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IN THIS VOLUME

Articles

Appraisal of Rural Land Certification in Ethiopia in Light of Good Land Governance Parameters: The Case of West Arsi Zone

Administration of Copyrights Through Collective Management Societies in Ethiopia: Exploring Legal Gaps and Challenges

Perjury in Ethiopia: Legal and Practical Challenges in East Gojjam Zone

Legal Independence of The National Bank of Ethiopia as a Supervisor and Regulator of the Banking Business

ሱናሕ፡- ሁለተኛው የሸሪዓ ሕግ ምንጭ

Case Comment

Advisory Opinion of the International Court of Justice on the Case of Chagos Archipelago: A Commentary

Reflection

Medemer in a Land of Extremes-Ethiopia

Book Review

Powers of Exclusion: Land Dilemmas in Southeast Asia

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HUJL | Hawassa University Journal *of* Law

Volume 3 July 2019

Contents

Articles (peer-reviewed)

Appraisal of Rural Land Certification in Ethiopia in Light of Good Land Governance Parameters: The Case of West Arsi Zone *1*

Gemmeda Amelo Gurero

Administration of Copyrights Through Collective Management Societies in Ethiopia: Exploring Legal Gaps and Challenges *53*

Kahsay Gebremedhn Weldegebrial

Perjury in Ethiopia: Legal and Practical Challenges in East Gojjam Zone *89*

Mekonnen Nigusie & Abreha Mesele

Legal Independence of the National Bank of Ethiopia as a Supervisor and Regulator of the Banking Business *127*

Nigus Zerefu

ሱናሕ፡- ሁለተኛው የሸሪዓ ሕግ ምንጭ *143*

አልዩ አባተ ይማም

Case Comment

Advisory Opinion of the International Court of Justice on the Case of Chagos Archipelago: A Commentary *191*

Anbesie Fura Gurmessa

Reflection

Medemer in a Land of Extremes-Ethiopia *217*

Daniel Behailu

Book Review

Powers of Exclusion: Land Dilemmas in Southeast Asia *231*

Yidneckachew Ayele Zikargie

Miscellaneous

HUJL Editorial Guidelines……..……..237

Appraisal of Rural Land Certification in Ethiopia in Light of Good Land Governance Parameters: The Case of West Arsi Zone

Gemmeda Amelo Gurero*

Abstract

This study examines the rural land registration and certification in Ethiopia focusing on West Arsis Zone of Oromia National Regional State. It is done in light of good land governance which mainly focuses on key areas of land sector such as, legal and institutional framework, and land information which is maintained by registration and certification of land. Rural land certification of the research area is assessed based on key informant interviews, focused group discussions, personal observation, previous research results, and relevant land laws. The findings of the study reveal that rural land certification is recognized for all types of land holdings by land laws though there are some loopholes. Furthermore, the rural land certification process is decentralized to the extent of Kebele level for making service accessible even though it is affected by lack of capacity. Moreover, the second level rural land registration and certification, which covers all types of rural land holdings, is underway to ensure tenure security. It is mainly meant to solve deficiencies of the first level registration relating to inaccuracy, outdated and incomplete land information. Although the second level certification helps to ensure more accurate data, and accessibility to farmers in terms of cost, it fails to incorporate land use plan, and land value specifically fertility of land which in turn affects the proper use of land and fairness of land taxation. Thus, to ensure good land governance, the second level registration should encompass all land information including land use plan, and value of land. Also, computerized land data should be updated timely to sustain the significance of the registration. Furthermore, there should be public awareness creation activities, building the capacity of the land administration office, and filling gaps in laws especially procedures of updating land data and the consequences of failure to comply with it.

Keywords: Land administration, Registration, Certification, Rural land, Good governance**,** Ethiopia

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Introduction

As elsewhere, in Ethiopia in general and West Arsi Zone[1] in particular rural land is fundamental to the lives of poor rural people as it is the source of food, shelter, income and social identity. Moreover, a number of human rights such as the right to an adequate standard of living, the rights to housing, food, health, work, and ultimately the right to life are intimately connected to access to land.

Cognizant of that, the 1995 Constitution of the Federal Democratic Republic of Ethiopia (hereinafter, FDRE Constitution) regulates and provides an umbrella policy framework for land matters. Article 40 (3) of the Constitution states that the right to ownership of rural land and urban land is vested in the state and the peoples of Ethiopia. And also, it guarantees the right to free access to rural land for those who want to make their livelihood on agriculture.[2] Furthermore, Article 89 (5) of the Constitution entrusts the government with the duty to hold, on behalf of the people, land and to deploy them for their common benefit and development. For that, it empowers regional governments to administer land including land registration and certification in accordance with Federal laws.[3]

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1 West Arsi Zone is one of the 20 Zones of the Oromia National Regional State (hereinafter, ONRS) in Ethiopia which has currently 13 rural *Woreda*s with 324 *Kebele*s. It has a total surface area of 12,732.12 KM2 which is inhabited by about 2,696,430 people of which 85.82 percent live in rural areas mostly by small-scale farming and livestock husbandry. This data is obtained from the West Arsi Zone Administration office (from demographic statistics that documented at the office) in April, 2018.

2 Art. 40 (4&5) of FDRE Constitution.

3 Art. 52(2) (d) of FDRE Constitution.

On the other hand, in Ethiopia (including West Arsi Zone), population growth, increased investment in rural areas, climate change, and other socio-economic factors are contributing to growing land scarcity. This scarcity has in turn led to increased individualization of land claims, and greater competition to access land. Moreover, increasing population density and the increasing degradation of the natural resource base have become the leading causes to declining per capita food production and thereby poverty.[4] Furthermore, the search for farming and grazing land, and firewood are disregarding the environmental impacts.[5] Though the rural land laws grant free access to all citizens as along as one wants to live on agriculture, this fact has created land fragmentation, and forest depletion and resulted in an ever-increasing land shortage as the population inflates.[6] These can be intensified by expensive tenure protection, adjudication procedures, and complications and delays that result from lack of readily available update and accurate land data required for informed decision-making.

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4 See in general Jason Bremner, 'Population, Poverty, Environment, and Climate Dynamics in the Developing World' *Interdisciplinary Environmental Review*, Vol. 11, No. 2/3, 2010. It shows vicious circle model (VCM) of population, poverty, and environment. The VCM shows of not just how population growth impacts on the environment, but also how population growth affects poverty, poverty affects population growth, poverty affects environmental degradation, environmental degradation affects population growth, and environmental degradation affects poverty.

5 Daniel Behailu, *Transfer of Land Rights in Ethiopia: Towards a Sustainable Policy Framework* (Eleven International Publishing, Hague, 2015), p. 168. For instance, the forest coverage of the nation had been more than 16 percent before the radical land reform in 1975 and now the forest coverage of the nation is less than 2.2 percent.

6 Ibid, p. 75.

These require good governance in 'land administration'[7] for it has manifold significances such as tenure security, sustainable economic development and social justice, environmental protection, and reducing land related disputes.[8] This can be achieved, *inter alia*, by land registration and certification that comply with good land governance. This is due to the fact that based on global experience, five key areas of land governance were identified which define good land governance, in an inclusive manner. These are:

> (i) laws and institutions recognize existing rights and allow users to exercise them at low cost, in line with their aspiration, and in ways that benefit society as a whole, and that policy is equitable, clear, derived in a participatory manner, and its implementation is monitored; (ii) land use planning and taxation are in place to avoid negative externalities, allow provision of services at low cost, and support effective decentralization; (iii) state land is unambiguously identified and managed efficiently to provide public goods; (iv) information on land ownership (spatial or textual) is accessible, comprehensive, current, and reliable; and (v) interested parties can access institutions with clear well-defined mandates to authoritatively resolve disputes.[9]

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7 Land (rural) administration can be understood as the processes of recording and disseminating information about pillars of land administration. These pillars include: Land tenure which determines who can use what resources for how long and under what conditions; land use which is the art and science of determining what use land is put into; land value which related to assessment of the value of land, the calculation and gathering of revenues through taxation, and; land development which emphasis on developing the land through land consolidation or land reallocation. See in general, United Nations Economic Commission for Europe (UNECE), Land Administration Guidelines: With Special Reference to Countries in Transition (United Nations, New York and Geneva, 1996).

8 UNECE, Land Administration in the UNECE Region, Development Trends and Main Principles, (UNECE, Geneva, 2005), p. 1.

9 Melissa Permezel and Petra Weber (eds.), *Tools to Support Transparency in Land Administration: Securing Land and Property Rights for All* (UN-Habitat, Nairobi, 2013), p. 7.

As a result, in recent years, good governance in land sector has been attracting the attention of many scholars and practitioners.[10] Moreover, there has also been increasing recognition of the importance of good land governance at the political level, for example, by the African Union whose Heads of State agreed in 2009 to a framework and guidelines for land policy in Africa which, among others, calls for the development of benchmarks against which to measure country performances.[11]

Cognizant of these facts the government of Ethiopia has also shown its commitment to address the pressing land policy and administration issues in both rural and urban areas.[12] It has embarked upon policy and institutional reforms since 1997 that have laid the ground for establishing and implementing a good land administration system.[13] This has also been followed by rural land registration and certification to ensure good land governance.

However, in Ethiopia particularly the institutions of land administration are blamed for inefficiency and corruption.[14] Corruption in the land sector in Ethiopia is

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10 Klaus Deininger *et al*, *The Land Governance Assessment Framework: Identifying and Monitoring Good Practice in the Land Sector* (The World Bank, Washington DC, 2012).

11 African Union Commission, Economic Commission for Africa and African Development Bank (AUC-ECA-AfDB) *Consortium, Framework and Guidelines on Land Policy in Africa Land Policy in Africa: A Framework to Strengthen Land Rights, Enhance Productivity and Secure Livelihoods* (AUC-ECA-AfDB Consortium, Addis Ababa, 2010), p. 4.

12 Tigistu Gebremeskel, 'Experience and Future Direction in Ethiopian Rural Land Administration (Paper Presented at the Annual World Bank Conference on Land and Poverty April, 2011 Washington D.C), p. 11, <http://www.siteresources.worldbank.org/ INTIE/ Resources/475495.../AbzaPres1.pdf> accessed 20 December 2017. Moreover, good land governance is key pillars of government development programme in the five-year new phase Growth and Transformation Plan (GTP2, 2015-2019) to accelerated growth and establish a spring board for economic structural transformation and thereby realizing the national vision of becoming a lower middle-income country by 2025.

13 This is the time when the first Federal Rural Land Administration and Use Proclamation No. 89 was promulgated in 1997, which is later on replaced by Proclamation No. 456/2005, to provide an umbrella framework for the regional states in enacting rural land administration laws.

14 *Supra* note 5, p. 86.

frequently reported in the media and on the Internet.[15] The less coordinated institutions are run by under qualified staff and under-financed bureaucracy, and hence, poor statistics are kept.[16] The government itself often acknowledges that there is poor administration in matters pertaining to land allocation, land administration, and land use. For instance, violent protests in rural areas in 2016 were triggered in many cases by poor governance in the land sector in which scant regard has been paid to existing holding rights and open consultative procedures with local people.[17] This, even more, shows good governance inland administration is also one of the central requirements for achieving overall good governance in society.[18] Cognizant of that, currently second level certification, which is meant to bring accurate, complete and updated land information and thereby to contribute to good land governance, is under way. In this regards, previous researchers have explored rural land certification mainly focusing on the process and effects of the first level registration and certification.[19] Yet, rural land certification was not investigated in light of good land governance. Furthermore, the second level registration and certification is untested so far in terms of its process, content and

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15 Janelle Plummer (ed.), *Diagnosing Corruption in Ethiopia: Perceptions, Realities, and the Way Forward for Key Sectors* (The World Bank, Washington DC, 2012), p. 300. The factors that have created fertile ground for corruption include not defining the spatial location and extent of registered holdings which reduces the ability to validate records and makes issuing forged documents easier. It resulted in state capture or the illegal conversion of state assets to private use where there are examples of corruption on a grand scale; or petty corruption or maladministration, including officials' solicitation (either directly or through middlemen) of illegal or informal payments in return for processing routine work or overlooking often ill-defined restrictions or requirements.

16 *Supra* note 5, p. 86.

17 Christopher Tanner and Tigistu Gebremeskel, 'A Programme for Improving Land Governance Transparency in Ethiopia' (Paper presented at the World Bank Conference on Land and Poverty - Washington DC, March 20-24, 2017) <https://www.conftool.com/landandpoverty2017/.../10-09-Tanner-793_paper.pdf> accessed on November 20, 2017.

18 Food and Agricultural Organization of UN (FAO), *Good Governance in Land Tenure and Administration* (FAO Land Tenure Series No. 9, Rome, 2007), p. 1.

19 See in general Klaus Deininger et al, *Rural Land Certification in Ethiopia: Process, Initial Impact and Implication for Other Countries* (World Bank, Washington D.C, 2007);Klaus Deininger et al, *Assessing the Certification Process of Ethiopia's Rural Lands*' (Colloque International "Les frontières de la question foncière- At the Frontier of Land Issues", Montpellier, 2006).

effects. Thus, it necessary to investigate rural land certification from the perspective of good land governance. Moreover, the second level rural land registration and certification, which is intended to solve the deficiencies of the first level certification, is worth critical investigation.

To that end, the researcher is guided by the generally accepted principle of good land governance which is called Land Governance Assessment Framework (hereinafter, LGAF).[20] This is due to its contemporariness as it was developed based on the recognition of the increasingly important role of land governance to help countries deal with the challenges of the 21st century in terms of climate change, urbanization, and management of increased demand for land in an integrated way that provides a basis for demonstrating progress over time. Besides, it was developed through the collaborations of World Bank (WB), FAO, United Nation Habitat (UN Habitat) and other partners which shows wider acceptance of the LGAF. And also, it was developed by institutions which have played main roles in good land governance. Furthermore, LGAF is inclusive of the principles of good governance. Accordingly, LGAF is proper mechanism to assess rural land registration and certification. This is due to the fact that, it allows to identify how arrangements in a given country or area compare to global good practice in key areas of good land governance which is identified as: How rights to land (at group or individual level) are defined, can be exchanged, and transformed; whether there are accessible and transparent institutions with clear mandate; whether land

[20] LGAF is a diagnostic tool to evaluate the legal framework, policies, and practices regarding land governance and to monitor improvement over time. It emerged from a collaborative process between the World Bank and its partners (IFPRI, FAO, IFAD, and UN Habitat). See in general, *Supra* note 10.

information systems provide sufficient, relevant, and up to date land data including land tenure, value, and use plan.[21]

In this paper, the researcher investigates rural land certification of the study area in light of these good land governance indicators considering both legal and practical aspects. In doing so, the challenges and opportunities of the first and the second levels registration and certification are elaborated. To attain these, the researcher used qualitative research method since it brings the researcher closer to the real world and thereby discloses the realities of rural land certification of the study area. Target groups that participated in the study are farmers, experts working on the rural land administration and use offices, and local administrators because they are the main players. To select the samples from the universe, purposive sampling, which is non-probability sampling, was used. Purposive sampling is used to get appropriate data from those who have experience and role with regard to the rural land certification process. Thus, the participants are selected by purposive sampling technique targeting farmers who get land holding certificates or contacted land administration officers for rural land matters, as well as the experts who work on rural land allocation, valuation, registration, and certification. The researcher conducted interviews and FGDs with the selected participants, side by side with personal observation, to know the reality of rural land certification. Besides, analysis of relevant land laws and literature reviews were used to describe good land governance, and legal and institutional frameworks focusing on rural land certification.

Accordingly, following this introductory section, section II dwells with legal and institutional frameworks on rural land registration and certification. Its focus is on evaluation of the rural land rights, and institutions registering rural land. Section III is about the investigation of the first and second levels registration and

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[21] *Supra* note 10, p. 2.

certification, and an assessment of whether land information systems provide sufficient, affordable, sustainable and up to date land information. The comparison of two levels registration and certification is also elaborated to scrutinize what the second level certification added or missed compared to the first level certification. Finally, the last section wraps up the paper with conclusions and possible recommendations.

2. Legal and Institutional Framework on Rural Land Certification

2.1. Legal Framework on Rural Land Certification: Rural Land Laws

Land administration in general and rural land certification in particular is built on policies and laws, and further detailed in regulations and guidelines.[22] In the same way, the current rural land legal framework of Ethiopia in general and West Arsi Zone of ONRS in particular comprises FDRE Constitution, Federal Rural Land Administration and Land Use Proclamation No. 456/2005, Expropriation of Landholdings for Public Purposes, Payments of Compensation and Resettlement Proclamation No. 1161/2019 (which currently has replaced Proclamation No. 455/2005),ONRS Rural Land Use and Administration Proclamation No. 130 /2007, ONRS Rural Land Administration and Use Regulation No.151/2012 and directives. However, there is no national single document that sets out Ethiopia's current land policy. Instead, the FDRE Constitution draws a broad framework for land policy in the country which enshrines the concept of public land ownership and the inalienability of landholdings. The FDRE Constitution asserts public ownership of land and absence of private property rights in land in stating that:

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[22] Swedish National Land Survey, *Land administration – Why* (Sida, Stockholm, 2008) <http://www.sida.se/publications> accessed on March 14, 2018.

> The right to ownership of rural and urban land, as well as natural resources, is exclusively vested in the state and in the peoples of Ethiopia. Land is an inalienable common property of the nations, nationalities and peoples of Ethiopia and shall not be subject to sale or to other means of exchange.[23]

Thus land (both rural and urban land) in Ethiopia is a constitutional issue. The constitutional provision asserts public ownership of land and prohibits private ownership of land, as the result of which individuals can only be granted usufruct/holding rights.[24] Only fixed improvements on land can be considered to constitute private properties and can be sold, exchanged, or used as collateral.[25]

The legal recognition of land rights, which is reinforced by certification, is a key element of good land governance. This is due to the fact that failure to recognize and certify land rights will create tenure insecurity, curb investments in land, increase potential conflict, and divert resources that can be more productively deployed elsewhere to the defense of property claims.[26] Cognizant of that, there are different land rights over three types of land holdings which are recognized in rural Ethiopia in general and in West Arsi in particular. These types of land holdings are

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23 Art. 40 (3) of FDRE Constitution.

24 It can be stated that FDRE Constitution recognizes usufruct or holding rights for individuals over rural land because: i) the FDRE Constitution under Article 40(2) effectively excludes land from the definition of private property since the land is not produced by labor, creativity or capital of individual or organization; ii) the same constitution under its Article 40(4&5) entitles, Ethiopian peasants and pastoralists, to obtain rural land for free and gives them protection against eviction from it; iii) those who acquired rural land are prohibited to sale or subject the acquired land to other means of exchange as per Article 40(3). Thus, the rights of individuals over rural land are full ownership minus the rights to dispose which can be better called usufructuary or holding rights. The argument forwarded by the ruling party for the continuation of land as public or state property rests mainly on two policy objectives: social equity and tenure security. That is to ensure equality of citizens in using the land by allowing free access to agricultural land, and to protect the peasants against market forces which would lead to massive eviction or migration of the farming population, as poor farmers are forced to sell their plots to unscrupulous urban speculators.

25 Art. 40 (7) of FDRE Constitution.

26 *Supra* note 10, p. 28.

categorized in terms of the holder of the land. Each will be discussed in detail below.

2.1.1. Private Land Holding

Private land holding can be defined as the holding of a peasant or farmer or semi-pastoralist or pastoralist or other bodies who are entitled to use rural land by the law, the minimum size of which is specified and usufruct rights are extended including the right of renting and inheriting the land within the limits of the law.[27] It is clear that private land plots can be provided to peasants in the highlands for farming and housing. Yet, it is not clear about the private plots to be given to pastoralists. But the assumption is that the plots may be those which the pastoralists will use for settlement or housing, rather than for grazing, which is communal in nature.[28]

Both federal and regional rural land administration and use legal frameworks clearly state that every citizen from 18 years of age whose main residence is in rural areas and who wants to make a living from agriculture should be accorded free access to rural land and permitted to exercise usufruct or holding rights for an indefinite period.[29] This private land holding can be acquired by government grant, donation, or inheritance.[30] Land grant by government may be made from unoccupied government lands, communal lands, land reserve (land left without

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27 Federal Rural Land Administration and Land Use Proclamation, 2005, Art. 2 (4) cum 2 (11), Proc. No. 456/2005, Fed. Neg. Gaz., Year, 11, No.44.

28 Daniel Weldegebriel, 'Land Rights and Expropriation in Ethiopia,' (PhD Thesis, Royal Institute of Technology, Stockholm, 2013), p. 34.

29 *Supra* note 27, Art. 5 (1); *infra* note 30, Art. 5(1).

30 ONRS Rural Land Use and Administration Proclamation, 2007, Art. 5 (5), Proc. No. 130 /2007, *Megeleta Oromia*, Year 15, No.12.

heirs and claimed back by government), and land claimed back by the state because the holder has left the area permanently or has neglected the land.[31]

The land holder has land holding rights which includes the right to use rural land for purpose of agriculture and natural resource development, lease and bequeath to members of his family or other lawful heirs, and the right to acquire property produced on his land thereon by his labor or capital and to sale, exchange and bequeath same.[32] Thus, peasant landholders have the right to use the land, lease it out temporarily, and transfer it to their children but cannot sell it permanently or mortgage it. Moreover, the FDRE Constitution, regarding property rights, states that every Ethiopian shall have the full right to the immovable property he builds and to the permanent improvements he brings about on the land by his labor or capital which include the right to alienate, to bequeath and where the right of use expires, to remove his property, transfer his title or claim compensation for it.[33] However, the ONRS rural land use and administration proclamation, in principle, prohibits sell of fixed assets (which is private property) such as coffee, mango, avocado, papaya, and orange.[34] However, the fixed assets produced on one's holding may be sold exceptionally in the situation where; i) the fixed asset to be sold should not exceed more than half of the total holding of the holder, and ii) the sale agreement of the product should not extend over a period of three years.[35] The rationale behind this restriction is to minimize the insecurity felt by peasant holders in coffee growing rural areas of the region, particularly, the peasant landholders in coffee and *khat-growing* areas of the region have been evicted from their holdings as a result of sale of the products of coffee and *khat* to unscrupulous urban wealthy

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31 Daniel Weldegebriel, 'Robust Land Rights for Sustainable Development in Ethiopia' *Journal of Land Administration in Eastern Africa*, Vol. 2, Issue 1, Jan 2014, p. 157.

32 *Supra* note 27, Art. 2 (4); and *supra* note 30, Art. 2 (7).

33 Art. 40 (7) of FDRE Constitution

34 *Supra* note 30, Art. 6 (2).

35 *Ibid*, Art. 6 (3).

individuals.[36] But limiting transfer of private property on held land, to protect farmers from unscrupulous urban wealthy individuals, goes against the constitution. The constitution provides full rights to transfer immovable property that the landholder builds or brings on the land by his labor or capital. Furthermore, the constitution does not provide limitation on this ground.

Concerning transfer of holding rights, both federal and regional land administration proclamations give rights to the rural landholders to inherit, bequeath and lease. However, there are restrictions on the modalities and period of land transfers. Transferring land use rights through inheritance or donation of land is restricted as it is only family members whose livelihood depends on the income earned from the land in question or with no other means of income, or landless children of the holder that are entitled to acquire rural land for use.[37] In case of lease, although the regional land law permits leasing of rural land, there are serious restrictions limiting the benefits of leasing. First, landholders cannot rent 100 percent of their land. They can rent only up to half of their holdings without reducing below 0.5 hectare for annual crops, and 0.25 hectares for perennial crops.[38] Though Article 5 (12) of ONRS rural land administration and use regulation No.151/2012 allows the right to rent out holdings fully, or give to share cropping or use by hiring labor, the right is limited to persons who cannot cultivate because of retirement, disability or disease. It also puts a limit on the number of years that smallholders can rent out their land stating that 'duration of the agreement shall not be more than three years

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36 Interview with Mr. Aman Muda, Oromia Bureau of Agriculture and Rural Development, Head of Land Use and Administration Department, June 22, 2011 as cited by Girma Kassa, 'Issues of Expropriation: The Law and the Practice in Oromia' (LLM Thesis, Addis Ababa University School of Law, 2011), p. 28.

37 *Supra* note 30, Art. 9 (5).

38 *Ibid*, a cumulative reading of Art. 10 (1) and (7).

for those who apply traditional farming, and fifteen years for mechanized farming'.[39]

2.1.2. Communal Holding

Communal holding is defined by Federal Rural Land Administration and Land Use Proclamation as a rural land, which is given by the government to local residents for common use.[40] This shows the land under the holding of the community is bestowed from the government for common use. The definition of communal land holding under ONRS rural land use and administration proclamation does not require bestowing of the land by government for the community. It defines communal holding as rural land which the local community commonly uses for grazing, woodlots and other social purposes.[41] This indicates that in the Region the land which is commonly used by local community for grazing, woodlots and other social purposes though the government did not give it for the community can be considered as communal holding.

The list of purposes of communal holding is an illustrative one and what are given are only examples. The government may allocate additional land as communal ones, if the local community needs it for some social or economic activities. Thus, land necessary for religious ceremonies, cultural festivities, or social gatherings may be permanently allocated to the village community in common. Besides, grazing and forestland, one may also add irrigation systems (although the irrigable land may be private holding), water wells (especially in pastoralist areas), small rivers, and hills to the list of communal lands.[42]

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39 *Ibid*, Art. 10 (2).
40 *Supra* note 27, Art. 2 (12).
41 *Supra* note 30, Art. 2(5).
42 *Supra* note 28, p. 37.

A communal land by definition allows access of use to everybody who is a residing member of the community in question.[43] It is important that an individual be a recognized member of the community in order for him or her to benefit from the communal land. Communal holding is designated usually from the customary use rights of the community, yet it is subject to conversion to private holding at the prerogative of the state.[44] This may affect the community holding rights unless accurate and updated data is maintained through certification.

2.1.3. State Holding

Federal and ONRS rural land administration and land use proclamations similarly define state holding as land demarcated and those lands to be demarcated in the future which include forest lands, wildlife protected areas, state farms, mining lands, lakes, and rivers.[45] As Daniel aptly puts it, the definition is not only very broad but also raises some concern:

> To begin with, if a certain piece of land is not private holding or communal, it automatically falls under the domain of the state holding because of the phrase "…any other land" included in the wordings of the law. Second, what are the rights of the people, for instance, on the lake owned by the government? Can they exercise fishing rights as they can exercise grazing rights on communal land? These questions can be raised with respect to forestlands and rivers as well. These lands are simply controlled by the state, and use rights are continuously regulated without making it a private holding or communal holding or in some cases, the resources on these lands are exploited by the state itself. The fact on the ground informs one

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43 *Supra* note 5, p. 38.
44 *Supra* note 27, Art. 5 (3).
45 *Ibid*, Art. 2 (13); *supr*a note 30, Art. 2 (4).

> otherwise; especially as far as lakes, rivers, and forests are concerned, it is more of an open resource. Such open access is disaster for the environment and the resource.[46]

Furthermore, the law does not provide the rights the government may have over its holding, the means for transfer, and the requirements for transfer.

Most importantly, legal recognition of land rights may not be enough but need to be backed by the ability to defend such rights effectively and at low cost against competing claims from the state or from other individuals. This needs the registration and certification of recognized land rights so that land information can be kept and the land right can be represented by the document.

To that end, the federal rural land administration and land use proclamation provides among others that farmers have a perpetual use right on their agricultural holdings, and that this right will be strengthened by issuing certificates and keeping registers.[47] ONRS rural land use and administration proclamation also provides for the compulsory registration system of all types of rural land holdings which must include the size of the land, land use, and fertility status of the land being measured.[48] Each holding must be conveyed with geo-referenced boundaries and the Bureau (currently, ONRS Land Administration and Use Bureau) is required to prepare maps showing the size of the land and its boundaries.[49] Besides, the landholding data must include the name and identity of the current holder, the boundaries of his holding, the status and potentials of the land and rights and obligation of the holder.[50] Article 15 (4) provides that the registration of holding rights is followed by land titling and certification whereby each holder is granted

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46 *Supra* note 5, p. 38.
47 *Supra* note 27, Arts. 6 (3&5) cum 7 (1).
48 *Supra* note 30, Art. 15 (1).
49 *Ibid*, Art. 15 (2).
50 *Ibid*, Art. 15 (3).

with a holding certificate describing the size of his holding, use and coverage, fertility, boundary and his rights and obligations. Moreover, it is provided that any rural landholder is entitled to a lifetime certificate of holding.[51] Therefore, substantiating lifelong use rights for peasant holders with certification will enable them to have secure legal rights over their holdings.

In addition to requiring for recording rural land data, the law requires updating of land data which is in line with good land governance. The law, clearly, provides that whenever the use right of rural land is changed, the holding certificate shall be changed to the new acquiring body accordingly.[52] Besides, it is provided that any rural landholder shall update and change his holding certificate in accordance with the law when he transfers the use right.[53] Nevertheless, the law has gaps in this regard since procedures for updating are not spelt out well, nor are the legal consequences of not doing it.

2.2. Institutional Framework: Rural Land Certification Organs

Besides the merits of legal framework, good land governance provides that the institutions that administer land rights need to be backed by law, be legitimate, accessible, accountable, follow clearly defined procedures, make authoritative

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51 *Ibid*, Art. 15 (6).

52 *Ibid*, Art. 15 (12). Besides, Article 15 (9) of ONRS Rural Land Administration and Use Regulation No.151/2012 provides that the transfer of rural land use right by inheritance or gift to another shall be registered by the Office and certified by the name of the person to whom the right to use of land is transferred.

53 *Supra* note 30, Art.16 (3).

decisions and provide information at low cost so as to not discriminate against the poor.[54]

Cognizant of that, Ethiopia has decentralized administration of land, which includes rural land certification, to the regional governments while the formulation of broad land policy still rests with the federal government. The overall mandate to enact laws for the utilization and conservation of land and other natural resources in Ethiopia is given to the federal government.[55] Simultaneously, the responsibility to administer land and other natural resources is given to regional states within their jurisdictions.[56] As a result, the mandate of the federal government is enacting laws, and supporting and coordinating regional states in the rural land administration process. For that, currently at the federal level, rural land matters are handled by the Ministry of Agriculture. Its nomenclature has been changing, for instance, it was named as Ministry of Natural Resources Development and Environmental Protection (1993 to 1995); Ministry of Agriculture (1995 to 2005); Ministry of Agriculture and Rural Development (2005 to 2010); Ministry of Agriculture (2010 to 2015); Ministry of Agriculture and Natural resources (2015 to 2018); Ministry of Agriculture and Livestock Resources (April 2018); and

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54 Ethiopia Land Policy and Administration Assessment, USAID Contract No. LAG- 00-98-00031-00, Task Order No. 4, Broadening Access and Strengthening Input Market Systems (Final Report with Appendices, May 2004), p. 3.

55 Art. 51 (5) of FDRE Constitution.

56 Art. 52(2) (d) of FDRE Constitution clearly recognizes the power of regional governments to administer land in accordance with Federal laws. The power to administer impliedly indicates making of laws to facilitate endeavors of land administration and to enact laws in the domain left by federal land laws based on particular local conditions. Besides, Article 17 of Federal Rural Land Proclamation 456/2005 clearly reveals the existence of power of regional states to "enact rural land administration and land use law" which is consistent with it (Proc. 456/2005) in order to implement the land administration mandate. Accordingly, all regional states, namely Oromia, Tigray, Amhara, Afar, Gambella, Somali, Benishangul-Gumuz and SNNPRS have adopted their own rural land administration and use proclamations in order to implement the federal rural land proclamations. It is also to be noted that the Afar and Somali regional states enacted, recently, laws that cater to the needs of the pastoral society in reality to the situation of their regions.

currently Ministry of Agriculture.[57] The Ministry is empowered to follow up and provide support in the establishment of a system involving rural land administration and use, and organize a national database.[58] In the past, it did not have a specialized unit dealing with rural land administration matters. Rather there was rural land administration and use core process under natural resource sector which was under the Ministry. But as of 2010, a Directorate for Rural Land Administration and Use was established under the Ministry. The key responsibility of this directorate is to implement the rural land administration and use proclamation by providing professional support and coordinating competent authorities. The directorate links the work at the federal level with that at the regional level and provides inputs for policymaking to advance the harmonization of land administration.

Thus, administering rural land which includes land registration and certification, land allocation and transfer for large-scale agricultural investments is clearly only the power of regional states though federal government coordinates and supports regional states in the administration process. However, in 2009, the Federal Ministry of Agriculture and Rural Development (now Ministry of Agriculture) has established an Agricultural Investment Support Directorate to administer the allocation of rural land for investment purposes above 5000 hectares. Although the constitutionality of power of the Directorate is at issue,[59] it has become operational,

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[57] See, the Definition of Powers and Duties of the Central and Regional Executive Organs of the Transitional Government of Ethiopia Proclamation No. 41/1993, and the Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 4/1995, 471/2005, 691/2010, 916/2015, 1097/2018.

[58] Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation, 2018, Art. 18 (1) (a)), Proc. No. 1097/2018, *Fed. Neg. Gaz.*, Year 25, No. 8.

[59] Art. 52(2) (d) of the FDRE Constitution vests the power to administer land on regional government which includes the allocation of rural land for whatever purposes regardless of the size of the land to be allocated. Moreover, though there is constitutional backing for the federal

and exercises this mandate on the basis of the delegation by the Regional States and has already demarcated large tracts of rural land for such purposes.

Concerning rural land administration of regions, each regional state has its own separate rural land administering body. ONRS which encompassed of West Arsi Zone is not an exception to this. Thus, rural land administration matters such as land registration and certification of holding rights, allocation of land, land valuation, determining land use, dispute resolution and other rural land matters in ONRS are currently handled by rural land administration and use organs. These rural land administrations and use organs are in the hierarchical arrangement within the regions, from the bureau at the top to the lowest representation of the land administration authority who are elected committees at the bottom. The administration is organized in such a way that the regional bureau is at the top echelon accountable to the office of the president of the region; under the regional bureau there are the zonal offices which coordinate the local *woreda* (district)-level offices. Thus, there are land administration units at different levels of government i.e. *Kebele*, *woreda*, zone, and regional level. Accordingly, the specific rural land administration organs of West Arsi Zone are investigated, here in under, towards accessibility and capability to accomplish and maintain rural land registration and certification.

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government to delegate its power to regional government, the upward delegation (the delegation of regional mandate to federal government) has no constitutional backing. In face of this, the justification of federal government is that it is done via delegation since the regional government lacks such administrative capacity to deal with large scale land lease specifically, by raising the example of, the western region of Gambella which had transferred 100,000 hectares of land to the Indian company Karuturi for less than two US dollars per a hectare and for exaggerated period of 70 years. Yet, this cannot entitle federal government to resort to upward delegation since such problems can be solved, inter alia, by assisting in building of the capacity of regional government land administration office. Thus, the current upward delegation by regional states of their mandates to administer land to the federal government has no constitutional basis and plausible justification.

2.2.1. Regional Level: ONRS Rural Land Administration and Use Bureau

At regional level, the organ that is established for land administration is called ONRS Rural Land Administration and Use Bureau. Previously, it was Bureau of Land and Environmental Protection which was established by Proclamation No. 147/2009 with the aim of creating a single executive organ to administer and regulate urban and rural land, and to prepare land-use plans for the region.[60] There were four basic core work processes within the Bureau, urban land administration, rural land administration, land use, and environmental protection. Specifically, the rural land administration comprised of four major tasks, namely land registration, surveying, valuation and land dispute resolution, and land use control. Similar arrangements were extended to the Zone and *Woreda* levels.

Then after, it was organized as the ONRS Rural Land and Environmental Protection Bureau by separating urban land matters. Furthermore, currently environmental matters are also separated and are under an independent office which is called Environmental, Forest and Climate Change Authority of ONRS.

Thus, currently, the power to administer rural land in ONRS is vested in ONRS Rural Land Administration and Use Bureau which is established by the Definition of Powers and Duties of the Executive Organs of ONRS proclamation No.199/2016. The duty of the Bureau is coordinating and supporting zonal rural land administration and use offices. Currently, ONRS has 20 Zones, and thus

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[60] ONRS Bureau of Land and Environmental Protection Establishment Proclamation, 2009, Preamble (para (I)), Proc. No. 147/2009, Megeleta Oromia, Year 17, No. 5. The Bureau was made accountable to the President of the ONRS. The Bureau had been given power to establish branch offices at the Zone, Woredas and towns of the region. Interestingly enough, the Bureau had the power to administer both rural and urban land, unlike the case in the other regions in the country.

ONRS Rural Land Administration and Use Bureau is entrusted with the duty to coordinate and support 20 Zonal rural land administrations and use offices.

2.2.2. Zonal Level: West Arsi Zone Rural Land Administration and Use Office

At the Zonal level, West Arsi Zone Rural Land Administration and Use Office is operating on the study area. The main tasks of the Office are to coordinate districts under its jurisdiction, provide training for the district staffs, consolidate data from districts, and report to the regional bureau. Accordingly, it coordinates 13 *Woredas* of the Zone, and also reports monthly to the regional rural land administration and use bureau.

The Office (West Arsi Zone Rural Land Administration and Use Office) has four teams.[61] These are:(1) Cadastral and registration team which is working on registration and certification of rural land; (2) Investment team which has the mandate to prepare land for investment, and then transfer it to investment office; (3) Land use team which is supposed to work on land use plan development and follow up its implementation once the plan has been developed fully. This is ineffective currently due to the absence of rural land use master plan which should be followed for compliance; and (4) the fourth is occupation, settlement and dispute resolution on rural land team which has been handling the following matters:

> Settling landless peasants to other places where free land is available. For example, in 2007 about 247 households who came from east and west Hararge zone were settled in Nansabo Woreda with the coordination of the team. Currently, the team is facilitating settlement of Oromo people who were evicted from Somalia regional state. It has also the duty to ascertain

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[61] Interview with Mr. Usman Kebata, Deputy Head of West Arsi Zone Rural Land Administration and Use Office (Shashamene, 15 April 2018).

> illegally occupied land and return it back to the rightful holder. For instance, in case the adjacent landholders encroached to state holding and communal holding, the Office through this team is mandated to ascertain whether there is encroachment. Besides, it ascertains the true landholder in case of the dispute over the land. This is the case when dispute arises over rural land among landholders concerning boundary, the holding title, or other cases.[62]

The Office's mandates need resources such as qualified human resources and material resources. In these regards, the head of West Arsi Zone Rural Land Administration and Use Office states that:

> The office has 31 posts. But currently, it is only 17 posts (including head of the office, experts, and secretary) which are filled by the necessary manpower. Regarding the qualification of employees, it is possible to say they are qualified staff for their posts. For instance, the experts are composed of employees who have educational background related to law, engineering, surveying, economics, IT and others. However, there is noon job training to update their knowledge and skills. Besides, there are no incentives for them though sometimes-educational opportunity has been given for some, for instance, masters level education opportunity was given for two persons so far.[63]

These factors may affect the capacity of the institution to perform the entrusted duties. Thus, the existing posts should be filled by qualified personnel, and the

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62 Interview with Mr. Petiros Tibeso, Expert on settlement, and disagreement over rural land at West Arsi Zone Rural Land Administration and Use Office (Shashamene, 19 March 2018).

63 Interview with Mr. Takalign Gemechu, Head of West Arsi Zone Rural Land Administration and Use Office (Shashamene, 15 April 2018).

skills of employees should be updated through different trainings and educational opportunities.

Concerning material resources, the researcher has observed that the Office has three rooms, chairs for all employees, and computer facilities. Confirming that the head of the Office states that 'for each employee a computer is given be it desktop or laptop. Moreover, the Office has additional budget for rural land registration and certification besides normal budget of the Office'.[64]

2.2.3. *Woreda* Level: *Woreda* Rural Land Administration and Use Office

At *woreda* level, *Woreda* Rural Land Administration and Use Office is established to carry out land administration issues. Its arrangement is the same with zonal rural land administration and use office. Accordingly, currently, 13 *woreda* land administration offices are operating land administration activities in the West *Arsi* Zone.

It mainly carries out registration of rural land and issues certificates. The registration and certification can be at the time of initial registration and/or update. At time of initial registration be it at first level or second level registration, the Office registers land information and thereby issue holding certificate. After initial registration is made the changes in land rights, land parcels, and landholdings may occur due to inheritance, divorce, rent, gift, exchange of parcels, parcel sub-division and parcel amalgamation. These require updating of initial registration to have accurate land data. Thus, at the time of update, the Office registers the fact of update and issue certificate for new land holder (save the case of update due to rent by which the Office registers rent contract without issuance of the holding certificate for new holder or lessee). Moreover, the Office issues new certificate in

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[64] Ibid.

case the landholder has lost the holding certificate. It also reports to zone rural land administration and use office monthly.

Carrying out such functions needs sufficient human and material resources. Thus, the qualification, number, incentives, and training of staff, and office facilities to provide effective and efficient service are considered. In this regard, the interview made with the expert of Shashamene *woreda* rural land administration and use office indicates that:

> The Office has 15 staff in the office (there are 35 staff including field workers). Yet, their qualifications do not match with what they are doing. Besides, there are no trainings and educational opportunities. Computers are not available for all employees. The Office has only one room which is also shared with the woreda environmental protection, forest and climate change office.[65]

The researcher has also observed that the Office has only one room for the Office and using it with *woreda* environmental protection, forest and climate change office. This affects quality of services. The same is true for Arsi Nagelle *woreda* rural land administration and use Office. The focused group discussion with the experts of Arsi Nagelle *woreda* rural land administration and use office revealed the following facts:[66] There are no enough facilities such as computers for the staff.

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[65] Interview with Mr. Tusa Tufa, Expert of land registration and certification at Shashamene *Woreda* Rural Land Administration and Land Use Office (Shashemane, 28 March 2018).

[66] Focused group discussion with seven experts at Arsi Nagelle *Woreda* Rural Land Administration and Use Office (Arsi Nagelle, 15 March 2018). It encompasses experts of the Office, and field workers (data collectors for the second level registration such as registrar and surveyors). Some of them were worked as *Kebele* land administration committee, and also currently carrying out second level registration. Currently, they work on land administration and use. Their (except field workers) work experiences at the Office is from 5 years to 13 ½ years.

For instance, at the time of the second level registration and certification in the *Woreda*, the surveyors shall wait to use a computer as one computer is given for two or three surveyors. And also concerning the staff, the *Woreda* rural land administration and use office has only ten staff including experts, secretary, and head of the office. Besides, there is a mismatch between qualifications with the work done. Furthermore, nothing has been done so far to update the skills of the employees through training and educational opportunity. For instance, there are employees who have been at the office for eleven, thirteen, and fourteen years without educational opportunities.

Moreover, there are no incentives for employees. Even more, there are problems related to expenses of fieldwork. Previously, the per diem for fieldwork was fifty birr. But, currently, it is prohibited and is covered from the pockets of employees. This has resulted in making employees reluctant to go for fieldwork. As a result, the clients (farmers), who seek services which require employees of the office to travel to the site of disputed land, are paying per diem for such employees. This payment is institutionalized and the amount of payment depends on negotiation between the assigned employee and the clients though it has no legal ground. This is also what was observed by the researcher during field data collection.

This shows the existence of inadequate institution for rural land administration and use at *Woreda* level. The problems mainly relate to lack of qualified human resource, material resource, and incentive for the employees. Furthermore, requiring the client farmers to pay per diem for employees will affect the decision of such employees, open way for corruption, and exclude poor farmers who cannot pay per diem for employees to get services. This will also affect accomplishment of certification and sustainment of achievements of certifications unless the office fulfills its material and human resource, and serve the communities equitably.

2.2.4. *Kebele* Level: *Kebele* Land Administration and Use Committee

Kebele is the place where actual work relating to the rural land certification is done. For that *Kebele* Land Administration and Use Committee is established by regulation no.151/2012.[67] The *Kebele* Rural Land Administration and Use Committee consists of 5 members and its accountability is to the *Kebele* administration.[68] Members of the Committee shall be elected by residents of the *Kebele* for 4 years of service terms, and also the Committee members may be re-elected for second term but cannot be elected for three consecutive terms.[69]

The same regulation provides mandates of *Kebele* Rural Land Administration and Use Committee as follows:[70]

- ✓ It gives awareness for people of the *Kebele* regarding registration, undertaking of cadastral work of land and land holding certificate, and regarding solution of conflicts and disputes on boundaries and holdings of the land;
- ✓ It performs registration and surveying of land based on directive issued by the Bureau.

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67 ONRS Rural Land Administration and Use Regulation, 2012, Art. 29, Reg. No.151/2012, *Megelata Oromia*, Year 17, No.151.

68 *Ibid*, Art. 29 (1) and (2). In this regard, the same is affirmed by the responses of the interview conducted with *kebele* land administration and use committees at Ararso *Kebele* of Kokkosa *Woreda* (Ararso, 5 March 2018). They also state that there is no payment for their work which is discouraging. This is also affirmed the responses of Mr., Takalign Gemechu, see *supra* note, 63.

69 When the elected Committee member has committed fault or failed to fulfill his/her responsibilities shall be terminated before reaching the four years' time and replaced by another person. *Supra* note 67, Art. 29 (4) (5) & (6).

70 *Supra* note 67, Art. 30.

- ✓ It keeps measured and registered data of land, cause land holder to get land holding certificate up on confirmation by the *Kebele* Administration and sends it to the *woreda* rural land administration and use office; and
- ✓ It screens request of transfer of land use right through gift as to its legality and then transfer to *Kebele* administration and if endorsed by *Kebele* administration, it will be sent to *woreda* rural land administration and use office).

Currently, there are 324 *Kebele* Rural Land Administration and Use Committees performing the above mentioned functions in West *Arsi* Zone. This shows high decentralization of rural land administration and thereby ensuring accessibility of service which is line with good land governance parameters. However, there are problem relating to skills of staff and lack of incentives to the employees as confirmed by the *Kebele* land administration and use committees, and by head of Zonal rural land administration and use office.

3. Rural Land Registration and Certification

Registration and certification of rural land rights, and thereby keeping up to date and complete rural land information are among the main indicators of good land governance. Land information includes information on what land (spatially), where the land is, size of the land, boundaries, what land rights exist on it, who accessed it, what it is used for or what it can be used for, and thus recorded in cadastres, land registers or tax rolls.[71] Such information is fundamental to effective land administration, and thus has to be registered and represented in some way as they do not exist in a physical form. Moreover, it is much of importance to ensure the quality of data in the registration system which can be assessed in terms of

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[71] *Supra* note 22, p. 4. See also Clarissa Augustinus *et al*, 'Pro Poor Land Management: Integrating Slums into City Planning Approaches' (UN-HABITAT, Nairobi, 2004), p. 15. Cadastre refers a type of map or diagram (or spatial representation) of where plots are in the country. It can be linked to registered land records. Registration system is the way in which information about rights on pieces of land is recorded, and kept as legal evidence.

accuracy (for example, land parcel area measurements), up-to-datedness (that is, whether all transactions subsequent to first level registration have been registered), and completeness(whether all legal holders are registered). This facilitates easy and predictable enforcement of claims on land, and facilitates land market allowing land to move towards its highest and best use. Moreover, knowing who owns or uses what land is also important for ensuring sustainable use. Making information public and freely accessible through a computerized and transparent land administration system also hampers corruption by making it easier to detect and expose, and thereby enhances good land governance.[72]

Cognizant of that, as elaborated in the preceding part, the necessity to establish an information database that enables to identify the size, direction and use rights of the different types of landholdings in the country such as individual, communal and states holdings is recognized in Ethiopia.[73] For that the law provides that sizes of rural lands under the holdings of private persons, communities, governmental and non-governmental organizations shall be measured as appropriate using cultural and modern measurement equipment's; their land use and level of fertility shall be registered as well in the data base center by the competent authorities established at all levels.[74]

Accordingly, the Ethiopian government as whole has been implementing land registration since the late 1990s in collaboration with some international donors, most notably the United States Agency for International Development (USAID), the World Bank and the United Kingdom Department for International

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72 *Supra* note 22, p. 5.
73 *Supra* note 27, Preamble and Art. 6.
74 *Ibid*, Art. 6 (1); *supra* note 30, Art. 15 (1).

Development.[75] Implementation of land registration and issuing holding certificate is also under way in West Arsi Zone of ONRS. The registration has two phases, i.e., 1st and 2nd level registration and certification. The parts that follow discusses, both 1st and 2nd registration and certification issues such as process for the registration, extent of registered land and issued certificate with incurred cost. Besides, how data are kept, accessed and updated are also investigated. Moreover, the comparison between 1st and 2nd registration and certification is made to scrutinize, and also what 2nd level certification added or missed compared to the 1st level certification is analyzed.

3.1. The First Level Registration and Certification

The 1st level registration and certification shows measuring rural land through traditional means and then issuing certificate.[76] It was carried out in all *woredas* of West *Arsi* Zone rural land from 2004 to 2015.[77] The data obtained from West *Arsi* Zone Rural Land Administration and Use Office shows that at the end of 2015 the total registered land is 545,258.1 hectares out of the expected 636,828.936 hectares. Out of this private holding is 512,335.6 hectares which is registered for 268, 394 households and thereby 1st level certificates were issued for them.

And also 14,849.94 hectares land was registered as communal holding[78] out of the expected 48,222.61 hectares which is below the expected sizes. Besides**,** 18,072.57 hectares land was registered and certificates were issued for governmental and non-

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75 David Chinigo, 'The Politics of Land Registration in Ethiopia: Territorializing State Power in the Rural Milieu' *Review of African Political Economy* Volume 42, 2015, p. 11. <http://dx.doi.org/10.1080/03056244.2014.928613> last accessed on September 13, 2017.

76 *Supra* note 67, Art. 2 (18).

77 Interview with Mr. Mohammad Amiin, Expert on Cadastral and Registration at West Arsi Zone Rural Land Administration and Land Use Office, (Shashamene, 19 March 2018).

78 It is registered by naming the specific name of that communal land and the holding certificate is kept with *Kebele* administrator on behalf of the community. In this regard, law also provides that the certificate of common holding shall be kept with the representatives of the users or *Kebele* administration. *Supra* note 67, Art. 15(8).

governmental organizations (which include religious organizations such as church, and mosques). Regrettably, state holding was not considered during the registration and certification process.

According to the responses of experts,[79] the registration has the following processes: The process of 1st level registration and certification was started by creating awareness to peasants at large. The information was given for *Woreda* and *Kebele* administration and the farmers at large (directly from the region or through trained *woreda* staff). Then *Kebele* land administration and use committees which comprised five persons were elected by each *Kebele* community at the lowest level of local government. Although attempt was made to include female members as members of the committees, because of the culture and unwillingness of the females, more than 95 percent of members of the committee were males in West *Arsi* Zone. Then training was given for the committee members in selected place by regional, and the remaining by *woreda* staff, and at special training centers and those trained then train the rest of the committee. These members of committees get training to undertake this endeavor, but do not get paid for their time.

That, *Kebele* land administration and use committees were the main actors in data collection for the registration and issuance of the certificates. They carried out demarcation of individual plots (boundaries fixed in terrain) by using traditional means such as robe or some times by simple eyesight in presence of landholder, and then filling it (all plots) on the first form (about boundary of land). Then second form, which shows about the holder, was filled by the committee. These both filled forms were transferred to *woreda* up on approval of *Kebele*

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[79] *Supra* note 77.During the focused group discussion, experts also affirmed the same, *supra* note 66. These whole processes of 1st level registration and certification were also affirmed by previous research. See in general, *infra* note 83.

administration. The *woreda* then filled all the collected information on the file (book of registry) which is kept at *woreda*. Thus, in this 1st level registration system the information that shows who have what rights in which parcels of land are recorded in the book of registry which is kept at the *woreda* office.

After the book of registry was filled, holding certificates were issued for landholders. Green card (holding certificate) which is prepared by regional bureau is distributed to zones and then to *woredas*. This green card is filled by the *woreda* and then given to land holder. Regarding farmers whose land holding is below minimum holding size, i.e. 0.5 hectares, their name is registered and they are given paper like receipt. But if they have scattered land combining of which makes it more than minimum holding size, they are given normal holding certificate by registering all plots.[80]

The issued holding certificate is evidence of rights the holder has over the parcels of land. The certificate is a green covered booklet. The contents of these books include special number of book, name of the holder with his/her photo, name of wife/husband, size of the land in terms of hectare, the modality through which that land acquired, name/s or identifications of holders of the surrounding plot, and the rights and duties of holder by referring to land laws.

The process and the service is accessible to peasants particularly in terms of cost as the peasants required to pay only 5 Birr (at tax collecting office) to get holding certificate.[81] Moreover, it was carried out in a decentralized, participatory, equitable, and transparent manner building on an elected *Kebele* Land Administration and Use Committee with broad geographic participation which is in line with good land governance.

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80 Interview with Mr. Tafara Wondimu, Expert of land registration and certification at West Arsi Zone Rural Land Administration and Land Use Office (Shashemane, 19 March 2018).

81 *Supra* note 66.

Despite the fact that the first level registration and certification was participatory, cost effective and was already covered almost all private land holding of 13 *woreda* of West *Arsi* Zone, it faced the following challenges.

First, relating to plot boundary. The first level registration and certification was carried out using traditional means such as robe and relying on traditional knowledge of the number of '*oolmaa guyyaa tokkoo'* in Afaan Oromo [82] of a plot. In some cases, it was carried out simply by eyesight. The plot is described by naming the neighbors on the North, East, South and West. This is weak on the description of the land plots, which neither includes a map, nor any kind of spatial reference (save a list of neighboring landholders), and only gives a roughly measured or estimated indication of the acreage.[83] Moreover, the exact size of plot is unknown. As a result, it fails to control boundary disputes, and the encroachment of communal land.[84]

The second challenge relates to updating the registered information. If the records are not being kept up to date, the usefulness of the whole process will be insignificant, if not futile. Good land governance requires good and updated records management for effective service delivery.[85] This is because collected data will lose much of its value unless the collected data is kept up-to-date. To ensure sustainability of the gains achieved,[86] authorities must see that land records are

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82 It refers to the size of land that takes one day to plough using one pair of oxen.

83 Klaus Deininger et al, Assessing the Certification Process of Ethiopia's Rural Lands' (Colloque international "Les frontières de la question foncière- At the frontier of land issues", Montpellier, 2006), p. 3.

84 *Supra* note 66.

85 Tony Burns and Kate Dalrymple, *Conceptual Framework for Governance in Land Administration* (International Federation of Surveyors Article of the Month, August 2008), p. 12.

86 Empirical studies have shown the multiple positive impacts of first level registration and certification programs (in Amhara, Oromia, SNNP and Tigray regional states) such as increased tenure security; increased investment on soil and water conservation, including

updated to show changes over time. For sustainability of the gains from 1st level certification in rural areas, land records need to be properly maintained, in particular, those involving the registration of changes. Thus, updating the record is necessary particularly in cases of rural land transfer through legal grounds such as donation, exchange for land consolidation, or inheritance, or rent (though it is temporary).

Despite that, the formats of the registry book are not suitable for updating the land information. This is because, the registry book is holding based and has only one line in the book per holding. Thus, the registry book lacks sufficient space to record all of the details of parcels in a holding. As the result, limited space in the book leads to cross-references to fact sheets, which are not an integral part of the registry book as practical solution. Furthermore, data are kept manually and not arranged properly, and thereby affecting speedy service as it takes time to search and provide services. Additionally, most of the time documents are lost and tore. Besides, any person (from all staff) can access it and then can take or hide the documents and thereby making it susceptible for informal payment.[87]

Furthermore, the law also fails to provide the procedure for updating the record. Yet, the focused group discussion with experts revealed practically developed procedures or updating which depends on nature of updates.[88] For instance, in case of request for updating the record due to disputed inheritance, all the legal heirs should come to the Office.[89] The legal heir who was given the certificate of heir by

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terracing and bunding; increased tree and perennial crops planting; increased land rental market participation; improved access of women to land; and reduced land related disputes. See in general, Klaus Deininger *et al*, *Rural Land Certification in Ethiopia: Process, Initial Impact and Implication for Other Countries* (World Bank, Washington D.C, 2007).

87 Interview with Mr. Aman Jarso, Expert on engineering and surveying at West Arsi Zone Rural Land Administration and Use Office, (Shashamene, 13 March 2018).

88 *Supra* note 66.

89 Practically, if there is no dispute among heirs over the inheritable land, the heirs will not have to come to the Office for update. Rather, they can divide the land among themselves on their own.

the court will have to come to *woreda* rural land administration and use office. Here, the heir shall bring certificate of heir. Then s/he will fill the form which is prepared at the Office for that purpose. Up on that the *woreda* office register it on cross-references to fact sheets and issue the holding certificate for the heir/s/ on the plot of land of which the share or size is determined by the court. And also, the original landholder will be erased from the register and the certificate should be returned to the Office.

In case of update because of donation, the parties shall fill the form at *Kebele* and then the *Kebele* will approve it up on checking the relation of parties, i.e., as to whether the transferor can transfer land legally to the transferee.[90] Then the parties will come to *woreda* rural land administration and use office by bringing contract of donation together with the filled form which is approved by *Kebele* administration. *Woreda* office also checks the legality of transfer and if it finds it contrary to the law it will be rejected. If it is accepted the *woreda* office will register and issue the certificate for both donated and remained plot accordingly. The filled form by parties and contract of donation are attached to the book of registry. The change is also made on the original documents. The same is true for the case of rent except for the holding certificate remains with the holder, and does not go to the transferee of plot.[91] And also no need of erasing the original record rather only attaching filled form and rent contract.

In all forms of permanent transfer, practically, land certificates are reissued with descriptions of plot-splitting, new owner(s)' details, voiding original certificates, and parallel changes in land registry books (which are done in cross-references fact

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[90] Interview with *Kebele* administrator at Adaba Xixa *Kebele*, Arsi Nagelle Woreda (Adaba Xixa, 14 March 2018). The same is affirmed by experts, see *supra* note 66.

[91] *Supra* note 30, Art. 15 (13).

sheets which are not an integral part of the registry book). Peasants will not pay anything to get services. They may fill forms which are provided by the office and then directly get service.[92] The only required payment is five birr per holder in case the holding certificate (green card) is to be issued.[93]

However, mostly in cases of transfer by donation and rent the parties prefer to do it informally rather than going to the Office. In such cases, not more than 5 to 10 percent go to the Office to request for the necessary modification of the record.[94] Although the main reason for transferring informally and not seeking its update need further research, it can be said that the main reason is not cost related. Admittedly, the time and travel required to do so can be an issue because, in most cases, records are updated at the *Woreda* (not *Kebele*) level. Unawareness and cultural related problems can be mentioned as the main reasons.[95] Furthermore, most farmers had little knowledge about the regulative provisions on inheritance and minimum plot size – the provision aimed at restricting subdivision of land to avoid plot fragmentation (the latter is considered to hamper land productivity).[96] This has resulted in increasing of situations in which the individuals using the land on which they do not have valid certificates in their names, even though they have legitimate claims to the land.

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92 *Supra* note 87. The same is revealed by women peasant who was at the office seeking the identification of land holder because of the disputes over the land over which she is claiming.

93 The new holding certificate (green card) issued when; the holder lost the first given holding certificate, and the land is transferred through donation and inheritance. In all cases the required payment is five birr per holder rather than per plot as the certificate contains as many as the plot one holder may has.

94 *Supra* note 66.

95 Previous empirical research by Ethiopian Economic Policy Research Institute, Land Tenure and Agricultural Development in Ethiopia (Ethiopian Economic Association, Addis Ababa, 2012) also shows that lack of awareness in the communities was found to be rampant in SNNPR (73%), Oromia (71%) and Amhara (54%).

96 Wibke Crewett and Benedikt Korf, 'Ethiopia: Reforming Land Tenure' (*Review of African Political Economy* No. 116, 2008), p. 213.

The other problem during 1st level registration and certification is that it mainly focused on private land holding, and state holding is not considered. It does not also cover all communal holdings, for example, as mentioned above, data obtained from West Arsi rural land administration and use office shows that it is only 30.8 percent of communal land holding of West Arsi Zone which is registered. Furthermore, though on the reports it is always stated as if the 1st level registration is completed all private rural land holding, many facts are showing that it was not totally covered. For example, data obtained from West Arsi Zone rural land administration and use office shows that 512,335.59 hectares of private land holding is registered out of expected 576,884.11 hectares of private land holding in the zone. This indicates 88.9 percent is registered while 11.1 percent of private land holding is not registered. Besides, in the *woreda* in which 2nd level registration has started, the fact that some peasants have not registered their land has been revealing.[97] The causes were the problems related to boundary problem, dispute by inheritance, case of divorce and informal land deals. Because of these factors, it was ignored during 1st registration and no one turned back to it except some peasants whose dispute is solved by court and thereby come to the Office to get occupation of land through assistance of the latter.[98]

3.2. The Second Level Registration and Certification

Currently, the 2nd level registration and certification using modern means and computerizing data on rural land holding that is found in West Arsi Zone is ongoing as of 2012.[99] It started in the seven *Woreda*s of West Arsi Zone in

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97 *Supra* note 62.

98 *Supra* note 87. Besides recognized private land holding, there are peasants who occupy forestland especially in Nansabo and Adaba *Woreda* and thereby not registered, and not yet evicted.

99 *Supra* note 63.

different years: 2012 in Shashamene and Arsi Nagelle *Woredas*; 2014 in Dodola *Woreda*; 2016 in Kokkosa *Woreda*. The second registration uses GPS[100] and Ortho Photo[101]. In six *Woredas of the Zone*, i.e., Shashamene, Arsi Nagelle, Dodola, Gadeb Asasa, Adaba, Shalla, and Kokkosa the registration is being carried out by GPS while in Siraro *Woreda* it uses ortho photo.[102] Accordingly, the second registration and certification of rural land of two *Woredas*, namely Shashamene[103] and Arsi Nagelle *Woredas* of West Arsi Zone are on completion stage.

The interview with experts, data collector and focused group discussion revealed the processes of 2nd level registration and certification.[104] Accordingly, the processes of registration and certification started by creation of awareness for all farmers as to the usefulness of 2nd level registration. Besides, they were informed as they shall appear on their land holding by carrying their 1st level-holding certificate at time of measuring the land for the 2nd level registration and certification.

The process of 2nd level registration is carried out by three persons namely, the informant, the surveyor and the registrar. This one team (three persons; one informant, one surveyor and one registrar) is for each *Kebele*. Informant is elected from the *Kebele* by community based on his/her local knowledge. His role is giving

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100 Geographic Information Systems (GIS) is a computer tool for creating, storing and analyzing information that is related to certain geographic features in digital maps, such as land parcels, roads, administrative areas and buildings.

101 The interview with experts shows that it has more accuracy and less error than GPS. See, *supra* note 87.

102 *Supra* note 87.

103 *Supra* note 65. However, the 2nd level registration and certification is faced challenges in Shashamene *Woreda*. This is because huge land of its pre-urban area is sold informally. The land is currently held by the buyers who do not have 1st level holding certificate, and those who are not farmers, and those who come from the city. As the result Shashamene *Woreda* rural land administration and use offices faces difficulties especially in seven *Kebeles* of Shashamene *Woreda* which are surrounding Shashamene city, and thus stopped the certification process in this area.

104 Interview with contractual staff i.e. surveyor, informant and registrar of Dodola *Woreda* Rural Land Administration and Use Office (Dodola, 1 March 2018); *supra* note 66; *supra* note 77. The process of registration is almost the same in all *Woreda* as it is carried out under direction and follow-up of the Zonal Rural Land Administration and Use Office.

information. The payment for informant is 2.17 birr per plot. Surveyor and registrar are non-permanent (contractual staff) employees for this purpose only. They are employed by *Woreda* rural land administration and use office. They are persons who are trained in surveying and IT, and qualified as level III, or level IV. Their role is that the surveyor measures the land using GPS while the registrar records the measurement result. Their duty covers inserting the data to computers and preparing certificates. They are paid 13.60 birr (for surveyor 8.60 birr while for registrar is 5 birr) per plot of land irrespective of other factors including size and location of land.

After land is registered and holding certificate is prepared what is expected from landholder is only taking the certificate as it is totally for free. Even more, the required photo for certificate is taken for free by employees of the office using digital camera, and then inserted in softy copy of certificate and printed with certificate. This is in line with good land governance which demands for efficient procedures related to land administration that generally allow transactions to be completed quickly, inexpensively, and transparently.

Although the titling process provides certificates of holding, it does not bestow ownership rights. Yet, it is considered as an incentive that will encourage farmers to sustainably manage the land they hold. Based on the focused group discussion with farmers:

> After registration and certification, the fear that rights over land may be encroached by rich neighboring land holders or the government waned away since the holder has registered his/her land and given certificate for it. Yet, the fear that their land can be taken any time by the government with insufficient compensations still lingers. The compensation paid by the government is not fully reinstating the landholders. The compensation paid

> by government is very less compared to the price by which the farmers may sale their land informally. Thus, the farmers (especially those in the outskirt of cities) opt to sale their land informally as the cities are expanding to their land before the government expropriates their land by paying little money.[105]

The certificate can also provide a concrete proof of holding rights thereby facilitating compensation and exercise of land rental rights. Security is believed to be maintained and further increased by the additional benefit obtained from the secured land and certificate of holding. When the farmers able to lease out their land and use their certificate of holding as collateral to access credit service,[106] they realize that they are exercising their property right and this further strengthens their security and increases land conservation activities. The worth of the certificate is multifaceted where transfer of land rights is allowed unfettering.[107] Certification, however, becomes an issue in case of inheritance. Since landholders are restricted to whom they can bequeath their usufruct rights and the minimum plot size, heirs of small plots may not receive individual certificates, but may need to cultivate the land in a way that maintains the integrity of the plot.[108]

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105 Focused group discussion with 9 farmers of Ebicha *Kebele*, Shashamene Woreda, West Arsi Zone (Ebicha, 12 March 2018). Included in the group were two females and seven males (two youth, two adults, three elders). Among members some of them have faced land disputes before court, and also holders who have sold land holding informally.

106 However, although all the legislative instruments fail to put provisions in mortgaging of farmers land use rights, recent practices indicated that Micro Finance Institutions (MFIs) that the researcher consulted in Shashamene city have been using holding certificates as collateral to release credit to the farmers. The MFIs seem to work in an informal way although there is no legal provision to refer and make such transactions legally binding.

107 *Supra* note 5, p. 44.

108 *Supra* note 96, p. 209.

3.3. The First Level vis-à-vis Second Level Registration and Certification

The comparison between the 1st and 2nd level registration and certification can be made on many grounds. The parts that follow juxtapose the first and second level registration and certification from different vantage points.

a) Nature of Registration

The 2nd level registration is parcel based, [109] i.e., the landholder can take certificates for as many land plots as possible.[110] As a result, holding certificate is issued for each plot though it is held by one person. On the other hand, the 1st level registration is ownership based, i.e., the holder of land takes one certificate for all plots. This shows though the holder has many plots in different places, all plots are registered on one holding certificate.

b) Accuracy of Registration

The 2nd level registration is accurate as it is done by scientific means namely GPS and Ortho photo. It clearly shows the exact location and size of the plot which is described in geo reference using longitude and latitude. The methodology used in this pilot relied on hand-held GPS receivers (costing approximately 6000.00 ETB each), and computerized storage of data and maps.[111] To the reverse 1st level registration was not accurate as it was carried out using traditional tools such as robe and simple eyesight. As a result, it does not show the exact location and size of the plot rather than showing boundary by naming adjacent landholders or other

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[109] This parcel is unique, permanent, capable of change when the property is subdivided or consolidated, convenient for users and suitable for computerization, easy to understand and remember, and accurate. To maintain the holdings nature of the records, a holding index can be set up and maintained with a link to the parcel index.

[110] The same is provided by the law. *Supra* note 67, Art. 15 (6).

[111] *Supra* note 87.

things. The data is also kept manually especially by books of register which is difficult to update.

c) Cost of Registration and Certification

During the 1st level registration, the holder of the land has to pay five birr to get or replace green card or holding certificate while the certificate issued during the 2nd level registration is given to land holder free of charge. Besides, there was no payment for data collector i.e. *kebele* land administration and use committee during 1st level registration. While during 2nd level there is payment for those who carry out the processes of registration and certification. Accordingly, for surveyor 8.60 birr, for registrar 5 birr, and for informant 2.17 birr per plot of land is paid regardless of its size and location. Thus, service is more accessible to farmer in terms of cost in 2nd level certification (as the holder can get the service totally for free) than in 1st level certification (as the farmer pays five birr to get the service or for certificate).

d) Covered Rural Land

The 1st level registration was mainly focused on private holding. The state holding was totally neglected. Communal holding was also not covered as expected. On the other hand, 2nd level registration covers the whole all land holdings as nothing is left out of the GPS. It is also registering disputed land. It is registering as disputed land, and the certificate will be issued to whom the land will belong up on determination of court or other means. This was not the case during 1st level registration as the disputed land was excluded.

e) The Content of Certificate

The 1st level certificate of holding contains name of husband and wife, and only photo of husband (or only photo of wife where the wife is holder of land though it is rare). On the other hand, certificate of holding issued during 2nd level registration contains both names and photo of husband and wife (all wives in case of polygamy).

Regrettably, the 2nd level certification does not include the category of land which was referred to as category A, B, or C during 1st level certification. The law requires the measurement of land as to its size, use and fertility.[112] To that end, at the time of 1st level registration, *Kebele* land administration and use committee categorized land as A, B, and C based on its fertility.[113] Category A is highly fertile land, category B is middle one while category C is infertile land which is not suitable for agriculture. This was done by traditional means i.e. by visiting the land and then considering the types of soil the land contains. Though the land is graded as A, B, and C category, it does not exactly reflect the fertility of land as it was not identified scientifically. Moreover, those who participated in land valuation revealed that many farmers do not want to register their land as top category (i.e. Category A). This was related to the fear that tax will be imposed based on the category of the land. Previous research also found that a common concern of many farmers was that, following the registration, the land tax would rise consistently.[114] As a result through informal payments or kinship with the *Kebele* land administration and use committee many of the farmers are able to register their land as category B or C by escaping category A, and thus resulting in improper categorization even through traditional means.[115] Regardless of land categorization by traditional means, and existence of improper categorization even through traditional means, no one has till now returned back to registering land value.

Even more the 2nd level registration, which is hoped to overcome deficiencies of 1st level registration, has failed to consider the fertility of land. But what 2nd level registration adds for land value is only determining exact size of the land (which

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112 *Supra* note 27, Art. 6(1); *supra* note 30, Art. 15 (1). But no provision clearly states about value of rural land.

113 *Supra* note 87.

114 *Supra* note 75, p. 16.

115 *Supra* note 66.

can be one element for determining land value). This absence of land value affects compensation in case of expropriation as ensuring that expropriated landholders are getting fair and commensurate compensation involves the land value element of land administration. It also affects rural land use taxation.

f) Contribution to Fairness of Rural Land Taxation

Peasants pay tax based on land size which is also not exactly measured during 1st level registration. Peasants are required to pay rural land use payment and agricultural income tax for their land holding. For both taxes it is only the size of land which is taken into account. Land fertility and its location (accessibility to water, urban or cash crop area), actual annual production, and other factors are not considered. Moreover, those who hold five hectare and more pay equal amount of tax. For instance, the amount of tax for rain dependent farmers is a shown in the table below.[116]

Table 1: Rural Land Taxation Rate in ONRS

Agricultural Income Tax and Rural Land Use Payment			
Land size (hectares)	Rural Land Use Payment (Birr)	Agricultural Income Tax (Birr)	Total (Birr)
≤ 0.5	15	Exempted	15
0.5 to 1.0	20	20	40
1.0 to 2.0	30	35	65
2.0 to 3.0	45	55	100
3.0 to 4.0	65	70	135
4.0 to 5.0	90	100	190
> 5.0	120	140	260

[116] Revised Rural Land Use Payment and Agricultural Income Tax of Oromia Regional State's Proclamation issued to amend the previous Proclamation No.99/2005, 2007, Art. 3 (1), Proc. No. 131/2007, *Megeleta Oromia*, Year 15, No. 13.

The focused group discussion conducted with farmers revealed that though the amount of tax is not so high, the way it is imposed, is not fair as it disregards fertility, and size of land (if it is more than five hectares).[117] They also stated that there are informal payments that accompany rural land use payment and agricultural income tax. These include payment for governing party membership, sports, Red Cross and others. If the rural land use payment and agricultural income tax is to be 15 birr, with those other accompanying payments it is more than 100 birr. This is also affirmed by deputy head of Oromia Revenue Authority West Arsi Zone branch.[118] Regarding the collection of land taxation, both farmers' income tax and rural land use payment shall be collected by the Revenue Bureau of ONRS or chairperson of the *Kebele* Administration delegated by the Revenue Bureau upon signing obligation to collect rural land use payment and income tax, and then deposit the revenue he collected to the Revenue Bureau which finally deposited at Finance and Economic Development offices by Revenue Bureau.[119] Practically also in West Arsi Zone, rural land use payment and agricultural income tax are collected by the chairperson of the *Kebele* Administration with his *kebele* committee.[120] This is by receiving receipt from revenue office, and the commission for the collector is 3 percent of collected tax.

However, the problem related to imposing land use payment and agricultural income tax based on only size has affected the fairness of taxation and extent of collected tax. This is exaggerated by the fact that the land size is not clearly known

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[117] *Supra* note 105. Those farmers, who hold more than five hectares of land, are currently few due to subdivision of holding rights mostly through donation and inheritance. Fortunately, they have not complained concerning current land taxation.

[118] Interview with Mr. Hasan Sinbiru, Deputy Head at ONRS Revenue Authority West Arsi Zone branch (Shashemane, 13 April 2018).

[119] ONRS Rural land Use Payment and Agricultural Activities Income Tax Amendment Proclamation, 2005, Cumulative reading of Arts. 2 (9), 5(2), 6(2), and 10(3), Proc. No. 99/2005, *Megeleta Oromia*.

[120] *Supra* note 118.

by 1st level registration which was done by using traditional means like rope or eyesight. This has resulted in low imposition and collection of both land use payment and agricultural income tax. The data obtained from Oromia Revenue Authority West Arsi Zone branch, for example, shows that currently the revenue from both land use payment and agricultural income tax is only 4.5 percent of total revenue of West Arsi Zone. Currently, (in 2018) the revenue authority has planned to collect 490 million birr from all sources out of which 22 million is from farmers (i.e. land use payment and agricultural income tax). In 2017 also the revenue authority of the Zone was planned to collect 420 million birr from all sources out of which 22 million birr was to be from land use payment and agricultural income tax. The collected amount in total was 347 million birr out of which 20 million birr was from land use payment and agricultural income tax. This shows that success in the collection of land use payment and agricultural income tax (which achieved more than 90%) is higher when compared to the total collection which is 82.6 percent.

However, the plan for land use payment and agricultural tax remain constant every year. This is because the revenue authority has not considered 2nd level registration which was hoped to bring exact size of rural land. The reason for not considering 2nd level registration for land taxation is that it doesn't cover whole rural areas of the Zone, and imposing on the covered area will bring dissatisfaction by farmers' thinking that it is discrimination.[121] Thus, the revenue authority is waiting for full coverage of rural land of the Zone by 2nd level registration for applying updated size of land for land taxation.

Yet, as other land value such as fertility and location are also missing from 2nd level registration, it is difficult to think that the fairness of land taxation will be realized.

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[121] *Ibid*.

g) Land Use Planning

Good land governance requires land use planning which should be able to cope with future land demands, avoid unrealistic standards that would force large parts of the population into informality, and be implemented effectively.[122] Cognizant of that, the Federal Rural Land Administration and Use Proclamation calls for the preparation and implementation of land-use plans and the establishment of land administration and use information systems which take in to account soil type, landform, weather condition, plant cover and socio economic conditions and which is based on water shed approach.[123] To that end, ONRS rural land administration and use proclamation empowers Oromia Agricultural and Rural Development Bureau (currently ONRS Rural Land Administration and Use Bureau) for developing and implementing guiding land use master plan.[124] Moreover, ONRS rural land administration and use laws have embedded a number of provisions that call for the development and implementation of land-use plans, and provide penalty for any land user who violates land use plan.[125]

Despite that, both 1st and 2nd levels of registration and certification fail to consider land use planning. Even though, the land use planning case team of Rural Land Administration and Use Directorate was planned in the first GTP to have national master land use plan, the country yet has no any master rural land use plan. This was attributed to the financial and capacity problems for such preparation.[126] In

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122 *Supra* note 10, p. 31.
123 *Supra* note 27, Art. 13.
124 *Supra* note 30, Art. 18.
125 *Ibid*, Art. 18 through 25, and 27; *Supra* note 67, Art. 33 (4); and *supra* note 63.
126 Abebaw Abebe, 'Ethiopian Federal Rural Land Administration Institution Practices, Challenges, Gaps and Recommendations' *International Review of Humanities and Scientific Research*, p. 298. http://www.irhsr.org/papers/Jun2017-10.pdf last accessed on December 20, 2017. Even though such problems are there, the case team is trying its best for the master land use plan preparation. With the financial and technical support of FAO, the case team has

addition, the government's attention is on the certification. Land use planning is not given great concern unlike land certification.

As a result, there is no palpable action relating land use master plan in West Arsi Zone, and also even no one knows the proper land use to punish land users for non-compliance.[127] The interview with head of West Arsi Zone Rural Land Administration and Land Use shows that hitherto no land has been taken from farmers on the ground of improper use. This is also affirmed by the legal expert of the same Office who states that:

> It is difficult to say certain farmers used land improperly because the nature of each land as to its fertility, and ingredients of soil is not measured specifically. There is also a problem relating to determining the extent of degradation which amounts to improper use. Due to the absence of standards of improper land use, so far, no land has been taken from the landholders on this ground.[128]

This has resulted in land degradation and deforestation. Moreover, high tracts of fertile lands are used for industry, construction, urbanization and other purposes as anyone who accessed rural land can use it for whatever purpose s/he wants to use which in turn affects efficient use of scarce land resource.

h) Link between 1st and 2nd level registration

Concerning the relevancy of the 1st level registration for the 2nd level registration, the focused group discussion with experts revealed that 1st level registration has

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prepared project document for the plan preparation. In addition, the experts are giving successive trainings for the regional state experts on the land use planning.

127 *Supra* note 87.

128 Interview with Mr. Dassu K/Gabriel, Legal expert at West Arsi Rural Land Administration and Use Office (Shashamene, 13 April 2018).

contributed to the 2nd level registration in terms of time and cost.[129] This is due to the fact that the 1st level registration has settled issue relating to whom specific land belongs. Specific landholder is identified by 1st level registration, thus at the time of the 2nd level registration the expert easily goes on measuring land using GPS. Even in cases where the land is transferred from the holder of the green card to other person be it through inheritance or donation, the 2nd level registration is made in the name of the original holder so long as such transfer is not registered in the Office and thereby green card is not issued to the transferee.[130] This is to speed up the process, and new holder can come to the Office and get an update for it.

Conclusion and Recommendation

Currently in Ethiopia land, be urban or rural, is a constitutional issue, and its ownership belongs to state and Ethiopian people's, and thus individuals are entitled to only usufructuary rights over rural land. Accordingly, certification of holding rights is recognized over three types of land holding namely private, communal and state holdings. For implementation of these rights, administration of land is decentralized to different stakeholders. Simply put, the responsibility to administer land is given to regional states while federal government is empowered to enact land laws. In line with this, rural land administration matters in ONRS are currently handled by Rural Land Administration and Use Offices which are established in the hierarchical arrangement within the regions, from the Bureau at the top to the *Kebele* at the bottom. This shows high decentralization of rural land administration (including certification) which is in line with good land governance parameters. But there are facts that reveal the existence of incapacity of these institutions which have resulted from lack of qualified human resource, material resource, and

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129 *Supra* note 66.
130 *Supra* note 77.

incentive for the employees. For instance, concerning *kebele* committee there are problems of skills and incentives (as their job is for free). Furthermore, at *woreda* office, there is a practice of requiring the client farmers to pay per diem for employees for fieldwork which is contrary to good governance in land administration.

To secure holding rights and land information, land registration and issuing holding certificate has been carried out in West Arsi Zone of ONRS in two phases. The 1st level was carried out in all *Woredas* from 2004 to 2015 by which the total of 545,258.1 hectares of land were registered out of the expected 636,828.936 hectares by using traditional means such as robe or eyesight at kebele level. Although this 1st level registration processes and the services were accessible to peasants, they faced challenges like inaccuracy, incompleteness, and unsuitability for updating.

Currently, the 2nd level rural land registration and certification which is using modern means and introduced computerized data is ongoing in seven *Woreda*s of the Zone as of 2012. The process of registration is carried out by a team of three persons, namely informant, surveyor and registrar. Then, holding certificate is given totally for free. The 2nd level registration and certification is different from the 1st level on many grounds such as the fact that it is parcel based; uses scientific means like GPS and thus shows exact location and size of the plot; holding certificate is given to land holder totally free of charge; there is payment for data collector; covers all types of holding; registers also disputed land; and issues holding certificate with both names and photos of husband and wife.

Though the 2nd level certification shall be appreciated for its accuracy of land data, for instances, land size and exact location, it fails to give due concerns for fertility of land as the land grade is totally missed from the holding certificate. The grading of land at the time of 1st level registration was not scientific and many farmers were

able to register their land improperly by fearing that tax will be imposed based on the grading of land. Regardless of that, till now no one has revisited and rectified this, and even more, it is not considered by the 2nd level registration. Besides, the 2nd level certification, like the 1st level certification, does not consider rural land use planning as a result of which anyone who accessed rural land can use it for whatever purpose s/he wants to, and thus making it difficult to ensure proper use of land.

Therefore, the following measures are suggested by the author to sustain the strength of the certification and overcome the challenges of rural land certification of the study area.

a) Computerization and updating land data**:** computerizing land data is not an end by itself rather it also needs to be updated timely so that the achievements of the 2nd level certification can be sustained.
b) Capacity-building: the government should take action on capacity-building which requires adequate investment in human and material resources including buildings and equipment so that the 2nd level certification can be accomplished shortly and then its achievements can be sustained. Regarding human resources at the time of hiring, the qualification to the position should be the primary test. Besides, regularly training (or giving educational opportunity for) the staff to update their competences and skills are necessary. And also, *Kebele* land administration and use committee members should be given training and incentives to carry out their assigned responsibilities.
c) Filling gaps in the land laws: it is recommendable to put in place the laws that determine process and standards of registration, update, and its fee which is accessible to the community. The law should also provide for land

taxation which should consider all factors of land value such as its fertility and location.

d) Public awareness creation**:** There should be more public awareness creation activities about the importance, and procedures for updating land information (and the consequence for not updating) with empowered authority to update. Furthermore, public awareness programs should be ongoing programs of information dissemination rather than be one-time affairs.

e) Complete rural land records**:** the 2nd level rural land registration which is covering all categories of land holdings (i.e. communal, state, and private land holdings) should be accompanied by all land information including fertility and use plan of each plots. Then updating it accordingly for its multifold significances such as land use planning (which ensures environmental protection and efficient use of land), imposing equitable land taxation, and reducing land related disputes and also easily resolving once disputes arise.

f) Extending the right to use rural land certificate as collateral to access credit services: this will increase the realization of the benefits of land certification for farmers as they realize that they are exercising their property right which will further strengthen their security and increases land conservation activities.

Administration of Copyrights through Collective Management Societies in Ethiopia: Exploring Legal Gaps and Challenges

Kahsay Gebremedhn Weldegebrial*

Abstract

This article examines the legal gaps and other challenges that hold back the administration of copyright and neighboring rights through the system of copyright collective management societies. Effective collective management of copyright requires, inter alia, comprehensive copyright legal framework that provides robust rights and remedies to owners and /or authors of works, and facilitates the establishment and operation of copyright collective management societies. The author of this article argues that the Ethiopian copyright legal regime lacks clarity on the requirements of three sectors of copyright and related rights for establishment of collective management society, and status of royalty. The copyright legal regime failsnot only to recognize users' right to negotiate in the process of setting up royalty scheme and fees, but also to incorporate principles that should be considered in setting up royalty schemes. Moreover, the copyright legal regime fails to recognize private levy system, regulate online environment, and limits government role in the regulation of collective management societies. These findings call for revising the Ethiopian copyright legal regime to ensure effective administration of copyright and neighbouring rights through the system of collective management of copyright.

***Key Terms**: Administration, Copyright, Collective Management Society, Ethiopia*

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Introduction

The underpinning rationale for the legal protection of copyrighted works is that such protection benefits not only owners but also the state and the society in many ways, including economic development.[1] States, thus, devised policies, legal frameworks and developed institutions such as copyright collective management society (hereinafter CMS) to ensure copyright owners are benefiting from their works. CMS facilitate rapid and lawful access to information in a relatively inexpensive way.[2] They are also guardians of the rights of copyright holders' and create a favorable environment for creativity by providing fair remuneration to copyrights holders and incentives for future creation.[3]

In the field of copyright and neighboring rights, functioning CMS have irreplaceable role to overcome the difficulties faced by both owners and users of copyright and related rights of works. The number of users of copyright and neighboring works increased and became difficult for the right holders to individually negotiate with users and manage legal use of their works.[4] Equally, users also faced difficulties to negotiate with individual right holders due to time and distance constraints.[5] In view of these, copyright owners collectively administer their rights through CMS. Yet, the effectiveness of CMS, depends on factors such as having well-developed copyright legal regime and active

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1 Gervais Daniel, ed., *Collective Management of Copyright and Related rights*, Kluwer Law International, (2015), p. 6,

2 Dorian Chicora., *The Role of the Administrative Authorities and Collective Management Societies in Promoting Creativity and Copyright Based Industries*, http://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ipa_ge_08/wipo_ipa_ge_08_theme08_3.pdf , lasted time accessed on September 29, 2018.

3 World Intellectual Property Organization (WIPO) and International Federation of Reproduction Rights Organizations (IFRRO), Collective Management in Reprography, Open Training, unescoci.org/cgibin/page.cgi?ghtml;d=1pdf , last time accessed on June 25, 2018.

4 Ficsor Mihály, *Collective Management of Copyright and Related Rights at a Triple Crossroads: Should it Remain Voluntary or May it be "Extended" or Made Mandatory*, http://bat8.inria.fr/~lang/orphan/documents/unesco/Ficsor+Eng.pdf , last time accessed on July 28, 2019.

5 Ibid.

government involvement especially in developing countries where the copyright holders are not economically and technically in a position to establish and effectively run CMS.[6]

Until the entry in to force of the Penal Code[7] and Civil Code[8] in 1957 and 1960, respectively, Ethiopia had no legislation that recognizes copyright of works. Since these laws were not adequate to address issues of modern copyright protection, the government enacted the Copyright and Neighboring Rights Protection Proclamation in 2004 (hereinafter copyright proclamation) as the country's first comprehensive legal framework on the matter.[9] However, till the enactment of Copyright and Neighboring Rights Protection (amendment) Proclamation No.872/2014 though attempts had been made by professional associations of copyright owners to enforce copyright and related rights through collective management societies, [10] it was very difficult to establish functioning collective management societies mainly because of legal challenges. The amendment is, thus, meant to address such legal challenges and thereby enable copyright owners to collectively administer their rights.

CMS proclamation embodies more functional and extensive provisions that regulate formation and function of CMS. Following its enactment, owners and their

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6 *Supra* note 3, p. 13.

7 The Penal Code imposes imprisonment or fine on a person committed copyright infringement. Penal Code of the Empire of Ethiopia, 1957, Arts. 675 and 676, Proc. No. 158 ,Neg. Gaz., Year 16, No 1.

8 The Civil Code had an independent section that deals with copyright protection. Civil Code of the Empire of Ethiopia, 1960, Arts 1647 through 1674, Proc. No. 165, Neg. Gaz., year 19, No 2.

9 Copyright and Neighboring Rights Protection Proclamation, 2004, Proc. No. 410/2004, *Fed. Neg. Gaz.*, Year 10 No. 55.

10 Ethiopian copyright holders and their professional associations established a collective management society referred to as Ethiopian Copyright and Neighboring Rights Collective Management Society (ECNRCMS) in November 2009, though it had not been functioning. Interview with Ato Uqubay Berhe, Former President of ECNRCMS, on October 15, 2018.

professional associations established Ethiopian Copyright and neighboring rights Collective management society in 2017. However, it is not yet engaging in issuing licenses and collecting royalties. And, some professional associations such as musician association have opposed its establishment and worked to establish new copyright collective management society.[11] Although the improvements made under the CMS proclamation are commendable; there are still shortfalls that are left unaddressed. CMS proclamation fails to recognize users' representation in setting up royalty scheme and fees, and incorporate principles that should be considered to set up royalty schemes. Besides, the copyright proclamation fails to recognize private levy system, appropriately incorporate legal provisions to regulate online environment, and limits government role to regulation of collective management societies. This article, therefore, addresses gaps pertaining to the copyright legal regime and other challenges that hold back the administration of copyrights and neighboring rights through the system of CMS.

To do so the paper is structured in to five sections. Section one briefly reviews the concept of copyright collective management society, its evolution, purposes and functions. Under section two, common features and practices of functioning CMS are presented. Copyright collective management models adopted by different jurisdictions are highlighted in section three. Section four examines, at a greater length, legal gaps and other challenges of collective administration of copyrights and neighboring rights. The article, finally, concludes by putting forth points that can help address the legal blind spots and other challenges. The discussions in these sections, thus, indicate the need for revisiting the copyright legal regime so as to ensure effective administration of copyrights and neighboring rights in Ethiopia through the system of copyright collective management societies.

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[11] Interview with Dawit Yiferu, President of the Ethiopian Musicians' Association, on June 5, 2018.

1. **Copyright Collective Management Societies: A Brief Insight**

Copyright collective management society refers to an entity or organization established by government or individual copyright right holders to provide license, collect royalties, distribute collected royalties to members, enter in to reciprocal arrangements with other collecting societies, and to enforce moral rights of copyright holders.[12]

The evolution of CMS dates back to 18th century.[13] Copyright has been managed collectively since the late 1700s and it is frequently claimed that it started in France in 1777, in the field of theatre, with dramatic and literary works.[14] The first of such organization was *Society des Auteurs et Compositeurs Dramatiques* (SACD), created in 1777 in France by playwrights to collect fees from theatres that had refused to pay them for the use of their plays. Then *Society des Auteurs, Compositeurset Edituers des Musique (*SACEM), was established in 1851 by composers and music publishers, to collect money for the live performance of music in cafes.[15] Whereas, the development of neighboring rights' collective management societies has recent history, and the main reason for that is absence of any statutory support for neighboring right claims in most jurisdictions.[16] At international level, neighboring rights has been legally recognized since the enactment of the Rome Convention, 1961, which has also provided the base from which most national neighboring rights legislations have developed.[17] The earliest,

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12 *Supra* note 3, p. 9.
13 Ibid.
14 Ibid.
15 Ibid.
16 Paul Berry, *Introduction to Collective Management of Copyright and Related Rights: a Regional Approach*, http://www.wipo.int/meetings/en/details.jsp?meeting_id=3662, last time accessed on September 24, 2018.
17 Ibid.

Phonographic Performance Limited (PPL), was formed in 1935 after British court in a landmark decision *Gramophone Co. Ltd.* v. *Carwardine* recognized record producers rights for the first time.[18]

Coming to the rationale that led to the emergence of CMS, it is based on the theory that CMS constitute an efficient way of organizing the lawful exploitation of works in those fields where individual licensing would prove impossible or impractical.[19] And, it is certainly cheaper to share the financial expenses of negotiation, supervision and collection of royalties among the greatest possible number of parties.[20] Thus, incapacity of owners of copyright and neighboring rights to effectively and efficiently administer their rights and transaction cost of customers are the rationale for the development of CMS.

With respect to functions, CMS are responsible for monitoring where, when and by whom copyright and related right works are being used; negotiate with users or their representatives; grant licenses against appropriate remuneration and under sound conditions; collect remuneration; and distribute it to copyright and related right holders.[21] In addition to these principal functions, collecting societies undertake other related activities such as

> Improving and defending the base of rights the organization manages through action for legislative change and court action to establish precedents in law; enforcement by court action of the rights managed where infringement or piracy occurs; information and education related

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18 Ibid.

19 Zhang Zijan, *Rationale of Collective Management Organizations: An Economic Perspective*, https://journals.muni.cz/mujlt/article/download/3620/5666, last time accessed on October 1, 2018.

20 Watt Richard, *Collective Management as a Business Strategy for Creators: An Introduction to the Economics of Collective Management of Copyright and Related Rights*. https://www.wipo.int/edocs/pubdocs/en/wipo_pub_emat_2016_3.pdf , last time accessed on October 1, 2018.

21 *Supra* note 3, p. 12.

to intellectual property and the rights managed; social or cultural action in the industry concerned.[22]

Moreover, CMS engage in other related activities such as cultural, social and educational activities. In recognition of such important roles, most CMS of different jurisdictions normally make provisions for a cultural fund within their budget to promote their national arts and culture through events such as concerts, workshops, and the provision of music scholarships to develop local cultural talent and promote national creativity.[23]

2. Common Features and Practices of Functioning Copyright Collective Management Societies

There is no uniform guiding principle for the effective establishment and functioning of CMS that can be applied in all countries. As there is no one-size-fits all model, countries should devise their copyright collective society laws and institutional frameworks by taking into account their respective socio-economic and political realities.[24] However, there are some common minimum requirements that should be in place in order to ensure effective functioning of CMS. Reviewing the experiences of its member countries' copyright collecting societies; World Intellectual Property Organization (WIPO) identifies four minimum requirements for effectiveness of CMS. These are:

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22. Ang Kwee Tiang, Collective Management Organizations, Their Role, Functions and Structure, www.wipo.com , last time accessed on August 10, 2018.
23 Ibid.
24 W Liu, Models for Collective Management of Copyright from an International Perspective: Potential Changes for Enhancing Performance. http://nopr.niscair.res.in/bitstream/123456789/13410/1/JIPR%2017(1)%2046-54.pdf last time accessed on September 25, 2018.

a) legislation that provides solid foundation for establishment and operation of CMS; b) vigorous and effective enforcement mechanisms; c) exercise and management of rights that ease access to copyright users; and d) role of the government in enforcement of copyrights.[25]

These requirements are discussed one after the other below.

2.1. Legislation

This minimum requirement calls for putting in place a copyright legislation that recognizes the rights of copyright owners and authors unambiguously setting exceptions and limitation to copyrights.[26] And, in accordance with such requirement, a copyright legal framework should properly facilitate and regulate the establishment and operation of CMS.[27] Accordingly, a comprehensive legal framework serves not only to effectively protect rights of authors or owner of works but also to ensure effective establishment and operation of collective management societies.

As regards the rights of owners of works, a copyright legislation should consist of exclusive economic and moral rights which include right to reproduce the work (or make copies); right to communicate the work to the public, right to create translations and adaptations of the work, right to claim authorship (right of paternity), and right to object to any changes that would be prejudicial to the author's honor or reputation (or right of integrity).[28] A national copyright legislation should also incorporate provisions governing copyright contracts; and

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25 *Supra* note 3, p. 3.

26 Uchtenhagen Ulrich, *Establishment of Collective Management Organizations*, http://www.wipo.int/about ip/en/copyright_societies.html, last accessed on July 3, 2018.

27 Ibid.

28 Ibid.

the establishment and functioning of copyright collective management organizations.[29]

The other area of concern for copyright legislation should be the exceptions and limitations to the exclusive rights of owners of works. Copyright legislation should contain provisions that support collective management of works and should make it clear that users must obtain permission to use protected works. Irrespective of the form and method that a national legislation takes, any solution for mass uses of copyright-protected works should be founded up on two principles. First, it should guarantee remuneration to owners and other rights holders; and second, it should be easy for users to respect.[30] For copyright collective management societies serve as bridges between owners and users by easing lawful access to copyright and related righted works, copyright law that incorporates principles and detailed provisions to facilitate effective establishment and operation of collective management societies serves to attain such objective.

A copyright legal regime should also incorporate a principle to prevent dumping of foreign copyrighted works because absence of such protection would affect the interest of the national authors.[31] That is to say that CMS will be successful if national and foreign works are protected in the same manner. In other words, CMS can effectively carry out their roles if only if a country commits itself to treat works by national authors and by foreign authors on an equal footing by acceding to the international conventions. The problem in the absence of protection against dumping of foreign copyright-protected works is aptly summarized by Ulrich in

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29 Ibid, p. 13.

30 Tarja Koskinen-Olsson and Nicholas Lowe, General Aspects of Collective Management, http://norcode.no/wp content/uploads/2013/03/WIPO-Module-1.pdf, last accessed on October 10, 2018.

31 *Supra* note 26, p. 4.

that "where foreign works are not treated in the same way and therefore remain without protection, they will constitute a kind of "dumping", since no royalties have to be paid for them, and will thereby undermine any reasonable utilization of domestic works".[32]

There are also some specific requirements that well-developed copyright legal regimes shall incorporate; that is, monopoly of the copyright collecting society, especially in developing countries, should be legally declared.[33] It shall also determine the relationship of CMS and government with respect to the establishment and operation of copyright collecting society.[34]

2.2. Tackling Piracy through Effective Enforcement Schemes

Vigorous and effective enforcement mechanism is other common minimum requirement for functioning copyright collective management society. Organized piracy of copyrighted works that manifests in different forms is said to be extremely harmful to creative industries and undermine their very foundation.[35] It is important that the illegal uses are curbed effectively, as piracy has a negative effect on the exercise and management of rights. In states where effective enforcement mechanism is not put in place, apart from copying the entire copyrighted works by users , other types of infringements such as photocopying of legally protected works for educational purposes in universities also exist.[36] Effective collective administration of copyrighted works can only exist if the copyright enforcement system of the country functions. Thus, illegal uses should be curbed effectively, as it is impossible to compete with free uses and the positive effects of proper management are severely hampered by piracy.

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32 Ibid, p. 3.
33 Ibid, p. 4.
34 For more discussion on the requirements of legislation, *supra* note 30, pp. 11-17.
35 World Intellectual Property Organization, Establishment *and Functioning of Collecting Management Organizations*, www.wipo.com last accessed on November 20, 2018.
36 Ibid, p. 4.

2.3. Exercise and Management of Rights

Ensuring easy access of copyright permissions to users either through individual licensing or collective management system is crucial for creating a compliance culture. In terms of preferences, copyrights owners first choice is individual licensing of copyrights.[37] Collective administration of works comes into play when individual exercise of rights becomes ineffective and thus collective management system is an effective and practical solution for rights holders, users and society at large.[38]

There are problems in clearly demarcating between collective and individual licensing of copyrighted works.[39] Collective management customarily deals with "secondary rights" involved in multiple uses of protected works.[40] However, the line between primary and secondary rights is blurred.[41] Therefore, there should be a clear legal boundary that demarcates primary and secondary rights and practical steps in order to reduce the likelihood of obstacles in collective administration of rights.[42] Meanwhile copyright owners, collective management societies and concerned government institutions should establish a line of communication and guidelines so that they may avoid overlaps in giving licenses.[43]

Legal monopoly of copyright collecting societies in a given legal area has also got a wide acceptance in most jurisdictions especially when or where a copyright

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37 Ibid.
38 Ibid.
39 Ibid.
40 Ibid.
41 Ibid.
42 Ibid.
43 Ibid.

collecting society is a newly introduced entity.[44] Some jurisdictions, however, left the issue of monopoly of copyright collective management societies to be determined by the voluntary union of all national and foreign right holders, thereby leading to a *de facto* monopoly position.[45] The rationale behind such precondition is that where several societies for the same rights and the same works in a country exist, it is not possible to make a precise demarcation between their activities.[46] That is to say, the adoption of homogenous collective management model creates a difficulty to ascertain works administered by copyright collecting society as it accepts establishment of multiple collecting societies for the same category of works and rights.

2.4. Role of Government

Traditionally the role of government in CMS was limited to granting intellectual property rights by enactment of legislation; putting a balance between copyright owners and user interests (for instance by creating exceptions and limitations to the exclusive right of copyright holders); offering international protection through membership of the multilateral conventions such as Berne Convention, Universal Copyright Convention, and Rome Convention.[47] These days, however, the roles of government are multi-faceted, as they involve policy-making, formulation and implementation of appropriate legislation; enforcement and management of

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[44] Denmark, Finland, Iceland, Malawi, Norway, Russia, Sweden, France etc., are States which legally provide monopoly position to copy right collecting societies in a given legal area. WIPO and IFRRO, *supra* note 3, p. 14.

[45] United States of America, United Kingdom, Canada, Argentina, Brazil etc., are States which left the issue of monopoly position of copy right collecting societies to be determined by voluntary agreement of right holders. Ibid, p. 17.

[46] Ibid.

[47] Goldstein Paul, *International Copyright: Principles, Law, and Practice* (Oxford University Press, Oxford, New York, 2001), p. 14.

copyrights, and other tasks often include education and awareness-raising activities.[48]

In some jurisdictions, governments are directly involved in the enforcement of copyrights by creating close collaboration with police and customs authorities.[49] Most importantly, governments have irreplaceable role, especially in developing countries, in facilitating the formation and operation of collective management societies, in particular at its initial stages; because copyright owners may not be in a position, both financially and technically, to establish properly functioning system of collective management.[50] Some other countries, mostly in the global south, go beyond assistance and give CMS a semi-governmental structure.[51] The reason behind government support is thatauthors'bargaining power was minimal; they were being exploited by users of their works like private companies with better financial power.[52]

To sum up, financial, technical and other sorts of government support have a lot to do with the effective establishment and operation of copyright collecting societies. Government support is especially crucial in developing countries like Ethiopia where copyright owners are not economically and technically capable to ensure effective establishment and successful operation of copyright collecting societies.[53]

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48. Ibid.
49 WIPO, *A Guide to Copyright Organization of Trinidad and Tobago*, http://www.wipo.int/, last accessed on August 20, 2018.
50 Ibid.
51 Ibid.
52. Ibid.
53 Ibid.

3. Operating Models of Copyright Collective Management Societies

Collective Management Societies of different jurisdictions perform a number of common roles. They provide a single point of access to content for those wishing to reproduce copyright materials and, in this way, help to keep administrative costs of secondary licensing to a minimum.[54] They also ensure content creators are rewarded for any copying or reproduction of their work and they act as advocates for their members. However, there are some significant differences in the forms of collective societies across countries, because of the legislative framework under which they operate and the economic, social and political realities of the countries.

Taking the legislative framework in which CMS operate, the International Federation of Reproduction Rights Organization (IFRRO) classifies the operating models of copyright collecting societies into three, namely voluntary collective management societies, extended collective management societies, and compulsory collective management societies.[55] Each of the models will be discussed in detail below.

3.1. Voluntary Collective Management Society

Under this model of collective management, the mandate of collective societies to provide license and collect royalties from users are voluntarily entrusted to them by copyright owners. Individual copyright owners have the right either to transfer their rights to the collective management society or individually license and collect royalties from users.[56] There is no law which governs the role of CMS and their

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54 Ibid.

55 *Supra* note 3, p. 15

56 Argentina, Brazil, Canada, Chile, Colombia, Ireland, Hong Kong, Italy, Jamaica, Japan, Kenya, Mexico, New Zealand, South Africa, South Korea, Trinidad and Tobago, and Uruguay are some of the countries with legal regimes which permit voluntary collective licensing. United Nations Education, Scientific and Cultural Organization (UNESCO), the ABC of Copyright, http://www.unesco.org/culture/copyright, last time accessed on September 20, 2018, pp. 15-22.

relation with the individual right holders. Put differently, the relationship between the copyright collecting societies and copyright holders shall be determined by agreement of the organizations and individual right holders.

In jurisdictions that recognize full-fledged voluntary collective management model, copyright owners authorize collective management societies to negotiate and grant licenses, collect remunerations and distribute collected royalties among right owners.[57] There are also partial voluntary collective management models in which right owners directly conclude contracts with users of their works and only entrust their collective societies to monitor performances and collect royalties.[58]

In this model, to address the issue of competition of collective management societies, some countries chose monopolistic approach[59] and some other countries, on the other hand, opted for co-existence of homogenous collective management societies.[60] Countries that have monopolistic approach assign certain collective management societies to take public authority role or allow only one collective management society to take role in each business (sectors of copyright and related rights). Put differently, only one collective management society may be established to administer one type of copyright and related rights and that the scope of one collective management society shall not conflict with another lawfully registered society.

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57 Fiscor, Mihaly, Collective Management of Copyright and Related Rights in the Digital, Networked Enviroment, *Daniel Gervais. Collective Management of Copyright and Related Rights* (2006). https://www.ivir.nl/publicaties/download/CMCR_5.pdf last accessed on July 19, 2018.

58 Ibid.

59 Some of the countries that adopted the monopolistic approach are Belgium, Greek, Netherlands, Spain, France, Germany, Sweden and China; Ibid.

60 For instance USA and Canada allow existences of many collective management societies that may administer same sectors of copyright and related rights and encourage competition among them. Ibid.

3.2. Extended Collective Management Society

Extended collecting society is similar to that of voluntary collecting society except that the agreements reached between users and collective societies are extended to cover rights of owners who have not specifically mandated the collective society to act on their behalf.[61] As Mihaly notes, the essence of extended collective management model is that if there is a sufficiently representative collective management society that is authorized by majority owners in a given field, it shall be legally extended to administer rights of other owners who have not authorized the society to manage their rights.[62] Even so, owners are able to opt out of the collective society if they wish. This model tries to balance efficiency of collective management society by legally extending their functions from the voluntary members to non-represented right holders and copyright and related right owners by allowing freedom of opting out. It is widely used in Nordic countries, Canada and China.[63]

3.3. Compulsory Collective Management Society

Under compulsory copyright collecting society, right owners are obliged by law to negotiate secondary rights through CMS with no opting out.[64] This model represents that although owners of works are granted exclusive rights, it is

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61 In some countries (such as Denmark, Finland Iceland, Malawi, Norway, Russia, and Sweden) , especially when the individual right holders are well organized, voluntary licensing is supported by legislation so as to guarantee fully covering licensing to the users (e.g.). Id, p. 17 See also, Dietz, Adolf, Chinese Copyright System: Anglo-American or Continental European model, International *Forum on the Centennial of Chinese Copyright Legislation, Renmin University of China. Beijing*, 2011. www.cpt.cn/uploadfiles/20110107112242548.Pdf, last time accessed on September 12, 2018.

62 Ibid, p. 48.

63 *Supra* note 57, p. 10.

64 Although management of copyright and related rights as an exclusive right is a voluntary act, in cases of compulsory collective management rights holders cannot make claims on an individual basis. Compulsory license is introduced in 1995 by France according to which individual right holders are legally obliged to make claims only through collective management organizations. Ibid.

provided that they can only exercise their rights through CMS.[65] This model of copyright collective management was devised, *inter alia*, to avoid fragmentation of rights which denotes "the fact that copyright and related rights are expressed in terms of a bundle of rights applicable to discrete types of use …; and each such right can not only be shared by co-authors or their assigns, it can also be divided contractually by territory, language, type of media".[66] Australia, Netherlands, Singapore, and Switzerland are some of the countries that adopted this model of collective management society. Private copying remuneration with a levy system in that license fees are levied on copying equipment at the point of sale or for ongoing operation and the collective society collects and distributes the fees to the rights owner.[67]

4. Copyright Collective Management Societies in Ethiopia: Legal Gaps and Challenges

4.1. Normative Requirements for the Formation of Copyright Collective Management Societies

Copyright and Neighboring Rights Protection Proclamation as amended by Proclamation No. 872/2014 is the first law in the country to recognize and state out specific requirements for the establishment of copyright collective management societies. Prior to its enactment, CMS was legally treated like any other non-profit

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65 *Supra* note 57, p. 42.

66 In the absence of mandatory model of collective management society, a single use of works may require multiple license or authorization from different right holders and collective management societies. See *supra* note 1 pp. 3-36.

67 Example Belgium copyright legal regime. Ibid.

civil society which had caused practical hindrances to functions of collective societies, like collection and distribution of royalties.[68]

Proclamation No. 872/2014 not only recognizes copyright collective management society as special institution but also lays down both substantive and formal requirements for its establishment and function thereof. Article 33(1) of Copyright Proclamation No. 872/2014 states the formal requirements as follows:

> An application for recognition of the formation of a collective management society shall be submitted to the [Ethiopian Intellectual Property Office] in a written form accompanied with […]: a) description of the types of members' creative works; b) internal rules and regulations; c) memorandum of association; and d) list of sector associations established under it, and their respective individual members.[69]

As can be gathered from the above quoted provision, with respect to the formal requirements, the law opts for the system of authorization or administrative approval of copyright collective management societies. Hence, CMS shall make application and get authorization from Ethiopian Intellectual Property Office so that it can collectively administer rights of members.

In stating the substantive requirements, the Copyright Proclamation No. 872/2014 envisaged the existence of three sector associations as a requirement to establish a

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[68] Copyright collective management societies were established and regulated like other civil society organizations; because collective administration of copyrights was not recognized in the copyright proclamation no. 410/2004. Due to the absence of special provisions in the copyright proclamation or separate legal regime, its establishment and regulated by Ethiopian Charities and Societies Proclamation No 12/2009. As a result, such Copyright Collective Management Society may not generate income from users and distribute collected fees among its members. Charities and Societies Proclamation, 2009, Arts. 7, 103 and 92, Proc. No 621/2009, Fed. Neg. Gaz., year 15, No. 25.

[69] Copyright and Neighboring Rights Protection (Amendment) Proclamation, 2014, Proc. No 872/2014,Fed.Neg.Gaz.,Year 21, No 20.

new copyright collective management society.[70] However, a definition for what constitutes sector association is provided nowhere in the proclamation. As a result different lines of arguments have been raised. Amenti noted that it could be interpreted in two ways: 1) the requirement of sectorial associations connotes copyright protection sectors in one organization; and 2) the requirement can be defined as presence of at least three right holders associations even if all of them belong to the same sector of copyright.[71] On the contrary, in 2017, the Ethiopia Intellectual Property Office (herein after EIPO) has rejected an application made by Musicians' Association, stating that the applicants shall join with two other sector associations as the applicants association is considered as one sector.[72] The latter stand seems sound; because it is in line with the purpose of collective administration of copyrights.

The other gap is that Copyright Proclamation No. 872/2014 fails to regulate the requirement for establishment of sector associations and compositions thereof. Besides, the term sector is not defined. These flaws can create fragmented establishment of sector associations and formation of CMS. Owners of copyright works residing in regional states and even small cities, for instance, can establish sector associations by fulfilling the requirements for establishment of professional association which are envisaged in the civil society's proclamation.[73] Such less strict requirements for formation will cause proliferation of CSM.

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70 *Supra* note 69, Art. 32 (2).

71 Amenti Abera, 'Collective Management of Copyright: More Than Two Centuries of Existence in History; Two Years old in Ethiopia, https://www.academia.edu, last accessed in June, 2018.

72 Rahel Alemayehu, 'Prospects and Challenges of the Ethiopian Copyright and Neighbouring Rights Collective Management Society' (unpublished undergraduate thesis, Mekelle University Law Library, 2018), p. 34.

73 Organizations of Civil Societies Proclamation, 2019, Proc. No.1113/2019, *Fed. Neg. Gaz.*, Year 25, No. 33.

The ambiguity on the requirement of three sector associations is practically creating obstacles on establishment and operation of copyright collective societies. Following the amendment of copyright proclamation, copyright owners and their associations have established a copyright collective management society in 2017. Yet, thus far the copyright collective management society has not engaged in collection and distribution of royalties because of; *inter alia*, oppositions made by non-member copyright holders and their professional associations.[74] Ethiopian Musicians' Association has opposed the legality of the collective society stating that it is not represented.[75]

As aforementioned, the position of EIPO on the requirement of sector association is that the associations shall be from three sectors of copyright or related rights. The sector associations of proposed collective management society may not belong to the same sector of copyright or related right protection. [76] For instance, associations of music producers, performers and lyricists together may not form collective management society for they are from one sector, music industry. In June 2017, lyric writers, melody writers and the music composers made application to establish a collective society; however, EIPO rejected their application stating that all members belong to one sector, music industry.[77] The Office added that lyric writers, melody writers and the music composers are sub-divisions within music industry, hence, are professional association (*Yemoya Zerf in* Amharic) but not sectors (*Yemesk Zerf*).[78] In its decision, the Office stated that such requirement is meant to limit the number of collective societies to be established in the country

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[74] Ibid.
[75] Ibid.
[76] Ibid.
[77] Interview with Mr. Nasir Nuru; Copyright expert and coordinator in the Ethiopian Intellectual Property Office, on September 14, 2018.
[78] Ibid.

as this would enable effective regulation of the collective societies by the government.[79]

To sum up, EIPO's interpretation and stand on the requirements in the formation of CMS can reduce fragmentation and enhance effectiveness in functioning CMS as well as ease regulation of societies. Although such requirement may contribute to the practical challenges that copyright holders are facing in ensuring adequate protection and enforcement of their rights, admittedly it is not the main challenge. The main problems rather are the financial and technical incapability of copyright owners; and the fact that the role of government is limited to regulation of copyright collective management societies.

4.2. Royalty Schemes

Royalty scheme refers to a method employed to calculate the amount of royalty collected from the users of work based on the type of work and the category of users.Article 34 (2) of theCopyright Proclamation No. 872/2014 states that collective management societies have a power to prepare and submit a royalty scheme[80] for approval to EIPO and implement the same when approved by the Office. The right of copyright users or their associations to negotiate on the royalty scheme can enhance effectiveness of copyright collective management societies in implementing royalty schemes.

In many jurisdictions, users of copyright works are given a right to negotiate and agree on the matter of royalty scheme.[81] Non-recognition of users' right to

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[79] Ibid.

[80]. *Supra* note 86, Art. 2 (33).

[81] If they fail to reach agreement, a third party like tribunal, court, copyright board or other body determines a reasonable fee for royalty payment. In Australia, for instance, Federal Court of

negotiate and agree may contribute to challenges in the enforcement of royalty schemes because the setting up of royalty shall take into account the interest of users and the countries' objective reality.[82]

Another challenge that needs to be noted is the absence of guiding principles on preparation of royalty scheme. The proclamation does not provide any guideline on how royalty scheme maybe determined; what it should include and how users may be identified. Nor has the Office issued a directive or guideline to address this blind spot. Needless to say, such legal gap practically holds back the new collective management society in preparing royalty schemes.[83]

4.3. Absence of Levy System

Failure of the Ethiopian copyright legal regime to recognize levy system[84] is the other challenge for the copyright collective management societies. Levy system refers to the right of copyright holders to remuneration for private copying of copyright-protected works and most of the time it is applicable to private copying

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Australia and State Supreme Courts have jurisdiction to determine a reasonable license terms where it cannot be agreed. Canada follows a good trend in which Copyright Board of Canada organizes hearings on tariff proposals filed by CMS; then tariff rates confirmed by the board are published in official gazette. In China, any ordinary court can determine whether a license term is reasonable. Other countries in which a third party has jurisdiction to decide reasonable license terms when agreement cannot be reached between users and CMS include Kenya (High Court), Brazil (State Courts) and Colombia (Civil Court Judges or the Colombian Copyright Office)among others. *Supra* note 30, p. 15.

82 Ibid.

83 *Supra* note 95.

84 This sort of remuneration was developed by Germany in 1985; and the remuneration in this regard is paid by manufacturers or importers of the equipment that users could use to reproduce copyrighted works. This sort of remuneration is also paid by large-scale users, like schools, universities, research institutes and copy shops. The amount of tariffs to be paid by manufacturers or importers of the equipment and by large scale users is determined by the legislator under the copyright law. Private levying system is recognized in a number of jurisdictions, including Austria, Spain, Poland, The Czech Republic, Slovakia, Romania and Nigeria. Greenfield Ch., The Administration of Reprographic Rights and the Establishment and Role of Reproduction Rights Organizations, https://www.wipo.int/mdocsarchives/WIPO_CCM_KLA/WIPOCCMKLA039.pdf last accessed on September 21, 2019

of phonograms and audiovisual works.[85] This system is mainly applied in the form of levies imposed on equipment and recording materials used for private copying. Usually the levy or remuneration for private reproduction is paid by manufacturers of the equipment or importers of such equipment and media.

The development of private levying system has some rationales. Experiences of different jurisdictions and a number of studies reveal that in certain cases, in particular in the case of phonograms and audiovisual works, private copying has become so wide-spread that it is already unreasonable and prejudices to the legitimate interest of the copyright owners.[86] And, it has been found that such violation of legitimate interest of copyright holders may not be effectively controlled through the legal principles like civil and criminal remedies since it is very extensive and impractical to enforce those remedies.[87] Thus, the reason behind evolution of private levying system is to reduce the prejudices or violation of copyright in the name of exceptions and limitations to reasonable level.

4.4. Lack of Clarity on Some Normative Principles

The copyright proclamation lacks clarity on: 1) the extent of contribution required to be considered for two or more authors as joint owners; 2) whether fair practice is an exception to exclusive rights of author or copyright owners; and 3) standard of proof in establishing infringement of copyright especially where the work is reproduced in part.[88]

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85 Ibid.
86 Ibid, p. 6.
87 Ibid.
88 Muradu Abdo, 'Legislative Protection of Property Rights in Ethiopia: An Overview' *Mizan Law Review*, Vol. 7 No.2, 2013, pp. 196-198.

The copyright proclamation lacks clarity on the extent of contribution required to consider two or more authors as joint owners of a work. The copyrights proclamation also fails to provide for requirements needed in case only one of the co-owners opts to license or assign jointly owned copyright.

Another ambiguity that needs to be noted relates to fair practice as an exception to copyrights. Absence of restricted qualifications like doctrine of fair practice to exceptions creates a problem on legal exploitation of copyrighted works.[89] The other problem is that the proclamation does not provide standards of proof in establishing infringement of copyright especially where the work is reproduced in part. What is unclear in here is that, the degree of similarity that needs to be established between the work alleged to have infringed the plaintiff's work to proof violation of the latter's copyright.[90]

4.5. Protection of Foreign Copyright Works

In addition to their conventional function, these days, copyright collective management societies are trying to ensure their members economic and moral rights abroad through reciprocal agreements and regional cooperation. However, legal protection to copyright holders must be first ensured by a state by way of ratifying relevant international copyright conventions. Although the primary task which the emerging Ethiopian copyright collecting society should focus on is securing economic and moral rights of copyright holders with in the country, to fully secure interest of its members, there is a need to create international cooperation and reciprocal agreements.

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[89] Daniel Mitiku, 'Fair Practice under Copyright Law of Ethiopia: The Case of Education' (LL.M Thesis, Addis Ababa University, School of Law Library, 2010); see also Biruk Haile., 'Scrutiny of the Ethiopian System of Copyright Limitations in the Light of International Legal Hybrid Resulting from (the Impending) WTO Membership: Three-Step Test in Focus' *Journal of Ethiopian Law*, Vol. 25 No. 2 (2012) p. 159.

[90] *Supra* note 107, p. 198.

Ethiopia is not yet a member of most international intellectual property protection conventions such as the Berene Copyright Convention, WIPO Copyright Treaty, WIPO Performers and Producers of Phonograph Treaty, Rome Convention and the TRIPS agreement.[91] For a long period of time Ethiopia has been reluctant to sign international copyright conventions.[92] The reason that is raised to justify Ethiopian government's reluctance to accede to relevant copyright treaties is that Ethiopia has nothing to lose by not signing the relevant international instruments and this has contributed negatively to the development of copyright in the country, as there is no obligation emanating for relevant treaties that enjoins the government to make the necessary legal reform to meet international standards.[93] The argument that we have nothing to lose but a lot to gain, however, is not convincing for two reasons. First, though the nation has justifiable need for access to the world's accumulated knowledge and information, getting such through illegal way would encourage copyright infringement and rent-seeking behavior among the potential copyright and opt for foreign works since they are not protected in Ethiopia. That ultimately affects the economic benefit of domestic copyright holders. Secondly, it may affect the relation of the country with other nations which give due emphasis for copyright protection.

A question that one can raise is, thus, whether local copyright rights can be protected without the protection of foreign copyrights. Absence of legal protection

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91 Getachew Mengistie, 'Copyright and Neighboring Rights' http://www.kluwerlawonline.com/ last accessed on November 1, 2018.

92 Proposal to become a party to international treaties was always rejected by prominent personalities. The proposal to become a party to international treats was raised during the reign of emperor Haileselassie, the *Derg* regime and the incumbent government. The major concern which always led to the rejection of such proposals was that if Ethiopia becomes a party to international treaties, the price of books will become too expensive due to the fees to be paid to foreign collecting societies. The argument "we have nothing to lose but a lot to gain" always seems to have been the motto of the groups rejecting this proposal. *Supra* note 77, pp. 63-68.

93 Ibid, p. 73.

to foreign works has a lot to do with the operation of copyright collecting societies. Successful operation of copyright collecting society can be ensured where foreign works are protected, that is to say if the nation undertakes to treat domestic and foreign works on an equal footing by acceding to the international conventions. It is worth mentioning that Ethiopia has been negotiating to accede to the WTO since January 2003. The country will be, thus, bound by the TRIPS Agreement if and when it joins the WTO, even if it has not ratified any of the existing international intellectual property conventions. Furthermore, the current government expressed its intention to accede to the Berne Convention, Paris Convention, Marrakesh Protocol and Madrid Protocol, and currently Ethiopia Intellectual Property Office is drafting a ratification proclamation.[94]

4.6. Rampant Copyright Infringement

In Ethiopia, the extent of copyright violation is said to be rampant even after the promulgation of the copyright proclamation. Some of the reasons are that the society's awareness and economic capacity, absence of well-organized professional associations, and lack of government support.[95] Existence of rampant copyright violation not only affects the copyright holders but also the public at large.[96]

Before the enactment of copyright proclamation, copyright holders like musicians almost stopped producing their works due to fear of illegal reproduction and as a result producers changed their production business into other sort of businesses.[97]

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94 Birhanu Fikade, "Intellectual Property as Economic Tool" The Reporter, (July 8, 2017).

95 Ibid.

96 The effect of copyright violation is multidimensional. It discourages potential authors and creators since it robs the creative authors and artists of their economic and moral rights. Besides, existence of rampant copyright violation not only negatively affects copyright holders and the government but also hinders the consumers for they usually get poor quality of copyrighted products on the market.

97 *Supra* note 77, pp. 73-78.

An assessment of copyright violation conducted in 2012 by EIPO in nine cities[98] shows that the level of copyright infringement is rampant, 64.7 percent. A study conducted in 2014 also revealed rampant infringement rate.[99] Another study that EIPO conducted in 2014 shows that 80 percent of the music sold in Ethiopia was pirated.[100] Furthermore, it is found that more than 95 percent of music and 98 percent of locally made movies on the market are illegal copies.[101] Some copyright infringements like broadcasting of music works, public performance and imitation of music works are not considered as copyright violations.[102] It is also common to play music in hotels, cafes and other business centers which is not considered by the business owners as copyright infringement.

A multitude of reasons can be mentioned for the extensive copyright infringements. Suffice it to mention the following as being a few of the sources that are of the interest to the functioning of copyright collective management societies. First, the economic capacity of the users, in Ethiopia, like other least developed countries, urges consumers to get pirated copyrighted works which is by far less costly than original works. Thus, taking their economic position, users would prefer to buy the illegally reproduced copyrighted-products at a lesser cost which in turn encourages the persons who supply illegally reproduced copyrighted- works.

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98 The cities where the Ethiopian Intellectual Property Office assessed the level of copyright infringement are Bahirdar, Harar, Diredawa, Gonder, Hawassa, Adama, Addis Ababa, Mekelle and Dessie. Fiscal Performance Report of Ethiopian Intellectual Property Office, *Assessment of Copyright Infringement of Audio-visual Works*, (2012, unpublished, EIPO), p. 13.

99 Fiscal Performance Report of Ethiopian Intellectual Property Office, *Assessment of Copyright Infringement of Music Works*,(2014, unpublished, EIPO)

100 *Supra* note 94.

101 Kiya Tsegaye., 'Copyright law in Ethiopia: Shining Law Zero Effect' https://www.abyssinialaw.com/blog-posts/item/1487-copyright-protection-in-ethiopia-shining-law-zero-effect last accessed on October 31, 2018.

102 *Supra* note 99.

Second, the government is not yet striving to take measures against perpetrators. Worst of all, government owned broadcasting organizations sometimes modify some copyrighted works and copyright holders have not objected to such act.[103] Some of the copyright infringements made by the broadcasting organizations are with an implied permission of the copyright holders because getting a chance to present copyright works on the media is considered as a privilege and copyright holders often do not want to negotiate or raise legal action against the broadcasting organizations.[104] In other words, they do want to become embroiled in with broadcasting organizations which are the only options for the copyright holders to broadcast their works to the public. On the other hand, it is not affordable to pay remuneration to all copyrighted works due to the financial capacity of the broadcasting organizations.[105]

The absence of well-organized copyright associations further aggravates the copyright violations in the nation. Though there are copyright holders' associations, they are not active in bringing action against infringers on behalf of the copyright holders in case of copyright infringement.[106] The main reason why the associations are inactive in bringing legal action is chronic financial constraints. Professional associations are limited to the capital city Addis Ababa and do not have branch office at the regional states which in turn limits their endeavors to create awareness and advocacy campaigns.[107]

Thus, as rampant copyright infringement is a sign of low copyright enforcement scheme and culture in a given society, emerging copyright collective management societies of Ethiopia would face difficulties to realize economic interests of their members. Users would not be interested to pay royalties if they can get the

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[103] Ibid.
[104] Ibid.
[105] Ibid.
[106] Ibid.
[107]. Ibid.

copyrighted works for free through the unlawful channel which is prevalent these days in Ethiopia.

4.7. The Online Environment: Internet

Development of Internet technology, at the international level, has become a very challenging issue for copyright enforcement and function of CMS. It threatens copyright collective management societies not only because of lack of technical know-how as to its function but also the difficulties related to individual users sharing of copyrighted works using the internet as mass media.[108] That means an individual end user of copyright-protected works such as music, with a view to jeopardize the interest of copyright owner or due to other reasons, may release the work through the internet from which other individuals can have access to the copyright-protected works.[109] What makes it difficult to control such kind of piracy is that individual users have become a content provider that is to say by using internet they can provide the copyright-protected works to other individual users easily.[110] In connection to this, Gervais wrote:

> …in the case of broadcasts and of cable transmissions, the intermediary responsible both for the technical operation and of getting content to end users and for selecting the content is a professional. On the internet the function is split. In the vast majority of cases, ISPs [intermediary service providers] do not select the content. They merely provide the means to get the content from one point to other. The point of origin may be professional content provider, but it may also be another individual user. When

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108 *Supra* note 3, p. 7.
109 Ibid.
110 Ibid, p. 8.

> broadcasters were analogized with theater and concert hall operators, the analogy held because both were making a professional use of copyright content. On the internet individual end users have become "content providers" but they are not professionals. Still, because right holders analogize to professional content providers, they had no hesitation to apply copyright, hitherto purely professional right, to those individuals, and that is when and why the tension emerged. Tension because, on the other side, individual users want to harness the enormous capabilities of the internet to access, use and disseminate information and content.[111]

The development of internet technology creates wide and uncontrollable piracy or copyright violation for the reason that both copyright holders and their copyright collective management societies could not easily identify the infringers because they are individual users. This is because, as mentioned above, individual users, using advanced software developed by others professionals to be used to browse on the internet, may share copyright-protected works on the internet with other users. It is also impracticable to issue licenses, like other professional copyright-protected works providers such as broadcasting organizations, to individual users. Still, this sort of problem has been occurring even in countries where there are well-developed and strong copyright collective management societies.[112]

Online environment has been spreading fast in Ethiopia. Today the numbers of internet service customers has reached 40 million.[113] Ethiopian Telecommunication has launched its fourth generation network (4G network) to enable the Internet users to be beneficiaries of a modern and efficient

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[111] Ibid, p. 9.
[112] Ibid, p. 8.
[113] EthioTelecom, *Tele density in Ethiopia*, https://www.ethiotelecom.et/, last accessed on April 21, 2019.

service.[114] With the growth of the Internet users, issues of intellectual property rights protection in general and copyright protection in particular are likely to come to the fore.

As aforementioned, well-developed copyright legal regime that can cope up with the technological developments including internet should be in place in order to ensure effective copyright enforcement and successful operation of copyright collecting societies. When we examine the Ethiopian legal regime, in connection with online environment, that whether Ethiopian copyright legal regime is in position to tackle the challenges associated with development of internet; there are two lines of arguments. The first line of argument is that the copyright legal regime does not contain specific provisions dealing with copyright-protected works on the internet; one may hold that the copyright legal regime (the proclamation) is not in a position to combat the challenges of online environment.

As a second line of argument, however, one may argue that the copyright legal regime contains principles meant to extend protection to copyright works including in the online environment. As envisaged under Article 2(6) of the copyright proclamation, owners of copyrighted works have exclusive right to communicate their works to the public using any mode of transmission including internet. It also includes the act of sharing of copyright-protected works through internet. Moreover, since it prohibits temporary copy of copyright-protected works and temporary copying is an essential part of the transmission process through internet without which messages cannot travel through the networks and reach their destinations. The definition of reproduction stipulated under Article 2(25) of the

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[114] Ibid.

proclamation can be interpreted to apply against individual internet users who share copyrighted works.

Nonetheless, the existence of the aforementioned two legal provisions of the copyright proclamation are hardly adequate to combat copyright violations in the online- environment. As Kinfe and Halefom observed, the copyright laws do have gaps on protection of computer programs; the liability and responsibility of online service providers for the infringing actions of their subscribers; and does not provide anything with respect to digital rights management systems and their unlawful circumvention.[115]

There are also technical difficulties to identify the infringers and evolution of software which facilitate individual sharing of works on the internet. To alleviate such problems, in some jurisdictions, governments and copyright holders, using the principle of machine-by-machine are trying to develop software.[116] They also developed legal mechanisms such as anti-circumvention law.[117]

In a nutshell, internet poses a couple of challenges to the emerging Ethiopian copy right collective management societies. The first challenge is related to the inadequacy of legal regime and the other has to do with technical matter.

Concluding Remarks

Copyright collective management societies are effective and efficient in collectively administering copyright rights and neighboring rights. International

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[115] Kinfe Micheal and Halefom Hailu, 'The Internet and Ethiopia's IP Law, Internet Governance and Legal Education: An Overview'*Mizan Law Review* Vol. 9, No. 1, September 2015, pp. 156-163.

[116] James, T.C. The *Internet as a Challenge for Intellectual Property Protection: Indian perspective*, http://www.wipo.int/edocs/mdocs/mdocs/en/wipointsin98/wipo intsin982.doc, last accessed on November 21, 2018.

[117] Dorian Chirosca, 'The Role of Administrative Authorities and Collective Management Societies in Promoting Creativity and Copyright Based Industries', http://www.wipo.int /edocs.pdf, last accessed on November 21, 2018.

practices show that depending on the specific socio-economic and political realities of countries, there are different models of copyright collective management societies. The common operating models of CMS that are put into practice are voluntary, extended and compulsory collective management societies. Each model has its own advantages and disadvantages. It is, however, to be noted that the models should be adopted considering factors such as country size, capability of copyright owners, and expertise. Besides, there are minimum conditions that need to be put addressed for the effectiveness of copyright collective management society of any model. These are legislation that provides solid foundation for establishment and operation of collective management societies; vigorous and effective enforcement mechanisms; exercise and management of rights that ease access to copyright users; and the role of government in the enforcement of copyright offices.

Despite the commendable progress made by Ethiopia in bringing about effective copyright collective administration system by adopting and amending laws, and establishing institutions, in this article the author argues that there are legal gaps and other challenges which hold back the establishment and functions of copyright collective management societies. The first deficiencies relate to lack of clarity on some principles including the requirements of three sectors for establishment of collective management society, and determination of royalty scheme. Second, the copyright legal regime fails to not only recognize users' right to negotiate in setting up royalty schemes and fees but also incorporate principles that should be considered in setting up royalty schemes. Third, the copyright proclamation fails to recognize private levy system, fails to appropriately incorporate legal provisions that regulate online environment, and fails to regulate dumping of foreign works, and limits government role to regulation of collective management societies. Lastly, the law lacks clarity on some normative principles such as the extent of

contribution required to be considered for two or more authors as joint owners; whether fair practice is an exception to exclusive rights of author or copyright owners; and standard of proof in establishing infringement of copyright especially where the work is reproduced in part.

The gaps and challenges discussed in this article call for amendments of the copyright legal regime to include legal provisions that recognize representation of copyright users in setting up royalty schemes. Besides, to ease process of establishing copyright collective management societies and prevent fragmentation of the same, the ambiguity as to the requirement of three sector associations should be clarified by law. Furthermore, in Ethiopia since copyright and related right holders are financially and technically incapable, the government should be made responsible to extend special support to the emerging copyright collective management societies. Moreover, In order to make the copyright holders economic interest in the area of private copying enforceable, private levying system should be recognized under Ethiopian copyright legal regime. Finally, as there is fast internet user growth in Ethiopia, it is crucial to fine-tune the copyright legal regime to respond to such new technological developments. Problems associated with on-line environment or internet may not be resolved only by enacting laws, hence, in addition to addressing the legal loopholes in this regard, it is indispensable to equip the emerging copyright collective management societies with technological means that will enable them to effectively combat copyright infringements in the virtual world.

Taking the aforementioned measures can indeed serve the purpose of delivering better efficiency and effectiveness in the formation and operation of copyright collective management societies and enforcement of copyrights. And, equally important, they can enhance productivity in the sector of copyright and economic benefit to the owners as well as the nation.

Perjury in Ethiopia: Legal and Practical Challenges in East Gojjam Zone

Mekonnen Nigusie* & Abreha Meselé*

Abstract

Perjury is a false testimony, in relation to facts material to the issue to be decided, given by a party to proceedings before a judicial or quasi-judicial tribunal who is (being) required to speak the truth. Witnesses are the major source of evidence in the administration of criminal justice and other proceedings. However, witnesses may also supply perjured testimony to courts that increases the conviction of innocent persons. The conviction of innocent persons is intolerable error under the FDRE Criminal Justice Policy and the FDRE Constitution. The article purports to explore the various legal and practical challenges posed by the practice of perjury in courts particularly in criminal cases. In order to explore the challenges, the article used both primary and secondary data. The researchers found that perjury is increasing in East Gojjam Zone courts leading to wrong conviction and punishment of innocent persons. Moreover, perjury debilitates the trust and confidence of the society towards the judiciary. This holds true as perjury is very rarely charged against anyone who perjured. The article recommends that courts must introduce better means of winnowing evidence by allowing suspects to use cross-examination properly and other procedural safeguards the FDRE Constitution guarantees. Moreover, the Office of Attorney's should also raise awareness of the society to hold better societal values. Lastly, there should be possible interface between different institutions for better management of evidence.

***Keywords**:* Perjury, Witness testimony, Truth, Justice Administration, East Gojjam Zone Courts, Ethiopia.

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Introduction

"*Witnesses are the eyes and ears of justice."* **Jeremy Bentham**

In the modern world lying is becoming as common as honesty.[1]Biblically, telling the truth is one of God's Ten Commandments by which human beings are commanded to practice. Despite the spiritual and legal[2] banning of lying, human beings remain to be dishonest. In principle, people are required to be honest and cooperative to the administration of justice. Fischweicher clearly depicted that"[t]ruthful testimony is essential to the administration of justice and the functional capacity of every branch of government."[3] However, due to different reasons including but not limited to personal gain, extending protection to families and revenge, witnesses tend to be dishonest to satisfy their respective ends.[4] According to Curriden "…family members and friends may commit perjury to protect loved ones from incarceration during trial."[5]This is being practiced in the

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1 Douglas Jack, *Investigative Social Research: Individual and Team Field Research* (Beverly Hills: Sage Publications. Newbury Park, CA, 1976), p. 1. In this regard Griffin provides that one cannot easily recreate lying clinically or study empirically, but recent research puts some evidence of its frequency. Kern Griffin, 'Criminal Lying, Prosecutorial Power, and Social Meaning' *California Law Review, Inc.*Vol. 97, No. 6, Dec. 2009, p. 5. As noted by Griffin, studies have revealed that as many as one out of three job applicants lies to potential employers; that nine out of ten college students have lied to sexual partners; and that study participants lied to about a third of the people with whom they spoke in a given week. See also David Livingston S., *Why We Lie: The Evolutionary Roots of Deception and the Unconscious Mind* (St. Martin's Griffin; Reprint edition, 2007), p. 2. As De Paulo also rightly put it the average person tells one or two lies a day, but one set of subjects recording daily interactions identified as many as three fibs or fabrications for every ten minutes of conversation. Bella M. De Paulo et al, 'Lying in Everyday Life' *Journal of Personality & Social Psychology* Vol.70. No. 5, 1996, p. 982.

2 The Criminal Code of the Federal Democratic Republic of Ethiopia, 9th of May, 2005, Art. 453, Proc. no.414/2004, Fed. Neg. Gaz. clearly penalizes perjury.

3 Jessica Fischweicher, 'Perjury' *American Criminal Law Review*, Vol.45 No.2, 2008, p. 799.

4 See *supra note* 2, Art. 448.

5 Mark Curriden, 'The Lies have It: Judges Maintain that Perjury is on the Rise, But the Court System may not have enough Resource to Stem the tide' *ABA journal*, Vol. 81 No. 5, May 1995, p. 71.

presence of provisions that prohibit the action of misleading administration of justice by supplying false information under the FDRE Criminal Code. Perjury, even if committed in a civil matter, is a criminal offense pursuant to Article 453(1) of the FDRE Criminal Code. The practice of perjury is rampantly growing in judicial and quasi-judicial proceedings in East Gojjam Zone. The problem is worse when the testimony is made before judicial or quasi-judicial organs. This is true because the decision would result in compromising the fundamental due process rights of accused person recognized under the FDRE Constitution such as the right to examine witnesses testifying against them, to adduce or to have evidence produced in their own defense, and to obtain the attendance and examination of witnesses on their behalf before a court.[6] This in turn leads to the wrong conviction of innocents or the acquittal of criminals. These motivated researchers to explore legal and practical challenges of perjury in East Gojjam zone. The research was conducted in three selected woredas, namely Sinan, Quy (*Debay Tilat Gin Woreda*) and Debre Elias. The woredas were selected purposefully based on the availability[7] of cases relating to perjury. Included Data were gathered from Focused Group Discussion (hereinafter FGD) and interviews with judges, public prosecutors, investigative police officers, paralegals, and defendants.

1. Perjury and Cognate Offences: Conceptual and Theoretical Overview

1.1. Perjury

Defining the term 'perjury', though such terminology is most accustomed in common law legal system, is not an easy task as it has been defined differently by

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6 Constitution of the Federal Democratic Republic of Ethiopia, 1995, Art. 20(4), Proc. no.1/1995, Fed. Neg. Gaz. no.1

7 The East Gojjam Zone High Court 2015-2016 G.C report reveals that, there were a huge number of perjury in Sinan, Quy (Debay Tilat Gin) and Debre Elias woreda courts.

many sources in various jurisdictions and at different times. Perjury is a crime that occurs when an individual intentionally makes a false statement in judicial proceedings after s/he has taken an oath or affirmation to speak the truth in either criminal or civil proceedings.[8]Curried clearly provides that, "perjury is the justice system's dirty little secret that no one wants to admit or confront".[9] The term also refers to an act of oath-breaking, false statement, false swearing, falsehood, falseness, falsification, intentional misstatement, invention of lies, perversion of truth, violation of an oath, willful telling of a falsehood, or willful telling of a lie.[10] Simply put, perjury means:-

> ... [L]ying under oath, commonly in the context of giving testimony in court. Such lying is different from simply making a mistake, because the law requires that any perjuries statement be intentional. It is different from evasion or half-truth because the perjury must be about some matter that the witness believes to be false; creating a misleading impression through indirection, while [being 'dishonest, is not perjury. The false statement must be material, meaning that the falsehood has the potential to influence the outcome of trials or other official proceedings.[11]

According to Black's Law Dictionary, perjury is defined as "deliberately making false or misleading statements while under oath".[12] Accordingly, six elements must be cumulatively fulfilled to claim that perjury is committed as a crime. First, the speaker has to make an oral statement. Second, the statement made has to be false. Third, the speaker has to make the statement while under oath. Fourth, the speaker must know that the statement he or she is making is false. Fifth, the statement is

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8 *Supra* note 2.
9 *Supra* note 3, p. 69.
10 Jared S. Hosid, 'Analyzing the Definition of Perjury'*American Criminal Law Review*, Vol.39, 2002, p. 895.
11 *Supra* note 11.
12 Bryan A. Garner, Black's *Law Dictionary (standard edition)*, (8th edition, Thomson West, United States 2004), .p. 1175.

made before judicial proceeding. Lastly, the speaker's statement has to be related to the materiality of the case that is the act of perjury must have the potential to influence the outcome of the decision.[13] Perjury may not result from confusion, mistake or faulty memory. Therefore, the public prosecutor must put questions to witnesses using clear and unambiguous language in order to check whether perjury is committed or not. To sum up perjury is "a crime that occurs when an individual intentionally makes a false statement during a court proceeding after s/he has taken an oath to speak the truth."

1.1.1. The Morality of the Act of Perjury

The discussion of perjury would not be complete without examining the causes of dishonesty and lying. After all, perjury is a lie, but a lie that is specifically prohibited by law. Usually, discussions of lying and deception are based on the two well-known ethical theories, particularly Jeremy Bentham's consequentialism and deontology, although in recent years "virtue ethics"[14] has increasingly been included as a basis for discussion.[15]

a) Teleological view

It is known that consequentiality arguments focus on the effects of lying. The consequentialists discuss how dishonesty undermines human relationships and

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13 Roger W. Shuy, *The Language of Perjury Cases, 198 Madison Avenue*, (Oxford University Press, USA, New York2011), p. 10.

14 "Virtue ethics" is a theory which is originally conceived by Aristotle that emphasizes on the individual act than the consequences of the act. It refers to the fact that not lying is built into an individual character. See also Solomon R (write in full), 'What a Tangled Web: Deception and Self-deception in Philosophy' in Lewis Michael and Carolyn Saarni C (eds.). *Lying and Deception in Everyday Life* (Guilford Press New York, 1993), pp. 30-58.

15 Rosalind Hurst House, 'Virtue Ethics and Human Nature *'Hume Studies*, volume xxv, No.1 and 2 April/November 1999, pp. 67-82.

trust, "the qualities that give human life its peculiar worth and dignity".[16]They argue that truthfulness among members of a society is essential to its survival**.** If all statements or assertions can be equally true or false, words and gestures can never be trusted and genuine communication cannot occur. Proponents of consequentialism argue that deceptions are an assumption of power, and that perjury can be taken as one kind of deception which confers power to the liar against the deceived litigant. Hence, lies that cause harm or decrease happiness upon individual litigants are not justified.[17] The foregoing assertion can be equated with one of the Ethiopian social value "*washito yetetalan sew mastarek tiru new*" (in Amharic) which can be loosely translated as "*resolving individual disputes even by using lies is acceptable*". Here, one can take cognizance that the procedure or act to resolve the dispute is not relevant so long as individual litigants have successfully resolved their conflict and their happiness is maintained. Consequentialist or utilitarian views of perjury are concerned with the 'result', not the 'act' itself to determine the validity of an act.

b) Deontological view

According to the deontologists' view, since lies may mislead someone into drawing false conclusions, it should be morally condemned.[18] The liar, like the physical coercer, bends others to his/her will, getting them to do or believe what s/he wants. So it is unfair and must be condemned.[19] Hence, perjury is a condemned act which results in unfairness and miscarriage of justice. Perjury, regardless of the reason of its commission whether to resolve disputes or create happiness of litigants is not to be accepted as it is considered by deontologists as the fruit of the poisonous tree.

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16 Kleinig John, 'Testimonial Deception by Police: An Ethical Analysis' *Philosophic Exchange,* Vol.18, No.1 1987, pp. 81-92.

17 *Supra* note 7.

18 Ellin Joseph, 'Special Professional Morality and the Duty of Veracity' *Business and Professional Ethics Journal*, Vol. 132, 1982, pp. 75-90.

19 McMahon Christopher, 'The Paradox of Deontology, Philosophy and Public Affairs*' Wiley Fall*, Vol. 20 No.4, Aut.1991, pp. 350-377.

1.2. Cognate Offenses

Cognate offences are crimes committed in the course of proving or disproving certain allegations in judicial or quasi-judicial proceedings which are in many ways similar to perjury. In order to characterize certain testimony as false and thereby cognate offence, it must meet three cumulative requirements.[20] First, there should be utterance of false statement by a person testifying. Second, the statement must be made deliberately. And third, there must be actual or potential damage to another person as a result of the utterance of the false testimony. In false testimony, oath is not a requirement unlike in the case of perjury. A false statement is another cognate offence committed in the course of proving or disproving disputed issues in court proceedings. A false statement is not a testimony rather a statement made without oath. There is convergence and overlap between; false statement and perjury as all are untrue utterances and could detract the administration of justice.

2. False Statement, False Testimony and Perjury under the FDRE Criminal Code

2.1. False Statement by Parties

Unlike perjury proper, which can only be committed by witnesses while under oath, 'false statement' is committed by parties who are not under oath.

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[20] Guy Bechor, *God in the Courtroom: the Transformation of Courtroom Oath and Perjury between Islamic and Franco-Egyptian Law*, (Vol. 34, Martinus Nijhoff Publishers and VSP, Leiden: rill Boston, 2012), pp. 358-359.

As per Article 452 of the FDRE Criminal Code, false statement is committed by parties to proceedings who intentionally make a false statement pertaining to facts relevant to the issue. According to Article 452 of the Code the crime of false statement is defined as follows:

> (1) Any party to proceedings before a judicial or quasi-judicial tribunal who being required to speak the truth, knowingly gives a false statement relating to facts material to the issue to be decided by the tribunal,
>
> Is punishable, even where the result sought is not achieved, with simple imprisonment not exceeding one year, or, where the false statement has been made in the course of criminal proceedings and is likely to cause injustice, with rigorous imprisonment not exceeding three years.
>
> (2) Where the party has been sworn or affirmed to speak the truth, the punishment shall be rigorous imprisonment not exceeding five years, particularly where the result sought has been in whole or in part achieved.
>
> (3) Mere inaccurate allegations by a party in defense of his interests are not subject to these provisions.

From the foregoing provision, one can deduce the following as the constituent elements of the crime of false statement: a) the crime should be committed by a party to a proceeding before judicial or quasi-judicial proceedings who is being required to speak the truth but without making an oath. Here, it has to be distinguished that the party in this case refers to neither oral witness nor expert witness who may be required to speak the truth during trial in the judicial or quasi-judicial tribunals after making an oath or affirmation. Rather, a party, in this

context refers to an individual litigant who is required to speak the truth during the proceedings before a judicial or quasi-judicial proceeding. b) The individual shall make a false statement intentionally. The crime of false statement cannot be committed by negligent act of the person. Hence, the person should make false statement with full knowledge and volitionally (or intentionally). c) A false statement shall be related to facts material to the issue to be decided by a judicial or quasi-judicial body. Any false statement made by a party cannot result in criminal accountability for the crime of false statement rather the false statement shall be linked to facts material to the issue to be decided by judicial or quasi-judicial entity. A statement is material if it is capable of influencing the decision of the decision maker to which it is addressed.

2.2. False Opinion

Pursuant to Article 54 of the Criminal Code, and Articles 136(2) and 142 of the Criminal Procedure Code, expert witnesses can be adduced before a court for the purpose of informing about the physical and mental condition of the criminal as this matter can technically be beyond the expertise or knowledge of the judges. When such expert witnesses utter false statement before judicial proceeding, they can be held accountable for crime of uttering false opinion, as opposed to false statement. False opinion is criminalized under the FDRE Criminal Code when it is made especially by expert witnesses in judicial or quasi-judicial proceedings to the advantage or detriment of any party thereof. Hence, under the foregoing situation, the expert witness shall make his/her opinion based on the definite scientific findings as it has been clearly indicated under Article 54 (2) of the FDRE Criminal Code, failure to do so and giving false opinion is a punishable act. Article 453 of the Code provides the definition of the crime of false opinion as follows:

> 1) Whoever being a witness in judicial or quasi- judicial proceedings knowingly makes or gives a false statement or *expert opinion [emphasis added]***,** or hides the truth whether to the advantage or the prejudice of any party thereto, is punishable, even where the result sought is not achieved, with simple imprisonment, or, in the more serious cases, with rigorous imprisonment not exceeding five years.
>
> (2) Where a witness has been sworn or affirmed to speak the truth, the punishment shall be rigorous imprisonment not exceeding ten years, particularly where the result sought has been in whole or in part achieved. Where, however, in a criminal case, the accused person has been wrongly convicted or has incurred rigorous imprisonment of more than ten years in consequence of the witness's act, the witness may himself be sentenced to the punishment which he has caused to be wrongfully inflicted....
>
> (4) Where due to its discovery, the false testimony, opinion**,** translation or interpretation is incapable of influencing the decision of the tribunal; the punishment shall be simple imprisonment not exceeding two years.

Consequently, false opinion, which may amount to perjury if the witnesses lie under oath, is punishable if expert witnesses intentionally make a false statement which is not based on definite scientific findings.

2.3. Perjury

Even though false swearing has been considered a spiritual offense since at least Biblical times, perjury did not become an offense in Ethiopia until much more recently. In Ethiopia, it is after the second half of the twentieth century that perjury has been made a punishable crime under the 1957 Penal Code. Currently, the 2004

FDRE Criminal Code, which replaced the 1957 Penal Code, is the primary piece of law that clearly provides the crime of perjury. Moreover, the FDRE Constitution, the Criminal Procedure Code and the Civil Procedure Code can also be taken as the legal frameworks governing perjury in Ethiopia. However, as will be shown in the sections that follow, the data gathered in the study area reveal that, the foregoing laws are not properly implemented by the courts of law.

In Ethiopia, perjury is first made a crime under the 1957 Penal Code of the Empire of Ethiopia.[21] Article 447 and the following articles of this Code provided that any witness who knowingly makes false statement under oath before a judicial or quasi-judicial proceeding is punishable up to ten years in prison. In 2004, The FDRE government repealed and replaced the 1957 Imperial Penal Code by new Criminal Code. Admittedly, as far as the crime of perjury is concerned the new Criminal Code is a cosmetic replica of its predecessor. Simply put, Article 447 of the Penal Code of 1957 on crime of perjury and Article 453 of the 2004 FDRE Criminal Code on same offense are similar in their contents.

Pursuant to Article 453 of the 2004 FDRE Criminal Code, perjury is a punishable crime.[22] It provides that:

> (1) Whoever being a witness in judicial or quasi-judicial proceedings knowingly makes or gives a *false statement* [emphasis added] or expert opinion, or hides the truth whether to the advantage or the prejudice of any party thereto, is punishable even where the result sought is not achieved, with simple imprisonment or, in more serious cases with rigorous imprisonment not exceeding five years.

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[21] Penal Code of the Empire of Ethiopia, 1957, Art. 447 (1), Proc. no. 158/1957.Neg. Gaz. (Extra Ordinary issue) year 1937, no.1.

[22] *Supra* note 2.

(2) Where a witness has been sworn or affirmed to speak the truth the punishment shall be rigorous imprisonment not exceeding ten years particularly where the result sought has been in whole or in part achieved.

From the reading of the foregoing provision of the Criminal Code, one can discern the defining elements of perjury in Ethiopia. A close look into Article 453(1) and (2) reveals that for there to be a crime of perjury under Ethiopian criminal law, first witness to the proceeding shall lawfully sworn or make an affirmation in a court of law.[23] In fact, under the FDRE Criminal Code it is not a mandatory requirement that a witness should make an oath or affirmation, by using the Bible or Quran, to testify. At this juncture, Article 453(2) of the Criminal Code seems to go consistently with Article 136(2) of the Criminal Procedure Code of Ethiopia where the Criminal Procedure Code considers oath or affirmation as a preliminary requirement for witness testimony.[24]

Second, a witness is considered committing perjury intentionally where s/he makes a testimony with full intent and volition. The witness must intend to do so. This intent requirement means that an honest mistake or unintentional falsehood cannot be considered as perjury. From this, it is understandable that a witness can be held liable if s/he supplies false information with the intent of jeopardizing others' interest. Therefore, the false statement is made with the intention to harm or procure benefit out of the supply of false information.

Third, the statement should be material to the fact at issue or should be capable of affecting the decision of the court. This refers to the fact that the false testimony made by the party is "material" or relevant to the judicial or quasi-judicial

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[23] Arts. 136 (2) and Art 142 (2) of the Criminal Procedure Code clearly state that the prosecution and defendant'switnesses and experts witnesses, if any, shall be sworn in or affirmed before they give their testimony. Criminal Procedure Code of Ethiopia, 1961, Arts. 136(2) and 142 (2), Proclamation No.185/1961, Neg. Gaz. (Extra Ordinary Issue) year No.1

[24] Ibid, Art. 147 (1).

proceeding in which it is made. To be material, a statement must have the tendency or capacity to influence the decision of a court or other quasi –judicial organ before which the statement is made. In fact, materiality is a broad concept, and a statement will be considered material not only if it directly relates to the matters at issue in the proceeding but also if it could lead to the discovery of other relevant evidence. Fourth, it is immaterial whether the intended result is achieved or not through supplying the false statement.

From the foregoing discussion, it is clear that, the FDRE Criminal Code has provided under oath false testimony to be a crime and punishable by a minimum of ten years in prison. Any witness to proceedings before a judicial or quasi-judicial organ who willfully makes under oath false material statement is punishable. Another matter that is inculcated in the FDRE Criminal Code is the issue of correction or withdrawal of false testimony.[25] If a perjurer by his/her own free will corrected or withdrawn his/her false testimony before it has taken effect and provided that the proceedings affected have not been finally concluded, the court may without restriction mitigate the punishment incurred.[26] While the courts generally agree that an offer of testimonial correction is pertinent to indicate that the inaccurate testimony was not deliberately given and that no perjury was therefore committed, there is a split of judicial opinion when the witness has made an intentionally false statement which s/he later seeks to correct.[27]

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25 *Supra* note 2, Art. 454.

26 Ibid, Art. 456.

27 Interview with Mr. Aderaw Endale, Quy woreda Court, Presiding Judge on 29 October 2016. Particularly Mr. Getaneh Shawel acting President of East Gojjam Zone High Court, on 26 September 2016 apparently provides that "**አንድ ምስክር የምስክርነት ቃሉን ከሠጠ ብኋላ ድጋሚ ቃሉን የሚያቃናበት ሁኔታ ሊኖር አይችልም ምክንያቱም ለሁለተኛ ጊዜ የሚሰጠው ቃል እወነተኛ ለመሆኑ ማረጋገጫ ስለሌለ ይህን ማድረግ አይቻልም**" which can be loosely translated as "in practice there is no any opportunity or circumstance in which a witness can

2.4. Suborning Perjury

The perpetrators of the crime of perjury are not only driven by the bad intention of the perjurer but also s/he might be induced by another party to commit the crime.[28] Hence, the FDRE Criminal Code has provided another type of perjury i.e. subornation of perjury.[29] This type of perjury is committed when someone willfully convinces or persuades another person to make false statements before a judicial or quasi-judicial proceeding.[30] Subornation of perjury is committed along with the actual perjurer. At this juncture, the public prosecutor is under duty to prove the case of inducement when charging a defendant with suborning perjury.[31]

In doing so, first, s/he has to prove the defendant has attempted to persuade the witness to lie before the judicial or quasi-judicial proceedings. But, the person who has induced a witness to lie does not need threaten the witness, mere inducement is sufficient. The defendant should believe that the testimony is or will be false.[32] It is a preliminary requirement that suborning perjury occurs only if a witness actually lies under oath.[33] This means that when the efforts of a person to convince a witness to lie are unsuccessful, s/he is not guilty of suborning perjury since no perjury has occurred. Similarly, if the witness agrees to lie but ends up not taking the stand, the person who persuaded him or her to lie is not guilty of suborning perjury.

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correct or withdraw his false testimony within the meaning of Article 454 of the FDRE Criminal Code."

28 Northwestern University Pritizker 'Perjury: The Forgotten Offence' *The Journal of Criminal Law and Criminology*' *North Western University School of Law*, Vol.65, No.3, Sep. 1973, p. 368.

29 *Supra* note 2, Art. 455.

30 *Supra* note 20, p. 362.

31 Thomas Frederik et al, 'A Review of Perjury Litigation' *American BarAssociation*, Vol.6, No.3, spring 1980, p. 29.

32 *Supra* note 20, p. 368.

33 See the *People vs. Ross*, 103, California 425, 428, p. 379. (California Court of Appeal). But, as has been provided under Article 455 (1) of the Criminal code, the Ethiopian case is different in the sense that a witness is not supposed to actually lie under oath and punishable, even where the act solicited has not been performed.

Under the FDRE Criminal Code, suborning perjury occurs when someone induces another to give false testimony or to make a false report or translation by using gifts, promises, threats, trickery or deceit in a judicial or quasi-judicial concerned proceedings even where the act solicited has not been performed.[34] The inducer should actually induce another person by using gifts or promises or other means and it is immaterial whether the act solicited has not been performed.[35] However, the inducer is not punishable within the meaning of Article 455 for suborning perjury if s/he is punishable for incitement under Article 36 of the FDRE Criminal Code. However, if the inducement is made in relation to a crime punishable with rigorous imprisonment for more than two year then the inducer is punishable with rigorous imprisonment not exceeding seven years.[36] Generally speaking, a party who is accused of suborning perjury can raise some common defenses, such as truth: if the induced witness speaks the truth, it can automatically defeat a charge of suborning perjury.

2.5. The 1961 Criminal Procedure Code of Ethiopia

The 1961 Criminal Procedure Code of Ethiopia can be additional piece of legislation which has entrusted jurisdiction over the crime of false testimony, opinion or translation to the High Court.[37] This in turn leads to the conclusion that perjury is a serious crime that may result on a third party being falsely inculpated and therefore unjustly convicted or conversely to a third party being falsely

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34 *Supra* note 2, Art. 455 (1). Besides, Art. 455 (2) of the same code provides that obstructing justice by tampering on evidence can amounts to suborning.

35 *Supra* note 2, Art. 455 (1), para. 2.

36 Ibid, Art. 455 (2).

37 *Supra* note 18, First Schedule of the Criminal Procedure Code p. 82. In fact, the Code literally reads as High Court but According to Federal Courts Proclamation No 25/1996, Art. 3(1) the Federal courts have jurisdictions over cases arising from Federal Laws where the Criminal Laws are part of it. However, as per Article 80(4) of FDRE Constitution, state High Courts can exercise the jurisdiction of the Federal First Instance court by delegation.

exculpated and therefore unjustly acquitted. It is a trite that in modern criminal justice system including Ethiopian legal system wrongful conviction is worse than wrongful acquittal.[38] Though perjury is committed in both civil and criminal cases, the police or public prosecutor should follow the Criminal Procedure Code so as to investigate the crime of perjury and punish thereof. Nevertheless, the Criminal Procedure Code has not provided any proper or unique mechanisms that would be helpful to identify perjury like other crimes in the trial room so that perjurers could be punished by the court.

The evidence rule has provided few evidentiary rules that may also be helpful in the investigation of the crime of perjury in the trial room. Article 89 of the Draft Evidence Rule provides that all persons are competent unless the court considers that they are prevented to appreciate the question put to them. Besides, Article 101 of the Draft Evidence Rule which deals with how witnesses make an oath before giving testimony and article 104 of the Rule that deals with examination of witnesses are some of the most important legal frameworks governing the crime of perjury. Nevertheless, the Draft Evidence Rule still remains a mere draft and non-binding save it inculcated customary evidence rule and international principles.

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[38] The Bible under its Old Testament says that a witness who falsely inculpates is to receive the same punishment as that which would have been given to the falsely accused; no such similar punishment is applicable for statements that are falsely exculpating. The Amharic Holly Bible with the Old Testament based on Septuagint Addis Ababa, Ethiopia, 2007 Deuteronomy 19:18–19.

3. Perjury in East Gojjam

3.1. The Nature and Magnitude of the Problem in the Zone

Regarding the sufficiency of the law governing perjury, respondents of the research have provided conflicting views. Some judges and public prosecutors and/or attorneys have said that the laws are sufficient to prevent perjury in the judicial proceedings but the other participants have replied negatively. Data gathered from FGDs and interviews revealed that the participants of the research perceived that the crime of perjury was increasing in the study areas due to the fact that the punishment provided by the FDRE Criminal Code is less serious to prevent the commission of the crime of perjury. In the case of *Public Prosecutor* vs. *Tizazu Hunegnaw*,[39] the defendant is found guilty of committing perjury that concerns bodily injury case in Debre Elias Woreda. But, the East Gojjam Zone High court decided that the criminal be punished only by one month simple imprisonment. Besides, in the cases of *Public Prosecutor* vs. *Tadege Demeke*,[40] *Public Prosecutor* vs. *Mamar Bizuneh*,[41] *Public Prosecutor* vs. *Biable Kassahun et al*[42] the court has rendered two months, three months and six months simple imprisonments, respectively. However, the FDRE Criminal Code as per Article 453 and the following articles have provided a minimum of five years and a maximum penalty of up to 25 years when the false statement or testimony has caused the victim to be wrongfully convicted. For example, the *Quy* Woreda public prosecutor chief provided that the legal framework governing perjury is insufficient to combat the

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39 See the case of *Public Prosecutor vs. Tizazu Hunegnaw*, East Gojjam Zone High Court 2008, criminal file no. 1634/491/08.

40 See the case of *Public Prosecutor vs. Tadege Demeke* East Gojjam Zone High Court, 2008, criminal file no. 1933/372/08.

41 See the case of *Public Prosecutor vs. Mamar Bizuneh*, East Gojjam Zone High Court, 2000, criminal file no. 1910/373/00.

42 See the case of *Public Prosecutor vs. Biable Kassahun*, East Gojjam Zone High Court, 2008, crimnal file no. 926/310/08.

crime of perjury as the Code provides a discretionary power to judges to impose a simple imprisonment.[43] However, one of the Debre Elias criminal bench judges provided a different opinion by stating that the legal framework governing perjury is sufficient and the punishment provided for the crime of perjury is proper. But, according to him, the most difficult thing in combating the crime of perjury was organizing sufficient evidence to prosecute the perjurer. It may be easy to prosecute the prosecution's witnesses who committed perjury. Nevertheless, the case is becoming thorny when an attempt is made to prosecute the defense witnesses of the accused when they are accused of perjury.[44] On top of that, one of the public prosecutors in the same office posited that the legal framework governing perjury in Ethiopia is insufficient to combat the crime of perjury in *Quy* Woreda. He stated that there are only a few articles that are stipulated in the FDRE Criminal Code to govern perjury. This seems unpersuasive as the number of articles has nothing to do with the amount of punishment it actually holds. Besides, it has been argued that the punishment prescribed for the crime of perjury is less serious and does not have deterrence effect for the potential offenders.[45]

The Quy Woreda criminal bench judge also provided similar statement by stating that the legal frameworks governing perjury are not sufficient.[46] The punishment that is stipulated to perjury should be increased. The way of sentencing crime of perjury should be put like crime of theft as has been stipulated in the Federal Supreme Court sentencing manual.[47] The legal framework governing perjury is

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43 Interview with Mr. Asefa, Quy Woreda Chief of public prosecutor on 9 March 2015.

44. Interview with Ms. Azmera Molla, Debre Elias Woreda Court judge on 10 March 2015.

45 *Supra* note 12.

46 Interview with Mr. Aderaw Endale, Quy Woreda Court, criminal bench judge on 29 March 2015.

47 Ibid. He also provides that, as it has been stated in the Federal Supreme court sentencing manual no.1/2002 in cases where the crime of theft is related to Articles 665 and 669 of the FDRE Criminal Code there has been up to 9 ranks that would in turn help to impose the appropriate punishment and achieve the various objectives of the criminal code.

insufficient and the punishment imposed on the criminal is less serious as compared to the negative consequences that it entails.[48]

What is more, the fact that the power to entertain the case of the crime of perjury is given to the High Court[49] has its own negative contribution to the prevalence of the crime in the study areas. Because, as the case is entertained in the Zonal High Court, which is situated in Debre Markos town, the society dwelling in the study areas, will not get a chance to learn from the trial or being deterred from the punishment of the criminal who has committed the crime in that area. It would have been better that justice would be seen to be done had the trial been in the place where the crime was committed.[50] It is not proper to give the power to entertain perjury to the High Court. As the Woreda Court is given the jurisdiction to entertain other criminal cases including the crime of false statement, it is not sensible to give the first instance jurisdiction to entertain the crime of perjury to the High Court.[51] Besides, this has affected the rights of the community to get speedy trials. In fact, the woreda court is given the power to entertain other serious crimes than perjury.[52] Hence, logically speaking it would not be appropriate to give jurisdiction to adjudicate perjury to the High Court. [53] However, some of the

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48 Interview with Mr. Habtamu Getahun, Quy Woreda public prosecutor on 9 March 2015.

49 *Supra* note 18, First Schedule.

50 See *supra* note 20.

51 Interview with Mr. Gubay Andualem Seyoum, Sinan Woreda Presiding judge on 23 April 2015.

52 In the first schedule of the Criminal Procedure Code of Ethiopia Proclamation No.185 of the 1961, it is clearly provided that the Woreda courts have given the jurisdictional power to entertain case of Aggravated offense and offenses of attack on members of Armed Forces on active duty among other things though as per The Federal Courts establishment Proclamation No 25/96, the foregoing cases falls under jurisdiction of federal first instance and by delegation under regional high court as it is federal matters pursuant to Article 3(1) cum Article 80(4) since state High Courts shall exercise the jurisdiction of the Federal First-Instance court by delegation.

53 Interview with Mr. Belsti Goshu, Debre Elias Woreda chief of public prosecutors on 10 March 2015.

participants of the research opined that there is no problem in giving the jurisdiction to the High Court and the punishment prescribed for it is sufficient as well. According to the respondents, the problem lies on the court implementing the law, that is, the punishment imposed by the court is very lenient.[54] Nevertheless, the authors believe that the jurisdiction to entertain the crime of perjury should be given to the woreda courts so that the purpose of punishment would have the impact of deterring future offenders and also to ensure access to justice.

3.2. Adverse Impacts of *False Testimony and Perjury*

As discussed so far, perjury can impede administration of justice and harms the very integrity of the criminal justice system. The negative impacts of perjury are versatile as shown in the parts that follow.

a) Debilitates Public Trust and Confidence towards the Judiciary

Erosion of public trust and confidence would increase due to the practice of perjury. In explaining this impact of perjury, Weiner described that "perjury strikes at the very heart of our system….When people lie in court, it undermines the whole process. The problem is so bad that it is severely evaporating confidence people have in the court system."[55]

So, if people's confidence in the court system is weakened or eroded as a result of perjury, it is inevitable that justice would be obstructed because the courtroom should always symbolize justice, and judges must relentlessly pursue the truth which actually requires the prosecution of perjurers.

All of the participants of the research responded that perjury is greatly eroding the public trust and confidence towards the courts in East Gojjam zone. Here, one

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[54] Interview with Ms. Yemegn Tade, Sinan Woreda Court judge on 23 March 2015.
[55] *Supra* note 3, p. 68.

should take cognizance of the fact that the judicial system need to have respect and confidence of the society for it to dispense justice, otherwise it cannot fairly determine the rights of the litigant parties that may appear before it. Courts require respect if they are to reach the goal of ascertaining the search for truth in a particular case. If individuals perceive that perjury is so wide spread in judicial proceedings, then they will either introduce false testimony for their own benefit or avoid the courts and settle disputes in their own ways. This highly jeopardizes the functioning of the judiciary and in turn the public confidence towards it.

b) Convictions of Innocent Persons

Perjury may also result in conviction and punishment of innocent persons, and that in turn goes against the fundamental rights such as life, liberty and property of innocent individuals.[56] Besides, perjury leads to the prevalence of absence of good governance, and obstruction of justice which would ultimately results in chaos and disorder.[57] It can also be a cause for the commission of other crimes.[58] Particularly, perjury intervenes with the function of the court in a trial. As it has been said so far, one of the goals of a trial is to ascertain the truth by presenting the facts to the judge. Despite this, perjury impedes reaching this goal due to the false evidence. In determining the truth of conflicting evidence at a trial, the judge has no simple formula of weights and measures upon which to rely. The judge must rely on the credibility and the trustworthiness of the testimony of witness. However, perjury destroys both credibility and trustworthiness and thus troubles the means by which a judge reaches a decision. Consequently, it dilutes determination of truth and therefore may result in a wrong decision. As a result, there is a high probability that

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[56] *Supra* note 18.
[57] *Supra* note 20.
[58] *Supra* note 26.

the innocent persons would be convicted due to perjury without their evil act or crime which in turn goes against their fundamental rights. Besides, the cases indicated in this paper so far reveal that there has been large number of wrongful conviction due to perjury in the study area.

c) Loss of Property

Respondents of the research area said that the crime of perjury causes poor fellow farmers to lose their land, causes people to buy evidence by their money, i.e., by organizing false witnesses, and causes people to lose their lives.[59] The families of the victims were disintegrated due to the fact that the perjurers have made them wrongly convicted and their properties unlawfully snatched by their opponents which ultimately resulted in miscarriage of justice.[60]

d) Weakening the Importance of Oath or Affirmation

Another consequence of perjury, in the study areas, on which all respondents of the interviews and FGDs provided, is the negative impact that perjury has upon the value of oath as a means to ensure trustworthy testimony. In all of the research areas, individuals are not hesitatant to give false testimony even after making an oath or affirmation. Admittedly, it is apparent that perjury can occur in a judicial proceeding in even though proper oath has been administered; however, it is problematic when it becomes as rampant as in the study areas of the research. As unpunished perjury weakens respect for the formal oath and subverts a safeguard intended to compel trustworthy testimony, it is necessary to replace impunity of perjurer with accountability.

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59 Ibid.
60 *Supra* note *18*.

3.3. Major Challenges in the Process of Combating the Crime of Perjury

Impunity for perjury sends a wrong message to witnesses and the society in general that false testimony has inconsequential legal effects and thereby encourages them to give false testimony before judiciary. As perjury is a serious crime which has debilitating effects on administration of justice, it should be taken very seriously by courts. However, prosecuting the perjurers is not an easy task as it would be difficult to identify the commission of perjury by oral witnesses in trial proceedings. In most criminal cases, the type of evidence produced before the courts of law are oral witnesses. It is only in some homicide cases that are committed using military weapons that forensic evidence is used as a corroborative value in the study areas.[61]

a) Perjury as a Necessary Evil

The society is increasingly accepting perjury as a necessary evil and considering the crime as a deep-rooted custom than condemning it. In fact, the societies criticize the practice of perjury openly but they are still practicing it.[62] They are still using it for their own sakes by courageously arguing that *"ሦስት አዳፍኔ አላጣም (ሦስት ጥይት አላጣም)"? "ሶስት ሀሰተኛ ምስክር አቅርብበት"* that means "adduce three false witnesses to secure acquittal". The society accepted it as a custom and perjurers are considered as heroes in some communities. [63]

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61 *Supra* note 20.

62 Ibid.

63 Interview with Mr. Belsti Goshu, Debre Elias Woreda Public Prosecutor on 10 March 2015. ይህንን በተመለከተ የምስራቅ ጎጃም ዞን ከፍተኛ ፍ/ቤት ተጠባባቂ ፕሬዚዳንት ዳኛ ጌታነህ ሻውል ህብረተሰቡ በሃሰተኛ ምስክርነት ላይ ያለውን አመለካከት ሲገልፁ እንዲህ በማለት ነበር "በመሰረቱ ሀሰተኛ ምስክርነት ሊፈጠር የቻለው በህብረተሰቡ ውሥጥ ባለው አመለካከት ነው፡ ፡ ለምሳሌ *"አየሁ ባይ እዳ ከፋይ" እና "በሀሰት የተከሳሽን ነብስ በሀሰት መስክሮ ነፃ ማውጣት ጥሩ ነው"* የሚሉት አባባሎች የሚያመለክቱት ብታይም አትመስክር የሚለውን

Furthermore, another challenge to preventing perjury that is worth mentioning in the study areas is the decline of societal value on truth due to perjury. The value that the society in the study areas gives to promise and oath is deteriorating.[64] This is because perjurers are not condemned and stigmatized by the society, and also they are not widely investigated and prosecuted by the justice machinery. Any individual whose interest is said to be affected will not hesitate to organize false witnesses and commit a crime of perjury that in turn poses an enormous challenge to the justice machineries to combat perjury.[65] Due to acceptance and wider practice of perjury by the society it is daunting to combat perjury without the necessary support from the community in the study areas.

b) High Technicality of the Offense

Although, perjury is increasing in the study areas, the courts are unable to detect the false statement of the perjurers in the trial proceedings and hence most perjurers are left unpunished. Many respondents of the study pointed out the absence of indictments and convictions for perjury, particularly when committed by the defense witnesses, due to the highly technical nature of the offense. It is difficult to identify whether or not the wordings of the defense witnesses during the trial proceeding are true. Besides, courts in the study areas have encountered a difficulty in identifying perjurers since the testimony given by the witnesses in the ordinary proceeding may be unclear and ambiguous. As a result, there has been impunity for perjurers particularly on the side of the defense witness in the study areas. Most of the perjurers who are tried for the crime of perjury are prosecution

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በመሆኑ ሀሰተኛ ምስክርነት እንዲስፋፋ አስተዋፅኦ አድርጓል ለማለት ይቻላል፡፡ አባባሎች የሃይማኖት ሆነ የስነ-አመክንዮ መሰረት ሳይኖራቸው ግለሰቦች አንዱን ለመጥቀም ወይም ሌላውን ለመጉዳት ይጠቀሙበታል፡፡" which can be loosely translated as " testifying the truth to the court of law costs you much' and 'exculpating the innocent accused by false testimony is a good way outare the sayings used by the society to justify perjury" , Interview with Mr. Getaneh Shawel, Acting President of East Gojjam Zone High Court on 26 September 2016.

64 *Supra* note 20.

65 Ibid.

witnesses. For instances in the case of *Public prosecutor* vs. *Mamar Bizuneh,*[66] *Public Prosecutor* vs. *Tadege Demeke et al,*[67] *Public Prosecutor* vs. *Ageze Tizazu Hunegnaw,* [68] and *Public Prosecutor* vs. *Biable Kassahun Asmare et al,*[69] the perjurers were the prosecution's witnesses.

c) High Reliance on Oral Evidence

Almost all participants of the research responded that it is their reliance on witnesses that exacerbate the commission of the crime of perjury. In fact, there are a lot of methods to investigate the truth. But the respondents said that they cannot use other evidence like forensic or other corroborative evidence that in turn is relevant in combating the crime of perjury due to limitation in capacity. But in all of the study areas, the main source of evidence adduced before courts are witnesses, the problem of combating perjury was a headache to the judge as it would be difficult to identify the words of witnesses to be perjuries.[70]

d) The Characteristics of Perjurers: Mode and Nature of Perjury

Identifying the identity of perjurers and the means they have used to commit perjury is vital in the process of combating the crime of perjury. In all of the research areas, the participants of the study stated that there is certain group of individuals, who appears before the court of law as witnesses, frequently gives false testimonies. Hence, the crime of perjury is committed by ordinary witnesses and experts who want to procure benefit for them or others.

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66 *Supra* note 50.
67 *Supra* note 49.
68 *Supra* note 48.
69 *Supra* note 51.
70 *Supra* note 20.

Predominantly, the most frequently punished perjurers in the study areas were the public prosecutor's witnesses but mainly the crime of perjury in the study areas are allegedly committed by defense witnesses. This is due to the fact that the witnesses were, in almost all cases, the relatives of the defendant and as a result of their false testimony the punishment that would be imposed on the convict are less serious and most of the time the perpetrators were left unpunished.[71] Once the false witnesses were organized, it would be difficult for the judge to winnow the truth in the trial proceedings.[72] The main means of committing perjury in the study areas were by changing the witnesses' names in the trial room. In fact, it would be difficult to identify the identity of the witnesses who gave false testimony as most of the witnesses do not have identification cards.[73] There are witnesses who anonymously appeared before the court and gave their testimony by alleging that they do not have identification cards.[74] As it has been mentioned before, in most cases, perjury is committed by defense witnesses both in civil and criminal cases but public prosecutor's witnesses also often engage in the commission of the crime.

However, defense witnesses could not be punished unless clear and sufficient evidence is produced against them which, is practically difficult to get, which is different in case, the public prosecutor witnesses are accused of perjury.[75] At this juncture, what the public prosecutor should do is to see whether or not the testimonies given by the witnesses in the police investigation stage are changed in the court. Hence, if the witnesses are giving contradictory testimony, it can serve as

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71 *Supra* note 20.
72 Ibid.
73 *Supra* note 18.
74 *Supra* note 27.
75 *Supra* note 26.

a sufficient evidence to charge them for the crime of perjury within the meaning of the FDRE Criminal Code.[76]

On the other hand, in one homicide case committed in '*Enekoy'* vicinity found in *Sinan* woreda, the defense witnesses were arranged to give false testimonies and resulted in the acquittal of the accused.[77] After this phenomenon, the public prosecutor has decided to organize witnesses to counterbalance the defendant evidence. [78] In so doing, the public prosecutor asked and examined witnesses in his office before they go to the court.[79]

Besides, the crime of perjury is sometimes committed by giving false or contradictory credentials to the court.[80]The medical experts also gave conflicting evidence to the same court in some cases. According to the *Quy* woreda public prosecutor, the referral hospital and the health center provide contradictory evidence on one rape case where a four years old child is alleged to have been raped. In this case, the referral hospital gave evidence that the child was not raped but the health center gave contrary evidence.

In Quy woreda, the crime of perjury is also committed at kebele level where individuals have prepared false court decision and simulated contract. For instance, in one land case in the Quy woreda, the public prosecutor stated that the court registrar has issued summons and gave it to the plaintiff but the latter failed to give

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76 *Supra* note 27. The practice in the study area reveals such a fact and it can be argued that Article 30 of the imperial Criminal procedure Code of Ethiopia proclamation No.185 of the 1961 gives the power to the police officers to examine witnesses and record their testimony. Hence, if the witnesses are changing their testimony in the court of law without good cause, it would amount to perjury within the meaning of Article 453(1) of the FDRE Criminal Code.

77 *Supra* note 51.

78 *Supra* note 51.

79 *Supra* note 51.

80 *Supra* note 18.

it to the defendant instead gave into another person and this person appeared before the court and provided his false testimony. Nonetheless, the court was able to detect the criminal and punished him after having complied with the necessary due process of law.[81] In addition to this, a land administration office professional were also participating in the commission of crime by giving false credentials and explains it to the court.

Regarding the type of crimes in relation to which perjury is committed, the participants of the research stated that, it is committed in connection to all types of crimes but the crime is highly prevalent primarily in the cases of homicide, rape, and land related cases.[82] Particularly, the crime of perjury is manifested in serious crime especially homicide cases.[83] Sometimes it is also occurs in relation petty offenses.[84]

3.3. Root Causes of the Problems

It has been a conventional thesis that the main reasons for high acquittal rate or wrong conviction in the criminal justice system is due to witnesses' behavior who are turning hostile and giving false testimony.[85] But why do witnesses give false testimonies? The researchers tried to make close scrutiny and investigation in the study areas and found out that there are different causes that drive individuals to commit the crime of perjury. Generally, the reason is the unholy combination of money and muscle power or revenge, intimidation and monetary inducement. Inducements in cash and in kind appear to play an important role in commission of perjury. Each will be discussed in the parts that follow.

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81 Ibid.
82 *Supra* note 20.
83 *Supra* note 20.
84 *Supra* note 18.
85 Interview with Mr. Habtamu Getahun, Public Prosecutor of Quy woreda on 8 March 2015.

a) Procuring Benefit

In all of the study areas, the main reason of committing perjury is to procure benefit to the perjurers themselves or to their relatives. In fact, most often, the perjurers do not direct receive monetary benefits from their relatives (or their organizers). Rather, their motive is to acquit the criminal and thereby enable him/her to acquire farmland, houses, or other movable goods. Since, in most cases, the perjurers have either consanguine or affine relationships with one of the parties they tend to falsely testify against the other adversary. Due to this, the Quy woreda court presiding judge opined that though the law does not support this, a person shall be banned from being a witness if s/he is a relative of one of the parties,; however. He added that there is no law that can support his suggestion.[86] But the authors of this paper are of the opinion that precluding the witnesses not to testify before the court of law by the mere fact that they are relatives of the accused cannot be a long lasting solution to prevent the crime of perjury.

Moreover, the Debre Elias woreda public prosecutor also provided that the two dominant causes of perjury are lack of awareness about prohibition of the act as crime and to acquit their relatives from criminal charges.[87] But the dominant motive of witnesses was to acquit their relatives from criminal liability.[88]

b) Revenge

The third reason that propels an individual to commit the crime of perjury in the study areas is revenge. Most of the perjurers are not willing to testify other than in favor of their relatives. The perjurers did this to avenge the opponent party often

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86 *Supra* note 2.
87 *Supra* note 18.
88 See *supra* note 11.

the defendant by inculpating or acquitting the accused from the public prosecutor's charge. As a result, revenge can be taken as another cause of perjury as people are using it as a weapon to attack the opponent party.[89] The Amharic sayings "***የሽበልን ሽፍታ በደባ ይምስክር***" which can be loosely translated as *"attack the bandits by perjurers"* and *"**ሦስት ሐዳፍኔ አላጣም**"* translated as *"be careful as it is not difficult to get three false witnesses"* are clear indication of the fact that people are using false witnesses as a weapon to attack their opponents. The foregoing sayings have been used as an engine in Quy woreda to commit the crime of perjury.[90]

Besides, the Sinan woreda court's presiding judge also stated that in one case a girl embraced a man in forest area and immediately started to shout. Then forthwith three individuals emerged from the forest, where they were hiding and pretended to have seen or witnessed the man's attempt to rape the girl. After that, they gave their false testimonies before the court of law by saying that the man had attempted to rape the girl. The judge told the authors of this paper that the motive of the witnesses was to revenge the man by conspiring with the girl through the production of false testimony.[91]

c) Weak Criminal Justice Administration

Weak criminal justice administration can also be cited as the other main cause of perjury in the study areas. Individuals have been committing the crime in the study areas as there is weak criminal justice administration both in the East Gojjam Zone High Court and even in other woreda courts.[92] The courts are not employing different mechanisms to investigate the truthfulness of testimonies given in the various proceedings. For example, expert witnesses were very rarely used by the

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89 *Supra* note 15.

90 Interview with Mr. Habtamu Getahun, Quy woreda Public Prosecutor and Mr. Aderaw Endale Quy criminal bench judge, on 10 March 2015.

91 *Supra* note 20.

92 See *supra* note 8.

judge in cases where it is necessary to investigate the truth and corroborate eyewitness accounts. Besides, both the investigative police officers and public prosecutors were not properly examining or cross-examining witnesses, respectively. Moreover, there was also a lack of coordination among the various institutions responsible for the production of evidence. Most importantly, the fact that almost all courts in East Gojjam zone were dependent on witnesses contributes to the commission of the crime of perjury.[93]

The judges were unable to analyze the words of false witnesses in the trial room and also prosecuting perjurers for perjury is very difficult to proof.[94] There are no mechanisms, other than asking witnesses or analyzing documents, to identify whether the testimonies of witnesses are false or not.[95]

d) Fear of Retaliation

In some of the research areas, perjury can be committed by fearing that the other party subsequently may cause danger upon the witness who testified truthfully against him or her. Most judges stated that witness avoided telling the truth before a court of law despite the fact that s/he has seen the commission of the crime for fear of retaliation.[96]

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93 Ibid.
94 Ibid, p. 71.
95 *Supra* note 2.
96 Ibid.

3.4. Efforts Made to Address the Widespread Problem of Perjury

a) The Role of Public Prosecutors and Investigative Police Officers

Perjury is a serious crime which is mostly difficult to detect during court proceedings. The justice machineries are reluctant to prosecute the perjurers by producing sufficient evidence in the trial proceedings.[97] The problem becomes prickly when the public prosecutor is required to proof his charge beyond a reasonable doubt. Particularly the judges, as the ultimate warden of the fundamental due rights, should devise the necessary platform for the litigant party in the course of ascertainments of perjury so that justice would be served. In the study areas, different justice bodies have attempted to prevent the commission of the crime of perjury. Hence, various mechanisms have been employed by the judges, public prosecutors and investigative police officers to identify the perjurers and punish thereof. To obtain truthful testimony, both the Criminal Code and the Criminal Procedure Code rely on cross-examination and use perjury to deter distorted testimony. Cross-examination probes the quality of testimony of witness by searching for internal inconsistencies or contradictions with the testimony of other witnesses.

Since establishing guilt or liability of perjurers often requires more information, which helps to exactly identify whether the testimonies given during the trial by the witnesses are true or false, perjury trials or trials of perjurers in the study areas are rare. The study revealed that perjurers were skillful witnesses who can tell false testimony to the court without fear of prosecution or liability. The public prosecutor employed tripartite procedures to check whether the witness testimony made to the investigative police officer is truthful. After having received the crime investigation report from the police, if the prosecutor is doubtful about the

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[97] *Supra* note 3, p. 71.

authenticity of the collected evidence, the public prosecutor can go to the place where the crime is alleged to have been committed and can reinvestigates the truth by identifying the real witnesses who have a direct and indirect knowledge about the fact at issue. Second, the prosecutor can re-interview the witnesses identified by the police in his/her office to investigate the truthfulness of the testimonies given to the investigative police officer. In doing so, the public prosecutor can put various questions to the witnesses and cross-examine and re-examine them in his/her office. If the testimonies of the witnesses given to the investigative police officer were found to be contradictory with the testimony given to the public prosecutor, the witnesses would be denied to testify before a court of law.[98]

Nonetheless, in this process the witnesses might say "*I forgot the date and help me recollect*". Some respondents stated that it does not matter whether the public prosecutor reminded them the date if the re-interview is seen in light of the purpose of combating perjury.[99] On the other hand, a few respondents argued that such act of the public prosecutor is tantamount to organizing false witnesses for possible counter balance. The practice of the public prosecutor to train his/her witness to testify in a certain manner without any relevant knowledge on the side of the witness can also be characterized as perjury on the side of the public prosecutor.

The public prosecutor argued the fact that re-examining the witness identified by the police is not considered as organizing witness. It is all about making sure that whether the testimony given to the police office is still the same immediately before the witnesses appear before courts of law. It has been said that such check-

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98 See *supra* note 18.
99 Ibid.

up will help the public prosecutors to decide on the closure or opening of the case as per the Criminal Procedure Code of Ethiopia.[100]

It has also been responded by the participants of the research that the public prosecutor would not organize any false witnesses. But, it is an undeniable fact that there has been a tendency on the part of the public prosecutor to focus on prosecuting the criminal than focusing on the sufficiency of evidence and the due process rights of the suspect.[101]

Moreover, in such instances, the public prosecutor might request another new witness who has a direct or indirect knowledge about the fact if s/he believed that doing so is relevant for the investigation of the truth.[102] In fact, if the witness testimony made before the police officer is either contradictory or insufficient to prove the case beyond reasonable doubt, the public prosecutor usually prefers to close the file as per Article 42(1) (a) of the Criminal Procedure Code of Ethiopia, than using witnesses as evidence by fearing that his capacity to prosecute the criminal or his/her efficiency result would be in danger.

b) The Role of Judges

Being the ultimate guardians of human rights and administration of justice, courts can play a pivotal role by detecting and thereby punishing perjurers in judicial proceedings. It is known that the court can get an opportunity to inspect witnesses and ask clarification questions in the course of investigating the truth.[103] It is at this stage that courts are supposed to investigate the truthfulness of the adduced evidence and arrive at a final decision.

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[100] See *Supra note* 87.
[101] Ibid.
[102] Ibid.
[103] *Supra* note 18, Art. 136 (4).

Given that, most of the courts decisions are based on evidence of oral witnesses, it is decisive that the court should act proactively in detecting perjury and punish thereof after having followed the necessary due process of law than doing the punishment by summary proceedings.

The judges ask different cross-examination and clarification questions at different stages of the litigation. It is observed that, the judges are actively involved in the litigation system in the study areas.

Basically, if the case is a criminal case, it is possible to identify perjury when the witness gives different testimony in the court proceeding from the one s/he gave before the police office. However, in cases of defense witnesses, it would be difficult to identify false testimony easily. The only way out to discover is by using the mechanisms of cross-examination and the contentious words of the false witnesses as this can be considered perjury. But, this can hardly be achieved as the majority of cases of perjury revealed that it is mostly in cases of the prosecution witnesses that there is high possibility of detecting and punishing the perjurers.[104]

Conclusion and Recommendations

The research findings in the study areas revealed the fact that perjury is the most repeatedly committed crime which substantially affected the administration of justice. By committing perjury, people partake in the miscarriage of justice and

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[104] For example in East Gojjam Zone High Court from July 2012 to June 2013 out of 48 perjury charges that were lodged in the High Court 63 witnesses were convicted. From July 1, 2013 to June 30, 2014, 40 perjury charges were lodged, and 49 witnesses were convicted and from July 1 to June 30, 2014 again out of 49 perjury charges lodged in to the court 40 witnesses are convicted. In 2015, 37 perjury cases were lodged and 34 prosecutor's witnesses were convicted. Surprisingly, all of the perjury cases which have been entertained by the Court are on perjury Committed by prosecution witnesses.

corrupt the legal process. As a result, perjury is considered a very serious offense, although most people who lie under oath do not consider it so.

When witnesses commit perjury, they disrupt the legitimate discovery of truth. Truth has a crucial role in maintaining the criminal justice administration. The judges, public prosecutors and/or investigative police officers are striving for the search of truth and thereby dispensing justice**.** The crime of perjury affects a fair and proper trial and interferes in the overall administration of the judicial system. It is also pretty clear that the legal frameworks governing perjury are intended to prevent the commission of the crime of perjury so that the potential offenders of the crime would be deterred.

However, perjury laws cannot properly serve their deterrent role unless they are strictly applied by the justice machinery. The crime of perjury cannot be prevented by the court or any other justice organ by simply observing its evil effects. Neither can it be deterred by arguing that the technicalities of the offense prevent the enforcement of the law governing perjury. Perjury can only be prevented by enforcing those laws governing it in cases where perjury occurs. Different mechanisms, which might be helpful in the ascertainment of perjury during judicial proceeding such as cross-examination, should be employed by the litigant party properly.

Courts, being the ultimate guardians of the fundamental human rights of the society, should act proactively in the ascertainment and punishment of the crime thereof.

Based on the foregoing discussions and findings of the study, the authors forward the following suggestions:

- The jurisdiction to entertain cases of perjury should be given to the woreda courts. In all of the research areas, *it has been identified that the fact that*

only the High Court is entertaining the cases of perjury creates a problem in the process of combating the crime. In this regard, the government should make a legislative amendment regarding the jurisdictional power of courts to entertain perjury including but not limited to the Criminal Procedure Code provision/s of Ethiopia.

- To check whether a given witness is giving testimony based on truth; both the public prosecutor and the judge should employ different mechanisms and scrutinize it. The litigant party should *cross-examine* the witness by making himself *well prepared* in advance so that it would not be difficult to determine the truthfulness or otherwise of the testimony.
- Particularly, while the witnesses are testifying in the courtroom, the judges should curiously scrutinize the following: the witnesses 'bodily movement, the hasty or sluggish nature of the witness testimony, unstructured words of the witness, inaccuracy of the information testified, consistency of the witness testimony or self-contradictory nature of the testimonial words Besides, it is very crucial that the judge should give much emphasis on whether or not the witness is testifying of what he has seen and heard or recognize the event purported to be testified.
- Furthermore, as perjury is a deep-rooted problem in the study area, a strong and continuous awareness raising activities and trainings should be given to all segments of the society and other stakeholders by using different means such as the mass media and /or *Ekub, Ediror religious* institutions. Justice professionals especially the judges should give a training that can raise public awareness about perjury that should start from the family and also be given to the court clients via the court's information desk professionals. The justice bodies should organize seminars, workshops and panel discussions by which the concept of perjury and its negative consequences would be discussed thoroughly.

- So as to combat the crime of perjury in the study areas, the courts should strictly apply the law governing perjury. The judges should impose serious punishment so that the society would be deterred and the criminal would be rehabilitated.
- The justice machinery should not heavily rely on witnesses, instead should also resort to other types of evidence. In all of the study areas, it has been identified that the majority of the evidence used by the courts to render a binding decision is based on witnesses. Conversely, the main perpetrators of the crime of perjury in the study areas are witnesses. Hence, to prevent perjury it is imperative that the justice machinery also rely on other evidence such documentary evidence, and forensic evidence.
- Both the investigative police officers and public prosecutors should update themselves with the required contemporary and advanced crime investigation knowledge and technology as well engage themselves in the process of combating perjury in the study area.
- The government should introduce comprehensive evidence law that can guide the litigation in the process of combating perjury in the trial room.
- Last but not least, the authors suggest that since in most cases the witnesses are organized by family and relatives both the police officer and the public prosecutor should corroborate the evidence by other circumstantial evidence in the process of prosecuting perjury.

Legal Independence of the National Bank of Ethiopia as a Supervisor and Regulator of the Banking Business

Nigus Zerefu*

Abstract

Central bank's independence has been an issue since distant past in history and many states were striving to assure independence of their national banks. However, African countries including Ethiopia are found to have challenges in that regard. Having this fact in mind, the central objective of this paper is to assess de-jure independence of National Bank of Ethiopia in light of internationally accepted indicators of independence. Independence of central banks has two categories: industry and political autonomy. Political autonomy again has other three categories. These are objective autonomy, instrument autonomy and economic autonomy. There are two internationally agreed indicators to assess the independence or otherwise of national banks, namely legal and non-legal indicators of independence. The former includes banks having objective independence, monetary policy independence of banks, existence of clear and open conflict resolution mechanism, institutional independence, and limited credit to the government and financial autonomy. The latter, on the other hand, incorporates turnover to governor of central bank and empirical evidence regarding practical enforcement of legal indicators of independence.

Weighed in light of the first indicators, the National Bank of Ethiopia is far less independent. Some of the indicators of less independence of the National Bank include first absence of plain indication about objective autonomy (because it is accountable to the central government). Second, a long handed intervention of government over the affairs of the National Bank such as appointment of chairperson and board members of the Bank; and lastly, absence of an explicit limit over the money to be borrowed by the government from the National Bank. One way or another, independence of the National Bank of Ethiopia is very problematic. Hence, recommendations are forwarded requesting for a lessened intervention of government and its politicians in the affairs of National Bank.

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Key terms: Autonomy, Banking, Government intervention, Supervisory authorities

Introduction

So far, in history, the issue of central bank independence was mainly stacked on legal independence until scholars introduce a more comprehensive type of study on central bank independence and greater bank independence.[1] The period from 1990 up to 1995 was a time during which at least thirty countries enacted a statutory independence of their central banks. This is the result of a huge and rapidly growing capital inflow to the developing countries and the resulting global demand for international financial resources and financial deregulation in developing countries. [2]

Dragging the case to Africa, the 1990s reform movement of central bank independence has started in Africa except in very few African countries such as Namibia and South Africa. In fact, the central bank independence of Namibia could not be realized if not for crucial role played by the international monetary fund (IMF). For example, as part of the IMF and United Nation Development Program (UNDP), officials of Dutch Central Bank ran the Bank of Namibia in 1990. In South Africa also central bank independence was recognized at constitutional level after a hot debate throughout 1993. Because of this limited reform, the continent has been suffering from limited access to international financial market.[3]

Often questions of independence of a central bank as a supervisory organ arise mainly due to the nature of its responsibilities. Central banks carry out a combination of three main functions. The first one is its macro-economic function

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1 Ranajoy Ray Chaudhuri, *Central Bank Independence, Regulation and Monetary Policy from Germany and Greece to China and America* (Springer Nature America, Inc., New York, 2018 p. 13.

2 Sylvia Maxfield, *Gatekeepers of Growth; the International Political Economy of Central Banking in Developing Countries*, (Princeton University Press, London, 1997), p. 50.

3 Ibid, p. 68.

that includes exercise of discretionary monetary policy that affects price level and exchange rate policy.

The second one is sector level and micro-economic function including supporting and providing regulatory and supervisory services for maintaining the healthy operation of the banking sector. The last function is performing its secondary functions including acting as banker or fiscal agent and economic consultant of the state and this last function makes the central bank to have special relationship with the state.[4]

Financial regulations (which are a basic task of central banks in many legal systems) have three basic objectives namely, macro-economic stability, financial stability, and investor protection. Given the complementary nature of the objectives, central bank autonomy is justified for achieving these goals. This is required because sometimes the short-term objectives of politicians including personal interests may not be in line with the need of establishing stable regulatory and supervisory mechanism that ensure the soundness of the financial system. Not only this, the long handed interference of politicians provokes negative consequences over investors and the economy in the sense that uncertain, unfair and non-transparent regulatory and supervisor mechanisms will cause investors to defer or cancel their investment decisions.[5]

Credibility problem is another problem resulting from lack of autonomy of central banks in the sense that regulatory intervention by politicians will bring hardship to many depositors and investors who are voters as well. Not only that, politicians

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[4] Luca Papi, '*Central Bank Autonomy without Monetary'* Policy, Paper, p. *116* https://www.researchgate.net/publication/24065688Central-Bank-Autonomy-without-Monetary-Policy last time accessed on December 15, 2018.

[5] Ibid, p. 119.

who are interested in short term re-election and maximizing their welfare may be very sensitive about the short-term political costs of a severe supervisory and regulatory intervention .Weak agency governance and management could be other problems because preferential treatments in situations related with state owned enterprises will be used in amore sever manner.[6]

Given these cases showing how inadequate management of central bank's autonomy contribute to financial crises[7] and theoretical premises it can be submitted that central bank's supervisory and regulatory independence is crucial for ensuring financial stability. Independence of central banks has two basic forms, namely, legal (formal) and non-legal (informal) indicators of independence.[8]

The legal independence of central banks refers the indication of the degree of independence that legislators of a state confer on the central bank by legal instruments.[9] The lawmakers may stipulate the independence of central banks in black and white terms commonly in the charter of the central bank and other legislations. There is also a stipulation under the Basel core principles that requires prescription and public disclosure of operational independence and accountability of banking supervisory authorities.[10] This legal independence of central bank may have several manifestations.

These manifestations includes independence of a bank in the appointment, dismissal, and term of office of the chief executive officer of the bank-usually the governor, independence on policy formulation concerning the resolution of

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6 *Supra* note 4, p. 120.

7 The experiences of Korea, Japan, Indonesia, and Venezuela are examples where the lack of independence of financial regulators and supervisors has undermined the integrity of the financial sector.

8 Alex Zukerman, Steven B. Webb, and Bilin Neyapti, 'Measuring the Independence of Central Banks and Its Effect on Policy Outcomes' *The World Bank Economic Review*, Vol. 6, no. 3, 353-398, p. 356.

9 Ibid.

10 Basel Committee on Banking Supervision Core Principles for Effective Banking Supervision September, 2017, Principle 2(1). https://www.bis.org/publ/bcbs213pdf, last time accessed on November 8, 2019.

conflicts between the executive branch and the central bank over monetary policy and the participation of the central bank in the budget process, as well as objectives of central bank. The last one is limitations on the ability of the central bank to lend to the public sector.[11]

Non-legal or informal indicator of central bank independence, on the other hand, refers to non-legal factors such as tradition or the personalities of the governor and other high officials of a bank that may affect or shape the independence of central bank at least partially.[12]

This non-legal independence has two basic indicators. The first one is turnover of central bank governors. As per this indicator, there is a correlation between turnover of governor of central bank and independence of the latter in the sense that the more the political authorities frequently take the opportunity to choose a new governor, the less the independence of the governor of central bank.[13]This is because politicians may get the opportunity to pick those who will do their will by firing those who choose to challenge the government.

The second indicator of non-legal independence of central bank is pragmatic evidence that can be generated via different means such as questionnaire regarding the practical enforcement of the legal independence as stipulated under the law. Though the questions for questionnaire involve the same issues in the legal variables this one wholly focuses on the practice, not the law.[14]

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11 *Supra* note 8, p. 356.
12 Ibid, p. 361.
13 Ibid, p. 363.
14 Ibid, p. 368.

This article makes a thorough scrutiny of legal (*dejure*) independence of the National Bank of Ethiopia as a supervisory authority. Hence, non-legal (informal) indicators of the Bank are out of the ambit of this paper since the content of the paper is dominantly doctrinal.

1. National Bank's Independence

Independence of central banks as supervisory organs may take two general categories. These are industry autonomy and political autonomy. Industry autonomy refers to the situation by which the regulator will be free from coercion by powerful and organized groups requiring the bureaucrats to give better response to the interest of the organized group than the public interest.[15]

Political autonomy, on the other hand, refers to the freedom of central banks to implement the objectives delegated by political authorities independently from political intervention.[16] It holds similar concept with legal or formal independence as discussed in the preceding part. Related to this, the Basel Core Principles for Effective Banking Supervision provides that a banking regulator, the National Bank of Ethiopia (NBE) for instance, should have "*operational independence, transparent processes, sound governance ... and adequate resources, and is accountable for the discharge of its duties*."[17]

There are several indicators of political autonomy of central banks. These include first absence of government control in senior level appointment. The second is non-participation of government representatives in decision-making. Third, if no prior government approval is required to make monetary decisions. Fourth, statement under the country's constitution that the primary responsibility of the central bank

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15 *Supra* note 4, p. 121.
16 Ibid, p. 122.
17 *Supra* note 10.

is maintaining monetary stability, and lastly, existence of a clear procedure for the resolution of conflicts that arise between the central bank and the government.[18]

Mesfin, on the other hand categorizes them into three types of independence, namely personnel, financial and policy related independence. The first refers to the exclusion of or limiting the involvement of the government in the appointment process of the personnel of the central bank. The second connotes the limitation placed up on the access to credit of the central bank by the government, and the third refers to the degree of flexibility that the central bank has in designing and executing monetary policies.[19] Hereunder the paper will briefly discuss about legal independence of central banks with special emphasis on its classifications.

1.1. Taxonomy of Legal Independence

Legal independence has three basic categories, each having several other sub-categories. The first one is objective autonomy. Objective connotes an autonomy that entrusts central banks with the responsibility to determine monetary policy and exchange rate regime. The Basel Core Principles call banking supervisory authorities to publish their objective and make them accountable in relation to discharging of their responsibilities through a transparent framework.[20] Objective autonomy holds two elements, namely, goal and target autonomy.[21] Goal autonomy in particular refers to the power to determine its primary objectives among several objectives mentioned under the central bank

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18 *Supra* note 1, p. 13.

19 Mesfin D. Mekonen, 'Liberalization *of Ethiopia's Banking Sector and its Legal Implication on the Regulation of Banks', (*LLM Thesis, University of Pretoria, 2017), p. 23.

20 *Supra* note 10, principle 2 (3).

21 Scholars have different stand on goal and target autonomy, some of them treat them separately (Debelle and Fischer (1994) and others (Lybek, 1999 and 1998) put them in one category as objective autonomy. The author of this paper also advances the latter approach.

laws whereas target autonomy refers to having only one clearly defined objective under the law.[22] The second one is instrument autonomy and it is all about giving central banks considerable latitude to decide how to pursue their goals. But, it does not mean that the bank can select the goals by itself rather in most democratic system the government may set goals and instruct central bank to pursue them.[23]

Instrument autonomy, has two categories, namely, operational and financial autonomy. Moreover, it is possible to classify financial autonomy into regulatory and supervisory autonomy. Regulatory autonomy refers to the power of the agency to set rules and procedures for the financial sector within the confines established by the primary legislation. Supervisory autonomy on the other hand refers to the independence of the central banks in the supervisory function, licensing, prudential supervision, sanctioning including revoking licenses, and crisis management.[24]

The third one is economic autonomy, which refers to the independence of the central bank with regard to selecting instruments including freedom to determine the procedure by which the government obtains credit from the central bank. It also includes determining interest rates and duration of payment of such debts, freedom of central banks to participate in primary markets for public debt and prohibiting lending to government and public agencies in the far extreme. Financial independence can be the last, which states that the central bank will have full control over its budget and not depend on the government for fund at all.[25]

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22 Tony Lybek, '*Central Bank Autonomy, Accountability, and Governance: Conceptual Framework'*https://www.imf.org/external/np/leg/sem/2004/cdmfl/eng/lybek.pdf.last time accessed on December 15, 2018, pp. 3-4.

23 Alan S. Blinder, *Central Banking in Theory and Practice, (*Massachusetts Institute of Press Cambridge, Massachusetts, London, 1998), p. 54.

24 *Supra* note 4, p. 125.

25 *Supra* note 1, p. 11.

2. Indicators of Central Bank's Independence as Supervisory and Regulatory Organ

Under this part, the author discusses some accepted indicators that may demonstrate the independence of a central bank of a certain state as supervisory and regulatory authority. The author opts to make such discussion because it serves as a benchmark to evaluate the Ethiopian scenario at later stage. The first indicator is objectives and targets so that the central bank should have clearly identified primary and broad objectives that may be determined by the central bank and consistent with specific targets as well that help to accomplish policy objectives in a way free from government intervention.[26] The second relates to monetary policy independence that is the central bank shall have an authority to determine quantities and interest rates for any transaction it conducts without any government intervention.[27] Existence of clear and open conflict resolution mechanism is the third indicator. The latter is based on the idea that any policy conflict between central bank and the government shall be resolved through an open and clear process.[28]

The fourth one is institutional independence, which proclaims that central banks be given the discretion to administer their internal affairs on their own. Hence, the government shall not intervene in selection, appointment and confirmation of officials (separate agencies shall decide so) and dismissal shall be only due to breaches of qualification requirement or professional misconduct that shall be

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[26] Alberto Alesina; Lawrence H. Summers, 'Central Bank Independence and Macroeconomic Performance: Some Comparative Evidence', *Journal of Money, Credit and Banking,* Vol. 25, No. 2, May 1993, p. 153.

[27] Stanley Fischer, 'Independence of Central Banks', Speech at the 2015 Herbert Stein Memorial Lecture National Economists Club,Washington DC, November 2015, https://www.bis.org/review/r151109.cpdf, last time accessed on December 9, 2018.

[28] *Supra* note 22, p. 14.

decided after exhaustion of all the administrative and judicial proceedings. In a more extended understanding of the concept, the board of central banks shall not be composed of executive and government representatives and for that they shall not be members of policy board (or at maximum participate as a member with no voting right) and probably from monitoring board also.[29]

The fifth indicator stipulates a prohibition if not limited, credit to the government. In principle central banks are prohibited from financing government in any way be it by way of purchasing government securities at primary level(equity financing) or via extending loan (debt financing). But exceptionally they may be allowed to finance government in limited circumstances in cases such as if loans are explicitly limited to a small ratio of average recurrent revenue of preceding fiscal years, if it bears a market-related interest rate and securitized by negotiable securities.[30] The second rule regarding credit to the government is the central bank which finances government shall disclose on regular bases and shall establish the conditions for short-term loan to the government.[31] Six, central banks shall be the sole responsible organs and principal advisors regarding exchange rate policy issues unless in that way it may be difficult for central banks to implement monetary policy within the constraints of exchange rate policy.[32]

The seventh one is financial condition, which requires central banks to have sufficient financial autonomy. Hence, the budget of central banks shall not be subject to the normal annual appropriation. However, there must be financial accountability, this must be shown via a formal publication, and reporting on

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29 Ibid.

30 Ibid.

31 Luis I. Jácome, *et al*, 'Central Bank Credit to the Government: What we can learn from International practices?' IMF Working Paper, January 2012, https://www.imf.org/external/pubs/ft/wp/2012/wp1216.pdf last time accessed on December 10, 2018, p. 5.

32 Tomás J.T. Baliño and Carlo Cottarelli, 'Should an *'Independent' Central Bank Control Foreign Exchange Policy?'*(Frameworks for Monetary Stability, International Monetary Fund, Washington, 1994), p. 331.

monetary performance published at regular intervals without the need for prior approval by the government but must forward for the executive and legislator.[33]

3. Legal independence of National Bank of Ethiopia in Light of the Indicators

Like many other African countries, Ethiopia was not part of the central bank independence reform during the 1990s. However, indirectly (through financial sector reform) the Ethiopian government has strived to assure independence of the Central Banks because the financial sector reform holds two agendas within its ambit. One is gradual opening up of private banks and insurance companies, and trade liberalization and the second one is intensification of domestic competitive capacity via strengthening the regulatory and supervisory capacity of the NBE.[34] The author believes that at least the second agenda can be seen as a step forward towards independence of the NBE. Similarly, the law establishing the NBE provides for an autonomous existence of the Bank.[35]

Nevertheless, the reality is different at least at the *de-jure* level. In the first place, the constitution FDRE grants the power of administering National Bank to the federal government.[36] Besides, it is to quote stipulations from two important articles of the NBE establishment proclamation that indicate a far less independence of the bank. Article 3(4) of the law makes the NBE directly accountable to the executive branch of the government namely the Prime Minister. The other relevant provision of the same law, Article 3(6) states the Chairperson of

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33 *Supra* note 22, p. 14.

34 Melesse Asfaw, 'Financial Regulation and Supervision in Ethiopia', *Journal of Economics and Sustainable Development*, Vol.5, No.17, 2014, p. 66.

35 National Bank of Ethiopia Establishment Proclamation, 2008, Art. 3(1), proclamation No 591/2008, *Federal Negarit Gazzeta* , 14th year, No 50.

36 FDRE Constitution, 1995, Art. 51(7), Proc. no.1/1995, *Fed. Neg. Gaz*., year 1, no. 1.

the Board of Directors and the remaining four members shall be appointed by the Government." This provision does not provide any statement about dismissal of members of board of directors, and furthermore, it is not clear as to which branch of the government legislative, executive or judiciary is entitled to appoint the governing body. [37]

An evaluation of the case of NBE in light of the indicators of independence of central banks discussed in the preceding part of this paper, will shows several loopholes with regard to independence and autonomy of National Bank of Ethiopia.

The first relates to objective autonomy. The has three basic objectives which include maintaining stable price and exchange rate, foster healthy financial system, and any other related activities as are conducive for the economic development of Ethiopia.[38] There is also a stipulation under the law that requires the governor to be guided by purposes of the National Bank of Ethiopia in carrying out its responsibilities.[39] But, it still has no indication as to whether these are set by the Bank. The other independence problem of the NBE is the fact it is more of subjected to government intervention for their implementation because the NBE is accountable to the Prime Minster.[40] There is also a big problem of institutional independence. Hence, the NBE lacks independence to administer its internal affairs. There are several indicators of lack of institutional independence of National Bank of Ethiopia. These are; appointment of the chairperson and three members of the board of directors by the government,[41] total ownership of capital of NBE by the government and crediting of 80 percent of the net profit to the Ministry of Finance and Economic Development.[42] Moreover, the government

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37 *Supra* note 19, p. 24.
38 *Supra* note 35, Art. 4.
39 Ibid, Art. 10 (5).
40 Ibid, Art. 3 (4).
41 Ibid, Art. 3 (6).
42 Ibid, Art. 6 (1) and (2).

fixes the amount of allowance paid to the board of directors[43] and the government appoints the governor charged with plenty of responsibilities as a chief executive of the NBE.[44] Monetary policy independence is another indicator raised so far and from this perspective, it is possible to submit that the NBE has autonomy to determine the supply and availability of money and interest rates.[45] Hence, it is possible to say the Bank is independent in that respect.

Another crucial factor that is detrimental to independence of the NBE is the lending practice of the Bank to the government, which has serious implications in fighting inflation. The government does lending in consultation with the National Bank and this is consistent with the goal of maintaining price and exchange rate stability. Yet, there is no explicit limit on the size of lending. Expanding the budget deficit made maintaining the balance between lending to the government and maintaining price stability difficult. This in turn sidelined the NBE's primary role in maintaining price stability.[46]

In this regard, Abdulmena writes that absence of independent central bank was found to be one of the reasons to an increase of inflation rate from a single digit to a double-digit from 2015 up to 2017. So, as per this indicator of independence, the NBE is less independent.

Regarding its instrument autonomy the NBE is granted the power to supervise and regulate banks, insurance companies and other financial institution save that there is no an explicit statement indicating whether such power is free from government intervention or not.[47] No mention is made regarding the issue of clear and open

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43 Ibid, Art. 9 (6).
44 Ibid, Art. 10.
45 Ibid, Art. 5 (4).
46 Ibid, Art. 13.
47 Banking Business Proclamation, 2008, Arts, 3 & 14, Proclamation No 592/2008 *Federal Negarit Gazeta*, 14th Year No 57.

conflict resolution processes in case where policy conflict between central bank and government exist.

Conclusion and Recommendations

Given the harmful consequences of the absence of independence of central banks and NBE in Ethiopian context on the monetary performance and the possible benefits to be fetched from it such as inflation reduction, most states strive to assure independence of their central banks. Despite such efforts countries most dominantly African countries including Ethiopia have not been successful in this regard. More specifically, based on various indicators of independence the NBE is far less independent. In other words a profound scrutiny of the scenario at country level in light of accepted international guidelines that it shall comply with to say there is an independent national bank, shows that the NBE does not meet most of the independence guidelines. For instance, there is no plain indication about the objective autonomy of the NBE as it is accountable to the central government. Besides, a long handed intervention of government over the affairs of the NBE through appointment of chairperson and board members of the Bank and absence of an explicit limit over the money that the government can borrow from the Bank are indicators of the less independent nature of the NBE. One way or another, the independence and autonomy of the National Bank of Ethiopia is at peril as falls way below the standards that indicate independence.

Based on the findings of the study, the author forward the following recommendations:

→ There shall be an amendment of the provisions of the National Bank establishment proclamation that provides accountability of the NBE to the Prime Minster and allows the government to borrow money from NBE. Consequently, the NBE should be made accountable to the law-making organ and government borrowing from the NBE should be subjected to prior approval of same by the law-making organ.

→ The government and its cabinets shall be precluded from participating in the management of the NBE including in the Board of the bank.

→ The law should also be amended to indicate a clear provision that regulates an open and clear conflict resolution processes.

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አልዩ አባተ ይማም*

Abstract

Sharia courts have been functioning in Ethiopia for more than half a century, since before the imperial regime; facing the challenges of time, they still exist and operate at different levels across the country on the basis of what has been reaffirmed under the FDRE Constitution. This has resulted in what is known as legal pluralism making Sharia Courts the only system of dispute resolution operating beside the regular judicial system of the country. It is provided in the Federal Consolidation Proclamation No. 188/1999 Article 6(1) that Sharia courts apply Islamic law to disputes arising from personal and family matters falling under their jurisdiction upon the consent of the parties; and the primary source of Islamic law is to be found in the Quran and the Sunnah. This paper delves into the second source of Sharia i.e. the Sunnah which represents the practice and teachings of Prophet Muhammad. Two kinds of Sunnah have been identified by Sharia jurists. The first is what is termed as legal Sunnah containing the principles and rules of conduct that Muhammad taught in his prophetic capacity; whereas the other type of Sunnah which is non-legal refers to those sets of practices that Muhammad has followed as a matter of his personal choice, or reflecting the societal culture of his Arab society of the time; added to non-legal Sunnah is the decisions and measures that Muhammad has taken in his status as leader and judge for the political and judicial matters of the Muslim community of that time. It is authoritatively held that Non-legal Sunnah is not binding and not applicable directly and automatically to cases arising Muslim communities that came after until the present time without passing through contextual scrutiny by authorized organs. This dual look at the prophetic legacy of Sunnah indicates to fact that oral traditions through which the Sunnah was reported do not make differentiation of these two set of groups of the Sunnah from Sharia perspective. As the Sunnah has come down through reports called Hadith, the reliability of the latter is a big issue in Islamic scientific discourses; and a separate discipline is devoted for the authentication of prophetic traditions; this field of Islamic study viz. Usul al-Hadith, embraces a scheme for the authentication of Hadith traditions that can generally be categorized as chain-based (Isnad) and content-based (Matn). Once a particular report passes these two-step tests of authenticity and acceptability, it can safely be utilized as a source of Sharia representing the actual prophetic Sunnah. Proper understanding in the nature and characteristics of Sunnah as source of Sharia and the reliability of the Hadith reports before basing Sharia rulings on Sunnah is necessary for Sharia courts operating in Ethiopia and anywhere else across the global Muslim community.

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Key Words Sharia, *Hadith*, *Sunnah*, Source of Sharia, Reliability, Authentication, Legal Pluralism

አሕጽሮተ-ጥናት

የኢትዮጵያ ሸሪዓ ፍርድ ቤቶች (ፍ/ቤቶች) ከኃይለ-ሥላሴ ዘመነ-መንግሥት በፊት ጀምሮ በሥራ ላይ የነበሩ ሲሆን፣ ግማሽ ምዕተ-ዓመታትን ተሻግረው፣ በኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ (ኢፌዲሪ) ሕገመንግሥት የተሰጣቸውን የአቋም ማጠናከሪያ ተንተርሰው፣ በፌዴራል እና በክልል መንግሥታት ደረጃ ከመጀመሪያ ደረጃ እስከ ጠቅላይ ፍ/ቤት ተደራጅተው በመሥራት ላይ ይገኛሉ። ይህ እውነታ፣ ከሕግ እውቅና ውጪ ካለው የሕግ ብዝኃነት ሌላ ሕጋዊ መሠረት ባለው የብዝኃነት መድረክ ላይ ከመደበኛው የፍ/ቤት ሥርዓት በተጓዳኝ በመስራት ላይ ያለ ብቸኛ የዳኝነት ሥርዓት ያደርገዋል። በሸሪዓ ፍ/ቤቶች ማጠናከሪያ አዋጅ ቁጥር 188/1992 አንቀጽ 6(1) መሠረት፣ ሸሪዓ ፍ/ቤቶች በባለጉዳዮች ፈቃድ የሚቀርቡላቸውን የግልና የቤተሰብ ክርክሮች ለመዳኘት ተፈጻሚ የሚያደርጉት ሕግ ሸሪዓ እንደሆነ ተደንግጓል። በሸሪዓ ሕግ የምንጮች ተዋረድ ደግሞ፣ ከቅዱስ-ቁርአን ቀጥሎ፣ ሁለተኛ የምንጭነት እርከን ላይ የሚገኘው ሱናሕ ነው። ሱናሕ፣ ከቁርአን በተጓዳኝ፣ ከመጀመሪያው የሙስሊም ሕብረተሰብ በሥነ-ቃላዊ ዘገባዎች (አሃዲስ) አማካይነት ተላልፎ ወደ እኛ የደረሰውን የነቢዩ ሙሀመድ አስተምህሮትን የሚወክል፣ ነቢያዊ ፈለግ ወይም አሻራ ነው። ሱናሕ በሕግ ምንጭነቱ፣ ከቁርአን አንጻር ሲታይ፣ መጠነ-ሰፊ ሸሪዓዊ የሕግ ማዕቀፍ ያለው ሲሆን፣ ዘርፈ-ብዙ ግለሰባዊና ማሕበረሰባዊ ግንኙነቶችን የሕግ መርሆዎችንና ልዩ ድንጋጌዎችን አቅፎ ይሟል። ሱናሕን የሸሪዓ ምንጭና አስረጂ አድረጎ በመጠቀም ረገድ፣ መሠረታዊ የሆኑ የሕግነትና የተዓማኒት ጭብጦች ይነሳሉ። ከሕግነት ባህርይ አኳያ፣ ሱናሕ፣ ደንጋጊ እና ኢ-ደንጋጊ በተሰኙ ሁለት ክፍሎች የሚታይ ሲሆን፣ ደንጋጊ ሱናዎች፣ ሙሀመድ በነቢይነት ደረጃቸው መለኮታዊ ተልዕኮ ተላብሰው ያስተላለፏቸውን የሕግ መርሆዎችና ድንጋጌዎችን የሚይዝ ሲሆን፣ ኢ-ደንጋጊ ሱናሕ ደግሞ ሙሀመድ እንደ ግለሰብ፣ ግላዊ ምርጫቸውንና ባህላቸውን ተከትለው የፈጸሟቸው ተግባራትን፣ እንደ አመራርና ዳኛ በተለያዩ አጋጣሚዎች የወሰዷቸውን እርምጃዎችና ውሳኔዎችን የሚመለከት ሲሆን፣ ይህ የሱናሕ ክፍል ለሸሪዓ ምንጭነት ቀጥተኛ የሆነ ዋጋ የለውም። ይህ የሱናሕ ሁለትዮሽ አተያይ፣ ነቢያዊ ፈለግ የተላለፈባቸው ዘገባዎች፣ በሙሀመድ ግለሰባዊ፣ ፖለቲካዊ፣ ነቢያዊ እና የዳኝነት ደረጃዎች መካከል ልዩነት የማያደርግ የሥነ-ጽትፍ አሻራ መሆኑን ያመለክታል። ሱናሕ የተላለፈው በሥነ-ቃላዊ ዘገባ (ሀዲስ) አማካይነት በመሆኑ፣ የዘገባ ተዓማኒት ጥያቄ አይቀሬ ነው። ይህም በመሆኑ፣ በሀዲስ ምዘና ሥርዓት ጥናት (ኡሱል አል-ሀዲስ) በዳበረው መሠረት፣ ዘገባዎች ነቢያዊ ሱናሕ ያዘሉ ለመሆናቸው በቅድሚያ የዘገባ ተዓማኒነታቸው (ኢስናድ) እና የይዘት (መትን) ቅቡልነታቸው ሊፈተሽ ይገባል። አንድ የሀዲስ ዘገባ እነዚህን ሁለት የኢስናድ እና የመትን ምዘና እርከኖች ካለፈ፣ ነቢያዊ ሱናሕን የሚወክል ዘገባ መሆኑ ተረጋግጦ አስተማማኝ የሸሪዓ ምንጭ በመሆን ጥቅም ላይ

ሊውል ይችላል። ሸሪዓ የኢትዮጵያ የፍትሕ ሥርዓት አካል እና በሸሪዓ ፍ/ቤቶች አማካይነት ገቢራዊ የሚደረግ እንደመሆኑ፣ ለዳኝነት ለሚቀርቡ የግልና የቤተሰብ ጉዳዮች ሸሪዓዊ እልባት በመስጠት ረገድ፣ የሕግነት ባህሪያላቸው ሱናዎችን ከሌላቸው፣ ተዓማኒ የሆኑትን ካልሆኑት ለመለየት፣ በዚህ ጽኑፍ ተጠቃለው የቀረቡትን፣ እንዲሁም በሸሪዓ መሠረተ-ሐሳቦች ጥናት ዘርፍ (ኡሱል አል-ፊቅሕ) እና የሀዲስ ምዘና ሥርዓት ጥናት በሥፋትና በጥልቀት የዳበሩትን የሱናሕ እና የሀዲስ የመርሆ እና የምዘና ሐሳቦችን መረዳት፣ በሃገራችን ትክክለኛ የሸሪዓ አረዳድና አፈጻጸም እንዲሰፍን በማድረግ ሂደት ቀዳሚውን ሥፍራ ይይዛል።

ቁልፍ ቃላት

ሱናሕ፣ ሀዲስ፣ ሸሪዓ፣ ምንጭነት፣ አስረጂነት፣ ተዓማኒት፣ ምዘና፣የሕግ ብዝኃነት፣ ሸሪዓ፣

1. መግቢያ፡- የርዕሰ-ጉዳዩ አግባብነትና ጠቀሜታ

ሱናሕ፣ የሸሪዓ ምንጭ መሆኑን መሠረት በማድረግ፣ የዚህ ጥናት አንባቢዎች የሕግ ገጽታዎቹን የሚያስተዋውቅ ጽኑፍ ለኢትዮጵያ የሕግ ሥርዓት ያለው አግባብነትና ጠቀሜታ ምንድን ነው የሚል ጥያቄ ሊያነሱ ይችላሉ። ለዚህ ምላሹ 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 የሚነሱ ግላዊና የቤተሰብ ግጭቶች፣ በባለጉዳዮቹ ፈቃድ በባህል ወይም በሃይማኖት ሕጎች መሠረት ሊዳኙ እና እልባት ሊሰጣቸው እንደሚችል ሕገ-መንግሥቱ ያትታል። ተቋማዊ አደረጃጀቱን በተመለከተም በሕገመንግሥቱ ላይ የተመለከተ ሀሳብ አለ።

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

በሕገ-መንግሥቱ አንቀጽ 78(4) ላይ እንደተመለከተው፣ የግልና የቤተሰብ ግጭቶችን የመዳኘት ሥልጣን ያላቸው ሃይማኖታዊና ባህላዊ ፍ/ቤቶችን የማቋቋም ውሳኔ የማሳለፍ 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 ፍ/ቤቶችን የማቋቋም ጥያቄዎችን ተቀብሎና ገምግሞ፣ በቂ ፍላጎት መኖሩ ከታወቀና አስፈላጊቱ ከታመነበት፣ በሕግ አውጪዎቹ ይሁንታ ባህላዊና ሃይማኖታዊ ፍ/ቤቶች ተቋቁመው የሕግ ብዝኃነቱ አካልና ተዋናይ እንዲሆኑ ሊደረግ እንደሚችል መረዳት ይቻላል፡፡ ከመደበኛ ፍቤቶች ውጪ ያሉ የዳኝነት አካላት የሚቋቋሙበት ይህ ሥርዓት፣ ለሸሪዓ ፍ/ቤቶች ተፈጻሚ አይሆንም፤ "እንዴት?" ከተባለ፣ ምላሹ በአንቀጹ ንዑስ ቁጥር 5 ላይ ይገኛል፡፡ ይኸውም፣ ሕገመንግሥቱ ከመጽደቁ በፊት፣ በመንግሥት እውቅና አግኝተው ሲሰራባቸው የነበሩ የባህል ወይም የሃይማኖት ፍ/ቤቶች እውቅና አግኝተው እንዲደራጁ የሚያስገድድ በመሆኑ ነው፡፡ በኢትዮጵያ የሕግ ሥርዓት ታሪክ ደግሞ፣ የሸሪዓ ፍ/ቤቶች ከአጼ ሐይለ-ሥላሴ ሥርዓተ-መንግሥት በፊት ጀምሮ በሥራ ላይ የነበሩ ከመሆናቸውም ባሻገር፣[2] በንጉሱ ዘመንም የቃዲና የናኢባ ፍ/ቤቶች ተብለው በ1934 እና በ1936 በወጡ የማቋቋሚያና የማሻሻያ አዋጆች ተደራጅተው ሲሰሩ የነበሩ ናቸው፡፡[3] ስለሆነም የሸሪዓ ፍ/ቤቶች ከመንግሥታዊ የዳኝነት ተቋማት በተጓዳኝ በመሥራት ከሕገ-መንግሥቱ መጽደቅ በፊት ሲሠሩ የነበሩ በመሆኑ፣ እነዚህን ፍ/ቤቶች በፌዴራልና በክልል ደረጃ አቋቁሞ ሥራቸውን

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[2] ዛኪ ሙስጠፋ፣በኢትዮጵያ ዉስጥ በሚገኙት የእስላም ፍርድ ቤቶች የሚሰራበት ሕግ፤ለሸሪዓ ሕግ በሥራላ ይመዋል መቀጠል ምክንያት የሆኑ ነገሮች፣የኢትዮጵያ ሕግ መጽሔት፣ ቅጽ 9፣ቁጥር 1፣1965፣ ገጽ 173 ይመለከቷል፡፡ ጽሁፉን በ፡ http://journals.co.za/docserver/fulltext/jel/9/1/211.pdf?expires=1513428722&id=id&accname=guest&checksum=61C6511681864827D9D37CAE4B9444CE ፈለገ-ገጽላ ይይገኛል (በታህሳስ 12፣ 2010 ዓ.ም የተገኘ), last accessed january1, 2019፡፡See also: Mohammed Abdo, 'Legal Pluralism, Sharia Courts, and Constitutional Issues in Ethiopia', *Mizan Law Review*, Vol. 5 No.1, Spring 2011, p. 78. https://www.ajol.info/index.php/mlr/article/view/68769/56835, last accessed January 01, 2019.

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

እንዲቀጥሉ ማድረግ በሕግ አውጪዎች ፈቃድ ላይ የተመሠረተ ሳይሆን፣ ሕገ-መንግሥቱ ራሱ ያቋቋማቸው እና እውቅና የሰጣቸው እንደመሆኑ መጠን፣ በሕግ አውጪ አካላት ላይ የተጣለ ሕገ-መንግሥታዊ ግዴታ መሆኑን ይገነዘቧል፡፡

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

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[4] በሕግ እውቅና ካገኘ የሕግ ብዝኃነት *(De-jure)* በተቃራኒ፣ሕግ የማይፈቅደውና እውቅና ያልተሰጠው፣የፍሬ-ነገር የሕግ ብዝኃነት *(De-facto)* አለ፡፡ ይህ የብዝኃነት ጽንሰ ሐሳብ፣በአንድ የሕግ ሥርዓት ውስጥ በተጨባጭ የሚታየውን፣ ከመንግሥታዊ የፍትሕ ሥርዓት በተጓዳኝ የግለሰቦችንና የማህበረሰብ ባህርይ እና ምግባር የሚቀርጹና የሚመሩ ሕጎች ተግባራዊ የሚሆኑበትን 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 የማይካድ ሃቅ ነው፡፡ ከሕግ እውቅና ውጪ የሆነው ነባራዊ ብዝኃነት፣በሃገራዊ የፍት ሕሥርዓት፣ በጾታ እኩልነት እና ሰብዓዊ መብት፣በልማታዊ የፖሊሲ አፈጻጸም እርምጃዎች ላይ የራሱ የሆኑ አሉታዊ ሚናዎች ያሉት ሲሆን፣ለባህላዊና የኃይማኖት 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፡፡

በፌዴራል ሸሪዓ ፍ/ቤቶች ማጠናከሪያ አዋጅ አንቀጽ 6(1) መሠረት፣ ለሸሪዓ ፍ/ቤቶች የሚቀርቡ ጉዳዮች፣ በሸሪዓ ሕግ መሠረት እንደሚዳኙ ይደነግጋል፡፡ የሸሪዓ ሕግ ደግሞ በጥቅሉ ሁለት ምንጮች አሉት፤ እነሱም ራዕያዊ *(ነቅሊያሕ/Revealed)* እና አመክንዮኣዊ *(ዐቅሊያሕ/Rational)* ናቸው፤ ራዕያዊ ምንጮች በመለኮታዊ ራዕይ *(ወሀይ)* የተገለጹ ሲሆኑ ቁርአን እና ሱናሕ በዚህ ምድብ ስር ይወድቃሉ፡፡[5] ለዝርዝር ሕጎች ምንጭ ከሆኑ የኢጅቲሓድ መርሆዎች መካከል ምሥሥሏዊ አመክንዮ *(ቂያስ)*፣ የሕዝብ ጥቅም *(መስላሃሕ/Public Interest)*፣ ከምንጩ ማድረቅ (*ሰድ አዝ-ዘራኢዕ/*Blocking the Means)፣ ርትዕ *(ኢስቲህሳን/Equity)* ወዘተ.. የመሳሰሉ ጥቅል አመክዮኣዊ የሕግ መርሆዎች ይገኙበታል፡፡[6] በሸሪዓ ምንጮች የአስረጂነት ተዋረድ ውስጥ፣ ራዕያዊ ምንጮች የበላይነት ያላቸው ሲሆን፣[7] ሰብዓዊ-አመክንዮዊ የሕግ ምርምሮች ከራዕያዊ የሕግ ቀኖናዎችና ድንጋጌዎች ጋር ቢጣረሱ ጽኑእነት እና ተፈጻሚነት አይኖራቸውም፡፡[8] በቁርአንና በሱናሕ መካከል ግጭት ቢያጋጥም ደግሞ፣ ምንም እንኳ በመሠረቱ ሁለቱም ምንጮች መለኮታዊ መነሻ ቢኖራቸውም፣ የነቢዩ ሙሀመድ ነቢያዊ ንግግሮችና ተግባራት *(ሱናሕ)* የተላለፉባቸው ዘገባዎች ተዓማኒነት አጠራጣሪ ሊሆን ስለሚችል፣ ከቁርአን ያነሰ የአስረጅነት ደረጃ ያላቸው በመሆኑ፣ ግጭቱ በቁርኣን ተቀዳሚነትና የበላይነት የሚፈታ ይሆናል፡፡[9] ይህ በንድፈ-ሐሳብ ደረጃ

ከእነዚህ እሳቤዎች አንጻር ደጋፊ ወይም ነቃፊ የመከራከሪያ ሐሳቦች ሊቀርቡ የሚችሉ መሆኑ እና እየ ቀረቡ ያሉ መሆኑ ሊታወቅ ይገባል፡፡

5 Ahmad Hasan, 'The Sources of "Fiqh": A General Survey', *Islamic Studies*, Vol. 29, No. 2 (Summer 1990), p. 114. http://www.jstor.org/stable/20839989 last accessed January 01, 2019.

6 ዝኒ ከማሁ፣ገጽ 115 ፡፡

7 ከአመክንዮኣዊ የሕግ እሳቤዎች ይልቅ በመለኮት የተገለጹ ራዕያዊ ሕጎች የበላይነት ያላቸው መሆኑ፣ በሸሪዓ የሕግ ፍልስፍና የሉዓላዊ ሥልጣን ባለቤትነት የአምላክ መሆኑን፣ከዚያ ባሻገር ሰፊውን የሸሪዓ ሕግ ማዕቀፍ የሚሸፈነው አመክንዮኣዊ የሕግ ምርምር *(ኢጅቲሓድ)* በማድረግ ሰው የተከታይነትና አስፈጻሚነት *(ሡልጣንአት-ተንፊዚ)* ሚና የተሰጠው መሆኑን፣ ባጠቃላይ ሰው የምድር ገዢ *(ኸሊፋሕ)* ሆኖ ሲወርድ ከራሱ ፈቃድ በላይ የፈጣሪን ፈቃድ ሊያስቀድም፣ሊፈጽም እና ሊያስፈጽም መሆኑን የሚያስተምረው የኢስላም የሕይወት ፍልስፍና *(ተውሂድ)* ነጸብራቅ ነው፡፡ (Kamali, *Principles*, fn 9, p. 7)

8 Supra note 5, p. 115

9 Muhammad Hashim Kamali, *Principles of Islamic Jurisprudence*, (Cambridge: Islamic Texts Society, 1991), pp. 58-59. http://www.targheeb.com/phocadownload/Fiqh/ISLAMIC%20LAW%20HISHAM%20KAMA

የተቀመጠ የሕግ ምንጮች የተቀዳሚነት ቅደም-ተከተል ቢሆንም፣ ቁርአን በአብዛሕኛው ጥቅል መርሆዎችን የያዘ በመሆኑ፣ ከሱናሕ ጋር ያለው ግንኙነት ከተደጋጋፊነት ባለፈ፣ የሚጋጭበት ሁኔታ እጅግ ጠባብ መሆኑን ይገነዘቧል፡፡[10]

ሱናሕ በሸሪዓ ሕግ ምንጮች ተዋረድ፣ ከቁርአን ቀጥሎ በሁለተኛ እርከን ላይ የሚገኝ ምንጭ ሲሆን፣ በእምነትና በታሪክ ላይ ያለው የምንጭነት ድርሻ እንደተጠበቀ ሆኖ፣ በተለይ የሰው ግለሰባዊ ባህርይና ምግባርን፣ እንዲሁም ሕብረተሰባዊ መሥተጋብርን በመግዛት ረገድ በውስጡ ያካተታቸው ሕጎች እጅግ በርካታ ሆነው፣ በተለይ ይህ ቁጥር፣ ጥቅል የሕግ መርሆዎችና ዓላማዎችን ከሚቀርጸው፣ እና ጥቂት ዝርዝርና ልዩ ድንጋጌዎችን ካካተተው የመጀመሪያው የሸሪዓ ምንጭ - ቁርአን - አንጻር ሲታይ፣ *ሱናሕ* ሰፊውን የሸሪዓ ራዕያዊ ወይም ዘገባዊ *(ነቅሊ)* የሕግ ማዕቀፍ ይሸፍናል፡፡[11]

ሱናሕ ወይም ነቢያዊ ዘገባ (ሀዲስ) ካለንበት የዓለም ማህበረሰብ የሥልጣኔ እሳቤዎችና እሴቶች ጋር የሚጣረሱ፣ በተለይም ከእኩልነት ጽንሰ-ሐሳብ ጋር ፍጥጫ የሚፈጥሩ፣ የሴቶችን ሰብዓዊ አቅም የሚገልጹ፣ በወንጀል-ፍትሕ አስተዳደር ውስጥ የዘረጋቸው የማስረጃና የቅጣት ጉዳዮች ላይ በርካታ አከራካሪ ድንጋጌዎችን በውስጡ አቅፎ ይገኛል፡፡ ከኢትዮጵያ የሸሪዓ ፍ/ቤቶች ሥልጣን አኳያ ደግሞ፣ ከሕገ-መንግሥታዊ የሰብዓዊ መብት ድንጋጌዎች ጋር አግባብነት ባለው መልኩ፣ በጋብቻና በውርስ የሕግ ማዕቀፍ ዉስጥ ከ *ሱናሕ/ሀዲሰ* የተገኙ የጋብቻና የውርስ ድንጋጌዎች ላይ በዘመነኛ የሙስሊም የሸሪዓ ሊቃውንትና

LI.pdf last accessed on January 01, 2019. ከዚህ መጽሃፍ የተጣቀሱት ገጾች በወረቀት ታትሞ የወጣውን የመጽሃፉን ቅጂ የገጽ ቁጥሮች የሚያመለክቱ ናቸው፡፡ የድረ-ገጽ ፈለጉን በመከተ ልየ ሚገኘው መጽጋፍ ላይ ያሉት ገጾች ከሕትመቱ ጋር የሚለያይ መሆኑን፣ሆኖም የገጾቹ ልዩነት እጅግ የተራራቀ ባለመሆኑ፣ሕትመቱ በሌለበት ዲጂታል ቅጂውን አውርዶ መጠቀም ፋይዳው የማይተናነስ መሆኑን እገልጻለሁ፡፡

10 Ibid, p. 59.

11 Jonathan A. C. Brown, *Hadith፡ Muhammad's Legacy in the Medieval and Modern World*, (Oxford፡ One world, 2009), p. 167.

የተሃድሶ መሪዎች፣ እንዲሁም በምዕራባዊ ሥልጣኔ ጎራ በኩል ከቀና ልቦና የሚመነጩ ጥያቄዎችና ትችቶች ይሰነዘሩበታል፡፡ በሌላ አገላለጽ፣ *ሱናሕ*፣ ሦስተኛ የሸሪዓ ምንጭ የሆነውን አመክንዮኣዊ የሕግ ምርምርን *(ኢጅቲሓድ)* ያህልም ባይሆን፣ በልዩ ልዩ ጉዳዮች ላይ ሰፊ የሸሪዓ ድንጋጌዎች ያቀፈ፣ ብሎም የከረረ ሂስና የለውጥ ጥያቄዎች የሚያነሱበት የሕግ ምንጭ ነው፡፡[12] በዚህ ጽሁፍ፣ በ*ሱናሕ* ላይ ለሚነሱ ጥያቄዎች ምላሽ ማግኘት ይቻል ዘንድ፣ በተለይም ሸሪዓ በኢትዮጵያ፣ በሸሪዓ ፍ/ቤቶች አማካይነት ትግበራ እንዲያገኝ ሕገመንግሥታዊእውቅና ባገኘው መሠረት፣ ለግለሰባዊና ቤተሰባዊ ጉዳዮች አግባብነት ያላቸዉ የሸሪዓ ድንጋጌዎችን በሕግነት በመጠቀም፣ በመተረጎም፣ ተግባራዊ በማድረግ ረገድ ቅድሚያ በቂ ግንዛቤ ሊያዝባቸው የሚገቡ የምንጭነት፣ የሕግነት፣ የአስረጂነትና ሌሎች ከ*ሱናሕ* ጋር አግባብነት ያላቸው የሸሪዓ መሠረተ-ሐሳቦች እንደሚከተለው ተዳሰዋል፡፡

2. ስለ *ሱናሕ* አጠቃላይ መግቢያ

ሸሪዓ የሚለው ቃል ኢስላም እንደ ሥርዓተ-እሴት በውስጡ የያዘውን የሕግ ማዕቀፍ የሚወክል ሲሆን፣ ይህ የሕግ ማዕቀፍ ሦስት ምንጮች አሉት፤ እነሱም ቁርአን፣ *ሱናሕ*፣ እና *ኢጅቲሓድ* (አመከንዮኣዊ ምርምር) ናቸው፡፡[13]*ሱናሕ* በቋንቋዊ ፍቺው አንድ ለረዥም ጊዜ ሳይለወጥ የተያዘ ፍኖተ-ምግባር ማለት ነው፡፡[14] በሌላ በኩል በሸሪዓ ሕግ መርሆዎች ጥናት *(ኡሱል አል-ፊቅሕ)* እና በ*ፊቅሕ* (ዝርዝር ሕግጋት ጥናት ማዕቀፎች) ውስጥ ደግሞ *ሱናሕ* የራሱ የሆነ ሙያዊ ፍቺዎች አሉት፡፡ በ*ፊቅሕ* ጥናት ውስጥ *ሱናሕ* ማለት አንድ የሸሪዓ ድንጋጌ አስገዳጅ አለመሆኑን፣ ነገር ግን ቢተገበር ወይም እንደ ባህሪ ቢያዝ የሚወደድ/የሚመመከር

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12 Ibid, pp. 140-142.

13 አልዩ አባተ ይማም፣ 'ቀዳሚው የሸሪዓ ሕግ ምንጭ'፣ *Hawassa University Journal of Law*, Volume 2, July 2018, ገጽ 126::

14 *Supra* note 9, p. 44. ለምሳሌ፡- ‹*ሱናሕ*› በቁርአን 33:38 ‹አምላክ ከጥንትም ይከተለው የነበረ ፍኖተ-ምግባር የሚል ትርጓሜ› ይሏል፤ በዚህ ቋንቋዊ ፍቺው በቁርአን በ16 አንቀጾች (ቦታዎች) ላይ ጥቅም ላይ ውሏል፡፡

(መንዱብ) መሆኑን የሚያመለክት ነው፡፡[15] የሸሪዓ ሕግ የሚተረጎምባቸው መርሆዎችና ደንቦች፣ እንዲሁም አዲስ ሕጎች የሚቀረጹባቸውን ድፈ-ሐሳቦችና ዘዴዎች በሚጠናበት በ*ኡሱል አል-ፊቅሕ* የእውቀት ዘርፍ ውስጥ ደግሞ *ሱናሕ* ከቁርአን በመቀጠል፣ በሁለተኛ ደረጃ የሚገኝ ኢስላማዊ የእምነትና የሕግ ምንጭ የሆነውን ነቢያዊ ፈለግ (አረዓያነት) የሚወክል ነው፡፡[16] ስለሆነም *ሱናሕ* በይዘቱ አስገዳጅ *(ዋጂብ/ፈርድ)* ወይም ፍቁድነትን ወይም ሌሎች የሸሪዓ ድንጋጌ ቅርጾች *(ሁክም አሸ-ሸርዒ)* ሕጎችን ሊይዝ ይችላል፡፡ በሥነቃላዊ ዘገባ *(ሀዲስ)* አማካይነት ከነቢዩ *ሙ*ሀመድ ወደ ባልደረቦች *(ሶሃቢዶን)* እና የዘመኑ ማህበረሰብ፣ ከዚያም ወደ ተከታይ ትውልዶች በቃል እንዲሁም በመጠኑም ቢሆንም በጽኑፍ ተላልፎ ወደ እኛ የደረሰ ነቢያዊ ንግግሮችን፣ ተግባራትን፣ ተቆጥቦዎችን፣ እንዲሁም ግላዊ ዝንባሌዎችንና ምርጫዎችን የሚይዝ ነቢያዊ ፈለግ ነው፡፡[17] የዚህ ጽኑፍ ርዕሰ-ጉዳይ *ኡሱል አል-ፊቅሕ* ጥናት አካል በመሆኑና ዓላማውም *ሱናሕ* ለሸሪዓ ሕግ ምንጭ መሆኑን መሠረት በማድረግ ምንነቱን እና የአስረጂነት ደረጃዎቹን መዳሰስ በመሆኑ በ*ኡሱል አል-ፊቅሕ* ጥናት ስር የተሰጠውን ትርጓሜ እንይዛለን፡፡

ወደ *ሀ*ዲስ ትርጓሜ ስንመጣ፣ *ሀ*ዲስ በቃላዊ ፍቺው ወሬ፣ ዜና *(ኸበር)*[18] ማለት ሲሆን ነቢያዊ የሕግና የእምነት እሴቶችን ከትውልድ ወደ ትውልድ የተላለፉበትን ሥነቃላዊ ዘዴን ወክሎ የገባ ከሆነ ደግሞ ዘገባ የሚል *ሙ*ያዊ ትርጉም ይይዛል፡[19] ይህን የ*ሱ*ናሕ እና *ሀ*ዲስ *ሙ*ያዊ አገባብና ትርጓሜ እንደተጠበቀ ሆኖ (ወይም በሌላ

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15 Ahmad hasan, "Sunnah" as a Source of "Fiqh" *Islamic Studies*, Vol. 39, No. 1 (Spring 2000), pp. 4-5.: http://www.jstor.org/stable/23076090, last accessed January 01, 2019.

16 Ibid. p. 6.

17 Ibid. pp. 7-10.

18 *ሀ*ዲስ፣ በጥሬ ቋንቋዊ ፍቺው በቁር አንድ ውስጥ 23 ጊዜ ጥቅም ላይ ውሏል፡፡በእነዚህ የቁርአን አንቀጾች ውስጥ ያለው የ‹*ሀ*ዲስ› ቃላዊ አገባብ፣ *ሀ*ዲስ በሸሪዓ መሠረተ-ሐሳቦች *(ኡሱል አል-ፊቅሕ)* እና በ*ሀ*ዲስ ምዘና ጥናት *(ኡሱል አል-ሀ*ዲስ*)* ውስጥ የተሰጠውን *ሙ*ያዊ (ቴክኒካዊ) ፍች ይዞ ሳይሆን፣ በተራ የቋንቋ ፍቺው፣ ማለትም ወሬ፣ዜና ወይም ትረካ በሚል እንደሆነ ይገነዘቧል፡፡(kamali, principles, pp. 46-47 ይመለከቷል)

19 *Supra* note 9, p. 47.

አገላለጽ ሀዲስ የሱናሕ አስተላላፊና ተሸካሚ መኪና ቢሆንም) ሁለቱ ቃላት በተለዋዋጭነት፣ አንዱ ሌላውን እየተካ፣ ሁለቱም እንደ ኢስላም/ሸሪዓ ምንጭ ጥቅም ላይ የሚውሉ መሆኑ የታወቀ ነው፡፡[20]

የሱናሕ ነቢያዊ የሕግ አሻራ ከተቀዳሚው ነቢያዊ ሙስሊም ሕብረተሰብ ወደ ተከታይ ትውልዶች የተላለፈበት መንገድ በዋናነት ሥነቃላዊ ዘገባዎች (ሀዲስ) መሆኑን ተከትሎ ሱናሕ ለሸሪዓ ሕግ ያለው አስተማማኝ የምንጭነት ደረጃ ጥያቄ ዉስጥ ያስገባ ሲሆን፣ ለዚህ የተዓማኒነት ችግር እልባት ለመስጠት የሀዲስ ዘገባ ምዘና ሥርዓት *(ኡሱል አል-ሀዲስ)* ዘርግተዋል፡፡[21] ይህ የምርምር ጽሁፍ ሱናሕ ለሸሪዓ ሕግ አስረጂና ምንጭ በሚሆንባቸው ጉዳዮች ላይ የሚነሱ ርዕሰ-ጉዳዮችንና ጭብጦችን የሚዳስስ ሲሆን፣ ከዚህ በተጨማሪ ነቢያዊ ፈለግ *(ሱናሕ)* የተላለፈባቸው የሀዲስ ዘገባዎች ስለተመረመሩበት ሥርዓት መሠረታዊ የመግቢያ ነጥቦችን ያስተዋውቃል፤ የሀዲስ ተዓማኒነት ምዘናና ፍረጃ ሱናሕ በሸሪዓ ባለው የአስረጂነት አተረጓጎም ላይ ያለውን ሚና እና በዘርፉ ምሁራን የተነሱ መሠረታዊ ነጥቦችን ይቃኛል፡፡

3. የሱናሕ አመዳደቦች እና የሕግ አስረጂነት ባህርያት

ሱናሕ ልዩ ልዩ አተየዮችን መሠረት በማድረግ በተለያዩ ምድቦች ሥር ሊከፋፈል ይችላል፡፡ ከእነዚህም መካከል ሱናሕ ከተላለፈበት ዘገባ (ሀዲስ) ክፍሎች አንጻር፣ መትን (ይዘት) እና ኢስናድ (የዘገባመስመር) በሚል በሁለት ሊከፈል ይችላል፡፡

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[20] Anwar A. Qadri, *Islamic Juriprudence in the Modern World*, (Delhi: Taj Company, 1997), pp. 189-190. ከሀዲስ ሌላ፣ *አሰር* የተሰኘ ሌላ የዘገባ አይነት ያለ ሲሆን፣ይህ ከሙሀመድ ሕልፈት በኃላ የባልደረቦቻቸውን ሃይማኖታዊ ተግባርና ንግግር የተላለፉባቸው ዘገባዎችን የሚመለከት ሲሆን፣ የ*አሰር* ዘገባዎች በሀዲስ ሥነ-ጽሁፍ ውስጥ የራሱ የሆነ ድርሻና የአስረጂነት ዋጋ ያገኘ ሲሆን፣እንደ አብነት ያህል ኢማም ማሊክ በ*ሙሰነፍ ሥራዎች (ሙወጦ እማሊክ)* ግማሽ የሚሆኑ የጥንቅሩ ዘገባዎች *አሃዲስ* (ሀዲሶች) ሳይሆኑ፣ *አሰር* (የባልደረቦችን ተግባርና ንግግር የሚገልጹ) ዘገባዎች ናቸው፡፡ (*Supra* note 9, pp. 47-48 ይመለከቷል)

[21] Mohammad Hashim Kamali, *A Textbook of Ḥadīth Studies: Authenticity, Compilation, Classification and Critisism of Ḥadīth, Markfield: The Islamic Foundation*, 2005, p. 4. https://ia801608.us.archive.org/23/items/a-textbook-of-hadith-studies/a-textbook-of-hadith-studies.pdf last accessed January 01, 2019.

ይህ አመዳደብ በዋናነት ለሀዲስ ጥናት አግባብነት ያለው ሲሆን፣ *ሱናሕ* በሀዲስ አማካይነት የተላለፈ ከመሆኑ አኳያ የዘገባ ተዓማኒነቱን በተመለከተ፣ የመግቢያ ነጥቦች በዚህ ጽሁፍ ክፍል ሥር ተዳሰዋል፡፡

ነቢያዊ መመሪያው የተላለፈበትን የተግባቦት ቅርጽ መሠረት በማድረግ፣ *ሱናሕ፣ ቃላዊ (ቀዉሊ)፣ ድርጊታዊ (ፊዕሊ)* እና *ተቆጥቧዊ (ተቅሪሪ)* በተሰኙ ሦስት ክፍሎች ተመድቦ ሊታይ ይችላል፡፡ የንግግር ወይም ቃላዊ ሱናዎች ሙሀመድ እንደ ነቢይ በአንደበታቸው የገለጿቸው መመሪያዎች ሲሆኑ፣ *ፊዕሊ* ሱናዎች ደግሞ በተጨባጭ ድርጊት የተገለጹ፣ ሙሀመድ በተግባር ተምሳሌት እና አረዓያ የሆነባቸው እጅግ በርካታ አጋጣሚዎችን ይይዛል፡፡ የሙሀመድ ባልደረቦች በግል በወሰኗቸውና በፈጸሟቸው ድርጊቶች ነቢዩ ሰምተው ወይም አይተው ተቃውሞ ያላቀረቡባቸው፣ ወይም ሥህተት እንደሆነ ያልገለጹባቸው - በዝምታ ያጸኗቸው አካሄዶች በሙሉ ተቋጥቧዊ *ሱናሕ (ሱናሕ ተቅሪሪያ)* ይባላሉ፡፡[22] ሱናዎች በየትኛውም ቅርጽ ሥር የሚመደቡ ቢሆንም፣ የተለያየ የአስገዳጅነት ደረጃና የድንጋጌ ቅርጽ ሊይዙ የሚችሉ መሆኑ ሊታወቅ ይገባል፡፡[23]

ሌላው የአመዳደብ አይነት፣ *ሱናሕ* ለሸሪዓ ያለውን የሕግ ምንጭነቱ መሠረት ያደረገው ሲሆን፣ በዚህ የምደባ አተያይ መሠረት፣ የሕግ ባህሪ ያለው - ደንጋጊ *ሱናሕ (ሱናሕ መሸሩዒያሕ)* እና የሕግነት ባህሪ የሌለው - ኢ-ደንጋጊ *(ሱናሕ ገይረ-መሸሩዒያሕ) ሱናሕ* በሚል በሁለት ተከፍሎ ይታያል፡፡[24] ይህ አመዳደብ፣

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22 *Supra* note 15, pp. 7-9.

23 *Supra* note 9, p. 51. ይህ ርዕሰ-ጉዳይ የሸሪዓ የድንጋጌ ቅርጾች *(አህካም አሸ-ሸሪዓሕ)* በሚዳሰስበት የኡሱል አል-ፊቅሕ ርዕስ ሥር የሚተነተን ጉዳይ ነዉ፡፡ ለምሳሌ፣ ከማሊ በእንግሊዝኛ የኡሱል አል-ፊቅሕ ሥነ-ጽኑፍ ፋና-ወጊ በሆኑበት ‹‹Principles of islamic Jurisprudence›› (*supra* note9), በተሰኘው ሥራቸው፣ ምዕራፍ 17 (ገጽ፡- 321-355) ሥር ተብራርቷል፡፡

24 Ibid.

ሱናሕ የሸሪዓ ሕግ ምንጭ ከመሆኑ ጋር የተያያዘና አግባብነት ያለው በመሆኑ፣ በተከታዩ ክፍል ስር ማብራሪያ ተሰጥቶበታል፡፡

3.1. ሕግ-ተኮር የሱናሕ አመዳደብ

የሕግነት ባህሪ ከሌለው፣ ኢ-ደንጋጊ *ሱናሕ* አይነት ብንጀምር፣ ነቢዩ በመደበኛ የግል ሕይወታቸው *(አል-አፍዓል አል-ጂቢሊያሕ)*፣ አመጋገባቸው፣ አተኛኘታቸው፣ አለባበሳቸው እና ሌሎች የሸሪዓ አካል ይሆናሉ ተብለው የማይገመቱ እንቅስቃሴዎቻቸው በጠቅላላ *ሱናሕ ገይረ-መሸሩዒያሕ* ይባላሉ፡፡ በብዙኃኑ ሊቃውንት *(ዑለማእ)* አተያይ፣ ነቢዩ በግላዊ ሰብዕናቸው፣ ፍላጎታቸውና የግል ምርጫዎቻቸው - የቀለም ምርጫቸው፣ መጀመሪያ በቀኝ ጎናቸው መተኛታቸው፣ ምንም አይነት የሱናነት ፋይዳ የሌላቸው ናቸው፡፡[25] በመሆኑም በሰፊው የሕግ ክፍል - በሲባሃሕ (ፍቁድነት) ሥር የሚወድቁ ናቸው፡፡ እነዚህ ተፈጥሯዊ ክንውኖች *ዋጂብ* (አስገዳጅ) ወይም *መንዱብ* (የተወደደ) ለመባል ተጨባጭ አስረጅ ያስፈልገዋል፡፡ይህ በሌለበት የትኛውም ጉዳይ *ሙባህ* በሚለው እልቆ-ቢስ የድንጋጌ ቅርጽ *(ሁክም)* ሥር የሚፈረጁ ይሆናሉ፡፡[26]

የሙሀመድ ተግባራት፣ ሙሀመድ በነቢይነታቸው ወይስ በግላዊ ምርጫቸው የፈጸሟቸው መሆኑ ለመለየት እጅግ አስቸጋሪ የሚሆኑባቸው ጉዳዮች አሉ፡፡ በተለይ ሙሀመድ የራሱ ባህልና ልማድ ያለው የወቅቱ አረቢያ ማህበረሰብ አባል እንደመሆናቸው በአለባበሳቸውና የጸጉር አቆራረጣቸው (ለምሳሌ፡- ጀለቢያ እና ጥምጣም ማድረጋቸው፣ ቆብ መድፋታቸው፣ ጺማቸውን ማስረዘማቸው) የመሳሰሉት ድርጊቶች ባህላቸውንና የሚያውቁትን እየተከተሉ ይሁን፣ እንደነቢይ ለሌሎች አረዓያ ለመሆን፣ ግልጽ ባለመሆኑ በሕግ ምሁራን መካከል ልዩነት መፈጠሩ አልቀረም፡፡[27] ሻፊዒን ጨምሮ ብዙኃኑ *ዑለማእ* እነዚህንና መሰል ተግባራት ነቢያዊ በመሆናቸው *ሲባሃሕ* ሳይሆን ሌሎች እንዲፈጽሟቸው

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[25] Ibid.
[26] Ibid.
[27] Ibid, p. 52

የሚፈለጉ *(መንዱብ)* ፈለጎች ናቸው፡፡[28] አቡ-ሀኒፋና ሌሎች ሊቃውንት ደግሞ እነዚህ ተግባራት ሸሪዓዊ እሴትነት የሌላቸው፣ በልማድና በግል አኗኗር አመቺ የሆነውን ከመከተል የተፈጸሙ እንጂ በሸሪዓ የሕግ ማዕቀፍ ውስጥ ምንም አይነት የእሴት-ተካይነት ሚና ወይም የ*መንዱብነት* ዋጋ የላቸውም በማለት ያስረዳሉ፡፡[29]

ከሁለቱ ፋና-ወጊ የሱሱል ሊቃዉንት ሐሳቦች የአቡ-ሀኒፋ እይታ አሳማኝ ይመስላል፡፡ ሙሀመድ በመለኮት ግልጽ ትዕዛዝና መመሪያ ካረፈባቸው ውጪ ባሉ ግላዊና ቤተሰባዊ ሕይወታቸው ከወቅቱ የአረቢያ ማህበረሰብ ባህልና አኗኗር የተለየ አልነበረም፤ ሊሆንም አይችልም፡፡ በግልጽ በትዕዛዝ መልክ ለአማኞች ከተላለፉ ትዕዛዞች ውጪ፣ ባልደረቦች ግብረ-ባህሪያቸውን ተመልክተው ያስተላለፉት ገላጭ ዘገባዎች ሁሉ ሙሀመድ ከማሕበረሰባቸው ባህልና ልማድ ውጪ ሆነው በነቢይነት ደረጃቸው ዓረዓያ ለመሆን ያንጸባረቋቸው ግብረ-ባህርያት ናቸው ሊባል አይችልም፡፡ ለዚህ ደግሞ ትልቁ የመከራከሪያ ነጥብ የሚሆነው፣ አምላክ የሁሉንም የሰው ዘር ማህበረሰብ ባህልና ልማድ ከሁለንተናዊ የሥነ-ምግባር እሴቶች፣ ከአመክንዮኣዊ አስተሳሰብ እና ሕብረተሰባዊ እድገት፣ እንዲሁም ከመለኮታዊ የቀኖና እሳቤዎች ጋር ተቃራኒ ካልሆነ በስተቀር፣ የትኛውም ማሕበረ-ሰብ በጊዜ ሂደት ያዳበራቸው ባህልና ልማዶች በፈጣሪ ዘንድ በአንድ አይን የሚታዩ እንጂ፣ የአንዱ ሕብረተሰብ ሥርዓተ-እሴት ለሌላው እንደ ፍኖተ-እሴት ወይም መልካም አረዓያ ተደርጎ ሊጫን አይችልም፡፡ ስለሆነም፣ የሀዲስ ጥንቅሮች የሙሀመድን ሁለንተናዊ ገጽታ የሚያቀርቡ በመሆናቸው፣ በተለይም በድርጊት ገላጭ *(ፊዕሊ)* ተዓማኒ ሀዲሶች አማካይነት የተላለፉ፣ ግለሰባዊ ዝንባሌና ምርጫን የሚዘግቡ ሀዲሶች፣ የሕግነት ባሕሪ የሌላቸው፣ እንዲሁ በጥቅል አነጋገር ግላዊ ሰብዕናን/ምርጫን እና ማሕበረሰባዊ ወግና ባህልን የሚያስረዱ የታሪክ ምንጮች ተደርገው ሊወሰዱ ይችላሉ፡፡ ከዚህ አተያይ አንጻር፣ ሙሀመድ በግል ምርጫቸው

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[28] Ibid.
[29] Ibid.

ወይም ባህላቸውን ተንተርሰው የፈጸሟቸው ተግባራትና ያንጸባረቋቸው ባሕርያት፣ ከነአካቴው ሱናሕ ሊባሉ አይገባም እላለሁ፡፡ ለሱናሕ የሚሰጠው ትርጓሜ፣ ከሸሪዓ ሕግ ጥናቶች አኳያ፣ አግባብነትና ፋይዳ ያለው፣ ሙያዊ መሆን ይገባዋል፡፡ ከዚህ አንጻር፣ ሱናሕ፣ የሕግነት ባህርይ የሌላቸውን፣ ልማድንና ግላዊ ባህርይን የሚወክሉ ሱናዎችን እንደሚያካትት ተደርጎ ቢተረጎም ሸሪዓን በመረዳት ረገድ አግባብነትና ጠቀሜታ የሌለው ስለሆነ፣ ትርጓሜው የሕግነትና የአስረጂነት ዋጋ ያላቸውን ነቢያዊ ፈለጎችን ብቻ እንደሚያካትት ተደርጎ ቢተረጎም፣ ከዚህ በፊት፣ ከሙሀመድ የተላለፉ ሁሉም ተግባራት የሱናነት ፋይዳ እንዳላቸው ተደርጎ የተያዘው መጠነ-ሰፊ የግንዛቤ ችግር እንዳይቀጥል ያግዛል፡፡ በተመሳሳይ መልኩ፣ በየትኛውም የተዓማኒነት መመዘኛ ውድቅ በሆኑ ዘገባዎች ውስጥ የተገለጹ ድርጊቶች በሱናሕ ትርጓሜ ውስጥ ሊካተቱ አይገባቸውም፤ ይህም ደካማና ውድቅ የአስረጂነት ደረጃ ያላቸው ዘገባዎች ነቢያዊ ፈለግን እንደሚያንጸባርቁ ተደርገው የሚተገበሩበት ሥር-የሰደደ መሠረት-የለሽ ሃይማኖታዊ ባህል እንዲታደስ ለሚደረገው ጥረት ጥሩ የግንዛቤ አስተዋጽኦ ይኖረዋል፡፡

3.2. የሕግነት ባህርይ ያለው - ደንጋጊ ሱናሕ (ሱናሕ ተሸሪዒያሕ)

የሕግነት ፋይዳ ያለው ሱናሕ፣ ሙሀመድ በወቅቱ ለነበረው አማኝ ሕብረተሰተብ ከነበራቸው ሚና አንጻር፣ በሁለት ክፍል ሥር ተመድቦ ይታያል፡፡ አንደኛ፡- ሙሀመድ እንደ ነቢይ፣ በመለኮታዊ ራዕይ የተገለጹ ናቸው ተብለው የሚታመንባቸውን መመሪያዎችና የሕግ ድንጋጌዎችን የሚይዝ ሲሆን፣ ሙሀመድ ከነቢይነት ደረጃቸው ውጪ፣ የወቅቱ የሙስሊም ማህበረሰብ የአመራርነትና የዳኝነት ሚና የነበራቸው መሆኑን ተከትሎ፣ የወሰዷቸው እርምጃዎችና ያስተላለፏቸው ውሳኔዎችን የሚይዘው፣ አውዳዊ ሱናሕ ደግሞ ሁለተኛው የደንጋጊ ሱናሕ አይነት ነው፡፡[30]

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[30] Ibid.

3.2.1. ጠቅላይ ደንጋጊ ሱናሕ *(ተሸሪዕ ዐም)*

*ሙ*ሀመድ በነቢይት ደረጃቸው፣ የእምነቱ ተከታዮችን ምግባርና ባህሪ ለመግራት ታሰበው የተላለፉ፣ በመለኮታዊ ራዕይ የተገለጹ ናቸው ተብለው የሚታመንባቸው፣ ጠቅላይና ሁለንተናዊ መርሆዎችና ሕጎች ጠቅላይ ደንጋጊ *ሱ*ናሕ *(ተሸሪዕ ዐ*ም) በሚል ስር ተፈርጀዋል፡፡ ይህ የደንጋጊ *ሱ*ናሕ ክፍል፣ በጊዜ ወይም በሁኔታዎች ላይ ያልተመረኮዘ፣ ለየትኛዉም ሙስሊም ሕብረተሰብ፣ በጊዜና በቦታ ሳይወሰን ተፈጻሚ ሊደረግ የሚገባ አጠቃላይ ነቢያዊ አረዓያ ነው፡፡[31]

3.2.2. አውዳዊ *ሱ*ናሕ

አውዳዊ *ሱ*ናሕ ሲባል *ሙ*ሀመድ በወቅታቸው ለነበረው የሙስሊም ማህበረሰብ የፖለቲካ አመራርነት ሥልጣን የነበራቸው አስተዳዳሪና፣ እና በሕብረተሰቡ አባላት መካከል ይፈጠሩ ለነበሩ ግጭቶች እልባት የሚሰጡ ዳኛ የነበሩ ከመሆኑ የተነሳ፣ የወቅቱን የፖለቲካ ተጨባጭ፣ እንዲሁም የግለሰብ ተከራከሪዎችን ግራቀኝ ሐሳብ እና ግላዊ ሁኔታዎች ታሳቢ በማድረግ የተወሰኑ፣ እና ባጠቃላይ በነባራዊ ተጨባጭ ሁኔታዎች ላይ የተመረኮዙ በመሆኑ፣ አውዳዊ *ሱ*ናሕ የሚል የጋራ ሥያሜ ሊሰጣቸው ይችላል፡፡

*ሙ*ሀመድ በነበራቸው የአመራርነት ኃላፊነት፣ ሕዝባዊ የፋይናንስ አስተዳደርን፣ የክፈለ ግዛት አስተዳዳሪዎች አሿሿምና አስተዳደራዊ ስምምነቶችን እና ባጠቃላይ የወቅቱ የማህበረሰብ አወቃቀርና የፖለቲካ ምሕዳር ታሳቢ ተደርገው የተወሰዱ የፖሊሲ እርምጃዎች *ሱ*ናሕ-መሸሩዒያሕ ቢሆኑም፣ እነዚህና መሰል ሕዝባዊ ውሳኔዎችና እርጃዎች ሥልጣን ባለው አካል በኩል እስካልተላለፉ ድረስ ተራው አማኝ ነቢያዊ *ሱ*ናሕ ናቸው በሚል ሊከተላቸውና ሊተገብራቸው አይችልም፡፡[32]

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[31] Ibid, pp. 52-53.
[32] Ibid, p. 54.

እነዚህ ሱናዎች ከሙሀመድ በኋላ ላሉ የሙስሊም አስተዳደሮች መሪነት ፋይዳ ቢኖራቸው ለተራዉ ሕዝብ የተደነገጉ ጠቅላይ ድንጋጌዎች አለመሆናቸውን ይገነዘቧል፡፡ ከነቢዩ አስተዳደር በኋላ አስከ አሁን ዘመን ድረስ ያሉ አስተዳደሮችም ቢሆኑ በእነዚህ ፖለቲካዊ ፋይዳ ያላቸው የሱናሕ ሕግጋት የአስገዳጅነት ዋጋ ሳይሆን፣ እንደየ ወቅቱ ማህበረሰብና የፖለቲካ ተጨባጩን መሠረት ያደረገ፣ እንደ ሁኔታዉ የነቢዩ *ሱናሕ* አግባብነት ካለው ሊከተሉት፣ ካልሆነ በምትኩ *ኢጅቲሓድ* በማድረግ ተገቢ ውሳኔ *(ሁክም/ፈትዋ)* ላይ እንዲደርሱ ሸሪዓው ይፈቅዳል፡፡ ለዚህ መሠረቱ ደግሞ እነዚህ ሱናዎች ሙሀመድ በአመራርነት ሥልጣናቸው - በግል የፍሬ-ነገር ምዘናቸው *(ኢጅቲሓድ)* የወሰኗቸው በመሆኑ የአስገዳጅነት ባህሪ የሌላቸው ሕጎች በመሆናቸው ነው፡፡[33]

ሙሀመድ እንደ ዳኛ፣ በሕብረተሰቡ አባላት መካከል ይፈጠሩ የነበሩ ግጭቶች ሲቀርቡላቸው በእነዚህ ጉዳዮች ላይ የሚሰጧቸው ፍርዶች በሁለት ክፍሎች ሊታዩ ይችላሉ፡፡ አንደኛው የክስእና የማስረጃ አቀራረብን በተመለከተ እንደ ጉዳዩ ምንነት በተናጠል የሚወሰን ሲሆን በመጨረሻ የተሰጠው ፍርድ በተመሳሳይ ጉዳዮች ላይ የሕግነት ዋጋ ያለው *(Precedent)* ይሆናል፡፡ ነገር ግን ይህ ሲባል እነዚህ ነቢያዊ ውሳኔዎች በዳኝነት ሥርዓት ውስጥ እስካላለፉ ድረስእነዚህ ውሳኔዎች ላይ ተመርኩዞ ግላዊ እርምጃ መውሰድ አይፈቀድም፤ ለዚህ ምክንያቱ ደግሞ እንደ ጉዳዩ/ግጭቱ ልዩ ከባቢያዊ ሁኔታዎችና ማስረጃዎች የተነሳ ነቢዩ መዝነው ፍርድ ከሰጡት ጉዳይ ጋራ የሚለይባቸው ነጥቦች ሊኖሩ ይችላሉና፣ በሕግ በተቋቋመ የፍርድ ሥርዓት ቢያልፍ የተለየ ውጤት ሊኖረው ይችል የነበረ ጉዳይ ሊሆን ስለሚችል፣ የዳኝነት ሱናዎች የጠቅላይ ሕግነት/ገዢነት ባህሪ የሌላቸው፣ ነቢያዊ ፍርድ በተሰጠባቸውና በአዲስ ጉዳዮች መካከል እንደተቀራራቢነታቸው መጠን፣

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[33] Ibid., p. 55.

በነቢዩ ውሳኔዎች ላይ ተንተርሰው ውሳኔ መስጠት የሚገባቸው የሕግ ባለሙያዎች ወይም ዳኞች *(ቁዲታ)* ብቻ በመሆናቸውነው፡፡[34]

አንድ ምሳሌ እንስጥ፡- የአቡ-ሱፍያን ሚስት (ሐንድ) ባሏ ለእሷና ለልጇ የሚበቃ ቀለብ አይቆርጥልንም በሚል ለነቢዩ አቤቱታ አሰምታ፣ የሚበቃትን ያህል ከባሏ ንብረት እያነሳች እንድተጠቀም ሲሉ ነቢዩ ፍርድ አስተላልፈዋል፡፡ ይህ ውሳኔ ሙሀመድ በዳኝነት የሰጡት ወይስ በነቢይነታቸው - በነዚህ ጉዳዮች ላይ ተፈጻሚ የሚሆን ጠቅላላ ሕግ መደንገጋቸው መሆኑ ላይ የምሁራን ልዩነት ተፈጥሯል.[35] በተያዘው ጉዳይ ላይ ነቢዩ የዳኝነት ሚና ወስደው ፍርድ የሰጡ እንጂ ጠቅላላ ሕግ እየዘረጉ አለመሆኑን አራቱ የመዝሓብ መሪዎች ይስማማሉ፡፡[36] ስለዚህ፣ ከባሏ ቀለብ ማግኘት ያልቻለች የትኛዋም ሚስት በራሷ ፈቃድ የባሏን ንብረት ለመጠቀም አይፈቀድላትም፡፡ በቂ ቀለብ እንዲቆርጥላትና ባሏ ይህን ማድረግ ከተሳነዉ ለቃዲ አቤቱታ በማቅረብ ዳኝነት መጠየቅ ትችላለች፤ ቃዲውም ንብረቱን እስከመሸጥ ድረስ ሄዶ ቀለብ እንዲቆረጥ ለማድርግ ሸሪዓዊ ሥልጣን አለው፡፡[37]

ለማጠቃለል ያህል፣ ሙሀመድ ለአማኞች ሦስት የአረዓያነት ደረጃ ያላቸዉ መሆኑን በመረዳት፣ የርሳቸዉን ሱናሕ የሚዘግቡ ሀዲሶች ከእነዚህ ሦስት አማራጮች አኳያ ሊገመገሙ ይገባል፡፡ ሙሀመድ በነቢይነታቸው የተገበሯቸው ወይም የተናገሯቸው የጠቅላላ ሕግነት ባህሪ ይኖራቸዋል፤ የወቅቱን ብቻ ሳይሆን ባጠቃላይ የጊዜና የቦታ ገደብ ሳይጣልበት በሱማው (ሕዝበ-ሙስሊም) ላይ የሕግነት ዋጋ *(ተሸሪዕ ዐም)* ይኖረዋል፡፡ በሕዝብ አመራርነት ሚናቸው፣ የወሰዷቸው እርምጃዎች የሱናሕ ተሸሪዒያሕ ደረጃ የሌላቸው፣ በየደረጃው ላሉ የሕዝብ አስተዳዳሪዎች ብቻ ተምሳሌት የሚሆኑ እንጂ በግለሰብ እጅ ሊተገበሩ

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34 Ibid.
35 Ibid, p. 56.
36 Ibid.
37 Ibid, pp. 55-56.

አይችሉም፡፡ በተመሳሳይ አንድ ልዩ ግጭት ሲቀርብላቸው፣ የዳኝነት ሚና *(ቃዲ)* ይዘው በሰጧቸው ፍርዶች፣ እንድ ተመሳሳይነታቸው ለአዳዲስ ጉዳዮች ተፈጻሚ የማድረግ ሥልጣን ለቃዲ (ዳኛ) እንጂ የነቢዩ *ሱናሕ* ነው በሚል ግለሰቦች ተከትለው ተግባራዊ ለማድረግ የሱናው ባህሪ የማይፈቅድ መሆኑን መገንዘብ ያሻል፡፡

ከላይ እንደተወሳው ነቢያዊ *ሱናሕ* የሕግነት ባህሪ ያለው ወይስ *ፖ*ሊሲያዊ ወይም የዳኝነት ጉዳይ መሆኑን የሚለየው በሀዲስ ዘገባ ይዘት አገላለጽ እና አንድምታ *(ጂሓኃ)*፣ በአተረጓጎም መርሆዎች፣ እንዲሁም ሌሎች ጠቋሚ ነጥቦችን መሠረት በማድረግ የሚወሰን ይሆናል፤ በዚህም ምክንያት በሸሪዓ ሊቃውንት *(ፉቁኃእ)* መካከል መጠነ-ሰፊ የሐሳብ ልዩነት *(ኢኽቲላፍ)* እንዲፈጠር ሆኗል፡፡[38] እነዚህ የልዩነት ነጥቦች እንደ አግባብነታቸው በተለያዩ የሕግ ዘርፎች ሥር የሚነሱና የሚተነተኑ ናቸው፡፡ ይህ ርዕሰ-ጉዳይ የሚጠናበት ኢስላማዊ የእውቀት ዘርፍ ደግሞ *ፊቅሕ* (ዝርዝር የሸሪዓ ሕግ ጥናት) በመባል ይታወቃል፡፡

4. የሐሰተኛ ሀዲሶች መፈብረክና ብረዛዎች

ነቢያዊ *ሱናሕ* ከሙሀመድ ወደ ባልደረቦች ተላልፎ ካለቀበት፣ ከነቢዩ ሕልፈት በኋላ በመጀመሪያዎቹ ሁለት ተተኪ *(ኺላፋ)* አመራር ዘመናት፣ ማለትም ከአቡ-በክር እና ዑመር የአስተዳዳር ዘመናት ወቅት ድረስ፣ አንድም ማህበረሰቡ ለነቢያዊ አስተምህሮት በነበረዉ የጊዜ ቅርበት ምክንያት፣ እንዲሁም ኢስላም የተስፍፋበት የግዛት ወሰን፣ ከብጹዓን የነቢዩ ተከታዮች መካሪዎችና ከማዕከላዊ መንግሥት የቁጥጥርና የሕግ ማስከበር አቅም በላይ ባለመሆኑ፣ ከነቢዩ በኋላ በመጀመሪያዎቹ ሁለት ዐስርተ-ዓመታት ውስጥ በአማኝ ሕብረተሰቡ መካከል ሲተላለፉና ሲሰራጩ የነበሩ ሀዲሶች ከሙሀመድ የተገኙ ለመሆናቸው አጠራጣሪ ሁኔታዎች አልነበሩም፣ ከአንዱ ባልደረባ ወደ ሌላው የተላለፉ ነቢያዊ ዘገባዎች፣ አስተምህሮቱ ሲተላለፍ በወቅቱ በነበሩ ሌሎች ባልደረቦች በቀላሉ የሚረጋገጥ

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[38] Ibid, p. 52.

በመሆኑ፣ ታሰቦባቸው ሀሰተኛ ሀዲሶች ሊፈጠሩ ይቅርና፣ በሰብዓዊ ሥህተት ሊፈጸሙ የሚችሉ መጠነኛ የፍሬሐሳብ ዝንፈቶች ቢፈጠሩ እንኳ፣ በቀላሉ ሊታረሙ የሚችሉበት እድል እና ምኅዳር እንደተጠበቀ ነበር፡፡[39]

ሐሰተኛ ሀዲሶች መነገር የጀመሩበትን ታሪካዊ አጋጣሚዎች በተመለከተ፣ ሦስት የተለየዩ ምሁራዊ ሐሳቦች እንደሚቀርቡ ከማሊ ሲገልጹ፣ እነዚህም አንደኛ፣ ከነቢዩ ሕልፈት በኋላ በመጀመሪያው የአቡ-በክር የአስተዳደር ዘመን ምጽዋት *(ዘካሕ)* አንከፍልም፣ለማዕከላዊ የመንግሥት የምጽዋት *(ዘካሕ)* አከፋፈል ሥርዓት ተገዢ አንሆንም *(ሪዳሕ)* ባሉ ቡድኖች/ኅሳዎችላይ ሕግ የማስከበር ዘመቻዎች ከመከፈታቸው ጋር ተያይዞ የመጣ ነዉ ሲሉ፣ ሁለተኛው ደግሞ፣ በዑስማን የኺላፋ ዘመንን የሚያጣቅስ ነው፡፡ ሦስተኛው፣ በ40ኛዉ የሒጅራ ዓመት፣ በዐሊ የአስተዳደር ዘመን ኸዋሪጆችና ሺዓዎች የመሰሉ በሙስሊም ታሪክ የመጀመሪያው ቡድናዊ አሰላለፍ እና ክፍፍል የተፈጠረበት፣ እንዲሁም በማዕከላዊ መንግሥትና በክፍለ-ሐገር ገዢ በነበረው በሙዓዊያ መካከል የነበሩ ፖለቲካዊ አለመግባባቶችና ወታደራዊ ግጭቶች የነበሩ መሆናቸውን ተከትሎ፣ በእያንዳንዱ ቡድን ውስጥ ይገኙ የነበሩ ጠርዘኞች የየራሳቸውን አቋም የበላይ ለማድረግ በሚል ከንቱ አሳብ፣ ነቢያዊ ንግግሮችን አጣሞ መተርጎም፣ ይባስ ብሎም የይዘት ለውጥ እስከመፍጠር

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[39] *Supra* note 11, pp. 70-71. የሀዲስ ፈጠራ የተጀመረበትን ልዩ የታሪክ አጋጣሚ በተመለከተ በ*ውለማእ* መካከል ልዩነት ተንጸባርቋል፡፡ ብራውን፣ እንደገለጸው፣የሀሰተኛ ሀዲስ ፈጠራዎች የተጀመረው ዋነኛ የሆኑት የነቢዩ ባልደረቦች መሞታቸውን ተከትሎ ነው፤ በዚህ ረገድ የመጨረሻ ባልደረባ የነበረው አነ ስኢብን ማሊክበ 93 ዓ.ሒ እንደ ሞተ ይገልጻል፡፡ (Brown, fn 11, p. 71 ይመልከቱ) ይህ እይታ ከዑስማን የኺላፋ ጊዜ ጀምሮ የነበረውን የፖለቲካ ልዩነት፣ እንዲሁም ለባልደረቦች ተደራሽ ባልሆኑ አካባቢዎችና ሁኔታዎች ላይ የሀዲስ ብረዛ እና ፈጠራ ሊከሰት የሚችል ከመሆኑ አኳያ የተያዘው አተያይ አሳማኝ አይመስልም፡፡ ነገር-ግን ጸሀፊው፣ ይህን የታሪክ አጋጣሚ ሲጠቅስ፣መጠነሰፊ የሀሰተኛ ሀዲስ ፈጠራና ሥርጭት የተከሰተበትን ጊዜ ዋቢዎችን አጣቅሶ የገለጸ ከመሆኑ አንጻር፣ ሐሳቡ ቀደምሲል፣ከታቢዑን በፊት በኋለኛ የባልደረቦች (የዑስማንና የዐሊ አስተዳደር) ጊዜያት ላይ የሐሰት ዘገባዎች መሰራጨት መጀመራቸውን የሚያመለክት አገላለጽ ያለው ከመሆኑ አንጻር፣ ልዩነቱን፣ ውስን እና መጠነ-ሰፊ የሐሰተኛ ሀዲስ ሥርጭት በሚል ሁለትዮሽ አተያይ አስታርቀን ልንመለከተው እንችላለን፡፡

ደርሰዋል፡፡[40] የዐሊ አገዛዝ ዘመን፣ ከዚያ በፊት ከነበሩት የሙስሊም የእርስ-በርስ ግንኙነቶች ውስጥ ከታዩት የበለጠ የሻከረ እና በአንጻሩ ትርምስ የበዛበት ስለነበር፣ የሀዲስ ፈጠራዎች በዚህ ዘመን ተጀመረ የሚለው አስተያየት ይበልጥ ሚዛን የሚደፋ ነው በማለት ከማሊ አክለው ያስረዳሉ፡፡[41]

ከለይ የተገለጸው የሀሰተኛ ዘገባዎች ታሪካዊ መሠረትላይ ያለው ልዩነት እንደተጠበቀ ሆኖ፣ በሙስሊም ተቀዳሚ ታሪክ ውስጥ፣ የማጣራት ወይም የተዓማኒነት ምዘና በቅጡ ሳይጀመር፣ ሐሰተኛ ሀዲሶች የተፈበረኩባቸው፣ እንዲሁም ይዘታቸው የተዛነፉ፣ ወይም የፍሬ-ሐሳብ ጭማሬ ወይም ቅነሳ የተደረገባቸው ሀዲሶች የተሰራጨበት፣ ከአንድ ምዕተ-ዓመት የበለጠ ጊዜ የተቆጠረ ለመሆኑ፣ ከሀዲስ ምዘና ታሪክ መረዳት ይቻላል፡፡[42] የመጀመሪያው ነቢያዊ ማህበረሰብ፣ በተከታይ ትውልድ እየተተካ፣ የኋለኛው ሙስሊም ሕብረተሰብ ከምንጩ እየራቀ እና እምነት-መር ማህበሰባዊ ትስስርና ወንድማማችነት እየላላ መምጣቱን ተከትሎ፣ እንዲሁም በወቅቱ ተፈጥሮ የነበረውን ፖለቲካዊ ውጥረት እና ጽንፈኛ የሐሳብ ጎራዎች ምክንያት፣ የግራ-ቀኝ ወገኖች የራሳቸውን እቋም የሚደግፉ ሀሰተኛ ሀዲሶችን በነቢዩ ስም አስተላልፈዋል፡፡[43] በዚህ ታሪካዊ ኩነት ላይ ሁሉም የሀዲስ ሊቃውንት ያለ ልዩነት በአንድ ድምጽ የሚስማሙ ሲሆን፣ በዚህ ረገድ ሀሰተኛ ዘገባዎች የተጠናቀሩባቸው *‹‹አልመውዱዓት››* የተሰኙ ሥራዎች እና የሀዲስ የሥነ-ጽኑፍ አይነት *(Genre)* መኖሩ፣ ለዚህ እውነታና የጋራ አቋም አረጋጋጭ ነው፡፡[44]

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40 *Supra* note 9, pp.65-66.

41 Ibid, p. 66.

42 *Supra* note 11, p. 77

43 Ibid, pp. 72-73.

44 *Supra* note 9, p. 65. የ*መውዱዓት* ድርሳናት፣ተዓማኒነት ወዳላቸው የሀዲስ የጥንቅር *ሥራ*ዎች ውስጥ ያልተካተቱ የሀዲስ *ሥነ-ቃ*ሎችን ማለት አይደልም፡፡ ይህ ከተባ ለቡኻሪ ወይም ሙስሊም በጥንቅሮቻቸው ውስጥ ያላስገቧቸውን በመቶ-ሺዎች የሚቆጠሩ ሀዲሶች ሁሉ *መውዱዓት* ሊሰኙ ይገባ ነበር፡፡በተዓማኒ የሀዲስ ጥንቅር ውስጥ ያልተካተቱ ሀዲሶች ሁሉ ውድቅ ወይም ሀሰተኛ ስለሆኑ ሳይሆን፣ ተዓማኒ ለመሆናቸው በቂ ማስረጃ ባለመገኘቱ፣ ለምሳሌ ያህል፣ በዘገባ ሰንሰለት ውስጥ የአንዱ አስተላላፊን ማንነት በተመለከተ

ነቢያዊ መሠረት አላቸው በሚል የተላለፉ ሐሰተኛ ሀዲሶች፣ አንድም በየትኛውም የዘገባ እርከን ላይ በሚገኙ አስተላላፊ ግለሰቦች ሆን ተብለው በሐሰት ሊፈጠሩ ይችላሉ *(መዉዱዕ)*፤ ወይም ደግሞ በአስተላላፊዎች የማስታወስ ችሎታ ማነስ ወይም ቸልተኝነት ምክንያት በሚፈጸም ሥሕተት ሊፈጠሩ ይችላሉ፡፡[45] ሆን ተብለው የተፈጠሩ ሐሰተኛ ሀዲሶች እንዲፈጠሩ ምክንያት ከሆኑ ታሪካዊ መንስኤዎች መካከል የመጀመሪያው የፖለቲካ መሪዎችን ሰብዕና ከፍ ለማድረግ የሚነዛ ከንቱ አድናቆት *(ፈዷኢል አል-አሸኻስ)* ወይም የሥም ማጥፋት ዘመቻ ተጠቃሽ ነው፡፡[46] ለምሳሌ፡- በሱኒዎች አተያይ፣ ሺዓዎች የዐሊ ኢብን ጧሊብ ሰብዕና ከማንም በላይ ልቆ እንዲታይ ለማድረግ በሚል ከቀዳሚው ትውልድ ያልተላለፉ፣ ሐሰተኛ የሀዲስ ዘገባዎችን ፈጥረዋል፤ ለምሳሌ፡- በገዲር ኹም ዘገባ፣ ዐሊ የአዳምን፣ የአብራሃምን፣ የሙሴን እና የእዮብን መልካም ሰብዕናዎችን የተላበሰ፣ ከነቢዩ ቀጥሎ ወደር-የለሽ አረዓያ እንደሆነ ተገልጿል፡፡ በተቃራኒው፣ ሙዓዊያን የሚያወግዙና ጥላቻ የሚነዙ በርካታ ዘገባዎች ከሺዓ ወገን በኩል ተላልፏል፡፡ በሌላበኩል፣ የሙዓዊያና የኡመያድ ሥርወ-መንግሥት አክራሪ ደጋፊዎች ደግሞ ሙዓዊያን ከሙሀመድ እና ከገብርኤል ጋር እስከ ማስተካከል የደረሱ ሀዲሶችን ፈጥረው፣ ከነቢዩ እንደተገኙ አድርገው አውርተዋል፡፡[47]

ሌሎች *ዘንዲቃሕ* በመባል የሚታወቁትና ለኢስላም ጥላቻ የነበራቸው የጥንት መናፍቃንም እንደዚሁ፣ የኃይማኖቱን ክብር ዝቅ ያደርጋሉ ብለው የሚያስቧቸውን

በአስተላላፊዎች ማንነት (*ዒልም አር-ሪጃል)* ጥናት መረጃ ሊገኝ ባለመቻሉ እንጂ፣የግድ ሐሰተኛ ነው በሚል አለመሆኑን መረዳት ያስፈልጋል፡፡*መውዱዓት* ሀዲሶች ግን በሕብረተሰቡ የእምነትና የሕግ እሳቤ ውስጥ ተጽእኖ መፍጠር የቻሉ፣ሰፊ ሥርጭት የነበራቸው እና ያላቸው እውቅ የሀዲስ ሥነ-ቃሎች ሲሆኑ፣ ተዓማኒ ለመሆናቸው ማስረጃ ያልተገኘላቸው ሳይሆኑ፣ ሀሰተኛ ለመሆናቸው በቂ ማስረጃ የተገኘባቸው፣ ሆንተብለው የተፈጠሩ (በቀና ዓላማ ቢመስልም) ሀዲሶችን ያጠናቀሩ የሀዲስ ድረሳናትን የሚመለከት ነው፡፡

45 Mustafa Azami, S*tudies in Hadith Methodology and Litrature, Indianapolis* (American Trust Publications, 1977), p. 68. https://www.abc.se/home/m9783/ir/d2/shla_e.pd last accessed January 1, 2019.

46 *Supra* note 9, p. 66.

47 Ibid.

ሀሰተኛ ወሬዎችና አሉባልታዎች በሙሀመድ ሥም አስተላልፈዋል፡፡ ሀዲሶችን እየፈጠረ በኢስናድ እንዲያልፉ በማድረግ የሚታወቀው ዐብዱል ከሪም አል-አውጃዕ ብቻ ከ 4,000 በላይ ሀዲሶችን ፈጥሮ ወደ ዘገባ መስመር ውስጥ እንዲገቡ ያደረገ መሆኑን ራሱ እንዳመነ የሚያስረዱ ዘገባዎች አሉ፡፡[48]

ሌሎች ዘረኛ እና ጎጠኛ አስተሳሰቦች፣ በቋንቋ መመጻደቅ ልቦናቸውን የማረካቸው ግለሰቦች በተለያዩ ጊዜያት እየተነሱ የተዛባ አመለካከታቸውን ይደግፉላቸው ዘንድ የውሸት ሀዲሶችን ፈጥረው አውርተዋል፡፡ ለምሳሌ፡- የአረብ ዘረኞችና የአረብኛ ቋንቋ ተመጻዳቂዎች በወቅቱ ተፎካካሪ ነው ያሉትን የፐርሺያን ቋንቋ ለማራከስ ሲሉ፣ "ፈጣሪ ሲበሳጭ በፐርሺያ፣ ሲደሰት ደግሞ በአረብኛ ይናገራል" የሚሉና መሰል መሠረትየለሽ አሉባልታዎችን እንደ ሀዲስ ዘገባ አድርገው የነገሩ መሆናቸው ታውቋል፡፡[49]

ታሪክ አዋቂዎችና ሰባኪዎች *(አል-ቁሷስ ወ አል-ዋዒዙን)* በኃይማኖት ሥም ታሪኮችን ሲተርኩ፣ አዋቂ-ጥበበኛ፣ አንደበተ-ርቱዕ ለመባልና ተሰሚነት ለማግኘት ሲሉ፣ በታሪክ ያልተደገፉ፣ በሙሀመድ ሰብዕና እና ቁርአናዊና ሀዲሳዊ ታሪኮች ላይ የአድማጮችን ስሜት ይኮረኩራል ያሏቸውን ጭማሬዎች አድርገዋል፡፡ እነዚህ ተለጣፊ እና ቀስቃሽ ታሪክ ኩነቶች ራሳቸው ነቢዩ እንዳስተላለፉም አድርገው ተርከዋል፡፡[50] በኢማም ኢብን-ሀንብል ዘመን፣ አንድ የሙስሊም ሰባኪ በመስጊድ ውስጥ እያስተማረ እያለ፣ ‹ከአላህ በስተቀር አምላክ የለም - *ላኢላኃ ኢለሏሕ*› ያለ ለእያንዳንዱ ፊደል በገነት ውስጥ ጉጣቸው ከወርቅ፣ ላባቸው ሉል የሆነ ወፎች ይሸለማል› ብሎ ሲናገር ኢብን-ሀምበል እና የህያ ኢብን-መዒን ሰምተዉ፣ በንግግሩ

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48 ምናልባትም አል-አዉጃዕ የእምነት ቃል መስጠቱ፣ ያን-ያህል ብዛት ያለዉ ሀሰተኛ ሀዲስ ፈጥሮ ባያስተላልፍ እንኳ፣ እምነቱ በራሱ ሐሰተኛ ሆኖ፣በትክክለኛ ሀዲሶች ላይ ጥርጣሬ በመፍጠር፣ ዋጋ ለማሳጣት ሲል የተናገረው አፍራሽ አሉባልታ ሊሆን ይችላል በማለት ከማሊ አያይዘው ገልጸዋል፡፡ በተጨማሪም፣ ዘንዲቃዎች ከ 14,000 በላይ ሐሰተኛ ሀዲሶችን ፈጥረው አስተላልፈዋል የሚል ሌላ ዘገባ ይገኛል፡፡እነዚህ ዘገባዎች በራሳቸው ያላቸው ተዓማኒነት በራሱ አጠያያቂ ሊሆን ቢችልም፣ በ *ዘንዲቃሕ* አማካይነት የሐሰት ዘገባዎች መሰራጨታቸው ግን የማይካድ ታሪካዊ እውነታ ነው፡፡ S*upra* note 9, p. 67 እና*supra* note 45, p. 69 ይመልከቱ)

49 Ibid.

50 *Supra* note 45, p. 69; *supra* note 11, p. 73.

መጨረሻ የዚህ አይነት ሀዲስ እንዳልተላለፈ በማስረገጥ፣ አቅራቢው እንዲታረም አድርገዋል፡፡[51] ከዚህ ጋር በተያያዘ፣ በጥልቅ የአማኝነት ስሜትና ፍቅር ተነድተው ያልተነገሩ ሀዲሶች ከነቢዩ እንደተላለፉ አድርገው የዘገቡም አሉ፡፡ ለምሳሌ፡- ኑህ ኢብን አቡ-መርየም፣ የቁርአን ምዕራፎች ያላቸውን ትሩፋቶች በተመለከተ፣ ላልተነገረላቸው አዲስ ፈጥሮ፣ ባለው ላይ ጨምሮ እንዳስተላለፈና፣ ይህንንም ያደረገውሰው ከቁርአን እየራቀ መምጣቱን ተመልከቶ ምዕራፎች በተናጠል ያላቸውን ልዩ ከፍታ በማሳየት አማኞችን ወደ ቁርአን ለመመለስ አስቦ እንደሆነ ገልጿል፡፡[52] ሌሎችም እንደ ጉላም ኸሊል እና አቢ-ዐያሽ (በግዳድ) ያሉ በርካታ የሀዲስ አስተላላፊዎች አንዳንድ የመወድስ ቃላትና ሐረጋትን *(አዝካር ወ አውራድ)* ፋይዳና ትሩፋት የሚያጋንኑ፣ ነቢያዊ ያልሆኑ ሀዲሶች በራሳቸው የፈጠሩ መሆኑ ተረጋግጧል፡፡[53]

ሌላው ለሀዲስ መፈብረክ ምክንያት የሆነው፣የተለያዩ የሕግና የእምነት አንጃዎች መፈጠራቸውን ተከትሎ፣ እነዚህ ቡድኖች ይዘውት የነበረው የከረረ የቡድናዊነትና የጭፍን ተከታይነት *(ተቅሊድ)* አካሄድ፣ ከሌሎች የሚለዩባቸው አቋሞቻቸውን የሚደግፉ ነቢያዊ ዘገባዎች ያገኙ ዘንድ፣ የነቢዩን ስም ተገን አድርገው ነባር ሀዲሶችን እስከ መበረዝ፣ ብሎም አዲሶችን እስከ መፍጠር አድርሷቸዋል፡፡[54] ለምሳሌ፡- ‹ቁርአን ፍጡር ነው ያለ ከእምነት ውጪ ይሆናል፤ ካለበት ቅጽበት ጀምሮ ትዳሩ ይፈርሳል፡፡› የሚለው ዘገባ ከዚህ የእሳቤ ጽንፈኝነትና አንጃዊነት ባህሪ የተነሳ ተፈብርኮ የተላለፈ ሀዲስ ነው፡፡[55]

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51 *Supra* note 9, p. 67.
52 Ibid, p. 68.
53 *Supra* note 11, p. 73; *supra* note 9, p. 68.
54 Ibid.
55 *Supra* note 9, p. 67; *supra* note 11, p. 72.

በመጨረሻም፣ አንዳንድ በሸሪዓ ክልክል የተደረጉ የምግብና የመጠጥ አይነቶችን፣ ለግል ፍላጎትና ስሜት ተገዥ በመሆን፣ ፍቁድ የሐሰት ሀዲሶችን ፈጥረው፣ ወደ ሀዲስ ስብስቦች ውስጥ እንዲገቡ ሆነዋል፡፡[56]

ይህን ታሪክና የዘመን ትዉልድ ቅብብሎሽ ያመጣውን አሳሳቢ የሀዲስ ሥነ-ጽሁፍ አስከፊ ገጽታ፣ ፍሬውን ከገለባዉ ለመለየት፣ በዋናነት ከሀዲስ አሰባሰብ በኋላ የተነሱት የሀዲስ ምዘና ሥርዓት *(ኡሱል አል-ሀዲስ)* ጠበብቶች ሰፊ ምሁራዊ ሥራ ሰርተዋል፡፡ የሀዲስ ሊቃውንት *(ሙሀዲሱን)* ተድበስብሶ የደረሳቸውን የሀዲስ ሥነ-ቃልና የጽሁፍ ጥንቅሮች ለማጣራት፣ ሰፊና ጥልቅ ጥናት አድርገው፣ ውስብስብ መሥፈርቶችንና ዘዴዎችን ዘርግተው፣ ወሳኝ ከባቢያዊ ሁኔታዎች በፈቀዱ መጠን፣ ተዓማኒ የሆኑ ሀዲሶችን ካልሆኑት ለይተው፣ እንደየደረጃቸው መድበው፣በተለያዩ የሀዲስ ሥነ-ጽኑፍ ጥንቅሮች ውስጥ አስፍረው አልፈዋል፡፡ በ*ኡሱል አል-ሀዲስ* ጥናት ሥር በጥልቀትና በዝርዝር የሚጠናውን፣ የሀዲስ ምዘናን መዋቅር የሚያመላክት፣ እንዲሁም የመግቢያ ሐሳቦችን የሚያስጭብጥ መሪ እና ጥቅል ዳሰሳ በተከታይ ክፍሎች ሥር ቀርቧል፡፡

5. የሀዲስ ተዓማኒነት ምዘና ሥርዓት፡- አጠቃላይ እይታ

በዚህ ክፍል ሥር፣ ‹ተዓማኒነት *(Authenticity)*› የሚለው፣ ሀዲሶች ምንጫቸው ከሙሀመድ መሆኑን ለማጣራት ተፈጻሚ የሚደረግባቸውን የተለያዩ የምዘና እርከኖችን፣ እንዲሁም የሚሰጣቸውን ደረጃዎች የሚመለከት ቃል ነው፡፡ የሀዲስ ተዓማኒነት ምዘና ከሁለት መሠረታዊ መሥፈርቶች አንጻር ሊፈጸም ይችላል፤ አንደኛው ሀዲሶች የተላለፉበትን የዘገባ መሥመር ቅጥልጥሎሽን ወይም ኢስናድንበመውሰድ ሲሆን፣ ሌላው ደግሞ፣ አንድ ሀዲስ የተላለፈበት የዘገባ ሰንሰለት *(ኢስናድ)* ምንም ያህል ጠንካራና ተዓማኒ ሆኖ ቢገኝም፣ ይዘቱን ወይም መልዕክቱን *(መትን)* በመውሰድ በመስኩ ምሁራን እየዳበሩ በሚገኙ መመዘኛዎች

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[56] Ibid, p. 67.

አማካይነት ጽኑእነቱና ተቀባይነቱ ሊመዘን ይችላል፡፡[57] ሁለቱን ማለትም በሀዲስ የኢስናድ (የዘገባ መሥመር) እና የመትን *(ይዘት)* ክፍሎች ላይ የሚደረገውን የምዘና ሥርዓት በተመለከተ *ሱናሕ* ለሸሪዓ የሕግ ማዕቀፍ ምንጭሆኖ ጥቅም ላይ ይውል ዘንድ በቅድሚያ ተዓማኒነቱ እና ቅቡልነቱ ለሸሪዓ የሕግ ትንታኔ ወሳኝ ድርሻ ያለው በመሆኑ፣ እነዚህን የምዘና ነጥቦች እጅግ አጭር በሚባል ቅኝታዊ አቀራረብ ቀጥለን እንመለከታለን፡፡ እዚህ ላይ አንባቢዎች ሊገነዘቡት የሚገባው፣ የሀዲስ ምዘና፣ እግጅ ሰፊ እና ውስብስብ በመሆኑ፣ *ሱናሕ* ለሕግም ሆነ ለእምነት ጉዳዮች አስተማማኝ ምንጭ ሆኖ ያገለግል ዘንድ፣ የሀዲስ ምዘናን ዋነኛ የጥናት አጀንዳው የሆነ፣ *ኡሱል አል-ሀዲስ* (የሀዲስ ምዘና ሥርዓት ጥናት) የተሰኘ ሰፊ ኢስላማዊ የእውቀት ዘርፍ ያለ በመሆኑ፣[58] ዝርዝር የሀዲስ ተዓማኒነት ምዘና ግንዛቤ ለማግኘት የመስኩን ሥነ-ጽሁፍ ማጥናት ያስፈልጋል፡፡ ሆኖም *ሱናሕ*፣ ከቁርአን ቀጥሎ የሚገኝ ሁለተኛ የሸሪዓ ሕግ ምንጭ በመሆኑ፣ ሱና-አዘል የሀዲስ ዘገባዎች ተዓማኒነትን በተመለከተ ቀጥተኛ አግባብነት ያላቸው የ*ኡሱል አል-ሀዲስ* የምዘና ነጥቦችን እና የአስረጅነት ፍረጃዎችን ጠቅለል አድርጎ መዳሰስ አስፈላጊ ነው፡፡ ስለሆነም፣ ሀዲስ ከተላለፈበት የዘገባ ቅብብሎሽ እና ይዘት አንጻር የሚነሱ ዐብይ ነጥቦች እንደሚከተለው ተጠቃለው ቀርበዋል፡፡

5.1. የዘገባ ሠንሠለትን *(ኢስናድ)* መሠረት ያደረገ የሀዲስ ተዓማኒነት ምዘና

እስከ 2ኛዉ ም.ሐ. አጋማሽ ድረስ የነበሩ የሀዲስ ምዘና ሊቃውንት፣ ቀደም ሲል ተንሰራፍቶ የነበረውን የሐሰተኛ ሀዲሶች ሥርጭት እና ብረዛ ግንዛቤ ውስጥ በማስገባት፣ የሀዲሶችን ተዓማኒነት ለማጣራት ባለሦስት እርከን የምዘና ሥርዓት ለማዳበር ችለዋል፤ የመጀመሪያው፣ ማንኛውም በሀዲስ ሥነ-ቃል በኢስናድ የተደገፈ መሆን ያለበት ስለመሆኑ፤ ሁለተኛ በሀዲስ በዘገባ ሠንሠለቱ ውስጥ

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[57] Israr Ahmad Khan, 'Muslim Scholars' Contribution in Hadith Authentication', *Journal of Islam in Asia*, Spl. Issue, No.4, December, 2011, pp. 349-353.

[58] *Supra* note 21, p. 3.

የተዘረዘሩ አስተላላፊ ግለሰቦች ብቁነትና ታማኝነት የሚመዘንበት፣ እንዲሁም የዘገባ ሠንሠለቱ ያለውን ተያያዥነት (ቅጥልጥሎሽ) የሚመለከት ሲሆን፣ ሦስተኛው ደግሞ፣ ከኢስናድ ጥንካሬ በተጨማሪ፣ ዘገባው በሌላ ተመሳሳይ ሐሳብ ባዘለ ዘገባ መደገፍ አለመደገፉ የሚመረመርበት ነው፡፡[59] እነዚህ ሦስት የሀዲስ ተዓማኒነት ምዘና እርከኖች እንደሚከተለው ባጭሩ ተገልጸዋል፡፡

5.1.1. የ*ሀዲስ ቃል* በ*ኢስናድ መታጀብ ያለበት ስለመሆኑ*

የመጀመሪያው የምዘና እርከን፣ ማንኛውም ከነቢዩ ሙሀመድ ተገኘ ተብሎ የተነገረ የሀዲስ ቃል፣ በቀደምት አስተላላፊዎች ተዋረድ *(ኢስናድ)* መታጀብ ይኖርበታል፡፡ ከ እከሌ ሰማሁ ብሎ ‹ነቢያዊ› ዘገባ የገለጸ አንድ ግለሰብ፣ ዘገባውን ከነቢዩ እስከ ግለሰቡ የደረሰበትን የአስተላላፊዎች ቅብብሎሽ (ሠንሠለት) መዘርጋት ያልቻለ ከሆነ፣ የዘገባ ቃሉ ገና ከመነሻው ቅቡልነት የሚያጣና፣ ወደ ቀጣዩ የምዘና እርከን ሳያልፍ ባለበት ውድቅ ይደረጋል፡፡[60]

5.1.2. የዘገባ *መስመር ትስስር(ኢቲሷል)*፣እና የአስተላላፊዎች ብቃት *(ዶብጥ)* እና *ታማኝነት (ዓዳላሕ)*

በኢስላም የሥልጣኔ ዘመናት ውስጥ በተለያዩ ጊዜያት አልፎ አልፎ ተነስተው ከነበሩ ጥቂት የሕግ ሊቃውንት *(ፉቀሓእ)*፣ የሀዲስ ምሁራን *(ሙሀዲሱን)* እና የኢስላም መሠረተ-ሐሳብ አጥኚዎች *(ኡሱሊዩን)* ካነሱት ይዘት-ተኮር የሀዲስ ምዘና ሐሳቦች ውጪ፣ ጠቅላላው የ*ኡሱል አል-ሀዲስ* ሊቆች እና የሥነ-ጽሁፍ አሻራቸው የዘረጋው የምዘና ማዕቀፍ *ኢስናድን* መሠረት ያደረገ መሆኑን ይገነዘቧል፡፡[61] የኢስናድ ምዘና ሁለት ዐብይ ክፍሎች አሉት፤ አንደኛው የሀዲስ የዘገባ ቀጣይነት *(ኢቲሷል አስ-ሰነድ)* የሚመረመርበት ሲሆን፣ ሌላኛው ደግሞ ከነቢዩ ሙሀመድ

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59 *Supra* note 11, p. 77.

60 Ibid, p. 78.

61 Israr Ahmad Khan, *Authentication of Hadith: Redefining the Criteria, Herndon: International Institute of Islamic Thought*, 2010, pp. XVI. The Abdriged version of the book can be found at: https://iiit.org/wp-content/uploads/2018/07/books-in-brief_authentication_of_hadith.pdf last accessed January 1 2019.

ጀምሮ በተዋረድ ዘገባውን ተቀባብለው ያስተላለፉ ግለሰቦች ታማኝነትና ብቃት የሚጣራበት *(ዒልም አር-ሪጃል)* የጥናት ክፍል ነው፡፡[62]

5.1.2.1. ከዘገባ መስመር ቀጣይነት አንጻር (ኢቲሷልአስ-ሰነድ)

ከኢስናድ ቅጥልጥሎሽ አንጻር፣ሀዲሶች፣ ዘገባቸው የተሟላ (ያልተቋረጠ - *ሙተሲል)* እና የዘገባ ሠንሠለታቸው የተቋረጠ *(ገይረ-ሙተሲል)* በተሰኙ ሁለት ክፍሎች ተመድበው ይታያሉ፡፡[63] በእነዚህ *ኢስናድን* መሠረት ካደረጉ ንዑስ የምዘና መስፈርቶች አማካይነት፣ ሀዲሶች የተለያየ የተዓማኒነትና የአስረጂነት ደረጃ ይሰጣቸዋል፡፡ በሌላ አገላለጽ፣ ሀዲሶች ነቢያዊ አስተምህሮትን ያዘሉ የሸሪዓ አስረጂዎች ይሆኑ ዘንድ፣ በሁለቱ *ኢስናዳዊ* መመዘኛዎች ውስጥ አልፈው ያላቸው የተዓማኒነት ደረጃ በቅድሚያ ሊታወቅ ይገባል፡፡ ከዘገባ ቀጣይነት *(ኢቲሷል)* አንጻር፣ ሥነ-ቃላዊ ትስስራቸው ያልተቋረጠ፣ ሀዲሶቹን ከሰበሰባቸው ዘጋቢ አንስቶ ነቢዩ ሙሀመድ ድረስ እስኪደርስ፣ በመሀከል ያልታወቀ ወይም የተዘለለ አስተላላፊ *(ራዊ)* የሌለ ከሆነ፣ እነዚህ ሀዲሶች ዘገባቸው ያልተቋረጠ፣ የተያያዘ *(ሙተሲል)* በሚል ይፈረጃሉ፡፡[64] በሌላ በኩል፣ የሀዲስ አስተላላፊዎች ከነበራቸው የቦታ እና የጊዜ ግንኙነት አንጻር ሲመዘን፣ በዘገባው ተዋረድ ካሉ ትስስሮች በአንዱ ወይም ከዚያ በላይ ባሉ እርከኖች ላይ የተቋረጠ ከሆነ፣ ያልተያያዘ (*ገይረ-ሙተሲል* ወይም *ሙርሰል)* የተሰኘ የተዓማኒነት ፍረጃ ይሰጣቸዋል፡፡[65]

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62 Iftikhar Zaman, ‘The Science of "RIJĀL" as A Method in the Study of Hadiths’, *Journal of Islamic Studies* 5:1 (1994) p. 1. http://www.jstor.org/stable/26196671, last accessed January 02, 2019.

63 *Supra* note 9, p.68.

64 Ibid.

65 Ibid.

የዘገባ *ሠንሠለታ*ቸው የተቋረጡ *ሀዲ*ሶች፣ *ሦ*ስት አይነት ቅርጽ ሊይዙ ይችላሉ፤ እነሱም *ሙ*ርሰል፣*ሙ*ዕደል እና *ሙ*ንቀጢዕ ና*ቸ*ው፡፡[66] *ሙ*ርሰል *ሀ*ዲስ የባልደረባ አስተላላፊ ያልተጠቀሰበት ወይም የተዘለለበት ዘገባ ሲሆን፣ አንድ የተከታይ ትውልድ *(ታቢዑን)* አስተላላፊ፣ ያስተላለፈለት ባልደረባ ሳይጠቀስ በቀጥታ ከነቢዩ እንደሰማ አድርጎ ያስተላለፈ ከሆነ፣ ዘገባው *ሙ*ርሰል ይባላል፡፡[67] *ሙ*ንቀጢዕ ደግሞ ከባልደረባ በታች ባለፈ የዘገባ ትስስር እርከኖች በአንዱ ላይ የተቋረጠ ሲሆን፣ *ሙ*ዕደል ደግሞ ሁለት ተከታታይ የትስስር እርከኖች ያልተጠቀሰበት ዘገባ ነው፡፡[68]

5.1.2.2. ከአስተላላፊዎች ብቁነት (ዶብጥ) እና ታማኝነት (ዐዳላሕ) አንጻር

የ*ሀ*ዲስ አስተላላፊዎች ከታማኝነትና ችሎታቸው አንጻር፣ በ*ሀ*ዲስ ምሁራን *(ሙ*ሀ*ዲሱን)* የተለያዩ ፍረጃዎችና ደረጃዎች ቢወጣላቸውም፣ በተለይም ከቀደሙት ይልቅ ከ3ኛ ም.ሒ በኋላ የተነሱ የኋለኛ *ሙ*ሀ*ዲሱን*፣ የቀደመውን የ*ሀ*ዲስ *ሥ*ነ-ጽሁፍና የእውቀት አሻራ መሠረት በማድረግ የተሻለ የደረጃ አመዳደብ *ሥ*ርዓት ዘርግተዋል፤ ከእነዚህም መካከል ኢብን-ሀጀር፣ 12 ደረጃዎችን የለዩ ሲሆን፣ ከእነዚህም ዋነኛ የሆኑት ሰባቱን ባጭሩ እንመልከት፡፡[69] በዘገባ *ሠ*ንሰለት የመጀመሪያ እርከን ላይ የሚገኙት የነቢዩ ባልደረቦች፣ እንድም ከነበራቸው ብጽእና፣ እንዲሁም ከላይ እንደተወሳው፣ የዘመናቸው ተጨባጭ እውነታ፣ እንኳን ፈጠራ *ሥ*ህተት ቢፈጸም እንኳ በሌሎች ሊታረም የሚችልበት ሰፊ እድል የነበረ ከመሆኑ አኳያ፣ ሙሉ ተዓማኒነት ይሰጣቸዋል፡፡[70] ማለትም በዘገባው ውስጥ የመጀመሪያ አስተላላፊ የሆነው ባልደረባ ታማኝነትና የማስተላለፍ ችሎታ ጥያቄ ውስጥ አይገባም፡፡ ከዚያም፣ በሁለተኛ እና በሦስተኛ ደረጃ፣ የታማኝነት ወይም የችሎታ ችግር የሌለባቸው አስተላላፊ ሊቃውንት ቢሆኑም፣ የሰብዕና ደረጃቸው እና አቅማቸው በጣም ከፍ ያሉት፣ ተዓማኒነታቸው የተረጋገጠ *(ሲቃት አሰ-*

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66 *Supra* note 45, p. 43.
67 Ibid.
68 Ibid.
69 Ibid, p. 69.
70 *Supra* note 11, pp. 71-71.

ሳቢቱን) በሚል በ2ኛ ደረጃ፣ እንዲሁም ከችሎታ አንጻር፣ እንደ 2ኛዎቹ የማይሆኑት ደግሞ፣ *ሲቃት* (ታማኞች) በሚል በ3ኛ ደረጃ ተፈርጀዋል። በአራተኛ ደረጃ የተመደቡት፣ ቀና ሰብዕና የላቸው መሆኑ የተረጋገጠ ሆኖ፣ ጥቃቅን ከመባል የማያልፍ ከባድ ስህተት ለመፈጸማቸው ማስረጃ ያልተገኘባቸው ሲሆኑ፣ በ5ኛ ላይ የተቀመጡት ደግሞ፣ አሁንም የታማኝነት ችግር የሌለባቸው ሆኖ፣ በተለያዩ አጋጣሚዎች ሕጸጾች መፈጸማቸው የተረጋገጠባቸው *(ሶዱቅ የሒም)* ናቸው። ሥድስተኛው የአስተላላፊዎች ደረጃ፣ ጥቂት ዘገባዊ እውቀት ማስተላለፋቸው የታወቀ ቢሆንም፣ ዘገባን ጠብቆ የማስተላለፍ ምሁራዊ ሰብዕና የነበራቸው ለመሆኑ ያልተረጋገጠ ከሆነ፣ *መቅቡል* (ታሳቢ የሚደረግ) የተሰኘ ደረጃ ተሰጥቷቸዋል። በመጨረሻም፣ ሙሉ በሙሉ ማንነታቸው ያልታወቀ አስተላላፊዎች *(መጅሑል)* ደረጃ ላይ ይወድቃሉ። ከዚህ በታች፣ የተደለደሉ አስተላላፊዎች፣ ኃጢያት፣ በሐሰት ወሬ፣ በአደባባይ ቅጥፈት የተወነጀሉና የተረጋገጠባቸው አስተላላፊዎችን የሚሸነሽኑ ናቸው።[71]

ከላይ በተዘረዘሩት ደረጃዎች መሠረት፣ በመጀመሪያዎቹ ሦስቱ የምዘና ደረጃዎች ላይ በሚወድቁ አስተላላፊዎች የተላለፉ ዘገባዎች፣ *ሶሂሕ* (ጠንካራ) የተሰኘ የተዓማኒነት ደረጃ ሲሰጣቸው፣ ከ 4-5 ባሉት ደረጃዎች ሥር ከተመደቡ አስተላላፊዎች የተገኙ የሀዲስ ዘገባዎች ደግሞ፣ *ሀሰን* (መለስተኛ) የተዓማኒነት ደረጃ አላቸው።[72] ከ6ኛ ደረጃ በታች ባሉት የምዘና እርከኖች ስር የተደለደሉት ደግሞ፣ *ዶዒፍ* (ደካማ) ተዓማኒነት ያላቸው ናቸው።[73]

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71 *Supra* note 45, p. 60.
72 Ibid, p. 62.
73 Ibid.

5.1.3. የተደጋጋፊነት ምዘና *(ኢዕቲባር)*

ሌላው ከኢስናድ ተዓማኒት ምዘና ጋር በተያያዘ በሦስተኛ ደረጃ ተፈጻሚ የሚደረገው የማጣሪያ ዘዴ፣ የተደጋጋፊነት ምዘና *(ኢዕቲባር)* ይባላል፡፡ ኢስናድ የቀረበላቸው የሀዲስ ዘገባዎች፣ ለተከታይ ማጣሪያ ብቁ ነው በሚል የመጀመሪያ የምዘና ቅቡልነት ካገኘ በኋላ፣ የኢስናዱ ተዓማኒነት፣ አንድም የዘገባውን ፍሬ-ሐሳብ በሚያረጋገጥ ሌላ ተዛማጅ የዘገባ መስመር *(ኢስናድ)* ወይም በሌላ አስተላላፊ ሊረጋገጥ/ሊነገር ይገባል፡፡ በሌላ አገላለጽ፣ አንድ የሀዲስ ቃል፣ በኢስናድ ስለታጀበ ብቻ ተዓማኒ ተደርጎ ሊወሰድ አይችልም፣ ምክንያቱም ሀሰተኛ የሀዲስ ቃል እንደሚፈጠር ሁሉ፣ ሀሰተኛ የዘገባ ሠንሰለት *(ኢስናድ)* ሌላው የተረጋገጠ አስከፊ ታሪካዊ እውነታ በመሆኑ፣ በአንድ የመጨረሻ አስተላላፊ ብቻ የተነገረ የሀዲስ ፍሬ-ሐሳብ (ይዘት - *መትን)* እና *ሰነድ* (የአስተላላፊዎች ተዋረድ) ይህንኑ ኢስናድ በሚጠቅስ - በሌላ ተዛማጅ ወይም ራሱን የቻለ ተመሳሳይ ዘገባ ካልተደገፈ፣ ውድቅ *(ሙንከር)* የሚል ተሰይሞ፣ የተዓማኒነት ዋጋ ያጣል፡[74] ከአንድ ባልደረባ የወረዱ፣ ነገር ግን በዘገባ አስተላላፊዎች እርከን በአንዱ በኩል የሚዛመዱና የሚጠቃለሉ ሀዲሶች መካከል ያለው ተደጋጋፊነት *ሙታብዓ* (ተዛምዷዊ ተደጋጋፊነት) ሲባል፣ራሱን በቻለ ባልደረባዊ ኢስናድ አማካይነት የሚገኝ የሀዲስ ተደጋጋፊነት ወይም ደጋፊው ሀዲስ/ኢስናድ፣ *ሺሒድ* (ባልደረባዊ ተደጋጋፊነት) በተሰኘ ሙያዊ ሥያሜ ይታወቃል፡፡[75] ባጠቃላይ፣ ሀዲሶች፣ የይዘት ተመሳሳይነት ባላቸው ሌሎች ሀዲሶች የተደገፉ ለመሆናቸው የሚደረገው የማጣሪያ ሂደት *ኢዕቲባር* (የተደጋጋፊነት ምዘና) እየተባለ ይጠራል፡፡[76]

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[74] *Supra* note 11, p. 94.

[75] Ibid, pp. 92-93. በሀዲስ ምዘና ጥናት፣ልዩ ልዩ የተዓማኒነት ደረጃዎችን የሚወክሉ ወጥ ሙያዊ ቃላት፣ እንዲሁም ባጠቃላይ በምዘና ሥርዓቱ ውስጥ በመስኩ ሥነ-ጽሁፍ ጥቅም ላይ የዋሉ ጽንሰ-ሐሳባዊ ቃላትና ሐረጋት፣ የሀዲስ ሙያዊ ቃላት *(መስጠለሕ አል-ሀዲስ)* በሚል *የኡሱል አል-ሀዲስ* ርዕስ ሥር ይብራራሉ፡፡ በዚህ ረገድ የመግቢያ ግንዛቤ ለማግኘት፣ የከማሊን፣ Textbook of Hadith Studies, fn 21 (Chapter 06 - Hadith Terminology), pp. 55-65) ያንብቡ፡፡

[76] Ibid, p. 93.

5.2. የሀዲስ ይዘትን *(መትን)* መሠረት ያደረገ የቅቡልነት ምዘና

የሀዲስ ይዘት ምዘና ዘዴ በተለየ አትኩሮት እያገኘ የመጣው፣ ቀደም ሲል በመካከለኛው ኢስላም ምሁራን ዘንድ ይነሱ የነበሩ የተበታተኑ እና ያልዳበሩ የ*መትን* ምዘና ሐሳቦችን ተንተርሶ፣ ከ19ኛዉ ምዕተ-ዓመት አጋማሽ በኋላ በሙስሊሙ ዓለም ያቆጠቆጠውን የተሃድሶና የለውጥ ንቅናቄ *(ተጅዲድ ወ ኢስላሕ)* ተከትሎ፣ በሀዲስ ምዘና ዘርፍ፣ የሀዲስ ዘገባዎች የይዘት ምዘና ጽንሰ-ሐሳብ ትኩረት እያገኘና፣ በ20ኛዉና ባለንበት ክፍለ-ዘመን በተነሱ ምሁራን የተሃድሶ መሪዎች አማካይነት ሥነ-ጽሁፉ በመዳበር ላይ ይገኛል፡፡ ይህ አዲስ የ*ኡሱል አል-ሀዲስ* ዘመነኛ እድገት፣ የሀዲስ ምዘና አጥኚዎችና ተመራማሪዎች በሆኑት በፕ/ር ጆናታን ብራውን እና በፕ/ር ኢስራር አህመድ ሥራዎች ውስጥ በሰፊው ተዳሷል፡፡

ሀዲሶችን ከይዘታቸው አኳያ የሚገመገሙበትን ዘመናዊ የምዘና ሥርዓት በተመለከተ በቀደመው *ኢስናድ-ተኮር* የሀዲስ ምዘና ላይ ከዘገባ ቅጥልጥሎሽ *(ኢተሷል)* እና ከአስተላላፊዎች ታማኝነትና ችሎታ በተጨማሪ፣ ከይዘት/መልዕክት ጋር ግንኙነት ያላቸው ሁለት መመዘኛዎች በ*ዑሉም አል-ሀዲስ* ሥነ-ጽኑፍ ውስጥ ይጠቀሳሉ፡፡ እነዚህ መስፈርቶች አፈንጋጭ አለመሆን *(ዐደም አሽ-ሹዙዝ)*፣ ከስውር እንከኖች ነጻ መሆን *(ገይር አል-ዒላሕ)* ናቸው፡፡[77] ሆኖም እነዚህ ለይዘት ምዘና አግባብነት ያላቸው መመዘኛዎች፣ በኢስናድ ምዘና ተውጠው፣ በቂ የጥናት ትኩረትና ትንታኔ ሳይሰጣቸው መቆየቱን ኢስራር አህመድ ይገልጻሉ፡፡[78]

ፕሮፌሰር ኢስራር በቁጭት ድምጸት እንደሚገልጹት፣ በኢስላም ታሪክ የኋለኛ ዘመናት ወቅት የመጡ በጣት የሚቆጠሩ ሊቃውንት፣ ይዘት-መር የሀዲስ ምዘናን ቢያነሱም፣ ሐሳባቸው በምሁራዊ የሐሳብ ልውውጥ ውስጥ ሳይገባ፣ እስከ ቅርብ

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77 *Supra* note 61, p. XVI.
78 Ibid, pp. XVI-XVII

ዐስርተ-ዓመታት ድረስ ተዳፍኖ ቆይቷል፡፡[79] በሙስሊሙ ዓለም ሥር የሰደደውን ጭፍን የኃይማኖት ተገዥነትና የፍርኃት ሥነ-ልቡና ምክንያት፣ የይዘት ምዘና ማዕቀፍ በቀደሙት የሀዲስ ሊቃውንት አልተዘረጋም ማለት አሁን ሊዘረጋ አይገባም ማለት አይደለም፡፡ ምሁሩ ይህን ተነሳሽነት በመውሰድ ከይዘት ረገድ ድምጻቸው ያልተሰሙ የኢስላም ሊቆችን ሐሳብ በማጎልበት ከመልዕታቸው አንጻር ተቀባይነተቸው የሚፈተሽባቸውን አምስት መመዘኛዎችን ለይተው፣ እያንዳንዱን መስፈርቶች በተናጠልና በስፋት ተንትነዋል፡፡ የምዘና ነጥቦችን አንድ በአንድ ማብራራት፣ *ሱናሕ* የሸሪዓ ምንጭ መሆኑ በሚዳሰስበት ርዕስ ሥርም ሆነ ከጠቅላላው የ*ኡሱል አል-ፊቅሕ* የጥናት ወሰን ውጪ በመሆኑ፣ ዝርዝር ትንታኔው ለ*ኡሱል አል-ሀዲስ* ዘርፍ በመተው፣ጸኃፊው በዝርዝር የተነተኗቸው አምስት የሀዲስ ይዘት መመዘኛዎች እንደሚከተለው ባጭሩ ተቃኝተዋል፡፡[80]

5.2.1. ቁርአን

ከአምስቱ የይዘት መመዘኛዎች ውስጥ የመጀመሪያው ቁርአን ነው፡፡[81] ቁርአን ከኢስላም የእውቀት አና የሕግ ምንጮች መካከል ቀዳሚውን ሥፍራ የሚይዝ ሲሆን፣ *ሱናሕን* ጨምሮ ከዚህ የበላይ አስረጅ ጋር የሚጣረስ ማንኛውም ራዕያዊ *(ነቅሊያሕ/Revealed)* ወይም አመክንዮኣዊ *(ዐቅሊያሕ/Rational*) የሕግ ምንጭ ተቀባይነት የሌለው መሆኑ ላይ ጥያቄ የማይነሳበት ጉዳይ ነው፡፡[82] ይህን የምንጮች የአስረጅነት ተዋረድ መሠረት በማድረግ፣ ቁርአን፣ የሀዲስ ይዘት ቅቡልነትና ጽኑእነት የሚፈተሽበት የመጀመሪያው መመዘኛ ይሆናል፡፡[83] የነቢዩ

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79 Ibid; see also: Jonathan Brown, How We Know Early Ḥadīth Critics Did *Matn* Criticism and Why It's So Hard to Find, Islamic Law and Society 15 (2008), pp. 153-175. http://www.jstor.org/stable/40377959 last accessed January 02, 2019.

80 ተመራማሪው ዶ/ር ኢስራር አህመድ፣ ለሕትመት ያበቁትን ጥናታቸውን ጠቅለል አድርገው፣ በአሜሪካን ኢስላሚክ ኮሌጅ መድረክ ዲስኩር አቅርበውታል፤አግባብነት ባላቸው ልዩልዩ ጥያቄዎች ላይ ከምሁራን ጋር ያደረጉት ውይይት በኮሌጁ ዩ-ቲዩብ ድረ-ገጽ ላይማግኘት ይቻላል::

81 Ibid, pp. 47-48.

82 አልዩ፣ ቀዳሚው የሸሪዓ ሕግ ምንጭ፣ የማ.ቁ. 13፣ገጽ፡126-127፤ Israr, Authentication, fn 60, pp. 46-47

83 *Supra* note 61, pp. 47-48.

ባልደረቦች *(ሶሃቢዩን)* ከነቢዩ ሕልፈት በኋላ በባልደረቦቻቸው ዘመን፣ ከነቢዩ ተገኙ ተብለው በሕብረተሰቡ ውስጥ ይሰራጩ የነበሩ የሀዲስ ወሬዎች በቁርአን ይዘት አማካይነት ይመዘኑ እንደነበር የሚያስረዱ ማስረጃዎች ያሉ ሲሆን፣ ከእነዚህም መካከል የነቢዩ ሚስት የሆነችው ዓኢሻ፣ ነቢያዊ ሽፋን ይሰጣቸው የነበሩ፣ ነገር ግን ሐሰተኛ መሆናቸውን የምታውቃቸዉን ሀዲሶች ውድቅ ከማድረጓም በላይ፣ የዘገባዎቹን ይዘት መሠረት በማድረግ፣ ከቁርአን ጋር ተጻራሪ መልእክት ያላቸውን ሀዲሶችን የማትቀበል መሆኗን የሚያስረዱ ዘገባዎች ይገኛሉ፡[84] ይህ፣አንዳንድ ባልደረቦች ይዘውት የነበረውን የሀዲስ ምዘና አቀራረብ ዘዴ በማጠናከር፣ በኋለኛ ትውልዶች ውስጥ የተንሰራፋውን የሀዲስ ሥነ-ቃል ከዘገባ ሠንሠለቱ በተጨማሪ፣ ይዘቱ በቁርአን መነጽር ተፈትሾ ቅቡልነቱ ሊወሰን እንደሚገባ ኢስራር አህመድ ያስገነዝባሉ፡፡[85]

5.2.2. ምክንያታዊ ሱናሕ

ሁለተኛው የይዘት መመዘኛ ዘዴ፣ ከአመክንዮኣዊና ጤናማ እሳቤ ጋር የሚጣጣሙ ሀዲሶች፣ ከሌሎች በምክንያታዊ አስተሳሰብ ሚዛን ሲታዩ ጥያቄ የሚነሳባቸውን ሀዲሶችን ቅቡልነት ለመወሰን በመመዘኛነት ያገለግላል፡፡[86] አመክንዮ፣ በሌላ ከቁርአን ቀጥሎ በሚገኝ ሽሪዓ ምንጭ፣ ማለትም በሱናሕ የተገለጸ ስለሆነ፣ መመዘኛ ሆኖ በቀዳሚነት የሚጠቀሰው የይዘት ጭብጥ ከተነሳበት ሀዲስ ጋር እኩል የኢስናድ ተዓማኒነት ደረጃ ያላቸው እና ተመሳሳይ ሐሳብ ያዘሉ አቻ ሀዲሶች ናቸው፤ ስለሆነም የአመክንዮ ሚና የደጋፊነት እና የለዩነት እንጂ፣ ሱናሕ ባለበት አመክንዮ ተቀዳሚ የመዛኝነት ዋጋ ሊሰጠው የማይችል መሆኑን መገንዘብ ያስፈልጋል፡፡ አመክንዮ ሱናሕ-አዘል የሆነውን ሀዲስ ለመለየት ጥቅም ላይ

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84 Israr Ahmad Khan, 'The Authentication of Hadith: Redefining Criteria', *The American Journal of Islamic Social Sciences* 24:4, p. 52-53.

85 Ibid, p. 52.

86 *Supra* note 61, pp. 72-73.

ይውላል ሲባል፣ በግላዊ እሳቤ ውስጥ ብቻ የሚንጸባረቁ ደካማ አስተያየቶች የሀዲስ ይዘት መመዘኛ ሆነው ይቀርባሉ ለማለት ሳይሆን፣ አመክንዮ ሁለንተናዊ ቁመናውን እንደያዘ፣ ጤናማ እሳቤ ባለው ምክንያታዊ ሰው *(Reasonable Man Standard)* ሊንጸባረቅ የሚችለውን ሰብዓዊ እሳቤ ማለት እንደሆነ መረዳት ያስፈልጋል፡፡

ጠንካራ ሐሳብ ያዘለ ሀዲስ መመዘኛ ሆኖ ሊያገለግል እንደሚችል በምሳሌ ለማስረዳት ያህል፣ በሙስሊም የ‹‹ተዓማኒ - ሶሂሕ›› ሀዲሶች ስብስብ ውስጥ በሚገኝ አንድ ሀዲስ መሠረት፣ የአንድ ሰው እድሜ እና ሲሳይ እንዲጨምር ለማድረግ ፈጽሞ የማይቻል መሆኑን፣ ለዚህ ምክንያቱ ደግሞ እነዚህ ጉዳዮች በመለኮት ቀድመው የተወሰኑ በመሆናቸው ሊለወጡ አይችልም የሚል ሐሳብ ያለው ሲሆን፣ በሌለ በኩል ደግሞ፣ አነስ ኢብን ማሊክ ባስተላለፉት ሀዲስ፣ ነቢዩ አገልጋያቸው ሐብት እንዲጨመርለት ጸሎት ያደረጉ መሆኑን፤ እንዲሁም በሌላ ዘገባ፣ የዝምድና ትስስር ተጠብቆ እንዲቆይ ያደረገ እድሜው እንደሚጨመርለት የሚያስረዱ ዘገባዎች፣ ከመጀመሪያው ሀዲስ መልዕክት አንጻር ሲገመገሙ፣ ይበልጥ አሳማኝ የሆነ ሐሳብ የሚያንጸባርቁ ሆነው እናገኛቸዋለን፡፡[87] ለዚህ ምክንያቱ ደግሞ መለኮት በሰው ምግባር እና ነጻፈቃድ ውስጥ ጣልቃ የሚገባ ከሆነ፣ ሰው በሥራው አላፊነት ሊወስድ አይችልም፤ተጠያቂ ሊደረግም አይገባም የሚል ድምዳሜ ላይ የሚያደርስ በመሆኑ፣ ምድራዊ እንቅስቃሴዎች በሙሉ በአምላክ ፍላጎት እና ፈቃድ ላይ የታሰሩ እንደሆኑ የሚያስገነዝበው የመጀመሪያው ሀዲስ፣ በምክንያታዊ እሳቤ ላይ በመመርኮዝ ተቀባይነት ያጣል ማለት ነው፡፡ በጥቅሉ አመክንዮ፣ ትክክለኛ ነቢያዊ ሱናሕ የሚያስተላልፉ ሀዲሶችን፣ ካልሆኑት ለመለየት የሚውል አባሪ መመዘኛ ተደርጎ ሊወሰድ እንደሚገባ ልንረዳ ይገባል፡፡

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87 Ibid, p. 78.

5.2.3. ጽኑእ ምክንያታዊ እሳቤ

ሦስተኛው የዘገባ ይዘት መመዘኛ፣ አመክንዮኣዊ እሳቤ ነው፤ ይህ የምዘና አቀራረብ ከቀደመው የሚለየው ምክንያታዊ እሳቤው በሌላ ሀዲስ ወይም ሀዲሶች አለመገለጹ ሲሆን፣ ጽኑእነቱ በሁለንተናዊነቱ *(Objectivity)* ላይ እንደተመረኮዘ፣ በብቸኝነት የሀዲሶችን ቅቡልነት፣ ነቢያዊ ተምሳሌትነት *(ሱናሕ-አዘልነት)* የሚመረመርበት የአዕምሮ ሚዛን ሲሆን፣ ከጠቅላላዉ የሰው ልጅ እሳቤ እና ውስጠ-ተፈጥሮ ጋር የሚፋለስ፣ የሚጎረብጥ ሐሳብ የሚያስተላልፉ ሀዲሶች በዚህ የምዘና ኢስላማዊ/ሸሪዓዊ አስረጂነታቸውን የሚያጡ ይሆናል፡፡[88] አመክንዮ የምዘናመስፈርት የመሆኑን ተገቢነት በተመለከተ፣ በአንድ በኩል ሀዲሶች በኢስናድ ሥርዓት ውስጥ አልፈው ‹‹ተዓማኒ›› ናቸውተብለው ቢፈረጁ እንኳ፣ የምዘና ሥርዓቱ ካሉበት በርካታ ድክመቶች ምክንያት፣ ሁሉም ‹‹ተዓማኒ›› የተባሉ ሀዲሶች ሙሉ በሙሉ ነቢያዊ መሠረት አላቸው የሚል ሙሉ እምነት ሊጣልባቸው የማይቻል ከመሆኑ አንጻር፤ እንዲሁም አመክንዮ በኢስላም የሥነ-እውቀት ማዕቀፍ ውስጥ ከፍ ያለ ድርሻ የተሰጠው መሆኑን የሚያስረዱ እጅግ በርካታ ቁርኣናዊ ጥቅሶችመኖራቸው፣ የሀዲስ ዘገባዎችን ቀርቶ የዘገባ ተዓማኒነት ጥያቄ በማይነሳበት ቀዳሚው የሸሪዓ ምንጭ - ቁርአንን እንኳ በአመክንዮ አማካይነት እንድንገነዘበው የሚወተውቱና ቁርአንን ከምክንያታዊ አስተሳሰብ ጋር አጣምረው የሚገልጹ ቁርኣናዊ መመሪያዎች መኖራቸው፣[89] አመክንዮ በኢስላም ውስጥ የተሰጠውን የጎላ የተዓማኒትና የአስረጂነት ደረጃ ያመለክታል፡፡[90] ስለዚህ፣

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88 Israr Ahmad Khan, ‘The Role of Sound Reasoning in Hadith-Text Examination’, *Islamic Perspective*, Number 3, 2010, pp. 165-166.

89 ቁርአን፣ አዝ-ዛሪያት (51፡20)፣ አስ-ሷድ (38፡29)፣ አል-ሀሽር (59፡21)፣ አል-በቀራሕ (2፡242)፣ እንዲሁም ሌሎች ወደ 750 ገደማ የሚሆኑ ወይም የቁርአን አንድ-ሥምንተኛ የሚሆነው ክፍል፣የተለያዩ ቋንቋዊ አገላለጾችን በመጠቀም አመክንዮኣዊ የእሳቤ ባህልን በመትከልና በማዳበር ረገድ ከፍተኛ አጽንኦት ይሰጣል፡፡See Mohammad Hashim Kamali, ‘Reading The Signs: Aquranic Perspective On Thinking’, *Islam &Science*, Vol. 4 (Winter 2006) No. 2, p. 142-144.

90 Ibid, p. 165-166.

በእነዚህ መሠረተ-አተያዮች ላይ በመመርኮዝ፣ አመክንዮ የሀዲስ ይዘት ምዘና መስፈርት መደረጉ ተገቢነት ያለው መሆኑን መረዳት ይቻላል፡፡ ለምሳሌ ያህል፣ በቡኻሪና ሙስሊም ጥንቅሮች ውስጥ በሚገኝ ዘገባ መሠረት፣ ሴቶች ከወንዶች አንጻር የእሳቤ አቅማቸው እና የመንፈሳዊነት ደረጃቸው ዝቅተኛና ጎዶሎ እንደሆነ ይገልጻል፡፡[91] ዶ/ር ኢስራር በመጽሃፋቸው ውስጥ የምክንያታዊነት ችግር ያለባቸው 11 ሀዲሶችን በመጥቀስ፣ እነዚህ ዘገባዎች ከምክንያታዊ የሳይንስ እሳቤ አንጻር፣ እንዲሁም ቁርአናዊ መርሆዎች እና ነቢያዊ አስተምኅሮት አኳያ ሲመዘኑ ተቀባይነት የላቸውም፤ ስለሆነም ሀዲሶቹ ሸሪዓዊ አስረጅነት አይኖራቸውም የሚል ድምዳሜ ላይ ደርሰዋል፡፡[92]

5.2.4. የተረጋገጡ ታሪካዊ ሀቆች

አራተኛው የይዘት መመዘኛ የተረጋገጠ ታሪካዊ እውነታ ነው፤ የምዘና መነሻ የሆነው ታሪካዊ ኩነት በሌሎች ሀዲሶች የተነገረ ሊሆን ይችላል፤ ወይም ደግሞ ከፍተኛ ተዓማኒነት ባላቸው ቀዳሚ የታሪክ ምንጮች ውስጥ ሊገለጽ ይችላል፡፡[93] በዚህም መሠረት፣ በአንድ ሀዲስ የተገለጸ የታሪክ ኩነት፣ በሌሎች አስተማማኝ የታሪክ አስረጂዎች ውስጥ ከተገለጸው የታመነና ሰፊ እውቅና ካለው ፍሬ-ነገር ጋር የሚፋለስ በሆነ ጊዜ፣ የሀዲስ ዘገባው ምንም እንኳ በኢስናድ መነጽር ተዓማኒ ነው ቢባል እንኳ፣ ተመራጭ አስረጂ ተደርጎ ሊወሰድ አይችልም፡፡[94] ለምሳሌ፡- በቡኻሪና ሙስሊም የሀዲስ ጥንቅር ውስጥ፣ በ*መስጂድ አል-ሀራም* (መካሕ) እና *በይት አል-መቅዲስ* (እየሩሳሌም) መስጊዶች መካከል የነበረው የጊዜ ልዩነት ዐርባ ዓመታት ብቻ እንደሆነ የሚገልጽ ሀዲስ ይገኛል፤ በሌላ እውቅ ታሪክ ደግሞ የመካሕ መስጊድን የገነቡት አብራኃም እና ልጁ ኢስማዒል ሲሆኑ፣ ቤተ-መቅደሱን ደግሞ ነቢይ ሰለሞን መሆኑን መሠረት በማድረግ በመኃከላቸው ከ1,000

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91 Ibid, p. 181.
92 See*supra* note 61,p. 85-117(Chapter 5).
93 Ibid, p. 66-67.
94 Ibid.

ዓመታትበላይ የጊዜ ልዩነት መኖሩ የተረጋገጠ ታሪካዊ ሐቅ በመሆኑ፣ የሀዲሱ ዘገባ የገለጸው የታሪክ መረጃ አመኔታ ሊያገኝ አይችልም፡፡[95]

5.2.5. የሚዛናዊነት መርሆ

የመጨረሻውና አምስተኛው የይዘት መመዘኛ የሚዛናዊነት መርሆ ነው፡፡[96] ሚዘናዊነት፣ ኢስላም፣ የግለሰብንና ማህበረሰብን ሥርዐተ-እሴት የሚቀርጽበትና የሚያንጽበት፣ የእሳቤ፣ የእምነትና የሥነ-ምግባር ጽንፎች ተወግደው፣ ሁሉም ሀይሎች ከጠርዝ ወደ መሀከለኛው ጎዳና እንዲመጡ፣ በሚዛናዊ የእሳቤና የምግባር ጎዳና ላይ ተራምደው ምድራዊና መንፈሳዊ ስኬትን እንዲጎናጸፉ ጥሪ የሚያደርግ ርዕዮተ-ዓለም ነው፡፡[97] ሚዛናዊነት ታላላቅ የሕልውና ጥያቄዎችን ከመፍታት ጀምሮ የትኛውንም የሕይወት ገጽ የሚዳስስ ሁለንተናዊ መሪ ሐሳብ ነው፡፡[98] ሰው በምድራዊና መንፈሳዊ ሕይወቱ መካከል ሚዛናዊ የአኗኗር የሕይወት ቀመር ሊዘረጋ የሚገባው ከመሆኑ በተጨማሪ፣ በእለት-ተዕለት እንቅስቃሴዎቹ እና እሳቤዎቹ ጫፍና ጫፍ ላይ የሚገኙ፣ ገሃዳዊ እውነታዎችን ያላገናዘቡ፣ ከፍትሕ ብሎም ከርትዕ ሚዛኖች ጋር የሚጣረሱ ምልከታዎችና እይታዎችን መያዝ የለበትም፤ ባህሪውም ሆነ ተግባሩ ጽንፍ በያዙ የከረሩ ሐሳቦች ላይ ሊመረኮዝ አይገባውም፡፡[99] በዚህም መሠረት፣ ከባቢ ሁኔታዎችን የማያገናዝቡ፣

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95 Ibid, p. 67-68.

96 *Supra* note 61, p. 127.

97 ‹‹እንደዚሁም በሰዎች ላይ መስካሪዎች ልትሆኑ፣መልክተኛው ደግሞ በምዕመናን ላይ መስካሪ ይሆን ዘንድ ሚዛናዊ ሕዝቦች አደረግናችሁ፡፡›› (ቁርኣን፡ 2፡143)

98 Mohammad Hashim Kamali, *The Middle Path of Moderation in Islam: The Qur'ānic Principle of Wasaṭiyyah* (New York, Oxford University Press, 2015), p. 1.

99 ፍትሕ፣ ሚዛናዊነት የተሰኙ እሴቶች የሸሪዓ ማዕከላዊ ዓላማዎች *(መቃሲድ)* መሆናቸውን፣ እንዲሁምአጠቃላይ የኢስላም ምንጮችን መሠረት በማድረግ የ*መቃሲድ* ሊቃውንት በለዩኣቸው ዓለማዊ የኢስላም ዓላማዎች እና ግቦች ላይ የዚህ ጽኑፍ አዘጋጅ ‹የሸሪዓ ሕግ ዓላማዎች *(መቃሲድ አሽ-ሸሪዓሕ)*› በሚል ርዕስ ያዘጋጀውን ጽኑፍ ያንብቡ (አልዩ አባተ፣የሸሪዓ ሕግ ዓላማዎች *(መቃሲድ አሽ-ሸሪዓሕ)*፣ Bahir Dar University Journal of Law, Vol. 7 No. 2, pp. 261-281). http://bdu.edu.et/sites/default/files/journal/BDU-JL%20Vol%207%20No%202.pdf, last accessed January 1, 2019.

ተመጠጣኝነት የሌላቸው ሐሳቦችንና ፍሬ-ነገሮችን የሚገልጹ ሀዲሶች፣ ከሚዛናዊነት እሳቤ ጋር የሚጋጩ በመሆናቸው፣ የአስረጅነት ዋጋ አይኖራቸውም፡ ፡[100] ቁርአን፣ እምነትና በጎ ተግባራት የሚያስገኙትን መልካም ምንዳ፣ እንዲሁም ማስተባበል እና ክፍ ተግባራት የሚያስከትሉትን ብርቱ ቅጣት በጥቅል ቃላት ሲገልጽ፣ የሀዲስ ሥነ-ጽሑፍ ደግሞ በርካታ የጽድቅ ወይም የኩነኔ ተግባራትን ነጥሎ በማውጣት የሚያስከትሉትን ቅጣትና ምንዳ በዝርዝር የሚገልጹ ዘገባዎችን አካቷል፡፡[101] በዚህ ረገድ፣ ለሰብዓዊ የእሳቤ ሚዛን የሚጎረብጡ፣ ባህርይንና ምግባርን መለወጥ የማይችሉ፣ ከተጠቀሱት መልካም ወይም መጥፎ ተግባራት ክብደት ጋር የማይመጣጠን ፍርድ የሚበይኑ ሀዲሶች ተቀባይነት የላቸውም፡፡[102] ተመሳሳይ የ*ወሰጢያ* መመዘኛ ተግባራዊ በማድረግ፣ ከመኝታ በፊት አጭር ጸሎት ያደረገ፣ በ 700,000 መላዕክት ይወደሳል፤ የውዳሴ ቃላትን ለአምላክ ያደረሰ፣ ገና እንደተወለ አራስ ሕጻን ከኃጢያት ነጻ ይሆናል፤[103] የመሳሳሉ፤ የማይመስል፣ ጥራዝነጠቅ ምንዳን ወይም ቅጣትን የሚያትቱ ሀዲሶች በሙሉ፣ ከመንፈሳዊ ተመስጥኦ ከመነጨ የእምነት ፍቅር ወይም ፍርኃት ሥሜት ግፊት የተፈበረኩ ሐሰተኛ ሀዲሶች መሆናቸውን የሀዲስ ምሁራን ያስረዳሉ፡፡[104] ባጠቃላይ፣ የተጋነነ መልዕክት ያላቸው ሀዲሶች፣ ከነቢያዊ- ሚዛናዊ አስተምህሮቶች ጋር አብረው የማይሄዱ፣ እና በአማኝ አንደበት በግልጽ ባይገለሉ እንኳ በሰው የሕሊና ሚዛን ውድቅ የሚደረግ ፍሬ-አልባ ሐሳብ የገልጹ በመሆኑ፣ ከመነሻው ውድቅ ተደርገው ሊታለፉ ይገባል፡፡

6. የሀዲስ የአስረጂነት አቅም ደረጃዎች

‹አስረጂነት› ማለት ጠቅላላው የሀዲስ ሀብት በሱሱል *አል-ሀዲሰ* ሊቃውንት ባዳበሩት የተዓማኒነት ፍረጃሥር በተደለደለው መሠረት፣ በተለያዩ በኢስላም

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[100] Israr Ahmad Khan, ‘Moderation vis-à-vis Authentication of Hadith’, *Islamic Perspective*, Vol. 9, Spring 2013, p.13.
[101] *Supra* note 11, p. 167.
[102] *Supra* note 100, pp. 7-8.
[103] Ibid, p. 7.
[104] Ibid, p. 8.

እውቀት ምንጭነት ማዕቀፍ ውስጥ ለእምነት እና ለሕግ ጉዳዮች ማስረጃ *(ደሊል)* ተደርገው ሊጠቀሱ የሚችሉበትን ደረጃ *(ሁጂያሕ)* የሚመለከት ነው፡፡[105] የዘገባ ሰንሰለታቸው ያልተቋረጡ ሀዲሶች፣[106] እርስ-በእርስ ያላቸውን ተደጋጋፊነትን *(Corroboration)* መሠረት በማድረግ ካላቸው የአስረጂነት አቅም አኳያ በሦስት ክፍሎች ይመደባሉ፡፡ እነሱም *ሙተዋቲር* (በእያንዳንዱ የዘገባ እርከን ላይ በርካታ አስተላላፊዎች ያስተላለፉት/ያረጋገጡት የዘገባ ቃል- የተረጋገጠ)፣ *መሽሑር* (በኋለኛ ትውልዶች በሥፋት የታወቀ - የታወቀ) እና *አሃድ* (ውስን ድጋፍ ያገኘ - የተደገፈ) ሀዲሶች ናቸው፡፡ እነዚህ የተደጋጋፊነት ደረጃዎች ለሸሪዓ ሕግ ያላቸውን የአስረጂነት ደረጃ በተከታዮቹ ንዑስ ክፍሎች ሥር ቀርቧል፡፡[107]

6.1. *ሙተዋቲር* (የተረጋገጠ) ሀዲስ

ሙተዋቲር ማለት በየትኛውም የዘገባ እርከን ላይ በሚገኙ፣ በፈጠራ ወሬ ላይ ይስማማሉ ተብሎ በማይገመቱ፣ ቁጥራቸው ብዙ በሆኑ አስተላላፊዎች ሳይቋረጥ የተላለፈ ሀዲስ *ሙተዋቲር* (ተደጋግሞ የተላለፈ - የተረጋገጠ) ሀዲስ ይባላል፡፡ በአስተላላፊዎቹ ብዛት ላይ በመስኩ ምሁራን በቁርአን ውስጥ የተጠቀሱ፣ አንድ የሀዲስ ቃል *ሙተዋቲር* ደረጃ ደርሷል ለማለት፣ በእያንዳንዱ የዘገባ እርከን ላይ ያሉ አስተላላፊዎች ብዛት ላይ፣ ምሁራን ከጉዳዩ ጋር ዝምድና የሌላቸው

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105 *Supra* note 9, pp. 48-49.

106 የሀዲስ ተደጋጋፊነት ግድ ዘገባቸው ባልተቋረጠ ቀጣይ *(ሙተሲል)* ሀዲሶች መካከል ብቻ ሳይሆን፣ ዘገባቸው የተቋረጠ ዘገባዎች፣ እንደመቋረጡ አይነት፣ እርስ-በርስ ተደጋግፈዉ፣ የአስረጂነት ዋጋ እንዲያገኙ ያደርጋል፤ እንዲሁም የተቋረጡ ዘገባዎች፣ከሌሎች *ሙተሲል* ሀዲሶች ተርታ ደጋፊ ሆነው ሲቀርቡ፣ የዘገባ ቃሉን አስረጂነት ከፍያ ደርገዋል፡፡

107 *Supra* note 11, pp. 100-101. የተደጋጋፊነት ርዕስ በተለየ ንዑስ ማቅረብ አስፈላጊ የሆነበት ምክንያት፣ምንም እንኳ ብዙኃኑ የኡሱል ምሁራን የተደጋጋፊነት ደረጃዎችን በ*ሙተሲል* የዘገባ አይነቶች ሥር ቢዳስሷቸውም፣አንድም የተደጋጋፊነት ጉዳይ ከዘገባ ቅጥልጥሎሽ ጋር በቀጥታ የማይገናኝ በመሆኑ፣ይልቁንም ተደጋጋፊነት ከተዓማኒነት ጥያቄ ተራምዶ የአስረጂነት አቅምን የሚመለከት በመሆኑ፣ በሌላ በኩል ደግሞ፣ተደጋጋፊነት በ*ሙተሲል* ዘገባዎች መካከል ብቻ ሳይሆን፣ የዘገባ መስመራቸው የተቆረጠ፣እንደ *ሙርሰል* አይነት የዘገባ መስመሮች *(አሳኒድ)* እርስ በእርስ ተደጋግፈው የአስረጂነት ዋጋ የሚያገኙ በመሆኑ፣ ተደጋጋፊነት የግድ በኢቲሷል ርዕስ ሥር ብቻ የሚዳሰስ ባለመሆኑ ነው፡፡

ቁጥሮችን መነሻ በማድረግ መላምቶችን ያስጡ ቢሆንም፣ እነዚህ የመከራከሪያ ሐሳቦች ዘፈቀደ መሆናቸውን አል-ገዛሊ ያስገነዝባሉ፡፡[108] ብቻ በየደረጃው የሚገኙት አስተላላፊዎች በጣም ብዙ ባይሆኑ እንኳ፣ ከመኖሪያ አካባቢያቸው መራራቅ፣ አንጃዊ እና ፖለቲካዊ ግንኙነት የሌላቸው ከመሆኑ እና ከብዛታቸው አንጻር ሆን ብለው ሐሰተኛ ዘገባ ፈጥረውና ተደራጅተው ያስተላልፋሉ ተብሎ የማይገመት ብዛት ካላቸው፣ ሀዲሱ *ሙተዋቲር* ከመባል አይከለክለውም፡፡[109]

በ*ሙተዋቲር መሥፈ*ርት ውስጥ የዘገባ መስመር አለመቋረጥ *(ኢቲሷል)* ብቻ አስተላላፊዎቹ ታማኝ *(ዐዱል)* ሊሆኑ ይገባል፣ ወይም በሌላ አነጋገር አማኝ ያልሆነ እና በኋጢያት ውስጥ የተዘፈቀ *(ኩፋር ወ ፉሳቅ)*፣ ብልሹ ሰብዕና ያለው አስተላላፊ የገባበት ከሆነ፣ *ሙተዋቲር* አይሆንም የሚል ተጨማሪ ቅድመ-ሁኔታ ያስቀመጡ ጥቂት *ዑለማእ* ቢኖሩም፣ ይህ በብዙዎቹ ዘንድ ተቀባይት አላገኘም፡፡[110] ሙስሊም ያልሆኑ፣ መጠነኛ የአዕምሮ ብስለት ያላቸው ታዳጊዎች እንኳ ቢሆኑ በ*ሙተዋቲር* ዘገባዎች ውስጥ አስተላላፊ ቢሆኑ፣ የዘገባ *ሠንሠለቱ* ታሳቢ ይደረጋል፤[111] ለዚህ ምክንያቱ ደግሞ ከዘገባው ብዛት እና ተመሳሳይ ሐሳብ ያዘለ ከመሆኑ አንጻር እርስ በእርስ የሚደጋገፍ በመሆኑ፣ በነዚህ መለኪያዎች ዘገባዎች ተገንጥለው አይታዩም፤ ይልቁንም አስረጂነታቸው መጠነኛ ቢሆንም እንኳ ከሌሎቹ መሰል *ኢስናዶች* ጋር ተዳምረው፣ ዘገባው የ*ሙተዋቲርነት* ደረጃ እንዲያገኝ የሚያደርጉ መሆኑን እንረዳለን፡፡

አስረጂነትን በተመለከተ፣ *ተዋቱር* ዘገባዎች ያዘሉት መልዕክት፣ ለየትኛውም ትውልድ በቀጥታ በአይን የታየ ወይም በጆሮ የተሰማ ያህል እጅግ ጠንካራ ተዓማኒነት ያላቸውና ፍጹም የጥርጣሬ በር የሌላቸው *(የቂን)* ከመሆናቸው አንጻር፣ አስረጂነታቸው ከቁርአን ጋር የሚስተካከል መሆኑ የአብዛኛው *ዑለማእ*

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108 *Supra* note 9, p.68.
109 Ibid, p. 69.
110 Ibid.
111 Ibid, p. 70.

አቋም ነው፡፡[112] *ሙተዋቲር* ዘገባዎች በቋንቋዊ አወቃቀራቸው የሚለያዩ ሆነው፣ ተመሳሳይ መልዕክት እና አንድምታ ያላቸው ከሆነ፣ *ተዋቱርነታቸው* በይዘት ብቻ *(ተዋቱር ቢል ማዕና)* ይሆናል፡፡ የዚህ አይነት ቅርጽ ካላቸው ሀዲሶች መካከል፣ ስለ እለታዊ የሥግደት፣ ሀጅ፣ ጾም ወዘተ. አምልኳዊ የአፈጻጸም ሥርዓት ላይ የሚያጠነጥኑ ሀዲሶች በርካታ ከመሆናቸው የተነሳ *ሙተዋቲር* ደረጃ የደረሱ ቢሆንም በአነጋገር *(ለፍዝ)* የተለያዩ ቢሆኑም፣ አንኳር መልዕክታቸው ተመሳሳይ በመሆናቸው፣ ተደጋጋሚነታቸው (ተዋቱርነታቸው) በፍሬ-ሐሳብ በመሆኑ አይነተኛ የ*ተዋቱር ቢል-ማዕና* ምሳሌዎች ናቸው፡፡[113]

ሌላው እምብዛም የማይገኘው የ*ሙተዋቱር* መስፈርቶችን አሟልተው*ሙተዋቲር* የሚሆኑበት እድል እጅግ የጠበበ ከመሆኑ የተነሳ፣ ተጨባጭ ተዋቱርነታቸው በመልዕክት ብቻ ሳይሆን ቃል-በቃል አንድ አይነት *(ሙተዋቲር ቢል-ለፍዝ)* የሆኑ ሀዲሶች በጣት የሚቆጠሩ ናቸው፡፡[114]

6.2. *መሸሑር* (የታወቀ) ሀዲስ

መሸሑር ሀዲስ ማለት በአንድ ወይም በሁለት ባልደረቦች በኩል ከነቢዩ የተላለፈ ሀዲስ ሆኖ፣ በመጀመሪያው የባልደረቦችና የተከታዮች ትውልድ በስፋት የተሰራጨ፣ የታወቀ ሀዲስ ማለት ነው፤ በሌላ አገላለጽ፣ አንድ ወይም ሁለት ባልደረቦች ብቻ ከነቢዩ የተማሩት ቢሆንም እነዚህ ባልደረቦች ለሌሎች ባልደረቦች በማስተላለፋቸውና፣ ከዚያም በዚህ አኳኋን ሀዲሱ ከአንዱ ወደ ሌላው ተላልፎ በስፋት የታወቀ ከሆነ፣ ሀዲሱ የ*መሸሑር* አስረጂነት ያገኛል፡፡[115]

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112 Ibid.
113 Ibid, p. 70.
114 Ibid.
115 Ibid.

የመጀመሪያዎቹ ተቀባይ ባልደረቦች በጣም እውቅ ከመሆናቸው በተጨማሪ ሌሎች ከእነሱ የወሰዱት ባልደረቦች በሐሰተኛ ዘገባ ላይ ይስማማሉ ተብሎ ፍጹም የማይገመት፣ የአስተላላፊ ባልደረቦቹ ታማኝነት አጠያያቂ ቢሆን ኖሮ፣ ሌሎች ባልደረቦች ይከተሏቸውና ሀዲሱን እርስ-በእርስ ይማማሩታል ተብሎ አይጠበቅም። በሀነፊዎች እይታ፣ *መሸሑር* ዘገባ ለቁርአን ጥቅል ድንጋጌዎች ልዩ ሁኔታ/ልዩ አፈጻጸም ሊደነገጉ ይችላሉ፤ ለምሳሌ፣ ‹የገደለ የውርስ መብት የሚያጣ መሆኑ (*Unworthiness*)› መሆኑን የሚያስረዳው ሀዲስ *መሸሑር* በመሆኑ ለቁርአን ጥቅል የውርስ ድንጋጌ፣[116]ልዩ ሁኔታን ለመደንገግ የሚያስችል የአስረጂነት አቅም አለው የሚል እይታ አንጸባርቀዋል።[117]

እንደ አቡ-ሀኒፋና ተማሪዎቻቸው፣ *መሸሑር* ሀዲሶች፣ የ*ሙተዋቲርን* ያህል ሙሉ እምነት ሊጣልባቸው የሚችል *(ቀጥዒ)* አስረጂዎች ናቸው። ሌሎች ከሀነፊ ሌላ ያሉ የሕግ ሊቃውንት ደግሞ *መሸሑር* ሀዲሶችን ከአሃድ ዘገባዎች ለይተው አይመለከቷቸውም፤ ስለሆነም፣ *መሸሑር* ዘገባዎች እንደ *አሃድ* ሁሉ *ዞኒ* (አከራካሪ) አስረጂ ነው።[118] በ*ሙተዋቲርና* በ*መሸሑርና* ሀዲስ መካከል ያለውልዩነት፣ *ሙተዋቲር* ከመጀመሪያው የዘገባ እርከን ጀምሮ እስከ መጨረሻ ድረስ በብዙ አስተላላፊዎች በኩል የተላለፈ ሲሆን፣ *መሸሑር* ደግሞ በአጀማመሩ በአንድና ሁለት ባልደረቦች በኩል የተላለፈ ሆኖ፣ ከዚያም እነዚህ ግለሰቦች በመጀመሪያውና በሁለተኛው ትውልድ ላይ በስፋት ለመሰራጨትና ለመታወቅ የበቃ ሀዲስ ነው።[119] ስለዚህ፣ የ*ሙተዋቲር ሥ*ርጭት ገና ከመጀመሪያው እርከን ከሙሀመድ ሲገኝ በርካታ የሰው ምስክሮች ያሉት ሲሆን፣ *መሸሑር* ደግሞ ከአንድና ከሁለት ያልበለጠ ቢሆንም፣ ከዚያ በታች ባለው የዘገባ እርከን ላይ ሁለቱም ተመሳሳይ የ*ሥ*ርጭትና የታዋቂነት ደረጃ ያላቸው ናቸው።

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116 ቁርአን፡ 4:11 ይመለከቷል።
117 *Supra* note 9, p. 71.
118 Ibid.
119 Ibid.

6.3. *አሃድ* (የተደገፈ) *ሀዲስ*

*አ*ንድን የ*ሀ*ዲ*ስ ቃ*ል፣ የ*ተ*ላ*ለ*ፈ*ባ*ቸ*ውን ተ*ደ*ጋ*ጋ*ፊ ዘ*ገ*ባ*ዎ*ች ብ*ዛ*ት ብ*ቻ መ*ሠ*ረ*ት በ*ማ*ድ*ረ*ግ፣ *ሙ*ተ*ዋ*ቲ*ር*፣ መ*ሸ*ሑ*ር* እ*ና አ*ሃ*ድ ተ*ብ*ሎ ሊ*ወ*ሰ*ን እ*ን*ደ*ማ*ይ*ቻ*ል፤ ይ*ል*ቁ*ን*ም ሌ*ሎ*ች አ*ግ*ባ*ብ*ነ*ት ያ*ላ*ቸ*ው ከ*ባ*ቢ*ያ*ዊ ሀ*ቆ*ች*ና ኩ*ነ*ቶ*ች የ*አ*ስ*ረ*ጅ*ነ*ቱ*ን ደ*ረ*ጃ ለ*መ*ወ*ሰ*ን የ*ግ*ድ ታ*ሳ*ቢ መ*ደ*ረ*ግ እ*ን*ዳ*ለ*ባ*ቸ*ው ከ*ላ*ይ ተ*መ*ል*ክ*ቷ*ል*። ስ*ለ*ሆ*ነ*ም፣ የ*አ*ሃ*ድ ሀ*ዲ*ስ ት*ር*ጓ*ሜ፣ ከ*ዘ*ገ*ባ ብ*ዛ*ት አ*ን*ጻ*ር ሳ*ይ*ሆ*ን፣ የ*አ*ስ*ተ*ላ*ላ*ፊ*ዎ*ች*ን የ*መ*ኖ*ሪ*ያ ቦ*ታ፣ የ*አ*ን*ድ የ*ፖ*ለ*ቲ*ካ ወ*ይ*ም የ*ሥ*ነ-መ*ለ*ኮ*ት እ*ሳ*ቤ ቡ*ድ*ን አ*ባ*ል*ነ*ት ወ*ዘ*ተ. ተ*ፈ*ት*ሾ፣ *ሙ*ተ*ዋ*ቲ*ር* ወ*ይ*ም *መ*ሸ*ሑ*ር* የ*አ*ስ*ረ*ጂ*ነ*ት ደ*ረ*ጃ ያ*ላ*ገ*ኘ ሀ*ዲ*ስ፣ *አ*ሃ*ድ* ይ*ባ*ል*። በ*አ*ጭ*ር አ*ገ*ላ*ለ*ጽ፣ የ*ሙ*ተ*ዋ*ቲ*ር* እ*ና* የ*መ*ሸ*ሑ*ር* ዘ*ገ*ባ*ዎ*ች*ን መ*ስ*ፈ*ር*ት ማ*ሟ*ላ*ት ያ*ል*ቻ*ለ የ*ሀ*ዲ*ስ ዘ*ገ*ባ ው*ስ*ን ድ*ጋ*ፍ ያ*ለ*ው፣ *አ*ሃ*ድ (ሽ*በ*ር አ*ል-ዋ*ሂ*ድ/አ*ል-ኻ*ሷ*ሕ)* ዘ*ገ*ባ ተ*ብ*ሎ ይ*ፈ*ረ*ጃ*ል*።[120]

በ*አ*ሃ*ድ የ*አ*ስ*ረ*ጅ*ነ*ት ደ*ረ*ጃ *ሥ*ር፣ ጠ*ን*ካ*ራ (*ሶ*ሂ*ሕ)*፣ ደ*ካ*ማ (*ደ*ዒ*ፍ)*፣ መ*ለ*ስ*ተ*ኛ (*ሀ*ሰ*ን)*፣ *ሙ*ተ*ሲ*ል ወ*ይ*ም *ገ*ይ*ረ-*ሙ*ተ*ሲ*ል ዘ*ገ*ባ*ዎ*ች ሊ*ካ*ተ*ቱ ቢ*ች*ሉ*ም፣ የ*አ*ሃ*ድ ዘ*ገ*ባ ም*ን*ነ*ት የ*አ*ን*ድ*ን ዘ*ገ*ባ ተ*ዓ*ማ*ኒ*ነ*ት የ*ሚ*መ*ለ*ከ*ት ሳ*ይ*ሆ*ን፣ አ*ን*ድ ዘ*ገ*ባ ወ*ይ*ም ዘ*ገ*ባ*ዎ*ች በ*አ*ን*ድ*ነ*ት በ*ሚ*ኖ*ራ*ቸ*ው አ*ስ*ረ*ጂ*ነ*ት ላ*ይ የ*ሚ*ያ*ጠ*ነ*ጥ*ን ር*ዕ*ስ ነ*ው*። ስ*ለ*ዚ*ህ፣ *አ*ሃ*ድ የ*አ*ስ*ረ*ጂ*ነ*ት ጉ*ዳ*ይ ከ*መ*ሆ*ኑ አ*ኳ*ያ፣ በ*ሥ*ሩ የ*ተ*ዓ*ማ*ኒ*ነ*ት ጉ*ዳ*ይ ሊ*ነ*ሳ አ*ይ*ች*ል*ም ማ*ለ*ት ነ*ው*። ተ*ዓ*ማ*ኒ*ነ*ታ*ቸ*ው ጠ*ን*ካ*ራ*ም ሆ*ነ ደ*ካ*ማ፣ በ*አ*ስ*ረ*ጂ*ነ*ታ*ቸ*ው *ሙ*ተ*ዋ*ቲ*ር* ወ*ይ*ም *መ*ሸ*ሑ*ር* ያ*ል*ደ*ረ*ሱ ሐ*ሳ*ቦ*ች በ*ተ*ና*ጠ*ል*ም ሆ*ነ ባ*ላ*ቸ*ው የ*ሐ*ሳ*ብ አ*ን*ድ*ነ*ት ሊ*ኖ*ራ*ቸ*ው የ*ሚ*ች*ሉ አ*ስ*ረ*ጂ*ነ*ት ደ*ረ*ጃ*ዎ*ች የ*ሚ*ተ*ነ*ተ*ን*በ*ት ክ*ፍ*ል ነ*ው*።

እ*ን*ደ ብ*ራ*ው*ን ገ*ለ*ጻ፣ ደ*ጋ*ፊ ወ*ይ*ም አ*ጠ*ና*ካ*ሪ በ*ሌ*ለ*ው በ*አ*ን*ድ የ*ዘ*ገ*ባ *ኢ*ስ*ና*ድ ብ*ቻ የ*ተ*ላ*ለ*ፈ የ*ሀ*ዲ*ስ ቃ*ል፣ በ*ቀ*ዳ*ሚ የ*ሀ*ዲ*ስ ሊ*ቃ*ው*ን*ት *(ሙ*ሀ*ዲ*ሱ*ን)* ዘ*ን*ድ ተ*ቀ*ባ*ይ*ነ*ት ያ*ላ*ገ*ኘ እ*ን*ደ*ሆ*ነ ከ*ላ*ይ በ*ተ*ደ*ጋ*ጋ*ፊ*ነ*ት ም*ዘ*ና እ*ር*ከ*ን *ሥ*ር ተ*ወ*ስ*ቷ*ል*። ሆ*ኖ*ም በ*ል*ዩ ሁ*ኔ*ታ፣ በ*አ*ን*ድ ነ*ጠ*ላ የ*ዘ*ገ*ባ መ*ስ*መ*ር ብ*ቻ የ*ተ*ላ*ለ*ፈ*ና ም*ን*ም ድ*ጋ*ፍ ያ*ል*ተ*ገ*ኘ*ለ*ት

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[120] Ibid, p. 71-72.

ሀዲስ፣ የተዓማኒነት ዋጋ የሚያገኝበት፣ ብሎም የአስረጂነት አቅም የሚያገኝበት ሁኔታ አለ፡፡ ይኸውም፣ የመጨረሻው አስተላላፊ፣ ሌሎች በርካታ ተዓማኒ ዘገባዎች ያስተላለፈ፣ በታማኝነቱና ምሁራዊ ብቃቱ የተረጋገጠ ከሆነ፣ ዘገባው ከባልደረባ ጀምሮ እስከ መጨረሻው እርከን ድረስ በአንድ አስተላላፊ ብቻ የወረደ ቢሆን እንኳ ተዓማኒነት ይሰጠዋል፡፡[121]

በአንድ ድጋፍ በሌለው፣ ነገር-ግን ተዓማኒ ኢስናድ ብቻ የተላለፈ *አሃድ* ሀዲስ፣ ወይም በ*ሶሂሕ* ወይም ሀሰን የተዓማኒነት ደረጃ የተላለፈ ተደጋጋፊ *አሃድ* ዘገባዎች ያላቸውን አስረጂነት በተመለከተ እንደ ጉዳዩ አይነት፣ ሁለት የተለያዩ ምሁራዊ አስተያየቶች ተሰንዝረዋል፡፡ አንደኛው፣ *አሃድ* ዘገባዎች፣ ከአመክንዮ ጋር ተጻራሪ እስካልሆኑ ድረስ፣ በሸሪዓ ጉዳዮች ላይ አስገዳጅ የአስረጂነት አቅም አላቸው የሚለው የብዙኃኑ *ዑለማእ* አቋም ነው፡፡[122] ተዓማኒነታቸው ደካማ ወደሆኑ ሀዲሶች የአስረጂነት ደረጃ ስንመጣ፣ ከአስተላላፊዎች ችሎታ ወይም ታማኝነት ከሚመነጭ የተዓማኒነት ድክመት የተገኘባቸው የዘገባ *ሠንሠለቶች*፣ ካላቸው የጋራ ፍሬ-ሐሳብ አንጻር በዚህ ጸጋፊ እጅ በሚገኙ የዘርፉ *ሥነ*-ጽሁፍ የእንግሊዝኛ ዋቢዎች ውስጥ ባይነሳም፣ ከአስተላላፊዎች ጋር በተያያዘ ደካማ የሆኑ ዘገባዎች የተላለፈ የሕግ መርሆ ወይም ድንጋጌ፣ ከላይ ብዙኃኑ *ዑለማእ* እንደያዙት አቋም፣ ከአመክንዮኣዊ አስተሳሰብ ጋር የሚጣረስ እስካልሆነ ድረስ፣ እንዲሁም ከሌሎች ተዓማኒነት ካላቸው ጠንካራ ሀዲሶች ጋር እስካልተጋጨ ድረስ፣ አስረጂ ሊደረግ ይገባል የሚል እምነት አለው፡፡ በአንድ ደካማ ሀዲስ ከተላለፈ፣ በሁለት - ሦስት ደካማ ሀዲሶች የተላለፈ ሀዲስ ከፍ ያለ ተዓማኒነት ያለው በመሆኑ፣ ካለው የአመክንዮ ጽኑእነት አንጻር፣ የሕግ ሐሳብ ምንጭ ቢደረግ ጠቀሜታ ይኖረዋል፡፡

ከኢስናድ አኳያ፣ በዘገባ መቋረጥ ምክንያት የተዓማኒነት ችግር የተነሳባቸው ዘገባዎችን አስረጂነት በተመለከተ፣ ከሦስቱ *ገይረ-ሙተሰል* የዘገባ አይነቶች፣ ማለትም፣ ከ*ሙርሰል*፣ *ሙንቀጢዕ* እና *ሙዕደል* ሀዲሶች መካከል፣ ሰፊውን የ*ገይረ-ሙተሲል* ሀዲስ የሚሸፍኑት *መርሰል* ዘገባዎች ሆነው እናገኛቸዋለን፡፡ለዚህም ምክንያቱ የታቢዑን ትውልድ

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121 *Supra* note 11, p. 94-95.
122 *Supra* note 9, p. 72.

አስተላላፊዎች ነቢያዊ ትውፊቶችን ወደ ቀጣዩ ትውልድ ሲያስተላልፉ፣ ባልደረቦች-አባቶቻቸውን ሳይጠቅሱ በቀጥታ ነቢዩን የሚጠቅሱበት አጠቃላይ *ሥነ-ቃላዊ* ባህል የነበረና ይኸውም በወቅቱ በነበረው የ*ሥነ-ቃል* ዘልማድ እንደ መደበኛ አነጋገር ይቆጠር የነበረ ከመሆኑ አኳያ *ሙርሰል* ዘገባዎች ሊበዙ ችለዋል፡፡[123]

አስረጂነታቸውን በተመለከተ *ሙርሰል* ዘገባዎች በሌሎች *ሙርሰል* ዘገባዎች የተደገፉ ከሆነ እና፣ የዘገባው ይዘት በጠቅላላ የባልደረባ ትውልድ ምግባር ጋር የሚጣጣም ከሆነ፣ ዘገባው ከላይ እንደተገለጸው፣ በዘልማድ ባልደረባ አስተላላፊ ባለመገለጹ በስተቀር፣ ከነቢዩ የተገኘ ነው ለማለት የሚያስደፍር በመሆኑ፣ የ*ሙርሰል* ተደጋጋፊነት፣ በመርህ ደረጃ በየትኛውም ምክንያት ቢሆን፣ ደካማ ተዓማኒነት ያላቸውን *(ዶዒፍ)* ሀዲሶች የአስረጂነት ዋጋ ይሰጣቸዋል፤ ይህ የኢማም አሽ-ሻፊዒ አቀራረብ ሲሆን፣[124] በሌላ በኩል ኢማም አቡ-ሀኒፋ እና ኢማም ማሊክ ደግሞ ከተደጋጋፊነት መስፈርት በተጨማሪ፣ ያስተላለፈው ተከታይ *(ታቢዒ)* ወይም ሁለተኛ ተከታይ *(ታቢዕ አት-ታቢዒ)* በሀዲስ አዋቂነቱ እና ቀናእሳቤው የታወቀ መሆንአለበት የሚል መመዘኛ ጨምረዋል፡፡[125]

ደካማ ሀዲሶች ካላቸው ተደጋጋፊነት ውጪ፣ *ዶዒፍ-አሃድ* ዘገባዎች በጠቅላላው ካላቸው የተዓማኒነት ችግር በመነሳት፣ ምንም አይነት ሸሪዓዊ የአስረጂነት ዋጋ እንደሌላቸው ሁሉም *ዑለማእ* ይስማሙበታል፡፡[126]

ማጠቃለያ

በዚህ ጽኑፍ የተዳሰሰው ማዕከላዊ ነጥብ፣ ነቢያዊ *ሱናሕ* በሁለተኛ የሸሪዓ ምንጮች፣ ከ1400 ዓመታት ከፊት በአረቢያ ባህረ-ሰላጤ፣ በመዲና ከተማ ይፋ

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[123] *Supra* note 11, p.156-157.
[124] *Supra* note 9, p. 79-81.
[125] Ibid, p. 80.
[126] Ibid, p. 82.

የተደረገ ነቢያዊ ፈለግና አስተምህሮትን የሚወክል እንደመሆኑ፣ ዘመናት ተሻግሮ ሕግነቱ፣ ገዥነቱ በሙስሊም ሕብረተሰብ ዘንድ ተቀባይነቱና አርዓያነቱ ላይ ብዙ አጠያያቂ ጭብጦች ይነሳሉ፡፡ ሱናሕ እንደ ኢትዮጵያ ባሉ ሉዓላዊ ሃገራት ውስጥ የሚገኙ ሕብረተሰቦችን መሥተጋብር የሚገዛ እና የሕግ ምንጭ መሆኑ የማይካድ ገሃዳዊ ሀቅ ነው፡፡ ሆኖም ሱናሕ በአስተምህሮቱ ላይ፣ አንድም ከተዓማኒነት አኳያ በሥነ-ቃላዊ የዘገባ ሥርዓት አልፎ የተሰበሰበ ከመሆኑ አንጻር፣ እንዲሁም በትውልድ መካከል የሚፈጠረውን የማህበረሰብ አደረጃጀት እና የዓለማዊ እውቀት ደረጃ ልዩነት ምክንያት፣ የተራራቀ የአስተሳሰብ፣ የገዢ ከባቢያዊ ሁኔታዎች እና ባጠቃላይ የሥርዓተ-እሴት (Value System) ልዩነት መፈጠሩን ተከትሎ፣ ነቢያዊ ሱናሕ ተደርገው የቀረቡ የሕግ ድንጋጌዎች ላይ ተጠይቃዊ እሳቤ እና ነባራዊ እውነታዎች መሠረት ያደረጉ፣ ሊታለፉ የማይችሉ ጭብጦች በምሁራንና በሰፊው ሕዝብ ዘንድ ይነሳሉ፡፡ በተለይም ደግሞ ከእኩልነትና ከፍትሕ እሳቤዎች የመነጩ ተገቢ የሰብዓዊ መብት ክርክሮች ይነሳባቸዋል፤ እንዲሁም በተጨባጭ ገዢ ሕብረተሰባዊ እና ሕገ-መንግሥታዊ እሴቶችን በሚቃረን አኳኋን የመብት ጥሰት እንዲፈጸም መሠረት ሲደረጉ ይስተዋላሉ፡፡ እነዚህን ንድፈ-ሐሳባዊና ተጨባጭ ችግሮች ለመፍታት ይቻል ዘንድ፣ አንደኛ የሱናሕን የሕግነት ባህሪ መገንዘብ ያስፈልጋል፣ በዚህ ረገድ የሕግ ወይም የደንጋጊነት ባህሪ የሌላቸው፣ ከሙሀመድ ግላዊ ምርጫና ዝንባሌ ጋር የተያያዙ ፍሬ-ሐሳቦች በሀዲስ ዘገባዎች የተካተቱ በመሆኑ፣ አጠቃላይ ሱናሕ የሀዲስ ዘገባዎች ከሌላቸው መለየት አስፈላጊ መሆኑን እንገነዘባለን፡፡ ሁለተኛ፣ የሕግነት ባህሪ ያለው ሱናሕ ደግሞ በቀጥታ የግለሰቦች ወይም የሕብረተሰቦች የባሕርይ፣ የምግባርና የእሴት ምንጭ/መሠረት ሊደረግ አይችልም፡፡ ከሕግ-ነክ የሱናሕ ማዕቀፍ ውስጥ ሙሀመድ በአመራርነትና በዳኝነት ደረጃቸው የወሰዷቸው እርምጃዎችና የሰጧቸው ውሳኔዎች ቀጥተኛ የሕግ ምንነትና የፈለግነት ዋጋ የላቸውም፡፡

ነቢያዊ ሱናሕ በሥነ-ቃላዊ የትውልድ ቅብብሎሽ ውስጥ ያለፈ ኢስላማዊ ትውፊት በመሆኑ፣ የሸሪዓ ምንጭ ተደርጎ ከመወሰዱ በፊት፣ የተላለፈበት ዘገባ (ሀዲስ) ተዓማኒነት በቅድሚያ ሊፈተሽ ይገባል፡፡ የሀዲስ ሊቃውንት ሁለት የምዘና

ዘዴዎችን ያዳበሩ ሲሆን፣ አንደኛው የዘገባ ሰንሰለትን የሚመለከት ነው፡፡ ይህ ጥንታዊ መሠረት ያለው፣ ከ2ኛዉ መቶ ዓ.ሒ ጀምሮ እየዳበረ የመጣ የምዘና ማዕቀፍ ሲሆን፣ ለኢስናድ የምዘና ማዕቀፍ አሚይና ደጋፊ የሆነ ሌላ የምዘና ማዕቀፍ በዘመነኛ የሀዲስ ምሁራን እየጎለበተ መጥቷል፤ ይኸውም የሀዲስ ፍሬ-ሐሳብ ጽኑእነትና ቅቡልነት የሚወሰንበት የይዘት *(መትን)* ምዘና ማዕቀፍ ነው፡፡ የአንድን ሀዲስ መልዕክት ቅቡልነት ለመመዘን አምስት መስፈርቶች ተለይተዋል፤ እነዚህም፣ ቁርአን፣ ምክንያታዊ *ሱናሕ*፣ አመክንዮኣዊ እሳቤ፣ የታወቀ ታሪካዊ እውነታ፣ እና የሚዛናዊነት መርሆ ናቸው፡፡ የትኛውም የሀዲስ ዘገባ፣ ምንም ያህል የኢስናድ ተዓማኒነት ቢኖረው፣ ከእነዚህ የይዘት መመዘኛዎች ከአንዱ ጋር የሚጣረስ ሆኖ ከተገኘ ቅቡልነት አይኖረውም፤ ስለሆነም ሸሪዓዊ አስረጂ ተደርጎ ሊቀርብ አይገባም የሚል ዘመነኛ እሳቤ በመስተጋባት ላይ ይገኛል፡፡

የኢፌዲሪ ሕገ-መንግሥትና አንቀጽ 34 (5) እና 78 (5)፣ እንዲሁም በሸሪዓ ፍ/ቤቶች ማጠናከሪያ አዋጅ አንቀጽ 6(1) መሠረት ያለውን ተፈጻሚነት መሠረት በማድረግ፣ ለትክክለኛ የሸሪዓ አረዳድና ትግባራ የሸሪዓ መሠረተ-ሐሳቦችን በቅጡ መገንዘብ እጅግ አስፈላጊ ነው፡፡ ከእነዚህ ርዕሰ-ጉዳዮች መካከል፣ ከቁርአን በመቀጠል፣ ሁለተኛ ምንጭ የሆነውን የሱናሕን ምንነትና አስረጂነት መረዳት አንዱ ነው፡፡ ይህ ጽኑፍ በሱናሕ የሕግ ገጽታዎች ላይ እና በሀዲስ የምዘና ሥርዓት ላይ መሠረታዊ ግንዛቤ እንደሚያስጨብጥ ተስፋ በማድረግ፣ ርዕሰ-ጥናቱ በአገርኛ ቋንቋ በይበልጥ ሊብራራና ሊተነተን የሚገባቸው በርካታ ርዕሰ-ጉዳዮች ያሉ በመሆኑ፣ በዚህ እና በሌሎች የሸሪዓ መሠረተ-ሐሳብ ርዕሶች ላይ ሃገራዊ እውነታዎችንና የግንዛቤ ደረጃን ታሳቢ ያደረገ ሥነ-ጽኑፍ መዳበር እንዳለበት በመጠቆም ጽኑፌን እቋጫለሁ፡፡

Advisory Opinion of the International Court of Justice on the Case of Chagos Archipelago: A Commentary

Anbesie Fura Gurmessa*

1. Introduction

On 25 February 2019, the International Court of Justice delivered an advisory opinion on *the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. The advisory opinion had been requested of the Court through a General Assembly Resolution in 2017. The advisory opinion has been among one of the most anticipated rulings that the Court had to deliver so far.[1] There could be multitude of reasons for such a high expectation, but one of the major reasons is the fact that it is two of the heavy weights in the UN (the US and the UK)that have been implicated in the request and the outcome could have far-reaching consequences for defense capabilities of the two states. The opinion could also determine the complete or otherwise nature of the decolonization of Mauritius at the time. It seemed to have lived up to the hype it has been expected to in passing the verdict that the decolonization of Mauritius was not legally complete. The Court was also not disappointing in analyzing the consequences of the detachment of Chagos Archipelago from Mauritius succinctly at the time of its independence.

The Court in reaching at the final opinion, however, has left some grey areas for the international community to ponder on. In this brief commentary, I will try to

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1 See generally, Monique Law, 'The Chagos Request: Does It Herald a Rejuvenation of the International Court of Justice's Advisory Function,'9 *Queen Mary Law Journal* (2018).

find some of the outstanding issues that lack necessary elaboration by the Court helping the international community to have a final determination with regard to these issues. With this purpose in view, I will limit my considerations to three issues that I consider warranting elaboration: the development of self-determination during the time of Mauritius` independence, the status of the right as principle of *erga omnes* and the consequences thereof, and finally the holding of the Court with regards to the free and genuine expression of the will of the people of Chagos Archipelago. After a brief introduction to the right to self-determination, the rest of the commentary will deal with those identified issues.

2. Brief Account of the Right to Self-Determination under International Law

The issue of people's right to self-determination has been the recurring question that the international community has to wrestle with over a long period of time.[2] Events that followed the two major world Wars, nonetheless, have significantly shaped the development of the right some way or another.[3] Particularly, the years just before the establishment of the UN and the drafting of the Charter thereof have brought about the big hope of decolonizing the majority of the people in the South who have been languishing under the colonial iron-fist.[4] It seemed, however, this high hope has been dashed since the UN Charter, despite its reference to the principle of self-determination under Article 1(2), did not bring an end to the pervasive presence of the colonial exercise even by the majority of its members in

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[2] See Lynn Berat, 'The Evolution of Self-Determination in International Law: South Africa, Namibia and the Case of Walvis Bay', 4 *Emory Int'l L. Rev*. 278, 282-83 (1990).

[3] Bereket Habte Selassie, 'Self-Determination in Principle and Practice: The Ethiopian-Eritrean Experience', 29 *Columbia Human Rights Law Review* (1997), p. 92. Bereket in support of the role of the First World War wrote that "self-determination achieved greater prominence and wider recognition as a political-philosophical concept following the First World War"

[4] See generally, Orfeas Chasapis Tassinis & Sarah M. H. Nouwen, 'The Consciousness of Duty Done'? British Attitudes Towards Self-Determination and the Case of Sudan', *The British Yearbook of International Law* (2019), pp. 1-56, Available online at www.bybil.oxfordjournals.org last visited on April 01, 2019.

the Security Council.[5] Understanding this fact, Hannum wrote that "self-determination was proclaimed in a manner that did not necessarily require the dismemberment of colonial empires; if it had included such an understanding, Britain, France, and Belgium simply would not have adhered to the Charter."[6]

In this context, it can be argued that the reference of the Charter to self-determination was only to be understood serving the purpose of protecting international peace and security, from where, based on the popularly held belief, the international community has suffered immensely.[7] Accordingly, the right to self-determination was sacrificed for the maintenance of international peace and the colonized territories were forced to remain under a slightly reformed mandate system.[8]The Charter, cognizant of the fact that not all the territories have been granted the right to self-determination and forcing these territories to remain under the administration of others, underlined that "members of the United Nations which have or assume responsibilities for the administration of territories…" among other duties, have the responsibility "to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses".[9] This misunderstanding created by the Charter of the UN has forced some commentators to claim that self-determination was more of a 'principle' than a right.[10]This is true because the Charter had not allowed the people under colonial power to be independent

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5 Hurst Hannum, 'The Right of Self-Determination in the Twenty-First Century', *55 Washington & Lee Law Review, (1998),* p. 775.

6 Ibid.

7 Trevor A Delaney, 'Article 2(7) of the United Nations Charter: Hindrance to the Self-Determination of Western Sahara and Eritrea' *4 Emory International Law Review* (1990), *p.* 413. In emphasizing this point Delaney wrote that "at that time the largest perceived threat was violence that transcended national boundaries."

8 Art. 73 of the UN Charter.

9 Ibid, Art. 73 (a).

10 *Supra* note *5,* p. 775.

effective immediately up on its adoption since the most important actors in the Charter adoption era were in control of a vast majority of territories based on colonial practice.

The issue of self-determination of people as a right seems to have emerged during the 1960s following the emergence of many states out of colony and starting to change and influence the composition of the members of the UN General Assembly.[11] This influence led to the adoption of two groundbreaking declarations at the Assembly level facilitating the decolonization of people subjugated by foreign colonial powers.[12] Besides, during the same period and in the form of recognizing the right, the UN had adopted two important and binding instruments that have enunciated self-determination as a right by stating that "all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[13] In spite of the concordant multifaceted issues relating to the content and the subject of the right to self-determination, these two instruments had addressed the right nature of the subject matter at a very late stage. For instance, the collective nature of the rights has only been determined through subsequent reflection and interpretation by important organs like the Human Rights Committees.[14]

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[11] *Supra* note *2,* pp. 283-4. Berat underlining the importance of this period wrote that "since World War II, the modern international legal order has evolved. The law of *decolonization has been a cornerstone of that order."*

[12]The Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV)), 1960, see also the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV), 1970.

[13] International Covenant on Civil and Political Rights, Dec. 19, 1966, Art. 1, 999 U.N.T.S. 171, International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, Art. 1, 993 U.N.T.S. 3.

[14] *Supra* note 5, p. 774. Hannum writes in this relation that "the first clarification is that self-determination is a right that belongs to collectivities known as peoples, not to individuals."

The international community, however, had not lost sight of the attendant complications that the right to self-determination of peoples could bring about.[15] That is why the statist approach of self-determination has been the dominant form of self-determination and in both the declarations I have referred to above, the General Assembly had to underline the limits of this right. The right never meant to extend to allowing elements within a state to establish their own independent entity, whatever the basis of their claim might be.[16] Moltchanova underscores this point stating that "international law understands the right to self-determination as the right to be free from external occupation and colonization. This understanding excludes the self-determination claims of many sub-state national groups."[17] This obviously is against the desire of various communities to have their own state for multiple reasons but most importantly because of the immense power that accompanies statehood.[18] Explaining the power that is attendant to the achievement of statehood, Batistich concludes that "traditionally, only statehood could confer international legal personality, and its accompanying rights and duties, upon any group."[19]

The international community seems to have relaxed a little bit with the adoption of the Declaration on the Indigenous people in 2007.[20] Yet, despite undeniable forward step in recognizing the right of people situated in a particular state, that has

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15 *Supra* note 3, p. 93. Bereket citing Robert Lansing- the US Secretary of State during the period of Woodrow Wilson wrote that "described self-determination as a dangerous idea because of his fear that its exercise would result in political fallout and bloodshed in empires where peace and stability formerly had been imposed by central control."

16 Anna Moltchanova, *National Self-Determination and Justice in Multinational States*, (Springer, 2009), p. 2.

17 Ibid.

18 Marija Batistich, 'The Right to Self-Determination and International Law' *7 Auckland University Law Review*, (1995), p. 1013.

19 Ibid.

20 *United Nations Declaration on the Rights of Indigenous Peoples Resolution 61/295, 2007* (UDRIP, hereinafter)

been hitherto exclusively reserved for the determination of the domestic state whatever rights that is available to those found in her jurisdiction,[21] the Declaration remained to be committed to the territorial integrity of the state when it comes to the right to be exercised outside of the jurisdiction of any particular state.[22]

What we can understand from the forgoing discussion is that the issue of self-determination despite its designation in terms of the right of the people, it was always the people's right within the context of the sovereign state which determines the exercise of this right. And its simplest and consensual understanding is in the form of decolonization, while the application of the right in other context still is very controversial.[23] The only difference with regard to the internal nature of self-determination is when the state blocks the exercise of meaningful internal right of certain group of people because of racial or political reasons like apartheid; in this case, the international community might intervene in assisting the exercise of this right. This fact has been distinctly recognized under both the Declarations. Accordingly, the territorial integrity and political independence of a sovereign state will be protected when the government represents all the people on equal footing - otherwise warranting intervention against racist governments like the one in the then South Africa.[24]

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21 *Supra* note *4*, p. 415. Delany argues that issues of internal self-determination were considered to be essentially internal matters following Article 2(7) of the Charter and as such "---the Charter concentrates on the problem of international war, ignoring the issues of civil war except in cases where domestic strife appears likely to develop significant international ramifications."

22 UDRIP, Art. 46 (1).

23 Frederic L. Kirgis, Jr., 'The Degrees of Self-Determination in the United Nations Era,' 88 *The American Journal of International Law, No. 2*, (1994), p. 305. Kirgis wrote on the consensus that "the one that virtually everybody now agrees it has is freedom from colonial domination, at least when the domination is of people of color in their homeland by other racial groups"

24 See for instance, *supra note 12*, stating among other things that "…thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."

3. The Chagos Archipelago Case Before the International Court of Justice

Before dealing with the issues that merit consideration, a brief history of the Chagos Archipelago and the case itself seems a logical place to start. On February 25, 2019, the International Court of Justice (ICJ) delivered an advisory opinion on *the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. The advisory opinion had been requested of the Court through a General Assembly Resolution in 2017. This case has come to existence because of the historical injustice perpetrated by the United Kingdom in its departure from Mauritius after administering the territory from 1814 through 1965.[25] As dependency of Mauritius, the Chagos Archipelago was administered by the United Kingdom after receiving it from France based on the Treaty of Paris of 1814 that ceded Mauritius and all its dependent territories to the former.[26] Following the 1960s wave of decolonization, when the United Kingdom was about to grant independence to Mauritius, the United States had shown an interest to establish a military base on Indian Ocean. That interest had manifested itself in the form of an agreement between the two - the final outcome of which being the detachment of Chagos Archipelago from Mauritius and the establishment of a new colony known as *the British Indian Ocean Territory* - under the disguised arrangement between the UK and Mauritius called the *Lancaster House Agreement*. The Agreement was concluded between the UK and the Premier of Mauritius when the UK was still the Administering Power.[27] The UK, in effect, was concluding the agreement with itself because the Premier of Mauritius and the other representatives presented at

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[25] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, ICJ Report, 2019,* para. , 28.

[26] Ibid, para., 27.

[27] Ibid, para., 171.

the ceremony did not have the actual power of engaging in the kind of decision they were undertaking.[28] Allen in explaining the predicament that the representatives' had been put in wrote that: "It [the United Kingdom] applied considerable pressure to obtain consent and the transaction was tied up with the decision to grant Mauritius its independence."[29] The 'Agreement', nonetheless, had allowed both the United Kingdom and the United States to administer certain territories on this part of the world cementing their military presence in the Archipelago.[30]

This obviously was against the interests of Mauritius and most importantly against the inhabitants of the Chagos Archipelago who had been forcefully removed from the Archipelago and never allowed to return home ever again.[31] Disregarding the plight of these people, the two states had established themselves militarily in the Archipelago: the US administering the biggest islands in the area named Diego Garcia, while the UK maintaining its control on the rest of the area~~s~~ after cooperatively removing all the dwellers.[32] In the identification process, Vine wrote that "given the general isolation and obscurity of Chagos and its people, the Navy

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28 Ibid, para., 172, the Courts writes in part that "---when the Council of Ministers agreed in principle to the detachment from Mauritius of the Chagos Archipelago, Mauritius was, as a colony, under the authority of the United Kingdom."

29 Stephen Allen, 'The Chagos Advisory Opinion and the Decolonization of Mauritius' *Insight*, April 15, 2019.https://www.asil.org/insights/volume/23/issue/2/chagos-advisory-opinion-and-decolonization-mauritius last visited on April 2, 2019.

30 *Supra* note 25, para., 36 "The talks between the United Kingdom and the United States resulted in the conclusion on 30 December 1966 of the "Agreement concerning the Availability for Defence Purposes of the British Indian Ocean Territory" and the conclusion of an Agreed Minute of the same date."

31 Ibid, para., 43 where the Court stated that "between 1967 and 1973, the entire population of the Chagos Archipelago was either prevented from returning or forcibly removed and prevented from returning by the United Kingdom. The main forcible removal of Diego Garcia's population took place in July and September 1971." See also Tom Frost; CRG Murray, 'The Chagos Islands Cases: The Empire Strikes Back', *66 Northern Ireland Legal Quarterly (2015)*, p. 265. the writers underscore that the remove inhabitants from identified islands was not only the practice many colonial powers "the expulsion of the Chagos islanders following the establishment of the BIOT as a defence colony does not of itself […] differentiate the UK from the contemporary practices of other major colonial powers"

32 David Vine, *Island of Shame: the Secret History of the U.S. Military Base on Diego Garcia*, (Princeton University Press, 2009), p. 61.

realized that few elsewhere would notice, let alone object."[33] Contrary to the expectation of both the US and the UK, this infamous arrangement was noticed and objected to by the UN, OAU and the Mauritius Prime Minister on various occasions.[34]

The discontent with the way the decolonization of Mauritius was handled had led to the adoption of series of Resolutions by the UN General Assembly and other regional Organizations like the OAU, since the decision had conspicuously violated the self-determination rights of the peoples of Mauritius and the Chagossians in particular.[35] The UK, by not fully returning all the territories of Mauritius, had also breached its obligation of completely decolonizing the territory.[36] The development of this conundrum on various fronts had culminated in the concern of the General Assembly that had eventually decided for the request of an advisory opinion from the International Court of Justice through Resolution A/RES/71/292, by referring to Article 65 of the ICJ Statute. The Assembly in a very carefully drafted resolution has sought the opinion of the Court on the following two questions.

a) "Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law including obligations reflected in General Assembly resolutions 1514 (XV) of

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33 Ibid.

34 See *supra* note *25*, paras., 34, 35 and 45, 46.

35 See the General Assembly Resolution 2232 (XXI*)*, para., 4, which reiterated in part that "any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of colonial Territories and the establishment of military bases and installations in these Territories is incompatible with the purposes and principles of the Charter of the United Nations and of General Assembly resolution 1514 (XV)".

36 See *supra* note *25*, para.,177.

14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?"

b) "What are the consequences under international law, including obligations reflected in the above mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?"

4. Observations with regard to the Case

Before dealing with the issues that merit consideration, it is important to briefly identify the answers that are provided by the Court to the questions set by the Assembly. As a common practice, parties to the Case and other interested members of the UN, had come up with different points of contention with regard to whether the Court should entertain the matter or not. And the Court, following its rules of procedure, determined first whether it had the jurisdiction and if so, whether it was is incumbent up on it to address the questions. The Court determined that the questions were legal in character, it had jurisdiction to address them.[37] On the usefulness of the decision to the General Assembly, some participants had vehemently argued against the rendering of the opinion based on its relevance for the performance of the function of the Assembly. The Court in this regard held that it is its consistent jurisprudence to leave to the Assembly itself to determine if the opinion is of importance to it and concluded that "…Court cannot decline to answer the questions posed to it by the General Assembly in resolution 71/292 on the ground that its opinion would not assist the General Assembly in the performance of its functions."[38] After satisfying itself of the existence of

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[37] Ibid, paras., 58 and 62.
[38] Ibid, paras., 75-78.

jurisdiction and the need to deliver the opinion, the Court turned to addressing the substantive questions formulated by the Assembly.

With regard to the first question, the Court determined that by the time of the Mauritius decolonization and during "…its detachment from Mauritius in 1965, the Chagos Archipelago was clearly an integral part of that non-self-governing territory."[39] The Court underscored unequivocally that "…as a result of the Chagos Archipelago's unlawful detachment and its incorporation into a new colony, known as the BIOT, the process of decolonization of Mauritius was not lawfully completed when Mauritius acceded to independence in 1968."[40] It was the opinion of the Court that by forcefully and unlawfully detaching the Chagos Archipelago from Mauritius, the United Kingdom has violated the self-determination rights of the residents of the Island and as such, the decolonization process could not have been completed in that form.

When dealing with the second question, the legal consequences of the continued administration of the Chagos Archipelago by the United Kingdom, the Court has decided that "the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State,"[41] and that "the United Kingdom is under an obligation to bring an end to its administration of the Chagos Archipelago as rapidly as possible, thereby enabling Mauritius to complete the decolonization of its territory in a manner consistent with the right of peoples to self-determination."[42] The Court had also pronounced that "since respect for the right to self-determination is an obligation

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39 Ibid, para., 170.
40 Ibid, para., 174.
41 Ibid, para., 177.
42 Ibid, para., 178.

erga omnes, all States have a legal interest in protecting that right."[43]Finally, the Court underlined the importance of bringing to an end the continued administration of the United Kingdom following the modalities that would be adopted by the General Assembly as appropriate, and that "…all Member States must co-operate with the United Nations to put those modalities into effect."[44]

After summarizing the holding of the Court with regard to the two questions, let's turn to the comments. As far as the Case is concerned, there are three issues that can be considered warranting identification and discussion**:** first, the Court`s decision with regard to the right of self-determination becoming customary international law; second, the Court`s holding with regard to the activities of the United Kingdom violating the right of the Chagossian people to determine their fate in the process of *free and genuine* engagement; and finally, the decision that the right to self-determination is an *erga omnes* obligation. That being said, we shall scrutinize those identified issues one-by-one as follows.

4.1.The Holding of the Courts Concerning the Customary Nature of Self-determination

No one doubts the importance of the right to self-determination particularly when considering the role it has played with regard to the decolonization of people. However, the holding of the Court that designates the right to self-determination as part of customary international law at the time of independence is a bit generalized at best and misgiving to the international community that had been eager to know the process through which the Court had reached at the decision. The development of the right is very doubtful especially when we evaluate it by adopting the *inter-temporal* interpretation. This is because as has been tried to be shown in the foregoing sections, the right to self-determination as an actual right of people was

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43 Ibid, para., 180.
44 Ibid.

only in the process of recognition during the 1960s following those major Declarations of the UN General Assembly, specifically Resolution 1514 of 1960. Before that, the adoption of self-determination was only as a principle rather than as a concretized right people can claim.[45]

The staunchest supporter of the fact that self-determination had been established during the period under consideration was Rosalyn Higgins arguing that the political organs of the UN have the law-making ability particularly when the Assembly adopts its resolution through an overwhelming majority vote.[46] The writer maintained that "the resolutions and declarations of international organs, repeated with sufficient frequency and bearing the characteristic of *opinio juris*, can establish a general practice recognized as legal custom."[47] Moreover, Higgins contended that the establishment of self-determination had been evidenced by multiple state practice and *opinio juris* and as such the argument that it is still a principle is unfounded.[48] The Court, by citing a series of UN General Assembly resolutions and deciding that the right of self-determination was part of customary international law, seems to have followed the same line of argument. Therefore, we need to dig into the validity of this position based on the material available at the time of the independence of Mauritius.

While Rosalyn Higgins argued that the principle had already achieved the status of right even during that period, the majority of contemporaneous publications refuted that standing. Berman, for instance, wrote in controverting this assertion that "the existence of a legal right of self-determination continues to be hotly disputed, from

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45 *Supra* note *5*, p. 775.

46 See generally, Rosalyn Higgins, 'The United Nations and Lawmaking: The Political Organs,' 64 *The American Journal of International Law,* No. 4,(1970).

47 Ibid, p. 42.

48 Rosalyn Higgins, *The Development of International Law by the Political Organs of the United Nations,* (Oxford University Press, 1963), pp. 101-102.

logical, jurisprudential and practical perspectives."[49] In outlining the confusion that existed on the status of the right in the time frame being considered, Chowdhury also argued that "there has been a prolonged controversy on the issue: some consider that the principle now enjoys the status of a legal right with corresponding obligations while others attribute only a moral status to the principle without any binding legal effect."[50] Yet, the strongest challenge came from Leo Gross considering the matter in a contemporaneous fashion.[51] Gross argued that the basic foundation of the argument that self-determination has been elevated to the status of right is based on the declaration of the UN General Assembly and he contradicted the idea that the UN organs have the law-making power.[52] Emphasizing this he wrote that "…in any event, the existence of the alleged right of self-determination in the legal sense will depend upon the authority or competence of the organs of the United Nations, particularly of the General Assembly, to create such a right or obligation."[53] In rebutting the assertion on the power of Assembly, he argued that the Assembly does not have the law-making power and as such no right of self-determination can be deduced from the General Assembly resolutions. According to Gross, therefore, "no such right is conferred upon the Assembly in the charter and no such right can be derived from any relevant document."[54]

The second basis for claiming the establishment of self-determination is the wide spread practice. In controverting the idea that the right to self-determination has been established on the basis of state practice following the staggering number of

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49 Nathaniel Berman, 'Sovereignty in Abeyance: Self-Determination and International Law', 7 *Wisconsin International Law Journal,* (1988), p. 54.

50 Subrata Roy Chowdhury, 'The Status and Norms of Self-determination in Contemporary International Law' 24 *Netherlands International Law Review,* (1977), p. 72.

51 See generally, Leo Gross, 'The Right of Self-Determination in International Law', in *Essays on International Law and Organization,* (Springer, Dordrecht, 1984), p. 257-275.

52 Ibid.

53 Ibid, p. 258.

54 Ibid.

decolonization, many writers claimed that customary international law cannot be established from this practice.[55] For the purpose of justifying this position, the writers refer to the jurisprudence of the International Court of Justice itself. To ascertain the existence of the principle of customary law, the International Court of Justice in the *Asylum* Case had underscored that the party that relies on custom "…must prove that the rule invoked by it is in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State."[56]

Contrary to this understanding, Gross argued that "…the practice of decolonization is a perfect illustration of a usage dictated by political expediency or necessity or sheer convenience; moreover, *it is neither constant nor uniform*" (Emphasis added).[57] What the foregoing discussion shows is, despite the fact that the development of the right of self-determination cannot be refuted as it operates in the current understanding of international law; its status has never been so obvious, particularly during the period where the independence of Mauritius was achieved. In concluding the controversy surrounding the development or otherwise of the right, Rupert Emerson wrote that "where so substantial a body of doubt and

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55 Rupert Emerson, 'Self-Determination' 65 *The American Journal of International Law*, No. 3, (1971), p. 462. In this regard, Emerson wrote that "the general climate of opinion has certainly turned sharply against colonialism, and the administering powers agree on the need for an orderly end of the colonial relationship, on their own terms; but that all dependent peoples have here and now the *right to determine their own destinies is denied by the states which remain in charge of them"* (emphasis added), see also *supra* note 49, p. 264.

56 *Colombian-Peruvian Asylum Case,* Judgment of November 20th 1950: I.C. J. Reports 1950, p. 266.

57 *Supra* note 51, p. 264.

opposition exists, including those major powers and those still possessed of colonies, *the existence of a rule of international law cannot lightly be assumed.*"[58]

The recognition of self-determination as actual right of people - the whole people had to wait more specifically for the adoption of the two major Covenants, which only came in 1966.[59] Regarding the role of Covenants, Hannum argued that "one of the great contributions of the United Nations to international law was in promoting the shift from proclaiming a principle of self-determination in the Charter to recognizing a right of self-determination some twenty years later."[60] Writing on the effect of the adoption of these two covenants, Green underlined that "…great caution is necessary when approaching these Covenants, for by the end of 1969 they were still signed by only a minority of the Members of the United Nations…"[61] This is because, even in the era of these important documents, the most important components of the right - people or nations - have not been given precise meaning allowing the right to have a specific subject of application.[62] Fisch capitalizing on this subject writes that "neither 'people' in the 'normal' sense nor 'indigenous people' are defined in international law. Therefore, no one can authoritatively say what people are and thus who can claim a right of self-determination."[63] Hence, in the absence of the essential conditions of precisely defining the people or the territories the right will apply to, it is at least difficult to talk about the right nature of self-determination in the time frame we are concerned with.[64]

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58 *Supra* note 55, p. 463.
59 ICCPR and ICESCR, *supra* note 13.
60 *Supra* note 5, p. 775.
61 Leslie C. Green 'Self-Determination and Settlement of the Arab-Israeli Conflict' *65 The American Journal of International Law, No.04*, (1971), *p*. 46.
62 *Supra* note 55, p. 462.
63 Jorg Fisch, *The Right of Self-Determination of Peoples: The Domestication of an Illusion (Human Rights in History)* (Cambridge University Press, 2015), p. 32.
64 Ibid.

In support of this conclusion on the coming of the role of these Covenants in a later stage, Green underscored that their importance is undeniable. He added that"…despite the statements of politicians or of partisan commentators, there is still no right of self-determination in positive international law; although since 1966 there may be one *in nascendi."*[65] According to Green, therefore, it is actually true that the right to self-determination is in the making through a binding document, but we talk about it in the form of a positive right and it cannot apply retroactively for those whose rights had been prejudiced in the preceding period.[66] Fisch in approaching the starting point of the right argued that it was not an enforceable right at the beginning, but "at best, one could speak of a vague principle grounded in natural law, but not in positive law. In the first years after the advent of the expression "right of self-determination" this did not change in any way."[67]

So, the judgment although it is an important contribution to the stock of our knowledge, the Court did not give us the necessary detail with regard to the timing of the development of this right into customary international law. This seems quite rushed compared to the approach of the Court with regard to the appreciation of the establishment of customary international law in other cases.[68] In the North Sea Continental Shelf Case where the Court had the occasion to extensively deal with the establishment of customary international law; it considered not only the practices of the international organizations like the UN, but the subsequent practice by states and the attendant *opinio juris.*[69] *Opinio juris* is the most difficult element

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65 *Supra* note 61, p. 46.
66 Ibid.
67 *Supra note 63, p.* 191.
68 Consider for instance, *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, p. 3*. (paras., 60-80)
69 Ibid.

to prove argued Higgins while writing that "the *opinio juris* problem is perhaps paramount."[70] The time for development was also being given some relevance in establishing the rules of customary international law. In the same case, the Court was so careful in arriving at the establishment of customary international law because it regarded the reason states engage in certain behavior can only be *"speculative*" (emphasis added.)[71]

For *opinio juris* to have validity and application, the Court in the above case reasoned that "the States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not in itself enough."[72] The Court should have used the same standard and established the existence at the particular time of both the practice and *opinio juris* with regards to the right to self-determination. This is because, as we have seen above, although there was a wide spread practice of decolonization in many parts of the world, this practice has not established the necessary obligatory element that is mandatory to render a principle right in the context we are dealing with. Emerson, writing in the same context concluded that "…the colonial powers and a number of states supporting them have not accepted the basic proposition that all colonialism is illegitimate and not the corollary proposition that the colonial people are entitled as speedy as possible to the exercise of the right of self-determination...."[73] That is why it has been concluded that the Court's decision in this regard "…*was too brief, too rushed, and insufficiently developed in terms of legal analysis*" (Emphasis mine).[74]

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70 *Supra* note 46, p. 39.
71 *Supra* note 68, para., 76.
72 Ibid, para., 77.
73 *Supra* note 55, p. 461.
74 Milena Sterio, ICJ Advisory Opinion in the Chagos Archipelago Case: Self-Determination Re-Examined? (2019), https://ilg2.org/2019/03/06/icj-advisory-opinion-in-the-chagos-archipelago-case-self-determination-re-examined/ last accessed on March 20, 2019.

4.2. The Holding of the Courts with regard to the *Erga Omnes* Nature of the Right to Self-Determination

The second point with regard to the Case is the consequence of the holding that the right to self-determination includes an *erga omnes* obligation. Since the *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain) of 1970 Case,* the Court had a number of opportunities to go back to the nature of the obligation *erga omnes*, based on those references to the obligation, currently the nature of the obligation seems to be clearer somehow.[75] This does not mean that all the contours of the obligation is crystal clear, but at least what the Court means is that the obligation is owed to the entire international community and the international community "…[*has] a legal interest in protecting that right.*"[76] To employ the wording of the Court in analyzing the right to self-determination, "in view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*."[77]

Substantively applied to the case at hand, the obligation means two things. Following the line of argument that we have set above, not only Mauritius but all the international community has the right to demand for the respect of the obligation because the violation of this right affects the interests of the whole international community. And as such, the international community through the use of various modalities - diplomatic/legal - can demand the perpetration that is taking place against the right is stopped. According to *Institut de droit international,*

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[75] See for instance, *East Timor (Portugal v. Australia), Judgment, I. C.J. Reports 1995, p. 90,* para., 29, see also *Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility,* Judgment, I.C.J. Reports 2006, p. 6, para., 64

[76] See *supra* note *25,* para., 180, see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, I. C. J. Reports 2004, p. 136, para., 155.

[77] See *Barcelona Traction, Light and Power Company, Limited,* Judgment, I.C.J. Reports 1970, p. 3, para., 33.

obligation *erga omnes* is "an obligation under general international law that a State owes in any given case to the international community, in view of its common values and its concern for compliance, so that a breach of that obligation enables all States to take action."[78] Because of this nature of the obligation, like any other obligation demanded under general international law, except that it is made by the international community, even if they are not specially affected, can demand cessation of the internationally wrongful act and performance of the obligation of reparation in the interest of the State, entity or individual which is specially affected by the breach.[79]

The second possible consequence of considering the right to self-determination to be part of obligation of *erga omnes* is that, by employing the legal technique of *a contrario* reading, the state that is violating the right to self-determination of a certain people should understand and act accordingly that it is not only violating the right of this specific group of people, but also the right of the international community as a whole. In this regard, Allen writes that "…states are under a duty not to knowingly assist the United Kingdom in the perpetuation of its internationally wrongful act. If they do so, they run the risk of being found complicit in this breach of international law."[80] To conclude, the Advisory Opinion of the Court had succinctly laid down that both the United Kingdom and the United States, by detaching the territory from Mauritius and establishing military bases, had violated not only the right of Chagossian people but also the right of the international Community.

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[78] Institut de droit international, 'Obligations and Rights *Erga Omnes* in International Law', Krakow Session, *Annuaire de l'Institut de droit international* (2005), Article 1. http://www.idi-iil.org/app/uploads/2017/06/2005_kra_01_en.pdf last visited on 10 March 2019.

[79] Ibid, Art. 2.

[80] *Supra* note *29*.

4.3.The Holding of the Courts with regard to the *'Free and Genuine Consent'*

The last and the other important issue we need to discuss with the regard to the Advisory Opinion of the Court is its holding on the way the United Kingdom had detached the Island from the main land of Mauritius. The Court, in paragraph 160 of the Judgment underscores that the detachment process had violated the right of the Chagossian people since it was not "…based on *the freely expressed and genuine will of the people of the territory* concerned, is contrary to the right to self-determination."(Emphasis added). This assertion of the Court raises a number of normative and procedural questions. What does free and genuine consent mean?

To start with, as has been clearly identified in the preceding part of this commentary, the right of self-determination has never been designed in such a way that a group of people can claim any right outside the whole population. Fisch underlines that "only peoples have this right - neither other collectives, neither tribes, populations, minorities, religious communities, clans, parties, nor other groups have this right."[81] This was quite restricted be it in the form of meaningful internal self-determination, or for some part of the society to have its own destiny decided by itself for various reasons. This was particularly quite seriously limited when the demand for self-determination was made as an outcome of colonial border creation, which was the most bizarre endeavor that the international community had to endure. The second scenario was very carefully limited in all the Declarations and other Resolutions of the UN General Assembly for it was considered to lead to "…the partial or total disruption of the national unity and the territorial integrity of a country…."[82] So, how did the Court move from the

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[81] *Supra* note *63,* p. 31.
[82] Resolution 1514, para., 6.

overarching statist approach to self-determination, where the government was authorized on the decisions of independence in a colonial context to the assertion of the free and genuine consent of the people?

The consequence of the holding of the Court seems to suggest that the Chagossian People could have expressed their free and genuine consent to be separated from Mauritius and decide either to remain under the control of the United Kingdom or by the same process; they could have decided to be an independent territory establishing a state. Obviously, the contemporaneous understating of the right to self-determination, reading from the interest of the government of Mauritius and the general international community, did not support this conclusion. And for that matter, people's right to freely and genuinely express the right to self-determination is still very restrictively applicable in the current arrangement of the international community where we have an enormous development of human rights, particularly when the right is considered to have repercussion to international peace and security.[83] Accordingly, the fate of the Chagossian People could have only been determined with that of the people in Mauritius as a whole, otherwise the expression of the consent of this people alone could lead to secession if they favored independence from Mauritius and that is against the position of the UN Charter and all its Declarations that have a very high regard for territorial integrity and sovereignty of states.[84] If this is the position of international law as it

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[83] Patrick Thornberry, 'The Principle of Self-determination,' in Vaughan Lowe and Colin Warbrick (eds.), *The United Nations and the Principles of International Law: Essays in memory of Michael Akehurst* (Taylor & Francis e-Library, 2002), p. 181. Thornberry asserts that the text of the UN Declarations refer to "…the whole people', so it seems that self-determination benefits the people of the State as a unified group."

[84] Milena Sterio, 'Self-Determination and Secession under International Law: The New Framework' 21 *ILSA Journal of International and Comparative Law,* (2015), p. 299. Sterio wrote in this regard that "secession inherently undermines the territorial integrity of the mother state, and international law has for centuries espoused the principles of state sovereignty and territorial integrity. Embracing the right of secession would jeopardize the above-mentioned principles and could, as critics assert, potentially lead to global chaos caused by an incessant redrawing of boundaries"

stands today, the question as to which free and genuine expression of the consent of people the Court was referring to remains to be unanswered.

The second issue that we need to consider in this regard is the procedural consideration of the 'free and genuine' expression of consent. The free and genuine expression of consent can only be realized in the form of holding a referendum and was it the opinion of the Court that the United Kingdom should have conducted referendum to ascertain the consent of the concerned community?[85] This is because it is determined that the government of Mauritius could not do the process since the independence of the country only came late in 1968, and the Court rightly rejected the position of the United Kingdom that asserts that they had an agreement-*the Lancaster House Agreement*- with the government of Mauritius, for the state was still under the colony of the former and the latter government lacked representative capacity.[86] So, how is it that the Court envisaged the expression of free and genuine consent? This question still remains to be unanswered as well.

Before finalizing this part, it is obvious that the Mauritius government could not express the consent of the people in that situation because; based on the conclusion we have reached above, the government itself was under colonial power and the government of the United Kingdom applied a lot of pressure. Consents expressed under this circumstance, in addition to the correct appreciation of the Court that has rejected the existence of any form of agreement, the arrangement cannot also stand the test of the Vienna Convention on the Law of Treaty Article 52.[87] Since the

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85 See *Supra* note 25, para., 167. "The General Assembly also monitors the means by which the free and genuine will of the people…"

86 Ibid, para., 172.

87 Vienna Convention on the Law of Treaties (Done at Vienna on 23 May 1969, entered into force on 27 January 1980.) United Nations, Treaty Series, vol. 1155, p. 331. The provision states that "a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."

acceptance of the detachment was predicated up on the decolonization of the rest of the state if agreement is secured with regard to the Chagos Island, the agreement can be considered to have been secured based on the threat or use of force in violation of the principle of international law. This is because; it is the understanding of the UN and the international community at large that the decolonization process of any non-self-governing territory was supposed to be conducted without the expectation of any prior conditions.

5. Concluding Remarks

The Chagos Archipelago Advisory Opinion has received a lot of attention from different corners of the international community because of various reasons. Principally, the concern was to know how the International Court of Justice would react to the question which looked like the answer to which could settle a bilateral relationship between the UK and Mauritius. The Court, however, had systematically avoided the complication that might be ensued from the consideration of this issue by deciding that the issue of decolonization fits squarely into the function of the General Assembly. As such, the Assembly was considered to have the legitimate authority to request for the opinion. That is why the Court had delivered the Opinion answering both the questions addressed to it, without directly meddling in the bilateral disputes between the two states. In the process, nevertheless, some of the most important issues have remained to be outstanding. In this commentary, attempt has been made to shed some lights on those issues like the timing of the development of the principle of self-determination into an actual right the people can claim in customary international law. The Court had modestly contended that the right was part of customary law by the time of the independence of Mauritius, but an otherwise opinion can be held considering the available literature from the renowned writers of the time. In this regard, it can be said that the Court has left the international community wondering about the exact time of the development of self-determination into claimable right.

With respect to the *erga omnes* nature of the right, the Court could have told us what the right or the obligation *erga omnes* entails for the international community as a whole or for those that have been specially affected, like Mauritius. Finally, the holding of the Court in relation to the right of the Chagossian people to express their free and genuine consent seems to be detached from the reality how self-determination was envisaged and applied. This is because international law has never recognized the right of some part of the people of a state to have an independent voice in deciding their fate in exclusivity without considering the whole of the territory or the people of that particular territory. This has been documented in various UN declarations and other practices of the international community. If this is allowed, it would open potential for secessionist movements and that would affect the preciously guarded territorial integrity and sovereignty of states, leading to the redrawing of international borders and inviting chaos in the process. Considered from this point view, the decision of the Court on this point remained to be a mystery that the international community has to grapple with for some time in the future.

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***Medemer* in a Land of Extremes-Ethiopia**

Brief Reflections on the Book

Daniel Behailu*

1. Introduction

Premier Abiy Ahmed of Ethiopia has written a book in Amharic entitled '*medemer'* meaning synergy.[1] I had established some of the opinions included in this review before the publication of the book as the idea was floating long before the publication of the book. However, the publication of the book forced me to review some of my earlier perceptions in light of the contents of the book. The book has sixteen chapters and touches upon practically everything there is to talk about Ethiopian politics, economics and societal fabrics. It elucidates the nature of '*medemer'* philosophy and its hurdles. The book starts with a confession of the author's humble beginnings and his evolutionary route to the notion of *medemer*. The author admits that the concept is not a flash of genius rather has developed overtime as age and experiences increase. He has proposed the philosophy as a solution and practical guide to developing a shared understanding on wide-array of issues such as history, culture, tolerance, and economics. He aspires to abate extremism in Ethiopia via this philosophy called *Medemer*.

Ethiopia is anything but politically stable and predictable. There has been a great rift among many political actors for the last several decades. The division is so

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1 Abiy Ahmed, *Medemer*, (Addis Ababa, 2019).

huge that the nation is always at war with itself. Ethiopian elites are divided along ethnic lines, occasionally across religious orientations, on perceptions of history, on group identity and most importantly, on political views. Tolerance and inclusive politics is not their virtue. The current political leaders; however, are trying to mend the broken politics. The new premier of Ethiopia, Abiy Ahmed, came up with the Amharic catchword "*medemer*" which means synergy, or to be included or to be together, or to be summed up towards collective greatness. The notion is highly relevant at this juncture of Ethiopian political, social and economic development. Why this notion is a buzzword (*labeled as a philosophy in the book written by the Prime Minister*) of the day is questioned by everyone. Obviously, the notion has attracted a huge attention in Ethiopia and abroad. In a nation seemingly at war with itself, the notion is seen as a salvation from the deepening ethno linguistic divides and ensuing turbulences. The problem of '*othering'* i.e. *you do not belong here* has become quite common place, annoying and disturbing many and even costing lives and property of citizens. Ethnic based eviction (internal displacement) is a routine news and Ethiopia is number one in the world with many people (close to three million at one peak moment) internally displaced.

2. *Medemer* as Antidote for Ills of a Divided Society

As a country of minorities and ethnic mosaic; Ethiopia is paying a huge price for being a mismanaged multiethnic and multilingual nation. The country is simply at war with itself. The question is; should it be? Being a plural society by itself is neither a curse nor a blessing; rather it could be a curse if mismanaged and a blessing if properly dealt with. Ethiopia's society is not only plural but also a divided one. Over 80 ethnic groups with about the same number of languages reside in the country. In addition, the society could be aptly described as ranging from typical urban society to pre-historic like society in terms of livelihood. Its geography also ranges *from Ras Dashen* (the second highest peak in Africa) to *Dalol* (the lowest depression in the world). In terms of political opinions,

Ethiopians hold diverse views ranging from extreme nationalism to deep ethnocentrism and so is religious orientation ranging from conservativism to atheism. Yet again, the societal divide on political views is more frightening; as it could be called a war of all against all. It is chaotic, formless; unpredictable and threatening of civil war. The politics is invested with ignorance, political profiteers and ethnic conflict promoters. *Medemer* as a philosophy proposes an end to extremisms, hate politics and tries to balance the good and the bad in history towards a better tomorrow. Abiy wrote under chapter three of the book, "*medemer"* is neither to agonize over the past nor to glorify it and stuck in the past, it is about learning from the past to make our future better. Our past is full of controversies and it has been taken to extremes with the advent of socialism in Ethiopia.

Struggle against class-based exploitation and questions of 'national/ethnic liberation' came to the forefront during the student movement of the 1960s. Since then and even before, militant groups had fought a fierce civil war to 'bring about equality of nationalities' and they claimed they did after the fall of the military government in 1991. However, ethnic based liberation movements did not cease with the fall of the D*erg* regime. The liberation movement was about installing democracy and ensuring equality among nations (ethno linguistic and religious groups) in Ethiopia. By its very nature, liberation movement must stop after the sought after liberation is attained.

On the contrary, the ethnic based liberation movements are all too many and still voicing the original complaints. Still some groups contend that there is no equality in Ethiopia. TPLF (Tigray People Liberation Front) as one among the ethnic based liberation fronts; although, it took over the state apparatus; its *modes operandi* is that it is first among equals. The other groups felt sidelined and still subjugated.

Thus, the question of liberation continues. What is the true essence of these questions of national liberation? Where is it to end? Is there any way of dealing with it? What are the answers for the queries in the philosophy of *medemer*?

3. Ethiopia and Ethnic Federalism via *Medemer*

Federalism is a system of government which accommodates differences and is ideal for pluralistic societies. Ethiopia's Federalism is grounded on language and ethnicity, as a result of which, the *nations, nationalities and peoples* of Ethiopia make its core foundations. This federal bargain has created an inextricable link between these ethno linguistic groups and territory whereby an ethnic group or a combination of ethnic groups own territory to the exclusion of others.[2] This has broadly resulted in the formation of two categories of Ethiopians. On the one hand are, those who belong to ethnic groups that are officially accorded ownership of a certain territory with all the privileges including political supremacy. On the other hand, there are those citizens who have long lived or recently migrated but are supposedly found outside of their mother states. The second ranking citizens are, therefore, not only without any form of entitlement in the territory of their residence, but also subjected to political and economic marginalization. Besides, even within an ethnic group composed of many clans, there are clans without political favor that are marginalized and subjugated.

Constitutionally speaking, the formation of the nine regions is largely accomplished by according territorial autonomy to an ethnic group or a combination of selected ethnic groups – language serving as the (sole) standard criterion. Following this design by the FDRE constitution, the regions have further apportioned their regional territory to those considered the legal and political

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[2] See Article 47 of the FDRE Constitution along with Article 52 of the same.

owners of sub-regional territories by using their newly available subnational constitutional autonomy – though in differing formats to one another.

The SNNPRS (southern nation, nationalities and peoples of regional state) is further divided into dozens of ethnic zones and special districts (*liyu woredas);* Gambella and Benshangul-Gumuz have established nationality administrations for the five respective indigenous nationalities as owners of the respective regions; Amhara and, to an extent, the Afar regions having reserved the lion's share of the regional territory's ownership to the respective dominant nationalities of Amhara and Afar, have allocated portions of their territories to select recognized indigenous minorities;[3] Somali and Oromia have jealously guarded the ownership of their regional territory thereby exclusively extending the privileges to the dominant ethnic groups of Oromo and Somali alone; despite the presence of other ethnic groups.[4] Tigray region, although it constitutionally follows a similar approach, has de facto permitted some sort of territorial autonomy to the recognized indigenous minorities of *Irob* and *Kunama*; and the city state of *Harar*, which is entirely located within Oromia region, is founded for the Harari nationality and shares its regional territory with ethnic Oromos.

4. Ethiopia and Land '*Owners'*: Is Eviction a Result of Constitutional Design?

One thing we cannot find in the book written by the PM is a clear stand on the land question that the nation has been paying a huge price for. *Medemer* is against divisions not diversity, but the land issue is not only dividing but also a source of

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[3] For instance Amhara region recognizes *Oromo, Agew, Argoba and Kemant* identities and grants them territorial autonomy at the sub-regional levels. The same is true for Afar which recognizes the *Argoba* identity.

[4] Oromia hosts one of the largest non-native communities accounting for 12 percent or close to 2 million peoples.

mega scale conflicts. Primarily, the issue of land access needs to be seen in light of the provisions of the constitution. The FDRE constitution rules over the overarching land policy of the nation. Article 40 (3) of the constitution is the center of the land policy in Ethiopia which reads:

> *The right to ownership of rural and urban land, as well as of all-natural resources, is exclusively vested in the State and in the peoples of Ethiopia. Land is a* ***common property of*** *the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange.*

Land ownership, in Ethiopia, is vested by virtue of the constitution in the state and the people of Ethiopia. In short, public land ownership is the essence of the land policy. However, the more problematic proviso of this provision reads, '… [l]and is a common property of the Nations, Nationalities and Peoples of Ethiopia'. Thus, Nations, Nationalities and Peoples (NNPs) of Ethiopia are common owners of land; the *proviso* is quite in tandem with the importation of articles 39, 47 and 52 of the constitution. The provision also needs to be understood in light of the power of land administration vested in the regions.[5] As outlined earlier, the regions are formed more or less by the NNPs. Now the question is what is the essence of land administration? Can anyone have access to land use rights wherever in Ethiopia by virtue of being a citizen alone? *Medemer* suggests an answer in the positive, but the practice could be otherwise.

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[5] Article 52 of the FDRE constitution provides for powers and functions of states and sub-four of the same article states that states have the power to administer land and other natural resources in accordance with Federal laws; accordingly, the federal land laws were enacted which guides the states to administrator land. However, the problem with the federal land laws are that they do not specifically rule on the essence of the land administration matters except ruling over land use rights. Indeed, the power is conferred to the regions but what are the bounds and limits of this land administration rights so given needs a powerful guide as it is being misused.

The FDRE constitution under Article 40 (4) states that, “”Ethiopian peasants have the right to obtain land without payment and the protection against eviction from their possession.” The expression ‘*Ethiopian peasants’* seems to portray that all peasants anywhere in the nation can have land for livelihood as long as they choose to live by farming. Yet again, this provision is tamed by Article 52, which confers land administration power to the regions that are formed by NNPs. The controlling phrase in here is ‘land administration’, which ultimately decides on access issues.

Land administration as per the definition of FAO[6] is “the way in which the rules of land tenure are applied and made operational”. The definition further suggests that one ought to be in a position to understand the rules and meanings of land tenure. And, land tenure in turn defines the relationship between people and their land. Thus, land tenure rules, “define how access is granted to rights to use, control, and transfer land, as well as associated responsibilities and restraints.”[7] In simple terms, land tenure systems determine who can use what resources, for how long, and under what conditions. The key functions of land administration are recording rights in land, controlling development and use of that land, determining the value of land to support taxation and revenue collection, and information management. The process of land administration, therefore, involves three key attributes of land – its tenure, value and use.[8] The modern notion of land admnsitratuion has four pillars: land tenure, land valuation, land use and land developmnet.

The core of the matter is that access is defined by NNPs (ethnic groups) via the land administration power conferred onto them. Hence, there is no wonder that

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6 FAO Land Tenure Studies 3, *Land tenure and Rural Development*, (Rome, 2002), p. 12.

7 Daniel Behailu, *Transfer of Land Rights in Ethiopia: Towards Sustainable Policy Framework*, (Eleven International Publishing, The Hague, 2014).

8 P.F. Dale and J. .P. McLaughlin, *Land Administration*, (Oxford University Press, reprinted 2003), p. 1.

they either refuse to give land access to outsiders or that they evict those who had prior access and do not belong to their group as per Artcile 39 of the FDRE constitution. Therefore, the core issue with regard to eviction and ethnic divides has to do withthe new federalism and the way it is implemented via land access and ownership. The matter has been exteremely exacerbated by land adniminstration power and the importance attached to land by culture.*Medmer* has to clearly spell out its policy guide on land matters. In fact, the policy deadlock is a result of extermism, yet *medemer*shys away from extermism. Thus, *medemer* should opt for multiple tenure systems including private ownership of land where it makes economic sense and that the market transendseven legal prohibitions.

5. *Medemer* and the Multifaceted Challenges of Ethiopia

Medemer is almost a cliché these days after the word is brought to the forefront of Ethiopian politics a year and half ago by the current premier. He has brought the concept as the backdrop of ethnic divides in Ethiopia. The concept makes full sense if one recalls that the TPLF led government used a strategy of divide and rule. The new premier is a pan-Africanist, let alone being a nationalist. He articulated in his book that coming together in all fronts that we can do collectively will establish us as a strong country. *Medemer* is coming together, synergy, collective security and a way of ensuring collective prosperity.

5.1. Medemer and Ideology

Medemer does not subscribe to any specific ideology, be it socialism, liberalism or social democracy. Yet, it tilts to social democracy harmonized with our indigenous knowledge and heritages. *Medemer* as a political ideology is a politics of compromises and it is about avoiding conservatism, ethnocentrism and rigidity. Ethnocentrism is being low and being a liability even to the group which one wants to protect or advance its interest. By being ethnocentric, you would definitely work

for hate group against your own group. *Medemer* is a transcending concept of being human and bringing humanity before ethnicity and religion.

Medemer abhors conflicts rooted in differences of ideology and wants to shy away from them. Rather, *Medemer* is a political philosophy that cherishes unity with all our differences, as it is rooted in self-understanding and nature. The philosophy acclaims that everything makes sense when seen in its holistic nature. It is rooted in the idea that the sum is bigger than its parts, taking the inspiration from nature where the sun, soil, and rain come together to give life. It contends that united pluralistic society is a nature force and sustainable. United we stand and divided we fall as the saying goes; *medemer* is a concept of *unity for diversity*. However, to be united does not mean to be one; it is about bringing together our collective forces for collective security, prosperity, cherishing diversity and power.

5.2. *Medemer* and Moral Values

Medemer is a moral culpability; it is being responsible and accountable to one's profession, family, society and country. It abhors hedonism and advocates being considerate, and giving than taking. Right without duty is nonsense; so is also knowledge without ethics and responsibility. *Medemer* is about going beyond one's interest and being considerate of collective interests. It is about discharging one's responsibilities and analyzing the same towards collective benefits. It is neither individualizing nor eliminative of the individual. It pays attention to individual rights without undermining collective rights. It encourages the private sector, and at the same time supports active state intervention in the economy where the private sector appears weak or unwilling to delve in. It does not subscribe to any ideology, but does not exclude learning from others experiences. It is rooted in homegrown potentials, so it pays homage to social capitals and tries to build on them than belittling anything '*ours'*. It tries to bring sense to history, and identity,

encourages neutrality in foreign relations and focuses on cooperation instead of confrontation.

5.3. Medemer and Rule of Law

Medemer works for the rule of law. It is being amenable to the rules and regulations of the country at large and working for change through peaceful and constructive ways when faults are observed. Respect for rule of law means paying homage to order and peace. It preaches the need for establishment of strong institutions, but also recognizes that institutions alone cannot bring solutions for all social ills. Moral sets and consensus are also key elements of society to maintain rule of law. Peace is seen as societal dividend which results from law and order. Law and order need to be respected by all concerned, especially by those who can traverse it and get away with it. In other words, *Medemer* is beyond power and is a moral quandary.

Medemer is siding with justice and working to bring to justice those who damage societal fabrics Ethiopians have inherited from their ancestors be it religious, traditional or any other. Accordingly, justice is trust and trust is a main pillar of the state and society. If societal trust is breached; no government can effectively function. Justice is a societal blood with which everyone becomes alive and lets the state and its machineries live. *Medemer* does not believe in exclusions and suppression rather it is for inclusion and justice.

Medemer is being tolerant to varying voices and; views whether they are ethnical, religious, political or cultural. It is always good to be tolerant of others (and other voices). Societal strength comes not from being the same but from being different and yet be able to forge consensus on basic and important matters of common concern. However, the tolerance cannot be stretched to the level that threatens societal unity and the common country. Justice is at the core of *medemer*, and rule of law is its embodiment.

5.4. Medemer and Civic Nationalism (Patriotism)

Medemer acknowledges that there is a huge difference between patriotism and ethnic nationalism. It concedes that Ethiopian nationalism has an unfinished project, yet believes the two could be harmonized. *Medemer* aspires to forge alliance between these two nationalisms via reconciliation and consensus. *Medemer* is being alive and being concerned about issues and concerns of the society and the country at large. One thing, the concept of *medemer* must achieve is avoiding detachedness and allowing active participations in the national affair. When society is unconcerned and detached from political life, then there comes a huge trouble. Citizens need to be active, informed and engaged. *Medemer* abhors reductionists, imposters and hedonists; it curses corruption and encourages the society to refrain from praising white-collar thieves; and it actually preaches cultural change concerning corruption and many others such as, the culture of negative attitudes towards work.

Medemer is a blend of being an Ethiopian and a civic *nationalist* in a constructive way. It is about loving one's country and respecting the historical achievements of the national heroes and heroines of the past. Paying homage to our past and learning from it is quite essential to take a positive step towards the future. Moreover, taking a step towards the future is possible when we can understand our situations within continental and global realties. Thus, love for one's country is *sin quo non* to forge a strong and prosperous nation. Yet again, historical imbalances and misdeeds need to be acknowledged as well because our past is neither all rosy nor all bad. It is in such a way that, the future is envisioned as a major focus by harmonizing the past and the preset for the future. *Medemer* values respect for women and children. It preaches the need for respecting mothers and enabling them to bring up disciplined and ethical children who would effectively take over

the nation in the future. Children also need to be taken care of, need to be well educated and they need to be well acquainted with their history and society. *Medemer* is being a hardworking citizen and a pride of one's nation not a liability to own country. Being lazy and ignorant is being a liability to the society. A productive citizen is one who resonates with the society and is a contributing one.

5.5. Medemer and Corruption.

Medemer takes a strong position on corruption and wants to change public perception against it. *Medemer* is being compassionate, loving and responsible and shying away from anything that is destructive including corrupting one's soul and body. It is a life to be lived by the scripture. It is about giving rather than taking; it is about love instead of hatred; it is about sharing and living a life of bounty by sharing; and it is magnanimity that abhors hedonism.

6. Conclusion

Medmer is about balancing and being in tune with nature and societal fabrics. It is not borrowing everything that is foreign, yet learning from foreign experiences is not excluded either. It focuses on inward looking, looking for local potentials and capabilities. *Medemer* could only make sense if one has lived a turbulent political life of Ethiopians. Ethiopia has a plural society which is at war with itself yet with enduring synergy as well. But currently, it has never been divided so much that citizens fear dismemberment of the nation. Thus, the youth and the capable are always on the run away from the country or busy fighting each other and waging protests. Others are fighting a bitter ethnic based segregation and discriminations. The new PM came to power at the background of these chaotic political and economic situations. His philosophy of *medemer* is to try to bring an end to this chaos and try to forge national consensus. The question is, would we allow and help him to do so. The key issue is whether we can help ourselves so he (and his team) would help us. He is now a Nobel Peace Laureate and that helps the

infamous name of the country, attached to famine and war. Could some of our elites stop being a dividing factor? Can they promise to forge consensus and forgive the past? Can they build bridges instead of sowing seeds of divisions?

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Book Review

Derek Hall, Philip Hirsch, and Tania Murray Li, *Powers of Exclusion: Land Dilemmas in Southeast Asia*, (Singapore: National University of Singapore Press, 2011. ISBN: 978-9971-69-541-5)

Yidneckachew Ayele Zikargie*

The book is a work on the political ecology of Southeast Asian countries, which explores the relationship between people and land while they were squeezed between a desire of change and continuity. The countries had to deal with a policy desire of deagrarianization and the continuation of agriculture as an important source of rural people's livelihood. The main theme of the book coiled in exclusion of land access and the command of power behind the exclusion. The book does not only offer a critical perspective in broadening the understanding of exclusion, and power dynamics in access to land but also unpacks the exclusion process. I believe its theoretical frames and insights could initiate a sturdy interest to comprehend the process of exclusion of access to land in other developing countries like Ethiopia.

In defining exclusion, the book brought a different perspective where it is inevitable in any circumstances. Exclusion is defined not in a mere opposite term 'inclusion' but '*access'* and framed as a method of restricting people from 'some kind of socially acknowledged and supported claims or rights'.[1] For instance, the writers claim that poor farmers need entitlements that restrict others from grabbing their farmlands for a sustainable farming and land use. With this broad perspective,

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[1] Hall, Derek R., Philip Hirsch, and Tania Murray Li *Powers of Exclusion: Land Dilemmas in Southeast Asia, Challenges of the Agrarian Transition in Southeast Asia* (Singapore: NUS Press, 2011), p. 8.

they depict exclusion by its *double edge* character that produces not only an anticipated outcome but also a series of other unwanted effects. In effect, it generates an intricate problem in policy debates, capitalism dilemma, ethno-territorial identity claims, and land administration cases.

In addition, the book presents exclusion from land as a systemic phenomenon well regulated in power relations based on an interdependent interaction between *regulation*, *force*, *market*, and *legitimacy*. Regulation refers to formal and informal rules that offer incentives to encourage or discourage access and exclusion. It sets rules and conditions to access and use land. In addition, force is noted as the soul of regulation that inflicts harm on others or any form of persuasive treatment to materialize it. The market value of land determines access, where the state intervention to regulate market end in rewarding group. Legitimacy is taken as a matter of appeal to an audience's moral value based on paid price, ethno-territorial claims, environmental concern, better policy choice and the like. By taking these four concepts as analytical tools, the writers unfold six processes of exclusion~~s~~ in Southeast Asia and how *double edge* arises in each process.

The first is the process of land formalization and allocation in Thailand, Laos and the Philippines using regulatory power 'to define who shall hold what land under what condition'[2]in support of market economy manifested *licensed exclusion.* Efforts such as *land to the tiller*, *poor people need land*, and *poverty reduction* promoted the power of legitimacy. The regulatory power gave force to execute the formalization and allocation of land.

The second is the process of an *ambient exclusion* drawn from the cases in Sulawesi of Indonesia, Cambodia and Laos. It is uneven social effect as a result of the desire to reduce people's impact on the environment, to govern 'where and how

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[2] Ibid, p. 55.

people live and farm',[3]legitimized by common good cause, coupled with regulatory power to enforce large-scale conservation, and use of force to evict people and terminate crops. The attribution of neo-liberal market value for environmental goods and involvement of corporate entities as a market-based conservation program enabled the power of market.

Third, *volatile exclusion*, is analyzed based on the booms in cash crops such as oil palm, farmed shrimp, and coffee in Malaysia, Thailand, and Vietnam due to rising price, new technologies and state policy that pushed people to seek 'more individualized claims to land'. Market as a determinant power in crop boom, state's regulatory power to zone and reallocate land for boom crop and seeking legitimacy based on an appeal to modernize and develop remote areas describe the intricate factors of power in volatile exclusion.

The fourth, *post-agrarian exclusions*, is the result of the expansion of industry, service, tourism and infrastructure and the conversion of agricultural land to other use. On one hand, the post-agrarian land use enabled various actors to mobilize power, and on the other, it forced smallholder tenants to abandon their claims to land. Here, the case studies reveal the fusion of regulatory, market, force, and legitimacy powers and trajectories of double edge exclusion.

The fifth, *intimate exclusions*, is a manifestation of exclusion made by intimate, kin, and co-villagers due to unequal land access, resulting in accumulation and formation of agrarian classes. The study shows an intermingled power of market and legitimization in the process of smallholders' exclusions of neighbors and kin where market is stimulated by offering good price. In this case, legitimacy depends on competition for growth, due to individual merit and diligence.

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[3] Ibid, p. 83.

The last one, *counter-exclusions*, is rooted in the legitimization of power as part of collective mobilization to struggle and restore ethno-territory based on the *right to livelihood, social justice, territorial belonging* etc. It presents a dilemma that 'people want the right to exclude, but do not want to be excluded'[4].

While I was reading this book, the Ethiopian land dilemma and power dynamics were rushing in my thoughts. Most of the processes of land exclusion, power issues and their dilemma discussed are relevant to the Ethiopian case. In Ethiopia, the issues of access to land or exclusion manifest the phenomenon of an interdependent interaction between power of *regulation, force, market, and legitimacy*. The last three successive regimes set their own rules of land access and conditions of land use that are intended to empower the preferred class or section or ethnic groups. Force has been their weapon to materialize their desires. With the discourse of developmentalism, private and state led investments,—as well as commercial agricultures intensified the land market that inflicted exclusion of access to land on many smallholder farms. The ethno-territorial and social justice claims had been the moral or legitimacy power for the counter claims in today's Ethiopian politics. They all present the *double edge* character of the power of exclusion, where the dilemma of the right to exclude, but do not want to be excluded is openly manifested. Moreover, the closer assessment of the land politics in Ethiopian history replicates the above listed six types of exclusion.

However, the book is highly grounded in Southeast Asian context that may not allow a complete reliance and translation in to the context of other developing countries. It shows the age of neo-liberalism in presenting the land dilemma within private property domain. In addition, its analysis of capitalism and the potentials of market economy to generate exclusion is tilted towards a Marxist approach. For instance, the influence of views from Marx and Lenin on agrarian class formation

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[4] Ibid, p. 188.

due to accumulation and aggression impede the analysis of *intimate exclusion* to see the power dynamics within the inter-generational land transfer mechanisms such as succession or donation of land in a family line. This may allow them to contribute on tools of land access or exclusion between generations and the intricate of social values, gender norms, and rules to affect power in the process. Nonetheless, it presents a useful conceptual tool and broader perspective of exclusion and power dynamics.

HUJL Editorial Guidelines

Language of Publication

- The Journal accepts contributions in English or Amharic.
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Originality of Contributions

All contributions in the Journal shall be original works of the author.

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- *Feature article*: from 4000 to 12000 words
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    1.1. Second Heading
        1.1.1. Third Heading

Conclusion

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Use italics for the title, and put the publication information in roman within parentheses. Use commas to prevent words running together, as may happen with author and titles, multiple authors, and publisher and place of publication. Where there are series titles or edition numbers, give the publication information in the order shown in the example.

Author, *Title in Italics* (series title, edition, publisher, place, date) page.

John Baker, *An Introduction to English Legal History* (4th ed., Butterworths, London, 2002) pp. 419–21.

Names of Ethiopian authors should appear as follows: author's given (first) name and his/her father's name without changing the order. Subsequent, references should be limited to given names.

Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*, (2nd ed., Wolf Legal Publishers, Nijmegen, 2007), p. 235.

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Carolyn Penfold, 'Nazis, Porn and Politics: Asserting Control over Internet Content' [2001] 2 JILT<http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2001_2/penfold> accessed on 27 April 2005.

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Labour Proclamation No. 377/2003, Art. 3.

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Civil Code of Ethiopia, 1960, Art. 1678 (1), Proc. No. 165/1960, *Fed. Neg. Gaz*. (Extraordinary issue), Year 19, No. 2.

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Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III) (UDHR) Art. 5.

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Art. 10.

• ***Resolutions***

Security Council Resolution 1368 (2001), at WWW http://daccessdds.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?Open Eleme nt> (accessed on 10 August 2008).

• ***Cases***

Corfu Channel Case (UK v Albania) 1949 ICJ rep 14 at 35, Nicaragua case (US v Nicaragua) (1986) ICJ rep 14 at 106

የኢትዮጵያ መድን ድርጅት vs. **ጊታሁን ሀይሉ፤ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት፤መ.ቁ.** 14057**፤**1998 **ዓ.ም.**

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Give the author, title, type of thesis, university and date of completion and pinpoint:

> Helen Toner, ‘Modernising Partnership Rights in EC Family Reunification Law’ (PhD thesis, University of Oxford, 2003).

• ***Periodicals***

Mehari Taddele, ‘Brain Drain and its Adverse Impact on the Achievement of MDGs and Poverty Reduction’, The Reporter, (Feb. 16, 2008), p.5.

• ***Interview***

Interview with Ato Abraham Dagne, President of Dorebafano *Woreda*, Sidama Zone, on 22 January 2014.

• ***Internet Source***

Derartu Abeba, *Higher Education in Ethiopia*, <http://www.ethiopar.net/type/English.htm> accessed on April 1, 2009

• ***Productions***

Child Soldier, Director Niel Abramson, Starring Danny Glover, Winghead Pictures, 2010.

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