully address the issues, the remaining part of this article is organized into three sections. Section 1 explicates the conceptual and theoretical foundations of divorce. Section 2 deals with issues related to compensation that follows the pronouncement of divorce. It presents the practices that courts in SNNPRS follow to determine the existence of a fault and assess compensation for the victim spouse. Section 3 uncovers the mechanisms of liquidation of property. The last section puts forward conclusions drawn from the study and outlines ways forward.

1. Divorce: Its Types and Process

Marriage presupposes, relatively, a long-term union of a man and a woman.[12] Despite this fact, several marriages break up due to divorce. A marriage will subsist if and only if both spouses are willing to continue with their union. This implies that the dissatisfaction of one of the spouses might

[10] James J. Gross and Michael F. Callahan, *Money and Divorce: The First 90 Days and After*, Sphinx Publishing, United States of America, 2006, p. 21. [hereinafter, *Money and Divorce: The First 90 Days and After]*

[11] Clarke-Stewart & Brentano, Divorce*: Causes and Consequences*, *supra* note 9, at. 60.

[12] O.A Odiase-Alegimenlen, Same Sex Marriage at the Middle of Western Politics, *Oromia Law Journal*, Vol. 3, No.1, 2006, p. 263.

suffice to end the marital relation. In this sense, divorce is the legal dissolution of a marriage.[13] Divorce may be fault based or no-fault based. Under no-fault divorce,[14] fault need not be established in court and acts of misconduct need not be proven.[15] On the other hand, when divorce is fault-based,[16] one spouse asserts that the other spouse is responsible for the breakdown of the marriage.[17] In this case, there is a need to produce evidence to prove that the grounds of divorce that are required by law are fulfilled. The need to prove the occurrence of grounds of divorce acts as a deterrent to divorce and reflects an understanding that marriage being a serious undertaking should not be dissolved easily.

In Ethiopia, several regional state family codes adopt no-fault divorce.[18] No-fault based divorce, which is recognized in several regional state family codes, is of two kinds: divorce by mutual consent and divorce by petition. In the words of these regional state family codes, a marriage may be dissolved when the spouses agree to divorce by mutual consent and such agreement is accepted by court,[19] or it may be dissolved upon petition which is made to the court by both or one of the spouses.[20]

Under divorce by mutual consent, which would allow a husband and wife to enter into a private divorce agreement without the official involvement of a

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[13] Lloyd Cohen, Marriage, Divorce, and Quasi Rents, *supra* note 6, at. 274.

[14] "The concept of no-fault divorce was also introduced early on in the communist world. Lenin's government in Russia declared freedom of divorce soon after coming to power in 1917. It was seen as the counterpart to freedom of marriage. Both kinds of freedom were regarded as aspects of the freedom of individuals. The Russian Family Code of 1918 introduced "mutual consent of both spouses as well as the wish of one of them" as grounds for divorce. Article 18 of the Russian Family Code of 1926 carried this freedom of divorce even further by allowing that application to the Civil Registry for a letter of divorce". See, Patrick Parkinson, Family Law and the Indissolubility of Parenthood, 18 (Cambridge University Press, New York, 2011).

[15] Lloyd Cohen, Marriage, Divorce, and Quasi Rents, *supra* note 6, at. 274.

[16] "Under a fault system, divorces could not be consensual and a divorce could be defended and defeated. When a fault-based system of divorce was the exclusive method of obtaining a divorce, evidence for formally proving grounds, for example, cruelty, desertion, or adultery was critical." (See, Sanford N. Katz, Family Law in America, 78 (Oxford University Press, New York, 2011).

[17] Lloyd Cohen, Marriage, Divorce, and Quasi Rents, *supra* note 6, at. 274

[18] Revised Family Code, 2000, Art., 77(3) &81(3), Proclamation No 213/2000, Fed. Neg., Gaz., (Extra ordinary issue) Year 6, No. 1, 2004 [hereafter Revised Family Code], SNNPRS Family code, Article, 86(3) &90(2), Amhara Regional State Family code, 2003, Art., 88(3) & 92(2).Proclamation No 79/2003, ZIKRE HIGE, 8 Year, No. 3, 2003 [hereinafter, Amhara Regional State Family Code].

[19] SNNPRS Family Code, Art.85 (a).

[20] *Id*., Art. 85(b).

court, spouses can agree to dissolve their marriage without establishing any grounds for divorce.[21] In such a case, both spouses are expected to reach an agreement on how their possessions are divided and debts will be settled as well as how their children are going to be raised and their maintenance issues.[22] For some couples, settling these issues are so easy that they can accomplish it in a single meeting, but for others, it may take several meetings.[23] A mere mutual consent, which is disclosed by spouses to end their marriage, does not automatically dissolve a marriage. Rather, since family is the natural and fundamental unit of society and is entitled to protection by society and the government, the state and the society intervene and try to save the marriage.[24] They engage in reconciling the spouses and circumventing possible symptoms of intention to divorce. The government has also a stake over the marriage so that it exerts substantial effort to save it from dissolution through the courts.

It is for this reason that the SNNPRS courts have been spending ample time to counsel spouses to renounce their request for divorce. In this regard, the court may talk to the spouses jointly or separately as the situation demands to convince them in order to change their mind.[25] One may ask if spouses have the option to be heard in the public court or in camera. In most courts, divorce proceedings are conducted in public sessions. On this point, it has been observed in one of the courts in the study area that the court asked the spouses' consent to conduct the divorce proceedings in camera or in public. If one of the spouses prefers the sessions to be in camera, then the court dismisses the audience and then proceeds to persuade the spouses to withdraw their application for divorce. This helps the spouses speak out their ground of divorce in private freely and resolve their disagreements amicably.

Conversely, if the spouses insist on pursuing divorce in public sessions and the court believes that there is no possibility of renouncing their intention to

[21] Clarke-Stewart & Brentano, *Divorce: Causes and Consequences*, *supra* note 9, at.11.

[22] As rule, spouses are expected to agree on not only on the divorce but also in all its consequences. However, it is possible for spouses to agree on the divorce alone and leave the rest of the issues for the court's decision

[23] Duncan, Roderic, *A Judge's Guide to Divorce: Uncommon Advice from the Bench*, Consolidated Printers Inc., USA, 2007, p. 26

[24] The FDRE Constitution, Art 34(3).

[25] SNNPRS Family Code, Art. 91(1).

divorce, the court may direct the spouses to settle their dispute through arbitrators of their own choice.[26] At this stage, the court requests the spouses to mention the names of arbitrators of their choice.[27] The court, upon receiving the names of the arbitrators, write summons to the chairperson of the arbitration and give a direction as to how they should proceed and how long the arbitration should take. Pursuant to this direction, the chairperson submits the report including the new developments in the meeting with the spouses. However, if the attempts to persuade the spouses to withdraw their petition for divorce, or solve their dispute through arbitrators of their choice fail, the court will dismiss them giving a cooling period of not more than three months.[28] There are variations across the courts on the duration of the cooling periods that range from a couple of days to a month. If all these efforts bear no fruit to save the marriage, the court shall pronounce divorce within one month from the receipt of the reports of the arbitrators, or at the end of the cooling period, as the case may be.[29] Though these are the procedural requirements set by the SNNPRS Family Code, there are courts which go an extra length and give a chance for the spouses to solve their disagreements amicably even after the lapse of the cooling period.[30] Although there is no procedure requirement that compels courts to give additional chance for the spouses to solve their disagreements amicably even after the lapse of the cooling period, the courts are doing this pursuant to the constitutional provision that requires the courts to work and protect the family.[31]

Unlike divorce by mutual consent, divorce by petition does not guarantee a peaceful separation since both of the spouses or one of them may state in the petition the reasons for divorce and try to show on whose fault the marriage

[26] *Id*., Art. 91(2). Unlike the 1960 Ethiopian Civil Code, the new family codes (RFC of the regional family codes have changed the roles of the family arbitrator in family disputes. According to the new family codes "the roles of family arbitrator is only that of reconciliation" (See, Tilahun Teshome, Reflections on the Revised Family Code of 2000, *International Survey of Family Law,* 153, 2002, p. 170 [hereinafter, Tilahun, Reflections on the Revised Family Code of 2000]

[27] SNNPRS Family Code, Art. 91(2).

[28] SNNPRS Family Code, Art. 91(3).

[29] *Id*., Art. 91(4).

[30] Information obtained during the field survey through observation at Hawassa First Instance Court which took place from October to November 2015.

[31] FDRE Constitution, Art. 34(3).

is dissolved. In this case, the court should request the spouses to agree on the conditions of divorce.[32] Where the spouses could not agree on the conditions of divorce, the court shall, through arbitrators, experts appointed by it, or by any other means it thinks appropriate, decide on the conditions of divorce.[33] The conditions of divorce agreed upon by the spouses or decided by arbitrators or experts shall be submitted to the court for approval.[34] In this manner, after making the necessary examination of the conditions of divorce submitted to it, the court decides on conditions of divorce.

Following the divorce pronouncement by the court, if the cause of divorce is attributable to one of the spouses and where justice so requires, the court may order such spouse to make good the damage sustained by the other spouse.[35] Thus, a spouse who sustains damage due to the faults of the other spouse could be awarded more than half of the marital property or ten thousand *birr* contingent upon the nature of the fault committed.[36] The coming section highlights how compensation is awarded following divorce.

2. Compensation and its assessment under the SNNPRS Family Code

The Family Code of the SNNPRS contains the grounds on which compensation can be claimed.[37] The logical extension of this idea is that, in order to get the remedies available, the claimant is required to prove that the respondent has committed fault and the fault resulted in damage. And such damage should be a kind of harm recognized as fault which attracts liability. The fault, which is a ground for claiming compensation, is a breach of duty fixed by the law for spouses that imposes liability on a spouse who causes the damage and its breach is redressable primarily by awarding damages.[38] The family law does not cover every type of harm. In other words, the mere fact that the acts of one spouse has caused harm to another does not in itself

[32] SNNPRS Family Code, Art.93 (1).

[33] *Id*., Art. 93(2).

[34] *Id*., Art. 93 (3).

[35] *Id*., Art. 94 (1).

[36] *Id*., Art. 95(2) (3).

[37] *Id*., Art. 94(2).

[38] *Id*., Arts 94, 98 and 99.

give the victim spouse a right to sue.[39] Compensation will be granted for reasons which are typically mentioned in the Family Code. If the claimed action does not contain a fault recognized under the Family Code, there will not be compensation. The issue is, therefore, when is compensation granted under the SNNPRS Family Code?

2.1 Compensation Following Divorce

A compensation claim arises when one of the spouses or both of them petition for divorce and mention the occurrence of a fault that drives the spouses to seek the divorce. In fact, spouses are not required to state their reasons in their divorce application. Conversely, if one of the spouses or both of them mention a reason in the petition for divorce and can prove it, s/he will be entitled to redress.[40] Damage caused to the victim may take several forms including physical injury, injury to reputation, damage to economic interests and others. To award compensation, a victim spouse must prove that the damage s/he sustains is due to the fault(s) of the other spouse. For the purpose of this sub-section, a spouse is at fault if s/he violates a personal obligation of a spouse owing to the marriage (marital obligations).[41]

The family law often refers to marital obligations of the spouses in very general terms. These terms (such as obligation to support, respect and assist, cohabit, obligation to owe fidelity and other) seem to be ambiguous and need comprehensive explanations to determine what conducts of the spouses are included in and excluded from the terms under discussion against which violation of the spousal obligation (occurrence of fault) can be judged. The mandate to determine whether a certain act amounts to violation of personal effect of a marriage is left for courts.[42] However, issues of ascertaining the violation of specific personal effects of marriage have not received sufficient

[39] For instance, if a spouse who has agency power goes beyond this mandate, s/he will be responsible for any damage the other spouse sustains. Such spouse will be responsible for any kind of damage the other spouse sustains. However, the aggrieved spouse will be barred from claiming compensation for acts of abuse of agency power which has been performed five years before the dissolution of the marriage. Id., Art. 98.

[40] *Id*. Art.94(1).

[41] SNNPRS Family Code, Arts. 94(2).

[42] The SNNPRS Family Code has empowered the Regional State Council to issue regulation (Id. Art. 338) that supports proper interpretation and enforcement of the Family Code. However, this has not been complied with so far. This gives the strength to argue that courts are by default empowered to give meaning for vague words of the Family Code.

attention.[43] If courts continue to assess compensation without ascertaining the meaning of each obligation, they will reach an erroneous conclusion. Furthermore, courts must determine whether the allegation of the spouse is a type of conduct recognized by law as a fault that warrants compensation. Hence, compensation will be granted only for reasons typically stated in the SNNPRS Family Code as a fault.[44] The logical extension of this argument is that courts could award compensation for spouses who prove the existence of a fault and resulting damage.

2.1.1 Faults Recognized by SNNPRS Family Code

As highlighted above, in "no-fault divorce" system, spouses who seek divorce are not obliged to prove the occurrence of a fault and to whom the fault attributes. In this regard, Tilahun states that "the notion of fault-based divorce has been reduced to a position of insignificance."[45] But when mentioned, the fault should be the reason and a cause of divorce to invoke it as a ground to claim compensation.[46] Thus, the spouse who sustains damage due to the faults of the other spouse could be awarded compensation corresponding to the nature of the fault committed by the other spouse.

At this juncture, it should be noted that the fault stated above should be associated with violation of the personal effects of marriage.[47] Personal obligation of spouses that marriage confers on married couples could be so many. However, the law recognizes some of the obligations that are unique to and flow from the institution of marriage. Importantly, these obligations cannot be derogated by the agreement of the spouses.[48] These are obligation to support, respect and assist, obligation to cohabit, obligation to owe fidelity, and obligation to joint management of the family.[49] A failure to comply with these personal effects of marriage amounts to a fault which

[43] Many of the cases examined and analyzed in this research prove that courts do not give meaning to terms, which are listed as personal obligations of spouses.

[44] This is logically inferred from the reading of Art 94 of the SNNPRS Family Code.

[45] Tilahun, Reflections on the Revised Family Code of 2000, *supra* note **Error! Bookmark not defined.**26, at. 17.

[46] SNNPRS Family Code, Arts.94 and 95.

[47] *Id*. Art.94(2).

[48] *Id*., Arts. 58(2), 61(2) and 62(2).

[49] *Id*., Arts. 58(2) to 65

warrants legal liability.[50] Hence, courts should decide the existence of a fault to warrant legal liability in the form of giving compensation by referring to the personal effects of marriage. However, there are cases where courts have imposed legal liability and compensation without verifying the occurrence of fault.

In the case of *Weyzero Meskerem Bekele v. Colonel Abebe Memihru*, the applicant alleged that the respondent abandoned her and started extra-marital relations with another woman and failed to bear household expenses.[51] The applicant made it clear that she is willing to live with him if he is keen to continue with the marital relationship. The applicant alternatively requested the court to dissolve the marriage and to award an appropriate moral compensation since he rejected the offer to reconcile and be negotiated by arbitrators of their choice and became the cause of breakup of the marital relationship. The respondent too, on the other hand, blamed the applicant for abandoning the family. As a result, the court pronounced the divorce and continued examining the moral compensation claim of the applicant. After investigating the relief sought by the applicant, the court awarded 3000 *birr* moral compensation. The court interpreted the reluctance of the respondent to reconcile with the applicant as a fault and made the respondent responsible for the breakup of the marriage.

This decision of the court begs a question – does reluctance to continue with the marriage constitute a fault that entitles to get compensation under the SNNPRS family code? This does not seem to be the essence of such family code. The main aim of the law (that governs compensation that arises from failure to comply with personal obligation of the spouses) is to compensate a victim for the harm one suffers because of the breach of a marital obligation stated under SNNPRS family code. The law seems to place greater emphasis on the kinds of fault which attracts liability along its modes of redress. In the compensation assessment, the relationship or proximity between the fault and the damage arises therefrom should be given attention. In the case at hand, however, the association between the fault and the appropriate compensation is less clear. As the marriage was established by the mutual

[50] *Id*., Art. 94(2).

[51] Weyzero Meskerem Bekele v. Colonel Abebe Memihru, Dilla First Instance ct., File No. 09662 (Decision of 28 September, 2006 E.C).

consent of the spouses, its life span depends on the willingness of the spouses. Thus, a mere reluctance to continue in the marriage does not amount to a fault leading to liability through compensation. Despite this, the above case reveals that there are instances which are practically considered by courts as fault attracting liability.[52] Counting a mere reluctance to continue in a marriage as a fault under the SNNPRS family code is an erroneous interpretation of the law.

The case went further when the applicant lodged an appeal on the amount of the compensation.[53] The appellant stated that the respondent raped her and got married while she was in grade seven forcing her to be dropped out of school and became dependent on respondent's income. In addition, the appellant submitted that she had assumed primary caretaking responsibility, fully engaged in the raising of children and hence remained unemployed. The appellant further alleged that the respondent is responsible for her school drop-out, unemployment and income situation.[54] The appellant tried to show to the court the extent of her dedication for the interest of the family and this invariably affected her future. The respondent, on his side, explained that he does not want to continue with the appellant. He contended that the amount of compensation decided by the lower court is appropriate. The appellate court finally raised the compensation to 4000 birr mentioning that the salary of the respondent appeared to be more than what was mentioned in the lower court.

The presence of fault is still contentious in this case since the applicant has not proven her claim, for instance the respondent has an extra marital relationship, with sufficient evidence. Of course, it is difficult for a married woman who was not employed outside her home and devoted her most career-productive years in the interest of the household to go to the labor

[52] One may challenge the provisions of SNNPRS Family Code dealing with compensation. A reader may also ask: should compensation always be contingent up on the fault?

[53] Weyzero Meskerem Bekele v. Colonel Abebe Memihru, Gedio Zone High ct, File No. 09412 (Decision of 17 December 2006 E.C).

[54] The appellant also clarified to the court that the respondent has no reason to dissolve the marriage and he insisted to dissolve their marriage with the intent of causing damage to her. The appellant made it clear that she is still willing to continue with him in the relationship so long as he is willing and capable of administering his home.

market and search a job. There is a possibility she may not be able to get a job. It is true that non-wage-earning mothers of young children and whose responsibilities as primary caretakers limit their career choices and their development faces similar risks. It seems with this assumption that the court, considering the realities of scant property and limited earning potential that homemaker mothers may have, adopts the notion that a homemaker mother needs nominal compensation. In doing so, the court seems to ameliorate the financial pain of lost support though the court fails to establish the existence of fault in the case.

However, the court is expected to examine and determine what kind of act that constitutes fault appears in this case. It must begin by examining the cause of the breakup of the marriage and whether a violation of personal effects of marriage is involved in the case. This is because compensation is awarded if one of the spouses proves a violation of personal effects of marriage and this is solely the cause of the breakup of the marriage. The mere act of applying for divorce and reluctance to continue with the conjugal relationship would not constitute as fault and make the respondent responsible for the dissolution of the marriage. Both the trial and appellate courts look at the hodgepodge of factors, weighing them in an unspecified and unsystematic fashion and make the respondent responsible for the dissolution of the marriage. It seems, from the case, that the wife is claiming for post-divorce maintenance which is something not recognized under our family law(s).

2.1.2 The Nexus between Fault and its Modes of Compensation

It is highlighted above that a fault of a spouse is viewed from failure to comply with personal effects of marriage. It is also apparent that the remedies will be decided based on the type of fault committed by a spouse. For this reason, the law goes to categorize faults that emanate from violation of personal effects of marriage into two categories. The first category is a fault that arises from a failure to carry out one's obligation to support, respect and assist.[55] The second category of fault is a fault which arises from spouses' failure to comply with their obligation to cohabitation without a

[55] SNNPRS Family Code, Arts. 94(1) (a) cum with 95(2 and 3).

good cause or/and infidelity to each other.[56] Both categories of fault entitle an aggrieved spouse to different kinds of remedies.[57] These remedies may be compensation that does not exceed birr 10,000 or awarding a higher portion of the common property.[58] In the case where the first category of the fault is committed, a victim spouse will get compensation that does not exceed ten thousand *birr*. On the other hand, the court may award higher portion of the property to the victim from the common property in case the second category of fault is committed.[59]

This shows that the kinds of compensation are deeply intertwined with the kind of fault. For this reason, when courts entertain a family case that involves a claim for compensation, it is necessary to decide whether there is a fault or not, into which category the alleged faults fall and then determine the appropriate remedy. However, not all courts are curious about these procedures. For example, in a case where a victim spouse proves a violation of the duty to respect, support and assist, courts award a higher portion of the common property. Similarly, there are cases where courts awarded a higher portion of the common property without proving that one spouse violates his/her obligation to cohabit or owe fidelity intentionally to hurt the other spouse. The following four cases may be examined to substantiate the position.

In a Weyzero Tadelech Alaro v. Ato Gulilat Tefera case, brought before Hawassa First Instance Court, the applicant submitted that their decent marriage of seven years was recently marred by respondent's extramarital affairs (bigamous marriage) and violation of his obligation to respect, assist and support.[60] Hence, she requested for divorce as well as ten thousand *birr* moral compensation and a higher share of the common property since the divorce is completely attributable to the defendant's fault. The defendant in his response insisted that he does not have a valid marriage with the applicant except a short-lived irregular union. He also denied the bigamous marriage and violation of his duty of fidelity. Finally, the court found out

[56] *Id*., Arts. 94(1) (b and C) cum 95 (3).

[57] *Id*., Arts. 95.

[58] *Id*.

[59] *Id*., Art. 95 (3).

[60] Hawassa First Instance ct, File No. 00804 (Decision of 12 May, 2006 E.C).

that the respondent concluded a valid marriage with the applicant and bigamous marriage with another woman. Nevertheless, the court has said nothing on the claim of the applicant that says that the respondent violated his obligation to respect, assist and support. However, the court awarded the applicant 3000 *birr* and 1/8 (roughly 12%) of the communal property of the spouses. The respondent violated his obligation to cohabit and owe fidelity to his wife. For this reason it can be argued that there is sufficient reason for awarding compensation that does not exceed *birr* 10,000 or a higher portion of the common property but not both. This is because the court may award a higher portion of the property to the victim from the common property in case a spouse who violated his obligation to cohabit or owe fidelity may intentionally hurt the other spouse.

The second case was also entertained by the same court.[61] In this case, the applicant alleged that she was in a marital relationship with the respondent for over 12 years. She also stated that, as time went on, the behavior of the respondent changed and he frequently threatened, and rampantly disrespected and sometimes beat her. Consequently, the applicant requested the court to award reasonable moral compensation alleging the respondent was responsible for the breaking up of the marriage.

The respondent denied the claim that he should take the blame for the breakup. He further illustrated that the applicant had extra-marital affair with another man and she usually insulated him and arbitrarily abandoned her home. The court, reviewing her inability to rebut the allegation made against her and the evidence produced to prove her allegation, decided that the applicant is the cause of the dissolution of the marriage and made her responsible for the breakdown of the marriage. In addition, the court awarded 3000 *birr* moral compensation for the respondent.

While rendering this decision, the court hardly mentioned any provision of the SNNPRS Family Code for awarding such amount of compensation to the respondent. The court neither established a nexus between the fault and the mode of compensation nor indicated the kind of fault committed by the applicant and how the compensation was computed.

[61] Weyzero Chalitu Huka v. Brihanu Zewige, Hawassa First Instance ct, Addis Ketema, Div, File No 01026 (Decision of 29 September 2007 E.C).

Weyzero Fedila Shafi v. Ato Reshid Dalu is another case decided by the Hawassa First Instance Court in which compensation was awarded for fault which is not raised by the spouses.[62] In this case, the applicant stated that the respondent despised, disrespected and kicked her repeatedly. The applicant further stated that the respondent was reluctant to render accounts for the income he received despite the applicant's frequent requests. Finally, the applicant requested the court to make the applicant responsible for the dissolution of the marriage and award compensation including a higher share of the common property.

The respondent, on his part, alleged that the applicant left the house without having adequate reason taking some of the properties they acquired during the relationship. Moreover, the respondent argued that the claim of the applicant is untrue and improper.

The court, from the testimony of the witnesses, concluded that the applicant was exposed to domestic violence expressed in many ways. The court further stated that the respondent neither denied nor rebutted the allegation brought against him. The court drew the opinion that allegation which was not expressly denied construed as admitted and made the respondent responsible for the breakdown of the marriage. Consequently, the court awarded the applicant 8500 *birr* moral compensation stating the failure of the respondent to respect, assist and support the applicant while they were in a marriage, and 54% of the common property of the spouses stating the failure of the respondent to cohabit.

The court's decision of making the respondent responsible for the breakdown of the marriage due to failure to cohabit seems inappropriate and has no factual basis. Neither the applicant nor the witness raised this allegation. Nowhere in the decision of the court, the issue of cohabitation was framed and analyzed either. However, the court entitled the applicant to take 54% of the common properties following the division of the communal property. This triggers the question of how the court gets the power to award 54% moral compensation in the absence of allegation and testimony on the

[62] Weyzero Fedila Shafi v. Ato Reshid Dalu, Hawassa First Instance ct, File No 00716 (Decision of 17/05/06 E. C).

issue of cohabitation and proof that shows the respondent fails to cohabit to intentionally hurt the applicant.

Likewise, in another case, the court made a wrong association between the fault and its corresponding remedy.[63] The case was instituted by the applicant alleging that she concluded a customary marriage with the respondent in 1996. The applicant further stated that the respondent started an extramarital affair with another woman with whom he has been cohabiting. In conclusion, the applicant requested the court to award an appropriate moral compensation and declare dissolution of the bigamous marriage.

The respondent argued that there was no marriage between the applicant and the respondent except a short-lived affection. He added, in the absence of marriage between the two, the applicant has no legitimate ground to challenge the current marriage that the respondent concluded with his current wife.

Following their allegation, the court allowed them to produce their respective evidence. Based on this, the court ruled that the applicant has a legitimate ground to challenge the current marriage, and this even might be the driving factor to apply for divorce. Therefore, the court also declared the dissolution of the bigamous marriage and, based on equity, awarded 5000 Birr moral compensation to the applicant. The dissolution of the bigamous marriage strengthened the allegation that the respondent had extramarital affair. Concluding of second marriage while being bound by previous marriage proves the infidelity of the respondent. In such a case, there is a possibility that the court shall redress the victim spouse by awarding a higher share from the common property.[64]

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[63] Aberash Zegeye v.Tadele Lema, HAWASSA First Instance ct, Addis Ketema, DIV., File No. 02695 (Decision of 01/06/07).

[64] SNNPRS Family Code, Art. 95 (3).The author of this piece needs to bring one thing to the attention of the readers. A claim for divorce and compensation is instituted separately from the claim for liquidation of property. It is not procedurally possible to know and quantify existence or otherwise of common property spouses at this stage: before courts resolve the issue of divorce. The presumption seems the spouse would have some common property to be divided unless this contested in oral argument during assessment of compensation.

On the other hand, the court awarded compensation for issues, which were not raised and proved by the parties, but characterized as a fault by the court's own initiative.[65] In the case of *Ato Micheal Sujure v. Weyzero Konjit Yantsera*, the applicant alleged that he concluded marriage with the respondent in accordance with Sidama culture and remained in the conjugal relationship until this case was filed before this court. The applicant further argued that the respondent failed to comply with her duty to respect, support and provide assistance despite consistent compliance of his duties. He added that the respondent was also in some extramarital affair and hence sought for divorce as well as adequate moral compensation.

The respondent stressed that she had marital relationship with the applicant. The respondent also stated that she had neither failed to fulfill her obligation to respect, support and assist her husband nor engaged in any extramarital affair, and that she never arbitrarily abandoned her family. She added that the applicant kicked her out in the midnight from her premises and he started living with another woman, which can be regarded as a bigamous relationship.

The court examined the oral contentions and the evidence produced by both sides. The court confirmed that the applicant is bound by a marriage registered in Hawassa City Municipality with another woman than the respondent. Consequently, the court declared divorce by attributing it to the respondent's fault. As the result, the court awarded 2000 *birr* moral compensation and entitled the applicant to take 52% of the common property.

The ruling of the court is based on the fact that some of the rights and obligations of the parties defined by law cannot be waived by mutual consent. However, in awarding 2000 *birr*, the court has not properly analyzed whether or not the other personal obligations of the spouses have been violated. It is to mean that awarding monetary compensation (2000 *birr*) without properly analyzing the occurrence of fault arising from violation of personal obligations of the spouses can be compensated in monetary terms. This implies that there is a conceptual confusion in

[65] Ato Micheal Sujure v. Weyzero Konjit Yantsera, Hawassa First Instance ct, File No. 00804 (Decision of 12 December 2006 E.C).

establishing a nexus between the kind of violations of personal effects of marriage and the kinds of damages provided by the law.

2.1.3. Assessment of Compensation

It is said above that fault is associated with violation of the personal obligation of marriage. The issue here is if one takes insulting a spouse as violation of the obligation to respect, how much money should be awarded to the victim spouse? Would it be different if it were made in public or at home? At the same time, if one of the spouses fails to give necessary care while the other spouse gets sick and if this amounts to a violation of the obligation to support, what amount of money is given to the victim spouse? How can a court assess the amount in these and other similar circumstances?

The other point that needs discussion is the issue of compensation in kind. It is clear that the court may award *"higher portion of common properties"* to the divorcing spouse who sustains damage because the other spouse violates the duties to cohabitation and fidelity intentionally to hurt the other spouse. The most difficult part of these categories of fault is that they are hard to define. When do we say a spouse haphazardly abandoned his duty to cohabit? What if s/he changes his/her work place for a better salary? What constitutes infidelity? Does concluding a *"pseudo marriage"* for the purposes of visa processing amount to infidelity? Would it be different if one of the spouses permits the other spouse to do so? Equally important, what constitutes *"higher portion of common properties"*? Is that to mean 50+1 or 65%? What are the parameters that can be used by courts? There are variations in the decisions of the courts of different levels on these points that range from awarding the smallest remedy to the largest possible amount of compensation.[66] The absence of clear and detailed guidelines on this issue contributes to such disparities in the decisions of the courts.

Of course, the law puts a general guiding principle on compensation assessment: the courts are to assess compensation based on the gravity of the

[66] That ranges 52 to 65%. See Weyzero Tadelech Alaro v. Ato Gulilat Tefera, Hawassa first instance ct, file No. 00804 (Decision of 12 May, 2006 EC), Aberash Zegeye v. Tadele Lema, HAWASSA FIRST Instance Ct, Addis Ketema, DIV., file No. 02695 (Decision of 1st February, 2007), Weyzero Filaha Tsegaye vs. Ato. Abera Amentie, Gedio Zone High ct, file No. 10303 (Decision of 2nd November 2007 E.C).

fault and equity.[67] The underlying assumption seems that the amount of compensation that is going to be given to the victim spouse depends on the gravity of the fault. If the fault is severe, the amount of compensation is likely to be higher. If the fault is manifold, this proves the gravity of the fault and increases the amount of compensation. It could even not be absurd to argue that violation of each personal obligation of spouses should be evaluated on its own and the amount of compensation is also assessed independently. However, in practice, there are variations in the courts' decisions in this regard. The following cases illustrate the disparity in the decisions given by different courts.

In *Weyzero Abebech Assefa v. Ato Mesfine Sileshi*, the applicant stated the reason to petition divorce and indicated that the respondent violated his duty to respect, assist and support, by nagging and insulting her and he failed to have lunch with her and even failed to share the household expenses.[68] The applicant also added that the respondent failed to render an account of his income. She further alleged that the respondent made it clear to her that his need to have children has been satisfied so that he does not want to continue with her any more. Elucidating all these facts, the applicant alleged that the statements of the respondent caused her psychological trauma and instigated her to petition for divorce. Finally, she begged the court to pronounce divorce upon awarding her commensurate compensation.

On the other hand, the respondent held the applicant responsible for the divorce. He stated that the applicant nagged and threatened him every time. As a result, he got fed up with her and wanted the action for divorce to be pursued. The respondent, welcoming the applicant divorce petition, claimed moral compensation alleging the applicant is the cause for the divorce as she failed to comply with her obligation to respect, support and assist.

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[67] SNNPRS Family Code, Art.95 (1) (a). For that matter, unlike the Revised Family Code (RFC), the SNNPRS Family Code clearly stipulates the existence of a nexus between the gravity of the fault and amount of compensation. Wondowosen citing Mehari claims that Article 84 of the RFC requires the need to prove the occurrence of fault on the part of the spouses to claim compensation. He extends his claim and argues that though the RFC doesn't clearly classify causes of divorce into serious and non-serious, the nature and seriousness of the cause has an effect on the division of property following divorce. See, Wondwossen Demissie, Implementation problems of the Revised Family Code, *BERCHI* , Vol. 6, 2007, p. 43).

[68] Hawassa First Instance CT, Addis Ketema, Div., File No. 02505 (Decision of 08 June 2006 E.C).

The court required the litigants to adduce evidence to prove their respective allegations. The applicant proved her allegation to the satisfaction of the court so that the court concluded that the respondent was responsible for the breaking up of the marriage and caused damage to the applicant. The court further emphasized that the respondent pushed the applicant to seek the divorce. The court, stressing all these facts, awarded the applicant one thousand (1000) *birr* with equity. One can simply ask why the court awarded 1000 birr only. Is it equitable?

The marriage seemed to be under the absolute control of the respondent. However, the facts of the case revealed the violation of multiple obligations of the spouse which are indications of the gravity of the fault. It is possible to argue that the applicant proved the violation of the obligation to respect because she was insulted and nagged; obligation to support because the respondent failed to contribute to the household expenses; the obligation to joint management of family since he was reluctant to give the amount of his income and so on. These acts of the respondent seem to be intentional exclusion of the applicant from the joint management of the family. This state of affairs resulted in constant strife and repeated disagreement between the spouses. Each of these illustrations makes it clear that the acts of the respondent led the applicant to petition for divorce. However, the court failed to appreciate all these facts and circumstances and awarded a negligible amount of 1000 *birr* compensation as stated above.

In fact, the court awarded higher compensation than this in another case, which involved violation of only a single personal obligation of a spouse.[69] In *Weyzero Terefech Tamirat v. Ato Lukas Shanka*, the applicant stated that the behavior of the respondent has changed through time and he started defaming her reputation - he told people that she is HIV positive while in reality she is a heart patient.[70] The applicant stated that, by doing so, the respondent had belittled the applicant in the eyes of members of the society and involved in compromising her reputation. As a result, the applicant was

[69] Dilla First Instance ct , File No 09522 (Decision of 28 September 2006 E.C).

[70] The applicant also revealed to the court that they made blood examination pursuant to the order of this court, which proved both of them are HIV negative. With this fact, respondent, most of the time, complained as if she has been living with the virus, made false accusation on fidelity and regularly nagged her.

forced to apply for divorce with the respondent and requested the court to award moral compensation.

The respondent, on his part, denied the applicant's allegation and made the applicant responsible for the breakup of the marriage. After examining the arguments on both sides, the court also ascertained that the respondent defamed the applicant's good name as if she were HIV positive. Then, the court ruled in favor of the applicant and awarded 4000 *birr* moral compensation. Here in this case the court failed to explain clearly in its judgment which obligation(s) is/are violated to award such an amount of compensation, be it a single marital obligation or multiple obligations. The court gave such compensation without ascertaining the occurrence and severity of the fault and its corresponding compensation. Therefore, it can be said that the courts are clearly going against the spirit of the law in awarding monetary compensations.

In another instance, that is in the case of *Weyzero Girum Alem v. Dr. Sitotaw Ababa Gare,* the court found no fault on the part of the respondent but the moral compensation awarded to the respondent can be said unjustifiable.[71] The applicant described in her statement of claim that she concluded valid marriage and had a decent relationship with the respondent for not less than ten years.[72] The applicant also admitted that the respondent was very supportive of her in all situations all these years. However, she claimed that his behaviour has changed following his move to change his work place. The applicant also explained to the court that the respondent changed his place of work for the mere reason that she underwent surgical treatment in her breast and he became reluctant to live with her. So, the applicant requested the court both monetary compensation and a higher share of the common property alleging that the respondent is the cause of the breakup of the marriage.

[71] Hawassa First Instance ct, file No 25632 (Decision of 21 August, 2004 E.C).

[72] The applicant confessed that they were loyal, listened carefully and attentively to each other and stood up on her side in all situations: he exerted his maximum effort to help her recover from her illness while she was sick, and he treated her politely that showed his affection and faithfulness towards applicant until the petition is lodged to this court. The applicant further admitted that it was with the provision of a huge amount of money by the respondent that she easily got better medical treatment abroad (Thailand). Later, after a prolonged follow up treatment at Black Lion Hospital, the applicant fully recovered from cancer.

The respondent replied to all allegations made by the applicant in detail and raised his own counterclaims.[73] The court after examining both sides' oral litigation and the evidence produced proved that the applicant failed to comply with her obligation to respect, assist, and support and owe fidelity to the respondent. The court added that the applicant did this just to fulfill her wishes rather than to cause damage to the respondent. Finally, the court ruled out that the applicant is responsible for the breakup of the marriage and should pay 8000 *birr* as moral compensation. The ruling of the court contains conceptual confusion. On the one hand, it was proved that the applicant violated her obligation as a spouse such as the duty to respect, assist, support, and owe fidelity and others. On the other hand, the court verified that the applicant did this just to fulfill her own whim rather to cause damage to the respondent. Surprisingly, the court awarded monetary compensation for the respondent. How could this be? If the court holds such kind of position, it implies there is no fault committed by the applicant and damage sustained by the respondent so that the respondent in such a case would receive no redress. No award will be made to compensate the respondent who does not sustain damage in the eye of the court.

In the case of *Weyzero Nigist Denib v. Ato Hayimanot Tado*, the court simply awarded compensation without indicating the gravity of the fault.[74] The applicant stated that the respondent insulted and beat her regularly even while she was pregnant. In her application, the applicant required the court to award 10,000 *birr* moral compensation alleging that the respondent is the cause of divorce. The respondent was in agreement with the applicant divorce petition, however, alleged that the applicant was the cause of divorce and sought moral compensation. Both the applicant and the respondent sought moral compensation. The court continued to hear their case and got convinced that the respondent was responsible for the breakup of the marriage and awarded 5000 *birr* compensation for the applicant. Here, too,

[73] The respondent explained to the court that he fully carried out his personal obligations as a spouse. The respondent also made it clear that he changed his work place and lived separately with the knowledge and permission of the applicant. The respondent proved this to the court stating the fact that the applicant was communicated from the head office, with which he was working, and that she consented to the change of his work place and to live separately for three years. It is because of this he started working at Dese branch of the organization he has been working with.

[74] Weyzero Nigist Denib v. Ato Hayimanot Tado, Dilla First Instance ct, File No. 09497 (Decision of 12 February, 2006 E.C)

the court did not mention how it assessed the amount of compensation. It is necessary to establish the nexus between the kind of fault, its gravity and the amount of compensation though the applicant's case is clearly strong.

2.2 Compensation Claim Due to the Abuse of Power of Agency

Another instance where compensation claims are brought to court, under the family law, is concerning agency power. The issue of agency power appears in marriage and is associated with the administration of personal and common property.[75] As a rule, spouses have shared and equal powers over the administration of their communal property.[76] Additionally, the consent of the spouses is a requirement for gifts, sale or mortgage of immovable or commercial enterprises and for the alienation of any assets of the common property.[77] The consent of the spouses is a requirement for the collection of prices for the sale of common properties. While the spouses have joint and several powers of administration over the communal property, the administration of specific common properties can be assigned exclusively to one of the spouses.[78] Similarly, the other spouse subject to the authorization by the owner spouse may perform exclusively the administration of personal property.[79] The delegated spouse must act in the name of the principal spouse and within the scope of his/her power.[80] If a spouse who has agency power goes beyond this mandate, s/he will be responsible for any damage the other spouse sustains. Such spouse will be responsible in the following situations.

The first situation is when the agent exceeds the scope of agency power in the administration of common or personal property. Moreover, if one of the spouses who is mandated to administer the common property or personal property of the other spouse has performed acts which adversely affect such

[75] Zekarias Keneaa, Agency Provision of the Revised Federal Family Code of Ethiopia, (Unpublished, 2006) P. 4-5

[76] SNNPRS Family Code, Art. 75(1).

[77] *Id*., Art. 77.

[78] *Id*., Art. 76.

[79] *Id*., Art. 70.

[80] Civil Code of the Empire of Ethiopia, Proclamation.No. 165/1960, *NEG. GAZ*. ETA, (Extraordinary issue) 19th Year, No. 3, Addis Ababa, 5th May, 1960, Art.2211 (2), [hereinafter, Civil Code].

spouse,[81] or if failed to collect the fruits of the common or personal property or consumed them fraudulently, such spouse is responsible for any kind of damage the other spouse sustains.

The second scenario is when one of the spouses acts as an agent without having any prior authorization.[82] Where the spouse who has performed such acts does not have the mandate or where such acts constitute acts of bad or fraudulent administration of the right of the spouse making the claim, the court may award damages to such spouse.[83] However, no claim for indemnity may be made due to acts which have been performed five years before the dissolution of the marriage.[84]

There is a case which involves compensation claim arising from the bad administration of the common property but the court failed to give compensation.[85] The applicant in the case of *Weyzero Chalitu Huka v. Ato Brihanu Zewige* instituted the case seeking liquidation of properties following a divorce pronouncement. The applicant submitted a comprehensive list of common properties along with her application. The respondent, on his part, alleged that some of the items, which are listed in the application, are already in the possession of the applicant and she should bring them for partition. The respondent, on his counterclaim, alleged that the applicant mandated to administer *women beauty salon, which* was their common property. The respondent alleged that the applicant performed acts which adversely affect his interest as well as constituted acts of bad administration while she was mandated to administer the beauty salon. The respondent, explaining these facts, required the court to award fair compensation alleging that he sustained damage as a result of the applicant's bad administration.

The court observed that the applicant had never expressly challenged her bad administration of the women beauty salon. This amounts to an admission of her bad administration of the women beauty salon, which is a common

[81] SNNPRS Family Code, Art. 98(1).

[82] *Id*.,

[83] *Id*., Art. 98(2).

[84] *Id*., Art. 98.

[85] Weyzero Chalitu Huka v. Ato Brihanu Zewige, Hawassa First Instance Ct, Addis Ketema div., File No. 1468 (Decision of February, 2006 E.C.).

property of the spouses. This makes it clear that the respondent proved the applicant's performance that adversely affected his interest. In this scenario, it is true that the applicant is responsible for any kind of damage the respondent sustained. Keeping this in view, the court overlooked the legitimate right of the respondent to get compensation and simply decided that the *women beauty salon is* the common property of the spouses and hence subject to partition. The court only entertained the division of common property *per se* disregarding the relief sought by the respondent.

2.3 Compensation Claim Due to Unlawful Enrichment

The last part that deals with compensation under SNNPRS Family Code is related to unlawful enrichment.[86] The idea of unlawful enrichment arises from the circumstances where a person derives gain from the work or property of another without just cause.[87] Therefore, a person who gets such benefit without valid grounds is required to indemnify the person at whose expense s/he has enriched himself.[88] The beneficiary of the unlawful enrichment should compensate the victim who suffered loss unlawfully to the extent s/he has benefited from his/her work or property of another.[89] Similarly, in the case where a spouse proved that the personal property of the other spouse or their common property has been misused at the expense of the other spouse's personal property, such spouse has the right to claim compensation.[90]

In one case, a personal property of a spouse has been misused at the expense of their common property though the court dismissed the claims of the applicant. The applicant instituted the suit to request liquidation of common properties following a divorce pronouncement.[91] The applicant submitted a list of common properties which includes a house and five dwelling rooms along with rental income derived therefrom. The applicant claimed that both the houses and dwelling rooms are communal property. The applicant

[86] SNNPRS Family Code, Art. 99.

[87] Civil Code, Art. 2163.

[88] *Id*.

[89] *Id*.

[90] SNNPRS Family Code, Art. 98.

[91] Weyzero Abayinesh Anjelo v. Ato Balikachew Abatineh, Hawassa First Instance ct, File No 01559/05 (Decision of 22 April, 2005 E.C.).

explained that the house was built before marriage but renewed during the marriage, so it should be considered as common property. The rooms were built during the marriage so that they are the common property of the spouses. On the other hand, the respondent argued that both the house and the rooms were made before the conclusion of the marriage with the applicant so that they are the personal property of the respondent.

The court, criticized the inconsistencies observed in the testimonies of the respondent's witnesses, and ruled that the house is the personal property of the respondent whereas the rooms are the common property of the spouses. Although there is an actual change in the house that is affirmed by the witnesses, the court overlooked the renewal of the house arguing that it is inconsequential. However, it can be argued that the personal property of the respondent was unlawfully used as the common property of the litigants. At least, the applicant has the right to get damages since the house of the respondent was unlawfully renovated by the common properties of the litigants.[92]

In other words, a spouse who sustains damage due to the acts of the other spouse will be entitled to some kind of remedy proportional to the damage. Nevertheless, a spouse who is entitled to the damages, especially spouses who are awarded compensation in kind, should wait for the process of liquidation of property. Now, one may raise a question: is establishing of fault and determination of compensation come along with a pronouncement of divorce? Moreover, is it sound to determine the amount of compensation without having any knowledge about the common property? According to the procedure the courts follow, establishing fault and determination of compensation come along with a pronouncement of divorce. It can be argued that when determining the specific percent of the property that can be awarded to the victim spouse in the form of compensation in kind, the court should know the quantity of the common property, the value of the percentage they award converted to real property. This is because sometimes even a difference of one percent may mean a lot particularly when the total

[92] The SNNPRS family code does not define what constitutes unlawful enrichment. In this case, nothing shall affect to cross-refer the relevant provisions of the civil code that deals with unlawful enrichment. Article 2162 of the civil code reads as follows: "Whosoever has derived a gain from the work or property of another without just cause shall indemnify the person at whose expense he has enriched himself to the extent to which he has benefited from his work or property."

value of the common property is high. Nevertheless, if the court determines compensation before liquidation, it cannot have accurate information about the existing common property and this may adversely affect the quality and fairness of the decision.

3. Liquidation of Pecuniary Relation between the Spouses

Divorce does not only dissolve the legal status of spouses but also dissolves financial issues that have existed between couples.[93] As the personal effects of marriage automatically cease when the court pronounces divorce, pecuniary effects of marriage remain an issue in court. This leads to liquidation of property which is one of the most important components in the divorce process. Liquidation of property focuses on issues concerning distribution of marital assets following the divorce. In this part, a detailed examination will be made regarding the rules that can be used to divide the property rights of divorcing spouses and how these rules are put in practice in courts of the study area.

Liquidation of property, in the first place, is made in accordance with the contract of marriage if any.[94] In the absence of a contract of marriage or if the contract of marriage is invalid, the court requires the spouses to mutually agree on the sharing of the jointly owned property. If the spouses agree on the distribution of their communal property, liquidation of property can be made in accordance with the agreement that could be entered into by the spouses.[95] If the spouses reach an agreement to divide all their property, they must provide a description of which spouse will receive which property. This also applies to the property that may have already been divided. If the spouses have already divided the property or it is only in one spouse's name, they must still tell the court which spouse will get which property and the value of that property. This is mainly done just to check the equitability of the property distribution between the spouses.id[96] On the other hand, if they do not have a contract of marriage and/or fail to solve this issue amicably, it

[93] Wendy Mantle, *The Handbook of Separation and Divorce*, Routledge Publisher, London and New York, 1996, P. 26, [hereinafter, *The Handbook of Separation and Divorce]*

[94] SNNPRS Family Code, Art. 96(1).

[95] SNNPRS Family Code, Art. 96(1).

[96] *Id*., Art. 101.

will be liquidated in accordance with pertinent provisions of the SNNPRS Family Code.[97] This means that the ownership by a husband or wife of a given property, be it a house, shares or money in a bank can be determined by the court.[98] Hence, the process of liquidation of the property has a number of phases ranging from identification of personal and common property spouses have to partition of common property.

3.1 Identifying the Common and Personal Property

The first task of liquidation of property starts with identifying the common and personal property of spouses. The mere fact of marriage should not affect the rights of property owners or the right to continue acquiring property for the use and benefit of the individual spouse. Spouses can have the right to continue acquiring property for the use and benefit of the individual spouse during a marriage in relation to property to which they can show sole legal or beneficial title. In fact, the law takes presumption that all property shall be deemed to be common property (otherwise called marital property which the spouses earned and acquired during marriage[99]) even if it is registered in the name of one of the spouses.[100] Consequently, marital property (community property), as the case may be, is divisible while the personal property of the spouses, on the other hand, is retained by the spouse who has the title.[101]

Therefore, spouses are expected to list out their personal and common property along with their evidence that proves their ownership allegations. There might be disagreement in listing personal and common property of the spouses. One of the spouses may list out some of the property under the common property category and the other spouse may contest this. Perhaps, after several years of marriage, it could be even difficult to ascertain who owned what before marriage and the separate assets brought into the

[97] *Id*., Art. 96(2).

[98] Wendy Mantle, *The Handbook of Separation and Divorce*, *supra* note 93, at. 26.

[99] Emily Doskow, *Nolo's Essential Guide to Divorce*, 1st edition., Consolidated Printers, U.S.A, P., 2006, p. 212 [hereinafter, Doskow, *Nolo's Essential Guide to Divorce*]

[100] SNNPRS Family Code, Art. 72(1).

[101] John DeWitt Gregory, The ALI Property Division Principles: A Model of Radical Paternalism, in Robin Fretwell Wilson (eds.), *Reconceiving the Family: Critique on the American Law Institute's Principles of the Law of Family Dissolution*, Cambridge University Press, New York., 2006, p. 166

marriage from those acquired during the marriage.[102] If there is disagreement in the process of discovering "who owns what", there are two considerations that can be used to determine this: the time when and how spouses acquired the property.[103]

As a result, all property, which a spouse acquired before or at the time of concluding the marriage, remains his or her own property.[104] At the same time, all property, which a spouse has acquired during marriage through gifts or inheritance, also remains his or her own property.[105] Moreover, those properties the spouses make personal property by their contract of agreements are also personal property of such spouses.[106] Furthermore, property acquired by onerous title during a marriage shall also remain personal property provided that the property is approved by the court to remain the personal property of such spouses.[107]

On the other hand, all property that has been acquired by either spouse during the marriage, with the exceptions of gifts and inherited property, is marital property, regardless of in whose name the property is held.[108] In this sense, the communal property includes all goods gainfully acquired by the spouses either separately or together in the course of their marriage. These also include the fruits or income derived from the goods they own personally or jointly or acquired by personal effort.[109] So, only either the property which is acquired by the spouses after their marriage by succession or donation, or the property that the spouses possess on the day of their marriage is excluded from the communal property.[110] This implies that to

[102] Clarke-Stewart and Brentano, *Divorce: Causes and Consequences supra* note 9, at. 62.

[103] SNNPR state Family Code, Art.66 to 72

[104] *Id*., Art. 66.

[105] *Id.* See also Doskow, *Nolo's Essential Guide to Divorce, supra* note 99, at. 214.

[106] SNNPR state Family Code, Art.51(1).

[107] *Id.* Art.67.

[108] Contrary reading of article 66 of the SNNPRS Family Code and article 72(1) of the SNNPRS Family Code

[109] *Id*., Art. 71(1).

[110] *Id*., Art. 66.

determine which property belongs to which spouse, it is necessary to have regard to its origin or its nature.[111]

Therefore, the courts handle "who owns what" matter upon proper examination of the evidence produced to prove the same. However, there are anomalies in the court's determination of certain property as personal or common property. The following cases reveal this.

Ato Zelalem Tariku v. Sosina Zewudu is a case where the applicant claimed a house and the income derived therefrom, to be their common property.[112] The respondent, on his part, challenged the allegation of the applicant and alleged the house is his personal property explaining that he got the house from his parents' through inheritance. Then, examining the testimony of the witnesses and the evidence produced, the court confirmed that the respondent got the house through succession and decided the house is a personal property of the respondent. The court also decided that the income derived from the house amounts to personal property of the respondent. The court stated that if the house is decided to be the personal property of the respondent, there is no reason why the income that is derived therefrom could become common property of the spouses. This is an apparent deviation from the law, which clearly makes all income derived from personal efforts of the spouses and from their common or personal property common property.[113] The source of the income (be it from the personal or common property) is irrelevant so long as the respondent derives the income during the marriage.

On another case, entitled *Weyzero Brihanie Teklemariam v. Ato Sefe Horsa* [114] the court made a wrong inference and decided personal property of

[111] In some states, for instance, USA, a whole body of law has developed to give courts guidance in determining whether assets are personal (separate) or (marital common property). "Courts have come up with three concepts: tracing, commingling, and transmutation. Tracing of assets consists of determining the source of the asset, that is whether the asset was acquired through inheritance, gift, or by the use of marital funds. Commingling takes place when separate funds are brought into the marriage but are mixed with other assets so as to be untraceable. Transmutation of an asset is the term used to describe the change in character of the property from separate to marital or from marital to separate, usually accomplished by use, gift, or contract"(See, Sanford N. Katz, Family Law in America, Oxford University Press, New York, , 2011, p. 88

[112] Dilla First Instance ct, File No 09036 (Decision of March, 2006 EC).

[113] SNNPRS Family Code, Art. 66.

[114] Dilla First Instance ct, file No 09901 (Decision of 29 June 2006 E.C).

the respondent as common property. The cause of the application was a house and vegetables from the courtyard of the house. The applicant claimed that both the house and vegetables should be decided as the common property of the spouses. On the other hand, the respondent, alleging the fact that he got the house and vegetable garden as well as the vegetables in it through donation, claimed them to be his personal property. To support his argument, the respondent produced the contract of donation that shows he got the house and the vegetables in the courtyard through the donation. The court made it clear on its judgment that the registration of the donation contract in the name of the respondent does not prove that he is the sole owner thereof. Hence, the court decided that the house and vegetables in the courtyard are common property of the applicant and the respondent.

The provision that governs donation demands that all property that spouses acquire during their marriage by donation shall remain their personal property.[115] The other way of saying this is found in another provision too which says 'unless otherwise stipulated in the act of donation, property donated conjointly to the spouses shall be common property'.[116] By implication, if the donation is made expressly to one of the spouses, it amounts to a donation made for the exclusive advantage of such a spouse. However, the court argued that the registration of the donation contract in the name of the respondent *per se* does not prove that he is the sole owner thereof. However, it is an indication that the donation is made expressly for the respondent. Incidentally, one can even challenge the ruling of the court in the sense that what type of evidence is supposed to be produced to show that the donation is made for the advantage of one of the spouses. One may ask which law authorizes the court to dispute the written donation agreement and accept the testimony of the witnesses who attested inconsistently.

Surprisingly, in another case, the court decided the property of a third party as the common property of spouses for the mere reason that the respondent has a full (complete) power of agency over a property.[117] The application was filed seeking partition of common properties following a divorce

[115] SNNPRS Family Code, Art. 66.

[116] *Id.* Art.71(3).

[117] Weyzero Zewudinesh Bayu v. Ato Mesay Masiresha, Hawassa FIC Addis Ketema, div., file No. 02101 (Decision of 19 February 2006 EC)

pronouncement. The applicant listed several items as communal property and requested the court to divide the same. However, the respondent was particularly interested in the motor vehicle and 6-gram gold. The applicant claimed that the motor vehicle is common property whereas the respondent argued that the motor vehicle belongs to a third party. The respondent proved his agency power over the motor vehicle by producing a document that shows his power of attorney registered in the public notary.

With this proof of third party's ownership right over the motor vehicle, the court decided the motor vehicle is the common property of the spouse and the motor vehicle should be sold and the proceeds thereof should be apportioned between the litigants. The court stated three points for its decision. The first is the absence of a third party intervention claiming ownership title over the motor vehicle until the court has rendered decision. Second, the court doubts the agency power of the respondent--the court doubts the respondent's extensive power over the motor that ranges from the right to use to the right to dispose of. According to the court, such power, the respondent has acquired over the motor reveals that the respondent seems to have "ownership" right over the motor vehicle as the legitimate owner of a motor vehicle does have. The court added that the scope of the power of respondent implies that the respondent has the ownership right of the motor vehicle rather than administering the motor vehicle through his power of attorney. Accordingly, the court decided that the motor vehicle is the common property of the spouses. This decision requires readers of the case to raise the following questions. Is it illegal to give a full-fledged agency power to a third party? Is it enough to doubt one's power of agency by mere fact that the agent has broader delegation? It is true that the law takes presumption that all property acquired by the spouses during marriage should be communal property regardless of in whose name the property is registered. This presumption holds true in the case where either of the spouses is unable to show that the property is acquired prior to marriage, by a gift from a third party or belongs solely to one of them. However, in the case at hand, the respondent shows that the motor vehicle belongs to a third party and that is confirmed by the agency power registered by the competent authority. Why did the court argue on the reverse? How does the court make property that belongs to a third party common property of the spouses?

Concerning the six grams of gold jewelry, the court decided that it is the personal property of the applicant although it was bought during the marriage. The court was of the opinion that the jewelry was bought solely for the beautification of the applicant, and it was understood that it was the personal property of the applicant.

3.2 Retaking of Personal Property

The second step, in liquidation of property process, is retaking of the personal property.[118] This means that each spouse who proves that s/he is the sole owner of a given property has the right to retake the same in kind. Spouses only have rights in relation to property to which they can show legal or beneficial title. This is the assumption that the mere fact of a marriage should not affect the rights of property owners or the right to continue acquiring property for the use and benefit of one of the spouses. This is to mean that each spouse has complete control over his/her personal property during and after marriage. The logical extension of this argument is if there is a proof as to the alienation of a personal property of one or both of the spouses and that the price thereof has fallen in the common property, s/he has the right to withdraw therefrom beforehand in proportion to his/ her contribution. Once the issue of identifying which one is personal and which is common property, retaking of personal property is not such a contentious issue. Once this stage is carried out, the next step is a partition of common property. This can be done after debts are discharged to the creditors if there are any.[119]

3.3 Settling Debt(s)

The third step, in liquidation of pecuniary relation between spouses, is to check the existence or otherwise of debt, and discharging the debts if there are any. Hence, the spouses must disclose all debts, regardless of who will be responsible for that. The court will determine which spouse is responsible to pay the debt(s) and other obligation(s) after considering any agreement (if there is any) which has been made between contracting parties. The issue is which debt is personal debt and which is common? Common debts are those

[118] SNNPRS Family Code, Art. 97.

[119] SNNPRS Family Code, Art. 100.

debts which are incurred by the spouses individually or jointly for the following purposes: debts incurred (a) to fulfill the livelihood of the spouses and their children[120] or (b) in order to fulfill an obligation of maintenance to which both the spouses or one of them is bound are common debts of the spouses.[121] Besides, those debts which are acknowledged to be common debts of the spouses by the court at the request of either of the spouses or creditors are also described as common debts of spouses.[122]

These debts are debts incurred in the interest of the household. Hence, the debts, which have been incurred, by both husband and wife for the common life shall be paid out of the common property.[123] In addition to that, if there is a debt incurred by either spouse or both spouses conjointly, and such debt is confirmed by judicial decision, or acknowledged by the spouses, such debt shall be paid before the partition of property.[124] The creditor may satisfy these debts from the jointly held property unless the spouse who owes the debt committed fraud, and the creditor was not acting in good faith. The personal property of a spouse is not available to creditors of the other spouse. However, if the jointly owned property is not enough to pay the debts, it must be recovered from the individually owned property. Even if the court orders one spouse to pay certain debts after divorce or legal separation, creditors may seek payment from the other party if the party ordered to make the payments does not have sufficient assets or files for bankruptcy.[125]

To show the practices in this regard, I want to present the case between W/ro Chalitu Huka and Brihanu Zewige.[126] The applicant instituted the suit seeking liquidation of properties following a divorce pronouncement. The applicant submitted a comprehensive list of common properties along with her application.

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[120] *Id*., Art. 80 (a).

[121] *Id*., Art. 80 (b).

[122] *Id*., Art. 80 (c).

[123] *Id*., Art. 79 (b).

[124] *Id*., Art. 100.

[125] *Id*., Art. 79 (2).

[126] Weyzero Chalitu Huka v. Brihanu Zewige, Hawassa First Instance Ct, Addis Ketema, div, File No 1468 (Decision of 12 February 2007 E.C).

The respondent further claimed that he, with the written authorization of the applicant, borrowed one hundred thousand Birr (100,000) fromWegagen Bank. Moreover, when the date was due, the spouses were not in a position to settle the debt so they again borrowed the same amount of money from an individual named Ato Asrat Bala, which was used to settle the debt they owed the bank. However, although they cleared their debt they had borrowed from the bank, the later debt was not paid until the case was filed before this court. Therefore, the respondent requested the court to decide the debt as a common debt of the spouses and such debt to be paid before the partition of the common properties.

The court observed that the applicant had never expressly denied the debt, and this amounts to her acknowledgement of the debt as a common debt. Hence, the court decided that the debt was a common debt of the spouses and had to be discharged from the common property before partition. The decision was in line with the law.

3.4. Partition of Common Property

Once courts have identified common properties of spouses by following steps stated above, the remaining part is the partition of such common property to the spouses. Therefore, property, which is itemized as common property of the spouses, must be divided between the two following the divorce pronouncement. In spite of this requirement, in one case, the court ruled out the division of property after all the above stages (in liquidation of pecuniary relation between spouses) have been completed.[127]

In this particular case, the appellant, aggrieved by the decision of the lower court, brought the case to the High Court. The lower court, which initially entertained the case, identified the common and personal property of the appellant and respondent. Following the identification of the personal and common property of the parties, the lower court empowered the respondent to maintain and administer some of the common property. The lower court decided that the property is not subject to division of property since it is very useful for the upbringing of their children. The appellant lodged his appeal

[127] Ato Akililu Worku v. Weyzero Fantaye Ashenafi, Gedio zone High ct, File No. 09622 (Decision of 12 June E.C).

dissatisfied by the decision of the lower court. The appellate court reversed the decision of the lower court arguing that division of property should not be associated with the upbringing of their children. This decision of the appellate court seems sound and appropriate when we see it in line with the pertinent provision of the SNNPRS Family Code that deals with the partition of property.

3.4.1 Partition in Kind

It is true that spouses are equal during and at the time of divorce. The logical extension of this fact is spouses will be equally entitled to the fruit of their marriage at the time of divorce. Similarly, common property of the spouses should be divided equally between the spouses regardless of their contribution to acquire the common property.[128] The issue here is as to how this can be done. In this regard, the SNNPRS Family Code promotes an equal and in-kind division of matrimonial assets, i.e. each asset essentially be divided in kind and into two halves.[129] The SNNPRS Family Code gives courts an enormous discretion to allocate all the property of the spouses as the court sees fit.[130] This shows that the court may award the property to one of the spouses and a cash payment to the other spouse.[131] In this case, utmost care shall be taken to give each spouse things which are most useful to him and the assets which are received by each spouse are equal in value.[132] Where it is not possible to divide such common property equally, the inequality of shares in kind shall be set off by the payment of sums of money. Still one can question what most useful means. Is using the property before divorce a sufficient condition to say that the property is most useful to a spouse who has been using the property? Is it associated with the professional background of the spouse? How can we resolve such matters if

[128] Tilahun, Reflections on the Revised Family Code of 2000, *supra* note 26, at. 13.1

[129] SNNPRS Family Code, Arts.101 and 102(1).

[130] This can be reasonably inferred from Article 102 of the family code which reads as follows." "(1) As a rule, partition shall be made in kind in such a way that each spouse receives some property from the common property. (2) Where it is not possible to divide such Common Property equally under Sub-Article (l) of this Article, the inequality of shares in kind shall be set off by the payment of sums of money.(3) The utmost care shall be taken to give each spouse things which are most useful to him." See Id., Art. 102.

[131] SNNPRS Family Code, Arts. 102

[132] Barbara Stark, *International Family Law: An Introduction*, Ashgate Publishing Company, USA, 2005, p. 117

both spouses prove that the property is most useful to both of them? Some of these issues will be explained in the coming subsection.

3.4.2 Selling the Common Property and Divide the Proceeds Equally

It should be noted that the court may divide the common property in kind if such division is practical as well as there is a mechanism to set off the inequalities. This part assumes that common property of the spouses does not always require division in kind. Certain property may not necessarily be divided into half practically owing to the nature of the property.[133] This is to mean if there is certain property which is difficult or impossible to be divided and if the spouses do not agree as to who shall have that property in his share, such property shall be sold and the proceeds thereof shall be divided between them.[134] If the spouses do not agree on the condition of sale, and, if one of them so requires, the sale shall be made by auction.[135] The important point is as to when a given property can be said to be difficult to be divided. Is that seen from the difficulty of giving normal uses upon division? Who should decide this – the spouses or the court? Would the mere disagreement of the spouses make the property difficult to divide? How can we differentiate *difficult to divide* and *impossible to divide* property? Can we apply these expressions interchangeably? This is the main point of contention among legal practitioners.

In *Weyzero Etenesh Kasa v. Ato Wolidie Fenta*'s case, the court tried to answer some of the above questions.[136] The appellant lodged his appeal to the appellate court pursuant to his dissatisfaction with the decision of the lower court concerning the division of the house that had been decided to be the common property of litigants. The lower court, in its decision, rendered that the market value of the house, which is a subject of the appeal, should be estimated again and the respondent can maintain the house if she is capable to pay half of the estimated value of the house. The appellant expressed that the respondent, driven by bad motives, pressed the expert who

[133] *Id.*

[134] *Id.*, Art. 103(1).

[135] *Id.*, Art. 103(2).

[136] Gedio zone High ct, File No. 09019 (Decision of 15September 2006 E.C).

was in charge of valuing the house to underestimate the value of the house. The appellant also argued that if the current estimated value of the house is believed to be proper, the appellant could pay half of the value of the house and maintain it for him. He further argued that if he is obliged to accept the current underestimated value of the house as the market value of the house and compelled to take half of the value of the house, it amounts to violating his right to equality after marriage. The respondent, on her part argued, that it is the appellant who pressed the house to be sold and price to be allocated between the two. The respondent added that it was proved by the lower court that the house does not give its normal uses if it is divided in kind and requested the appellate court to reaffirm the decision of the lower court.

The appellate court identified the contentions of the spouses. The appellate court explained that the family law provides three mechanisms of how to partition common property that can take place in a sequential order. The first one is to divide the property by the agreements of the parties. In the absence of agreements, the property should be partitioned in kind. If the property is impossible to divide in kind and the parties are not able to divide property through an agreement, it should be sold by auction.[137] After making such an extensive explanation, the appellate court believed that the house could not give its normal use if it is divided in kind. With this conclusion, the court decided that the house is impossible to be divided in kind. At the same time, the court made clear that the spouses failed to reach an agreement on who can take the house and set off inequality of shares in kind. Up to this assertion, the appellate court revised the decision of the lower court (that made the respondent maintain the house if she was capable to pay half of the estimated value of the house) and decided the house to be sold by auction and the proceeds thereof should be divided to the parties. This decision was in line with the stipulations of the law.

Conclusion

Marriage, an essential way to form a family, is established with a belief that the relationship will last a lifetime. Despite this fact, several marriages end

[137] In this regard, Wonwossen has said the following "the court should decide by itself, in consultation with experts if necessary, whether the property is divisible or not instead of leaving this question to the parties." See Wondwossen, *supra* note 67, at. 40.

in divorce. The legal process of divorce involves filing for divorce and making financial arrangements whether it is fault based or not. The RFC and SNNPS Family Code, which incorporate no-fault divorce, do not require a spouse who seeks divorce to prove the occurrence of a fault and to whom the fault is attributed. The family laws (both the RFC and the regional states) state that mentioning the reasons for divorce is optional and give the discretion for the spouses. Though mentioning the occurrence of fault is not a compulsory requirement, it will be considered in the case where courts entertain divorce application that involves compensation claim under the SNNP regional family code.

When courts entertain a divorce petition, which involves compensation claim, they must decide a type of fault that is involved in the case. This is because the kind of compensation is deeply intertwined with the kind of fault. However, there are cases which are decided by the court without such considerations. Numerous examples of this kind are to be found in different courts' judgment, for example, in the case where a victim spouse proves a violation of the duty to respect, support and assist which should be redressed by monetary compensation but the court awards compensation in kind. At the same time, there are dissimilarities on various levels of courts' decisions in determining the extent of damage the claimant sustains and its corresponding compensation. This variation ranges from awarding the smallest remedy to the extent of giving the maximum amount of compensation for similar damage. The absence of clear detailed guidelines on this issue that can be used by courts is the main reason for such variations.

Such variations also exist in the liquidation process. In one case, the court considered the income obtained during the marriage as personal property although the law considers such kind of income as common property. In another case, the court decided property which was given to one of the spouses by donation as the common property of the spouses. In another case, the respondent proved that the property belongs to a third party and such was confirmed by the agency power registered with the competent organ but the court decided such property was the common property of the spouses. Still in another case, the court pended the division of common property arguing that such property was very useful for the upbringing of their children. The

appellate court reversed the decision of the lower court arguing that division of property should not be associated with the upbringing of their children. The author of this article argues that the inconsistencies observed in the courts would be corrected through two mechanisms. The first one is through intensive on job training. The main aim of the training is to enhance the overall knowledge, attitude, and experiences of the judges so as to ensure the full implementation of the family code. The second one is enacting detailed regulations that give directions on how the courts should assess compensation following dissolution of marriage. This would help to ensure consistency and predictability in divorce, compensation assessment and liquidation of property decisions.

The Duty to Notify Planned Measures under International Watercourse Law and the Nile Basin Cooperative Framework Agreement

Zewdu Mengesha Bashahider[*]

Abstract

The duty to notify planned measures is one of the obligations imposed upon riparian states planning to perform activities that may have a significant adverse effect upon other watercourse states. Although the duty is found in the UN Watercourse Convention and other watercourse agreements, there is no consensus as to the details of this rule and its status under international watercourse law. Among the main points of contention are whether this obligation is a customary international law obligation and whether its non-observance would lead to the strict liability of the state concerned. Taking into account the divergent approaches of articulation of this duty under the UN Watercourse Convention and the Cooperative Framework Agreement over the Nile, there exist disagreements as to the contents of this duty. This has its own impact on the proper implementation of this duty by watercourse states. In this article the writer will mainly investigate the essence and normative basis of the duty to inform planned measures as enshrined under these instruments. The writer will mainly employ a doctrinal analysis in addressing the abovementioned issues and bases the scrutiny on the relevant sources of international law.

Keywords: Nile River Basin, UN Watercourse Convention, the duty to notify planned measures, Cooperative Framework Agreement (CFA)

Introduction

The uses of international watercourses are mainly classified into navigational and non-navigational uses. The navigational uses of international watercourses are very common in the periods where international watercourses are the major ways of transportation. Since the time when

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humankind massively used the international watercourse for systematic large scale irrigation and hydroelectric generation, the non-navigational purpose of these international watercourses become an issue that needs the states' regulation.[1] Though there are different efforts to codify a law concerning the non-navigational uses of international watercourses, the most successful one is the attempt made by the International Law Commission (ILC). The ILC work was adopted by the United Nations General Assembly in 1997. This draft convention on the non-navigational uses of international watercourses came into force on 17 August, 2014 in accordance with Article 36(1) of the same.[2]

According to the 1997 UN Watercourse Convention, each riparian state of an international watercourse has the responsibility of exchanging on a regular basis readily available data and information on the condition of the watercourse.[3] The exchange of data and information regarding the state of the watercourse includes both current and future planned uses along the international watercourse.[4] This duty of states to notify planned measures is one of the procedural obligations[5]of the riparian states provided under the 1997 UN Watercourses Convention. The inclusion of the obligation to provide prior notification of planned measures under the UN Watercourse Convention indicates that the international community rejects a state's unfettered discretion to do as it alone wishes with the portion of an international watercourse within its territory.[6] According to the UN

[1] Ibrahim Kaya, Equitable Utilization: The Law of Non-navigational Uses of International Watercourses, Ashagate Publishing limited, 2003, pp, 1-2

[2] https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=xxvii-12&chapter=27&lang=en last visited 4/4/2019. As of April 2019, the convention has been ratified by 36 states. It is important to note that there is no any state from the Nile basin countries which neither ratified nor signed this convention.

[3] The UN Convention on the Law of the Non-navigational Uses of International Watercourses, adopted by the
General Assembly of the United Nations by resolution 51/229, in its Fifty-first Session, on 21 May 1997, come in
to force, August 2014, Look Article 9(1).

[4] Muhammad Mizanur Rahaman, Principles of Transboundary Water Resources Management and Ganges Treaties: An Analysis, *Water Resources Development*, Vol. 25, No. 1, 159–173, March 2009, p.162

[5] There is a classification of obligation on watercourse states in to substantive obligation and procedural obligation. This can be inferred from the classification made by Stephen C. McCaffrey, in his book entitled "The law of international watercourses", 2nd ed, Oxford University press, 2007.

[6] Stephen McCaffrey , The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: Prospects and Pitfalls, in *Salman M.A.Salman and Laurence Boisson de Chazourn* (editors) International Watercourses *Enhancing cooperation and Managing Conflicts, Proceeding of*

Watercourse Convention, the notification shall be accompanied by available technical data and information, including the results of any environmental impact assessment.[7]

Some authors note that the duty to notify planned measures is a generally accepted practice. According to this practice a watercourse state potentially affected by planned activities of a co-riparian has the right to be promptly notified of such activities before it is implemented.[8] Nevertheless, there is no consensus and clarity to what extent the duty is considered as a generally accepted practice that is binding on riparian states under international watercourses law. Especially in the absence of an inclusive legal framework governing the utilization, management, and conservation of transboundary watercourses, tension and confrontation between riparian states over the normative content of the duty to notify planned measures are likely to occur.[9]

Because of this fact it is possible to look at the diverse construction of this duty in different international watercourse agreements. Moreover, it is also worth looking at the divergent views of authors regarding its status under international watercourse law. While some authors argue that the duty to notify planned measures is a binding customary obligation for the riparian state,[10] others contend that it is not a strict substantive legal obligation.[11]

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the world bank seminar, World Bank Technical Paper No. 414 , *The World Bank Washington, first published in 1998 D.C.* P.23.

[7] Supra note 3, UN watercourse convention, Article 9(1) second paragraph.

[8] Dr Attila Tanzi, Chairman, Legal Board, UNECE Water Convention, commentary on"Planned Measures" Under International Water Law, available at; <https://www.unece.org/.../**water**/.../Tanzi_**planned_measures**_Eng.pdf> last visited July 5, 2017.p.10 Szekely, Alberto, "General Principles" and "Planned Measures" Provisions in the International Law Commission Draft Articles on the Non-Navigational Uses of International Watercourses: A Mexican Point of View" (1991). The Law of International Watercourses: The United Nations International Law Commission's Draft Rules on the Non-Navigational Uses of International Watercourses (October 18). P.17 it can be reached at: http://scholar.law.colorado.edu/law-of-international-watercourses-united-nations-international-law-commission/6

[9] 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.

[10] The following statements are quoted from different sources to support this position. The duty to cooperate and notify other riparian states about planned measures for shared watercourses and… were among the cornerstone articles of customary law. See Reaz Rahman, 'The law of the non-navigational

According to the latter, the duty to notify is rather a procedural requirement that forms an integrated part of the due diligence obligation imposed upon states performing developmental activities in their domestic undertakings over an international watercourse. Such disputed issues as the specific content and scope of the duty to notify planned measures as well as its normative content under the UN Watercourse Convention and the agreements within the Nile basin[12] will be the focus of this article.

Following this introduction, the first section of this article will talk about general remarks on the development of international watercourse law and the basic principles. The second section discusses the development of the duty to notify planned measures under international law. While the third section discusses the content, scope and essence of the duty to notify planned measures under the 1997 UN Watercourse Convention, the forth section will assess the duty to notify planned measures under the agreement over the Nile, especially on the Cooperative Framework Agreement over the Nile (CFA). The last two sections discuss the status of the duty to notify planned measures under international law and concluding remarks respectively.

1. International Watercourse Law and the Basic Principles

The development of international water law is inseparable from the development of international law in general. Such fundamental principles and basic concepts like the sovereign equality of states, non-interference in matters of exclusive national jurisdiction, responsibility for the breach of

uses of international watercourses: dilemma for lower riparian, 1995-1996, Vol. 19, Fordham International Law Journal, PP.9-10. The obligation of the co-riparian states to inform and notify each other prior to implementing or taking any action has become a recognized rule of customary international law. See ibid Abiy Chelkeba, p.128. During the negotiation of the UN watercourse convention the prior notification was not controversial, the general acceptance of the preposition that states have a duty to provide prior notification of planned projects that may adverse impact on co-riparian….required by customary international law. Stephen McCaffrey, *The Law of International Watercourses*,2nd edition, Oxford University Press, first published in 2007, P. 473.

[11] Jutta Brunnée, ESIL Reflection: Procedure and Substance in International Environmental Law: Confused at a Higher Level? Vol 5, Issue 6 available at at:-http://esil-sedi.eu/?p=1344 last visited 23/11/2018.

[12] The total area of the Nile basin represents 10.3% of the area of the African continent and spreads over eleven countries. Nile River, with an estimated length of over 6800 km, is the longest river flowing from south to north over. It is fed by two main river systems: the White Nile, with its sources on the Equatorial Lake Plateau (Burundi, Rwanda, Tanzania, Kenya, Zaire and Uganda), and the Blue Nile, with its sources in the Ethiopian highlands. It can be reached at: http://www.fao.org/3/W4347E/w4347e0k.htm last visited 5/04/2019

state's international obligations, and peaceful settlement of international disputes equally apply to international watercourse law.[13] At the same time, this independent branch of international law has developed its own principles and norms specifically tailored to regulate states' conduct in a rather distinct field, i.e. in the utilization of transboundary water resources.

International Watercourse Law has developed as part of the evolution of human social organization and the intensification of use by human society of fresh water.[14] The importance of water in international relations and the need for cooperation in developing as well as protecting international rivers has resulted in the development of a treaty regime regulating the non-navigational uses of international watercourses.[15]

Despite the attempt by the international community to agree on a comprehensive convention to manage transboundary water resources, there are still some basic rules and principles that are commonly cited to regulate the non-navigational uses of international watercourses. Among these basic rules the equitable utilization principle and the obligation not to cause significant harm can be mentioned.[16] While the principle of equitable utilization evolved from early inter-state practice involving watercourses, the duty not to cause significant harm rule originated as a general principle of law in inter-state relation.[17] Taking into consideration the due diligence nature of the obligation one may say that the duty to inform planned measures is an additional extension of the duty not to cause significant harm rule.

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[13] Sergei Vinogradov, and et al., Transforming Potential Conflict into Cooperation Potential: The Role of International Water Law, (2003) University of Dundee, UK, UNESCO, working paper <http://unesdoc.unesco.org/images/0013/001332/133258e.pdf >, p 12. Last visited 14/09/2018

[14] Supra note 10, Stephen McCaffrey, p. 58.

[15] David J. Lazerwitz, The Flow of International Water Law: The International Law Commission's Law of the Non-Navigational Uses of International Watercourses, *Indiana Journal of Global Legal Studies*: Vol. 1: Iss.1, 1993, P.248

[16] Kai Wegerich & Oliver Olsson (2010) Late developers and the inequity of "equitable utilization" and the harm of "do no harm", Water International, Vol 35, No.6, 707-717, available at at https://www.tandfonline.com/doi/full/10.1080/02508060.2010.533345?scroll=top&needAccess=true

[17] Patricia K. Wouters, An Assessment of Recent Developments in International Watercourse Law through the Prism of the Substantive Rules Governing Use Allocation, Natural Resources Journal, Vol. 36, No. 2, River Basins (Spring 1996), P.419

The basic rule of equitable and reasonable utilization entitles watercourse states the right to use waters of the transboundary watercourse located in the territory of the state with a correlative duty to ensure comparable rights enjoyed by all basin states.[18] However, the obligation not to cause significant harm calls for watercourse states to take all appropriate measures to prevent causing significant harm to other watercourse states. The obligation "not to cause significant harm" is basically linked to concerns about trans-boundary pollution affecting water quality.[19] Like that of the rule of equitable and reasonable utilization, there is a general agreement that the principle of the duty not to cause significant harm has already achieved the status of customary international law.[20] These rules are widely accepted as the basic principles that serve as the foundations of the law of international watercourses and the UN Watercourse Convention.[21]

Agreement, on which of the two rules (equitable and reasonable utilization or the obligation not to cause harm) takes priority over the other, has proved quite difficult to attain and the issue has preoccupied the work of ILC throughout its 23 years of work on the convention. Each rapporteur dealt with the issue in a different way, with some equating the two principles and others subordinating one principle to the other.[22] Taking into account the

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[18] Supra note 13, Sergei Vinogradov, p.12 equitable and reasonable utilization principle is one of the basic international Customary laws international watercourse law.

[19] Albert E. Utton, Which Rule should prevail in international dispute: That of reasonableness or that of No harm? Natural resource Journal, Vol 36, 1996, P.639

[20] Scholars like McCaffrey and Caflisch have concurred that this principle is firmly grounded in customary international law and is a general principle of international law. See generally Mohammed S. Helal, Sharing Blue Gold: The 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses Ten Years On, *Colo. J. Int'l Environmental. Law.& Pol'y*, Vol. 18:2, 2007, p.356.

[21] User's Guide Fact Sheet Series: Number 5, No Significant Harm Rule, available at; http://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-5-No-Significant-Harm-Rule, last visited 13/12/2018.

[22] For example, Special Rapporteur Rosenstock, in his first report in 1993, reversed precedent in favor of the principle of equitable utilization. However, in the 1988 40th session it is stated that "[a] watercourse State's right to utilize an international watercourse [system] in an equitable and reasonable manner has its limit in the duty of that State not to cause appreciable harm to other watercourse States. In other words—prima facie, at least—utilization of an international watercourse [system] is not equitable if it causes other watercourse States appreciable harm. Thus a watercourse State may not justify a use that causes appreciable harm to another watercourse State on the ground that the use is 'equitable', in the absence of agreement between the watercourse States concerned. See Report of the International Law Commission on the work of its fortieth session, 9 May-29 July 1988, Official Records of the General Assembly, Forty-third session, Supplement No.10,p.36.This clearly shows that there seems to have been some sort of priority given to the duty to cause appreciable harm to other watercourse States.

respective advantages riparian states derived from these principles, they differ in terms of their preference for these core principles. Ethiopia, for example, believes that a Nile agreement should be based on the principle of equitable utilization and that the "no significant harm" principle should only operate when a state has exceeded its equitable or reasonable use.[23] Believing that this principle gives better right, most of the time lower riparian states prefer the no significant harm rule over that of the principle of equitable utilization.[24] On the other hand, upper riparians favor the equitable utilization principle because it provides more scope for states to utilize their share of the watercourse.[25]

Like the two core principles of international watercourse law, there are also other rules that developed in recent decades to regulate the conduct of watercourse states. Among these rules the duty to notify planned measures may be mentioned.

2. The Duty to Notify Planned Measures under International Watercourse Law

The very aim of the duty to notify planned measures is to provide early warning of potentially adverse changes in shared international watercourses. This will allow the states concerned the opportunity to make the necessary adjustments.[26] From the outset, the duty seems to contradict with the old and well-developed international law principle called state sovereignty, which entitles states to conduct their domestic affairs without interference by other states or external actors. However, the sovereignty of states is not absolute and is increasingly subject to limitations based on certain fundamental concerns and principles. This includes human rights protection,

[23] Country paper, Ethiopia, Water Resources Management of the Nile Basin: Basis for Cooperation 9-10(Feb.24-27, 1997) (unpublished paper prepared for the Fifth Nile 2002 Conference, on file with Geo, International Environmental Law Rev.).

[24] Salman M.A. Salman (2013) The Nile Basin Cooperative Framework Agreement: a peacefully unfolding African spring?, Water International, Vol 38: no 1, 17-29, P. 22.

[25] *Ibid.*

[26] Stephen C. McCaffrey, The Law of International Watercourses: Some Recent Developments and Unanswered Questions, Denver Journal of International law and policy Vol,17 No. 3, 1989, P.511 The core of this procedural underpinnings is to encourage the transparency of a proposed project and to ensure that it is for maximizing the benefits with no significant adverse effects to the other watercourse states. Look Trilochan Upreti, International Watercourses Law and Its Application in South Asia, Pairavi Prakashan,2006 Pp.121-122.

environmental considerations, and the need to peaceful coexistence between states.[27] There are instances in which state sovereignty may not be claimed by the harming state where the activities over shared resources do have transboundary effect on other states.[28] Imposing a duty on states to notify planned measures in cases, where a planned activity has significant adverse effects upon other watercourse states, can also be cited as one development of limitation on state sovereignty. Therefore, it can be said that the state concerned needs to observe this obligation in its relation with other watercourse states.

There are authors who note that the development of the duty to notify planned measures is traced back mainly to international environmental cases.[29] In fact, it is possible to examine what some old watercourse utilization treaties include in this duty.[30] The roots of this procedural duty of the state can even be traced back to international case laws.[31]

Taking into account the very nature of the general rules of cooperation,[32] there are views that state the duty to notify planned measures is understood as a specific application of the general principle of cooperation between states.[33] This principle, which declares that states have an obligation to

[27] For example issues related to human rights and racial oppression do not now fall within the closed category of domestic jurisdiction. It was stated on behalf of the European Community, for example, that the 'protection of human rights and fundamental freedoms can in no way be considered an interference in a state's internal affairs'. Reference was also made to 'the moral right to intervene whenever human rights are violated'. See Show, Malcolm N., *International Law*, 6th edition, Cambridge University Press, Cambridge, 2008, p.213. See also M. Reisman, 'Sovereignty and Human Rights in Contemporary International Law', 84 AJIL, 1990, p. 866.

[28] The sovereignty of the contracting States over the waters of successive rivers which flow on their territories is not absolute, but is made subject to modifications arrived at between the two parties. Look Lake Lanoux Arbitration (France V. Spain) (1957) *Arbitral Tribunal. November 1*6, 1957, P.12, available at at http://www2.ecolex.org/server2.php/libcat/docs/.../Full/En/COU-143747E.pd... last visited 06/07/2017.

[29] Elli Louka, International Environmental Law Fairness, Effectiveness, and World Order, Cambridge University Press, First published in 2006, P.123

[30] The multilateral convention relating to the development of hydraulic power affecting more than one state, which was signed at Geneva, 9 December 1923, and Art 7, Paragraph 2 of the Indus Water Treaty of 1960. Look Dante A. Caponera, National and International Water Law and Administration selected writings, International and National water law and policy series, Kluwer law international, 2003, p.212.

[31] Supra note 15, David J. Lazerwitz, Pp. 263-264

[32] Yearbook of the International Law Commission 1987 *Summary records of the meetings of the thirty-ninth session 4 May-17 July 1987, Vol. 1,* P.71, Para.13.

[33] Supra note 10, Stephen McCaffrey, P. 472.

cooperate in the interests of avoiding harm to another state, was clearly articulated in the Lake Lanoux Arbitration.[34]One may say among the different means of avoiding harm to other states of international watercourses, notifying new planned activities within the shared watercourse can be mentioned.

The Arbitral Tribunal, in its decision of November 16/1957, stated that:

> "[S]tates are today perfectly conscious of the importance of the conflicting interests brought into play by the industrial use of international rivers, and of the necessity to reconcile them by mutual concessions. The only way to arrive at such compromises of interests is to conclude agreements on an increasingly comprehensive basis … There would thus appear to be an *obligation to accept in good faith all communications* and contracts which could, by a broad comparison of interests and by *reciprocal good will*, provide States with the best conditions for concluding agreements...."[35]

From this case, one can understand that the broad statement of agreement on an increasing comprehensive basis with reciprocal good will possibly incorporates the obligation to cooperate. One way of enforcing this general obligation as stated above may be to include the exchange of information and consultation among riparian states on the possible effects of planned measures. Elli Louka noted that the tribunal in this case concluded that France had the duty to notify and consult with Spain with regard to work planned on Lake Lanoux.[36] It is also stated in the findings of the Tribunal that the conflicting interests that arose due to the industrial use of international rivers must be reconciled by mutual concessions embodied in comprehensive agreements.[37] This means states have a duty to make arrangements and modalities that possibly avoid confrontation.

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[34] The Lake Lanoux dispute arose from the French Government's decision to permit Électricité de France to develop a hydroelectric project that diverted water from Lake Lanoux into the Ariège River. Spain opposed the French project, which initially provided for no return of water to the Carol River and offered only monetary compensation by France. The French offer to modify the project by returning to the Carol the same amount of water that it extracted for the reservoir, was also rejected by Spain. It can be reached at: https://www.internationalwaterlaw.org/cases/othertribunals.html Last visited 05/04/2019

[35] Supra note 15, David J. Lazerwitz, p. 264.

[36] The *Lake Lanoux* case has been heralded as establishing the principle of prior consultation with another state before undertaking a project that has transboundary effects. See Supra note 29, Elli Louka, P.123, PP,41-42

[37] Supra note 28, Lake Lanoux Arbitration , P. 15.

A state wishing to undertake a project that will possibly affect an international watercourse cannot decide whether another state's interests will be affected; the other state is the sole judge of that and has the right to get information on the proposals. In order to enable the state to come up with a conscious decision, consultations and negotiations between the two states must be genuine, must comply with the rules of good faith, and must not be mere formalities.[38] However, this does not mean the state that is notified of its planned measures cannot advance its project until it gets the consent of the other watercourse states. Subjecting a state's right to use its watercourses to the completion of a prior agreement with another state would give the other state essentially "*a right to veto*". This will paralyze the exercise of territorial competence of one state at the discretion of another state.[39]

Under the International Law Association Helsinki Rules on the uses of the waters of international rivers, we may find a provision relevant to the duty of the state to notify planned measures. It is provided under Article XXIX (2) of the Helsinki Rules which states, "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, notice of any proposed construction or installation which would alter the regime of the basin in a way which might give rise to a dispute…and the notice should include such essential facts as will permit the recipient to make an assessment of the probable effect of the proposed alteration." [40] From the provisions of Helsinki rules, it is possible to look at the inclusion of the obligation to notify planned activities by riparian states to other riparian states. What is interesting in this provision is the duty is imposed upon the watercourse states irrespective of the location of the state as upper or lower riparian. However, mostly the lower riparian states note that because of their location in the basin, they believed that this obligation is primarily imposed only on

[38] *Ibid*., pp 15-16.

[39] Lake Lanoux Arbitration, (France v. Spain), Nov. 16. 1957, 12 UN Reports of International Arbitral Awards 281 (1957). Para. 11, as noted by supra note 29 Elli Louka, p. 42.

[40] The Helsinki Rules on the Uses of the Waters of International Rivers, Adopted by the International Law Association, held at Helsinki in August 1966, Article XXIX.

the upper riparian states of the water basin, noting that harm is traveling to the downstream of the watercourse.[41]

The other international instrument is the 1992 Rio Declaration on Environment and Development.[42] Though this declaration is not specifically concerned about watercourse utilization, as the declaration contains statements on the notification of transboundary environmental impacts of the states' conduct, it has some implications and relevance to the utilization of watercourses. The declaration frames the principle in the following terms: "States shall provide prior and timely notification and relevant information to potentially affected states on activities that may have a significant adverse transboundary environmental effect and shall consult with those states at an early stage and in good faith".[43] Though the document deals with general environmental law matters, this provision is particularly significant because it had proved impossible to include a similar principle in the Stockholm Declaration on the Human Environment twenty years before the Rio Declaration, owing chiefly to the objections of Brazil,[44] which was embroiled in a dispute about prior notification with Argentina concerning the *Itapúa* dam project on the *Paraná* River.[45] The reason why Brazil objects to

[41] In this regard it is stated that '… downstream riparians require that they be notified of any activity upstream to ensure that such activity would not harm their interests. Most downstream riparians believe that this is a unilateral requirement and does not apply to upstream riparians. Look Salman M.A. Salman, 'Downstream riparians can also harm upstream riparians: the concept of foreclosure of future uses', July 2010, Vol. 35, No. 4, *Water International,* p. 351.

[42] Rio Declaration on Environment and Development, Rio de Janeiro, Brazil, 14 June 1992.

[43] *Ibid*, Principle19.

[44] The draft Stockholm declaration on the Human Environment incorporate a principle which states that:- "the right and duty to consult each other if there are reason to believe that any planned activity may cause serious harm to the Environment in general or infringe up on the Environmental right of other states." Some states like the US and Canada come up with detailed issues that should be undertaken by this principle. Some other states notes that this already stated under the UN Charter therefore there is no need to incorporate with this declaration as it is redundant. A group of African states requested for making a bit strong obligation on state parties. Some other states note that the declaration is somewhat inspirational document therefore we should not incorporate such obligation in this document. Latter Brazil come to exist as the main opponent of this principle within the Stockholm Declaration and notes that the adoption of this principle might be used as obstacle in the path of development. This is accepted by the general assembly drafted as what is presently existed in Art 21 and 22 of the Declaration.

[45] Supra note 5, Stephen C. McCaffrey, p. 472. The dispute arose in the early 1970s between Brazil and Argentina over plans by Brazil and Paraguay to construct one of the world's largest dams across the Parana River at *Itapúa*. Argentina was concerned that this project will have adverse impact on a dam it planned to construct. Argentina also maintained that Brazil had an obligation under international law to inform it of the technical details of the *Itapúa* project and to consult with it so that Brazil might take Argentina's concerns into account. First Brazil vigorously denied the existence of such obligation of

this principle is because of her fear that the principle might be used as obstacle in the path of development of the state. This general rule of international environmental law has its own importance for the specific regime of international watercourse law.

There are also bilateral as well as multilateral international watercourse treaties that incorporate the duty to inform planned measures.[46] The following treaties such as the Ganges River basin, i.e. the 1996 Mahakali Treaty between Nepal and India and the 1996 Ganges Treaty between India and Bangladesh[47]; the 1995 SADC Protocol on Shared Watercourse Systems (Articles 2[9], 2[10]); Article 22 of the 2002 Sava River Basin Agreement; the 1995 Mekong Agreement (Articles 5, 10, 11, 24), are bilateral treaties, just to mention a few.[48] The Mekong River Commission, Preliminary Procedures for Notification, Prior Consultation and Agreement, 12 November 2002, which state how to receive prior notice of proposed projects and measures likely to have a significant cross-border impact can also be mentioned. The Senegal River Water Charter was concluded by Mali, Mauritania and Senegal in May 2002 and later on Guinea became a party in 2006. Article 4 of the Charter enumerates a number of principles for the proper allocation of the water resources of the Senegal River. Among these principles is "the obligation of each riparian state to inform other riparian states before engaging in any activity or project likely to have an impact on water availability, and/or the possibility to implement future projects" may be mentioned.[49]

However, there are also instances where riparian states objected to the rule of prior notification of planned measures. For example, the existence of such a duty was disputed in 1979 when an agreement concluded by Argentina, Brazil, and Paraguay on the coordination of separate water development

prior notification and consultation; however in 29 September 1972 they come in to agreement and able to resolve this dispute in an amicable fashion by incorporating provision that deal with exchange of hydrological information.

[46] Salman M. A. Salman, The World Bank Policy for Projects on International Waterways An Historical and Legal Analysis, the World Bank Washington DC, Law, Justice and development series, Martinus Nijhoff Publishers, 2009, P. 105.

[47] Article IV-VII of the Ganges Treaty (1996), Articles 6, 9 of Mahakali Treaty (1996) includes provision regarding Notification, consultation and negotiation. See supra note 5, p.170.

[48] *Ibid.,* p. 61.

[49] Supra note 41, Salman M.A. Salman, P. 353.

projects planned on bi-lateral bases by these three states on the Paraná River, which ended a bitter dispute between Argentina and Brazil over prior notification. Argentina was of the opinion that Brazil had an obligation to provide prior notification and technical details regarding the bi-lateral Brazilian/Paraguayan *Itaipú* project and to consult with Argentina because of concerns the project would adversely affect a dam it planned to construct with Paraguay further downstream on the Paraná. In the end, these states came to agreement in 1979, which included these two obligations.[50]

Part three of the 1997 UN Watercourse Convention, which came into force in August 2014 after the 35th state[51] ratified the document, is centered on the obligation set out in Part III of the convention (Articles 11-19) for watercourse states to exchange information and consult with each other on the possible effects of planned measures on the condition of an international watercourse. The inclusion of provisions on information concerning planned measures is contained in some bilateral[52] and multilateral agreements[53] on international watercourses and is also addressed in decisions of the ICJ[54] as well as different arbitral court decisions.[55] However, it is important to state that the details of this obligation differ from one treaty to the other.

[50] Kerstin Mechlem, water as a vehicle for inter-state cooperation: a legal perspective, *FAO Development Law Service,* August 2003, P 17. http://www.fao.org/Legal/pub-e.htm, last visited 18 September 2016.

[51] The 35th state to accede the convention is Vietnam. The state accedes to the convention in 19 May, 2014 and the Convention entered into force on 17 August 2014, 90 days after that 35th ratification was deposited.

[52] The bilateral treaties of the Ganges River basin i.e. the 1996 Mahakali Treaty between Nepal and India.

[53] For Zambezi Watercourse states the 'duty to notify' is a legally binding international treaty obligation set out in Art.16 of the Agreement establishing the Zambezi Watercourse Commission (ZAMCOM Agreement) as well as Art.4 of the Revised SADC Protocol on Shared Watercourses. Look Zambezi Watercourse Commission, ZAMCOM Procedures for Notification of Planned Measures, p.5, available at at http://www.zambezicommission.org/sites/default/files/clusters_pdfs/ZAMCOM-Procedures-for-Notification-of-Planned-Measures.pdf last visited 06/12/2018

[54] In the *Pulp Mills (Argentina v.Uruguay) 2010* case, ICJ recognized the existence of a stand-alone obligation in international law for States planning measures or projects with the potential to significantly impact upon a shared watercourse or other watercourse States to provide meaningful notification. Look ibid, P.6

[55] Lake Lanoux Arbitration, (France v. Spain)

3. Essence of the Duty to Notify Planned Measures under the 1997 UN Watercourse Convention

The existence and, to a lesser degree, the normative status of general environmental rules have largely been defined by the "progressive gathering of recurrent treaty provisions, recommendations made by international organizations, resolutions adopted at the end of international conferences, and other texts that can be said to have influenced state practice."[56] The application of the duty to notify planned measures is amply supported by UNGA Resolution 2995(1972), by the 1997 UN watercourse convention, and by other international codifications, declarations, case laws, and commentators.[57]

The UNGA Resolution of 2995(1972) states that in exercising their sovereignty over their natural resources, states must seek, through effective bilateral and multilateral co-operation or through regional machinery, to preserve and improve the environment; in addition, it emphasizes that, in the exploration, exploitation and development of their natural resources, states must not produce significant harmful effects in zones situated outside their national jurisdiction.[58] It also notes that co-operation between states in the field of the environment will be effectively achieved if the technical data relating to the work to be carried out by states within their national jurisdiction is properly communicated with a view to avoiding significant harm that may occur in the environment of the other state.[59]The resolution also recognized the importance of the exchange of technical data with respect to proposed activities in preventing transboundary harm.[60] From this resolution one can infer that the prohibition of producing significant harmful

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[56] Owen McIntyre The Role of Customary Rules and Principles in the Environmental Protection of Shared International Freshwater Resources, Faculty of Law, University College Cork, National University of Ireland. at <www.esil-sedi.eu/sites/default/files/**McIntyre**.PDF> Pp.2-3 last accessed on 02/12/2018.

[57] Patricia Birnie and Etal, international law and the Environment, Oxford ; New York : Oxford University Press, 3rd ed. 2009, p. 565.

[58] UN general Assembly resolution 2995 (1972), *2112th plenary meeting, 15 December 1972,* Co-operation between States in the field of the environment, <http://www.un.org/ga/ RESOLUTION>. last visited 5/04/2019.

[59] *Ibid*.

[60] Neil Craik, The International Law of Environmental Impact Assessment: Process, Substance and Integration, Cambridge University Press, first published in 2008, P. 91.

effects on the environments of other states might include a duty on the part of the state to notify its planned measures that possibly have significant impact upon the environment of the other neighboring states, including neighboring states within the shared international watercourses. This can be supported by the very nature of the requirement of due diligence on the part of the planning state not to produce significant harm to the other watercourse states.

The 1997 UN watercourse convention incorporates provisions that deal with the rules of planned measures. The inclusion of the articles on transboundary notification and consultation in the 1997 UN watercourses convention was opposed by only three states, all upstream: Ethiopia, Rwanda, and Turkey.[61] Some note that acceptance by most delegations of the basic obligation to provide prior notification is itself important: "It provides further evidence that the international community as a whole emphatically rejects the notion that a state has unfettered discretion to do as it wishes with the portion of an international watercourse within its territory."[62] Despite the fact that the watercourse convention is a 'framework convention' that was assumed to provide general guidelines, it came up with detailed rules of the duty to notify planned measures under Art 12-19 of the convention.[63] This does have its own impact on the position of these upper riparian states and even for late ratification of the convention. In this regard, it might be important to look at the position of the states in the adoption of the convention. Even the states that support the convention for its adoption failed to ratify and took 17 years for the document to be enforced among member states. We may say that the voting pattern of the watercourse convention reveals that the document was supported mainly by downstream and midstream states while many upstream states either voted against or abstained.[64] For instance, all of the three states that voted against the convention are upper riparian states.[65] Among other things, one may say that the way the provisions on planned measures drafted

[61] Muhammad Mizanur Rahaman, Principles of international water law: creating effective transboundary water resources management, *2009 Vol. 1, No. 3, Int. J. Sustainable Society,* P. 212.

[62] Supra note 57, Patricia Birnie and Etal, p. 566.

[63] Supra note 46, Salman M. A. Salman, P. 108.

[64] Andualem Eshetu Lema*,* The United Nations Watercourses Convention from the Ethiopian Context: Better to Join or stay out?, Haramaya Law Review, 2015, Vol 4. No1, P. 6.

[65] (Burundi, Turkey and China) are upper riparian states for the Nile, Tigris-Euphrates, and Mekong Rivers respectively.

in the convention may contribute to the late ratification of the documents by the upper riparian states and these states might look at the provisions on planned measures as an additional extension of the duty not to cause significant harm rules.

In fact, it is not feasible to achieve equitable and optimal utilization of a transboundary watercourse without information and data exchange and consultations between the states sharing it. Therefore, prior notification with respect to planned activities that may significantly affect other co-riparians is a crucial obligation. It plays an important role in preventing international disputes.[66] However, the issue of when notification and consultation of planned measures will be triggered is an important point that needs analysis.

In order to properly realize the rule of equitable and reasonable utilization, certain mechanisms of cooperation are necessary, including the prior notification of planned measures, the exchange of information, consultations, and in certain instances negotiations.[67] The convention sets forth a number of procedural rules to be followed by states when they seek to undertake works on an international watercourse. In the first instance, "states must on a regular basis exchange readily available data and information on the condition of the watercourse, in particular that of a hydrological, meteorological, hydrogeological, and ecological nature and related to the water quality, as well as related forecasts."[68] In the event of a planned measure, states are required to "exchange information and consult each other and, if necessary, negotiate on the possible effects of planned measures on the condition of an international watercourse".[69] This article lays down a general obligation on the states to consult each other on the possible effects of these measures. The exchange of information is important in addressing problems that may possibly come out of the one-sided assessments of the state planning the project on the actual nature of the planned activities. As stated in the Yearbook of the International Law Commission, riparian states

[66] Supra note 13, Sergei Vinogradov, p. 57.

[67] *Ibid.,* p. 19.

[68] Supra note 3, The UN Watercourse Convention, Look Article 9(1).

[69] Supra note 13, Sergei Vinogradov, p.19 and Article 11of the UNWCC.

have an interest in being informed of possible effects of planned measures.[70] This will have the effect of avoiding problems that are inherent in unilateral assessments of the actual nature of such effects.[71]

In cases where planned measures could have possible adverse effects on the riparian states, there are a more stringent procedural requirements expected from the state planning such activities.[72] Article 12 of the UN Watercourse Convention states that, "Before a watercourse state implements or permits the implementation of planned measures, which may have a significant adverse effect upon other watercourse states, it shall provide those states with timely notification thereof." This article stipulates obligations regarding planned measures that may have a significant adverse effect upon other watercourse states.[73] The articles under part three establish a procedural framework designed to assist watercourse states in maintaining an equitable balance between their respective uses of an international watercourse.[74] It is believed that this set of procedures under these articles will help watercourse states to avoid disputes relating to new uses of watercourses.[75] However, there is a fear on the part of the planning state that the duty may be construed as a limitation on developing a new water use over the shared international watercourse.

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[70] Yearbook of the International Law Commission (1994), Summary records of the meetings of the forty sixth session, 2 May -22 July 1994, Extract from the Yearbook of the International Law Commission: Document A/49/10, Volume II, United Nations, New York, P.111.

[71] *Ibid.*, P. 111.

[72] *Id*., p.111.The international law Association Helsinki rules also requested [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, notice of any proposed construction or installation which would alter the regime of the basin... and the notice should include such essential facts as will permit the recipient to make an assessment of the probable effect of the proposed alteration. Look Helsinki rules Art XXIX(2). Here it is important to note that although the Helsinki Rules do not reach the status of an international treaty, the Rules may be characterized as teachings of publicists, because the International Law Association is a body of experts in the field of international law. As teachings of publicists, the Helsinki Rules are a source of international law for international watercourse law. Look Sharing the Gifts of the Nile: Establishment of a Legal Regime for Nile Waters Management, Temp. Int'l & Comp. L.J., vol 7, 1993, Pp. 101-102.

[73] Supra note 3, the UN Watercourse Convention, Article 12.

[74] Supra note 70, Yearbook of the International Law Commission (1994), P. 111.

[75] *Ibid.*, P. 111.

According to the ILC document, a "significant adverse effect" may not rise to the level of "significant harm" within the meaning of article 7.[76] "Significant harm" is not an appropriate standard for the setting in motion of the procedures under part three of the convention, since the use of this standard would mean that the procedures under articles 12-19 would be engaged only where implementation of the new measures might result in a conduct covered by article 7.[77]

It is important to note that the duty to provide notification under the convention arises not when the state planning measures or asked to issue a permit for planned measures believes those measures may result in significant harm to other riparian states. Rather, the threshold is lower when the planning state has a reason to believe that the measures in question may have a "significant adverse effect" upon other states that the obligation is triggered. This threshold is chosen deliberately by the ILC.[78] It advances the goal of prevention of harm.[79] However, as the duty to inform measures mainly aims at preventing harm to the watercourse states, it seems this duty may possibly endanger the equitable and reasonable utilization rights of the planning states. Beyond the new states to utilize the watercourse, extra duty is imposed by this provision in addition to what is clearly stated under Article 7 of the convention. On the other hand, one may say that this duty is a means of safeguarding the notified state from the possible significant harm by the planning state.

After reading Article 12 of the convention, one may say that unless the state planning the measures notifies the other concerned watercourse states, this

[76] *Ibid.,* p. 111 under Article 7 Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States. Though it is not easy to show this threshold clearly, it is indicated that causing harm to another state by utilizing the shared river resource has to have a '*significant*' impact on other watercourse states. This threshold implies that the state actor must be in a position to cause the other riparian states to suffer some degree of harm, and that harm; is not a simple harm on that states rather it linked with some degree of harm that do have an effect on the utilization of that shared resources. Scholars who study international water law stipulate that in order to qualify as ―significant‖ the level of harm has to be higher than merely perceptible or trivial (which would be considered insignificant), but it could be less than severe or substantial.

[77] *Id.*, p. 111.

[78] Para.2 of the commentary to art .11, ILC 1994 Report, R.111: "the threshold established by the standard [of 'significant adverse effect'] is intended to be lower than that of 'significant harm' under article 7." As noted by Supra note 5, Stephen C. McCaffrey, 2007, p 472

[79] *Id*, p. 472.

article will not allow a watercourse state to advance its planned project that possibly has a significant adverse impact on other watercourse states. This means that so long as every new use of the watercourse has a significant adverse impact on other watercourse states, it has to be notified to other watercourse states even if the new use of the watercourse resource is under the equitable use right of the state planning the project. According to the first statement of Article 12, the one who will assess the threshold of the harm of the planned activity on the other watercourse states is the state that planned the project. This entails the state planning to undertake its own assessment of the impact of the project upon other watercourse states.[80] This again denotes that notification to the other watercourse states depends upon whether the planning state properly investigates its environmental impact assessment of the project upon other states and the proper investigation of facts on the ground.

The convention under Article 13 provides that, unless an agreement is made by the basin states, the notifying state shall allow notified states a period of six months within which to study and evaluate the measures and to communicate their findings. However, this period can be extended for a further six months at the request of a notified state 'for which the evaluation of the planned measures poses special difficulty'.[81] The rules of the International Law Association Helsinki, on the other hand, request a state providing the notice to afford the recipient a *reasonable period of time* to make an assessment of the possible effect of the proposed project and to submit its views thereon to the state furnishing the notice.[82] Unlike the UN Watercourse Convention, which is limited to a period of six months within which the notified state should reply to the notifying state, the Helsinki rules use a general standard.

When it is said that the state is under a duty to notify planned measures, it is not saying that a state carrying out planned measures is required to gain the

[80] Stephen McCaffrey, The Law of International Watercourses: Some resent development and unanswered questions, Denver Journal of International Law and Policy, 1989, Vol. 17, no 3, P. 512.

[81] Supra note 3, The 1997 UN Watercourse Convention, Art 13.

[82] The Helsinki Rules on the Uses of the Waters of International Rivers, Adopted by the International Law Association at the fifty-second conference, held at Helsinki in August 1966. Report of the Committee on the Uses of the Waters of International Rivers (London, International Law Association, 1967), Art XXIX(3)

consent of co-riparian states before it begins its planned project. The need to have a prior consent of the state concerned is not required.[83] This signifies that the notifying state may proceed with its planned project and there is no duty on the part of the notifying state to get the consent of the notified state to proceed with its planned measures. During the utilization of international watercourse resources, there is no necessity to have the consent of the other riparian states. However, there is an obligation on the planning state to engage in timely notification, technical consultations, and cooperation and exchange of available technical data and information to the other riparian states.[84] I think the very importance of the general rule of prior notice is and should solely be for technical purposes and is not a matter of gaining the consent of the other riparian states. Nowhere in the text of the convention is it stipulated that notifying and notified states have to agree on a planned measure. Rather, it simply obliges them to consult.[85] Therefore, its main purposes include giving the other watercourse states the opportunity to assess the impact of the planned measures on its own and taking the necessary technical measures and consultation with the planning states.

Despite the general rule, as stated under Article 14(b) of the convention, the notifying state shall not implement the planned measures without the consent of the notified states. This means the state which notifies its planned measure with a possible significant adverse effect upon the other watercourse states is not allowed to carry on its planned project during the periods in which the notified states are allowed to evaluate the possible effects of the planned measures under Article 13 of the convention. According to an ILC commentary, the very aim of the duty not to proceed with implementation is intended to assist watercourse states in ensuring that any measures they plan will not be inconsistent with their obligations under Articles 5 and 7.

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[83] Dr Patricia K. Wouters & etal, Sharing Transboundary Waters An Integrated Assessment of Equitable Entitlement: The Legal Assessment Model, UNESCO, Paris, 2005, p. 24 available at http://www.cawater-info.net/bk/water_law/pdf/legal_model_doc.pdf Last accessed 18/11/2018

[84] Supra note 3, the UN Watercourse Convention, Art 12.

[85] Alistair Rieu-Clarke, Notification and Consultation on Planned Measures Concerning International Watercourses: Learning Lessons from the Pulp Mills and Kishenganga Cases, Yearbook of international Environmental Law, Vol. 24, No. 1 (2014), P. 108.

Moreover, it will help the notifying state to obtain all the information it would need to be in a position to comply with Articles 5 to 7.[86]

There are also detailed procedures aimed at assisting the state planning a project, and the other watercourse states within the basin may exchange information about the planned measures.[87] The notified watercourse state has a fixed period within which to reply, informing of its opinion with respect to the proposed measure. Where no response is received, and the notifying state is confident that its planned measure complies with the other obligations enshrined under the UN Watercourse Conventions, it can proceed as planned. Whereas if the notified state objects to the planned measure, consultations are required; this is aimed at seeking a solution that will equitably and reasonably serve the watercourse states.[88]

There may be instances where a state may believe that its planned activity has no a significant adverse effect upon other watercourse states and proceed with its projects. In this case, if the other watercourse states think the planned measures have significant adverse effects upon them, the states may request the planning state to observe the obligation imposed on it under Article 12 of the Convention.[89] In this case, the planning state must be willing either to proceed based on the request of the other states or to insist on its position. If the planning state still maintains that its planned project has no a significant adverse effect, it has a duty to provide the other states a documented explanation to this effect.[90]

If riparian states object to the planned use, they are required to enter into discussions with the notifying state "with a view to arriving at an equitable resolution of the situation".[91] If the state objects to the planned measures, the entire process might take twelve months or longer. If the matter is not resolved to the satisfaction of one or more of the states concerned, the

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[86] Report of the International Law Commission on the work of its forty-sixth session, 2 May -22 July 1994, Official Records of the General Assembly, Forty-ninth session, Supplement Extract from the Yearbook of the International Law Commission:- 1994 Document:-, vol. II(2), P.114.

[87] Supra note 3, the UN Watercourse Convention, Look Art 12,13,14,15,16,17,18 and 19.

[88] Supra note 13, Sergei Vinogradov, p. 19.

[89] Supra note 3, the UN Watercourse Convention, Art 18(1).

[90] *Ibid*, Art 18(2).

[91] *Ibid*, Art 17(1).

dispute settlement procedures of Article 33 would be applicable.[92]

These articles represent the acceptance by the international law commission of the principles of prior notification, consultation and negotiation in relation to new watercourse uses or modifications of existing ones.[93] While the procedures they establish are quite general, they provide a framework within that states sharing international watercourses can develop specific regimes tailored to their particular needs and to the characteristics of the watercourse and uses being made of it. The articles cover all potentially adverse effects of planned measures, including environmental impacts.[94]

4. Exceptions to the Duty to Notify Planned Measures under the UN Watercourse Convention

There are exceptional circumstances that are stated under the UN Watercourse Convention in which the riparian states may not be required to give notice of their planned measures to the other riparian states. There are three instances in this regard. The first exception is found in Article 19, which states that a watercourse state may immediately proceed with measures that are "of the utmost urgency in order to protect public health, public safety or other equally important interests." Article 19 mainly requires that planned measures be implemented immediately, without awaiting the expiry of the periods allowed for reply to notification and for consultations and negotiations.[95] In this case, the implementing state must transmit to the other watercourse states a formal declaration of the urgency of the measures together with relevant data and information, then after the normal requirements of consultation, negotiation will proceed.[96]

The second exception is found under Article 28 of the UN Watercourse Convention, which allows states latitude in procedural compliance in the case of actual emergency situations that are related to international watercourses. An emergency is defined here as "a situation that causes, or

[92] Stephen McCaffrey, The contribution of the UN Convention on the law of the non-navigational uses of international watercourses, Int. J. Global Environmental Issues, Vol. 1, Nos. 3/4, 2001 p. 256.

[93] Supra note 80, Stephen McCaffrey, p. 512.

[94] *Ibid*, pp. 512-513.

[95] Supra note 70, Yearbook of the International Law Commission (1994), p.118.

[96] Supra note 15, David J. Lazerwitz, p. 265.

poses an imminent threat of causing, serious harm to ... other States and that results suddenly from natural causes. .. Or from human conduct..."[97] This article provides that a state in whose territory an emergency occurs needs only to notify the other watercourse states and relevant international organizations.[98] However, there is no clear obligation imposed upon other states to come to the assistance of the victim state. The obligation only comes into effect when the necessary contingency plans have been agreed to in advance.[99]

The third exception is what is stated under Article 31; the article reads: "Nothing in the present Convention obliges a watercourse State to provide data or information vital to its national defense or security". On the other hand, states shall cooperate in good faith with the other watercourse states with a view to providing as much information as possible under the circumstances.[100] This article allows states to withhold information that is vital to their national defense or security, thereby protecting this most important sovereign interest from disclosure. It should be noted, however, that the national defense and security criteria have no specific definitions in the convention and could potentially become an avenue of retreat for signatory states to avoid compliance with the articles. Article 31 attempts to narrow this exception by requiring that states "shall cooperate in good faith with other watercourse States with a view to providing as much information as possible under the circumstances."[101] In such like instances, the state that

[97] Art 28(1) of the UN watercourse convention states that:- For the purposes of this article, "emergency" means a situation that causes, or poses an imminent threat of causing, serious harm to watercourse States or other States and that results suddenly from natural causes, such as floods, the breaking up of ice, landslides or earthquakes, or from human conduct, such as industrial accidents.

[98] The most effective action to counteract most emergencies resulting from human conduct is that taken where the industrial accident, vessel grounding or other incident occurs. But the paragraph requires only that all "practicable" measures be taken, meaning those that are feasible, workable and reasonable. Further, only such measures as are "necessitated by the circumstances" need be taken, meaning those that are warranted by the factual situation of the emergency and its possible effect upon other States. Supra note 68, The Yearbook of the International Law Commission (1994), P. 130.

[99] At this moment it is important to note the difference between the two exceptions. Article 19 deals with planned measures whose implementation is of the utmost urgency "in order to protect public health, public safety or other equally important interests". It does not deal with emergency situations, which will be addressed in article 28. Article 19 concerns highly exceptional cases in which interests of overriding importance require that planned measures be implemented immediately, without awaiting the expiry of the periods allowed for reply to notification and for consultations and negotiations. Art 28 deals with issues that deals with the already existence of emergencies in the watercourse state.

[100] Supra note 3, The UN watercourse convention, Art 31.

[101] Supra note 15, David J. Lazerwitz, p. 265.

planned the project in the international watercourse may not be required to give such notification to other riparian states of that specific international watercourse. However, the states doing this have to perform in good faith and consider what is stated in the above articles of the international watercourse convention.

5. The Duty to Notify Planned Measures in the Bilateral and Multilateral Agreements of the Nile Basin

The Nile River Basin does not yet have a comprehensive treaty framework that could be applied to all the riparian states. What is more, the absence of a unified legal regime and the unique geopolitical setting of the region have so far limited possibilities of integrated river basin planning and utilization.[102] Except for the Constitutive Act of the Nile Basin Initiative, which clearly highlighted the Nile as a shared resource of all the riparian states and recognizes the equitable utilization of the resource across the basin region,[103] one would note that throughout its long history, not a single legal arrangement has been made about the use of the Nile.[104] However, there are a number of bilateral and multilateral treaties signed since the period of colonization. In the following subsections, an attempt will be made to appraise the duty to notify planned measures or a related principle that imposes a comparable sense of duty under bilateral and multilateral agreements within the basin; and to evaluate how far this duty is incorporated under the Cooperative Framework Agreement over the Nile.

In recent diplomatic negotiations of the Eastern Nile states, it is observed that Ethiopia let the downstream states work with the state to assess the effect of the Great Ethiopian Renaissance Dam (GERD) on the downstream states. The Ethiopian government provided the necessary GERD Project in hard and soft copies for review to an international panel of experts to which the representatives of the downstream states are a party.[105] As it has been

[102] Zewdu Mengesha, Application of the Duty not to Cause Significant Harm in the Context of the Nile River Basin, *Bahir Dar University Journal of Law, 2014, Vol.4, No.2,* p. 287.

[103] Please see the objectives of Nile basin imitative, available at http://www.nilebasin.org/index.php/nbi/who-we-are last visited 10/12/2018

[104] Christina M. Carroll, Past and Future Legal Framework of the Nile River Basin, 1999, Vol.12, The Georgetown International Environmental law Review, P.282

[105] International Panel of experts (IPoE) on Grand Ethiopian Renaissance project Dam Project (GERDP), Final Report Addis Ababa Ethiopia, may 31st 2013 p.4 available at :

repeatedly stated by different higher officials of the government of Ethiopia, Ethiopia did this not from the sense of legal obligation, rather in good faith for having a good relation with these basin states and to maintain a good neighborhood with them. In fact, the motive of Ethiopia was appreciated by the international panel of experts. The panel clearly stated that it appreciated the initiative taken by Ethiopia to invite the two downstream riparian countries, Egypt and Sudan, to undertake joint consultation on the project.[106] This clearly shows that Ethiopia undertook this action not out of a legal duty imposed upon the state rather from the sense of good neighborhood and good faith.

5.1 The Duty to Notify Planned Measures under the Colonial Agreements[107] of the Nile

The past legal agreements for Nile water allocation were subject to Egyptian hegemony and there is no single legal statement or agreement that acknowledges that all the riparians of the Nile have rights to its water resources.[108] The existing legal framework of the Nile does not reflect the needs and interests of all Nile riparian states.[109] Most of the Nile agreements are also bilateral, and all have questionable effects today because they were adopted in the colonial period.[110] Moreover, there is no post-colonial agreement reflecting the interests of all riparian states of the Nile.[111] Despite this fact, according to authors who studied the laws that govern the water resources utilization of the Nile River, the treaties and legal instruments regulating the use of Nile waters may be divided into four categories.[112]

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http://www.scidev.net/filemanager/root/site_assets/docs/international_panel_of_experts_for_ethiopian_renaissance_dam-_final_report.pdf

[106] *Ibid*, p.1.

[107] It is important to tell the reader that the discussion under this subsection is mainly for the sake of assessing the development of the duty to notify planned measures under the Nile water use agreements and this should not be taken to mean that these different colonial agreements have a binding effect upon watercourse states of the Nile in the present days. Beyond the nature of the duty imposed by these old agreements may not exactly reflect the current form of the duty to notify planned measures.

[108] Nurit Kliot (1994), Water Resources and Conflict in the Middle East, Rutledge, London and New York, P.75.

[109] Supra note 104, Christina M. Carroll, P. 270.

[110] *Ibid*, P. 270.

[111] *Ibid*, P. 270.

[112] The purpose of taking this classification is for the sake of simplicity to make my investigation about the duty under different periods of the agreements on the Nile water.

These are treaties between the United Kingdom and countries under the control of the upper riparians of the Nile basin around the beginning of the 20th century. The second one is the 1929 Nile Waters Agreement; the third is a set of agreements and measures complementing and consolidating the 1929 agreement; and finally there exist post-colonial treaties and other legal instruments.[113] The CFA can be categorized under the last category of the treaties.

The most important treaties within the first categories of instruments include the 1891 Protocol between the United Kingdom and Italy for the demarcation of their respective spheres of influence in Eastern Africa, the 1902 agreement between United Kingdom and His Majesty Emperor Menelik II of Ethiopia, which mainly aimed to set boundaries between Anglo-Egyptian Sudan and Ethiopia. The other treaties within this first category also include the 1906 United Kingdom and the Independent State of the Congo Treaty to Re-define their Respective Spheres of Influence in Eastern and Central Africa. In addition to this, in 1925, there was an exchange of notes between Italy and the United Kingdom by which Italy recognized the prior hydraulic rights of Egypt and the Sudan. In this agreement, the upper riparian states, which were under the colony of these countries, agreed not to construct in the headwaters of the Blue Nile and White Nile rivers and their tributaries any work that might sensibly modify their flow into the main river.[114] All the first categories of treaties one way or another incorporate a provision that prohibits the construction of water works in the upper basins of the Nile. For example, the 1902 treaty provides 'restriction on construction of dams across the Blue Nile, Lake Tana or Sobat without the prior consent of the British Government of Sudan.[115] This treaty shows that the upper riparian state, Ethiopia, has the duty to notify planned activity to the British Government of Sudan and get the approval of

[113] Arthur Okoth-Owiro, The Nile Treaty State Succession and International Treaty Commitments: A Case Study of the Nile Water Treaties, *Law and Policy Research Foundation,* Nairobi 2004, p. 6.

[114] Exchange of notes between the United Kingdom and Italy respecting concessions for a barrage at Lake Tsana and a railway across Abyssinia from Eritrea to Italian Somaliland. Rome, 14 and 20 December 1925, British and Foreign State Papers, vol. 121. p. 805. Available at:- http://www.fao.org/docrep/W7414B/w7414b0u.htm

[115] Tadesse kassa, The Anglo Ethiopian Treaty on the Nile and the Tana Dam Concessions: A script in legal history of Ethiopia's Diplomatic confront (1900-1956), Mizan Law Review, Vol.8, no.2,2014, p. 278.

the British government before undertaking such projects. This means the upper riparian state, Ethiopia, must pledge not to construct dams or other structures within the watercourse and if the state wishes, it has to communicate its planned projects and get the consent of the British Government of Sudan. This agreement gives a veto right to the British Government of Sudan.

The 1929 Exchange of Notes between Great Britain (acting for and on the behalf of Sudan and her East African colonies) stated under Art 4(II) that "except with the prior consent of the Egyptian Government, no irrigation works shall be undertaken nor electric generators installed along the Nile and its branches nor on the lakes from which they flow if these lakes are situated in Sudan or in countries under British administration which could jeopardize the interests of Egypt either by reducing the quantity of water flowing into Egypt…"[116] The effect of this treaty is that all the riparian countries under British administration had to seek the consent of the Egyptian Government if they wanted to carry out irrigation, power works or construction of any other measures on the River Nile or its branches or on the lakes in those territories. It is possible to say that this colonial treaty imposes an obligation on riparian states to inform Egypt and get her blessing before undertaking the planned activity. This mean that the upper riparian states of the Nile basin that were under British colony needed the consent of Egypt to carry on with any planned activities using the water resource of the river.

The Supplementary Agreement of 1932 (the Aswan Dam Project) and the 1949 Owen Falls Agreement were made with the view to constructing the Owen Falls Dam in Uganda; the agreement was made between Great Britain as administrator of Uganda and Egypt to protect her interest recognized by the 1929 agreement. This treaty as a project-based arrangement concerning only the Owen falls dam; however, it is important to note that following this agreement even after the independence of Uganda, the state was requesting the blessing of Egypt for the projects that Uganda wants to perform in the Nile Basin water resources.[117] This means in order to undertake projects in

[116] Exchange of Notes Regarding the Use of the Waters of the Nile for Irrigation, May 7 , 1929, Egypt-U.K, Art 4(II) .

[117] Appendix B.1, History of Riparian Agreements Respecting the River Nile, *Bujagali Project Hydropower Facility EIA,* March 2001, P.5

the Nile basin, the Egyptian officials should give consent to the planned projects of Uganda. This can be substantiated from the different diplomatic letters that were sent by Uganda to Egypt while the state was a British Colony.[118] According to this agreement, the interests of Egypt will, during the period of construction represented at the site by an Egyptian resident engineer; the engineer will make sure the activity is undertaken in a way that protects the interest of Egypt.[119] This shows that beyond imposing a duty to notify on the part of Uganda its planned measures, this agreement entitles Egypt to follow up the project so as to protect her interests.

In post colonial era, there have been a number of technical cooperation agreements. The most important of all these agreements is the 1959 agreement between Egypt and Sudan on the Full Utilization of the Nile waters.[120] This agreement did not come up with a clear provision with regard to the duty to notify planned measures by the state planning to enhance the utilization of the water resource of the Nile in its territory. However, it is stated under Art 3 [121] that if Egypt, on account of the progress in its planned agricultural expansion, finds it necessary to start any of the increase of the Nile yield project after its approval by the two governments and at a time

<http://documents.worldbank.org/curated/en/835071468111856514/pdf/multi0page.pdf> last visited 10/04/2019

[118] *Ibid.* It can be noted from history that Uganda was sending diplomatic letters to Egypt for the purpose of requesting the latter state to allow the former state to perform activities on the Nile Basin located in her territory. Such letters was sent by Uganda may be interpreted in recognizing the prior right of Egypt on the water resources of the Nile. From the different letters it is possible to look the attempt made by Uganda to show that the activities undertaken by the state will not have impact on Egypt right over the water resource. A case in point is the Owen Falls Dam Extension Project where Egypt was consulted before the project could take off. It was only after extensive consultations with the other riparian states, especially the downstream ones that the project finally started. For example in 16/05/2006 the Egyptian foreign affair ministry respond for the letter of Uganda dated in 3rd may 2006. The Egyptian government responds to the government of Uganda, upon Uganda request for the renewal of Egypt's no objection to the development of *Bujagali* hydro electric project and *Karuma* project. The Egyptian foreign affair ministry clearly notes that taking into account the projects do not affects Egypt's water share from the river Nile in accordance with the relevant existing agreements in this regards…therefore the relevant Egyptian governmental authorities do not object the project of Uganda.

[119] Exchange of Notes Constituting an Agreement Regarding the Construction of the Owen Falls Dam, Uganda, May 30-31, 1949, Egypt-U.K, no. 4.

[120] United Arab Republic and Sudan Agreement for the Full Utilization of the Nile Waters Signed at Cairo, on 8 November 1959; come in to force 12 December 1959.

[121] *Ibid*, this article deals with projects for the utilization of lost waters in the Nile Basin. It is known that considerable volumes of the Nile Basin Waters are lost in the swamps of Bahr El Jebel, Bahr El Zeraf, Balir el Ghazal and the Sobat River, the two Republics agree in order to prevent these losses and to increase the yield of the River for use in agricultural expansion in the two Republics.

when the Sudan Republic does not need such a project, the United Arab Republic *shall notify* the Sudan Republic of the time convenient for the former to start the effecting of the planned project. This can be considered one instance that deals with the notification of planned measures with regard to activities within the basin water resources.

5.2 The Duty to Inform Planned Measures under the Cooperative Framework Agreement over the Nile (CFA)

The Nile River Basin Cooperative Framework Agreement is an agreement for the regulation of "the use, development, protection, conservation and management of the Nile River Basin and its resources and establishes an institutional mechanism for cooperation among the Nile Basin States."[122] Despite this huge ambition, this agreement is not yet entered into force failing to fulfill the minimum number of ratification as required by the agreement for its entry into force.[123] Part I, Article 3(8) of the Agreement deals with information concerning planned measures, and reads: "The principle that the Nile Basin States exchange information on planned measures through the Nile River Basin Commission." The Commission "which is planned to establish by Part III of the Framework Agreement, will serve as a means to exchange such information among the Nile River Basin states".[124] It is also stated that Nile Basin States shall observe the rules and procedures established by the Nile River Basin Commission for exchanging information concerning planned measures.[125] This means the detailed rules with regard to the rules of procedure governing exchange of information for planned activities will be issued by the Nile Basin Commission after its establishment.

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[122] Agreement on the Nile River Basin Cooperative Framework, May 2009, Entebbe, Uganda, Art.1 It has not yet entered into force.

[123] According to Article 43 of the framework agreement shall enter into force on the sixtieth day following the date of the deposit of the sixth instrument of ratification or accession with the African Union. Presently 6 states (Ethiopia Ruanda, Kenya, Tanzania, Uganda and Burundi) signed and three states Ethiopia, Ruanda and Tanzania Ratified with the respective legislative organs of the states. See ≤http://www.nilebasin.org/index.php/nbi/cooperative-framework-agreement> last visited at 20

[124] Supra note 122, Agreement on the Nile River Basin Cooperative Framework, Art 3(8) and 2(e).

[125] *Ibid*, Article 8(2).

Taking into account the general framing of the exchange of information concerning planned measures under Article 8 of the CFA[126], it may be possible to argue that the duty to inform planned measures is drafted in a way that might not impose stringent duty upon a state planning to perform a different activity over the water resources of the Nile. If we are able to contrast the drafting of this principle under CFA with that of the UN watercourse convention, this stand may be acceptable. In fact, the drafting process of the principle of planned measures under the CFA has been one of the most difficult issues throughout the CFA negotiations.[127]

As stated in the above discussion, the Articles from 12 to 19 of the UN Watercourse Convention provide a detailed rule on the exchange of information concerning a planned measure. The duty imposed by the CFA on the state planning the activity is to give information about the planned activity to the Nile Basin Commission, not to the potentially affected watercourse states.[128] This has its own impact on how the planned measure is communicated to the concerned states, at least in terms of communicating the planned activities to the concerned state at the earliest possible time. The states only get the information on the planned measures from the commission after this organ is notified by the state planning the activity. During the negotiation process on the Cooperative Framework Agreement, Ethiopia, for example opposed notification of other riparians because of its concerns that such notification may be construed as recognition of the 1902 treaty,[129] which the lower riparian states of the Nile, especially Egypt, claim that the agreement gives the state a historical rights over the watercourse resources. By comparing with the UN watercourse convention and taking into account the drafting history of the CFA, the position taken by CFA may be construed as if the watercourse states of the Nile are not willing to abide by a detailed duty of due diligence. The preference by the states of the Nile

[126] *Ibid*, Art 8(1) it is stated that "Nile Basin States agree to exchange information through the Nile River Basin Commission.

[127] Musa Mohammed Abseno (2013) Role and relevance of the 1997 UN Watercourses Convention in resolving transboundary water disputes in the Nile, International Journal of River Basin Management, Vol 11: no2, 193-203, P. 199.

[128] Supra note 122, Agreement on the Nile River Basin Cooperative Framework, as the agreement notes that the exchange of the information is made through Nile River basin commission. look Art 8(1) of the CFA.

[129] Supra note 24, Salman M.A. Salman, P. 22.

in the CFA to exchange information through the Nile basin Commission may have its own impact upon the potential affected states. So long as the states are not directly notified by the state planning the project, one may say that the institutional capacity and the neutrality of the commission will possibly have an impact on the proper notification of information received from the planning state to the other watercourse states of the Nile.

However, as the details of the procedural rules have not yet come into existence, it might be a bit difficult to take position that this duty is formulated loosely. However, it can be again argued that despite the efforts of lower riparian states for the inclusion of similar articulation of the duty to notify planned measures under the UN watercourse Convention,[130] they failed to convince the position taken by upper riparian states. The failure to take due consideration by Nile basin states in drafting this duty in the main part of the framework agreement might suggest that the upper riparian states of the Nile were not happy with the very essence of the duty as enshrined in the UN watercourse convention. The CFA is mainly signed and ratified by the upper basin sates of the Nile.[131] What was happening at the very voting process for this article of the UN watercourse convention might slightly support this argument.[132] This idea was even supported by the Nile watercourse states at the drafting stages of the CFA. Earlier at the drafting stage of the CFA, there was an attempt to adopt the provisions on planned measures from the draft UN Watercourse Convention. However, the lack of agreement in adopting procedural rules on planned measures had led to the removal from the earlier CFA of provisions on planned measures, which had been adopted from the UNWC.[133]

Egypt and Sudan insist that provisions on notification of other riparians about planned measures is in line with those included in the World Bank

[130] *Ibid*, P. 22.

[131] Up to 20/09/2018 6 states sign and 3 states ratified with their domestic legislative authorities. These states which sign and ratified the CFA are the upper riparian states of the Nile. http://www.nilebasin.org/index.php/nbi/cooperative-framework-agreement last visited 20/09/2017.

[132] The basic obligation to provide prior notification about planned activity was accepted as a part of the Convention by most delegation; however three states did not support this article. The states were Ethiopia, Rwanda and Turkey. Supra note 5, Stephen C. McCaffrey, p.473, look also Supra note 6, Stephen McCaffrey, p. 23.

[133] Musa M. Abseno (2013) The influence of the UN Watercourses Convention on the development of a treaty regime in the Nile River basin, Water International, Vol 38: no 2, 192-203, P. 200.

Policy for Projects on International Waterways and that of the watercourses convention and argued that therefore it should be included in the CFA.[134] Ethiopia, for example, rejected the former draft rules on planned measures, stating that the issue of planned measures becomes relevant if and only if a water sharing arrangement is set and gets acceptance from the basin states. In the absence of Water sharing arrangement, Ethiopia notes that we need only general rules; therefore, the rules governing the regular exchange of data and information are sufficient.[135] Furthermore, Ethiopia's position on the UN Watercourse Convention was clear. The state noted that Part III of the convention imposed an onerous burden upon riparian states.[136]

These all can show that the position of Nile basin states on the content of the rule of planned measures were varied at the negotiation of the CFA and this leads to the drafting of the rule in its current form. One may note that the current form of the duty to notify planned measures under the CFA is intentional articulation by the watercourse states of the Nile. Though the detailed rules are expected to be issued by the Nile River Commission on which the Conference of Heads of State and Government is the supreme policy-making organ, it might be unwise to expect that a similar form of the rules with the UN Watercourse Convention will be articulated by this organ. The fear with which Nile basin states consider this rule as imposing limitation on the latecomer states' equitable uses right of the watercourse resources of the Nile might force the Conference of Heads of State and Government to maintain this position. Taking into account the history of the Nile watercourse states, there is a fear on the part of the upper riparian states of the Nile that the duty to notify planned measures may be construed mainly as a means of maintaining the interests of Lower Riparian states of the Nile, which the old colonial agreements mainly favor. Like the state of Ethiopia, the other upper riparian states took a similar position by saying that without having a proper water allocation agreement of the river, abiding themselves by a similar detailed rule of the duty to notify planned measures as enshrined

[134] Supra note 24,Salman M.A. Salman, P. 22.

[135] PoE Final Report, 2000, p. 17 as noted by Supra note 133, Musa M. Abseno (2013), P. 200.

[136] Official Records of the 99th Plenary Meeting of the 51st Session, UN Doc A/51/PV.99 (1997) p. 9 as noted by supra note 85, Alistair Rieu-Clarke, p. 108.

under the UNWC may not be wise to protect their respective equitable and reasonably utilization rights of these states.

6. The International Customary Law status of the Duty to Notify Planned Measure

There is disagreement whether riparian's duty to inform about planned measures has the status of international customary law under the present international watercourse laws. In fact, there are diverse views as to what status this duty has under international watercourse law. Some authors in the field of international watercourse law argued that riparian's duty to notify planned measures is accepted as a general practice by watercourse states and even has the status of customary international law.[137] There are also views that support this stand.[138] This means that the duty will bind every riparian state irrespective of the fact that they are a member of a treaty to that effect or not.[139] The provision of the UN Watercourse Convention on prior notification was not controversial during the negotiation of the convention;

[137] Supra note 8, Attila Tanzi (Ph.D.), P. 10. At least as regards the duty to provide neighboring States with prior notice of plans to exploit a shared natural resource, commentators agree that it is an obligatory requirement under customary international law or 'as a principle generally recognized in international environmental law'. Several States have sought to rely on the duty to provide prior notification in the course of international disputes. The obligation certainly receives broad support in important recent conventional and declaratory instruments. There are individuals who argue that the customary law status of this obligation would also be supported by the general duty to cooperate. The *Pulp Mills* case is often cited to support this argument because the International Court of Justice found that Uruguay breached its procedural obligation under the 1975 Statute to inform, notify and negotiate with Argentina regarding the authorization and construction of the pulp mills. However, it is important to note that the Court's decision refers only to the obligation to 'inform, notify, and negotiate' under the 1975 Statute specifically, and not under general international law. See also Nadia Sanchez and et al, Recent Changes in the Nile Region May Create an Opportunity for a More Equitable Sharing of the Nile River Waters, *Netherlands International Law Review*, 2011, p. 376.

[138] Dante noted that the duty of basin state initiating a project which may adversely affect the right and interests of co-basin states to bring the issue to the knowledge of these states are…increasingly regarded as a rule of international customary law. look supra note 30, Dante A. Caponera, National and International Water Law and Administration selected writings, International and National water law and policy series, Kluwer law international, 2003, p. 212.

[139] Here it should also be mentioned that proving the existence of international customary laws is also a difficult task that need to look different things like looking the existence of state practice and *opinio juris* as per Article 38(1) of the ICJ Statute. Customary international law is more complex and uncertain than formal agreements such as treaties or conventions. Customary international law consists of the practices of states undertaken out of a sense of legal obligation that is out of a sense that the practice is required by law. In determining what customary international law actually is, diplomats, international tribunals, lawyers, and scholars must examine a wide variety of sources of state practice. Look Joseph W. Dellapenna, The customary international law of transboundary fresh waters, *Int. J. Global Environmental Issues, Vol. 1, Nos. 3/4,* 2001 pp. 266-267

this indicates states generally accept that they have a duty to provide prior notification of planned projects that may adversely impact co-riparians.[140] It may be concluded from the available evidence, the manner in which disputes between states have been resolved, state treaty practice, instruments adopted like the Rio Declaration and General Assembly Resolution 2995, the work of expert bodies, and the writings of commentators shows that prior notification is required by customary international law.[141] This idea is also supported by authors like Charles .B. Bourne. He noted that for the most part, the basic requirements of the exchange of information, notices, consultations, and negotiation now form part of customary international law.[142]

However, in order to say that a riparian's duty to notify planned measures has achieved the status of international customary law; we need to be certain as to the existence of the general state practice as well as the existence *opinio juris*. This means that states are practicing such an act because of their beliefs that such an activity is a legal obligation imposed upon them. Unless we do have such evidence as to this conviction, it becomes difficult to conclude that the practice has the status of international customary law. When we assess the existence of the general practice of the duty to notify planned measures, it seems that the practice is mainly supported by agreements that emanate either from bilateral or multilateral watercourse agreements.[143] Some states even feel that too detailed rules of the duty to notify planned measures has no basis in general and customary international law.[144]

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[140] Supra note 5, Stephen C. McCaffrey, p. 473.

[141] *Id*, p. 473

[142] Charles .B. Bourne, The International Law Commission's Draft Articles on the Law of International Watercourses: Principles and Planned Measures, (1991) University of Colorado Law School Colorado Law Scholarly Commons, p.11 http://scholar.law.colorado.edu/law-of-international-watercourses-united-nations-international-law-commission/4 Last visited 20/09/2018. Bourne also notes that there is now considerable authority for this proposition. In the Helsinki Rules, the ILA treated these procedural rules only as recommendations: see Helsinki Rules, and as recently as the Stockholm Conference on the Environment in 1972, there was no agreement that the rules were obligatory. But the Lake Lanoux arbitration had treated them as part of international law.

[143] It is important to mention that in both the Pulp Mills *case and* Indus Waters Kishenganga Arbitration (Pakistan v India) though the ICJ entertained the issue with regard to the duty to notify planned measures, in both cases the court mainly based its assessment in terms of the agreement made by the watercourse states. Supra note 85, Alistair Rieu-Clarke, Pp.113-116

[144] *Ibid*, P.107 it is important what Ethiopia and Turkey raised as opposition to the text presented by the ILC regarding the way how this duty is constituted in the UN framework convention.

There are also other authors who argue that this riparian duty to cooperate and to notify planned measures is not a strict legal obligation.[145] Most of the time it is possible to examine how the detailed rules of the duty to notify planned measures differ from one agreement to the other. This might tell us that there is no consensus on what exactly this duty imposes upon watercourse states. Therefore, unless the riparian state is a member to a treaty that stipulates the riparian's duty to notify planned measures, it will not be bound by such obligations.

Though a number of watercourse agreements incorporate this duty, the existence of this duty should not imply the corresponding powers of veto. The very existence of this obligation does not mean that one state is obliged to obtain the consent of all interested states and by that token to conclude an agreement with them before it may proceed with its project.[146] ICJ's formulation in *Costa Rica v. Nicaragua* could suggest that only when an environmental impact assessment by the planning state confirms that there is a risk of significant trans-boundary harm, the state causing the risk must notify potentially affected states.[147] This could give wider discretion to the planning states. Watercourse states may even fear that the existence of this duty may be taken as if it may impose more duty on the new riparian states that plan to utilize the watercourse resources. This, in fact, relates with what the upper riparian states of the Nile understood or decided while they were in the negotiation of the CFA. Therefore, taking into consideration the above discussion on the subject matter it is possible to say that though the general rule of the duty to notify planned measures is in the process of forming customary international law and the details of the rule is still disputed.

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[145] Calero Rodriguez argued that 'cooperation was a goal, a guideline for conduct, but not a strict legal obligation which, if violated, would entail international responsibility' See [1987] *Yearbook of the International Law Commission*, vol. 1, at 71.

[146] Dante A Caponera (1921–2003), Principles of Water Law and Administration National and International *(*2nd Edition, Taylor & Francis Group, London, UK 2007) PP. 220-221

[147] Yoshifumi Tanaka , Case Note on the cases concerning Certain Activities carried out by Nicaraguain the Border Area (Costa Rica v. Nicaragua), Some Reflections on the Obligation to Conduct an Environmental Impact Assessment, Review of European community and International Environmental law (RECIEL) 26 (1) 2017 P. 95.

Concluding Remarks

Riparian's duty to notify planned measures is one of the principles that govern the international watercourse regime. It constitutes recognition that activities performed in one of the riparian states will have some sort of positive and/or negative effect on the other members of the international watercourse states; this principle is developed. In order to minimize the adverse negative effect of the project performed by one member of the riparian states to the other states, international watercourse law has come up with such prior notification of the planned measures to the other states in the watercourses. However, what status this principle has under international watercourse laws and especially whether it gets the status of international customary law is contested. In fact, it is observed that while watercourse states incorporate this duty in their agreement, and international tribunals also use this duty to settle disputes mainly if it emanates from the agreements of the concerned state. Nevertheless, it should also be emphasized that there is significant diversity in how the principle is drafted in different international watercourse treaties. While some of the international treaties came up with detailed rules of the duty, others prefer to state in a general way. The 1997 UN Watercourse Convention and the Cooperative Framework Agreement over the Nile show this nature respectively. Such diverse articulations have an impact on the proper development of the principle under the international watercourse law regime. It can be concluded that the principle is not yet fully grown in its development. Again there is fear among the upper riparian states of the Nile that the existence of this duty may be taken as if it may impose more duty on the new riparian states that plan to utilize the watercourse resources.

In view of the above, it is difficult to conclude that this principle has attained a customary international law status at present. Considering the widespread inclusion of the duty in different watercourse treaties over many decades, it may be argued that it is in the process of forming international customary law. Emerging practice among riparian states indicates that states make requests for information on planned measures, cooperate and share relevant information. However, taking into consideration the divergent articulation in different watercourse agreements and the due diligence nature of the duty, new states that plan to utilize the watercourse resources may not look at the duty as a strict duty with which they will comply in case they face vital interests.

An Appraisal of the Legal Bottom-Line of Corporate Environmental Responsibility in Ethiopia

Ayalew Abate Bishaw[*]

Abstract

While working towards attracting huge investment and promoting business whether or not developing countries have the necessary environmental legal regime to hold corporations legally liable is often an issue. In an effort to partly respond on the issue, this article is meant to assess the minimum environmental law requirements applied for holding business entities (both foreign and domestic) liable to their environmental misdemeanors in Ethiopia-'the legal bottom lines of corporate environmental responsibility.' The legal bottom lines of corporate environmental responsibility are requirements that corporations or business organizations are legally mandated to comply with. The purpose of this article is therefore to ascertain whether Ethiopia has the necessary environmental and related legal foundational frameworks to holding corporations accountable- determining the minimum legal framework. For this purpose doctrinal analyses were preferred as a method and assessment was made on relevant laws. Accordingly, the assessment finds that Ethiopia has foundational environmental legal regime and if applied may hold corporations liable. It further unearths that still the laws lack clarity; comprehensiveness and adequacy to flatteringly control businesses conduct to the contemporary requirements. Hence for a proper corporate environmental regulation, further amendment need to be made.

Keywords: Legal bottom line, corporate environmental responsibility, Ethiopia, and environmental liability.

Introduction

Corporate responsibility (CR/ CSR) has been a subject of researchers from various disciplines that include law.[1] It has been a concept debated over a

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century and continues being debatable.[2] The central issue for the development of various theories and literature as well as arguments reclines in the nature of responsibility and level or extent of corporate responsibility[3] is whether corporations (need to) be responsible beyond the shareholder's interest? Why and how?, to mention some. A much more related issue to the topic at the point is over delineating the legal threshold as CR is understood by many scholars as a *compliance plus*[4] voluntary approach against compulsory authority. Whether the voluntarism is self-initiated or government intervened approach is also a basic issue that quests the extent of legal intervention in regulating the corporate environmental responsibility of corporations. Leaving the rhetoric/theoretic debates[5] aside, this article dwells on setting down corporate environmental accountability in Ethiopia

[1] Among the scholastic works reflecting that CSR is hotspot multidisciplinary researchable concept include: Constantina Bichta (2003) Corporate Social Responsibility, a Role in Government Policy and Regulation? Fromthe University of Bath, School of Management; Mia Muhmudur Rahim (2013), Legal Regulation of Corporate Social Responsibility, a Meta Regulation of Law for Raising Corporate Social Responsibility in a Week Economy from School of Accountancy Queensland University of Technology Brisbane, Queensland Australia; Virgina Harper Ho (2012), Beyond Regulation: A Comparative Look at State-Centric CSR and the Law in China, University of Kansas School of law, Vanderbilt Journal of Transnational Law vol.46; UNTAD (1999), the Social Responsibility of Transnational Corporations. Halina Ward (2005), Corporate Responsibility and the Business of Law International institute of environment and development. Lyman Johnson, JD (2011), History of Corporate Responsibility, University of St. Thomas School of Law, Washington and Lee University School of Law Project Working Paper No. 6. Avery, C. 2000, Business and Human Rights in a Time of Change Amnesty International-UK: London. Barkin, D.1999. The Greening of Business in Mexico, Discussion Paper No. 110. UNRISD: Geneva. Cairncross, F. 1995. Green Inc.: A Guide to Business and the Environment. Earth scan: London.Capra, F. and Pauli, G. (eds.). 1995. Steering Business toward Sustainability, United Nations University Press: Tokyo. Clark, A. and Clark, J. 1998. An Integrated Methodology for Assessing the Social and Cultural Impact of Mining UNCTAD: Geneva.

[2] There are literatures dated from 1870 about CSR up until now. This clearly shows that the concept is as old as corporations. As we can see from supra note 1, still we are dealing with it and will continue so far as corporations are important actors in the economy.

[3] The shareholder theory, stakeholder theory, and sustainable development theory are to be mentioned as example here.

[4] UNTAD (1999); the Social Responsibility of Transnational Corporations, New York and Geneva.p.3-4

[5] At the very fore-front there exist two basic theoretical debates: one that alleges corporations responsibility is to make profit and keep the business interest of their stakeholders, and the other that claims the triple bottom line approach: corporations shall be responsible to the society and environment beyond the economic interest they are established to do. Besides taking the political economy and government interest in the business there is further argument relating to whether they shall be responsible compulsory or voluntary. In the neo-liberal classic thought corporations shall be free to do well towards the society and environment and hence CSR is voluntary commitment. Whereas, on the other side of the argument others say that the public has interest in the business and hence they shall be required to be responsible. The debates still are persists and countries choose the kind of policy on context, as there is no internationally agreed standard of CSR.

i.e., marking out and analyzing the minimum legal threshold-*legal bottom line of CER in this sense*.

Ethiopia is one of the poorest nations in the world aspiring to join a low middle-income countries class by 2025.[6] Indeed, the government's plan is inspirational and hunts for a grand contribution from the business sector for its fulfillment as the consecutive plans have accentuated.[7]In an effort to meet its goal and/or attain the mission, it concentrates mostly on policies of both attracting foreign investment and enlightening its domestic entrepreneurs (both public and private) to highest level especially since recently. Accordingly, from small scale to large scale, companies are now engaged in the economic sector. And then the corporate responsibility concept is believed to grow up in parallel thereof.

The purpose of this article is to conduct a legal appraisal on the environmental legal frameworks in Ethiopia in order to ascertain the minimum environmental legal requirements of corporations' environmental responsibility (public/private and domestic/foreign, small, medium or larger) - *determine corporate liability/accountability*. The article, however, doesn't surpass to discuss the extent of each liability (administrative, civil and criminal) of corporations. In the meanwhile, legal gaps, inconsistencies and other legal challenges in setting the corporate environmental responsibility are discussed.

To this effect, relevant literature, the laws including the federal constitution, international environmental and bilateral treaties, criminal and civil legislation with the environmental ruling, investment laws, the land laws, the mining proclamation and environmental proclamations are charged. So far studies undertaken in this area (in Ethiopia) have basically focused on evaluating the human rights aspect of the investment;[8] focused on the

[6] *See* FDRE (2015), the Second Growth and Transformation Plan of 2015/16-2019/20 http://nepadbusinessfoundation.org/index.php/news/latest-news/663-avid-11 https://en.unesco.org/creativity/policy-monitoring-platform/second-growth-transformation-plan,it necessary to show this link? The document is already published.) Last accessed on 28 sep. 2018, now the numbers of foreign investment companies are steadily increasing. The private economic sector as well is flourishing compared to the previous era. From China only there are more than thousands of companies registered to invest.

[7] Ibid

[8] Mizanie Abate Tadess (PhD)(2016), Transnational Corporate Liability for Human Rights Abuses: A Cursory Review of the Ethiopian Legal Framework 4 Mekelle U. L.J. 34 (2016)

fairness of the agreements in best protecting Ethiopian interest[9] and others.[10] They don't have a direct compact with the environment. Building on these studies, this article seeks to appraise the Ethiopian legal regime that can hold corporations environmentally accountable. The author has also referred to the relevant foreign literature in order to reinforce the positions and assertions.

The Article is organized into ten small sections. Preceded by this brief introduction section, the section will explore the environmental regulatory legal frameworks in Ethiopia in general. The second section assesses corporate environmental accountability of corporations from treaties as the third section scrutinizes the constitution. The fourth, fifth, sixth, seventh, eighth and ninth sections have examined CEA from the criminal law, the civil code, investment law, land law, the commercial code and the mining proclamations respectively. Finally concluding remarks are also included.

1. Environmental laws in Ethiopia

Ethiopia is a civil law (continental law) system. Thus, environmental laws are fundamentally acts from the legislative organ rather than decisions from the courts. To understand environmental law, therefore, we focus on legislation than court decisions. Nevertheless, the legislation doesn't define the term environmental law that may confuse about its scope as well as content. There is no either any court case contested over the definition of environmental law in Ethiopia. This may obviously have some impact to delineate the scope of environmental law for this study as well. Therefore an attempt is made to define by context from the definition basically given for the word environment as environmental law is naturally believed o regulate the environment. The simple survey over the definition sections of laws being applied in Ethiopia revealed that the term *environment* is defined under the pollution control proclamation[11] of 2002.

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[9] *See* Martha Belete Hailu and Tilahun Esmael Kassahun(2014), Rethinking Ethiopia's Bilateral Investment Treaties in light of Recent Developments in International Investment Arbitration, MIZAN LAW REVIEW, Vol. 8, No.1 September 2014, Asamnew D. Gizaw (2017) International Bilateral Investment Treaties and Protection of the Environment, Central European University LLM Thesis.

[10] *See* supra note 8

[11] Federal Negarit Gazette of the Federal Democratic Republic Of Ethiopia Proclamation N0.300/2002 herein called the Environmental Pollution Control Proclamation, Art2(6)

It seems that the legislature has chosen to give a definition for the term environment than attempting to define the environmental law as confining to the certain element may distort (either by narrowing or broadening to the extent of confusing) understanding of the environmental law in Ethiopia. The definition of environment is still fundamental to capture the message shot to air by the author of this article. Thus the definition section under article 2(6) of the pollution control proclamation states as[12]:

> "Environment" means the totality of all materials whether in natural state or modified or changed by humans, their external spaces and the interactions which affect their quality or quantity and the welfare of human or other living beings, including but not restricted to, land, atmosphere, weather and climate, water, living things, sound, odor, taste, social factors, and aesthetics;

As designated in the definition *'environment'* is defined very broadly which includes almost all the natural resources and their interaction. Thus if the law is set of rules regulating conduct by inference, environmental law is considered as a broad category of law (sets of rules) to regulating these elements mentioned in the definition section. It is broad enough to encompass the rule regulating the totality of all materials in either natural or modified form plus their interaction, or the external space affecting either quality or quantity including welfare of human and other living things that may include land, water, atmosphere, weather, climate, living things, sound, odor, taste, social factors, and aesthetics.

Therefore the legal framework of the environment in Ethiopia may not be restricted to certainly specified legislation and has to be understood the broad spectrum of rules with effect directly or indirectly to the *environment* as defined/mentioned above.

Thus the legal framework of corporate environmental responsibility in Ethiopia may emanate from rules of the different legal category whose application may affect those elements of the environment in the definition and therefore for the purpose of this study environmental law may refer to all the laws that set forth corporate environmental liability in Ethiopia. Among others, it may include international agreements, the constitution, the tort law,

[12] Ibid

the criminal law, the investment law, the environmental impact assessment law, the pollution control law, the mining and energy law. The discussion is thus imperfect to analyzing and determining the coverage of legal foundations of corporate environmental accountability in these legislative frameworks.

2. Corporate Environmental Accountability (CEA) from State Agreements (Treaties) in Ethiopia

a) Environmental Treaties

Ethiopia is a state party to many international and regional environmental agreements. It has also ratified most of the agreements that it has signed. Among others the following could be mentioned in this respect: Nagoya Protocol (Japan) on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising from their Utilization (concluded in 2010 ratified in Ethiopia by 2012)[13], the Vienna Convention for the Preservation of the Ozone Layer and the Montreal Protocol on Substance that Deplete the Ozone layer (ratified in 2009), United Nations Convention to Combat Desertification in those Countries experiencing Serious drought and-or Desertification particularly in Africa (concluded in Paris in 1994 and ratified by Ethiopia in 1997),[14] Basel Convention on the Control of the Trans-boundary Movements of Hazardous Wastes and their Disposal (concluded between party members in 1989 and ratified by Ethiopia 2000),[15] the International Treaty on Plant Genetic Resources for food and medicine (signed in 2001 and ratified 2003),[16] the Bamako Convention on the Ban of the import into Africa and the Control of Trans boundary movements and management of Hazardous Wastes Within Africa (signed in 1991 and ratified in 2003),[17] Cartagena Protocol on Bio-safety (signed in 2000 and

[13] *See* Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising from their Utilization Ratification Proclamation, Proclamation No. 753/2012

[14] Federal Democratic Republic of Ethiopian Treaty Ratification Proclamation No. 81/1997; Constitution of the Federal Democratic Republic of Ethiopia, proclamation No. 1/1995, Federal Negarit Gazette 1st year, 1995

[15] Basel Convention on the Control of the Transboundary Movements of Hazardous Wastes and their Disposal Ratification, Proclamation 192/2000

[16] The International Treaty on Plant Genetic, Proclamation 330/2003.

[17] Bamako Convention Ratification Proclamation No. 355/2003, This Proclamation provides for the ratification of the Bamako Convention on the Ban of the Import into Africa and the Control of

ratified in 2003)[18] and Kyoto protocol to the implementation of the united nation convention on climate change (signed in 1997 and ratified in 2005).[19] Each of these treaties obliges Ethiopia, as a state party to the treaty, to develop a strategy for its implementation and enforcement of environmental law. In an attempt to enforce these treaties, Ethiopia has ratified most of the agreements it has signed and given them a force of law based on its constitutional stipulation.[20]

The constitution of Ethiopia accords treaties ratified by Ethiopian government status of domestic laws.[21] Once ratified, treaties are for all purpose considered as part of laws of the land and the provisions shall be enforced[22] in the country. The constitution being the supreme law of the land doesn't simply annex and award treaties the status of domestic law in Ethiopia. There is a prime further requirement following ratification set therein for such agreement to attain domestic law status and enforced. Inter alia, the constitution requires them to comply with the fundamental and opportune principle: *the principle of sustainable development.*[23] If not, they shall be deemed void.[24] Therefore, agreements on whatsoever subject matter they are concluded is constitutionally required to comply with the sustainability principle. Sustainability, as mentioned in different literature, contains economic, social and environmental aspects and the balance of them has to be maintained. Therefore, all ventures in Ethiopia shall satisfy this basic requirement.

The act of concluding environmental treaties and ratification proves that the country is committed and duty bound for their implementation so far as it

Transboundary Movement and Management of Hazardous Wastes within Africa and authorizes the Environmental Protection Authority to take, in cooperation with the appropriate Federal, Regional and City Administration Government organs, actions necessary to implement the Convention.

[18] Cartagena Protocol on Biosafety Ratification Proclamation No. 362/2003

[19] Kyoto Protocol Ratification Proclamation No. 439/2005

[20] *See* Article 9 of the Federal Democratic Republic of Ethiopian Constitution; Constitution of the Federal Democratic Republic of Ethiopia, proclamation No. 1/1995, Federal Negarit Gazette 1st year, 1995

[21] Id, Article 9 It specifically states under its sub section three that all international agreements ratified by Ethiopia are an integral part of the law of the land.

[22] Ibid

[23] Id, *see* Article 43(3) of the constitution. It states that all international agreements and relations concluded, established or concluded by the State shall protect and ensure Ethiopia's right to sustainable development.

[24] Id, See Article 9

ensures sustainability. Consequently, this conveys a clear message to corporations in that they are accountable to the environmental treaty commands that Ethiopia has ever ratified.

b) Bilateral Investment Treaties (BITs)

BITs are agreements concluded between sovereign countries with basically prime objective of promoting investment and protection of the investor. They have come to be another most important source of environmental accountability to corporations. BITs basically regulate investment relation between party States. Since recently, however, there have been trends to include environmental protection provisions in the BITs. Especially, BITs between developed countries used to contain an environmental provision in their content or urge environmental related side agreement to be developed between parties. [25] North American Agreement on the environmental cooperation (NAAEC) can be mentioned as an important example of side agreement. The Government of Canada, the Government of the United Mexican States and the Government of the United States of America following their North American Free Trade Agreement (NAFTA) have understood that NAFTA didn't contain any environmental protection rule and later agreed to cooperate for the environmental protection works via this side agreement.[26] Now it has come to be common to include environmental protection rules in the BITs being concluded between States in order for regulating the conduct of investment corporations basically in the host state. As such therefore BITs are cited as important sources to corporate environmental accountability.

In Ethiopia and elsewhere in the world the numbers of these agreements have increased since the last decades.[27]By 2017, Ethiopia has concluded over 34 such agreements.[28] Nevertheless, based on the simple survey of a

[25] UNEP 2011; Corporate Social Responsibility (CSR) and Regional trade and investment agreements pp23

[26] *See* the North American Agreement on the Environmental Cooperation (NAAEC) http://www.cec.org/about-us/NAAEC

[27] See from http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/1485 as last accessed on 21 Dec. 2018

[28] *See* http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/1485 as last accessed on 21 Dec. 2018

treaty content analysis for the inclusion of environment-related provision, only the treaties with Finland (The preamble includes the environmental provision that states *"agreeing that these objectives can be achieved without relaxing health, safety and environmental measures of general application),*[29] Denmark (in the preamble there is productive use of resource that could be interpreted to include the environment),[30] and Belgium-Luxembourg (the preamble and article 5)[31] contains environment related provision. These BITs are the only ones that would be cited as a source to environmental responsibility for corporations investing in Ethiopia. The rest of the BITs either purposefully or negligently have omitted the environmental protection provisions and neither of the countries has concluded side environmental agreement with Ethiopia.[32] The BITs model developed and concluded with Ethiopia are obsolete that doesn't reflect any environmental provision. This signals that it may be hard for Ethiopian government to require them accountability basically for two reasons. First the corporations are not a party to the agreement. Second most of the BITs don't require them to follow environmental requirements.[33]

3. The Constitution of Federal Democratic Republic of Ethiopia, 1995 and CEA/R

The constitution is a supreme and basic source of law in Ethiopia. It is supreme law of the land and overrides all other subsidiary legislation and practices,[34]as described above. The Ethiopian constitution with its overriding effect on other legislation and practices has many environment-related

[29] *See* the preamble of the BIT between Finland and Ethiopia (2006), http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/1485 as last accessed on 21 Dec. 2018

[30] *See* the preamble of the BIT between Ethiopia and Denmark, http://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/1485 as last accessed on 21 Dec. 2018

[31] See the BIT between Ethiopia and Belgium -Luxembourg which was concluded in 2006.

[32] The exploration from the Ethiopian Ministry of Foreign Affair (MoFA) and from the official website of UNCTAD doesn't witness any side environmental agreement. Neither the Ethiopian environment, forest and climate change ministry website testifies the opposite.

[33] Ethiopia has concluded about 34 BITs. The BITs except with Belgium and Finland don't have any environmental protection provision. This implies that corporations don't have any obligation (sourced from BIT) to take environmental protection measures. On the other hand the BITs (though the corporations are not directly signatories) have given full protection and security for their property and investment in Ethiopia. See also supra note 27

[34] *See* supra note 19 Article 9 (4) of the Constitution. It states that *"all agreements ratified by Ethiopia are an integral part of the law of the land."*

stipulations that serve as a source of corporate environmental accountability. Among others, Article 9(2), Article 43(3), Article 44[35], article 51, 52, and Article 92 [36] could be mentioned in this regard. [37] From these specific mentions the first, the third and the last articles are only very related to our subject matter. Article 43 (3) is about the right to sustainable development. It is already discussed above. Article 51 and 52 are about environmental lawmaking power of the federal government and administration power of the States.

Article 9(2) of the constitution deals with the implementation of the constitution in general manner. It refers to the implementation of environmental provisions as narrowed to our issue of environmental corporate responsibility. In this aspect, the Constitution imposes the duty of implementation of its provisions in general including the realization of protection of the environment in particular not only on the state but also non-state entities. To this effect, article 9(2) of the constitution provides that *"all citizens, organs of state, political organizations, other associations as well as their officials have the duty to ensure observance of the constitution and to obey it"* It is argued that, the term 'other associations' is broad enough that capture investment corporations whether foreign or domestic (small, medium or large). Thus the constitution requires corporations (public or private) to observe its stipulations and ensure observance by others.

The Constitution being supreme law of the land nullifies all acts and practices contravening its declarations. [38] And hence the constitutional prescriptions regarding the environment as well as the investment have overriding effect over other sub-legislation and practices. Therefore, it is the supreme source of law in Ethiopia relating to corporate environmental

[35] Ibid Article 44 (1) of the Constitution. It states about environmental rights. It declares that all persons have the right to clean and healthy environment.

[36] Id Article 92 It states the environmental objectives. Specifically it addresses that:

1. Government shall endeavor to ensure that all Ethiopians live in a clean and healthy environment. 2. The design and implementation of programmes and projects of development shall not damage or destroy the environment. 4. People have the right to full consultation and to the expression of views in the planning and implementations of environmental policies and projects that affect them directly. 5. Government and citizens shall have the duty to protect the environment

[37] The rest of the articles are about right to sustainable development (article 43) and the environmental law making power of the government (the federal and state governments- articles 51 and 52).

[38] *See* Article 9 of the Constitution, as mentioned supra note 20

accountability too. Therefore, corporations are made duty bound in the environmental protection to take measure to ensure the constitutional environmental stipulations in this regard. The constitution, however, has failed to mention explicitly corporations as the subject of duty in environmental protection. It seems that there is no commerce clause unless through modality of interpretation as highlighted above. It mentions only citizens and government.[39] Still it seems that both of these subjects can't include corporations. But as the corporate citizenship concept is developing, citizen may otherwise be considered to include them. Nevertheless one may still question whether corporations have the duty of environmental protection and accountability and is free to hold his position. Thus, it is possible to argue that, the obligation section of the constitution under article 92 (4) is meant to cover the citizens and government, as subjects and doesn't include corporations explicitly. From this it may seem that, Corporations are entitled only with the duty to observe the duty of *duty bearers*; that is the citizens and the government.[40] He may further argue that corporations are not made party the way citizens and government is mentioned to protect the environment.

Nevertheless, this doesn't exonerate corporations from constitutional environmental liability at times they violated the right of citizens to clean and healthy environment and challenges the government action/omission as it exercises its duty of protecting the environment. What is not imposed on them in this line of argument may be about taking protection measure. Otherwise, they are constitutionally bound to observe measures for the protection of the environment. Besides corporations as mentioned above are citizens because of corporate citizenship. Corporations are creations of a human being and they are formed through association of people. Further unless for academic discourse, such an argument may not have practical significance to exonerate corporations from constitutional liability. They have the constitutional duty of protecting the environment from the negative impact of their activities.

[39] Id, Article 92

[40] Id, Article 92(4) contrary reading

In a nutshell, the cumulative reading of article 9 (2) and 92 imply that they are imposed with both duties of observing protection and taking environmental protection measures to ensure environmental objectives. They are accordingly bound by constitutional environmental accountability.

4. The Criminal Corporate Environmental Accountability (*Criminal Environmental Corporate Liability)*

It is obvious that corporate environmental accountability can be either criminal or civil depending on its nature and consequence. In this section therefore criminal environmental accountability of corporations as incorporated in Ethiopian criminal law are assessed.

a) Purpose and Objectives of the Criminal Law

The criminal law of Ethiopia has the general purpose of ensuring order, peace and the security of the State, its people, and inhabitants for the public good.[41] When narrowed to the environment, in an effort to meet the very purpose of assessing the environmental criminal accountability of corporations, the criminal code through incorporating environmental criminal provisions has the purpose of maintenance of public environmental interest through ensuring order, peace, and security.

The other most important point in the assessment of criminal accountability of corporations is the objective section of the code. Objective clauses are fundamental inclusions in Ethiopian legal system based on its construction detail rules/provisions are interpreted and given meaning. Accordingly, the objective of the code is discussed as follows to shed light on the subsequent discussions relating to corporate criminal responsibility.

The objective of the Ethiopian criminal code is prescribed to be:

> prevention of crime by giving due notice of the crime and penalties through prescribing it in the code and should it came to be ineffective by providing for the punishment of criminals in order to deter them from committing

[41] *See* Article 1 of the Criminal Code of FDRE Proclamation No. 414/2004.

> another crime and make them a lesson to others, or by providing for their reform and measures to prevent the commission of further crimes.[42]

From this one can understand that, prevention, deterrence, and rehabilitation are the basicobjectives of the criminal code; and prevention, as can be inferred, is placed to be the priority objective in the law.

Considering the effect and nature of the act of environmental crime (on the environment), the inclusion of prevention as the primary approach is rewarding. As environmental damages may not be easily restored/ rehabilitated, prevention as the prime approach shall be encouraged and the criminal law may be appreciated.[43] The other objective of the code is deterrence. It is applied after the crime is committed as the first approach fails. Deterrence has two sub-objectives: limiting the offender from committing a further environmental crime and pass the message to others not to commit an environmental crime. The last most important objective is rehabilitation based on which environmental offenders could learn to get environmental knowledge and reformed.

b) Criminal Environmental Law in Ethiopia

Criminal law in Ethiopia basically consists of the 2004 criminal code and special proclamations and regulations with criminal provisions in them.[44] For the sake of clarity and simplicity, the 2004 criminal code is referred here just as the *ordinary criminal code* (**የወንጀል ህግ**) and the rest piecemeal criminal provisions included in the specific legislation of investment, environment, mining, etc. as *sectoral legislations with criminal provisions (ልዩ የወንጀል ድንጋጌን ያካተቱ ህግጋት)*.

The criminal code is the amended form of the penal code of 1957. It regulates criminal conducts in a broad and general manner. In most situations, however, it doesn't cover crimes specific to a particular field (subject area) nor have detail facet. The sectoral criminal legislation, on the

[42] Ibid.

[43] Ibid

[44] This can be inferred from article 3 of the criminal code. It reads that nothing in this code shall affect regulation and special laws of criminal nature provided that the general principles embodied in this code are applicable to those regulations and laws except as otherwise expressly provided there.

other hand, is exceptionally specific criminal rules said to regulate the uncovered and unjustifiably covered special criminal conducts. The uncovered as mentioned here refers to those conducts that are not mentioned as crime and are unregulated by the criminal code whereas the unjustified imply for those crimes specified by the ordinary code but may not be justified to be regulated that way. With this brief illustration follows the discussion of corporate environmental criminal liability under the two stated categories.

c) Corporate Environmental Criminal Accountability under the Criminal Code

Environmental and related crimes mentioned in the criminal code include the following: spreading of human disease Article 517), contamination of water (Article 518), environmental pollution (Article 519), mismanagement of hazardous wastes and other materials (Article 520), acts contrary to environmental impact assessment(Article 521), infringement of preventive or protective public health measures (Article 522), creation of distress of famine (Article 523), manufacture, adulteration and sale of injurious or damaged products or foodstuffs (article 527 cum. article 530), crimes committed through production and distribution of substances hazardous to human and animal health (Article 525) (producing, marketing, trafficking in or using poisons or narcotic, and psychotropic substances), Doping (Article 526), Manufacture, Adulteration and Sale of Products or Foodstuffs (Article 527), Manufacture, Adulteration and Sale of Fodder and products injurious to livestock (Article 528), Endangering the Health of Another by Alcoholic Beverages or Spirituous Liquors (Article 531), Endangering by Mental Means or Practices (article 532), Endangering by Philters, Spells or Similar Means (Article 533), Unlawful Delivery of Poisonous or Dangerous Substances (Article 536), and petty offence against public interest and the community 778-837 cum 77. As per this law, one commits an environmental crime and shall be criminally punished in violation of the aforementioned provisions.

Regarding criminal liability of investment companies (juridical persons), there are different views and/or approaches. Some Countries believe that juridical person shall not be liable criminally and don't espouse criminal

liability to corporations in their law. Countries such as Brazil, Bulgaria, Luxembourg, and the Slovak Republic are to be mentioned here. They don't admit any form of corporate criminal liability.[45] Countries such as Germany, Greece, Hungary, Mexico, and Sweden have adopted a legal regime in their law whereby administrative penalties may be imposed on corporations for the criminal act of their employee.[46] Others believe that corporations shall be held criminally liable and adopt criminal accountability of corporations. Ethiopia is under the last category.[47] The criminal code holds corporations and their employee criminally accountable.[48] They will be liable where the law clearly stated that they shall be liable.[49]

Therefore as the corporations participate as the instigator, accomplice, and principal offender they are liable under the criminal code pursuant to article 34 in Ethiopia. The country of origin or nationality can't be an issue so far as the crime is committed in Ethiopia.

d) Corporate Environmental Criminal Accountability under the Sectoral Legislations

As mentioned above, sectoral environmental laws are too many to have a list of them here. In Ethiopia, almost all sectoral legislations have penalty provisions that imply criminal accountability. The following conducts can be examples as the complete list of all the environmental provisions in the sectoral legislation is not relevant. In the EIA proclamation, we can get a failure to observe the EIA and pollution control proclamation (PCP),[50] false presentation in the EIA study report,[51] failure to record or to fulfill conditions of authorization of EIA as special criminal provisions.[52] In the

[45] *See* supra note 8 pp 63.

[46] Ibid.

[47] Ibid See article 34 (1), 34(2), 34(3) and 90(3), 90(4).

[48] The Criminal Law of the Federal Democratic Republic of Ethiopia, Proclamation No. 414/2004, 9th of May 2005, art. 34(1) read together with art 23(3). Art 34(4) defines the term 'juridical person' to include private organizations established for commercial purpose.

[49] Ibid, Art. 34(1) read together with art 23(3). Art 34(4) defines the term 'juridical person' to include private organizations established for commercial purpose.

[50] *See* Article 18 of the EIA Proclamation of the FDRE 9thYear Federal Negarette Gazzette No. 11 ADDIS ABABA-3rd December, 2002

[51] Ibid

[52] Ibid

pollution control proclamation, we may see hindering or obstructing, refusing, impersonating or preventing the environmental pollution inspectors, failure to manage hazardous waste or other substances, mislabel or fails to label or withholding information or illegal traffic of any hazardous material, discharging a pollutant, and taking the control of ozone layer depleting substances proclamation importation of substances that deplete the ozone layer are prohibited.[53] The solid waste management proclamation article 17 mentions some of the crimes and penalties relating to license and permit though it is still very vague itself.[54] Crimes committed in violation of the forest development, conservation and utilization proclamation includes cutting and using state forest without the necessary permit, destroy, damage or falsify forest boundary, causes damage to a forest by setting fire or in any other manner, settles or expands farmland in a forest area and providing assistant for illegal forest users.[55]

In similar fashion, other legislations such as water management proclamation, the wildlife conservation and utilization proclamation and other sectoral environmental legislations have included provisions that could hold corporations liable for the damage on the environment. Their cross-reference to the ordinary criminal law and formulation have still problem in addressing all possible special crimes to be committed over the natural resources. The punishment is not also directed to the managers and/or directors of the company and is relatively not heavy for corporations to compel them into compliance.

5. Corporate Environmental Civil Accountability/Liability

5.1. Tort Law (Law of Extra-Contractual Liability)

> "A tort is a civil wrong for which the remedy is an action for unliquidated damages and which is not exclusively the breach of a contract, or the breach of a trust, or the breach of other merely equitable obligation"[56]

[53] *See* Article 12-14 of the Pollution Control Proclamation, Proclamation No. 300/2002 of the FDRE Negarit Gazette 9th Year No. 12 ADDIS ABABA, December, 2002.

[54] *See* Article 17 of Solid Waste Management Proclamation No. 513/2007

[55] *See* Article 26 of the Forest Development, Conservation and Utilization Proclamation, Proclamation No. 1065/2018

[56] Salmond and Hueston (1981): Laws of Torts 18th ed. P 17

Generally, tort liability in Ethiopia is administered under civil code [57] provisions of articles 2027-2161. There are three sources of tort liability in Ethiopia; namely, fault-based liability, strict liability and vicarious liability.

Fault-based liability arises where a person causes damage by an offense.[58] It requires volition and as corporations may not have the required volition like humans this category of tort liability may not apply on them. In this regard, Dr. Mizanie Abate has also stated that *'of the three sources of tort liability, fault-based liability doesn't directly apply to redress human rights violations by investment corporations'.* [59] It applies *mutantis-mutandis* to the environment.

Strict liability also known as a liability in the absence of an offense arises from the damage a person causes through his activities and by an object he possesses.[60] Here the basic element to derive accountability is the occurrence of environmental damage. Accordingly, corporations can be held accountable once the damage is sustained by their act. Strict liability provisions of tort law provide another avenue for the tort liability of investment corporations for their violation of environment and environmental rights. The specific situations may include damage caused by building (2077); damage caused by machines and vehicles (article 2081) and damage caused by the use of manufactured goods (article 2085). The manufactured goods may not keep environmental quality standard or it may cause injury either to human or other biological entities. The vehicle and the machine may also produce harmful effluents affecting the environment. The effluents may affect nature or the human environment itself. The product or the process of production or the means of production employed by the company may also by itself cause damage to the environment. Accordingly they may be tortuously liable.

Vicarious liability is a liability for a third party for whom a person is responsible.[61] As per this mode of tort liability, the corporation will be held

[57] *See* Civil Code of the Empire of Ethiopia, Proclamation No. 165/1960, Neg. Gaz. Year 19, No.2.

[58] Id, Art. 2080. The offence in this case may be on the environmental offence.

[59] *See* supra note 8, (Mizanie Abate) pp. 63

[60] Ibid Article 2066-2089

[61] Ibid see articles 2124-2136.

accountable to the environmental damage its employee has caused.[62] For instance, if the employee brings environmental damage during discharging his duties applying vicarious liability the investment corporation can be held liable.[63]

Another provision that directly applies to tort liability of investment corporations is 2035 of the civil code. This article contains a very important stipulation in the sense that an infringement of every law, be it the constitution or environmental legislation is an offense which attracts tort liability.[64] Consequently, if one of the employees of the foreign investment company violates the constitutionally guaranteed rights of the clean and safe environment, it can be an offense for which the corporation may be vicariously liable. If the company violates the EIA requirement in the EIA proclamation and damage sustains, it will be liable for violating the law and for causing damage. If one company engages of business without environmental permit or business license and/or registration, it will be directly accountable without the need to show damage to the environment.

The major remedy in environmental tort law is compensation, although injunctive reliefs, restoration, and others could be included. For the victim (environment) to get her compensation shall prove that actions, omissions/omissions, and activities of the corporation or the property have caused the damage.[65]

5.2. Environmental Laws

Environmental legal frameworks have a relatively short history of development compared to other legal regimes in Ethiopia. They have a relatively short history of development and their implementation lags in the stern. It consists of policies and legislation that are issued for the protection of the environment from dreadful conditions (see the definition of environment and environmental law in the definition sections). It has both general (ordinary) and sectoral parts (special): general in a sense that it

[62] Ibid Article 2130

[63] Ibid

[64] Ibid

[65] Ibid, see Article 2027

doesn't specifically talk about one environmental (natural resource)) element such as water, air or land. Example the pollution control proclamation is general environmental legislation that applies to any form of pollution and to any of the natural resources that pollute. And sectoral/specific environmental law refers to category of environmental law that relates to one environmental aspect such as water, air, land, and/or biodiversity. Environmental law in Ethiopia includes also treaties and/or agreements that the country has ratified through the course of its history.[66]

The most notable domestic environmental legislation include: the Environmental Impact Assessment (EIA) proclamation, Environmental Pollution Control (EPC) proclamation, Solid Waste Management (SWM) proclamation, and other sectoral laws such as Water Resource Management (WRM) proclamation, fishery development and utilization proclamation, development conservation and utilization of wildlife proclamation, the bio-safety proclamation and others.

Environmental law in Ethiopia, among other things, put set of environmental rules that everybody requires to comply with, stipulate criminal sanction, set civil remedies to victims as well as administrative measures to be taken against persons who fail to observe the standard set therein and establish institutions that oversee its enforcement or implementations. For more clarification, each of the notable legislations (EIA proclamation, pollution control proclamation (PCP)) is analyzed as follow relating to corporate environmental accountability.

5.2.1. Environmental Impact Assessment (EIA) Proclamation

EIA is an environmental planning and management tool. It requires developmental activity to conform to environmental requirements. It Cleary demands/adopts the application of the principle of precaution mentioned at Rio earth summit: "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing

[66] Ethiopia has been member to many of the environmental agreements. It has also ratified almost all treaties it has signed. These agreements once ratified are part and parcel of the law of the land pursuant to article 9 (4) of the federal constitution.

cost-effective measures to prevent environmental degradation."[67] It requires EIA to be done before the project is going to be operational. Caution is a requirement. From this we understand that utmost care needs to be taken when investment projects are being promoted and run in Ethiopia. As the purpose of the paper is not to talk about EIA, let's now closely examine whether the proclamation has incorporated corporate environmental compliance requirements.

The first assessment is on the objective clause of the proclamation. The proclamation sets its objective in the preamble as:[68]

> predict and manage the environmental impacts which a proposed development activity entails; to harmonize and integrate environmental, economic, cultural and social considerations into a decision-making process; to bring about administrative transparency and accountability as well as to ensure the participation of the communities in the planning and decision making on developments; and to mitigate the environmental impacts of a proposed development activity (project).

From this objective clause it comes clear that the legislator has interest to ensure, among other things, to harmonize and integrate the environment in the economic and social development. Hence the *triple bottom lines*: economic, social and environment aspects are to be integrated. This in one important manifestation of corporate environmental responsibility and any development work or project by corporations shall observe this prescription. The preamble adds that transparency and accountability shall be ensured. The environmental impacts of projects are reduced. Therefore the objective clause of the EIA proclamation has entrenched the system of environmental accountability and corporations that own development project are expected to meet the purpose clause.

EIA is believed to be a tool that ensures the respect of the constitutionally guaranteed rights of the people to live in a clean and healthy environment. It does this by significantly reducing the negative impacts of development projects on the environment and by maximizing the socio-economic benefits

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[67] *See* Principle 15 of the Rio Declaration https://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm

[68] *See* EIA Proclamation of the FDRE 9th Year Federal Negarette Gazzette No. 11 ADDIS ABABA-3rd December, Proclamation No. 299/2002

of such development activities. Accordingly the proclamation has given full recognition.

Moreover, EIA proclamation brings about administrative transparency and accountability, as it allows the public to participate in decision making with respect to development projects, which are proposed to take place within their environment.[69] It shall be remarked that the project proponents and owners, as well as runners, are companies/corporations or business entities. Accordingly they are being compelled to discharging their environmental responsibility while required to conducting EIA.

Second relevant provision that sets requirement for corporate environmental liability is article three. Article three has about five basic sub-provisions. Sub-article one is about requirement of authorization or permit from the environmental concerned organ for the projects requiring EIA. According to this sub-article the environmental ministry has to give permit evaluating and accepting the EIA prepared. Sub-article two is about projects of insignificant environmental impact. Sub-article three is about license. Pursuant to this sub-article licensing agencies such as ministry of trade, investment agency or others with the power to give operating/working license has to first ensure that such activity is authorized by the ministry of environment. Sub-article four is about liability of the project proponent for the environmental damage notwithstanding permit or authorization is given from the environmental organ. Sub-article four holds the project proponent, in this case corporations, liable for any damage to the environment emanating from their activity. Whether they have got the approval and permit from the environmental or licensing agency doesn't exonerate them from liability. Whether damage has sustained is the requirement to hold the corporations accountable regardless of the government organs decision. The only way to exonerate from liability is to verify that damage is not occurred by the project proponent or his agency.[70]

Article five of the proclamation requires EIA for projects that negatively affect the environment. As per this provision therefore corporations bringing projects that may negatively affect the environment will be required to

[69] Ibid

[70] Ibid See Article 3(5)

prepare EIA and need approval from the environmental organ in order to run it.[71] A directive that includes projects of likely negative impact and requiring EIA is said to be issued in 2008 although its authority is contested.[72] Additional related duties of the project proponent related to EIA are also included in the proclamation.[73]

The last important provision that could hold corporations accountable to the environment is article 18 of the EIA proclamation. In its five sub-articles it has lays down the offenses and punishments when the stipulations in the proclamation are violated. As offences and punishments are discussed earlier in the criminal law discussion section, there is no need to further describe it here. But sub-article 5 shall be underscored. It grants the court with power to order the convicted person to restore or in any other way compensate for the damage inflicted. It stated it as:

> The court before which a person is prosecuted for an offence under this Proclamation or regulations or directives emanating from it, may, in addition to any penalty it may impose, order the convicted person to restore or in any other way compensate for the damage inflicted.

Therefore beyond the criminal punishment the court may give order for environmental restoration or *compensation* to be made. Accordingly corporations or business that inflict damage to the environment violating the requirement of EIA proclamation will be, beyond criminal punishment, held liable for restoring the environment back to its earlier state of being or to pay compensation in any other way.

In nutshell, the environmental impact assessment proclamation establishes basic requirements to hold corporations environmentally accountable. It tries to integrate environment into all development aspects. Its attempt to avert bad environmental impact of development projects and to hold liable the perpetrators needs shall be underscored. It requires an environmental permit and calls for the triple bottom line approach-economic, social and environment.

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[71] Ibid see article 5(2)

[72] A Directive for the Implementation of the Environmental Impact Assessment Proclamation (No 299/2002) of FDRE-Directive No. 1/2008

[73] Supra note 68 Article 7

5.2.2. FDRE Environmental Pollution Control Proclamation

In order to ensure sustainable economic development (green development) by controlling pollution, Ethiopia has also developed pollution control proclamation in 2002[74] and implementation regulation of same in 2008.[75]The proclamation is renowned for bringing radical change in Ethiopia legal system adopting public interest environmental litigation or granting the right of standing to anyone interested of taking action (court and administrative) against environmental damage. In this section, therefore an attempt is made to examine how it has adopted requirements for holding corporations liable for the environment.

The first section that catches scrutiny is the purpose clause enshrined in the preamble part. In the preamble, among other, descriptions such as "entrusting duties and responsibilities of environmental protection for all (stakeholders), and to eliminate or when not possible to mitigate pollution as an undesirable consequence of development activity." [76] Therefore the proclamation has made clear that environmental protection is not the only responsibility of the government; and stakeholders such as corporations are made accordingly responsible. Thus to protect pollution corporations have responsibility. They are required to eliminate pollution in their business activity. If to eliminate pollution is not possible they are expected to mitigate. Above all they are required to develop environmentally responsible business in the country which is the essence of corporate environmental liability. From here one may argue that CER has got legal recognition in Ethiopia. This may further lead to say that CER is no more voluntary in Ethiopia as per the pollution control law.

The second important provision of the pollution control proclamation relating to corporate environmental liability is article 7 that sets general obligation. The proclamation among other things imposes the following

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[74] Environmental Control Proclamation Number 300/2002; Federal Negarit Gazeta 9th year number 12 Addiss Ababa 3rd December 2002.

[75] Council of ministers regulation to provide for the prevention of industrial pollution regulation number 159/2008, Federal Negarit Gazeta 15th year number 14 Addiss Ababa 7th January 2009.

[76] *See* the preamble section of Environmental Control Proclamation Number 300/2002; Federal Negarit Gazeta 9th year number 12 Addis Ababa 3rd December 2002.

obligation on any person including investment companies that engages in activities that may cause pollution:[77]

> shall not pollute or cause other persons to pollute the environment violating environmental standards; install a sound technology that avoids or reduces, to the required minimum the generation of waste and when feasible for the recycling of waste; once a person or an investment company cause any pollution shall be required to clean up or pay the cost of clean up the polluted environment as per the order from the environment organ; to relocate or shut down the company in a situation where the activity causes risk to health or to the environment; take precaution to prevent damage to the environment; obtain the permit before engaging on the activity; observe environmental standards set by the concerned environmental protection organs; and provide information to government stakeholders including the environmental ministry.

Accordingly, the proclamation obliges those interested to engage in business or any development activity to properly obtain the necessary permit and regulate their pollution accordingly. They are required to install sound technology, they are also required to recycle and if they affect the environment violating the required prescription they will be forced to pay compensation, pay the cost of cleanup and may be also closed as they don't comply with the requirements. Much to worry is whether we have the necessary standards to enforce this provision properly as it requires resource, technologically advancement others that our country don't have itself. Here one may argue that corporations shall still be required to take the responsibility for granted as the proclamation has clearly stated that the responsibility to protect pollution and save the environment is not only for the government. This may not be tenable argument as regulation is basically and inherently government power. In fact pluralistic regulatory approach is being considered in most environmental issues and corporations may not totally free in this regard.

The other important thing the proclamation has included is about the duty to provide information. This is important but their duty is limited only to the government organ with authority. They are not obliged to give information for ordinary citizens other than government organ. This may create problem

[77] Ibid

to the public interest environmental litigation[78] as incorporated under article 11 and 12 of the proclamation.

Last that author aspires to envisage is about the measures against the corporation that damages the environment because of pollution. As per article 6 necessary corrective measures that could remedy pollution including order of immediate cessation of activities may be taken by the environmental inspectors. Besides as per article 17 the criminal court may

> …in addition to any penalty it impose upon the convicted person, order: confiscation of anything used in the commission of the offence in favor of the state or to dispose of it in any other way; that the cost of cleaning up and the disposing of the substance, chemical or equipment seized be borne by the convicted person; and the convicted person to restore to the state in which the environment was prior to the infliction of the damage, and when such restoration is not possible to pay appropriate compensation.

Hence, order of forfeiture and restoration are considered.

In nutshell, the pollution control proclamation has imposed environmental accountability on corporations. It is innovative environmental legislation in that beyond incorporating liability entailing responsibility on corporations it includes public interest environmental litigation. Beyond many of its stipulation relating to corporate environmental accountability, it grants a right of standing to individuals and civil society organizations. Accordingly, individuals and CSOs are empowered with the right of bringing environmental administrative and civil litigation without the need to show vested interest.[79]

6. The Investment Law

Greening investment laws through incorporating environmental provisions have been practiced towards ensuring responsible and/or sustainable economic development. So the investment companies are being required

[78] For more description on public interest environmental litigation see Ayalew Abate Bishaw, (2015) Public Interest Environmental Litigation (PIEL) Under Ethiopian Law; www.theinternationaljournal.org RJSSM: Volume: 05, Number: 7, November 2015 and Yenehun Berlie, Public Interest Environmental Litigation in Ethiopia: Factors for its Dormant and Stunted Features, MIZAN LAW REVIEW, Vol. 11, No.2 December 2017.

[79] *See* Article 11 and 12 of the pollution control proclamation

through environmental regulatory frameworks to comply with certain environmental requirements as a common practice.

This section is thus devoted to examining the Ethiopian investment law to prove whether it supports environmental accountability of investment corporations.

In Ethiopia, the historical development of investment law could be traced back to the era of Emperor Menelik-II in the late 19 century. By the late 19th century attempts had been made to regulate investment and there was a major shift towards attracting foreign investment and establishing a market economy. At this epoch, the attempt was made to regulate investment through concession and the practice had continued until 1974 on which the Derge regime has abolished privatization and established command political economy. This state ownership has continued until 1991/2 in which landmark history is recorded-reorienting the economy from command and control to developmental and free market.[80]

In 1991, when FDRE come to power different economic reform programs have been launched and there have been efforts towards investment regulation. As a result series of investment proclamations have been developed including Proclamation No. 116/1998, Proclamation No. 280/2002, Proclamation No.769/ 2012, and Proclamation No 814/2014. The whole purpose of the repeated amendment was because the government has the interest to give due protection to investors and wanted to attract them into establishing their business in Ethiopia.

The current investment proclamation came into force in 2012 replacing the 2002 investment proclamations but still, there is some amendment made to the 2012 proclamation.[81]

The objective clauses both from article 5 and the preamble show that through the proclamation[82], the government pledges to work on promoting

[80] In 1992/93 began the first series of economic reform programs aimed at: reorienting the economy from command to market economy, rationalizing the role of the state; creating legal, institutional, policy environment and enhance private sector investment.

[81] *See* Investment Amendment Proclamation No. 849/2014 Federal Negarrit Gazette 20th Year No. 52 ADDIS ABABA 22nd July, 2014.

private investment, both foreign and domestic. It doesn't show any environmental element except devoting itself on economic agenda. There is no sustainability element from the objectives-*triple bottom line approach*.

Although the objective of the proclamation doesn't incorporate environmental element, article 38 of the proclamation expressly mentions special environmental protection law to be respected. Undoubtedly, this provision has imposed an environmental obligation to corporations to comply with all legislation, treaties and other legal documents relating to environmental protection. Particularly the clause "in particular, he shall give due regard to environmental protection*"* has clear message in that beyond observing the existing laws relating to the environment or in the absence of any clear legal obligation towards the environment, investment corporations are expected to take the measure of environmental protection by their own effort. What are these measures the investment corporation will be considered has taken due regard towards environmental protection will be, however, are unclear to them. Besides as Dejenie Girma Jnaka (Ph.D.) has expressed this article is meant to convey the message that investors shall observe myriad of environmental protection laws so as to be considered as discharging their environmental protection duties. [83] One instance of observing the environmental law among others could be to observe the EIA proclamation that requires investment companies to conduct EIA before the launching of the project.[84] This is so because as, Dejenie has mentioned 'an investor who fails to do EIA cannot be taken as observing the EIA Proclamation and, hence, the law pertaining to the protection of the environment within the meaning of article 38 of the new Investment

[82] The purposes of the investment proclamation states: to accelerate the country's economic development; to exploit and develop the immense natural resources of the country; to develop the domestic market through the growth of production, productivity, and services; to increase foreign exchange earnings by encouraging expansion in volume, variety, and quality of the country's export products and services as well as to save foreign exchange through the production of import-substituting products locally; to encourage balanced development and integrated economic activity among the regions and to strengthen the inter-sectoral linkages of the economy; to enhance the role of the private sector in the acceleration of the country's economic development; to enable foreign investment to play its role in the country's economic development; and to create ample employment opportunities for Ethiopians and to advance the transfer of technology required for the development of the country. See Article 5 of Investment Proclamation No. 769/2012 (2012) Official Gazette No. 63, 17 September 2012

[83] Dejene Girma Janka (PhD), the chance to improve the system of EIA in Ethiopia: a look at the new investment proclamation, Oromia law journal volume 3 issue number 1,

[84] *See* EIA Proclamation article 3, 5 and 9

Proclamation'. And in this regard, it will be wise to take principles of sustainable investment adopted by different non-government organizations that work on responsible investment.

The other most pertinent article from the investment provisions is article 30 (4(d)). It basically covers one-stop-shop service provided to investors. It prescribes that investors shall get all the service they need from the government at one office. The office needs to be staffed with all the concerned experts and officials to provide the required service to investors. The proclamation intends to reduce investors' effort of going to different government departments that saves them time, labor and money. Then, the proclamation goes on and, under article 30(4) (d), requires the Agency to execute investors' requests for approval of impact assessment studies conducted for their investment projects. This means investors are required to bring up with them the EIA document once their investment project needs EIA. Then on their behalf, the EIC will be asking the MEFCC to review and approve the EIA document. The proclamation in this regard has prescribed in its sub-article five of same article (30(5)) for the executive organ of the government to establish investment desk that could discharge the task from the EIC. As per article 30(6), the appropriate federal or regional executive organs shall take measures necessary to help the commission properly discharge its duties specified under sub-article (4) of this article. However, whether there is a relevant department that facilitates and renders service to the discharge of the commission's responsibility particularly in relation to EIA is the issue to be seen from the structure of the executive organ. Notwithstanding this, there is no any investment desk said to be established in the EFCCC.[85] There is no also any EIA expert that could review and approve at EIC level. There is the institutional incongruity observed. The investment permit is also granted without the need to go for the approval of EIA.[86]

The last provision very related to the environment is article 19 of the proclamation No.769/2012. It provides grounds of suspension and revocation of investment permit. Among the grounds of both suspension and

[85] A response from Ato Wondoson Tadesse, legal directorate at MEFCC June, 2018

[86] James Krueger, Aman K. Gebru, and Inku Asnake (2012) Environmental Permitting in Ethiopia: No Restraint on "Unstoppable Growth?" Haramaya Law Review Journal Vol.1:1 pp 89-92

revocation, environmental grounds may be claimed. The grounds for the suspension and revocation mentioned to include environmental grounds include violation of the proclamation 19(1 and 2(a)). Thus it seems clear that the failure by Investment Corporation to observe its environmental obligation entails for the suspension and revocation of the permit/license.

In nutshell, Ethiopian investment law has more economic objective and motive than maintaining corporate environmental accountability. This doesn't mean, however, that it is exonerated from liability as environmental laws are cross-referred by the proclamation and applies.

7. Land Law in Ethiopia

The regulation of corporate conduct relating to land is cardinal for countries like Ethiopia where agriculture is the blood line for the people's subsistence. Any sort of impact to the land also directly affects our life as our attachment and dependence to land and its resources is very natural and direct- is not supported by any other technology. Thus the way the law commands corporations use of the land could affects directly the community as well beyond its direct impact on the ecology in general. Hence we expect strict accountability of corporate practice to the land as basic resource. Land is also among the three bases of economic development that include labor, and capital. Labor and capital are meaningless for corporations without land. It is from land that labor and capital are sourced. It is over the land that many activities of development works are being done and related. The land law of a country is almost the basic reason of economic development as well. The political economy of the country is the country is determined based on its law over the land as major part. Much of the natural resources that we have seen in the definition section of environmental law are found on the land. Hence protection to the land implicates to protection to the environment. Recognizing these states of beings, let's see the land law whether it has foundational legal framework to corporate accountability. The land law in Ethiopia basically covers among other the EFDR constitution, the FDRE rural land use and administration proclamation, the urban land proclamation and expropriation and payment of compensation proclamation. The regional states have detail legislations for the proper enforcement of the land law

principles enshrined in the federal land laws. The regional land laws and other lease contracts are not covered in this article.

The constitution, as the prime law, declares land to be under the ownership of government and nations, nationalities and people of Ethiopia.[87] Private business persons and investors are thus out-rightly excluded to have shared in the ownership of land in Ethiopia as they invest. Therefore obligations attached to the owner of land could not be applicably over corporations. Corporate environmental accountability relating to land is therefore subordinated and supposed to be emanating from sub-ordinary government legislations such as the proclamations, regulations and directives relating to land. In fact the constitution environmental stipulations relating to the environment as discussed above are still preserved.

The FDRE Constitution further has stipulated discretely that investors that obviously could include corporations can get land holding through the modality of lease holding.[88] Thus the type of tenure adopted of investors is leasehold which is administered through government contract- *lease holding contract*. From this constitutional ruling, one may deduce that government being a trustee to land [89] has inherent right to guide as to the environmental/sustainable use of land by the public, private sectors including investors. The government lease holding contract is also major source of obligation for corporations in their economic engagement and in relation to land. Save its significance to regulating corporate conduct including their environmental conduct this paper doesn't, however, dwell on discussing lease contracts. Thus the subsequent discussion will be over other federal sub- ordinary legislations.

Beyond the constitution other land related legislations at the federal level in Ethiopia include subsidiary laws such as the federal rural land administration and use proclamation, [90] the urban land administration and use proclamation[91] and property evaluation and expropriation proclamation as

[87] *See* Article 40 of the Constitution.

[88] Ibid

[89] Article 89 of the Constitution

[90] Federal Democratic Republic of Ethiopia Rural Land Administration and Land Use Proclamation No. 456/2005, Negarrit Gazette 11th Year No. 44 ADDIS ABABA-15th July, 2005

[91] Federal Democratic Republic of Ethiopia Urban Land Use and Lease Proclamation No. 721/2012

mentioned herein above What these legislations say about the environmental liability of corporations will be then be discussed hereafter.

The rural land law administration and use proclamation categorized landholding into private, state/public and communal.[92] Each of the landholders is duty bound to manage their land holding.[93] They are obliged to manage their land and lose their right in cases of damage.[94] Damage is not defined and from our ordinary understanding it may imply affecting the natural quality and distorting its feature to the extent of reducing its production. Damage presupposes compensation to the owner/holder whose right is affected. The owner is the government and the people. Hence the holder in this article the corporation holding the land by means of leasehold may lose his right if improperly uses the land and damage sustains. The damage as described may include environmental damage and hence the corporation shall manage the land and protect from environmental problems such as soil pollution and degradation. In fact the extent of damage and the measures taken against a corporation that damages its land holding are not mentioned and one may question whether lose of use right is the only measure to be taken for environmentally damaged land. It may pollute to the irreversible level and lose of right may not be appropriate measure at all. Obviously if damage sustains compensation and other related measures are expected. Whether the holder will be forced to pay compensation in cases of mismanagement and damage to the land and the amount of damage and the payment modalities are expected from the regional land legislations in which the proclamation has given agency power for its detail administration. As per the author's view if the land is damaged because of improper use and management of the land, he shall not only be forced to lose his right but must be forced further to compensate, restore the land and if not restored has to be penalized. Hence corporations once they are entitled a lease-holding right of rural land may lose their use right at times of mismanagement and penalized criminally as stipulated under article 9.

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[92] *See* Article 2 of the rural land use and administration proclamation, Proclamation No. 456/2005

[93] *See* the preamble and Article 10 of the rural land use and administration proclamation, Proclamation number 456/2005

[94] Ibid

Another important thing that the proclamation has included is sustainable conservation, intergenerational equity and land use plan incorporated in the objective clause. The objective clause says that the proclamation has objective to:

> to sustainably conserve and develop natural resources and pass over to the coming generation through the development and implementation of a sustainable rural land use planning based on the different agro-ecological zones of the country, to establish\ an information data base that enables to identify the size, direction and use rights of the different types of landholdings in the country such as individual and federal and regional states holdings; to resolve problems that arise in connection with encouraging individual farmers, pastoralists and agricultural investors and establish a conducive system of rural land administration; to put in place legal conditions which are conducive to enhance and strengthen the land use right of farmers to encourage to take the necessary conservation measures in areas where mixed farming of crop and animal production is prevalent and where there is a threat of soil erosion and forest degradation; to establish a conducive system of rural land administration that promotes the conservation and management of natural resources, and encourages private investors in pastoralist areas where the tribe based communal landholding system dominates.[95]

From this objective clause, it is to be inferred that the government intends to modernize the land administration system and plans to use land sustainably by employing different modalities including conservation works. It clearly has recognized one of the pillar environmental principles called sustainable development. It also has recognized intergenerational equity and rights of the coming generation. These principles presuppose environmental responsibility of land holders among which corporations are obviously one. Any violation of such pillar environmental principles affects the land. Hence civil as well as criminal measures may then be taken on the culprit accordingly.

The proclamation has enshrined environment related user's obligations and restrictions too that applies over corporations.

[95] Ibid (the preamble part of the proclamation)

Holders restrictions[96] are basically land conservation and environmental management tools as included in article 13. It includes restriction relating to free grazing, use of water between upper and lower catchments, use restriction of the sloppy land, wetland conservation and farming restrictions depending on the nature of the land.[97] These are important restrictions the use of which protects the environment.

Inutshell the rural land administration and use proclamation has important provisions that could hold corporations liable while affecting the land through applying environmentally unfreindly technics or ways of production. Although the very detail administrations are expected more from the regional land laws, the proclamation has still incorporated fundamental environmental protection clauses if applied could held corporations accountable.

The third part of the land law discussion is about the urban land use proclamation (721/2002). The content analysis on the urban land proclamation testify that the proclamation doesn't have clear and direct environment related provision to apply over corporations to hold accountable for the sake of environment. This, however, doesn't mean that in urban centers the environment is not regulated. The environmental laws as discussed above apply all over the country. The last is about the expropriation for public purpose and payment of compensation proclamation.[98] The proclamation has its main objective of regulating how expropriation is made and relating to payment of compensation of property including land. It is the proclamation based on which the government takes land using its eminent domain and distribute to the investors. This proclamation doesn't have close objective relating to environmental regulation unless there are instances the government may take land for environment related projects. Hence there is no special need to articulate the provisions.

[96] Ibid, see Article 13

[97] Ibid, See article 13

[98] Expropriation of landholding for public purpose and Payment of Compensation Proclamation, Proclamation No. 455/2005

The overall assessment shows that the rural land administration proclamation and the constitution relating to land have incorporated important environmental protection provisions that may hold corporations accountable. However, the urban land proclamation and the expropriation for public purpose and payment of compensation proclamation don't have enough coverage that helps to hold corporations accountable for the environment. This doesn't, however, mean that they are exonerated from liability as the environmental laws are applied and the common law remedies in the civil and criminal code still may apply.

8. The Commercial Code of Ethiopia, 1960-Company Law

Company and other business issues are basically regulated by the commercial code in Ethiopia. The commercial code of Ethiopia was issued in 1960.[99] It was enacted with an attempt to comprehensively regulate business and business-related affairs.[100] It treats business, the formation of business organizations, administers the mode of business practices, company formations, operations, and winding ups and related issues.[101]

Foreign investment companies, in whatsoever form they might be constituted, are subject to Ethiopian law requirements while operating in Ethiopia. They are required to be incorporated as per Ethiopian law.[102] As per the company law, there are about six basic business organizations.[103] Nevertheless, the commercial code of Ethiopia is an old business regulatory framework that doesn't incorporate provisions requiring stakeholder's interest such as the environment. It doesn't have any provision requiring or promoting companies for CSR. The content analysis over its provisions indicates that the legal orientation is based on the classic shareholders model that runs for promoting economic interest of shareholders as its prime objective.

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[99] Michael P. Porter (1995), Unlimited and limited liability in the commercial code of Ethiopia, ILSA Journal of Int'l & Comparative Law, Vol. 4: 1083. It can be accessed from www.abyssinialaw.com.

[100] See the commercial code of the empire of Ethiopia, 1960

[101] Ibid

[102] *See* Article 10 of the Investment Proclamation, Proclamation No. 769/2012 (as amended in 2014)

[103] *See* Article 100 of the Commercial Code and Article 10 of the Investment Proclamation

From all the provisions there is only a single article that may apply to the environment as a case in the public interest (Article 542). Article 542 describes the causes of the dissolution of private limited companies. It stated that a court may dissolve a private limited company through order provided there is a good cause. The phrase for *good cause* includes cases of public interest.[104] And the environment is one of the most important public interest issues that shall be included in such a scenario. The violation of environmental law requirements, therefore, amounts to good cause for the order of dissolution are rendered. Besides the commercial code applies over investment companies incorporated in Ethiopia in the form of business organization.[105]

In nutshell, although the applicability of the commercial code over investment companies in Ethiopia is unquestionable, still, however, the commercial code lags behind time to set environmental requirements and hence its review proves the non-existence of direct environment related requirement to make companies liable. It doesn't require environmental responsibility from companies. Corporate governance shall, however, promote stakeholder participation and environmental interest needs to be reflected in the future amendment.

9. The Mining Operations Proclamation no. 678/2010

Mining may affect badly the environment unless properly managed. This section assesses the mining proclamation relating to whether it has some regulatory framework that compel corporations or business entities involved on the sector to be environmentally accountable.

In Ethiopia the first proclamation to regulate the mining sector and subjects was enacted in 1993[106] and has been amended in 2010. The objective of the 2010 proclamation incorporates ensuring environmentally sustainable

[104] Mizanie Abate Tadesse (PhD), Transnational Corporate Liability for Human Rights Abuses: a Cursory Review of the Ethiopian Legal Framework, Mekelle University Law Journal Vol.4 June 2016 pp 63. See also article 10 of the investment proclamation number 769/2012.

[105] Ibid and See also article 10 of the investment proclamation number 769/2012.

[106] *See* Proclamation No. 52/1993: A Proclamation to Promote the Development of Mineral Resources

development of mineral resources in the country. [107] The proclamation in the preamble section clearly states that "it is the obligation of the Government to protect the environment for the benefit of present and future generations and to ensure ecologically sustainable development of minerals." From this sustainable development and future generation equity which are among the fundamental environmental principles are recognized. The proclamation thus has clearly mainstreamed in its objective the issue of the environment in the mining process. Whether it has further prescribed liability for corporations operating against the environmental principles is also scrutinized. Thus as per the review article 60 of the proclamation is found relevant to the point at hand. As per this article two environmental rulings of great significance are prescribed. First rules about environmental impact assessment[108] while the second importantly deals with allocation of funds to cover the costs of rehabilitation of environmental impact. [109] According to the first for obtaining license preparing EIA is mandatory and he shall also get approval from the ministry of forest, environment and climate change. It stated as;

> except for reconnaissance license, retention license or artisanal mining license, any applicant for a license shall submit an environmental impact assessment and obtain all the necessary approvals from the competent authority required by the relevant environmental laws of the country. [110]

As per the second environmental sub article the owner of the license has to show deposit about funding the costs of rehabilitation of the environmental impact it will obviously be emanating from the actual mining practice. It stated very clearly as "… any licensee shall allocate funds to cover the costs of rehabilitation of environmental impact." This provision has great contribution to the environmental protection endeavor. It may have significant prevention role to the environment. Via these two provisions the mining proclamation able to regulate environmental responsibility of corporations involving on the sector. The last important provision is article 78 that describes about penalty. This provision in general has set a

[107] *See* the preamble and objective clause of the mining operation proclamation, Proclamation No. 678/2010, Fed.Neg.Gaz. 4th august 2010

[108] Ibid, see Article 60

[109] Ibid

[110] Ibid

punishment of fine up to Birr 200,000 or an imprisonment up to five years or both. Accordingly if corporations contravenes or fails to comply with provisions we have discussed above they may face with such punishment. But whether this punishment is additional to the punishment relating to EIA in the criminal code and EIA proclamation is not clear. The mode of calculation of costs for rehabilitating environmental impact is not as well clear. Still, however, the mining proclamation has attempted to set the bottom-line environmental legal requirements for corporations or business that wants to involve on the sector. The cross reference to the EIA law and the incorporation of environmentally sustainable clause as well as the requirement of allocation of fund for the environmental rehabilitation makes this proclamation very crucial for ensuring responsible corporate practice.

Concluding Remarks

Corporate environmental responsibility is often recognized as *compliance plus approach* and to ascertain whether a country has corporate environmental liability regime requires assessment of investment and environmental regulatory frameworks that have a nexus to do with business and environment. By this article whether or not Ethiopia has the necessary legal regime to hold corporations accountable for their impact on the environment has been assessed- *it is called an appraisal of the legal bottom line.* It scrutinizes the minimum legal threshold of corporation's environmental legal liability.

The assessment signifies that there are various provisions/rules to regulate the environmental conduct of corporate/business sector that ranges from international hard and soft laws (to which Ethiopia is a party) to national environmental laws of civil and criminal nature. These environmental regulatory frameworks are found scattered in different forms and sizes that include international environmental treaties, bilateral investment treaties, the constitution, the criminal law, the civil code, specific environmental laws (pollution control proclamation and the environmental impact assessment proclamation), and sectoral legislations such as the company law, the investment law, land law and the mining law.

Hence the study confirms that Ethiopia has the necessary legal bottom-line to hold corporations environmentally accountable although its special

environmental legislations lack comprehensiveness, clarity and adequacy. Hence it is suggested that reforms shall be made to better respond for the current environmental problems and holding the business sector environmentally accountable. Especially the commercial code needs to take environmental issues into its governance framework so as to promote responsible investment.

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አልዩ አባተ ይማም*

አህጽሮተ-ፅሁፍ

የኢትዮጵያ የሕግ ሥርዓት አንዱና ዋነኛ መገለጫው፣ በሕግ እውቅና ያገኘ የሕግ ብዝኃነት የሥርዓቱ አካል መደረጉ ነው። በኢፌዲሪ ሕገ-መንግሥት አንቀጽ 35(4) እና 78(5) መሠረት፣ ከመንግሥት የፍትሕ ሥርዓት በተጓዳኝ መደበኛ ያልሆኑ፣ ባህላዊና የሃይማኖት የዳኝነት ተቋማት ተቋቁመው፣ የግልና የቤተሰብ ጉዳዮች፣ በተከራካሪ ወገኖች ፈቃድ በባህላዊ ወይም በሃይማኖታዊ ሕጎች ሊዳኙ እንደሚችሉ ይደነግጋል። ይህን ሕገ-መንግስታዊ የብዝኃነት እውቅና በተጨባጭ እውን ያደረጉት ሸሪዓ ፍርድ ቤቶች ብቻ ናቸው። ሸሪዓ ፍርድ ቤቶቹ ከዘውዳዊዉ የኃይለ-ሥላሴ ዘመነ-መንግሥት በፊት ጀምሮ ከግማሽ ምዕተ-ዓመት በላይ በሃገሪቱ የፍትሕ ሥርዓት ዉስጥ ሲሰሩ የነበሩ ሲሆን፣ ይህ እዉነታም በኢፌዲሪ ሕገ-መንግሥት እውቅና ተሰጥቶት፣ በፌዴራልና በክልል ደረጃ በሦስት የዳኝነት እርከኖች ተቋቁመው በመስራት ላይ ይገኛሉ። የፌደራል ሸሪዓ ፍርድ ቤቶችን አቋም ለማጠናከር በወጣው አዋጅ ቁጥር 188/1992 አንቀጽ 3 መሠረት፣ ሸሪዓ ፍርድ ቤቶች የሚቀርቡላቸውን ጉዳዮች የኢስላም ሕግን ተፈጻሚ በማድረግ የሚዳኙ መሆኑ ተደንግጓል። ይህ ጽሁፍ፣ ከሸሪዓ መሠረተ-ሐሳቦች መካከል አንዱና ዋነኛው የሆነውን የሸሪዓ ዓላማዎችና ግቦች (መቃሲድ አሽ-ሸሪዓሕ) የሚዳስስ ሲሆን፣ የኢትዮጵያ ሸሪዓ ፍርድ ቤቶች በእለት ተዕለት የዳኝነት ሥራቸው ውስጥ፣ የሸሪዓ የግል፣ የቤተሰብና የውርስ ሕጎችን ሲተረጉሙና ተፈጻሚ ሲያደርጉ፣ የጠቅላላውን የሸሪዓ ሕግ ዓላማዎች እና የየዘርፉን ንዑስ ዓላማዎችን በሚያሳካ አኳኋን መሆን ይችል ዘንድ የመስኩን ሥነ-ጽሁፍ ዋና ዋና እና መንደርደሪያ ፍሬ-ሐሳቦች ያብራራል። የቃል በቃል የሕግ አተረጓጎም ተግባራዊ በማድረግ፣ በቀዳሚ የሸሪዓ ምንጮች፣ መዝሓቦችና (የሕግ ትምህርት ቤቶች)፣ እና ሊቃውንት (ሙጅተሒዱን፣ ፉቅሓእ) ከዳበረው ዝርዝር የሸሪዓ የሕግ ማዕቀፍ ጀርባ፣ በ20ኛው ክፍለ-ዘመን የሸሪዓ ምሁራን ጥልቅ ጥናት እየተደረገበት ያለውንና፣ ሸሪዓን ከዘመኑ የማሕበረሰብ ሥልጣኔ እና እዉነታዎች ጋር ለማጣጣም አይነተኛ መሳሪያ የሆነውን የመቃሲድ እድገት፣ ዘዴዎች፣ መርሆዎችን መረዳትና መተግበር እጅግ አስፈላጊ ነው። የሸሪዓ ሕጎች በጠቅላላው አንድ የታወቀ የፍትሕ (ዐድል)፣ ጥቅምን የማረጋገጥ (መሷሊህ) ወይም መልካም ግለሰባዊ ሰብዕናን የማነጽ (ተሕዚብ አል-ፈርድ) እና ማሕበረሰባዊ የግብረ-ገብ እሴቶችን የማስጠበቅ ዓላማዎችን ያነገቡ ናቸው። ከዚህ ጥቅል የሸሪዓ ዓላማ በታች፣ የቤተሰብና የውርስ ሕግን ጨምሮ፣ ሁሉም የሸሪዓ ዐብይ እና ንዑስ ዘርፎች የየራሳቸው ዓላማዎች አሏቸው። ትክክለኛ የሸሪዓ ሕግ ግንዛቤ እና የፍትሕ ሥርዓት ለመዘርጋት፣ በጥንታዊው የቃል በቃል፣ ደረቅ የሕግ አተረጓጎም ምትክ፣ ዓላማና መንፈስ ላይ ያነጣጠረ የሕግ አረዳድ ባህል ሊዳብር ይገባል። የሸሪዓ ሕግ፣ በኢፌዲሪ ሕገ-መንግሥት በተሰጠው የተፋዳሚነት ወሰን ውስጥ በመሆን እየተሰራበት መሆኑን መሠረት በማድረግ፣ የሸሪዓ የፍትሕ ሥርዓቱ የሕግ አውጪውን ዓላማ ማሳካት እና ተለማጭ መሆን ይችል ዘንድ፣ በመቃሲድ ላይ ሐሳቦችን ማንሸራሸር አስፈላጊ ነው፤ ስለሆነም በዚህ ጽሁፍ በመቃሲድ አጭር ታሪካዊ አነሳስና እድገት፣ መቃሲድ የሚለይባቸው ዘዴዎችና መርሆዎች እና ሌሎች ተዛማጅ መሠረታዊ ርዕሶች ተዳሰዋል።

ቁልፍ ቃላት፡- *መቃሲድ፣ የሸሪዓ ዓላማዎች፣ ጥቅል የሕግ ዓላማዎች፣ ኢጅቲሓድ፣ ሸሪዓዊ የሕግ ምርምር።*

መግቢያ፡- የርዕሰ-ጉዳዩ አግባብነትና ጠቀሜታ

የሸሪዓ ሕግ ዓላማዎችን *(መቃሲድ አሸ-ሸሪዓሕ)* በመስኩ ሥነ-ጽሁፍ የተተነተነውን ያህል ባይሆን እንኳ፣ የ*መቃሲድን* ምንነት፣ ንድፈ-ሐሳቦችን፣ የምርምር ዘዴዎችንና እና አጠቃላይ መሠረታዊ ፍሬ-ሐሳቦቹን የሚዳስስ፣ ጽሁፍ ለኢትዮጵያ የሕግ ሥርዓት ያለው አግባብነትና ጠቀሜታ ምንድን ነው የሚል ጥያቄ በአንባቢው በኩል ሊነሳ ይችላል። የዚህ ምላሽ ደግሞ የኢትዮጵያ ፌዴሬሽን ማቋቋሚያ ሠነድ ከሆነው የፌዴራል ሕገ-መንግሥት አንቀጾች የሚገኝ ነው።[1] የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ ሕገ-መንግሥት አንቀጽ 34(5) እና 78 (5) ላይ 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 ሊዳኙ እና እልባት ሊሰጣቸው እንደሚችል ሕገ-መንግሥቱ ያትታል።

ተቋማዊ አደረጃጀቱን በተመለከተ በሕገ-መንግሥቱ አንቀጽ 78(4) ላይ እንደተመለከተው፣ የግልና የቤተሰብ ግጭቶችን የመዳኘት ሥልጣን ያላቸው ሃይማኖታዊና ባህላዊ ፍርድ 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 የሃይማኖት ፍርድ-ቤቶችን የማቋቋም ጥያቄዎችን ተቀብሎና ገምግሞ፣ በቂ ፍላጎት ያለና አስፈላጊነቱ የታመነበት ከሆነ፣ በሕግ አውጪዎቹ ይሁንታ ባህላዊና ሃይማኖታዊ ፍርድ ቤቶች ተቋቁመው የሕግ ብዛኃነቱ አካልና ተዋናይ እንዲሆኑ ሊደረግ እንደሚችል መረዳት ይቻላል። እንደ እድል ሆኖ፣ ከመደበኛ ፍርድ ቤቶች ውጪ ያሉ የዳኝነት አካላት የሚቋቋሙበት ይህ ሥርዓት፣ ለሸሪዓ ፍርድ ቤቶች ተፈጻሚ አይሆንም፤ እንዴት ከተባለ ምላሹ በአንቀጹ ንዑስ 5 ላይ ይገኛል። ይኸውም፣ ሕገ-መንግሥቱ ከመጽደቁ በፊት በመንግሥት እውቅና አግኝተው ሲሰራባቸው የነበሩ የባህል ወይም የሃይማኖት ፍርድ ቤቶች እውቅና አግኝተው እንዲደራጁ የሚያስገድድ በመሆኑ ነው። በኢትዮጵያ የሕግ ሥርዓት ታሪክ ደግሞ፣ ሸሪዓ ፍርድ ቤቶች ከአጼ ኃይለ-ሥላሴ ሥርዓተ-መንግሥት በፊት ጀምሮ በሥራ ላይ የነበሩ በመሆኑ፣[2] በንጉሱ ዘመን ደግሞ የቃዲና የናኢባ ፍርድ ቤቶች ተብለው በ1934 እና በ1936 ዓ.ል በወጡ የማቋቋሚያና የማሻሻያ አዋጆች ተደራጅተው ሲሰሩ የነበሩ ናቸው።[3] ሥለሆነም ሸሪዓ ፍርድ ቤቶች፣ ከመንግሥታዊ የዳኝነት ተቋማት በተጓዳኝ በመሥራት፣ ከሕገ-መንግሥቱ መጽደቅ በፊት

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* (LL.B, ሐረማያ ዩኒቨርሲቲ፣ LL.M, አዲስ አበባ ዩኒቨርሲቲ፣ በወሎ ዩኒቨርሲቲ የሕግ ት/ቤት መምህር። ኢ-ሜይል፡ alyuabate09@gmail.com)

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

[2] ዛኪ መስጠፋ፣ 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። ጽሁፉ በ፡ http://journals.co.za/docserver/fulltext/jel/9/1/211.pdf?expires=1513428722&id=id&accname=guest&checksum=61C6511681864827D9D37CAE4B9444CE ፊለን-ገጽ ላይ ይገኛል (በታህሳስ 12፣ 2010 ዓ.ም የተገኘ)። See also: Mohammed Abdo, Legal Pluralism, Sharia Courts, And Constitutional Issues In Ethiopia, Mizan Law Review, Vol. 5 No.1, Spring 2011, p. 78. Available at: https://www.ajol.info/index.php/mlr/article/view/68769/56835

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

ሲሠሩ የነበሩ በመሆኑ፣ እነዚህን ፍርድ 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 ሕገ-መንግሥቱን አስገዳጅ አንቀጽ መሠረት በማድረግ፣ የፌዴራልና የክልል ምክር ቤቶች የሸሪዓ ፍርድ ቤቶችን አቋም የሚያጠናክሩ እና እንደገና የሚያደራጁ አዋጆችን አውጥተዋል። የሕዝብ ተወካዮች ምክር ቤት፣ ‹የፌዴራል ሸሪዓ ፍርድ ቤቶችን አቋም ለማጠናከር የወጣ አዋጅ ቁጥር 188/1992› በተሰኘ አዋጅ አማካይነት ፍርድ ቤቶቹ በይበልጥ ተጠናክረውና ተደራጅተው እየሰሩ መሆናቸው የታወቀ ነው። በተመሳሳይ፣ የክልል መንግሥታትም በበኩላቸው፣ የፌዴራል ሕግ መንግሥቱን አንቀጽ 78(5) መሠረት በማድረግ፣ ክልላዊ ተፈጻሚነት ያላቸው የየራሳቸውን የሸሪዓ ፍርድ ቤቶች ማጠናከሪያ አዋጆች አውጥተው፣ በሃገሪቱ ዙሪያ በወረዳ፣ በዞንና በክልል ደረጃ፣ የመጀመሪያ፣ ከፍተኛና ጠቅላይ ሸሪዓ ፍርድ 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 ፍርድ ቤቶች ማጠናከሪያ አዋጅ አንቀጽ 3 መሠረት፣ ለሸሪዓ ፍርድ ቤቶች የሚቀርቡ ጉዳዮች በሸሪዓ ሕግ መሠረት እንደሚዳኙ ይደነግጋል። ለፍርድ ቤቶች የሚቀርቡ የግልና የቤተሰብ ግጭቶችን ለመዳኘት፣ ተፈጻሚ የሚደረገው የሸሪዓ የግልና የቤተሰብ የሕግ ማዕቀፍ በመተርጎም ረገድ፣ መቃሲድ ወሳኝ የመሪነት ሚና የሚጫወት በመሆኑ፣ የርዕሱን ልዩ ልዩ ገጽታዎች መገንዘብ እና በተግባር እንዲንጸባረቅ ማድረግ፣ በየደረጃው ካሉ የሸሪዓ ፍርድ ቤቶች እና በሕግ ሙያ ከተሰማሩ ጠበቆችና አማካሪዎች የሚጠበቅ ነው።

የሸሪዓ ሕጎች በሁለት ጥቅል ምድቦች ተከፍለው ሊታዩ ይችላሉ። የመጀመሪያው የአምልኮ ሥነ-ሥርዓት የሚዘረጋው የሸሪዓ ክፍል - ዒባዳት ሲሆን፣ ሁለተኛው ምድብ ደግሞ በዓለማዊ ሕይወት ላይ ዘርፈ-ብዙ የግለሰብ እና የማህበረሰብ ግንኙነቶችን የሚገዛው የሸሪዓ ክፍል - *ሙዓመላት* ነው። ሁሉም የሸሪዓ ሕጎች ከሕግነታቸው ጀርባ ሊያሳኳቸው ያለሙት የፍትሕ፣ የግለሰብ እና የማህበረሰብ መብትና ጥቅም የማስከበር ዓላማዎች አላቸው፤ በሌላ አገላለጽ ያለ ዓላማና ግብ (*መቃሲድ*) የተደነገገ የሸሪዓ ሕግ በተለይም የ*ሙዓመላት* ሕግጋት የለም። የዒባዳሕ ሕጎችም ቢሆኑ፣ ዓላማቸው እውን ሲሆን በተጨባጭ የሚታይ ባይሆንም

[4] በሕግ እውቅና ካገኘ የሕግ ብዝኃነት (*De-jure*) በተቃራኒ፣ ሕግ የማይፈቅደውና እውቅና ያልተሰጠው፣ የፍራ-ነገር የሕግ-ብዝኃነት (*De-facto*) አለ። ይህ የብዝኃነት ጽንሰ-ሐሳብ፣ በአንድ የሕግ ሥርዓት ውስጥ በተጨባጭ የሚታየውን፣ ከመንግሥታዊ የፍትሕ ሥርዓት በተጓዳኝ የግለሰቦችንና የማሕበረሰብ ባህርይ እና ምግባር የሚቀርጹና የሚመሩ ሕጎች ተግባራዊ የሚሆኑበትን ነባራዊ እውነታ የሚያመለክት ነው። ለምሳሌ፣ በኢትዮጵያ የሸሪዓ ሕግ ወይም ባህላዊ ሕጎች በባህላዊ እና ሃይማኖታዊ የፍትሕ ተቋማት አማካይነት ከተፈቀዱበት ወሰን አልፈው፣ በፍትሐ-ብሔራዊ፣ በንግድ እና በወንጀል ጉዳዮች ላይ ተፈጻሚ የሚደረጉ መሆኑ የማይክድ ሃቅ ነው። ከሕግ እውቅና ውጪ የሆነው ነባራዊ ብዝኃነት፣ በሃገራዊ የፍትሕ ሥርዓት፣ በጾታ እኩልነት እና የሰብዓዊ መብት፣ በልማታዊ የፖሊሲ አፈጻጸም እርምጃዎች ላይ የራሱ የሆኑ አሉታዊ ሚናዎች ያሉት ሲሆን፣ ለባህላዊና የሃይማኖት የሕግ ሥርዓቶች የተሰጣቸው የእውቅና ደረጃና የተፈጻሚነት ወሰን 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።

የግለሰብን ሰብዕና በማነጽ፣ መንፈሳዊ እርጋታና መልካም ባህርይን በማላበስ፣ ለምድራዊ ሕይወት ስኬት የራሱን ሚና ይጫወታል።

መቃሲድ የሸሪዓ አንድ አካል ነው። ስለሆነም ሕጎች ሲተረጎሙ እና ሲተገበሩ የወጡበትን ዓላማ በሚያሳካ አኳኋን መሆን ይኖርበታል። የሸሪዓ ሕግ ዓላማዎችና ግቦች ወደጎን ተብለው የቃል-በቃል አረዳድ *(Literal Interpretation)* በመከተል ሕጉን ማስፈጸም የሕጉን ዓላማና መንፈስ የማያሳካ ከመሆኑም በላይ ያልታሰበ ጉዳት እና ኢ-ፍትሐዊ ሁኔታ ሊያስከትል ይችላል። ባለማወቅም ሆነ በችልተኝነት *መቃሲድ* ግንዛቤ ውስጥ የማይገባበት ሁኔታ እንደተጠበቀ ሆኖ፣ በሕግ ባለሙያዎችና ተከራካሪ ወገኖች የግል ወይም የደንበኞቻቸውን ጥቅም ለማስከበር ሲባል በሕጎች አተረጓጎም ላይ ብልሐተኛ (*ሥልታዊ*) *(ሂያል)* በመሆን ሲባል ሕግ ተጠምዝዞ የሚተረጎምበት፣ ወደ ግቡ የሚደርስበትን አቅጣጫ እንዲስት የሚደረግበት ዘዴ፣ በ*መቃሲድ* የሚታረም መሆኑ፣ በርዕሱ ላይ በቂ ግንዛቤ መያዝ አንገብጋቢ መሆኑን ያመለክታል። ስለሆነም፣ *መቃሲድ* የሸሪዓ ሕግን በትክክል ለመረዳት እና ተግባራዊ ለማድረግ ካለው መሠረታዊ ጠቀሜታ አኳያ፣ ምንነቱን፣ የሕግ ዓላማዎች የሚለዩባቸው ዘዴዎችን፣ ልዩ ልዩ የ*መቃሲድ* አመዳደቦችን፣ ጠቅላላ የሸሪዓ ዓላማዎችን እና ሌሎች መሠረታዊ ፍሬ-ሐሳቦች በዚህ ጽኑፍ ርዕሶች ሥር ተቃኝተዋል።

1. የ*መቃሲድ* ታሪካዊ እድገት

መቃሲድ እንደ ሌሎቹ የታወቁ የሉሱል *አል-ፊቅሕ* አርዕስት ሁሉ ከጥንታዊ የመስኩ አነሳስ ጀምሮ የነበረ ሳይሆን የቅርብ ዘመናት ሉሱል ምሁራን ትኩረት ያገኘና የሉሱል ጥናት ዘርፍ አዲስ ጭማሬ ነው። በዚህ ዘመን የሚወጡ ብዙዎቹ የሉሱል ድርሳናትም ቢሆኑ የ*መቃሲድ* ርዕስን አካተው አይገኙም።[5] ምንም እንኳ ግንባር ቀደም የሙሀመድ ባልደረቦች፣ ሸሪዓን እንድ ሕግ ብቻ ሳይሆን እንደ *ሥርዓተ-እሴት* ይመለከቱት የነበር ለመሆኑ፣ እና እነዚህ እሴቶችንና ዓላማዎችን በሕግ አተረጓጎማቸውና ትግበራቸው ላይ ያንጸባረቁ መሆኑን የሚያስረዱ ታሪካዊ ማስረጃዎች ቢኖሩም፣ በመጀመሪያዎቹ የኢስላም *ዐሥርተ-ዓመታት* በባልደረቦች ተከታዮች *(ታቢዑን)* ተመስርተው ከነበሩ ሁለት የምሁራን ጎራዎች፣ *አሕል አል-ሀዲስ* (የ*ሀዲስ* ባለቤቶች) የሚባሉት፣ ከ*አሕል ሰርዕ-ረእይ* (የአሳቤ/አመክንዮ ባለቤቶች) አንጻር ሲታዩ፣ በቀዳሚ ምንጮች (ቀርአንና *ሱናሕ*) የተደነገጉ ሕጎችን ቃል-በቃል የመተርጎም ዝንባሌ የነበራቸው መሆኑ፣ እንዲሁም በተቃራኒው ዓላማን ወይም ምክንያታዊ አሳቤን በምንጮች ያልተደገፈ ነው በማለት ይቃወሙ የነበር መሆናቸዉ፣ *መቃሲድ* በእነዚህ የእድገት ጊዜያት መሠረት እንዳያገኝ ሆኗል።[6] ከእነዚህ የምስረታ ዘመናት በኋላ ለሦስት ምዕተ-ዓመታት የዘለቀው የሸሪዓ አረዳድ ዋነኛው መገለጫው ደረቅ፣ የቃል በቃል የሕግ አረዳድ ዘዴዎች ላይ ያተኮረ ሲሆን፣ የሸሪዓ ዓላማዎች ግምት ውስጥ ሳይገቡ ሕጎችን የሚተረጉሙትና ከምንጮቹ የሚወስዱበት *(ኢጅቲሓድ)* አቀራረብ ሰፍኖ ነበር።[7]

ከሂሒሪዎች በስተቀር፣ ሁሉም *ሉሱል* ምሁራንና *መዝሓቦች*፣ የ*መቃሲድን* አስፈላጊነትና ጠቀሜታ በእጅግ ያምኑበት ነበር። በተጨባጭ የሕግ ትንታኔያቸው፣ ከሸሪዓና የ*ፊቅሕ*

[5] Mohammad Hashim Kamali, "Maqasid Al-Sharī'ah": The Objectives of Islamic Law, Islamic Studies, Vol. 38, No. 2, p. 198. Available At: Http://Www.Jstor.Org/Stable/20837037 (Accessed: 20-10-2017).

[6] Kamali, *"Maqasid Al-Sharī'ah"*, *Supra* note 5, p. 198.

[7] Ibid.

ድንጋጌ ምክንያት *(ዒላሕ)* እና ዓላማ ጋር የሚጻረር አተረጓጎምን አይቀበሉም ነበር።[8] ሆኖም ግን እስከ ቅርብ ዓመታት ድረስ *መቃሲድን* በርዕሰነት አንስተው ለማብራራት ዝግጁ አልነበሩም፤ ለዚህ ምክንያቱ ደግሞ በምርምር አማካይነት የሕግ አውጪውን ትክክለኛ ዓላማ ላይ መድረስ ለመለየት የማይቻል በመሆኑና፣ በመለየቱ ሂደት ውስጥ በማናቸውም ሁኔታ እርግጠኛ መሆን የማይቻልበትና በጥርጣሬ ወይም ግምታዊነት *(ዞኒ)* ላይ የተመረኮዘ በመሆኑ፣ የሸሪዓ ሕግጋት በ*መቃሲድ* ሥም አተረጓጎማቸው እና አፈጻጸማቸው የሚሸረሸርበት ሁኔታ ሊፈጠር ይችላል በሚል ሥጋት ርዕሱ ለረኻርም ክፍለ-ዘመናት የጥናት የምርምር ትኩረት እንዳያገኝ ሆኗል።[9] ይህ ሥጋት *መቃሲድ ሊጅቲሓድን* በትክክለኛ ጎዳና ላይ እንዲራመድ በማድረግ ካለው ወሳኝ ሚና አኳያ፣ *መቃሲድን* ወደጎን ለማለት በቂ ምክንያት ሊሆን አይችልም። *መቃሲድ* ተገቢነት በሌለዉ የግል ጥቅም ወይም ቡድናዊ እሳቤ ምክንያት የሕግ ማቅለያ ወይም ማሻሻያ ከሚሆንበት እድል በላይ የሸሪዓ ሕግጋት ከጠቅላላ የ*መስላሃሕ* ሸሪዓ ዓላማ እና በተለየ የተደነገጉበትን ልዩ ዓላማ በሳተ አኳኋን የሕግ አዉጪዉን ሐሳብ በሚያደናቅፍ እና በማያሳካ ዘዴ እንዲተረጎሙ የሚሆኑበት አደጋ የከፋ ነው፤ በተለይም ላልተገባ የሕግ አክራሪነት/አጥባቂነት *(Legalism)* ጽንፍ የሚጋብዝ ነው፤ የዘመናችን የፊቅሕ አስተማሪዎች፣ ሰባኪዎችና ሰፊው ማህበረሰብ የሕግ አተኳሪነት *(Literalist legalism)* ባህል የዚህ ታሪካዊ እድገት ውጤት ነው።[10]

በሸሪዓ እድገት ታሪክ፣ የ*መቃሲድ* ሐሳብ የተነሳውና ፈር-ቀዳጅ ሐሳቦችን በድርሳኖቻቸው ያንሸራሸሩት ምሁራን በ10ኛው ክፍለ-ዘመን፣ በአት-ተርሚዝ አል-ሃኪም (932 አ.) ሲሆን፣ ይህን ሥራ ያጣቀሰ ሌላ የ*መቃሲድ* ሥራ በኢማም አል-ሃረመይን አል-ጁወይኒ (1085 አ.) ተደርሷል።[11] አል-ጁወይኒ የቁርአን እና የሱናሕ ሕጎችን በጥልቀት በማጥናት እና ከጀርባቸው የያዙቱን አንኳር እሴቶች (ዓላማዎች) በመፈተሽ አጠቃላይ የሸሪዓ ዓላማዎችን ለይተዋል፤ በብዙኃኑ ዘንድ ተቃባይነት ለማግኘት የቻለውን፣ የ*መቃሲድ* ሦስትዮሽ አመዳደብን፣ ማለትም መሠረታዊ ፍላጎቶች *(ዶሩሪያት)*፣ ደጋፊዎች (አባሪዎች) *(ሃጂያት)* እና አሳማሪዎች (ቅንጦታዉያን)፣ ለመጀመሪያ ጊዜ ያስተዋወቁት ጁወይኒ እንደሆኑ ይታመናል።[12] ከጁወይኒ በኋላ የ*መቃሲድን* ጽንሰ-ሐሳብ እና የጥናት ዘዴዎች በማሰፋፋት፣ አልገዛሊ (እ.አ.አ 1111 አ.) ‹ሺፋዕ አል-ገሊል› እና ‹አል-መስተሰፋ› በተሰኙ መጽኃፎቻቸው ጠቃሚ *መቃሲድ* ምልከታዎችን አክለዋል። ሸሪዓ፣ እምነት፣ ሕይወት፣ እዕምሮ፣ የዘር-ሐረግ - ተወላጆችን *(ነስል፣ ነሰብ)* እና ንብረት የተሰኙ አምስት መሠረታዊ ዓላማዎችን የያዘ መለኮታዊ የሕግ ማዕቀፍ እንደሆነ፣ ከምንም በላይ እነዚህ ዓላማዎች ቅድሚያ ሊሰጣቸው እና ጥበቃ ሊደረግባቸው እንደሚገባ በሥራዎቻቸው አጽንኦት ሰጥተዋል።[13]

ከዚህ በኋላ የመጡ የልዩ ልዩ *መዝሓብ* ሊቃውንት በተጀመረው የ*መቃሲድ* እሳቤ ላይ ታላቅ ጥናት በማድረግ *መቃሲድ* የየራሳቸውን ምልከታዎች ጨምረዋል። ለአብነት ያህል፣ በሁለት

[8] Ibid., pp. 198-199.

[9] Ibid., p. 199.

[10] Mohammad Hashim Kamali, Sharia Law: An Introduction, Oxford:Oneworld Publications, Oxford, 2008, p. 125.

[11] Kamali, *"Maqasid Al-Sharī'ah", Supra* note 5, p. 199.

[12] Ibid.

[13] Ibid.

የቂያስ (ምስስሏዊ አመክንዮ) መካከል ግጭት ቢፈጠር፣ *መቃሲድን* መሠረት ያደረገ ምርጫ *(ተርጂሕ)* ማድረግ ይገባል በማለት ፈኽር አድ-ዲን አር-ራዚ (1208 አ.) እና ሰይፍ አድ-ዲን አል-አሚዲ (1233 አ.) በማለት *መቃሲድ* በኢጅቲሓድ ላይ ሊኖረው ከሚገባው ሚናዎች መካከል አንዱን ጠቁመዋል፤ በተጨማሪም በተለያዩ ደረጃዎች ላይ ለሚገኙ ሸሪዓዊ የሕግ ዓላማዎች መካከል አንዱን መምረጥ ግድ ሆኖ ከተገኘ፣ አንዱ ከሌላው ሊመረጥ የሚችልባቸዉን መመዘኛዎች አብራርተዋል።[14] የማሊኪ *መዝሓብ* ሊቅ የሆነው ሺሓብ አድ-ዲን አል-ቀራፊ (1285 አ.) ደግሞ የሸሪዓ ድንጋጌዎችን ተመርኩዞ ከላይ አል-ገዛሊ ከለዩዋቸው አምስት መሠረታዊ የሸሪዓ ዓላማዎች በተጨማሪ፣ ክብር *(አል-ዒርድ)* ስድስተኛ የሸሪዓ ዓላማ ሆኖ ሊታከል እንደሚገባ አስገንዝቧል፤ ለዚህ የአል-ቀራፊ ሐሳብ፣ ከእርሱ በኋላ የመጡት አስ-ሱብኪ (1834 አ.) እና አሽ-ሸዉካኒ (1834 አ.) ድጋፍ ሰጥተዋል።[15] በተጨማሪም፣ ዐብድ አሰ-ሰላም አስ-ሱላሚ (1282 አ.) ደግሞ፣ በ*መቃሲድ* ላይ በሚያተኩረዉ *‹ቀዋዒድ አል-አሀካም›* ሥራቸው፣ በዒላሕ እና *መቃሲድ* ዙሪያ ተጨማሪ አዲስ ሐሳቦችን ያመነጨ ሲሆን፣ ከሀሉም የቁርአን ዓላማዎች ቀዳሚው *‹ጉዳትን መከላከልን›* ጨምሮ በየትኛውም ገጽታው *‹ጥቅምን ማስገኘት/ማስከበር›* ነው በማለት ሰፋ ያለ ምልከታ አስተዋውቀዋል።[16] አል-ኻጢቢ (1388 አ.) ደግሞ ቀድመው የተነሱ የ*መቃሲድ* ንደፈ-ሐሳቦችን በጥልቀት በመተንተንና አዲስ የእይታ አቅጣጫዎችን በማመላከት፣ እንዲሁም *መቃሲድ* ከሚለይበቸው ዋነኛ ዘዴዎች መካከል አንዱና ዋነኛ የሆነውን ዳሰሳዊ/ሁለንተናዊ የሕግ ምርምር *(ኢስቲቅራእ/Induction)* ዘዴ በማስተዋወቅ፣ ለ*መቃሲድ* እድገት የጎላ ምሁራዊ አበርክቶ ያደረጉ ከመሆኑ አንጻር፣ የ*መቃሲድ* አባት *(ሸይኽ አል-መቃሲድ)* የሚል መጠሪያ ሊያገኙ ችለዋል።[17]

እንደ ተቂይ አድ-ዲን ኢብን ተይሚያሕ ደግሞ የሸሪዓ ዓላማዎች ከላይ በተወሱት ጥቂት ዓላማዎች ብቻ ሊወሰን አይችልም፤ ሌሎችን ለምሳሌ፣ ዓለማዊ ሕይወትን በሚመለከት የውል ግዴታን ማሟላት፣ የገዘምድና ትስስር መጠበቅ፣ የጎረቤት መብትን ማክበር ወዘተ..፣ ዘልዓለማዊ ሕይወትን በሚመለከት አምላክን ማፍቀር፣ ቅንነት፣ መልካም ባህርይና ሥነ-ምግባር ወዘተ..፣ ከብዙዎቹ የሸሪዓ ዓላማዎች መካከል ጥቂቶቹ ናቸው።[18] ይህ የሸሪዓ እሴቶች ውሱን ያለመሆን ሐሳብ አህመድ ረይሱኒን ጨምሮ ሌሎችም ዘመነኛ የ*መቃሲድ* ምሁራን ዘንድ ሰፊ ተቀባይነት አግኝቷል።[19] ከዚህ እሳቤ ላይ፣ የሰብዓዊ መብት እና ነጻነቶች ጥበቃ፣ የኢኮኖሚ ልማት፣ የሳይንስ እና የቴክኖሎጂ ምርምር እና ልማት፣ በብሔሮች መካከል ሰላማዊ እና በመከባበር ላይ የተመሠረተ ግንኙነት ማረጋገጥ የመሳሰሉት ከቁርአን እና ከሱናሕ ድጋፍ የሚገኝላቸዉ ታላላቅ *መቃሲድ* ናቸው በማለት ፕሮፌሰር ሙሀመድ ሐሺም ከማሊ የራሳቸውን ሐሳብ ጨምረዋል።[20] ባጠቃላይ የሸሪዓ ዓላማዎች

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[14] Ibid.

[15] Ibid., pp. 199-200.

[16] Mohammad Hashim Kamali, Goals and Purposes *(Maqasid)* of Shariah (Part 1), IAIS Bulletin on Islam and Contemporary Issues, No. 31 March-April 2016, p. 3. Available at: https://www.iais.org.my/e/attach/bulletin/2016/bulletin31.pdf (Accessed: 10-Nov-18). see also: Kamali, *"Maqasid Al-Sharī'ah"*, *supra* note 5, p.199.

[17] Ibid., See also: Kamali, *"Maqasid Al-Sharī'ah"*, *supra* note 5, 198.

[18] Kamali, *"Maqasid Al-Sharī'ah"*, *supra* note 5, p. 200.

[19] Ibid.

[20] Ibid., p. 201.

በጥቂት ዓላማዎች ሊገደብ የማይችል፣ እንደ ወቅታዊ እና አካባቢያዊ ተጨባጭ ሁኔታዎች ዓላማዎቹ ጎልተው ሊወጡ እና ሊታዩ የሚችሉ በመሆኑ የመቃሲድ በር ሁልጊዜም ክፍት መሆኑን እንገነዘባለን።[21]

2. ጠቅላላ የሸሪዓ ግቦች *(መቃሲድ አሽ-ሸሪዓሕ)*

ኢስላም በእምነት *(ዓቂዳሕ)* እና በሸሪዓ ማዕቀፉ፣ የሰው ልጅ በምድራዊ እና ከሞት በኋላ ባለው ሕይወቱ ስኬታማ እንዲሆን የማድረግ ዓላማ ያነገበ አምላካዊ መመሪያ ነው። በሸሪዓ ማዕቀፉ በተለየ ደግሞ በዋናነት ሰው በዚህ ዓለም በሚኖረው ቆይታ በግለሰባዊ ሕይወቱ ደስተኛና የተረጋጋ እንዲሆን፣ በማህበረሰብ ወይም በሃገር ደረጃ ያለውን ዘርፈ-ብዙ መስተጋብር ሰላማዊና ፍትሐዊ እንዲሆን በሚደረገው ውጣ-ውረድ ውስጥ ተዓማኒ እና ፍሬያማ የሆኑ መለኮታዊ የሕግ መርሆዎችን እና ድንጋጌዎችን ያቀርባል። ኢስላም፣ የሸሪዓ ሕግን የበላይነትና መሪነት በማስፈን ከሰብዓዊ ጥረት በላይ መለኮታዊ የሕግ እውቀትንና ጥበብን በመለገስ የፍትሕ፣ የሰላም እና የልማት ዓላማዎችን የማሳካት ግብ ያለው ነው። እነዚህን ዓላማዎች እውን ለማድረግ በሚደረገው ጥረት ውስጥ፣ ሰው በተሰጠው የማሰብ አቅም እና ነጻ-ምርጫ የራሱን ሰብዓዊ የሕግ ምርምር ሲያደርግ የቆየ እና አሁንም በማድረግ ላይ ያለ መሆኑ እንደተጠበቀ ሆኖ፣ ጥረቱ መለኮታዊ እገዛ እና አመራር ታክሎበት ወደ አስተማማኝ ሁኔታ ወደ ስኬቶቹ እንዲያመራ ያስችለዋል። ሰው ለሸሪዓው በቀረበው ልክ ለስኬቶቹም ያንኑ ያህል ይቀርባል፤ ከራቀም ያንን ያህል እየራቀ ይሄዳል። ኢስላም ምድራዊ ዓላማዎችን በማንገብ እና የሰውን እርምጃ ከፊት ሆኖ ከመምራት ዓላማው በተጨማሪ፣ እነዚህ ምድራዊ ስኬቶች ተደምረው ወደ ዋነኛዉ የቀጣዩ ዓለም ስኬት ግብዓት እና መጋቢ የሚሆኑበትን የእምነት ማዕቀፍ ይዘረጋል። በሌላ አገላለጽ ሸሪዓዊ ግቦች ለመንፈሳዊ ግቦች እውን መሆን መሳሪያዎች ናቸው፤ ስለሆነም ሸሪዓ በሕግነቱ ግለሰባዊ ሕይወትን፣ ማህበራዊ፣ ኢኮኖሚያዊ እና ፖለቲካዊ መስተጋብሮችን ከመቆጣጠር እና ምድራዊ ስኬትን እንዲቀዳጅ ከማድረግ በላይ የእነዚህ ስኬቶች ድምር ለመጪው ሕይወት መሳካት እና ማማር መሳሪያዎች ናቸው።[22] ይህ መንፈሳዊ ዓላማ ከሸሪዓ ዓላማዎችም በላይ ታላቁ የኢስላም ዓላማ መሆኑን የሸሪዓ ሊቃዉንት ያስገነዝባሉ።[23]

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[21] Kamali, Sharia Law, *supra* note 10, p. 127.

[22] ለመለኮታዊ ሕጎች ተከታይ እና ታዛዥ መሆን ከሰው አዕምሯዊ ግኝቶች በላይ ፍሬያማ ረቂቅ ጥበብ እና ፋይዳ ያዘሉ ከመሆናቸዉ በተጨማሪ የእምነት ነጻብራቅ ናቸው። አንድ ሰው፣ ማህበረሰብ ወይም ሃገር በሸሪዓ ሲተዳደር ከምድራዊ ጉልህ ፋይዳዉ ባሻገር ከሰው እዉቀት እና ጥበብ በላይ ላለ ሌላ ታላቅ የሕግ እውቀት እና ጥበብ ያለ መሆኑን እውቅና እየሰጠ ነው፤ ተገገርነቱን፣ እጅ መስጡቱን በአመለካከት ከሚይዘዉ በላይ በተግባር እያሳየ ነው።

[23] Mohammad Hashim Kamali, Source, Nature and Objectives of Shariah, *Islamic Quarterly*, p. 119, Available At: http://www.hashimkamali.com/index.php/publications/item/113-sources-nature-and-objectives-of-the-sharicah (Accessed on: 24, Nov, 2017).

ኢስላም እንደ ወጥ የሕይወት መመሪያ ወይም ቁርአን እንደ በላይ የእዉቀት ምንጭ፣ ዋነኛ ትኩረቱ ዓለማዊ ሕይወትን ስኬታማ በማድረግ የቀጣዩን የድሕረ-ሕልፈት ዘልዓለማዊ ሕይወት ማሳካት ነው፤ ስለሆነም የሸሪዓ ሕጎች በየደረጃው የራሳቸው ዓላማ እና ለጠቅላላው የሸሪዓ ሕግ ማዕቀፍ የተለዩ ግቦች ቢኖሩም፣ የኢስላም የመጨረሻ ዓላማዎች ናቸው ማለት አይደሉም። ለዚህ አብነት የሚሆነዉ፤ ይህን በቀጥታ የሚያረጋግጡ በርካታ የቁርአን ጥቅሶች ከመኖራቸዉም በላይ፣ ከአጠቀላይ የቁርአን 6235 አንቀጾች መካከል፣ ወደ 350 ብቻ የሚሆኑትን ሕግን የተመለከቱ መሆኑና፣ ሌላው የቁርአን ክፍል በጥቅሉ ስለእምነትና እና ቀጣዩ ዓለም የሚያጠነጥን መሆኑ ነው፤ በዚህም መሠረት ቁርአን እንደ ሕግ መጽሓፍ ሊወሰድ አይችልም፣ በራሱ በመጽሓፉ አነጋገር፣ ቀርአን የሕይወት ‹መመሪያ *(ሁዳ)*›፣ የዋነኛው ግብ ‹አስታዋሽ፣ ተግሳጽ *(ዚክር)*› በተሰኙ ስሞች ይጠራል። (See: Kamali, Sources, *supra* note 22, p. 119).

በሰው የሕግ ምርምር አማካይነት የሕግ ሥርዓትን ሊዘረጋ የሚችልበት አቅም ቢሰጠውም፣ የምሉዕ እዉቀት ባለቤት አይደለም ተብሎ ስለሚታመን ጥቅል የሕግ መርሆዎች እና ማሳያ ድንጋጌዎች በቁርአን እና በሱናሕ ተገልጸው እናገኛለን፡፡ እነዚህ መለኮታዊ የሕግ መርሆዎች ለሰው የሕግ እዉቀት ምርምር *(ኢጅቲሓድ)* መሪ እንደመሆናቸው የመለኮታዊ እዝነት መገለጫዎች እንደሆኑ የእምነቱ ተቀዳሚ ምንጮች ያስረዳሉ፤ ለዚህም ነው ኢስላም የእምነት ክፍሉ እንዳለ ሆኖ፣ በሸሪዓ ክፍሉ ለአማኞች መመሪያ እና እዝነት እንደሆነ ቁርአን በምዕራፍ 10 አንቀጽ 57 የሚገልጸው፡፡ በዚህ ረገድ የመልዕክቱ አምባሳደር የሆኑት ነቢዩ ሙሀመድ ራሳቸው አምላካዊ እዝነት የተገለጠባቸው ልዑክ መሆናቸውን ቁርአን ያስረዳል፡፡[24]

ጠቅለል ባለ አቀራረብ፣ ሸሪዓ እንደ መለኮታዊ የሕግ ማዕቀፍ፣ የሰውን ምድራዊ እና ድሕረ-ሕልፈት ስኬት ለማረጋገጥ ሲል በሕግ ማዕቀፉ ውስጥ ተሰራጭተው የሚገኙት ዓላማዎቹ በሦስት መሠረታዊ ዓላማዎች ስር ሊጠቃለሉ ይችላሉ፡፡ እነዚህም፣ አንደኛ፣ ግለሰባዊ ሰብዕናን ማነጽ *(ተሕዚብ ኣል-ፈርድ)*፤ ሁለተኛ፣ ፍትሕን *(ዐድል)* ማስፈን፣ እና ሦስተኛ፣ የሰዎችን ጥቅም ማረጋገጥ *(መሰለሃሕ)* ናቸው፤[25] እነዚህ ዓላማዎች በተከታዮቹ አንቀጾች ተብራርተዋል፡፡

በተሕዚብ ስር ያለው የሸሪዓ ዓላማ የማህበረሰቡ አባላት የሆኑትን ግለሰቦች አመለካከት እና ሥነ-ምግባር በማነጽ ሕብረተሰቡን በማህበራዊ፣ በኢኮኖሚያዊ እና ፖለቲካዊ ግንኙነቱ ሚዛናዊ እንዲሆን ማድረግ ነው፡፡[26] ማህበረሰብ የግለሰቦች ድምር ውጤት እንደመሆኑ፣ ሰዎች በተናጠል ያላቸውን ሰብዕና በሥነ-ምግባር እና መንፈሳዊ ትምህርት በማነጽ፣ የሕብረተሰቡን የግብረ-ገብ ዕሴቶች፣ የመከባበርና የሰላም እሴቶችን መጠበቅ ይቻላል፡፡[27] በሌላ በኩል ግለሰቦች በቁሳዊ ሕይወታቸው ራሳቸውን ከመቻል ባለፈ፣ ለቤተሰባቸው፣ ለማህበረሰባቸው፣ ብሎም ለሃገር ጠቃሚ እና የራሳቸውን ሚና ማከል የሚችል ይሆኑ ዘንድ በልዩ ልዩ የቁሳዊ የሳይንስ ትምህርት መስኮች በእውቀትና በሙያ የተካኑ እንዲሆኑ ለማድርግ፣ አጠቃላይ የሸሪዓ ምድራዊና መንፈሳዊ ዓላማዎችን ለማሳካት ቁልፍ መሣሪያ ነው፡፡ በዚህ ረገድ፣ በዓለም የሙስሊም ማህበረሰብ ውስጥ ለዘመናት የዘለቀውን የሃይማኖት ትምህርትና የምድራዊ ሳይንሶች ክፍፍል *(Educational Dualism)*፣ እንዲሁም በሳይንስ የእዉቀት ዘርፎች ላይ የታየው ደካማ የሙስሊሞች ተሳትፎ፣ እና ዓለማዊ ሳይንሶች ከመለኮታዊ የእውቀት ማዕቀፍ ውጪ በራሳቸው መንገድ በመፈርጠጣቸው ምክንያት የደረሰውን ዓለም-አቀፍ የሰብዓዊነት መንጠፍ፣ ቁሳዊነትና አፍቅሮ-ትፍስህት፣ የሰላምና መረጋጋት እጦት ወዘተ.. ችግሮችን ለመቅረፍ፣ የዘመኑ የሙስሊምና ሙስሊም ያልሆኑ የሥነ-ትምህርት ልሂቃን፣ እውቀትን ኢስላማዊ ለማድረግና *(Islamization of knowledge)* የሁለትዮሽ የትምህርት አቀራረብ ችግሮችን ለመቅረፍ ከፍተኛ ምሁራዊ ጥረት በማድረግ

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[24] Ibid., p. 225፣ ‹‹(መሐመድ ሆይ!) ለዓለማትም እዝነት አድርገን እንጅ አልላክንህም፡፡፡››(ቁርአን፡ 21፡107)

[25] Ibid.

[26] Ibid.

[27] Ibid.

ላይ ይገኛሉ።[28] ይህም ግለሰቦችን በትክክለኛው የሸሪዓ እውቀት እና እሴቶች በማነጽ፣ የሸሪዓ ዓላማዎችን ከግብ በማድረስ ረገድ ከፍተኛ አስተዋጽኦ ይኖረዋል።[29]

ቁርአናዊው የፍትሕ ጽንሰ-ሐሳብ ሰፊ ሲሆን የበደል ቀጥተኛ ተቃራኒ የሆነውን የእርምት ወይም ቅጣት-ተኮር ፍትሕ *(corrective or retributive justice)* ብቻ ሳይሆን፣ በርትዕ *(ኢህሳን)* እና በእኩል ተጠቃሚነት ላይ የተመሠረተ ፍትሕ *(distributive justice)* የማስፈን ዓላማ አለው።[30] የፍትሕ ዓላማ በኢስላም ወይም በመጨረሻው የአምላክ ነቢይ በሆኑት በሙሀመድ እና በሕዝባቸው ላይ ብቻ የተደነገገ ሳይሆን፣ ሁሉም የቀደምት የአምላክ መልዕክተኞች ያነገቡት እና እውን ለማድረግ ከፍተኛ ተጋድሎዎችን ያደረጉበት፣ ከአምላክ የተደነገገ ታላቅ የተልዕኮ ግብ ነው።[31] ሕግን ተፈፃሚ በማድረግ ፍትሕን ለማስፈን በሚደረገው ጥረት ውጤቱ የሕጉን ዓላማ የማያሳካ በሚሆን ጊዜ በአተረጓጎሙ ዓላማውን በማገናዘብ ከፍትሕ በተጨማሪ ርትዕ *(ኢህሳን)* እውን የሚደረግበት ማዕቀፍ ያለው ነው።[32]

ሌላኛው የሸሪዓ ዓላማ የሰዎችን ጥቅም *(መሷሊሕ)* ማስጠበቅ ነው። ጥቅም ሲባል የትኛውንም አይነት ፋይዳ የሚያካትት ሲሆን፣ ምድራዊ እና ከሕልፈት በኋላ ያለውን፣ የግለሰብን እና የማህበረሰብን ቁሳዊ፣ ሞራላዊ እና መንፈሳዊ እንዲሁም የዚህን እና የመጪዉን ትውልድ ጥቅም በሙሉ አካቶ የያዘ ሰፊ ጽንሰ-ሐሳብ ነው። በዚህ ዓላማ *ሥር* ጉዳትን ወይም ብልሹነትን *(መፍሰዲሕ)* መከላከል ይካተታል፤ ምክንያቱም ጥቅሞችን የሚያሰናክሉ ወይም ጉዳትን የሚያስከትሉ ችግሮች ባሉበት *መሰላሃን* እውን ማድረግ የማይቻል በመሆኑ ጉዳትን መከላከል *(ደፍዕ ሉድ-ዶረር)*[33] ወይም ችግርን ማስወገድን *(ረፍዕ ሉል-ሀረጅ)*[34] በራሱ ጥቅምን የማስገኘትና የማረጋገጥ አካል ነው።[35] *መፍሰዲሕን* መከላከልና

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[28] Taha Jabir Alwani, Toward An Islamic Alternative in Thought and knowledge, The American Journal of Islamic Social Sciences, Vol. 6, N0. 1, 1989, pp 3-4, Available at: https://i-epistemology.net/subjects/islamization-of-knowledge/item/333-toward-an-islamic-alternative-in-thought-and-knowledge.html (Accessed: 10-Nov-18).

ከጥቂት ዐስርተ-ዓመታት ወዲህ፣ እውቀትን ኢስላማዊ ስለማድረግ እና የሁለትዮሽ የትምህርት ሥርዓት በሙስሊሙ ዓለም የመስከ ምሁራን እና የምርምር ተቋማት አማካይነት አበረታች የሆነ የሥነ-ጽሁፍ እድገት እየታየ ሲሆን፣ ከኢስላማይዜሽን መርሆዎች እና ዘዴዎች በተጨማሪ፣ በርካታ የተፈጥሮ እና የማህበረሰባዊ ሳይንሶች እንደገና በኢስላማዊው የሥነ-እውቀት ፍልስፍናና ምንጮች እየተቃኙ ይገኛሉ። ለዚህም፣ ፈር-ቀዳጅ ከሆነው የኢስላማይዜሽን አባት ተብሎ ሊጠቀስ በሚችለው ታላቁ ምሁር ዶ/ር ኢስማዒል አል-ፋሩቂ የተቋቋመውን ዓለም-አቀፍ የኢስላማዊ እሳቤ ተቋም (The International Institute Of Islamic Thought (IIIT) ጨምሮ ሌሎች ከፍተኛ ኢስላማዊ የትምህርትና የምርምር ማዕከላት ለዘርፉ እድገት ከፍተኛ ምሁራዊ ርብርብ በማድረግ ላይ ይገኛሉ። በዚህ ረገድ የኢስማዒል አል-ፋሩቂ ፋና-ወጊ የሆነው፣ ‹Islamization of Knowledge: Gneral Principles and Work plan.› የተሰኘውን ሥራ ይመለከቷል (Available at: https://www.muslim-library.com/dl/books/English_Islamization_of_Knowledge_General_Principles_and_Work_Plan.pdf ላይ ይገኛል)፤ እንዲሁም የ IIIT ድረ-ገጽ https://iiit.org/en/home/ እና https://i-epistemology.net/ ይጎብኙ። ከኢትዮጵያ ሙስሊም ማህበረሰብ አንጻር፣ ኢስላማይዜሽን በሐሳብ ደረጃ በቂ ግንዛቤ መጨበጥ አስፈላጊ ቢሆንም፣ ከዚህ በፊት ጥንታዊው ኢስላማዊ ትምህርት ላይ ሥር-ነቀል ማሻሻያ እና ለውጥ ሊደረግበት መሆኑን በመጠቆም፣ በዚህ ረገድ የኢትዮጵያን ሙስሊም ማሕበረሰብ ተጨባጭ እውነታዎች መሠረት ያደረገ ኢስላማዊ የሥነ-ትምህርት ምርምር ሊደረግ ይገባል።

[29] Kamali, Sharia Law, *supra* note 10, p. 28.

[30] Kamali, Sources, *supra* note 22, p. 225.

[31] Ibid., p. 227. እንዲሁም ቁርአን፣ *ሉል-ሀዲድ*፣ 5፡25 ይመለከቷል።

[32] Ibid. እንዲሁም ቁርአን፣ *ሉል-ነህል* 16፡90 ይመለከቷል።

[33] ቁርአን፣ *ሉል-ሐጅ*፣ 22፡78

[34] ቁርአን፣ *ሉል-ማኢዳ*፣ 5፡6፣ አን-ኒሳእ፣ 4፡28.

[35] Kamali, Sharia Law, *supra* note 10, p. 132.

ማስወገድ የጠቅላላው የሸሪዓ ሕግ ማዕቀፍ መዘርጋት ታላቅ ምክንያት *(ዒላሕ)* ተደርጎ ሊወሰድ ይችላል።[36] በዓለማዊ ሕይወት ውስጥ በጥቅሉ ለሰዎች ጠቃሚ የሆነውን *(መስላሃን)* እና ጎጂ የሆነውን *(መፍሰዳሕን)* በተጠየቃዊ የአዕምሮ ምዘና መለየት የሚቻል ሲሆን፣ በዚህ የግምገማ ሂደት ላይ ግላዊ ጥቅም እና ስሜት ከሚዛናዊ የ*መስላሃሕ* እሳቤ ጋር እንዳይቀላቀል ለመጠበቅ ሲባል ሸሪዓ ጥቅል መርሆዎችን የሚዘረጋ ቢሆንም፣ ጥቅም እና ጉዳትን የመለየት ዋነኛ ድርሻ ለሊጅቲሓድ የተተወ ነው።[37]

አሽ-ሻጢቢ *‹አል-ሙዋፈቃት ፊ ኡሱል አሸ-ሸሪዓሕ›* በተሰኘው ፋና-ወጊ መጽሃፋቸው እንደገለጹት፣ ኢስላም በሕግነት (ሸሪዓ) ቅርጹ ለሰው ምድራዊ ፋይዳ ሲባል የተዘረጋ፣ የፈጣሪ እዝነት *(ረሀማሕ)* መገለጫ ነው። *ዋጂብ*፣ *መንዱብ* እና *ሙባህ* የሕግ ቅርፆች አዎንታዊ ፋይዳን ወይም ጠቀሜታን *(መስለሃሕ)* እውን የማድረግ ዓላማ ያላቸው ሲሆን፣ *ሀራም* እና *መክሩሕ* ደግሞ ጉዳትን ወይም ብልሹነትን *(መፍሰዳሕ)* ለመከላከል የተደነገጉ ናቸው።[38] ዝርዝር የሸሪዓ ድንጋጌዎችን በማስፈጸም ሂደት ውስጥ አንዱ ከሌላው ጋር የሚጋጭበት አጋጣሚ ቢፈጠር በይበልጥ *መስለሃሕ* የሚያስገኘው ተመራጭ መሆን ይገባዋል። ይህም ከላይ ሕግን ከርትዕ *(ሲሀሳን)* የሸሪዓ ዓላማ ጋር እንደሚተረጎመው ሁሉ ሕግጋትን በመፈጸም ውስጥ የግድ አንዱ መመረጥ ካለበት በይበልጥ ጥቅም በሚያስጠብቅ አኳኋን እንዲሆን ማድረግም እንዲሁ ሌላው የሸሪዓ ዓላማ ነው።[39]

የሰው ጥቅም *(መሲሊሕ)* በጥቅሉ በሦስት ይከፈላል፤ እነሱም *መሠረታዊ* አስፈልጎቶች *(ዶሩሪያት)*፣ *ማሚያያዎች (ሀጂያት)* እና ቅንጦቶች *(ተህሲኒያት)* ናቸው። ሸሪዓ በየትኛውም ቅርጹ ከእነዚህ ጥቅሞች አንዱን እውን የማድረግ ዓላማ አለው። የ*ዶሩሪያት* አስፈልጎቶች የሰው ሕልውና የተመሠረተባቸው፣ የሕይወት፣ የእምነት፣ *ሥነ-ልቦና* እና ንብረት ፍላጎቶች ሲሆኑ፣ የእነዚህ አለመሟላት ወይም መጓደል ሁለንተናዊ ቀውስ እና ማህበረሰባዊ ዝንፈት የሚያስከትል በመሆኑ ሸሪዓ ልዩ እና የከረረ ጥበቃ ያደርግላቸዋል። የ*ሀጂያት* ጉዳዮች ደግሞ ከላይ ወሳኝ ለሆኑት አስፈልጎቶች መከበር አባሪ ሲሆኑ፣ የእነዚህ *መሟላት* ለ*ዶሩሪያት* መከበር ደጋፊ ሚና አላቸው። የ*ሀጂያት* አለመሟላት ወይም አለመከበር ማህበረሰባዊ ቀውስን የማያስከትል ቢሆንም አስቸጋሪ ሁኔታዎችን፣ ጉዳትን ወይም እንግልትን ሊፈጥር ይችላል። ለምሳሌ ያህል፣ ሸሪዓው በዒባዳት ወይም በ*ሙዓመላት* ክፍሉ ያካተታቸው የሕግ ማቅለያዎች በሙሉ በ*ሀጂያት ሥር* የሚወድቁ ናቸው፣ ለመንገደኛ ወይም ለታማሚ ሰው የተፈቀዱ የአምልኮ ማቅለያዎችን አለመጠቀም መቸገርን *(ሀረጅ)* ያስከትላሉ።[40]

የ*መሲሊሕ* አወሳሰን በጠቅላላው ሰዎችን በተጨባጭ ይጠቅማል በሚል *(ሃቂቂያሕ)* እሳቤ ላይ የሚመረኮዝ እንጂ የግለሰቦች ጥቅም እና ምኞት *(መናፊዕ)* ግምት ውስጥ ሊገባ አይችልም። ከተጠየቃዊ እና ገለልተኛ ምዘና ውጪ *መስላሃሕ* በግል ፍላጎትና *ሥሜት*(*አህዋእ አን-ኑፉስ*) እና ወገንተኛ ታሳቢዎች ላይ የተመሠረተ ከሆነ የሁለንተናዊነት *(Universal)* ባህርይውን የሚያሳጣው ይሆናል።[41] በተጨማሪም፣ በ*መስላሃሕ* አወሳሰን

[36] Ibid., p. 36.

[37] Kamali, Sharia Law, *supra* note 10, p. 35.

[38] Ibid., p. 132

[39] Kamali, Sources, *supra* note 22, p. 230

[40] Ibid., p. 229

[41] Ibid.

ሂደት ላይ፣ እርስ-በርስ የሚጋጩ ጥቅሞች ካጋጠሙና የግድ አንዱ መመረጥ ያለበት ከሆነ፣ የጥቅሞቹ መሠረታዊነት እና በሸሪዓ አንገብጋቢ ተብለው ከተለዩ ጥቅሞች ጋር ያላቸው ቀረቤታ፣ እና በግልጽ የሸሪዓ አስረጂዎችና መርሆዎች ያላቸው ድጋፍ ግንዛቤ ውስጥ ገብቶ የሚወሰን ይሆናል።[42]

ባጠቃላይ ሸሪዓ የሰውን ዓለማዊ ጥቅም *(መሰላሃሕ)* የማስከበር ጠቅላላ ዓላማ ያነገበ የሕግ ሥርዓት ሲሆን፣ በተጓዳኝ በማንኛውም ማህበራዊ መስክ ብልሹነትን *(መፍሰዲሕ)* መከላከል በራሱ ጠቀሜታን የማስገኘትና የማስከበር አንድ አካል ነው። ከመሰላሃሕ መርሆዎች ላይ ሌሎች የሕግ ቀኖናዎች *(ቀዋዒድ አል-ፊቅሕያሕ)* የተቀለሙ ሲሆን፣ ከእነዚህም መካከል ‹ጥቅምን ከማስከበር በላይ በቅድሚያ ጉዳትን መከላከል›፣ እንዲሁም ‹ሁለንተናዊ ጉዳትን ለመከላከል ሲባል አንድ ልዩ ጉዳት እንዲደርስ መተው› የመሳሰሉ ጠቅላላ ተቀባይነት ያገኙ የሸሪዓ የሕግ ብሂሎች በመሆን ለሚነሱ አዳዲስ የሕግ ጭብጦች ሙሉ ኢጅቲሓድ ማድረግ ሳያስፈልግ፣ ቀጥተኛ መፍትሔ ለመስጠት ዝግጁ የሆኑ የሸሪዓ ቀኖናዎች ሊቀረጹ ችለዋል፡ :[43]

3. *መቃሲድን* መለየት

መቃሲድን ለመለየት የመጀመሪያው ዘዴ፣ የድንጋጌውን የሕግ ቅርጽ እና ቋንቋዊ መልዕክቱን በቀጥታ በመውሰድ፣ ዓላማውን መለየት ይቻላል። ከልካይ ሕግ ከሆነ መከልከሉ፣ አዛዥ ሕግ ከሆነ እንዲፈጸም ማዘዙ የሸሪዓው ዓላማ ነው በማለት *መቃሲድ* ከድንጋጌው ቋንቋዊ አገላለጽ ይወሰዳል። በሌላ አነጋገር፣ የድንጋጌው እማሬያዊ መልዕክት ከዓላማው ተለይቶ አይታይም። ይህን አቀራረብ እንደ ሂሒሪ ያሉ የቃል-በቃል የሕግ አረዳድ የሚከተሉ *መዝሓቦች* የሚከተሉት ሲሆን፣ የሸሪዓ ዓላማ ከሕጉ ድንጋጌ አገላለጽ ተለይቶ እንደማይታይ ያስረዳሉ።[44] ከድንጋጌው ቀጥተኛ መልዕክት በተጨማሪ፣ ከጀርባ ያለው የሕግ ምክንያት *(ዒላሕ)* ሊመረመር እና ሁለቱ የሕግ ገጽታዎች በአንድነት ሊታዩ ይገባል የሚለው፣ ኢማም አሽ-ሻጢቢን ጨምሮ የብዙኃኑ *ዑለማእ የመቃሲድ* አቀራረብ ነው። ለዚህ ምክንያታቸው ደግሞ፣ የአንድ ድንጋጌ ትዕዛዝ ወይም ክልከላ በራሱ ድንጋጌው ሊያሳካው ያሳበው ወይም ከመነሻው የተደነገገበት ምክንያት ሊሆን አይችልም፤ ከትዕዛዝ ወይም ክልከላ ጀርባ ምንጊዜም አንድ ጥቅም የማስገኘት ወይም ጉዳትን የመከላከል ወይም ችግርን የመቅርፍ ግብ ይኖራል። ይህ የድንጋጌ ምክንያት ከቋንቋዊ መልዕክቱ ጋር ተዳምሮ ለ*መቃሲድ* ምርምር መነሻ ሊደረግ ይገባል። የድንጋጌዉ ዒላሕ በግልጽ በአንቀጹ ውስጥ ባልተመለከተ ጊዜ፣ የሕጉ ዓላማ *(ሂክማሕ)* ሙሉ በሙሉ በአንቀጹ አገላለጽ እና በወቅቱ የቋንቋ አጠቃቀም ላይ ይመሰረታል።[45]

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[42] Ibid., p. 230

[43] Ibid. የሸሪዓ ሕግ ቀኖናዎች *(ቀዋዒድ አል-ፊቅሕያሕ)* ራሱን የቻለ ሰፊ ትንታኔ የሚያስፈልገው፣ ከሉሉል አል-ፊቅሕ ርዕሰ-ጥናቶች መካከል አንዱ ነው።

[44] Muhammad Hashim Kamali, Maqasid al-Shariah Made Simple, Occassional paper Series 13, The International Institute of Islamic Thought, 2008, pp. 12-13. Available at: https://www.academia.edu/attachments/33761430/download_file?st=MTU0MTg2NTI2NCwyMTMuNTUuODMuMTI0LDY1MjE0NjM%3D&s=swp-toolbar&ct=MTU0MTg2NTI2MSwxNTQxODY1MjkyLDY1MjE0NjM= (Accessed: 10-Nov-18).

[45] Ibid., p. 13.

እዚህ ላይ ግልጽ መሆን ያለበት፣ ዒላሕ ሲባል አንድ ልዩ የሸሪዓ ሕግ የተደነገገበትን የጀርባ ምክንያት ሲጠቁም፣ *ሂክማሕ* ደግሞ ድንጋጌው ሊያሳካው ያሰበውን ዓላማ ያመለክታል። ይህ ልዩ የድንጋጌ ዓላማ *(ሂክማሕ)* አጠቃላይ የሸሪዓ ዓላማ የሆነውን ጥቅምን ማስገኘት *(መስላሃሕ)* እና ጉዳትን ወይም ብልሹነትን መከላከልና ማስወገድ *(መፍሰዳሕ)* የሚያሳካ ንዑስ-ዓላማ ነው። በምሳሌ ግልጽ ለማድረግ ያህል፣ *ኽምር* (ወይን) የተከለከለበት ምክንያት *(ዒላሕ)* በአንቀጹ ያልተገለጸ በመሆኑ፣ *ኽምር* ለምን ተከለከለ በሚል ጥያቄ የአንቀጹን አገላለጽ እና የወቅቱን የቋንቋ አጠቃቀም መሠረት በማድረግ፣ የድንጋጌውን ምክንያት *(ዒላሕ)* መለየት የመጀመሪያው የ*ሙጅተሒድ* ተግባር ነው። *ኽምር* የተከለከለው አስካሪ በመሆኑ ምክንያት ከሆነ፣ ይህ የድንጋጌው ዒላሕ ይሆንና፣ አስካሪነቱ የተወገዘበት ጠቅላላ ምክንያትና ዓላማ ደግሞ የሰውን የአዕምሮ ሚዛን የሚያዛባና ጉዳት እንዲደርስ ስለሚያደርግ *መፍሰዳን* የመከላከል ዓላማ *(ሂክማሕ)* አለው ማለት ነው። በጥቅሉ፣ ጉዳትን መከላከል በራሱ ጥቅም የማስገኘት አካል በመሆኑ የጠቅላላው የሸሪዓ ሕግ ማዕቀፍ ዓላማ *መስላሃሕ* ነው ቢባል ስህተት የለውም። ከሕጉ አንቀጽ አገላለጽ እና የቃላት ፍች አኳያ የድንጋጌውን ዒላሕ መለየት አንቀጽን መሠረት ያደረገ ንድፈ-ሐሳባዊ *(የኡሱል)* አቀራረብ ሲሆን፣ የድንጋጌውን ዓላማ *(ሂክማሕ)* መለየት ደግሞ የ*መቃሲድ* (ተጨባጭ ዓላማን መሠረተ ያደረገ) አተያይ ነው።[46] *መቃሲድን* መለየት የድንጋጌን ምክንያት *(ዒላሕ)* እንደመለየት ከባድ አይደለም፤ በተለይ ዒላሕ በሕጉ አንቀጽ ወይም ዘገባ በግልጽ ያልተመለከተ ከሆነ፣ የዐረፍተ-ነገሩን እማሬያዊ *(ሀቂቂ)* እና ፍካሬያዊ *(መጃዚ)* መልዕክት፣ ጥቅልነትና *(ዐም)* ዝርዝርነት *(ኻስ)* ወዘተ.. ባህርያት መሠረት አድርጎ መተንተን አስፈላጊ ስለሚሆን ሙያዊ ችሎታን ይጠይቃል።[47]

መቃሲድን መለየት፣ ከሕጉ ቋንቋዊ ይዘት በዘለለ፣ ሰፋ ያለ አመክንዮኣዊ ምርምር የሚጠይቅ ነው፤ በዚህ ረገድ ከድንጋጌው አንቀጽ እና ዒላሕ በተጨማሪ፣ ሕጉ የወረደበት መንስኤ እና ከባቢያዊ እውነታ (አውድ) *(አስባብ አን-ኑዙል)* ከፍተኛ ጠቀሜታ አለው። ሕግን ከወረደበት ወይም ከተደነገገበት ልዩ ምክንያት እና አጃቢ እውነታዎች ውጪ ቋንቋዊ (እማሬያዊ) መልዕክቱን ብቻ መከተል፣ ከሕጉ ዓላማና መንፈስ ውጪ ለተሳሳተ አረዳድና አተረጓጎም የሚዳርግ የመሆኑን ያህል፣ የ*አስባብ አን-ኑዙል* በቂ ግንዛቤ ደግሞ የሕግ አውጪውን ዓላማ በትክክል ለመረዳት ወሳኝ ግብዓት መሆኑን፣ በቀደመው የ*ኡሱል አል-ፊቅሕ* እድገት የቃል በቃል የሕግ አረዳድ እና ከምንጮች ጋር በጥብቅ በተሳሰረ *ኢጅቲሓድ (ቂያስ* - ምስስሏዊ አመክንዮ) ላይ ተወስኖ የቆየ በመሆኑ፣ ለ*አስባብ አን-ኑዙል* ይሰጠው የነበረው ትኩረት አናሳ ነበር። በውጤቱም *መቃሲድ* የሚጠበቅበትን ያህል ታሪካዊ የ*ኡሱል* አሻራ እንዳይኖረው ሆኗል።[48]

መቃሲድ ወደሚለይበት ዘዴ ስንመጣ፣ ብዙዎቹ የሸሪዓ መርሆዎችንና ድንጋጌዎችን በማጥናት ዓላማቸውን መለየት አስቸጋሪ እንዳልሆነ አሽ-ሻጢቢ ይገልጻሉ። የሕጎቹን ዓላማዎች የሚያሟሉና የሚደግፉ ሌሎች ተጓዳኝ ዓላማዎችም ቢሆኑ የ*መቃሲድ* አካል ናቸው። ከቁርአንና የሕግ አንቀጾችና የሱናሕ የሕግ ዘገባዎች የተላለፉ ግልጽና ልዩ *(ቀጥሂ)*

[46] Kamali, Sharia Law, *supra* note 10, p. 128.

[47] Ibid., p.128 & 131.

[48] Ibid., pp. 130 &124.

ድንጋጌዎችን መሠረት በማድረግ *መቃሲድን* መለየት አንዱ ዘዴ ነው።[49] አሚይና ደጋፊ *(ሃጂያት)* ዓላማዎችን በተመለከተ፣ ለምሳሌ፦ በሕግ ግዴታ የተደረገን ተግባር *(ዋጂብ)* ለመፈጸም አስፈላጊ የሆኑ ነገሮች ሁሉ፣ የግዴታነት ቅርጽ አላቸውን? ወይም እንዲሁም በሕግ ከተከለከለ ነገር ለመቆጠብ አስፈላጊ የሆነ ሁሉ፣ በክልከላው ዓላማ ውስጥ ይካተታልን? ለሚሉት ጥያቄዎች በጥቂት ዝርዝር ነጥቦች ላይ የምሁራን ልዩነት ቢንጸባረቅም፣ ከሕግ ትዕዛዝ ወይም ክልከላ ጀርባ ያሉ አስፈላጊ ነገሮች (ቅድመ-ሁኔታዎች) ሁሉ በትዕዛዙ (*ዋጂብ*) ወይም ክልከላው *(ሀራም)* ዓላማ ስር የሚወድቅ መሆኑ ላይ ጠቅላላ ስምምነት አለ።[50]

ለመቃሲድ መንደርደያ የተደረገው የሸሪዓ አስረጂ ግልጽ ካልሆነ፣ ወይም *ዞኒ* (አሻሚ) ከሆነ፣ ጥቅል እና ግልጽ ካልሆኑ የሕግ አስረጂዎች ላይ *መቃሲድ* ከሚለይባቸው ወሳኝ ዘዴዎች መካከል አንዱ *ኢስቲቅራእ* (ዳሰሳዊ አረዳድ/*Induction*) ነው። አንድ ወይም ሁለት አንቀጾች ለየብቻቸው ግልጽ ባይሆኑም ሁሉም በአንድነት ሲነበቡ፣ ተነጣጥለው *ዞኒ* የነበሩት በሕብረት ግልጽ የሆነ መልዕክት የሚያስተላልፉበት እድል ሰፊ ነው፤ በዚህ ጊዜም ከእነዚህ በአንድ አጀንዳ ላይ ከሚያጠነጥኑ ድንጋጌዎች ላይ *መቃሲድ* በ*ኢስቲቅራእ* (በአንድነት በማንበብ) ሊለይ ይችላል። የልዩ ልዩ የሕግ ክፍሎችና ድንጋጌዎች ዓላማ ብቻ ሳይሆን በራሱ በ*መቃሲድ* ጥናት ዉስጥ መሠረታዊ የሆኑ፣ ለምሳሌ፣ ከታች እንደተብራራው፣ *መቃሲድ ዶሩሪ፣ ሃጂ፣ ተህሲኒ* በተሰኙ ሦስት ምድቦች መመደቡ፣ በ*ዶሩሪ መቃሲድ* ስር አምስቱ ማለትም እምነት፣ ሕይወት፣ እዕምሮ፣ ንብረት እና ትውልድ የሚካተቱ መሆኑ፣ በዚሁ በምሁራን ጥልቅ እና ጥቅል የቁርአንና የሱናሕ ጥናት *(ኢስቲቅራዕ)* ድምዳሜ ነው። ባጠቃላይ ሻጢቢ እንደሚያረጋጡት አጠቃላዊ አመክንዮ *(Inductive Reasoning) መቃሲድን* በመለየት ሂደት ዉስጥ ቀዳሚውን ሚና የሚጫወት ዘዴ ነው።[51]

የሕጎችን ዓላማ በመለየትና አተረጓጎማቸውን እና ትግበራቸዉ ዓላማውን የተከተለ እንዲሆን ለማድረግ፣ አንዲሁም የተለዩት ዓላማዎችን ተንተርሶ በአዲስ ጭብጦች ላይ አዲስ ድንጋጌዎችን ለመቅረጽ እና ውሳኔዎችን ለመስጠት ይቻል ዘንድ በመጀመሪያ የተለየው *መቃሲድ* ከግላዊ ፍላጎት ወይም ቡድናዊ እሳቤ በራቀ አካኋን መከናወኑን ማረጋገጥ ያስፈልጋል፤ እንዲሁም ነገሩ ጥልቅ የምንጮችን ግንዘቤ የሚጠይቅ እንደመሆኑ፣ በዚህ ረገድ ሊፈጠር የሚችለውን ስህተት ለማስወገድና በቅንነት ይፈጸም ዘንድ፣ *በሙጅተሒዶች* በተናጠል ከሚከናወን ይልቅ፣ በጋር የሊቃውንት ምክክር የሚከናወንበት የሕብረት *ኢጅቲሓድ* ተቋማዊ አደረጃጀት (ምክር-ቤታዊ *ኢጅቲሓድ)* ሊፈጠር እንደሚገባና በዘመናዊ የሕግና ፖሊሲ አወጣጥ ሥርዓት ውስጥ ምሁራዊ አመራርና እገዛ የሚያደርግበት መዋቅር ሊዘረጋ እንደሚገባ ከማለ ያስረዳሉ።[52]

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[49] Ibid., pp. 131-32.

[50] Ibid., p. 133.

[51] Ibid., pp. 132-133.

[52] Ibid., p. 136. *ኢጅቲሓድ* በምሁራን ምክክር ወይም በዘመናዊ የመንግሥት አስተዳደር ውስጥ በሕዝብ በተቋቋመ የሕግ አዉጪ አካል (ፓርላማ) ውስጥ የሸሪዓ ሊቃውንትን ባቀፈ የሸሪዓ ኮሚቴ አማካይነት የሚተገበርበት ተቋማዊ ቅርጽ አጥጋቢ በሆነ ደረጃ ያላደገ በመሆኑ አሁንም ቢሆን *መቃሲድ ኢጅቲሓድን* በማቃናት፣ እንዲሁም *መቃሲድ* የሕግ ዓላማዎችን ከማስጠበቅ በተቃራኒ ቅንነት ለጎደለዉ የግል ራዕይ ተገዥ እንዳይሆን በሊጅማዕ የሚፈጸምበት እድገት ገና የሚቀረው መሆኑን ምሁራን ያስረዳሉ። (ከማለ፣ ዝኒ ከማሁ፣ ገጽ 170 -171 ይመለከቷል።)

4. መቃሲድ እና ኢጅቲሓድ፡- ኡሱልን - መቃሲድን መሠረት ያደረገ ኢጅቲሓድ

ኡሱልን መሠረት ያደረገው ኢጅቲሓድ በዋናነት የቃል በቃል አረዳድ ላይ የተመረኮዘ በመሆኑ፣ እና ከዚህም አለፈ ከተባለ ከምስስላዊ አመክንዮ *(ቂያስ)* ስለማይዘል የቁርኣናዊ ሕጎችን የድንጋጌ ምክንያት *(ዒላሕ)* አሳማኝ በሆነ ደረጃ ለማስረዳት አይችልም። ለምሳሌ፡- ለሥርቆት ወንጀል የተቀመጠው ቅጣት እጅ መቁረጥ ነው፤ በአሱላዊ ኢጅቲሓድ መሠረት የዚህ ድንጋጌ ምክንያት ምናልባት ሥርቆት በእጅ ስለሚፈጸም ነው ከማለት አያልፍም። መቃሲድን መሠረት ባደረገ የሕግ ምርምር ከሆነ ግን ሕጉ በወጣበት ጊዜ የነበረውን አካባቢያዊ ሁኔታ *(አስባብ አን-ኑዙል)* ይፈትሻል፤ እጅ መቁረጥ እንደ ቅጣት የተመረጠበትን ምክንያት ከወቅቱ፣ ከቦታው እና ከአካባቢያዊ ሁኔታው ጋር በማዛመድ ትንታኔ ይደረጋል። ነገሩን ግልጽ ለማድረግ በያዝነዉ ምሳሌ እንግፋበት፤ የሚከተሉት ለሥርቆት ወንጀል ከተደነገገዉ የእጅ መቆረጥ ቅጣት ጀርባ ተከታዮቹ አጃቢ ሁኔታዎች በወቅቱ የአረቢያ ማሕበረሰብ መገለጫዎች ነበሩ፤ አንደኛ፣ ከኢስላም መምጣት በፊት ለሥርቆት እጅ መቁረጥ በአረቦች ይተገበር ነበር፤ ሁለተኛ፣ የወቅቱ የአረቢያ ማህበረሰብ ዘላን የነበረ በመሆኑ፣ ግጦሽ እና ውሃ ፍለጋ ግመሎቻቸውንና ድንኳናቸውን (ቤታቸውን) ይዘው የሚዞሩ ስለነበር የእሥራት ቅጣትን ማስፈጸም አይቻልም ነበር፤ ምክንያቱም የእስር ቅጣትን ለማስፈጸም ቋሚ እስር-ቤቶችን ማቋቋም እና ዋርዲያዎችን ማደራጀት፣ እንዲሁም ለእስረኞች መደበኛ የምግብ አቅርቦትና ሌሎች አገልግሎቶችን የያዘ የማረሚያ ቤት ተቋም ያስፈልጋል። አርብቶ-አደር እና ዘላን በሆነው የወቅቱ ማሕበረሰብ የንብረት መብትን ማስከበር እጅግ አንገብጋቢ ከመሆኑ ጋር፣ እንዲሁም ኢስላም በመጣበት ጊዜ የልማድና የአኗኗር ለውጥ ያልነበረ በመሆኑ ቀድሞ እንደነበረው የአረብ ልማዳዊ ሕግ ሁሉ የሸሪዓ ሕጉ ተመሳሳይ ቅጣት እንዲጸና አድርጓል።[53] ተመሳሳይ አይነት ትንታኔ ለአመንዝራነት እና የወንጀሉን የማስረጃ አቀራረብ በተመለከተ ለተቀመጡት ቅድመ-ሁኔታዎች፣ አንዲሁም ሌሎች ቁርኣናዊ የወንጀል ቅጣቶች ላይ ሊቀርብ ይችላል። በተለይም፣ ለአመንዝራነት የወንጀል ክስ፣ አራት የዐይን ምስክሮች እንዲቀርቡ የተደነገገው ከወቅቱ የምድረ-በዳ ላይ ሕይወት እና ዘላንነት ጋር ተያይዞ ተፋጻሚ ሊደረግ የሚችል ነበር። እዚህ ላይ አንገብጋቢ ጥያቄ የሚሆነው፣ በገጠርና በከተሞች ዉስጥ በአንድነት ሰፍሮና ተደላድሎ ለሚኖረው የዘመኑ ማሕበረሰብ እነዚህና መሰል የሸሪዓ ሕጎች አግባብነት አላቸውን? የሚለው ነው። በዚህ ዘመን የሥልጣኔ ደረጃ፣ የሕብረተሰብ አደረጃጀት እና የግለሰብ አኗኗር አኳያ፣ የሴሰኝነት ወይም አመንዝራነት ወንጀል በአራት የዐይን ምስክሮች ይረጋገጥ ከተባለ ፍጹም የማይቻል ነው ለማለት ያስደፍራል። በኡሱል ላይ በተመረኮዘ ኢጅቲሓድ ከሆነ፣ እነዚህ እና መሰል የሸሪዓ ሕጎች የተደነገጉበትን አካባቢያዊ ሁኔታና ተጨባጭ እዉነታ ታሳቢ ሳይደረግ ሕጉ ቃል በቃል በቦታ እና በሁኔታ ሳይወሰን እንዲፈጸም ለማድረግ የሚሞክርና በመጨረሻም ተቀባይት እንዲያጣና በወረቀት ላይ ብቻ እንዲቀር የሚያደርግ ነው። ከጥንት ከሻፊዒ ጊዜ ጀምሮ፣ ኢጅቲሓድ በድንጋጌው አገላለጽ፣ ቃላት እና ሐረጋት ላይ ብቻ ታስሮ በቂያስ አማካይነት የሚደረግ ዉስን የምርምር ሂደት የነበረ ሲሆን፣ አንዳንድ ጊዜም ለሕጉ መውጣት ምክንያት የሆነውን ዓላማ *(ሂክማሕ)* በሚያደናቅፍ አኳኋን ሲከናወን ቆይቷል። እንደ ሻጢቢ እና ሌሎች የመቃሲድ ምሁራን እይታ ደግሞ ከሕግ የቃል በቃል ትርጓሜ ወይ ቂያሳዊ ድምዳሜ የሕጉን ዓላማ ያላነገበ፣ ደረቅ የቃላት ጨዋታ መሆን የለበትም።[54] አስባብ አን-

[53] Ibid., pp. 130-131.

[54] Ibid., p. 127.

ነብልን ግምት ውስጥ በማስገባት እና የሸሪዓው ዓላማ ሳይሰናከል፣ ተጨባጩን እና ማህበረሰባዊ ለውጡን ያገናዘቡ ሌሎች አማራጭ ድንጋጌዎችን በመዘርጋት ሕጉ ያነገበውን ፍትሕንና መረጋጋትን የማስፈን ዓላማ *(መሷሊሕ)* እንዲያሳካ ማድረግ የሚቻለው *መቃሲድን* መሠረት ባደረገ *ኢጅቲሓድ* አማካይነት ነው።[55]

መቃሲድን መሠረት ያደረገ *ኢጅቲሓድ* ደግሞ ለሕጉ መደንገግ የቅርብ ምክንያት ከሆነው ዒላሕ ባሻገር ሕጉ በመደንገጉ ለማሳካት በታሰበዉ ዓላማ ላይ የተመረኮዘ ነው። የዚህ አይነቱ የሕግ ምርምር የሕጉን አገላለጽ መነሻ ያደረገ የሐሳብ መስመር *(ቂያስ)* የተከተለ ሳይሆን ጠቅላላ የሸሪዓ ዓላማ የሆነውን *የመስላሃን* ግብ እውን ለማድረግ ከሕጉ ጀርባ ያለውን ጥበብ፣ ምክንያተ-ድንጋጌ *(ሂክማሕ)* መሠረት ያደረገ ነዉ። ስለዚህ *የኡሱል ኢጅቲሓድ* እና *የመቃሲድ ኢጅቲሓድ* ሁለት የተለያየ አተያይ ያላቸው የሸሪዓ ምርምር አቀራረቦች መሆናቸውን ይገነዘቧል።[56]

የ20ኛው ክፍለ-ዘመን *የመቃሲድ* ሊቃውንት መካከል ቀዳሚው የሆኑት ጧሒር ኢብን ዐሹር፣ *መቃሲድ አሽ-ሸሪዓሕ አል-ኢስላሚያሕ* በተሰኘዉ ፋና-ወጊ መጽሃፋቸው እንደሚያስረዱት፣ የሸሪዓ *መቃሲድን* ያልተከተለ *አጅቲሓድ* ለስህተት እንደሚዳርግና፣ የሕጉን ዓላማና መንፈስ ወደ ጎን በመተዉ የግል እይታ በጉሰሰ ጥቅሶች ውስጥ ጎልተዉ እንዲታዩ በማድረግ የአረዳድ ችግር ይፈጥራል፤ እንዲሁም *የመቃሲድ* እዉቀት *ኢጅቲሓድ* ለማድረግ *(ሙጅቲሒድ* ለመሆን) አንዱና ወሳኝ ቅድመ-ሁኔታ እንደሆነ ያስገነዝባሉ። በሌላ በኩል፣ የሕጉን ቃላት ብቻ በመከተል የሚደረግ አተረጓጎም የሕጉ ዓላማ በሌላ ተጨባጩን በተከተለ አተረጓጎም ሊሳካ ቢችልም አላስፈላጊ የቃላት አክራሪነትን ያስከትላል። በምሳሌ ግልጽ ለማድርግ ያህል፣ *የዘካሕ* ወይም *የዘካሕ አል-ፊጥር* (በረመዳን ፆም መጨረሻ ለድሆች የሚሰጥ ምጽዋት) አከፋፋልን በተመለከተ በ*ሀዲስ* የተገለጸው በአይነት እንደሚከፈል ነው። ይህን መሠረት በማድረግ አሽ-ሻፊዒ *ዘካሕ* በጥሬ ገንዘብ ሊከፈል አይችልም የሚል አቋም አላቸዉ። ሀነፊዎች ደግሞ *የዘካሕ* ዓላማ የድሆችን ፍላጎት ማሟላት እስከሆነ ድረስ በጥሬ ገንዘብ ቢሰጥ ዓላማዉ የማይደናቀፍ በመሆኑ በጥሬ ገንዘብ መክፈል ይፈቀዳል የሚል እይታ አላቸዉ።[57] በአይነቱ እንዲከፈል የሚገልጹት *ሀዲሶች* የወቅቱን የአረቢያ ማህበረሰብ አኗኗር መሠረት በማድረግ የተላለፉ ናቸዉ፤ ስለሆነም ዓላማቸውን በመከተል ባለንበት ዘመን ማንኛዉም ንብረት በወረቀት ገንዘብ በሚወከልበትና በጥሬ ገንዘብ ፍላጎትን ማሟላት በሚቻልበት ሁኔታ ላይ *ዘካሕ* በገንዘብ ቢከፈል ከሕጉ *ጋር* የማይጻረር፣ ብሎም ዓላማውን ሙሉ በሙሉ እውን የሚያደርግ በመሆኑ የሻፊዒ *መዝሓብ* አቋም *መቃሲድን* ያላገናዘበ ነው ማለት ይቻላል።[58]

በተጨማሪ ምሳሌ ለማብራራት፣ እንደ ኢማም ማሊክ እይታ *ዘካሕ* በዓመቱ መጨረሻ ከሚከፈልበት ጊዜ ቀደም ብሎ መክፍል የሚቻል መሆኑን ተጠይቀው፣ ከ*ሶላሕ* (ስግደት) *ጋር* በማመሳሰል (*ቂያስ* በማድረግ) *ሶላሕ* ከወቅቱ ውጪ እንደማይፈጸም ሁሉ *ዘካሕም* እንደዚሁ በወቅቱ ብቻ መከፈል ይኖርበታል የሚል *ፈትዋ* (ብይን) ሰጥተዋል። ነገር ግን

[55] Ibid., p. 131.

[56] Ibid., p. 128.

[57] Ibid., p. 137.

[58] Ibid.

እንደ ኢብን ዓረቢ (1148 አ.) እና ኢብን ሩሽድ (1126 አ.) ያሉ የእርሳቸው *መዝሓብ* ተከታይ ሊቃውንት የማሊክ አቋም ቀልብሰው ከሕጉ ዓላማ አኳያ ለከፋዩ አመቺ እስከሆነ ድረስ *ዘካሕ* ቀድሞ ቢከፈል የማይከለከል ወይም የሚፈቀድ መሆኑን ገልጸዋል። ከዓላማ አንጻር ብቻ ሳይሆን *ዘካሕ ከሶላሕ* ጋር በተመሳሳይነት የታየበት አመክንዮ *(ቂያስ)* በራሱ ትክክል አይደለም፤ ምክንያቱም *ሶላሕ* የሚፈጸምበት ልዩ ጊዜ ተለይቶ የተደነገገ ሲሆን፣ ለ*ዘካሕ* አከፋፈል ደግሞ ልዩ ጊዜ ያልተቀመጠ በመሆኑ፣ *ዘካሕ* ቀደም ብሎ ለመክፈል የተፈቀደ መሆኑን አስረድተዋል።[59]

ሸሪዓዊ የሕግ ምርምር *(ኢጅቲሓድ)* እና ብይኖች *(ፈታዋ)* የሚያስከትሉት ውጤት *(መዓላት)* ከወዲሁ ታሳቢ በማድረግ፣ ከሕጉ ዓላማ አንጻር አስፈላጊውን ማስተካከያ ማድረግ የ*መቃሲድ* አንዱ አካል ነው። ምንም እንኳ የሸሪዓ ምርምር የኢጅቲሓድ መርሆዎችንና ሥነ-ሥርዓቱን የጠበቀ ቢሆንም፣ የሚያስከትለው ውጤት የከፋ ከሆነና ሌላ የገዘፈ የሸሪዓ ዓላማ የሚያፈርስ ከሆነ ፍርዱ እንዳይፈጸም ወይም በርትዕ *(ኢስቲህሳን)* መሠረት በሌላ *መቃሲድን* ባገናዘበ አማራጭ ውሳኔ መተካት ይኖርበታል። ለምሳሌ፣ በቅድመ-ኢስላም የመካሕ አረቦች ካዕባን ሲገነቡ አብራሃም የካዕባን መሠረት ከጣለበት ትክክለኛ ቦታ ላይ ያልገነቡ መሆኑ እየታወቀ፣ ካዕባው ቀድሞ የተገነባበት ልዩ ቦታ ላይ እንደገና እንዲገነባ ከዓኢሻ በኩል ሐሳብ ቢቀርብም፣ ነቢዩ *ሙሀመድ* ግን እርምጃው በምዕመናን ላይ ሊያስከትለው የሚችለዉን የእምነት መዋገርቅ ችግር ታሳቢ በማድረግ፣ ካዕባው ባለበት እንዲቀጥል አድርገዋል።[60] ከዚህ ዉሳኔ መረዳት የሚቻለዉ አንዳንዴ ሐቅን ለመከተል በሚደረገው ሙከራ ሌላ ታላቅ ዓላማ *(መቅሰድ)* የሚናድ ከሆነ ከውጤቱ አኳያ ዉሳኔው መልኩን እንዲቀይር ሊደረግ እንደሚገባና ሸሪዓም የሚደግፈው መሆኑን ነው።[61]

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[59] Ibid.

[60] Ibid.

[61] Ibid., p. 138.

መቃሲድ ከወንጀል ሕጎች አፈጻጸም አኳያ ሲታይ፣ አንድ የወንጀል ድንጋጌ እና ቅጣት የተደነገገበት ልዩ ምክንያት *(ዒላሕ)* እና ከባቢያዊ ሁኔታ *(አስባብ አን-ኑዙል)* ግንዛቤ ውስጥ ገብቶ፣ የሕጉ ዓላማና መንፈስ ከተለየ በኋላ፣ ድንጋጌውን በአንድ በተለየ ጉዳይ ተፈጻሚ ሲደረግ፣ የወንጀል አድራጊውን፣ ድርጊቱን ያካበቡ ወሳኝ ፍሬ-ነገሮች ግምት ውስጥ ገብተው፣ እንደ ጉዳዩ ሁኔታ በርትዕ እሳቤ ላይ በተመረኮዘ የ*መቃሲድ* እሳቤ መሠረት ቅጣቱ ተፈጻሚ እንዳይሆን ሊታገድ ይችላል። ከወንጀል ፈጻሚዉ ግላዊ ሁኔታዎች በመነሳት ቅጣቱን ተፈጻሚ ከማድረግ ይልቅ፣ እንዳይፈጸም ማድረጉ የሕጉን ዓላማ የሚያሳካ ከሆነ፣ ከቃል በቃል የሕግ አረዳድ ይልቅ ለሕጉ ዓላማ ቅድሚያ መስጠት ተገቢ ይሆናል። (kamali, Sharia law: an Introduction, *supra* note 10, pp. 138-139).

በሸሪዓ የወንጀል ሕግ እድገት፣ ከጠቅላላው የሱሉል ለል-ፊቅሕ የሸሪዓ የፍትሐ-ብሔር እና የንግድ ሕግ ማዕቀፍ አንጻር፣ ገና በጅምር ላይ ያለ የሕግ ዘርፍ ነው። በቀደመው የፊቅሕ ሥነ-ጽሁፍ ውስጥ ጥቂት በቁርአንና በሠዒህ ተለይተው የተገለጹ የወንጀል ድንጋጌዎች ላይ ትንታኔዎችን የሚያቀርብ፣ አንዲሁም ከነቢዩ ሙሀመድ ባልደረቦች በኋላ በነበረው የተከታዮች *(ታቢዑን)* የከሊፋ ሥርዓተ-መንግሥታት እና የኢጅቲሓድ ዘመናት ላይ፣ በአንዳንድ የሸሪዓ የወንጀል ገጽታዎች ላይ ኢጅቲሓድ የተደረገ ቢሆንም፣ ከዚያ በኋላ፣ በተለይም የኢጅቲሓድ በር ተዘጋ ከተባለበት ከ11ኛው ክፍለ-ዘመን መጀመሪያ በኋላ በነበረው የ*ተቅሊድ* ባሕል መንሰራፋት፣ በተጓዳኝ የዓለም ሙስሊም ማህበረሰብ በጊዜ ሂደት ዘርፈ-ብዙ ለውጦችን ያስተናገደ ቢሆንም፣ የ*ተቅሊድን* ባህል ሰብሮ፣ የዘመኑን ማሕበረሰብ ተጨባጭ መሠረት ያደረገ ኢጅቲሓዳዊ የወንጀል ሕግ ምርምር ሲደረግ በስፋት አይስተዋልም። ከጥቂት ወራት በፊት፣ የዘመኑ የሸሪዓ ሊቅ የሆኑት ፕ/ር ሐሺም ከማሊ፣ በሸሪዓ የወንጀል ሕግ *(ሁዱድ)* ዙሪያ ከሚያጠነጥኑ ጥቂት አጫጭር የምርምር ጽሁፎቻቸዉ በተጨማሪ፣ ‹Islamic Criminal Law: Issues and Reform Proposals› የተሰኘ ሥራቸውን ለሕትመት እንደሰጡ፣ እና በዚህ ሥራ በርካታ የማሻሻያ እና የለውጥ ሐሳቦችን ያፈለቁ መሆኑ የተገለጸ ሲሆን፣ ወደፊት *ሁዱድ* የሚያድገበትን ትልም የሚያሳይ ፋና-ወጊ ሥራ ይሆናል ተብሎ ይጠበቃል። (see: IAIS Bulletin No. 39 July-August 2017, p. 10, Avaialable at: https://www.iais.org.my/e/attach/bulletin/2017/bulletin39.pdf (Accessed: 10-Nov-18).

ባጠቃላይ፣ *መቃሲድ* በሁለት መንገድ የኢጅቲሓድ መሪ ሊሆን ይችላል፤ አንደኛ ቀድሞ በሸሪዓ ማዕቀፍ ውስጥ ያሉ ዝርዝር ሕጎች ከተደነገጉበት ዓላማ ጋር በሚጣጣም መልኩ ተፈጻሚ እንዲደረጉ በማድረግ ሲሆን፣ ሁለተኛው ደግሞ ቀድመው ከነበሩ ሕጎች ላይ በኢስቲቅራእ ከተለዩ የሸሪዓ ዓላማዎች ላይ በመነሳት ሌሎች አዲስ ሕጎች የሚቀረጹበትን ማዕቀፍ ይዘረጋል፤ በመሆኑም በኢጅቲሓድ አማካይነት አዲስ የሕግ ድንጋጌ *(ሁክም)* ላይ ለመድረስ ለሚደረገው ምርምር መንደርደሪያ መርሆ በመሆን ያገለግላል።

5. የመቃሲድ አተያዮች

መቃሲድ ከተለያዩ የእሳቤ አቅጣጫዎች አንጻር በልዩ ልዩ ክፍል ሥር ሊመደብ ይችላል፤ እነሱም፣ ግለሰባዊ ሕይወትን መሠረት በማድረግ የሸሪዓ ዓላማዎች ካላቸው የአስፈላጊነት ደረጃ አንጻር፣ *ዶሩሪያት* (መሠረታዊ ፍላጎቶች)፣ *ሀጂያት* (አስፈላጊዎች/አሚይ) እና *ተሀሲኒያት (ቅንጦቶች/ታካሮች)* የተሰኙ ናቸው። እምነትን፣ አካልን፣ ሐብትን፣ አዕምሮን (ሥነ-ልቦናን) እና የዘር ትውልድን ለመጠበቅ እጅግ አስፈላጊ የሆኑ የሕልውና ጥያቄዎች ሁሉ በዶሩሪያት ሥር የሚወድቅ ሲሆን፣ ጥቂት ምሁራን ደግሞ ከአምስቱ መሠረታውያን በተጨማሪ ክብር *(ዒርድ)* በዶሩሪያት ስር አካተዋል።[62] በ*ሀጂያት* ስር የሚካተቱት *መቃሲድ* ደግሞ፣ ለሰብዓዊ ሕይወት እጅግ ጠቃሚ የሆኑ፤ ነገር ግን በተለይ ከግለሰብ ሕይወት አንጻር ሲታዩ፣ የሞት ሽረት ያላይደሉ ፍላጎቶች ናቸዉ። ለምሳሌ፦ ጋብቻ፣ ንግድ፣ መጓጓዣ ወዘተ.. የ*ሀጂያት* ዓላማዎች ከግል ሕይወት አንጻር ቢሟሉ ሕይወትን ምቹና ደስተኛ እንዲሆን የሚያደርጉ ቢሆንም፣ ሳይሟሉ ቢቀር፣ ሕይወትን አደጋ ላይ የሚጥሉ አይደሉም። ከግል ሕይወት ባለፈ፣ በማህበረሰብ ደረጃ የማይሟሉበት ሁኔታ የተንሰራፋ ከሆነ፣ ከአስፈላጊነት ወደ አስገዳጅ *(ዶሩሪያት)* ዓላማዎች ይሸጋገራሉ። በሦስተኛ ደረጃ፣ የሥነ-ዉበት እና ቅንጦት ባህሪ ያላቸዉ ዓላማዎች ደግሞ በ*ተሀሲኒያት* ስር ይወድቃሉ፤ ለምሳሌ፦ ያማረ አለባበስ፣ የተዋቡ መኖሪያ ቤቶች.. ወዘተ።[63] በሦስቱ የዓላማ እርከኖች መካከል ተዛምዶና አንዱ ለሌላው ቅድመ-ሁኔታ የሚሆንበት ትስስር እንዳለ መረዳት ይቻላል፤ ነገር ግን የሸሪዓ ድንጋጌው ቀጥተኛ ዓላማ ምንድን ነው ከሚለው አንጻር፣ ዓላማዎች ለሰው ምድራዊ ሕልውናና ሕይወት ያላቸውን የአስፈላጊነት ደረጃ በመመዘን፣ ከላይ ባጭሩ በተገለጸው አኳኋን፣ ከሦስቱ በአንዱ *መቅሰድ* ሥር ሊመደቡ ይችላሉ።[64] በሌላ አገላለጽ፣ የአንድ ድንጋጌ ዓላማ ምንድን ነው ሲባል፣ የጋብቻ ግንኙነትን መጠበቅ ነው ከተባለ፣ የ*ሃጂያት* ዓላማ አለው ማለት ነው፤ ነገር ግን የባለትዳሮችን የጋራ ንብረት መብት የሚያረጋግጥ ከሆነ፣ ተጋቢዎች እንደ ግለሰብ ያላቸውን የንብረት መብት የሚያስከብር በመሆኑ፣ ሕጉ *ዶሩሪ* ዓላማ ያዘለ ነው። በሦስቱ የ*መቃሲድ* መካከል ግጭት ቢያጋጥም፣

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[62] በሸሪዓ ሊቃውንት ጥናት የተለዩት አምስት መለኮታዊ-ሰብዓዊ መሠረቶች አስፈልጎቶች፣ አብረሓም ማስሎው፣ እ.ኤ.አ በ1943 አምስት ተዋረዳዊ ሰብዓዊ ፍላጎቶች ብሎ የለያቸውና፣ በ1977 ደግሞ ሰባት ካደረሳቸው መሠረታዊ የሰው ፍላጎቶች ጋር ይመሳሰላሉ። የያሲር ዐውዳ ‹Maqasid Al-Shariah: A Beginner's Guide, Occassional Papers Series 14, The International Institute of Islamic Thought (2008)› ገጽ 6 ይመለከቷል።

[63] Jasser Auda, Maqasid Al-Shariah: A Beginner's Guide, Occassional Papers Series 14, The International Institute of Islamic Thought (2008), pp. 4-5. Available at: https://www.muslim-library.com/dl/books/English_Maqasid_alShariah_A_Beginners_Guide.pdf (Accessed: 10-Nov-18).

[64] Ibid., p. 5.

እንደ አስፈላጊነታቸው *ዶሩሪያሕ* ቅድሚያ ይሰጠውና፣ ከዚያም *ሀጂያት*፣ ከዚያም *ተህሲኒያት* ዓላማዎች ተመራጭ ይሆናሉ።[65]

መቃሲድ ካለው የጽንሰ-ሐሳብና የተፈጻሚነት ወሰን አኳያ ደግሞ፣ *መቃሲድ* ጠቅላላ ዓላማዎች *(አል-መቃሲድ አል-ዐማሕ)* እና ንዑስ ዓላማዎች *(አል-መቃሲድ አል-ኻሷሕ)* ተብሎ በሁለት ክፍል ሊታይ ይችላል።[66] በዚህ ረገድ፣ *መቃሲድ* ማለት በየደረጃው ለሚነሳው የ‹ለምን› ጥያቄዎች ምላሽ የሚሰጥ እንደመሆኑ፣ ከዚህ አንጸር ከአንድ ልዩ የድንጋጌ ምክንያት ጀምሮ፣ የሕጎች *መቃሲድ* ከልዩ *(ኻስ)* ዓላማ ወደ ጥቅል *(ዐም)* እያደገ እንደሚሄድ፣ ይህን ሐሳብ መሠረት በማድረግ፣ የ‹ለምን› ጥያቄ እና የሕጉ *መቃሲድ* ምንድን ነው የሚሉት ጥያቄዎች ተመሳሳይ እንደሆኑ፤ ጃሲር ዐዉዳ ያስረዳሉ።[67] የአጠቃላይ የኢስላም እና የሸሪዓ ዓላማዎች የሚባሉት፣ ፍትሕ *(ዐድል)*፣ ‹ጉዳትን *(ዶረር)* መከላከል›፣ መሠረታዊ ሰብዓዊ መብቶችና አስፈላጎቶች መሟላት የመሳሰሉት ጥቅል ዓላማዎች ለሁሉም የሸሪዓ ሕግ ንዑስ ዘርፍ አግባብነት ያላቸው እና የዓላማነት ሚናቸው በተወሰኑ ርዕሰ-ጉዳዮች ላይ የማይገደብ ጠቅላይ እና ሁለ-ገብ ዓላማዎች ናቸው።[68] በሌላ በኩል ደግሞ፣ ለውስን የሕግ ዘርፎችና ግንኙነቶች ብቻ የተቀየሱ ንዑስ ዓላማዎች አሉ፤ እነዚህ ንዑስ ዓላማዎች የአንድን ልዩ የሕግ ዘርፍ አረዳድ እና አተረጓጎም መልክ እና አቅጣጫ የሚያስይዙ ሲሆን፣ የመጨረሻ ውጤታቸው ጠቅላላ የሸሪዓ ዓላማዎችን ከግብ የሚያደርሱ ናቸው። ለምሳሌ፣ በቤተሰብ ጉዳዮች፣ የንግድ እና የገንዘብ ግንኙነቶችን፣ የአሠሪና ሰራተኛ ግንኙነት የሚገዙ ሕጎች፣ የወንጀል ሕግ፣ የሥነ-ሥርዓት ሕጎች ወዘተ.. አንዱ ከሌላው የሚለይበት የየራሳቸው ዓላማዎች አላቸው።[69]

የቀደመው የ*መቃሲድ* ጥናት፣ ከግለሰብ ጥቅም አኳያ ከላይ በተጠቀሱት ሦስት የሸሪዓ ዓላማዎች ላይ የተገደበ ነበር፤ ይህን ውስን አተያይ በማስፋት እንደ ኢብን ዐሹር ያሉ ሊቃውንት፣ ማህበረሰብ፣ ሃገርን፣ ሕገ-መንግሥትን *(ኡማሕ)* እንዲሁም አጠቃላይ የሰዉ ዘርን የተመለከቱ የሸሪዓ ዓላማዎችን አስተዋውቀዋል። ይህ ማህበረሰብን መሠረት ያደረገ የ*መቃሲድ* አመዳደብ፣ በሃገር እና በዓለም-አቀፍ ደረጃ እየተነሱ ላሉ አዳዲስ ሸሪዓዊ ጭብጦች እልባት ለመስጠት መሪ በመሆን በማገልገል ላይ ይገኛል።[70] ለምሳሌ፡- የ20ኛው ክፍለ-ዘመን የ*መቃሲድ* አጥኚ የሆኑት ረሺድ ሪዷ፣ ‹የሴቶችን መብትና ጥቅም ማስከበር› እና ‹ነባራዊ እውነታዎችን የተከተለ የሕግ ተሃድሶ› የሸሪዓ ዓላማዎች ናቸው የሚል ድምዳሜ ላይ ሲደርሱ፣ ዩሱፍ አል-ቀርዷዊ ደግሞ፣ ‹ሰው በሰውነቱ የሚጎናጸፋቸውን ክብሮችና መብቶች ማረጋገጥና ማስከበር› ሁለንተናዊ የሸሪዓ ዓላማ እንደሆነ በ*መቃሲድ* አሳቤያቸው ያስረዳሉ።[71]

ሌላው *መቃሲድ* የሚመደብበት አተያይ፣ የተለየው ዓላማ የተመሠረተበት አስረጅ ግልጽነት ላይ የተመረኮዘ ነው፤ በግልጽ የቁርአን ወይም የ*ሱናሕ* *(ኑሱስ)* ላይ የተደገፉ የሸሪዓ

[65] Kamali, Sharia Law, *supra* note 10, p. 136.

[66] Ibid., p. 134.

[67] Jasser, *Maqasid Al-Shariah*: A Beginner's Guide, *supra* note 60, pp. 1-2.

[68] Ibid., p. 7.

[69] Kamali, Sharia Law, *supra* note 10, p. 134.

[70] Jasser, Maqasid al-Shariah: A Beginner's Guide, *supra* note 60, pp. 7-8.

[71] Ibid.

ዓላማዎች ‹*አል-መቃሲድ አል-ቀጥዒያሕ* (የተረጋገጡ ዓላማዎች)› ሲባሉ፣ አስረጂው ግልጽነት የጎደለው፣ አሻሚ ከሆነ ደግሞ ‹*አል-መቃሲድ አዝ-ዘኒያሕ* (አከራካሪ ዓላማዎች)› ይባላሉ፤ እነዚህ ዓላማዎች ተቃራኒ ወይም የተለየ መከራከሪያ ሊቀርብባቸው የሚችሉ፣ ለትርጉም የተጋለጡ ናቸው።[72] ወሳኝና አንገብጋቢ የሚባሉት የሸሪዓ ግቦች *(ዶሩሪያት)* በግልጽ አስረጂዎች የተረጋገጡ በመሆናቸው፣ ሁሉም *ዶሩሪያት* የተረጋገጡ *(ቀጥዒ) መቃሲድ* ናቸው ሊባሉ ይችላሉ፤ እንዲሁም ከጉሉሰ አስረጂዎች ላይ በአጠቃላዊ ጥናት/አረዳድ *(ኢስቲቅራእ/Induction)* ወይም ከብዙ ግልጽ አስረጂዎች ላይ የተቀሰመ የ*መቃሲድ* ድምዳሜ እንደ *ቀጥዒ መቃሲድ* ሊወሰድ እንደሚችል ከማለ ያስረዳሉ።[73] ከዚህ ውጪ አስረጂዉ ጥቅል ከሆነ ወይም ልዩ ቢሆንም አሻሚ የሆነ እንደሆነ፣ ከዚህ ድንጋጌ ላይ ተመርኩዞ የተለየ ዓላማ አሻሚ *መቃሲድ* ነው። በቤተ-ዘመዶች መካከል መረዳዳት ሊኖር ይገባል፤ ስለሆነም በሕግ በተወሰነ ዝምድና ባላቸው ሰዎች መካከል የቀለብ ግዴታ ተወስኗል፤ በተጨማሪም የንብረት መብት እና የግለሰብ ክብር መጠበቅ ዓላማዎች፣ በግልጽ በሸሪዓ አስረጂዎች የተደገፉ በመሆኑ፣ ዓላማነታቸው አከራካሪ አይደለም።[74] በ*ቀጥዒ* እና አሻሚ *መቃሲድ* መካከል ግጭት ቢፈጠር፣ በግልጽ *(ነስ)* አስረጅ የተደገፈው *መቃሲድ* ተመራጭ እንደሚሆን ግልጽ ነው።[75]

የመስኩ ምሁራን ሌሎች የ*መቃሲድ* የአመዳደብ ዘዴዎችን ጨምረዋል፤ ከነዚህም መካከል፣ ተቀዳሚ ዓላማዎች *(አል-መቃሲድ አል-አስሊያሕ)* እና ተጓዳኝ ዓላማዎች *(አል-መቃሲድ አል-ተብዒያሕ)* አንዱ ነው፤ በዚህ አመዳደብ፣ በሕጉ ለማሳካት የታሰበው ዋነኛው ዓላማ ‹ተቀዳሚ *መቃሲድ*› ሲሆን፣ ከዚህ ዓላማ መሳካት በተጓዳኝ እውን እንዲሆን የታሰበው መለስተኛ ዓላማ ደግሞ ‹ተጓዳኝ *መቃሲድ*› ይባላል። የሕጉ አተረጓጎም ሥልታዊ *(ሂያልlegal Stratagems)* ሆኖ፣ ዋነኛ ግቡን ስቶ ተጓዳኝ ዓላማውን በማሳካት ላይ ያነጣጠረ መሆን የለበትም፤ የሕግ አረዳድ የዓላማዎቹን ተቀዳሚነት የተከተለ መሆን ይኖርበታል። ለምሳሌ፦ የእውቀትና የትምህርት ዋነኛ ዓላማ የሥነ-ፍጥረቱን አስገኚ እና የሕይወትን ዓላማ ማወቅ፣ እንዲሁም ምድራዊ ሕይወት ይህን ዓላማ የተከተለ እንዲሆን ለማድረግ ቢሆንም፣ እግረ-መንገዱን የብቃት ማረጋገጫ፣ የክብር ደረጃ ለማግኘት እና የገቢ ምንጭ በመሆን ሊያገለግል ይችላል።[76]

ማጠቃለያ

መቃሲድን ማወቅ፣ በተለይ የሸሪዓ ዓላማዎች በፊት ከነበረበት የግለሰባዊነት አዙሪት ወጥቶ በሁለንተናዊ ሰብዓዊ መብቶች፣ በተለይም የሴቶች መብት መከበር ከጠቅላላ ዓላማዎቹ መካከል አንዱ እንደሆነ አጽንኦት ባገኘበት በዚህ ክፍለ-ዘመን፣ በመስኩ ምሁራን ከግራም ከቀኝም የሚሰነዘሩ የ*መቃሲድ* ሐሳቦችን እና አዲስ እይታዎችን መረዳት እጅግ አስፈላጊ ነው። ሸሪዓን ከዘመናዊ የማህበረሰብ እውነታዎችና አስተሳሰቦች *ጋር* በማጣጣም ረገድ፣ ከሸሪዓ ማዕቀፍ ውጪ ባደገው የሰብዓዊ መብት አስተሳሰብ ለማረም ከመሞከር፣ ወይም

[72] Kamali, Sharia Law, *supra* note 10, p. 134.

[73] Ibid., p. 135.

[74] Kamali, Maqasid al-Shariah Made Simple, *supra* note 43, p. 7.

[75] Ibid.

[76] Kamali, Sharia Law, *supra* note 10, p. 135.

በሌላ አገላለጽ ሸሪዓን በውጫዊ የለውጥ ተጽእኖዎች ለመለወጥ ሙከራ ቢደረግ የተፈለገውን ዉጤት ማስመዝገብ አይቻልም።[77] ከሌሎች ማህበረሰቦች ጋር ለመዋሃድ እና ተቀባይነት ለማግኘት ሲባል የሸሪዓን ነባራዊነትና ተለማጭነት ማረጋገጥ አይቻልም፤ ስለሆነም ለውጡ እና ተሃድሶው ከዉስጥ የመጣ መሆን አለበት፤ ለዚህ አይነተኛዉ መሳሪያ ደግሞ በጥንታዊው የኡሱል እድገት ዉስጥ ተገቢውን ድርሻ ያላገኘውና የክፍለ-ዘመኑን *ዑለማእ* ትኩረት የሳበው *መቃሲድ* ነው። በሸሪዓ ሕግ ላይ የሚነሱ ዘመነኛ ንድፈ-ሐሳባዊና ተጨባጭ ጭብጦች እና ተግዳሮቶች፣ ከራሱ ከሸሪዓዉ በመነሳት ምንጩን ያለቀቀ መፍትሔ ሊሰጣቸዉ ይችላል፤ እንዴት ከተባለ የሸሪዓ ዓላማዎችን መሠረት ያደረጉ አዳዲስ ጥናቶችና እይታዎች *(ኢጅቲሓድ)* ሲዳብሩ ነው። ሸሪዓን ከዓለም-አቀፍ ሰብዓዊ መብት እሴቶችና የልማት ፖሊሲዎች ጋር እንዲጣጣምና የራሱ እሴቶች አድርጎ ይቀበላቸው ዘንድ፣ በተጀመረው የ*መቃሲድ* የእውቀትና ሥነ-ጽሁፍ ጅማሮ ላይ ዓለም-አቀፋዊና አካባቢያዊ ተራማጅ ምልከታዎች ሊዳብሩ ይገባል።[78]

ከኢትዮጵያ ሕግ ሥርዓት ጋር አግባብነት ባለዉ መልኩ፣ የ*መቃሲድ* ግንዛቤ የሸሪዓ የግልና የቤተሰብ ሕግ አተገባበር ማዕቀፉ በፌዴራል እና በክልል ሸሪዓ ፍርድ ቤቶች ተፈጻሚ እየተደረገ መሆኑን ተከትሎ በኢፌዲሪ ሕገ-መንግሥት ጥበቃ የተደረገላቸው ሰብዓዊ መብቶች፣ በተለይም በቤተሰብ ግንኙነት ዉስጥ ጥሰት ሊፈጸምባቸው የሚችሉ የሴቶችና የሕጻናት መብቶችን ያከበረ እና የሚያስከብር የሕግ አተረጓጎም እንዲሰፍን ለማድረግ ከፍተኛ አስተዋጽኦ አለው።

ለክልልና ለፌዴራል የሸሪዓ ፍርድ ቤቶች እየቀረቡ ያሉ የቤተሰብና የውርስ ጉዳዮች፣ ከ*መዝሐብ* የቡድናዊነት አተረጓጎም ርቆ ከሸሪዓ ሕግ ዓላማዎች ጋር በተጣጣመ አኳኋን እንዲተረጎሙ በማድረግ ረገድ፣ ሸሪዓ ፍርድ ቤቶች ራሳቸውን በዘመኑ የሸሪዓ *መቃሲድ* እውቀት የማነጽ እንቅስቃሴ ማድረግ ይገባቸዋል። ዝርዝር የሸሪዓ ድንጋጌዎችን ተግባራዊ በማድረግ ረገድ ከሕጎቹ ጀርባ ያለው ዓላማ፣ እና ሸሪዓ በጠቅላላው ያነገበውን የፍትሕና የ*መሲሊሕ* ዓላማ ባገናዘበ መሆን ይገባዋል። በትምህርት መስክ፣ የ*መቃሲድ* ጥናት በዩኒቨርሲቲ ደረጃ የኢስላም ሕግ ጥናት አካል ሆኖ ይቀርብ ዘንድ፣ ነባሩን የሸሪዓ ትምህርት አቀራረብና የመማሪያ ሞዱል መሠረታዊ የይዘት እና የአቀራረብ ለውጥ ሊደረግበት ይገባል፤ በዚህ ረገድ የሕግ ትምህርትንና ጥናትን በማሻሻልና በማዘመን ረገድ ኃላፊነት የተጣለበት፣ የፍትሕና የሕግ ምርምር ኢንስቲቲዩት የሚጠበቅበትንም ሚና እንዲጫወት ይጠበቃል።[79] ይህ ጽሁፍ የ*መቃሲድን* ምንነት፣ *መቃሲድ* የሚለይባቸውን ዘዴዎችና ጠቅላላ የሸሪዓ ዓላማዎችን ካስተዋወቀ ዘንድ፣ በኢትዮጵያ ተግባራዊ እየሆነ ያለው የሸሪዓ የቤተሰብ ሕግ ዓላማዎች ምንድን ናቸው? የሕጎቹ አተረጓጎምና አፈጻጸም በምን መልኩ ሊሆን ይገባል? የመሳሰሉ ጥያቄዎች፣ በተጨባጭ የሸሪዓ ፍርድ ቤቶችን አሰራር በመቃኘት፣ የሸሪዓን የቤተሰብ ሕግ ማዕቀፍ፣ *መቃሲድ* እና ተጨባጭ ችግሮችን በአንድነት መተንተን የሌላ ጥናት ርዕስ ይሆናል።

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[77] Jasser, Maqasid al-Shariah: A Beginner's Guide, *supra* note 60 pp. 22-23.

[78] Ibid, p. 23.

[79] የፍትሕና የሕግ ሥርዓት ምርምር ኢንስቲትዩት ማቋቋሚያ የሚኒስትሮች ምክር ቤት ደንብ ቁጥር 22/1990፣ አንቀጽ 5(7).

Objectives of Sharia Law *(Maqasid Al-Shariah)*

Alyu Abate Yimam[♣]

Abstract

Pluralism is one of the essential features of the Ethiopian legal system. It is enunciated in the FDRE Constitution that religious and customary systems of dispute resolution are officially allowed to play their part on personal and family matters alongside the regular justice system. This pluralistic aspect of the Constitution has been officially reduced into reality by Sharia Courts of the Country that have been in operation since the time before Hailesilassie; and with the adoption of the FDRE Constitution, their parallel operation is guaranteed and made mandatory for recognition by the legislative organs of the country. Accordingly, Sharia courts have been restructured along federal structure and a three-tiered Sharia court levels are adopted both at the federal and regional levels. It is stated in the Federal Sharia Courts Consolidation Proclamation that Sharia courts shall apply Islamic law to adjudicate cases falling under their material jurisdiction (Art. 6). One of foundational concepts and currently reviving theme of Islamic jurisprudence is Maqasid Al-Sharia (the Purpose and Goals of Islamic Law). This work introduces the methodologies employed in identification of Maqasid, and the goals the Sharia aims to achieve through its diverse legal frameworks It is pointed out by the classical and contemporary Sharia literature and Maqasid jurists that different branches of Islamic law including its personal and family framework have objectives to realize which falls in either of one or more of the three cardinal goals i.e. Consideration of public interest (Maslahah), establishing Justice (Adl) and Educating an Individual (Tahdhib al-Fard). This paper presents an introductory analysis in the methodological exposition of Maqasid so as to tackle the difficulties arising from literalistic understanding of Sharia rules in general, and ensure correct and acceptable interpretation and enforcement of Islamic personal and family laws by the Ethiopian Sharia courts.

Key Words: *Maqasid*, Objectives of *Shariah*, Juristic Reasoning *(Ijtihad*), Public Interest *(Maslahah),* Justice *(Adl)*

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Teaching Legal Research Methods in the LL.B. Programme of Ethiopian Law Schools: The Need to Revisit Some Key Points

Nega Ewunetie Mekonnen[♣]

Introduction

Modern legal education in Ethiopia dates back to 1963, the year in which the then Haile Selassie I University (now Addis Ababa University) opened its Faculty of Law. The Faculty of Law at Addis Ababa University had been the only institution that offered an undergraduate law (LL.B.) degree programme until the late 1990s. The Ethiopian Civil Service College (now the Ethiopian Civil Service University) offered the same programme starting from the mid-1990s. In the early 2000s, new law schools were opened at the so-called "First Generation Universities": Mekele University, Bahir Dar University, Haramaya University, Hawassa University, University of Gondar, and Jimma University. The trend of opening new law schools was later followed by other public universities that were established after the First Generation Universities.[1] Private law schools were also opened in different parts of Ethiopia.[2] The expansion of law schools was later followed by the adoption of the Reform Document on legal education and training in 2006.[3]

The Reform Document singled out various problems in the existing LL.B. curricula. Poor research methodology training in the LL.B. programmes was one of the problems identified by the Reform Document. Later, a national LL.B. curriculum was adopted based on the guidelines provided in the Reform Document. The inclusion of a course on legal research methods was

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[1] Currently, the LL.B. programme is offered by twenty-six federal public universities, and one regional public university (Oromiya State University).

[2] It should be noted that private law schools are banned from offering LL.B., diploma and other law programmes.

[3] *FDRE, Legal Education and Training Reform Document,* Addis Ababa, 2006 (unpublished).

one way in which the newly adopted national LL.B. curriculum departed from existing LL.B. curricula.

However, as the culture of teaching legal research methods in Ethiopian law schools is relatively new (it is not older than a decade), the process faces a number of problems. Having taught a legal research methods course for more than eight years, this writer has identified and experienced the following problems and challenges facing both students and course instructors: overly large class sizes, students who lack substantive law foundation (i.e., no exposure to core doctrinal concepts and issues), inadequate credit allotment for the course, and a lack of qualified and experienced course instructors.

In this reflection the challenges and problems facing Ethiopian law schools, in particular, and the challenges facing the teaching of legal research methods courses will be discussed. Specifically, the reflection will examine how large class size, heavy teaching load, timing of the course delivery; and the teaching, research, and publication experiences of instructors affect the quality of teaching legal research methods in the LL.B. programme of Ethiopian law schools.[4] The refection will be concluded by recommending possible ways to address these problems.

To collect empirical data a questionnaire was developed and administered. In the reflection eleven public law schools were surveyed.[5] A focus group discussion among first year law students at Bahir Dar University was also conducted. The writer has selected the eleven public law schools and the members of the focus group discussion by using convenient sampling techniques.[6]

[4] It should be noted that these are not the only factors that are affecting the quality of the teaching of legal research methods. It is also possible to think of other factors like the content and the quality of the teaching material, the facility of the law schools, and role of stakeholders such as courts, prosecution departments, attorney offices and others. However, in the opinion of this writer, compared to these factors the aforementioned factors are key points that need more focus and further discussion.

[5] In the reflection law schools at Addis Ababa University, Arba Minch University, Assosa University, Bahir Dar University, Debre Markos University, Dilla University, Jimma University, Mizan-Tepi University, Semera University, University of Gondar, and Wollega University were surveyed.

[6] To collect empirical data it was convenient for the writer to use LL.M. students studying at Bahir Dar University, Jimma University, and Arba Minch University, and a friend teaching at Addis Ababa University. Law schools were non-randomly selected by taking in to account the convenience of the data collection process. Fortunately, law schools from the three-generation universities were

1. Large Class Size and Heavy Teaching Load

Large class size affects the teaching-learning process of legal research methods in two ways. It diminishes the active engagement of students, and it puts a heavy teaching load on the instructor. In the following sub-sections, these two points will be analyzed and expanded.

1.1. Students' Active Engagement

Learning legal research as a skill-oriented course needs the close supervision of the instructor. "The legal research classroom should be an active one that offers hands-on learning experiences for the students."[7] As a skill-oriented course, the active engagement of students is crucial in legal research methods classes. "Sole reliance on a passive teaching format (text-lecture-exam) for a research methods course runs the risk of driving student motivation and interest even lower than typically expected."[8] A number of studies have been conducted on the impact of class size on the active engagement of students. For instance, J. Barraket pointed out that the combination of a student-centered approach and a small class size is an effective way of research methodology teaching methods.[9] However, it should be noted that class size is not the only factor that affects active learning. There are a number of factors that affect the active engagement of students.[10] Among these factors the most important ones are:

> [A]attendance at and active participation in class, hours of personal study, be it alone or in a group, engagement with the discipline or disciplines the student is studying (the extent to which the student of history or physics, say, feels, and acts as a historian or physicist in the making) or attachment with that disciplinary community, collaborative and more informal interaction with fellow students, or 'peer engagement', interaction with

represented in the sample taken. It was also convenient to use first-year LL.B. students at Bahir Dar University as participants in the focus group discussion.

[7] Filippa M. Anzalone, Some Musings on Teaching Legal Research, *the Journal of the Legal Writing Institute* 20, (2015), p.7.

[8] Jill A. Gordon, Christina M. Barnes, and Kasey J. Martin, Undergraduate Research Methods: Does Size Matter - A Look at the Attitudes and Outcomes of Students in a Hybrid Class Format versus a Traditional Class Format, 20 *J. Crim. Just. Educ.* 231 (2009).

[9] J. Barraket, Teaching Research Method Using a Student-Centered Approach? Critical Reflections on Practice, *Journal of University Teaching & Learning Practice*, 2(2), 2005., Vol. 2, issue, 2/3, p.73.

[10] Gordon*, supra* note 8*,* p. 229.

> academic staff, particularly interactions which focus on an individual's learning and development, and engagement with and through a range of available learning resources.[11]

If we closely examine these factors, smaller class size would enhance the active engagement of students in all classes in general, and legal research methods classes in particular. Even if it is not possible to have a hard and fast rule on the size of the class, it is clear that a lower instructor-student ratio is preferred and more fruitful than a higher instructor-student ratio. For instance, the American *Sourcebook on Legal Writing programmes* "recommends a maximum number of thirty to thirty-five students" for legal writing [research] classes.[12] Jill A. Gordon, Christina M. Barnes, and Kasey J. Martin, argue that a class of 20-35 students will help to have the active engagement of students.[13] From these two recommendations, one can understand that there is a slight difference in the number of the ideal class conducive for the active engagement of students. Irrespective of this difference, the most important point is "[t]he type of instruction needed for quality legal writing [research] courses requires a lower faculty-student ratio because of the processes involved. Training in legal writing [research] does not conform well with 'mass education'."[14]

In Ethiopian laws schools, the class size of students taking legal research methods is not different from the class size of students taking "traditional" law courses. For instance, at Bahir Dar University it is common to have on average 50-60 students in legal research methods classes.[15] The following table shows the class size of students taking legal research methods in the 2018/19 academic year in the selected nine law schools.

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[11] *Ibid*.

[12] Bonny L. Tavares; Rebecca L. Scalio, Teaching afterDark: Part-Time Evening Students and the First-Year Legal Research & Writing Classroom, 17 Legal Writing: *J. Legal Writing Inst*. 86 (2011).

[13] Gordon*, supra* note 8, p. 234.

[14] Maureen J. Arrigo, Hierarchy Maintained: Status and Gender Issued in Legal Writing Programs, 70 *Temp. L. Rev.* 130 (1997).

[15] As a course instructor this fact has been witnessed by this writer.

Table 1: Class Size of Students Taking Legal Research Methods

No.	University	Class size
1	Addis Ababa University	50
2	Arba Minch University	56
3	Assosa University	35
4	Bahir Dar University	61
5	Debre Markos University	57
6	Dilla University	40
7	Jimma University	50
8	Mizan-Tepi University	41
9	Semera University	34
10	University of Gondar	85 (Two sections)
11	Wollega University	73

1.2. Heavy Teaching Burden

Instructors teaching legal research methods should assign "[…] more active-learning tasks and encourage critical thinking and continuous lifetime learning […]"[16] Large class size coupled with the intensive and extensive assessment will obviously give rise to a heavy teaching burden on the instructor teaching legal research methods. "[…] the number of students in a research and writing class has a direct relation to the amount of work required, whereas the number of students in a traditional course has a much smaller impact on the workload, usually only on the examination-grading time."[17]

From the collected data it appears that on average four to five assessments are given in legal methods courses. One of the common assessments is the development of a research proposal. It is not difficult to understand the workload of a legal research method instructor correcting all these assessments in general and the research proposal of each and every student in the class in particular. Teaching such a course is not only challenging in

[16] Anzalone, *supra* note 7, p. 8.

[17] Marjorie Dick Rombauer, First-Year Legal Research and Writing: Then and Now, 25 *J. Legal Educ.* 538 (1972), p. 547.

the context of Ethiopian law schools, but it is also challenging in the law schools of other jurisdictions. For instance, the teaching experience of professors at US law schools was expressed as follows: "In response to a question intended to elicit such comparison, about half of all the legal research and writing who taught other law school courses expressed the view that teaching this course was less stimulating, was more challenging, and required more work than teaching other courses." (Emphasis added by this writer)[18] The heavy teaching burden imposed on the legal research methods instructors in the selected nine law schools is summarized in the following table.

Table 2: Type and Number of Assessment

No.	University	Type of Assessment	No. of Assignments
1	Addis Ababa University	- Proposal writing and presentation - Identification of type of research, and the applicable methodology - Final exam	3
2	Arba Minch University	- Quiz - Group assignment - Proposal writing - Individual assignment	4
3	Assosa University	- Proposal writing - Six continuous assessments - Final exam	8
4	Bahir Dar University	- Quiz - Group assignment - Proposal writing - Mid exam - Final exam	5
5	Debre Markos University	- Proposal writing - Proposal presentation - Quiz - Final exam	4
6	Dilla University	- Proposal writing - Mid exam	4

[18] *Id.* p. 546.

		- Class participation - Final exam	
7	Jimma University	- Quiz - Assignment - Proposal writing - Mid exam - Final exam	5
8	Semera University	- Proposal writing - Proposal presentation	2
9	Mizan-Tepi University	- Proposal writing - Research deport - Class participation - Final exam	4
10	University of Gondar	- Proposal writing - Proposal presentation - Final exam	3
11	Wollega University	- Proposal writing - Six continuous assessments - Final exam	8

As it can be understood from the table, on average the selected law schools give four assessments. These four assessments coupled with the large class size impose heavy teaching load on the course instructor.

2. Timing of the Course Delivery

Teaching a legal methods course is less stimulating than teaching a doctrinal or theoretical course not only because of the class size, the number of assignments, and tasks involved in the course, but also because it involves teaching first-year students with almost no legal experience.[19] In the following sub-section, this learning gap and a proposed solution will be discussed respectively.

2.1. The Learning Gap

In Ethiopian law schools, Legal Research Methods is delivered in the second semester of the first year. It is common to see first-year law students

[19] *Ibid.*

struggling with the course. First-year law students are "newcomers" and have not yet been extensively exposed to "doctrinal courses". Accordingly, they do not have a "substantive law foundation" on which they can rely, and that will help them in understand class lectures on legal research methods, and to effectively accomplish different assigned tasks in the course. This reflects a learning gap between substantive doctrinal courses and legal research methods as a skill-oriented course. This suggests that teaching a legal methods course for students who are not exposed to doctrinal courses will be futile until they have a better foundation in doctrinal legal scholarship.

According to the national LL.B curriculum, students, among other things, are required to understand or develop a research proposal.[20] In order to do this, however, students need to first understand the class lecture on how to select a research title, how to write the background of the study, how to articulate a statement of the problem, how to formulate research questions and research objectives, and how to develop a research design, or methodology. The next stage involves developing a research proposal. All these activities can be effectively and efficiently discharged if and only if students are armed with the basic doctrinal or substantive law knowledge. From the course breakdown in the national LL.B curriculum, one can see, however, that in the first year first semester substantive law courses are not taught. Even in the first year second semester only three substantive law courses (Law of Persons, Law of Successions, and Family Law) are offered, and they are taught in parallel with Legal Research Methods. Still, at the time when students are taking Legal Research Methods, they are *tabula rasa* when it comes to their doctrinal foundation.[21] The challenge this writer has been facing in teaching the course to first-year students in the last eight years can be best summarized by the words of Lamar Woodard (an American legal research professor). Prof. Woodard expresses his experience and the hurdles of teaching legal research to first-year law students as follows: "teaching a

[20] *See* the LL.B curriculum on Legal Research Methods. The collected data from the sampled law schools also reveals that research proposal writing is one of the assessments used to evaluate students.

[21] This fact was revealed through discussions with first-year students taking the course (focus group discussion among first-year law students at Bahir Dar University, moderated by Dawit Tsige, April 24, 2019).

pig to sing-the pig doesn't do it very well and certainly doesn't appreciate the lesson."[22]

2.2. Which Year, which Semester, and what to Deliver?

When it comes to the timing of the teaching of a course on legal research methods, law schools in different legal systems adopt different ways of delivering the course. Law schools in Europe and the United States (US) adopt different models in teaching legal research including the year in which the course should be taught. In the US law schools, legal research coupled with legal writing is typically offered to first-year law students.

In the American system delivering the course in the first year may not be a problem especially when it is seen from the perspective of the content of the course and the background of the students (the admission requirement). In the American system, legal research instruction is often blended with legal writing. If one closely examines the course content it mainly focuses on bibliographic instruction.[23] It is also common to see librarians rather than law professors offering legal research in general and the bibliographic instruction in particular. In the US the teaching of the course mainly focuses on the teaching of the skill of locating and finding bibliographic sources (legal bibliography). According to this approach, students are provided with different legal problems and are required to locate the appropriate state laws, federal laws, and common laws that would address the legal problem at hand.[24] And "students then must analyze the facts of the problem and locate relevant information in a variety of sources; this forces them to make judgments about the material they locate."[25] Locating appropriate bibliographic resources and analyzing legal problems in light of the identified law does not need much doctrinal foundation and substantive knowledge compared to what students at Ethiopian law schools are expected to do in the national LL.B curriculum in their legal methods course.

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[22] Email from Lamar Woodard cited *in* Herbert E. Cihak, Teaching Legal Research: A Proactive Approach, 19 *Legal Reference Services Q*. 27 (2001), pp.30, 37.

[23] *See* Herbert E. Cihak, Teaching Legal Research: A Proactive Approach, 19 *Legal Reference Services Q.* 27 (2001)

[24] *See* Joyce Manna Janto & Lucinda D. Harrison-Cox, Teaching Legal Research: Past and Present, 84 *L. Libr. J.* 281 (1992).

[25] *Id.* p. 291.

The American legal education model is also different from the system of legal education in Ethiopia in terms of admission requirements. In the US pre-legal education—typically an undergraduate degree—is a requirement of admission to join law schools.[26] This requirement helps to ensure the "academic maturity" of students joining the law schools and ensure that they enter law school with prior research skills and training on research methods in their respective undergraduate degree programmes. The admission requirement of Ethiopian law schools, however, is not different from the admission requirement of any other undergraduate degree programmes: any high school graduate who passed the national university entrance exams is a candidate to join a law school. The educational background of students in these two systems will both negatively and positively affect the course understanding of students. So, compared to the Ethiopian system, students in the American system are believed to be capable and "mature candidates" who are primed to take a legal methods course in the first year of their law degree.

Law schools in Europe take a different approach. This writer believes that the model adopted by Dutch law schools is instructive as he believes this model is more appropriate to the situation and the existing problems prevailing in Ethiopian law schools. This is because the writer has found a resemblance between a set of research skills identified by the Utrecht University and the national LL.B. curriculum of Ethiopian law schools. Accordingly, the writer will look into the Utrecht University model and recommend the adoption of this model by Ethiopian law schools.

The training on legal research in The Netherlands is geared towards the graduate profile of law graduates from Dutch universities. "A student graduating with a law degree from a university in The Netherlands must be able to conduct independent research academic research."[27] Research skills

[26] For the details of the historical development of this admission requirement *see* Maureen J. Arrigo, Hierarchy Maintained: Status and Gender Issued in Legal Writing Programs, 70 *Temp. L. Rev.* 117 (1997).

[27] Ian Curry-Sumner & Marieke van der Schaaf, The Theory and Practice of Teaching and Guiding Legal Research Skills, *Recht en Methode in onderzoek en onderwijs* 2011 (1) 1, p. 64.

and sound legal knowledge are the two important components to effectively conduct research.[28]

To ensure that law graduates meet the intended graduate profile, the legal research methods training is different from what Ethiopian law schools are doing in two ways: first, the training is "integrated into the subject-related courses, instead of separate skills course"; and second, it covers the "entire three years of the bachelor programme".[29] This approach has been chosen to fully integrate the research skill courses into substantive law courses.[30] This will, in turn, enable students to learn "non-subject specific [legal research] skills alongside the subject-related content."[31]

The integrated legal research skills training at Utrecht follows the structure of the course breakdown in the law degree programme. The course breakdown has three main sections distributed according to the three years of the programme: a Foundational section, a Core section, and a Choice section. "These three sections also form the basis for instruction in the research skills."[32] The teaching process goes as follows.[33]

I. Foundational section

This section covers the first semester of the first year. In the first semester, students are exposed to the basic principle of law (*Grondslagen van het Recht*). In this section, foundational research skills are taught along with these basic principles of law. These foundational research skills include citation, "structure, legal reasoning and reporting".

II. Core section

The next two semesters are devoted to eight core subjects *(kernvakken*): property law, the law of obligations (contract and tort), substantive criminal law, criminal procedural law, constitutional law, administrative law, international law, and European law. The research

[28] *Ibid.*
[29] *Id.* p. 75.
[30] *Ibid.*
[31] *Ibid.*
[32] *Id.* p. 76
[33] *See Id.* p. 76 ff.

skill component or counterpart of this section covers "core research skills" that will help students to find appropriate statutory or case laws and address content related legal problems.

III. Choice section

In the remaining three semesters, students choose courses "within a range of specific groupings" (*algemene rechtsleer*). The research skills line of this section is tailored to the nature of the specialized course taught. Students in this section are "introduced to the most complicated research skills" and are taught how to choose a research area and how to formulate a research question.

As pointed out before, this writer thinks that it is important to consider the Utrecht approach to the teaching of legal research methods in the Ethiopian laws schools, among things, for one main reason. Regardless of the difference in the duration of the study[34], the Ethiopian LL.B. national curriculum, like the one in Utrecht, has been structured into three "modules": Core modules, Elective courses, and General modules.[35] This does not mean that the list and the nature of courses in these three modules mirror the structure and the content of courses in the Utrecht system. For instance, in the Ethiopian curriculum, the core module is replete with "foundational courses" and "core courses"; while the general module contains only two courses: English for Lawyers, and Information and Communications Technology. So, courses that are by their nature foundational but which are grouped under the Core course should be switched to the General modules.[36]

After suitable restructuring is done the legal research methods training in Ethiopian law schools can be offered in line with the three modules. Like the Utrecht system, in the general (foundational) modules an introductory course on legal research could be offered. This introductory course should cover topics such as the meaning, type, and nature of research; the nature of legal research; citation and documentation sources; plagiarism and research; and

[34] The regular programme of the law schools in Ethiopia leading to the award of LL.B. degree takes five years.

[35] The 2012/13 revised and modularized LL.B. Curriculum.

[36] This writer believes that courses in the Core modules such as Introduction to Law, Legal History and Traditions, Introduction to the Ethiopian Legal System, Customary Law, Introduction to Logic, Jurisprudence, and Legal Research Methods should be grouped under the General modules.

so on, and could be aligned with Law of Persons, Family Law, and Law of Successions. In the core courses, the scope of the legal research methods course will become more advanced and tailored to the substantive courses students are taking. On this model, by the time that students engage in more advanced legal methods instruction they will have been acquainted with some substantive courses, and they will be in a position to appreciate and understand more complex legal problems. In this phase the following themes can be covered: identification of legal problems, locating appropriate legal sources, and the skills of applying the law to the issues at hand and solving the legal problems. In the last phase, the elective courses, the full-fledged research process including the skills of research proposal development can be covered. In this phase the following legal research skills should be taught: identification of research ideas; selection of research topics; formulation of research problems and research questions; setting research objectives; and preparing a research design. As with the first two phases, here the skills training should be aligned to the elected substantive courses and courses taught in the preceding semesters. This will, in turn, equip students with the necessary research skills and make them better able to effectively administer and write their final year LL.B. essay.[37]

If a model along these lines is adopted in Ethiopian law schools legal research methods will in effect become a three-semester course. This raises an obvious question: how many credit hours should be allocated in the three semesters? It has been mentioned that a heavy teaching burden is one of the hurdles instructors are facing. Because of this it is neither feasible nor fair to teach the course as it stands today as a three hour course. Taking into account the teaching burden and the respective issues to be addressed in the three semesters, this writer recommends allocating two credit hours for each of the three semesters; ultimately the course will cover six credit hours in the LL.B. programme.

[37] This writer witnessed deterioration in the quality of the final year LL.B. essays from time to time. Instructors advising and examining final year LL.B. essays (at Bahir Dar University) have also complained about the poor quality of most of the works.

3. The Teaching, Research, and Publication Experiences of Instructors

As has been pointed out repeatedly, legal research is a skill-oriented course. Students learn the course by doing. Instructors are expected to teach mainly by referring to their research and publication experiences. As a result, the research and publication profiles of the instructor are pivotal in teaching legal research compared to other traditional courses. The instructor must be able to teach the course "by doing". The importance of learning legal research by doing and the role of the instructor in the process of learning has been stated by Wesley Jr. Gilmer four decades before as follows:

> The skills of legal research and legal writing are akin to the skills of playing baseball and football, the skills of playing the piano and guitar, and the skills of driving an automobile. People learn those skills mainly by doing them. None of them can be learned solely by listening to someone tell how they do them, by reading about the way to do them, or by watching someone else do them. Requiring the law student to perform the operations himself is the way to teach legal research and writing. Guided experience for the student, along a way known to the teacher, with a realistic objective before the student, will teach the types of literature, its contents, a method of research, and how to apply them via a writing. (Emphasis added by this writer)[38]

So, unlike the traditional courses, the guidance of the instructor is invaluable to the effective teaching of legal research methods. In turn, the guidance of the instructor will be fruitful and effective only if it is embedded in the teaching, research and publication experiences of the instructor. In emphasizing the importance of the experience of the instructor teaching legal research Gilmer adds the following:

> Regardless of how long one has been in the legal profession, each day constitutes a unique opportunity to learn something new about the monster called legal research. This point should not be passed by, without noting that daily exposure is the way that each of us learned how to do legal research, from the first day that we attempted it, to the day when we supposed we were at our best. This admission is the keystone of effective

[38] Wesley Jr. Gilmer, Teaching Legal Research and Legal Writing in American Law Schools, 25 *J. Legal Educ.* 571(1972), p. 571.

> teaching of legal research and legal writing. Experience is an excellent educator, especially for this field, where even the teachers must perpetually strive to improve their own knowledge. (Emphasis added by this writer)[39]

When it comes to the experience of instructors in the selected law schools, the data reveal that there is significant diversity in the academic rank, teaching, research, and publication experiences of instructors teaching legal research methods.

Table 3: The Academic Rank of Instructors Teaching Legal Research Methods in the LL.B. Programme

No.	University	Academic Rank
1	Addis Ababa University	Assistant Professor
2	Arba Minch University	Assistant Lecturer
3	Assosa University	Assistant Lecturer
4	Bahir Dar University	Assistant Professor
5	Debre Markos University	Lecturer
6	Dilla University	Assistant Lecturer
7	Jimma University	Assistant Lecturer
8	Mizan-Tepi University	Lecturer
9	Semera University	Lecturer
10	University of Gondar	Associate Professor
11	Wollega University	Lecturer

With the exception of Addis Ababa University, Bahir Dar University and University of Gondar, legal research methods instructors are exclusively lecturers and assistant lecturers. In four law schools, instructors are teaching with the rank of assistant lecturer. It is clear that instructors with the rank of assistant lecturer are newly employed young LL.B. graduates with no teaching, research and publication experiences. Even instructors with the rank of lecturer do not have rich research and publication experience except doing their final year LL.M essay and undertaking one to two research projects. A lack of experience in teaching, research and publication will

[39] *Ibid.*

negatively affect the quality of education that students get in their legal methods courses.

Concluding Remarks

After completing the LL.B. programme, graduates are expected to have acquired the skill and competence, among other things, to render high-quality research service to organizations, undertake independent research in areas of law, and research and publish to reinforce the Ethiopian legal jurisprudence.[40] To acquire these skills, competence, and knowledge the teaching of legal research methods should be revisited so that students will receive quality education and skill training. Three changes in particular would, in the opinion of this writer, make significant positive differences. First, large class sizes should be reduced to enable more active participation of students and to reduce the heavy teaching load imposed on instructors. Here, it is possible to think of having two small classes instead of one large class. Second, the existing curriculum and the course breakdown should be restructured. Specifically, it would be helpful if Legal Research Methods is offered as a three-semester introductory, core, and advanced course that follows the established substantive and doctrinal knowledge of students. It has been suggested that the Utrecht model might be one to emulate. Finally, it appears that the teaching, research and publication experiences of most of the instructors currently teaching legal research methods at Ethiopian law schools hampers the quality of education and the skill training that they can offer to LL.B. students. With that in mind, law schools should employ and assign competent and qualified senior instructors who have extensive teaching, research, and publication experiences to teach courses in legal research methods. If these three changes are made, it is the opinion of this writer that legal research methods courses can be more fruitfully integrated into the LL.B. programmes of Ethiopian law schools, to the benefit of both students and instructors.

[40] The professional profile, graduate profile and the specific objective of the 2012/13 revised and modularized LL.B. Curriculum of Ethiopian Law Schools.

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መዝገቡ ተመርምሮ የሚከተለው ፍርድ ተሰጠ፡፡

<u>ፍርድ</u>

ጉዳዩ ከውርስ ጋር ተያይዞ የቀረበን ክርክርን መሰረት ያደረገ ነው፡፡ ይህንን የሰበር አቤቱታ አመልካቾች ያቀረቡት በሱዴ ወረዳ ሽሪዓ ፍርድ ቤት በመ/ቁጥር 00669 በ28/07/2008 ዓ.ም ተሰጥቶ በአርሲ ዞን ከፍተኛ ሽሪዓ ፍርድ ቤት በመ/ቁጥር 00437 በ3/12/2008 ዓ.ም የጸናውን ውሳኔ የኦሮሚያ ክልል ጠቅላይ ሽሪዓ ፍርድ ቤት በመ/ቁጥር 519/2008 በ28/04/2009 ዓ.ም ሽሮ ተጠሪ 2.1589 ሄክታር የገጠር እርሻ መሬት ለአመልካቾች ሊለቁ አይገባም በማለት በመወሰኑና ይኼው የጠቅላይ ሽሪዓ ፍርድ ቤቱ ውሳኔ መሰረታዊ የሆነ የሕግ ስህተት የለበትም ተብሎ በክልሉ ጠቅላይ ፍርድ ቤት ሰበር አጣሪ ችሎት በመ/ቁጥር 255157 በ21/06/2009 ዓ.ም ትእዛዝ በመስጠቱ አመልካቾች ቅር በመሰኘት ነው፡፡

የአቤቱታቸው መሰረታዊ ይዘትም፡- የወላጅ አባታቸውን የሟች አቶ ከማሎ ሀምዳ የውርስ ንብረት የሆነውን የገጠር እርሻ መሬትና ባህር ዛፍ እንዲካፈሉ ክስ መስርተው የሟቹ ሚስቶች በሆኑት ባሁኗ ተጠሪና የአመልካቾች ወላጅ እናት እጅ ያለው ይዞታ መኖሩ ተረጋግጦ ተጠሪ ያላግባብ የያዙትን ይዞታና ባህር ዛፍ እንዲያካፍሉ በወረዳውና በዞኑ የሽሪያ ፍርድ ቤቶች የተሰጠው ውሳኔ በክልሉ ሽሪዓ ፍርድ ቤት የተሸረው ተጠሪ ተገቢውን ክርክርና ማስረጃ ባላቀረቡት ሁኔታ ከመሆኑም በላይ ነው፡፡ አቤቱታው ተመርምሮም በዚህ ችሎት እንዲታይ በመደረጉም ተጠሪ ቀርበው ግራ ቀኙ በፅሑፍ እንዲከራከሩ ተደርጓል፡፡

በመሰረቱ የኢ.ፌ.ዲ.ሪ ፕብሊክ ህገ መንግስት አንቀፅ 34(5) እና በኦሮሚያ ብሔራዊ ክልላዊ መንግስት ሕገ መንግስት በአንቀፅ 35(5) ስር የግልና የቤተሰብ ሕግን በተመለከተ በተከራካሪዎች ፈቃድ በሀይማኖቶች ወይም በባሕሎች ሕጎች መሰረት መዳኘትን በሕገ መንግስቱ ክልከላ እንዳልተደረገበት በግልፅ ከማስቀመጡም በላይ ዝርዝሩ በሕግ እንደሚወሰን ያሳያል፡፡ በሽሪዓ ፍርድ ቤት የመዳኘት መብትም ምንጩ ይኼው የሕገ

መንግስቱ ድንጋጌ ሲሆን በአማራ ብሔራዊ ክልላዊ መንግስትም የሸሪዓ ፍርድ ቤቶች በአዋጅ ቁጥር54/1994 መሰረት ተደራጅተዋል፡፡ በዚሁ አዋጅም ስልጣናቸው ተለይቶ ተቀምጧል፡፡ በአዋጁ የክርክሩን የአመራር ሥርዓት ካልሆነ በስተቀር የሸሪዓ ፍርድ ቤቶች በሥረ ነገር ስልጣናቸው ስር የሆኑ ጉዳዮች የሚቀርብላቸውን አቤቱታና ክርክር የሚወስኑት የሸሪዓ ህግን መሰረት በማድረግ እንደሆነ በአዋጅ ቁጥር 53/94 በአንቀፅ 6(1) ስር በግልፅ የተደነገገ ሲሆን አንድ ሰው ለሸሪዓ ፍርድ ቤት ክስ ወይም አቤቱታ ሲያቀርብ ሥነ ሥርዓታዊ ከሆነው ጭብጥና ጥያቄ ውጭ የሆኑት ጉዳዮች በሸሪዓ ሕግ ለመዳኘት ፈቃድ የሰጠ መሆኑም ሊረጋገጥ ይገባል፡፡ በመሆኑም የሸሪዓ ፍርድ ቤት ጉዳዩን ተመልክቶ ዳኝነት ከመስጠቱ በፊት በአዋጅ ቁጥር 53/1994 አግባብ ጉዳዩን ለማየት ስልጣን የተሰጠው መሆኑን በቅድሚያ ሊያረጋግጥ የሚገባ መሆኑን ከአዋጁ አንቀፅ 6 ድንጋጌና ከፍ/ብ/ሥ/ሥ/ሕ/ቁጥር 9 እና 231 (1(ለ)) ድንጋጌዎች ይዘትና መንፈስ የምንገነዘበው ጉዳይ ነው፡፡ ይህ ችሎትም ሆነ የኦሮሚያ ክልል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት በኢ.ፌ.ዲ.ሪ.ፐብሊክ ህገ መንግስት አንቀጽ 80(3(ሀ))፣ 80(3(ለ)) እና አዋጅ ቁጥር 53/94 እና አዋጅ ቁጥር 188/1992 አንቀፅ 6 ጣምራ ንባብ መሰረት ስነ ስርዓታዊ የሆነ የሕግ ጥያቄን ብቻ ለማየት ስልጣን እንዳላቸው ግንዛቤ በመውሰድ በጉዳዩ ላይ የተሰጠው ውሳኔ ስነ ስርዓታዊ ሕጎችን መሰረት አድርጎ የተሰጠ መሆን ያለመሆኑን መመርመር እንጂ ከዚህ ውጪ መደበኛ ሕጎችን መሰረት አድርገው በሸሪዓ ፍርድ ቤት የተሰጠውን ውሳኔ ሊመለምሩ የሚችሉበት አግባብ የለም፡፡

እኛም የቀረበውን የሰበር አቤቱታ ግራ ቀኙ በስር ፍርድ ቤት ካቀረቡት ክርክር እና ማስረጃ እንዲሁም በአዋጅ ቁጥር 53/94 ከተዘረጋው ስርዓት አንፃር የስር ፍርድ ቤቶች የሰጡት ውሳኔ መሰረታዊ የሆነ የሥነ ስርዓት ሕግ ስህተት የተፈፀመበት መሆን ያለመሆኑን መርምረዋል፡፡

ወደተያዘው ጉዳይ ስንመለስም የክልሉ ጠቅላይ ሸሪዓ ፍርድ ቤት ተጠሪ 2.1589 ካ/ሜትር ይዘው እንዲቀሩ ውሳኔ የሰጠው አመልካቾች በወላጅ እናታቸው በኩል ተጠሪ ይዞታውንና ባህርዛፉን እንዲለቁላቸው የመሰረቱትን ክስ የበታች የሸሪዓ ፍርድ ቤቶች ተቀብለው ተጠሪ ይዞታውን እንዲለቁ መወሰናቸው ተገቢውን የፍሬ ነገር ማጣራትና የሸሪዓ ሕግ መሰረት ያደረገ መሆን ያለመሆኑን በመመርመር ስለመሆኑ ከውሳኔው ግልባጭ መረዳት ችለናል፡፡

አመልካቾች በሸሪዓ ፍርድ ቤቶች ለመዳኘት ፍቃደኛ ሳይሆኑ የተሰጠ ውሳኔ ስለመሆኑ ገልጸው ያቀረቡት ቅሬታ የሌለ ሲሆን አጥብቀው የሚከራከሩት ተጠሪ የያዙትን ይዞታ እንድንካፈል አልተወሰነም በሚል ነው፡፡ ይህም የሚያሳየው አመልካቾች ተጠሪ የየገቡትን ይዞታ በሚች ከማሎ ሀምዳ ወራሽነታቸውን ከተጠሪ ጋር ልንካፈል ይገባል በሚል የሚከራከሩ መሆኑን ነው፡፡ ይሁን እንጂ የክልሉ ሸሪዓ ፍርድ ቤት ፍሬ ነገሩን በራሱ አጣርቶ የአመልካቾች ወላጅ እናት የሆኑት ወ/ሮ ሃዲያ አብድሮ 6.77 ሄክታር ይዘው ያሉ መሆኑን፣ ይህን ይዞታ ይዘውም የአሁኑ አመልካቾችን ወክለው ተጠሪ የያዙትን 2.1589 ሄክታር ጭምር ለመውሰድ ዳኝነት መጠየቃቸው በጉዳዩ ከተረጋገጡት ፍሬ ነገሮችና ከሸሪዓ ሕግ አንፃር ተገቢ ያለመሆኑን በመገንዘብ ተጠሪ የያዙትን 2.1589 ሄክታር ጭምር ለመውሰድ ዳኝነት መጠየቃቸው በጉዳዩ ከተረጋገጡት ፍሬ ነገሩን በራሱ አጣርቶ አመልካቾች ወላጅ እናት የሆኑት ወ/ሮ ሃዲያ አብድሮ 6.77 ሄክታር ይዘው ያሉ መሆኑን፣ ይህን ይዞታ ይዘውም የአሁኑ አመልካቾችን ወክለው ተጠሪ የያዙትን 2.1589 ሄክታር

ጭምር ለመውሰድ ዳኝነት መጠየቃቸው በጉዳዩ ከተረጋገጡት ፍሬ ነገሮችና ከሸሪዓ ሕግ አንጻር ተገቢ ያለመሆኑን በመገንዘብ ተጠሪ የያዙትን ይዞታ ሊለቁ አይገባም በማለት ዳኝነት መስጠቱን የውሳኔ ግልባጭ የሚያሳይ በመሆኑና ይህም ውሳኔ ከሸሪዓ ሕግ አንፃር ታይቶ ከመሰጠቱም በተጨማሪ የአመልካቾችም ከወላጅ እናታቸው ስር ያሉ መሆኑን ግንዛቤ ውስጥ ያስገባ መሆኑን ተገንዝበናል፡፡

ስለሆነም የጠቅላይ ሸሪዓ ፍርድ ቤት በሕግ ተለይቶ በተሰጠው ስልጣን መሰረት ተጠሪ ይዞታውን የሚለቁበት አግባብ መኖር ያለመኖሩን በማስረጃ አጣርቶና ጉዳዩን በሐይማኖት ስርዓት መዝኖ ይዞታውን ተጠሪ ሊለቁ የሚችሉበት ሐይማኖታዊ ምክንያት የሌለ መሆኑን ድምዳሜ ላይ ደርሷል፡፡ ይሄው ጠቅላይ ሸሪዓ ፍርድ ቤቱ ፍሬ ነገርን በማጣራት እና ማስረጃ በመመዘን ስልጣኑ የደረሰበት መደምደሚያ በዚህ ሰበር ሰሚ ችሎት በድጋሚ የሚመዘንበት አግባብ የሌለ መሆኑን በኢ.ፌ.ዴ.ሪ ሕገ መንግስት አንቀፅ 80/3/ሀ/ እና በአዋጅ ቁጥር 25/88 አንቀፅ 10፣ እንዲሁም በክልሉ የሸሪዓ ፍ/ቤቶች ማቋቋሚያ አዋጅ ቁጥር 53/94 ድንጋጌዎች ይዘትና መንፈስ የምንገነዘበው ጉዳይ ነው፡፡ ከእነዚህ የሕግ ማዕቀፎች አንጻር ስናየው ደግሞ ሸሪዓ ፍ/ቤቶች ክርክሩ ሲመሩ በስነ-ስርዓት ሕግ መሰረታዊ የሕግ ስህተት ፈጽመዋል ለማለት የሚያስችል ምክንያት አላገኘንም፡፡ ከዚህ አንፃር ሲታይ አመልካቾች የክፍፍል ጥያቄያችን ሙሉ በሙሉ ውድቅ ሆኗል በማለት ያቀረቡት ክርክር የጠቅላይ ሸሪዓ ፍርድ ቤት ፍሬ ነገሩን አጣርቶና በሐይማኖቱ ስርዓት አግባብ ውድቅ ያደረገውን ያላገናዘበ እና የአመልካቾች ቅሬታ መሰረታዊ ይዘቱ በሐይማኖት ስርዓት ላይ ተመስርቶ የተሰጠውን ውሳኔ በመደበኛው ሕግ እንዲታይ የሚጠይቅ በመሆኑ አልተቀበልነውም፡፡

በእነዚህ ሁሉ ምክንያቶች የክልሉ ጠቅላይ ሸሪዓ ፍርድ ቤት የአመልካቾችን ክርክር ውድቅ በማድረግ በሰጠው ውሳኔና ይህንኑ ውሳኔ ባፀናው የክልሉ ጠቅላይ ፍርድ ቤት ሰበር አጣሪ ችሎት ትዕዛዝ ላይ የተፈፀመ መሰረታዊ የሆነ የሕግ ስህተት አላገኘንም፡፡ በመሆኑም የሚከተለውን ውሳኔ ሰጥተናል፡፡

<u>ውሳኔ</u>

1. በኦሮሚያ ክልል ጠቅላይ ሸሪአ ፍርድ ቤት በመዝገብ ቁጥር 519/2008 በ28/4/2009 ዓ.ም ተሰጥቶ በክልሉ ጠቅላይ ፍርድ ቤት ሰበር ሰሚ አጣሪ ችሎት በመዝገብ ቁጥር 255157 በ21/06/2009 ዓ.ም የጸናው ውሳኔ በፍ/ብ/ሥ/ሥ/ሕ/ቁጥር 348/1/ መሠረት ጸንቷል፡፡
2. በዚህ ችሎት ለተደረገው ክርክር የወጣውን ወጪና ኪሳራ የየራሳቸውን ይቻሉ ብለናል፡፡

መዝገቡ ተዘግቷል፤ ወደ መዝገብ ቤት ይመለስ፡፡

የማይነበብ የአምስት ዳኞች ፊርማ አለበት፡፡

የሰበር መ.ቁ. 126411
መስከረም 23 ቀን 2010 ዓ.ም

ዳኞች፡- አልማ ወሌ
መስጠፉ አህመድ
አብርሃ መሰለ
ጳውሎስ ኦርሺሶ
ሰናይት አድነው

አመልካች፡-አቶ ተስፋጊዮርጊስ አዳነ -ጠበቃ ኤልያስ መሐመድ ቀረቡ

ተጠሪ፡- ወ/ሮ አሰፉ ግርማ - የቀረበ የለም

መዝገቡ ተመርምሮ የሚከተለው ፍርድ ተሰጥቷል፡፡

ፍርድ

ጉዳዩ የተጀመረው በአማራ ብሔራዊ ክልላዊ መንግስት በጎንደር ከተማ ወረዳ ፍ/ቤት ሲሆን ተጠሪ ከሳሽ፣ አመልካች ተከሳሽ፣ ወ/ሮ አለም መንግስትአብ ደግሞ ጣልቃ ገብ ነበሩ፡፡ ተጠሪ ከአሁኑ አመልካች ጋር እንደባልና ሚስት በመሆን አብረን የኖርን ስለሆነ ንብረት ሊያካፍለኝ ይገባል በማለት ክስ ያቀረቡ ሲሆን አመልካች ከተጠሪ ጋር በሕግ ጥበቃ በሚደረግለት ግንኙነት ውስጥ ያልነበሩና በጋራ ያፈሩት ንብረትም የሌለ መሆኑን ጠቅሰው ተከራክረዋል፡፡ የአመልካች ሕጋዊ ሚስት ነኝ ያሉት ግለሰብም ወደ ክርክሩ ጣልቃ እንዲገቡ ጥያቄ አቅርበው ፍርድ ቤቱም ፈቅዶላቸው ጣልቃ ገብተው ተከራክረዋል፡፡

ጉዳዩን በመጀመሪያ ደረጃ የተመለከተው ፍርድ ቤትም የግራ ቀኙን ክርክርና ማስረጃ ሰምቶ አመልካች ከሁለቱም ሴቶች ጋር እንደ ባልና ሚስት የኖሩ መሆኑ ተረጋገጠ ቢሆንም የተሻለ ያረዱና መጀመሪያ ከአመልካች ጋር መኖር የጀመሩት የአሁን ተጠሪ ናቸው በማለት አመልካችና ተጠሪ ንብረቱን እኩል ከተካፈሉ በኋላ የአሁኑ አመልካች ከድርሻቸው ለስር ጣልቃ ገብ እንዲያካፍሏቸው ጣልቃ ገቧ መጠየቅ ይችላሉ በማለት ወስኗል፡፡ በዚህ ውሳኔ የአሁኑ አመልካችና የስር ጣልቃ ገብ ቅር በመሰኘት ይግባኛቸውን ለሰሜን ጎንደር መስዳደር ዞን ከፍተኛ ፍ/ቤት አቅርበው ፍርድ ቤቱም የግራ ቀኙን ክርክር ከሰማ እና በስር ፍርድ ቤት የተሰሙትን የተጠሪ መስክሮችን በድጋሜ ከሰማ በኋላ ጉዳዩን መርምሮ አመልካች ከአሁኗ ተጠሪ ጋር እንደ ባልና ሚስት መኖር የጀመሩት ከ1996 ዓ.ም ጀምሮ እንደሆነ ተጠሪ በምስክሮቻቸው ማስረዳታቸውን፣ አመልካች ከስር ጣልቃ ገብ ጋር እንደ ባልና ሚስት አብሮ መኖር የጀመሩት ደግሞ ከ1995 ዓ.ም ጀም በማስረጃ ተነግሯል ወደሚል ድምዳሜ ደርሶ የስር ፍ/ቤት ሁለቱንም ሚስቶች ናቸው በማለት የሰጠው ውሳኔ ክፍል ተገቢ ቢሆንም በንብረት መብት ረገድ ቅድሚያ ደረጃ ሊሰጣቸው የሚገባው ግን የአሁኗ ተጠሪ ሳይሆኑ ለስር ጣልቃ ገብ ሆኖ እያለ ይኼው መታለፉ ያላግባብ ነው በማለት በዚህ ረገድ የተሰጠውን የውሳኔ ክፍል በማሻሻል የጣውላ ቤት ድርጅትና 46 ካ/ሜትር የማህበር ቤት የአሁኑ አመልካችና የስር ጣልቃ ገብ የጋራ ሃብት ሆኖ ሊከፈል እንደሚገባ፣ ከአሁኑ አመልካች ድርሻ ግማሹን ማለትም ከጠቅላላ ንብረቱ 1/4ኛው ለአሁኗ ተጠሪ እንዲያካፍሉ፣ ክፍፍሉም በአይነት ወይም ግምቱን በመክፈል ሊከናወን ይገባል በማለት ወስኗል፡፡ በዚህ ውሳኔ የአሁኑ አመልካች ቅር በመሰኘት ይገባኛቸውን ለክልል ጠቅላይ ፍር ቤት ይግባኝ ሰሚ ችሎት

አቅርበው ፍርድ ቤቱም ጋራ ቀኙን ሲያከራክር ቆይቶ ጉዳዩን መርምሮ አመልካች በወረዳው ፍርድ ቤት በተሰጠው ውሳኔ ይግባኛቸውን ለዞኑ ከፍተኛ ፍርድ ቤት አቅርበው የዞኑ ከፍተኛ ፍርድ ቤት የስር ፍርድ ቤትን ውሳኔ አሻሽሎ በወሰነበት አግባብ ድጋሜ ይግባኝ ማቅረባቸው ስነ ስርዓታዊ አይደለም በሚል ምክንያት ወደ ፍሬ ነገሩ ሳይገባ የአመልካች ይግባኝ መዝገብ ዘግቶታል። ከዚህም በኋላ አመልካች የሰበር አቤቱታቸውን ለክልሉ ጠቅላይ ፍር ቤት ሰበር ሰሚ ችሎት ቢያቀርቡም አጣሪ ችሎቱ በጉዳዩ ላይ በተሰጠው ውሳኔ የተፈፀመ መሰረታዊ የሆነ የህግ ስህተት የለም በማለት መዝገቡን ዘግቶታል። የአሁኑ የሰበር አቤቱታ የቀረበውም ይህንኑ ውሳኔ በመቃወም ለማስለወጥ ነው። የአመልካች የሰበር አቤቱታ መሰረታዊ ይዘትም፡- ከተጠሪ ጋር በህጉ ጥበቃ የሚደረግለት ግንኙነት ውስጥ የነበሩ ስለመሆኑ በህጉ አግባ ሳይረጋገጥና አመልካች ከ1988 ዓ/ም ጀምሮ ከሌላ ሴት ጋር በሕጋዊ ግንኙነት ያሉ መሆኑ የሚያሳዩ ማስረጃዎች በአግባቡ ሳይታዩ መታለፋቸውን ዘርዝረው የበታች ፍርድ ቤቶች ከ1996 እስከ 2004 ዓ.ም እንደ ባልና ሚስት አብሮ የመኖር ግንኙነት ነበር በማለት የሰጡት ውሳኔ እንዲሻር ቅድሚያ ዳኝነት የጠየቁ መሆኑንና በአማራጭ ደግሞ ብር 75,000.00 ተጠሪ እንዲከፍሉ ይወሰንላቸው ዘንድ ዳኝነት መጠየቃቸውን የሚያሳይ ነው። አቤቱታው ተመርምሮም አመልካች ከንብረቱ ¼ኛ እንዲወስዱ የሚያደርግ የክፍፍል ውሳኔ መሰጠቱ በአግባቡ መሆን ያለመሆኑን ለመመርመር ተብሎ ጉዳዩ ለዚህ ችሎት እንዲቀርብ የተደረገ ሲሆን ተጠሪ ቀርበውም ግራ ቀኙ በፅሑፍ እንዲከራከሩ ተደርጎአል።

በአጠቃላይ የክርክሩ አመጣጥ ባጭሩ ከላይ የተጠቀሰው ሲሆን እኛም የግራ ቀኙን ክርክር አቤቱታ ከቀረበበት ውሳኔ እና አግባብነት ካለው የሕግ ድንጋጌ አንፃር መርምረናል። እንደመረመርነውም በጉዳዩ ላይ በተሰጠው ውሳኔ መሰረታዊ የሆነ የሕግ ስህተት ተፈፅሟል ለማለት ይቻላል? ወይስ አይቻልም? የሚለው ነጥብ በጭብጥነት ሊታይ የሚገባው ሁኖ ተገኝቷል።

አመልካች አጥብቀው የሚከራከሩት ከተጠሪ ጋር በሕግ ጥበቃ የሚደረግለት ግንኙነት የለኝም፣ በስር ፍርድ ቤቶች መታየት የነበረባቸው ውሳኔዎች በማስረጃነት አልታዩም፣ የተጠሪ ምስክሮች ዘመዶቻቸው ሆነው በሐሰት የሰጡት የምስክርነት ቃል የማስረጃነት ዋጋ መሰጠቱ ያላግባብ ነው የሚሉ ነጥቦችን በማንሳት ስለመሆኑ ከሰበር አቤቱታቸው ይዘት ተገንዝበናል። ይሁን እንጂ አመልካች በስር ፍርድ ቤት የማስረጃ አሰማም ላይ ቅሬታ አድሮባቸው ለይግባኝ ሰሚው ፍርድ ቤት ባቀረቡት ይግባኝ መነሻ ይግባኝ ሰሚው ፍርድ ቤት የተጠሪን ምስክሮች እንደገና የሰማ ሲሆን የተጠሪ ምስክሮችም በስር ፍርድ ቤት የሰጡትን የምስክርነት ቃል በመድገም አመልካች እና ተጠሪ እንደባልና ሚስት ሁነው ከ1995 ዓ.ም ጀምሮ እስከ 2004 ዓ.ም ድረስ አብረው የቆዩ መሆኑን፣ ከ1991 እስከ 1995 ዓ.ም መጀመሪያ ድረስ በፍቅር ጓደኝነት የቆዩ መሆኑን ማስረዳታቸውን፣ ምንም እንኳን የአሁኑ አመልካች የስር ጣልቃ ገብን ሚስቱ ናት በማለትና ንብረቶችን ደግሞ የሌላ ሚስቱና የግሌ ልጅ በሰጠችኝ ብር የተገዙ ናቸው የሚል ክርክር ቢያቀርቡም በስር ፍርድ ቤት የተሰሙት የአመልካች ምስክሮች ግን አመልካችና የስር ጣልቃ ገብ ባልና ሚስት እንደሆኑ፣ ጋብቻ ግን ሲፈጸም አለማወቃቸውን፣ የስር ጣልቃ ገብም አራት ልጆችን ወልደው ከአሁኑ አመልካች ጋር አብረው እንደሚኖሩ ያስረዱ መሆናቸውን፣ እነዚህ የአመልካች ምስክሮች አመልካች ከተጠሪ ጋር ግንኙነት የላቸውም በማለት ያስረዱና ስለንብረቱም ያስረዱት ነገር ያለመኖሩን ይግባኝ ሰሚ ፍርድ ቤት የደመደመ መሆኑን ከውሳኔው ግልባጭ ተገንዝበናል። ይህ የይግባኝ ሰሚው ፍርድ ቤት ድምዳሜ የተያዘው ደግሞ ፍርድ ቤቱ ለትክክለኛ ፍትህ

አሰጣጥ ሲል የተጠሪ ምስክሮችን በድጋሚ በመስማት ፍሬ ነገሩን በሚገባ ከአጣራና በጉዳዩ በሕጉ አግባብ የቀረቡትን የግራ ቀኙን ማስረጃዎች ከመዘነ በኋላ ስለመሆኑ የክርክሩ ሂደት በግልፅ ያሳያል፡፡ ይህ የይግባኝ ሰሚው ፍርድ ቤት የፍሬ ነገር ማጣራትና የማስረጃ ድምዳሜ ደግሞ ከስር ፍርድ ቤት ድምዳሜ ጋር ተመሳሳይ ከመሆኑም በላይ በሕጉ አግባብ የተቀጠሩትንና የተሰሙትን ማስረጃዎችን በመመዘን የተያዘ በመሆኑ ይህ ችሎት በኢ.ፌ.ዲ.ሪፐብሊክ ሕገ መንግስት አንቀፅ 80(3(ሀ)) እና አዋጅ ቁጥር 25/88 አንቀፅ 10 ድንጋጌዎች ይዘትና መንፈስ ሊለውጠው የሚችለው አይደለም፡፡ ምክንያቱም ለዚህ ችሎት በሕጉ ተለይቶ የተሰጠው ስልጣን መሰረታዊ የሆነ የሕግ ስህተት ማረምን እንጂ የፍሬ ነገር ማጣራት ስህተት ወይም የማስረጃ ምዘና ስህተትን የሚመለከተውን ጉዳይ አይደለም፡፡ በመሆኑም አመልካች ከተጠሪ ጋር ሕጉ ጥበቃ በሚያደርገው ግንኙነት ውስጥ አልነበርኩም በማለት የሚያቀርቡት ቅሬታ የፍሬ ነገርና የማስረጃ ምዘና ጉዳይ በመሆኑ በዚህ ችሎት ሊታይ አይችልም በማለት አልፈነዋል፡፡

ከዚህ አንፃር ጉዳዩን ስንመለከተው ጋብቻ ሳይፈፀም እንደባልና ሚስት አብሮ የመኖርን ግንኙነት ለማስረዳት የሚቀርበው ማስረጃ ግንኙነቱን የማሳየት ብቃት ያለው መሆኑን ፍሬ ነገሩን የማጣራትና ማስረጃና የመመዘን ስልጣን ያላቸው ፍርድ ቤቶች ከአረጋገጡ ሕጉ ግንኙነቱን ጥበቃ የሚያደርግለት መሆኑን ከክልሉ የቤተሰብ ህግ አዋጅ ቁጥር 79/1995 አንቀፅ 109፣110፣113፣117 እና ከሌሎች ድንጋጌዎች ጣምራ ንባብ መረዳት ይቻላል፡፡ ስለሆነም አመልካች ከተጠሪ ጋር በሕጉ ጥበቃ ሊደረግ የሚገባው ግንኙነት ስላለመኖሩ በተጠቃሹ አዋጅ አንቀፅ 117 (4) ድንጋጌ አግባብ የማስረዳት ግዴታቸውን ያልተወጡ ስለመሆኑ በበታች ፍርድ ቤቶች የተረጋገጠ ከመሆኑም በላይ ንብረቶቹ የግላቸው ስለመሆኑም በአዋጁ አንቀፅ 114 እና 97 ድንጋጌዎች መሰረት የማስረዳት ግዴታቸውን አልተወጡም፡፡ አመልካች በዚህ ሰበር ደረጃ ባቀረቡት ክርክር ድርሻቸው ¼ኛ እንዲሆን በተሰጠው የውሳኔ ክፍል ግልፅ የሆነ ቅሬታ ያላቀረቡና ክፍፍሉም የእኩልነት መርህን ወይም የእያንዳንዱ ተጋቢ በንብረቱ ላይ የነበረውን አስተዋፅኦ ግምት ውስጥ በማስገባት መኪናውን ነበረበት በማለት ያቀረቡት ክርክር ካለመኖሩም በላይ በሰበር አቤቱታቸው መጨረሻ ላይ የጠየቁት ዋናም ሆነ አማራጭ የዳኝነት ጥያቄ መጠንም በዚህ ረገድ የሚጠቅሰው ግልፅ የሆነ የዳኝነት ጥያቄ የሌለ በመሆኑ የሠበር አጣሪው ስለንብረት ክፍፍሉ የያዘውን ጭብጥ ተገቢነት ያልነበረው ሁኖ አግኝተናል፡፡

ሲጠቃለልም በጉዳዩ ላይ ውሳኔ የተሰጠው የግራ ቀኙ ክርክር በአግባቡ ተሰምቶና ፍሬ ነገሩም በሚገባ ተጣርቶ የግራ ቀኙን የማስረጃ ማቅረብና የማስረዳት ግዴታቸውን ባገናዘበ መልኩ ከመሆኑ ውጪ መሰረታዊ የሆነ የሕግ ስህተት ያለበት ነው ለማለት የሚቻልበትን አግባብ አላገኘንም፡፡ በዚህም መሰረት ተከታዩ ውሳኔ ተሰጥቷል፡፡

<u>ው ሳ ኔ</u>

1. በአማራ ክልል በጎንደር ወረዳ ፍርድ ቤት በመ.ቁ 0228 ጥር 29 ቀን 2006 ዓ.ም ተሰጥቶ በሰሜን ጎንደር መስተዳደር ዞን ከፍተኛ ፍርድ ቤት በመ.ቁጥር 01-16605 በ27/07/2007 ዓ.ም ተሸሽሎ በክልል ጠቅላይ ፍርድ ቤቱ ሰበር አጣሪ ችሎት በመ.ቁ 03-56035 መጋቢት 01 ቀን 2008 ዓ.ም የጸናው ውሳኔ በፍ/ብ/ሥ/ሥ/ሕ/ቁጥር 348(1) መሰረት ጸንቷል፡፡
2. አመልካች ከአሁኗ ተጠሪ ጋር እንደባልና ሚስት መኖር የጀመሩት ጊዜ በ1996 ዓ.ም ጀምሮ እንደሆነ ተጠሪ በምስክሮቻቸው አስረድተዋል፣ ከአሁኑ አመልካች

ድርሻ ግማሹን ማለትም ከጠቅላላ ንብረቱ ¼ኛውን ለአሁኗ ተጠሪ እንዲያካፍሉ፣ ክፍፍሉም በአይነት ወይም ግምቱን በመክፈል ሊከናወን ይገባል ተብሎ በተሰጠው ውሳኔ የተፈጸመ መሰረታዊ የሆነ የሕግ ስህተት የለም ብለናል፡፡

3. በዚህ ችሎት ለተደረገው ክርክር የወጣውን ወጪና ኪሳራ ግራ ቀኙ የይቻቻሉ ብለናል፡፡

መዝገቡ ተዘግቷል፤ ወደ መዝገብ ቤት ይመለስ ብለናል፡፡

የማይነበብ የአምስት ዳኞች ፊርማ አለ