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INCREASING CONSTITUTIONAL COMPLAINTS IN ETHIOPIA: EXPLORING THE CHALLENGES

STRENGTHENING SHAREHOLDERS CONTROL OF COMPANIES IN ETHIOPIA: MINIMIZING AGENCY COST

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Examining Suitability of the Draft Ethiopian Personal Property Security Rights' Law to the Local Context

Dr. Asress Adimi Gikay[♣]

Abstract

In what could be regarded as a defining moment in secured transactions law reform in Ethiopia, a new legal regime governing security interests has been drafted under the aegis of the International Finance Corporation (IFC), evidently based on Article 9 of the Uniform Commercial Code (UCC) of US or legal systems (instruments) influenced by it. Pending the approval of the draft law by the Ethiopian parliament, this article examines whether it is suitable to the Ethiopian local context. It argues that while the anatomy of the draft law and its general approach are consistent to the theme of enhancing access to credit which dictates secured transactions law reform across the globe, it suffers from shortcomings that must be addressed. First, the draft law mandates electronic collateral registration system in a country without the necessary perquisites/ for the successful operation of electronic registration system. Second, by adopting the Personal Property Security Right (PPSR) approach, the draft law unnecessarily excludes security rights in immovable property from its umbrella and defeats the purpose of comprehensive secured transactions law reform, i.e., implementing a legal regime that covers all types of assets, parties, and transactions. Third, the draft law has alarming terminological problems resulting from drafter(s) misapprehension of or insensitivity to the existing legal regime. Fourth, the unclarity of the provisions of the draft law on floating security interest could potentially lead to costly court litigation. Fifth, in departure from UCC Article 9 or recently reformed secured transactions laws, the draft law entitles the creditor to take possession of the collateral upon the debtor's default, without putting in place the necessary tools to protect consumer debtors from potential abusive conducts of creditors. By empowering the Collateral Registry Office to order the police to assist the creditor in repossessing the collateral, it potentially subjects the debtor to extra-judicial deprivation of property right, with no judicial control mechanism. Based on

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comparative analysis of the key provisions and policies of UCC Article 9, the Draft Ethiopian PPSRs' law along with the laws of other civil law jurisdictions to a limited extent, this article concludes that the draft law is ill-suited to the Ethiopian local context. The paper suggests that its approval by the parliament be delayed for further public scrutiny and debate among the relevant stakeholders. It proffers policy recommendations for revision.

***Key Words**:* Ethiopia, Security Interests, Functional Approach, Personal Property Security Right, Movable Assets, Self-Help Repossession, Local Context

Introduction

In Ethiopia, the time for secured transactions law reform has been long overdue. The reason is simple. The main body of the Ethiopian secured transactions law incorporated in the Civil Code and the Commercial Code of 1960, supplemented by subsequent piecemeal revisions through various statutes has been patently economically inefficient.[1]

In my paper published in September 2017, calling for secured transactions law reform in Ethiopia, I laid out the reasons for undertaking comprehensive reform.[2] I argued, *among others,* that Ethiopia should adopt the unitary theory and functional approach to security interest.[3] But I also cautioned that there are risks in implementing reforms that do not take into account the local context of the reforming country. In particular I argued that "the participation of scholars in shaping secured transactions law reform is crucial in the view of the trend that reforms based on international model laws promote one-size-fits-all models that ignore the local contexts of the reforming countries."[4] I provided an anecdote from Malawi, an African country with substantial technological and infrastructural

[1] Asress Adimi Gikay, 'Rethinking Ethiopian Secured Transactions Law through Comparative Perspective: Lessons from the Uniform Commercial Code of the US (2017), 11(1) Mizan Law Review 153-197.
[2] Ibid 165-175.
[3] Ibid 175-182.
[4] Ibid 162.

impediments, where a reform was implemented in 2013 based on the UNICTRAL Legislative Guide on Secured Transactions Law that mandates electronic collateral registry.[5] I pointed out that the mandating of exclusively electronic registry in Malawi, a decision that even countries with advanced technology do not take overnight was mistaken.[6] In Malawi, the majority of the people have no access to electricity and the internet, infrastructures that are necessary for the proper functioning of electronic collateral registry.[7] I noted that Ethiopia can draw lessons from that and avoid similar mistakes through open and participatory debate on the potential reform effort.

The Draft Ethiopian PPSRs' law, crafted under the umbrella of the IFC clearly ignores the local context of Ethiopia, as it appears to be an attempt to implement the one-size-fits-all model in Ethiopia. The lack of transparency in the drafting process was a clear indication of the fact that the draft law was indeed dictated by and written for the self-interest of its patron with the interest of the broader stakeholders and the draft law suitability to the local context of Ethiopia being secondary. One of the letters to which the draft law was annexed, sent out by the National Bank of Ethiopia was addressed only to the Ethiopian Bankers Association, Ethiopian Lawyers Association and the Association of Ethiopian Micro-Finance Institutions, seeking comments from these stakeholders.[8] The draft law was shared with the author by an informant under condition of anonymity. Considering that the draft law is designed mostly based on foreign law, fundamentally changing the approach to law of security interests in Ethiopia, it is

[5] *See* The Personal Property Security Act of Malawi (2013), Section 49.

[6] Ontario had operated with hybrid filing system for decades until it implements exclusively electronic filing in 2007. In the US where electronic filing is utilized most efficiently, paper based filing is still allowed in the majority of states. *See* Marek Dubovec, UCC Article 9 Registration System for Latin America (2013), 28(1) Arizona Journal of *International & Comparative Law* 117, 123.

[7] Of over 16 Million total population of the country, in the year 2016, only about a million people have access to the internet. <http://www.internetlivestats.com/internet-users/malawi/>. Accessed on 30 January 2018.

[8] Ref. No.: FlS/ 22/2017. <https://i-libertarianrealist.blogspot.it/2018/05/the-draft-ethiopian-law-of-security_14.html.> Accessed 15 May 2018.

questionable whether the aforementioned stakeholders were/are in the position to provide meaningful feedback. Hence, it is legitimate to ask as to why a reform that impacts businesses and consumers across Ethiopia has not been subjected to the participation and scrutiny of the public at large? Isn't transparency a value the World Bank (of which the IFC is the investment wing) stands behind? Is there a hidden motive for it? Or was it the Ethiopian government that advised the crafters that one of the important branches of commercial law be enacted without the participation of the people in the process? On what basis were the stakeholders who had access to the draft law chosen? For instance, shouldn't all academic institutions, in particular law schools have had access to the draft law?

The IFC has supported secured transactions law reforms across the globe.[9] The IFC both as reform advocate and an investor in sectors such as leasing and hotel industries promotes creditor-friendly secured transactions laws.[10] It deploys experts that promote its short-term and long-term interests with benefit of the legal reform to the broader stakeholders being secondary. An interested observer only needs to ask why the World Bank is helping African governments in reforming their laws. Self-interest is the only explanation for that. Nevertheless, the IFC also utilizes a limited transparency to create the impression of transparency in the eyes of the public and legitimacy for the reform. The Ethiopian draft secured transactions law was public only to the extent that certain stakeholders have/had access to it. This limited transparency allows the IFC to claim later that the successful legal reform it assisted was transparent and every stakeholder had the

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[9] The IFC backed the Ghanaian Lenders and Borrower Act of 2009, the 2011 Secured Transactions Law of Romania, the 2013 Secured Transactions Law of Malawi, the 2014 Borrowers and Lenders Act of Sierra Leone, the 2015 Law of Registration of Security Interests in Movable Property by Banks and Other Financial Institutions of Nigeria.

[10] *See* Tigrai Online IFC, the investment arm of the World Bank is interested to finance Ethiopia Djibouti Fuel Pipeline Project(Tigrai Online, Nov. 15, 2016), <http://www.tigraionline.com/articles/ethio-djibouti-pipeline16.html> Accessed 28 January, 2018. *See* also IFC, IFC Makes its 100th Hotel Investment in Africa- Project will Improve Business Infrastructure, General Jobs, IFC, November 10, 2011,<http://www.ifc.org/wps/wcm/connect/news_ext_content/ifc_external_corporate_site/news+and+events/news/hotelinvafrica>. Accessed 28 January 2018.

opportunity to influence the draft law. But reform is largely secretive as far as experts who could raise meaningful questions are concerned. This ensures that legal provisions and policies that are not well-thought through are not questioned during the reform process. Hence, the secretive nature of the reform process run by the IFC and its loyal consultants is deliberate.

This article identifies five building blocks of the draft Ethiopian PPSRs' law and scrutinizes if those building blocks sufficiently respond to the needs of the stakeholders that should benefit from the reform, including companies, financial institutions, small businesses, and consumers.[11] In particular, it examines the suitability of electronic collateral registration system, the personal property security rights approach, terminological problems, the potential legal uncertainty associated with floating security interest and the unfitness of self-help repossession as enshrined in the draft law to the Ethiopian context.

1. Electronic Collateral Registration

Though the Ethiopian draft PPSRs' law does not specifically state so, all of its provisions governing collateral registry and registration foresee electronic registration, with no parallel paper-based registration system. One of the recitals of the draft law underlines that establishing single comprehensive electronic registration regime for secured transactions in movable property to determine priority rights among competing claimants is necessary. All of its provisions are dedicated to the details on how to file the registration including creating a user account at the collateral registry.[12] There is no single provision dedicated to paper-based registration in the draft law. It can therefore be concluded that the draft law

[11] The approach adopted in this paper is inspired by Tajti's five building blocks of UCC Art. 9. *See* Tibor Tajti (2002), Comparative Secured Transactions Law- Harmonization of Law of Security Interests in the United States of America, Canada, England, Germany, and Hungary, Budapest, Akademiai Kiado, p. 141.

[12] Art. 23(1) (a) of the draft law states that "any person may submit a notice to the Collateral Registry, if that person has established a user account with the Registry."

is intended to implement exclusive electronic collateral registry. It is to be noted that, in Malawi, the 2013 Personal Property Security Act mandates exclusively collateral registry by stating that "there shall be personal property security registry which shall be electronic."[13] Though the wordings of the relevant provisions of the Draft Ethiopian PPSRS' law are not as clear as its Malawian counterpart, considering that the lead consultant for the two counties is the same person,[14] and given the lack of any rule on paper-based registration under the draft law, it is fair to state that the draft law is based the policy of implementing electronic registration.

This policy choice is out of touch with the reality in Ethiopia. According to a 2017 World Bank data, Ethiopia ranks third in the world in terms of electricity access deficit,[15] with 71 Million people with no access to electricity based on 2014 statistics.[16] Although the situation has improved today, it has not changed radically. According to African Infrastructure Country Diagnosis report (2010), "the coverage of Information Communication Technologies in Ethiopia is the lowest in Africa."[17] As of 2010:

> *GSM signals cover barely 10 percent of the population, compared with 48 percent for the low-income country benchmark; and the GSM subscription rate is only 1.6 percent of the population in Ethiopia, compared with 15.1 for the low-income country benchmark. Furthermore, whereas the typical African country adds 1.7 percent of the population to the GSM subscriber base per year, the figure for Ethiopia is only 0.1 percent. Internet bandwidth in Ethiopia is only 0.3 megabits per second per capita,*

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[13] The Personal Property Security Act of Malawi (2013) Section 49.
[14] < http://natlaw.com/staff/dr-marek-dubovec/> Accessed 14 May 2018.
[15] International Bank for Reconstruction and Development / The World Bank, 'State of Electricity Access Report'(The World Bank 2017) XIV
[16] Ibid 18.
17 Vivien Foster and Elvira Morella 'Ethiopia's Infrastructure: A Continental Perspective' (The International Bank for Reconstruction and Development / The World Bank 2010) 15.

> *compared with 5.8 megabits per second per capita for the low-income country benchmark.*[18]

The above data reveals that, as of 2010 more than 50 percent of the Ethiopian population living in rural areas does not have access to internet, a situation that has not substantially changed today. Even where there is access to the internet, there is limited internet bandwidth which means that a slow connection could render the operation of office works relying on the internet difficult, sometimes with intolerable degrees of blackouts for hours or even days. Electronic filing has obvious advantages in that creditors carrying out public notification of security interests do not need to go through the burdensome administrative procedures to comply with the traditional method of authenticated registration of security agreements. There is no need to wait in a long queue in front of the notary. Thousands of secured creditors could file registration at the same time, if the infrastructure works well. The same is true for searching in the collateral registry by interested third parties. Nonetheless, in a country where electricity is meagerly accessible to the majority of the people and where less than 50 % of the population has access to the internet, implementing electronic filing system is not a viable solution. Even if internet use grows above 50%, users who have the required internet bandwidth to file online registration would be limited. Certainly, rural Ethiopians would not benefit from the system in the near future. Hence, the drafting group clearly implemented a solution that does not reflect the local context of Ethiopia.

In order to ensure the access of the broader stakeholder to the collateral registry, certain countries adopted hybrid system i.e. electronic and paper based registration systems. Ontario (Canada) had operated with hybrid filing system for decades until it implements exclusively electronic filing in 2007.[19] In the United States

18 Ibid.
19 Marek Dubovec (n 6) 123.

where electronic filing is utilized efficiently, paper-based filing is still allowed in the majority of the states[20] including in New York.[21] When the countries that are the sources of the idea have not implemented it overnight, it is foolish for Ethiopia to implement exclusively electronic filing. Hence, the registration regime of the draft law must be revised to permit hybrid system.

2. The Personal Property Security Right Approach

The Draft Ethiopian PPSRs' law applies to "to all rights in movable property created by agreement that secure payment or performance of an obligation."[22] It does not apply to security rights in immovable properties. Hence, it governs what is commonly referred to in a generic term as Personal Property Security Rights. But why does the draft law aimed bringing about comprehensive reform exclude security rights in immovable properties? From the experience of other jurisdictions, two explanations can be given for the adoption of comprehensive law of PPSRs. These are historical accident and commercial necessity.

2.1. Historical Accident

To understand the historical reason for the divide between security rights in movable property and Security rights in real property, one has to go back to UCC Article. 9 which has clearly influenced the drat Ethiopian PPSRs' law. UCC Article 9 does not apply to security interests in real estate; it applies to security interests in personal property and fixtures.[23] Real estate mortgage being outside its scope is governed by state laws.[24]

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20 Ibid.
[21] <https://www.dos.ny.gov/corps/fees_ucc.html> Accessed 14 May 2018.
[22]The Draft Ethiopian PPSRs' law Art. 3(1).
23 UCC, Section 9-109(d) (11)
24 Andra Ghent, 'the Historical Origin of America's Real Estate laws' (Research Institute for Housing America 2012) 1.

UCC Article 9 excludes real estate mortgage from its ambit because state mortgage laws follow three different theories of mortgage- the title theory, the lien theory[25] and the intermediary theory,[26] making it difficult to provide uniform law on the subject matter. Under the title theory, the title to the property is transferred to the lender and the lender remains the legal owner of the property for the duration of the mortgage while in the lien theory, the mortgagor (debtor) is the owner for the duration of the mortgage.[27] In the states where the intermediary theory applies, the mortgagor remains the owner until default on the mortgage.[28]

The fact that mortgage of immovables is excluded from UCC Article 9 and is subjected to state real estate mortgage laws is considered to create problems in the US legal system. First, dealers of real estate do not have complete information as to the existence of security interests in fixtures from real estate records and as such have to bear the cost associated with checking various records including registrations made under UCC Article 9.[29] Second, both by real estate claimants and chattel-type secured parties need to be cautious of the classification of the collateral and may need to make double or triple registrations.[30] Hence, the relegation of real estate mortgage law from UCC Article 9 which has been dictated by differences in state laws is proven to have undesirable consequences. But the system could not be fixed due to the irreconcilability of the existing differences among state laws.

The explanation for the differences in state real estate laws in the US is historical. Most of the older states in the US adopted the title theory of real estate mortgage developed in England in order to circumvent usury law while younger states

25 Ibid 7.
[26] <https://www.law.cornell.edu/wex/mortgage>. Accessed 30 January 2018.
27 Andra Ghent (n 24) p. 7.
[28] <https://www.law.cornell.edu/wex/mortgage> Accessed 30 January 2018.
29 Coogan, Peter F. and Clovis, Albert L. 'The Uniform Commercial Code and Real Estate Law: Problems for Both the Real Estate Lawyer and the Chattel Security Lawyer' (1963), 38(4) Indiana Law Journal 536, 573.
30 Ibid.

adopted the lien theory as the usury laws were relaxed during the 19th century making it unnecessary to adopt the title theory.[31] If the primary reason real estate mortgage is not covered by UCC Article 9 is the different approaches adopted by state laws which in turn is explained by the historical origin of state mortgage laws, it can be argued that for countries where real estate mortgage law is uniform nationwide, there is no need to exclude it from secured transactions law reform.

In Ethiopia, the Civil Code governs mortgage of immovable properties nationwide.[32] States do not have the power to enact laws governing real estate mortgage (the constitutional basis for this can be debated but realistically speaking that is irrelevant to the topic at hand). Therefore, from historical perspective, there is no reason to have separate laws governing security interests in movable assets and in immovable assets in Ethiopia.

2.2. Commercial Necessity

The second reason the personal property security right approach is trending is that in many legal systems, despite the fact that movable assets represent a large portion of assets of businesses,[33] secured transactions laws tend to have no comprehensive legal regime for allowing debtors to access credit using movable assets as collateral.[34] Financial institutions tend to settle with real estate mortgage as it is simpler to enforce mortgage rights as real estate value tends to increase over time and real estates are readily available for foreclosure. Hence, recent reforms are aimed at facilitating the use of movable assets as collaterals to counter their underutilization. But this does not mean that security rights in immovable assets

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[31] Ibid 15 - 19. Since mortgage transactions in which the debtor pays high interest rates were regarded as usurious, the title theory enabled the lender to get the title of the debtor's property and structure the transactions in such a manner that the debtor pays rents on the property instead of interest rate and this enabled the parties avoid violating usury law.

[32] The Ethiopian Civil Code Art. 3041 et seq.

[33] Heywood Fleisig, et al, Reforming *Collateral Laws to Expand Access to Credit* (The World Bank 2006) 7.

[34] Ibid ix.

should be disregarded or ignored. It simply means that a stronger legal framework for the use of movable assets including incorporeals assets should be put in place. In other words, creating a comprehensive legal framework that governs the use of movable assets as collateral is necessary. But it does not necessarily call for separating movable assets from immovable assets. In Ethiopia, certainly the context does not justify such a separation.

2.3. The Effect of Personal Property Security Right Approach in Ethiopia

Real estate mortgage plays a key role in financing in Ethiopia. The legal regime governing mortgage has been in place since 1960. It is as obsolete as the rest of the Ethiopian secured transactions law. There is neither historical, nor commercial reason to separate security rights in movable and immovable assets in Ethiopia. The only reason the draft Ethiopian PPSRs' law excludes security rights in immovable assets from its umbrella is that the law is based on the template model of the IFC. The lead consultant who also engaged in secured transactions law reform in Malawi and dozens of other African countries is promoting nearly copy-pasting approach.[35]

The problem in implementing personal property security law for Ethiopia is the differential treatment of secured creditors with interests in movable assets on the one hand and real estate mortgage creditors on the other hand, due to the application of different methods of registration for the purpose of notifying the public/third parties of the existence of security right.

A. Notice Filling for Creditors with Interest in Movable Assets

Under the draft Ethiopian PPSRs' law, the registration of security interest should contain the identifier of the grantor of the security interest (the debtor or the person

[35] Dr. Marek Dubovec whom the author met in 2015 at UNIDROIT headquarter in Rome has advised on secured transactions law reform in dozens of African countries including in Ethiopia < http://natlaw.com/staff/dr-marek-dubovec/> Accessed 14 May 2018.

who gave the property as collateral on the debtor's behalf), the identifier of the secured creditor or its representative, an address of the grantor and the secured creditor, a description of the collateral, the period of effectiveness of the registration, and any other information to be prescribed in the directive to be issued pursuant to the draft proclamation.[36] The draft proclamation's registration provisions incorporate what is termed as notice filing system as opposed to authenticated registration.

The notice filing system which was introduced by UCC Article 9 provides subsequent creditors (or third parties) general information on the existence of security interests attached to the property of the debtor. Essentially, notice filing system considers it unnecessary to provide the security agreement or its details to third parties; hence it requires disclosure of information that should be supplemented by further inquiry from the debtor by interested thirds parties.[37]

The notice filing system is based on the policy that subsequent creditors should inquire the details of the transaction from the earlier creditor(s). Subsequent creditors can require the debtor's approval of prepared statement of account that discloses the indebtedness of the debtor; failure of the debtor to give approval is sign that the debtor is hiding credit information and therefore it is helps subsequent creditor to decide not to extend credit to the debtor.[38] The theoretical benefit of this system is the reduced transaction cost; both in terms of time and money spent to comply with the registration. The draft Ethiopian PPSRs' law confers this advantage upon creditors with personal property security rights. But how about real estate mortgagors? Do they benefit from similar system? The answer is negative (*see infra* section B).

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[36] The Draft Ethiopian PPSRs' law Art. 26(1).

37 Robert I. Donnellan (1964), 'Notice and Filing under Article 9' (1964) 29 Mo. L. Rev.1, 1,

38 Jens Haussmann, 'the Value of Public-Notice Filing under Uniform Commercial Code Article 9: A Comparison with the German Legal System of Securities in Personal Property' (1996) 25 Georgia J. Int'l and Comp. Law 427, 444. *See* UCC (2010) § 9-210(b).

B. Authenticated Registration for Real Estate Mortgage Creditors

A comprehensive registration system requires registration of different types of transactions such as financial leasing, sale with retention of title and consignment in a single registry and makes it easier to inquire information on the status of assets, i.e., whether an asset is encumbered or not. But notice filing is also aimed at reducing the transaction cost involved in authenticated registration system, i.e., the amount of time and money spent in conducting the registration. Ethiopia has authenticated registration system for security interests which requires the security agreement to be authenticated and registered by a notary and the notary has substantial authority to that effect including to ascertain whether: the formalities for the relevant contract are met; the parties have the capacity and authority to sign the contract and others.[39] All acts creating or varying mortgage must be entered into a register of mortgages.[40]

The main advantage of authenticated registration system is its paternalistic nature because a state authority or a notary checks the validity of the security agreement giving the parties more opportunity to do so at the stage of registration. Its disadvantage is inflexibility and higher transaction cost because it requires unnecessary details regarding the transaction to be registered. Furthermore, because authentication requires the entire document to be produced to the authority in charge, the parties or their legal representatives must be physically present at the authority in charge and deposit copy of the relevant agreement entailing higher transaction cost.

With the enactment the draft Ethiopian PPSRs' law, real estate mortgage creditors are stuck with this old system of registration system while secured creditors governed by the new law benefit from efficient registration system. Why would

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[39] FDRE Acts and Documents Authentication and Registration Proclamation, No. 334/2003, Federal Negarit Gazzet, Legal Notice No. 54(Addis Ababa, 2003). *See* Arts. 2(1) & 4.

40 *See* Ethiopian Civil Code Art.1573.

consultants and policy makers who seem to be interested in implementing comprehensive legal regime and enhancing efficiency in transactions leave real estate mortgage out of the new legal framework? The reason is simple- there is no template model that encompasses both personal property and real property securities, and it requires much more effort to contextualize the readily available model to the local context.

3. The Functional Approach & Conceptual Flaws

The draft Ethiopian PPSRs' law follows the functional approach to security interests. First, it defines security agreement as an agreement, *regardless of whether the parties have denominated it as a security agreement*, between a grantor and a secured creditor that provides for the creation of a security right.[41] Second, it defines security right as "a property right in movable property that is created by an agreement to secure payment or performance of an obligation, *regardless of whether the parties have denominated it as a security right*, and regardless of the type of movable property, the status of the grantor or secured creditor, or the nature of the secured obligation."[42] But how is the functional approach incorporated in these definitions?

UCC Article 9 is the origin of the functional approach to security interests- the notion that all transactions that secure the performance of an obligation should be brought under the roof of a single statute regardless of the formal label the parties give them.[43] Under this approach, the characterization the parities give to the transaction in question or the failure of the parties to name their transaction as

[41] The Draft Ethiopian PPSRs' law Art. 2(43).
[42] Ibid Art. 2(44).
[43] UCC § 9-109(1) (a).

security agreement is irrelevant as long as the transaction in reality secures the performance of an obligation.[44]

The functional approach to security interests ensures that transactions whose economic function is to secure payment or performance of an obligation be treated as secured transactions and be subject to secured transitions law. By applying essentially similar rules to all security interests, the approach eliminates the differential treatment of different transactions and parties. This does not mean that minor differences that are designed to fit the peculiarities of different types of assets or parties are eradicated entirely. The draft Ethiopian PPSRs' law has enshrined this innovative approach to treating transactions.

The functional approach to security interests requires a shift from dogmatic treatment of transactions prevalent in civilian systems[45] to purpose assessment. Unsurprisingly, this approach is unfamiliar to the Ethiopian law of security interests. Hence offering a practical example to demonstrate the concept is useful.

One of the transactions that is treated as secured transaction using the functional approach is a title financing transaction. Title financing is a generic term referring to transactions where the financier has the title to the ownership of the asset while the debtor has possession within the framework of the relevant legal arrangement.[46] These transactions include sale with retention of ownership, financial leasing, and consignment. In legal regimes adopting the functional approach, title financing transactions are re-characterized as secured transactions.[47]

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[44] Cindy J. Chemuchin (ed.) *Forms under the Revised Uniform Commercial Code Article 9 Committee,* Task Force on Forms under Revied Article 9, 2nd Ed. (American Bar Association 2009), p. 4.

[45] Tajti, Tibor, 'Consignments, and the Draft Common Frame of Reference' (2011), 2 *Pravni Zapisi: Godina 358, 362*.

[46] Philip R. Wood, *Title Finance, Securitization, Derivatives, Set-off and Netting* (Sweet & Maxwell 1995) 4.

[47] *See* UNCITRAL Legislative Guide on Secured Transactions Law (2010), Recommendation 50-64.

The draft Ethiopian PPSRs' law re-characterizes financial leasing, hire purchase and sale with retention of title as security agreements.[48] While the approach takes Ethiopian secured transactions law in the right direction, the draft law raises serious conceptual/terminological concerns that reveal the lack of serious effort put into crafting it. More specifically, the draft law lists certain transactions to which it applies without defining the transactions in its definitional section even when the transaction is undefined under Ethiopian law in general. Accordingly, the draft law applies to "… financial lease, right under a hire-purchase agreement, *charge, security trust deed, trust receipt, commercial consignment*…"[49] Some of these terms including charge, security trust deed and commercial consignment are defined neither in the draft law, nor under the Ethiopian legal system in general. Defining these terms is one of the most arduous tasks. Commercial consignment and charge are used as examples here to explain the challenge.

3.1. Commercial Consignment

Consignment - a tripartite transaction whereby goods are delivered by the consignor to a consignee who deals in the goods with third parties[50] falls under UCC Article 9 under certain conditions. Consignment is title financing transaction because the consignor retains the title to the good delivered to the consignee. The purpose of consignment is to allow the consignee to sell the goods in consignment without having to take the risk of mismatch in demand and supply of the goods in question since the title to the goods in consignment remains with the consignor with the possibility for the consignee to return the goods to the consignor, should the former not be able to sell the goods. The specifics of the rights and duties of the parties is determined by contract subject to mandatory law.

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[48] For further explanation, *see* Asress Adimi Gikay (n 1) 176-182.
[49] The Draft Ethiopian PPSRs' law Art. 3(1) (a).
[50] Richard W. Duesenberg, 'Consignment under the UCC: A comment on the emerging principle' (1970), 26 The Business Lawyer 2, p. 565.

A. Commercial Consignment in the US

Consignment has different variations. True (obvious Consignment), Non-Obvious consignment, Quasi-Consignment (Disguised Security) and Extended Consignment are the common four types of consignment out of which only the last three fall under UCC Article 9.[51]

The central problem consignment poses is ostensible ownership, i.e. the consignee appears to be the owner of the goods whose ownership remain with the consignor and thus leads third parties to believe that consignee is the owner.[52] To solve this problem, treating consignment as a secured transaction and subjecting it to registration is the solution adopted by UCC Article 9. However, under UCC Article 9, not all forms of consignments are treated as secured transactions. For instance, a true consignment- where the consignee is known to third parties to sell the goods on behalf of the consignor does not pose ostensible ownership problem and it does not fall under UCC Article 9.[53] This is because third parties dealing with a true consignee know that the consignee is not an owner and they do not need additional protection.

As the above overview shows, defining commercial consignment is not a walk in the park. Not all types of commercial consignments are subject to secured transactions law as they present different types and degrees of legal problems.

B. Consignment in Ethiopia

The draft Ethiopian PPSRs' law simply states that it applies to commercial consignment without defining it. In Ethiopia, there is no law that defines

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51 *See* Tajti (n 45) 388-389.

[52] Louis F. Del Duca, et al, Secured *Transactions under the Uniform Commercial Code and International Commercial Code* (Anderson Publishing Co. 2006) 3. *See* also, Flint, George Lee Jr. & Alfaro, Marie Juliet 'Secured Transactions History: The First Chattel Mortgage Acts in the Anglo-American World (2004) 30(4) William Mitchell Law Review 1404, 1405.

53 UCC (2002) § 9-102 (a) (20).

commercial consignment. The Ethiopian Commercial Code is the first code addressing consignment but only in the context of carriage of goods.[54] It also mentions consignment in the context of sale of goods and in other fields but none of them are relevant to secured transactions law.[55]

Continental Europeans legal systems locate consignment in the law of agency and sales disconnecting it from secured transactions law.[56] The same approach seems to be reflected under the Ethiopian law. With no substantive code or statute defining commercial consignment, the Ethiopian bankruptcy law recognizes an arrangement similar to commercial consignment where goods consigned to the debtor for deposit or for sale on behalf of the owner may, if they exist in kind, in whole or in part, be recovered from the debtor.[57] It is important to realize at this point that the bankruptcy law assumes that commercial consignment is governed by substantive law. The assumption is wrong to the author's best knowledge because there is no clear statutory definition for consignment. Moreover, the bankruptcy law intermingles bailment with consignment because it refers to goods received by the debtor not only for sale but also for deposit.

The fact that the draft law purports to apply to a commercial consignment without defining the concept clearly illustrates that the drafter(s) simply used a template model without critically examining the existing Ethiopian legal rules and concepts. This is apparent in the fact that commercial consignment is listed together with sale with retention of title, the latter having fairly clear definition under the Ethiopian Civil Code.[58] More revealingly, the draft law defines financial leasing,[59] hire-

54 *See* Ethiopian Commercial Code Art. 571 & Federal Negarit Gazeta, Legal notice No.58 6th September, 1960 & The Proclamation to Amend Carriage of Goods by Land 547/2007 Arts 4 & 12(1).
55 See Ethiopian Civil Code Art. 2236.
56 Tajti (n 47) 378.
57 Ethiopian Commercial Code Article 1074.
58 The Ethiopian Civil Code Art. 2287.
59 The Draft Ethiopian PPSRs' law Art. 2(2.18).

purchase,[60] corporeal asset[61] and possession[62] all of which have well-settled meaning under Ethiopian law relative to commercial consignment. There does not appear to be any other plausible explanation than that the drafter(s) lacked adequate understanding of the existing Ethiopian legal regime in defining well-settled concepts while leaving commercial consignment undefined.

3.2. Charge

Charge is another legal transaction the draft law covers. But the term has no meaning under the Ethiopian law of security interests or the Ethiopian law in general. The Ethiopian income tax law states that "where the tax authority has served a notice on the registering authority(of its preferential claim over the asset of the defaulting tax payer), the registering authority shall, without fee, register the notice of security as if the notice were an instrument of mortgage over or charge on such asset, as the case may be, and such registration shall, subject to any prior mortgage or charge, operate while it subsists in all respects as a legal mortgage over or charge on the land or building to secure the amount due.[63] The income tax law does not define what charge on an asset is.

Charge is a generic term that refers to security interest under English law and law of countries that are influenced by English law. Under English law, a charge can be fixed or floating charge (meaning a security right that attaches to specific asset or floats over the after-acquired assets of the debtors respectively).[64] In Germany,

[60] Ibid Art. 2(2.23).
[61] Ibid Art. 2(2.9).
[62] Ibid Art. 2(2.9).
[63] The Ethiopian Income Tax Proclamation No. 286/2002, Art. 80(4).
[64] *See generally* Roy Goode, *Commercial Law*, 2nd Ed, (Penguin Books 1995) 732. *See* also Asress Adimi Gikay (n 1) 184-188.

there are two well-known security devices governed by the Bürgerliches Gesetzbuch (BGB) - German Civil Code, i.e., Hypothec and Land Charge.[65]

Under the BGB, a plot of land may be encumbered in such a way that the person in whose favor the encumbrance is created is paid a specific sum of money from the plot of land.[66] The key difference between hypothec (the equivalent of real estate mortgage under Ethiopian Law) and land charge is that while "hypothec secures a personal claim against the owner of the property (or a third party) and is dependent on the existence of the specific debt, land charge is a "stand alone" security right, independent of a claim to be secured."[67] In Germany, the stand-alone land charge has some advantages. When the underlining contract of loan is invalid, hypothec as an accessory security ceases to exist while land charge survives.[68] Moreover, when a business debtor receives additional line of credit from a creditor the original land charge suffices to secure the new obligation of the debtor without additional steps being taken to that effect.[69]

The only security rights that can be acquired on immovable property in Ethiopia are mortgage and the least utilized antichresis; none resembles land charge as governed under German law. Under the Ethiopian Civil Code or Commercial Code or any other statute there is no definition of term "charge" comparable to the one under the BGB. Since draft Ethiopian PPSRs' law applies to security rights in movable assets, neither land charge, nor real estate mortgage and antichresis are

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[65] German Civil Code (BGB) in the version promulgated on 2 January 2002 (Federal Law Gazette [Bundesgesetzblatt] I page 42, 2909; 2003 I page 738), last amended by Article 1 of the statute of 27 July 2011 (Federal Law Gazette I page 1600). <http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p2598 > Accessed 30 January 2018.

[66] BGB Art. 1191(1).Translation service provided by Federal Ministry of in cooperation with Juris GmBH, <www.juris.de> Accessed 30 January 2018.

[67] David Cox et al, Endrik Lettau, Security over real estate: Germany compared to England and Wales (White & Case LLP, 2006), p. 21.<allaw.com/1-204-0956#.>Accessed 06 September 2017.

[68] Christian Hertel & Hartmut Wicke (2005), Real Property Law and Procedure in the European Union National Report Germany, European University Institute (EUI) Florence/European Private Law Forum in cooperation with Deutsches Notarinstitut (DNotI) Würzburg, p. 38.

[69] Ibid 39.

relevant it. Hence, the fact that the draft law uses this term without defining it is simply a drafting problem that must be remedied.

4. Floating Security Interest

Another problematic aspect of the draft law is its imprecision in addressing floating security right. When security right is created on the debtor's present and after-acquired property, it is referred to as floating security interest.[70] One of the attributes of modern secured transactions law is that it "permits all property, whether existing or to be acquired, to serve as collateral for loan"[71] to increases the debtor's borrowing basis and access to credit. To understand how the draft Ethiopian PPSRs' law allows the debtor to use its present and future assets as collateral by entering into one security agreement, it is expedient to start by explaining floating security interest under UCC Article 9.

4.1. Floating Security Interest in the US: Floating Lien

Under UCC Article 9, the creditor can encumber the debtor's present and after-acquired property[72] through floating lien in the terminology of US secured transactions law.[73] Gilmore defines floating lien as "an interest in all the assets of a borrowing enterprise, whether owned by the borrower when the loan is extended or subsequently acquired."[74]

There is no single provision that creates floating lien Under UCC Article 9, rather a secured creditors use different provisions to acquire security interest over present and future assets of the debtor. The first one is the provision under which the security interests attaches to an after-acquired property, in which case the security

[70] Arthur J. Harrington, 'Insecurity for Secured Creditors: The Floating lien and Section 547 of the Bankruptcy Act' (1980), 64(3) *Marquette Law Review* 447, 449.
[71] Heywood Fleisig (n 33), p. 30.
[72] UCC § 9-204(a).
[73] Harrington (n 70) 449.
[74] Grant Gilmore, 'Purchase Money Priority' (1963), 76 *Harvard Law Review* 1333, 1333.

interests attaches and perfects the moment the debtor acquires rights in the property.[75] "The second set of provisions which are thought to contribute to the floating lien are those that allow the security agreement to cover future advances whether or not committed for."[76]

The third possible component of floating lien is the abolition of *Benedict vs Ratner* rule by UCC Article 9[77] as a consequence of which security interest is not invalid or fraudulent merely because the debtor uses proceeds or acts as though there was no security interests, i.e. *exercises unfettered dominion over the collateral*.[78] The abolition of *Benedit vs. Ratner* rule allows the secured creditor to take security interests in the debtor's accounts receivables without being required to exercise control.[79]

Under UCC Article 9, by using the clause "owned and after acquired assets" the parties can avoid specific description of the collateral as long as the security agreement identifies the collateral reasonably.[80]

Floating lien can create monopoly over the assets of the debtor and may discourage subsequent lenders from providing loan; the phenomenon is called situational monopoly.[81] UCC Article 9 resolves this problem by giving super-priority to Purchase Money Security Interest (PMSI).[82]

Generally, for a security interest to qualify as PMSI, (1) the creditor must have extended "enabling" loan -a loan that made it possible for the debtor to acquire

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[75] UCC, § 9-204(a). Peter F. Coogan (1959), 'Article 9 of the Uniform Commercial Code: Priorities among Secured Creditors and the "Floating Lien."'(1959), 72(5) *Harvard Law Review 838,* 851.
[76] Ibid.
[77] Ibid 853.
[78] UCC § 9-205(a).
[79] Coogan (n 75) 853.
[80] In Re Filtercrop, Inc., United States Court of Appeal, Ninth Circuit, 1998, 163 F. 3d 579. See also UCC §9-108.
[81] Anthony Townsend and Jackson, Thomas H., 'Secured Financing and Priorities among Creditors'(1979), 88 *Yale Law Journal*, 1143, 1167.
[82] UCC (2002) § 9-103, (b) (1-3).

rights in property that it did not previously have and (2) the loan must be traced to identifiable, discrete items of property.[83] If the loan is extended for a purpose other than financing a particular item, there is no PMSI as it is the case when the loan cannot be traced to a particular item of good.[84] Any valid security interest created to secure the performance of an obligation incurred to finance identifiable collateral is PMSI.[85] The goal of PMSI super-priority is to ensure that where the debtor's present and future assets are encumbered, subsequent lenders are encouraged to provide credit to the debtor by virtue of the super-priority PMSI enjoys.

To sum up, floating lien widens the debtor's borrowing basis by permitting the debtor to grant security interest in after-acquired assets. In order to offset the pervasive effect of the device from subsequent lenders point of view, UCC Art. 9 gives super-priority to security interest of subsequent financiers of specific assets.

4.2. The Draft Ethiopian PPSRs' Law and Floating Security Interest

There are three relevant principles under the draft Ethiopian PPSRs' law pertinent to floating. First "a security agreement may provide for the creation of a security right in a future asset, but the security right in that asset is created only at the time when the grantor acquires rights in it or the power to encumber it."[86] Second, "a security right may secure one or more obligations of any type, present or future, determined or determinable, conditional or unconditional, fixed or fluctuating."[87] Third, "the priority of a security right extends to all secured obligations, including obligations incurred after the security right became effective against third parties

[83] Townsend and Jackson (n 81) 1165.
[84] Ibid.
[85] Scott J. Burnham, *the Glannon Guide to Secured Transactions, Learning Secured Transactions through Multiple-Choices, Questions and Analysis (*Aspen Publishers 2007) 36.
[86] The Draft Ethiopian PPSRs' law Art. 4(4).
[87] Ibid Art. 5(1).

(save certain exceptions that are not relevant for the purpose at hand)."[88] These three principles enable the secured creditor and the debtor to enter into an agreement whereby the creditor's security right extends to future assets of the debtor provided that they are acquired by the debtor/grantor and become disposable. Furthermore, they enable the debtor to encumber his/her asset, with single agreement, for obligations that may be incurred in the future. But the relevant provisions of the draft law do not clearly indicate that the creditor's security right *can float over shifting assets of the debto*r. On the contrary, the draft law states that the priority of a security right covers all collateral described in the notice registered in the collateral registry, whether they are acquired by the grantor or come into existence before or after the time of registration.[89] Considering that the collateral description should sufficiently identify the collateral whether it is existing or future asset, it is difficult to say with certainty that this principle creates floating security interest.

A counter argument for the above would be based on the rules that give priority right to acquisition security right defined as a security right in a corporeal asset or intellectual property, which secures the obligation to pay any unpaid portion of the purchase price of the asset or other credit extended (this is the functional equivalent of purchase money security interest under UCC Article 9).[90] Those provisions are meant to ensure that in case of conflict between the security rights of a secured creditor who has provided loan to the creditor by taking security interest in a future asset and the security right of the person who has sold that asset or granted loan for the purchase of that asset, the security right of the latter prevails.[91] Such a conflict can occur only if the non-acquisition security right holder can acquire such right in future assets of the debtor.

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[88] Ibid.
[89] Ibid Art. 51(2).
[90] Ibid Art. 2(2.1).
[91] Ibid Art. 57.

But acquiring security right in future assets is not contestable under the draft Ethiopian PPSRs' law. What is unclear is whether this right can hover over the shifting assets of the debtor and survive the requirements of collateral description. In the US where floating security is well utilized, litigations on the effect of the after-acquired clause usually arise. In Re Filtercrop, the 9th Circuit Appellate Court faced "whether under Washington law, a security agreement that grants an interest in "inventory" or "accounts receivable," presumptively includes after-acquired inventory or accounts receivable."[92] The court held that the description does extend to after-acquired accounts receivables because there was no evidence to the effect that the intent of the parties was to limit their agreement to specific after-acquired receivables.[93] But the court held that the agreement does not extend to after-acquired inventories because the agreement contained an attachment of list of inventories that the court used as an evidence of the intent of the parties to limit the inventories to present inventories.[94] One of the questions to ask with respect to the draft Ethiopian PPSRs' law is the following: if the parties to the security agreement state in their agreement that the creditor's security right extends to the presently available assets of the debtor and accounts receivables, does this agreement cover all accounts receivables of the debtor without regard to their source and when the accounts receivables are due? What if the agreement applies to identified or listed inventories and to unspecified accounts receivables? At least in the US, these questions gave rise to litigation. It is difficult to assume that the situation would be any different in Ethiopia.

The problem could have been avoided by stating that the creditor can take security right in the present and future assets of the debtor by a single agreement and by at least by illustratively listing the scenarios in which an agreement does not apply to certain assets. One could find ample of cases from US courts to draw lessons from.

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[92] In Re Filtercrop, Inc., United States Court of Appeal, Ninth Circuit, 1998, 163 F. 3d 579.<http://caselaw.findlaw.com/us-9th-circuit/1179673.html> Accessed 29/09/2015.
[93] Ibid.
[94] Ibid.

If the intention of the drafter(s) is not to give wide power to the parties to encumber future assets, it could clearly be stated that unless the future property is specifically identified by the parities, the security agreement does not extend to it. If the draft law enacted in its current form, courts would be congested by litigation on this issue.

5. Private Enforcement of Security Rights: Self-Help Repossession

Private enforcement refers to the enforcement of security rights without the involvement of the court. Efficient and fair procedure of enforcement of security rights serves the interests of both the debtor and the creditor. While creditors could enforce their claims at least cost, debtors would in turn benefit from increased access to credit that results from creditors' willingness to extend collateralized loan. Due to the fact that traditional court administered enforcement of security rights is generally lengthy and inefficient, private enforcement mechanisms remove the judiciary from the enforcement process and thereby reduces the cost of enforcement.[95] Self-help repossession which is enshrined in the draft Ethiopian PPSRs' law[96] is one aspect of private enforcement of security rights.

5.1. Self-Help Repossession

Self-Help repossession refers to the secured creditor's right to take possession of the collateral upon the debtor's default without the assistance of state official.[97] It is one of the controversial institutions in the discourse of secured transactions law reform, especially in civil law countries. Addressing how continental European lawyers perceive self-help repossession, Warren and Walt wrote "the Europeans

[95] *see* Catalin-Gabriel Stanescu (2015), Self-Help, Private Debt Collection, and the Concomitant Risks: A Comparative Law Analysis, Switzerland, Springer Publishing, p. 1.
[96] The Draft Ethiopian PPSRs' law Art. 83(1).
[97] UCC § 9-609.

tend to see it as another example of American Barbarism: You mean the creditor can just go and steal the property back?"[98]

5.1.1. Self-Help Repossession under the Draft Ethiopian PPSRs' Law

As part of providing wider room for private enforcement of security rights, the draft Ethiopian PPSRs' law entitles the secured creditor to take possession of the collateral upon the debtor's default without applying to a court, if the grantor has consented to it in the security agreement or at the time the secured creditor attempts to obtain possession of the collateral, the grantor or any other person in possession of the collateral does not object to the repossession.[99] Strikingly, the draft law states that "if the grantor or any other person in possession of the collateral objects to giving possession of the collateral to the secured creditor, the Collateral Registry Office shall have the power and duties to order the police force."[100] Many implementation problems arise from the self-help procedure under the draft law. To have clear idea about the self-help repossession procedure of the draft law, the overview self-help repossession under UCC Art. 9 and how the balance between efficient enforcement of security rights on the one hand and protection of consumer rights on the other hand is struck should be imperative. Furthermore, self-help repossession in other civil law jurisdictions is also examined to provide an insight into how the draft law should be improved.

5.1.2. Conditions for Exercising Self-Help Repossession under UCC Article 9

Under UCC article 9, the secured creditor has the option of repossessing the collateral under section 9-609 through either judicial[101] or non-judicial means.[102]

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98 William D. Warren & Steven D. Walt, *Secured Transactions in Personal Property*, 7th ed (Foundation Press 2007) 269.
[99] The Draft Ethiopian PPSRs' law Art. 83(1).
[100] Ibid Art. 83(2).
[101] *See* Warren and Walt (n 105) 277.

Non-judicial repossession should be conducted without breach of the peace.[103] The "without breach of the peace" standard being undefined by UCC Article 9 is left to the determination of courts, *ex post facto.*[104] The determination of breach of peace is easier in cases involving physical assault by the repossessor, whereas it is difficult in cases involving emotional harms or when it is conducted through tactics whose effect on the debtor are psychological than physical but that influence the debtor's behavior(for instance the mere presence of law enforcement officer).[105] The objective of subjecting self-help repossession to the without breach of the peace standard is to protect consumer debtors from abuses that can occur during self-help repossession.

Although discussing every possible scenario involving breach of the peace standard is not plausible, it is instructive to discuss some of the situations in which US courts found the violation or otherwise of the standard. McRoberts provides comprehensive, yet simple and policy based analysis of the "without breach of the peace" standard under UCC Article 9.[106] He emphasizes on the inconsistency of court decisions on the breach of the peace standard across states and federal courts in the US.[107] While there are cases where the courts tend to agree on, for example in cases involving physical assault or violence during the repossession,[108] there are borderline cases such as trespass, involving a law enforcement officer as mere observer during the repossession, emotional harm on third parties and the effect of

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102 UCC § 9-609.
103 Ibid.
104 Ryan McRobert 'Defining Breach of the Peace in Self-Help Repossession' (2012), 87 *Washington Law Review* 569, 569.
105 Ibid 570-571.
106 Ibid 117.
107 Ibid 578-594.
108 See Ford Motor Credit Co. V. Herring, 589 S.W.2d 584, 586 (Ark. 1979) & McCall v. Owens, 820 S.W.2d 748, 751 (Tenn. Ct. App. 1991). 120.

debtor's verbal objection during repossession where courts do not have a uniform view on.[109]

McRoberts argues that since the inconsistency in court decisions on breach of the peace in the US means unpredictability to creditor's involved in interstate trade, the fact that UCC Article 9 left breach of the peace standard undefined defeats the very purpose of the UCC.[110] He recommends amendment of UCC Article 9.[111]

Under UCC article 9, violation of the breach of peace standard could entail criminal liability in cases of grave breach such physical assault, compensatory damages, statutory and punitive damages as well as the secured creditor's loss of the right to deficiency claim.[112]

In the United States, despite all the legal tools regulating self-help repossession and limiting its boundaries, the occurrence of confrontation between repossession agents and debtors ending in tragic deaths of repossession agents or debtors is common.[113]

5.2.3. Self-Help Repossession in the Existing Ethiopian Legal Regime

In Ethiopia, self-help repossession is not allowed as a remedy to a secured creditor under general secured transactions law, whether under the Civil Code or any other statute. There are two exceptions to that, i.e., (a) the lessor's right to repossess a

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109 McRoberts (n 104) 582-591. *See also* Chapa v. Traciers & Assocs., 267 S.W.3d 386 (Tex. Ct. App. 2008).
110 McRoberts (n 104) 587.
111 Ibid 594.
112 *See* generally UCC Sections 9-625 et seq.
113 Associated Press via NBC, Violence between Repo Men, Car Owners Rising, NBC News, 2/27/2009, <http://www.nbcnews.com/id/29427734/ns/us_news-life/t/violence-between-repo-men-car-owners-rising/#.WvtNnaSFPIU> Accessed 15 May 2018. *See* also Rick Lessard, Tow truck driver murdered repossessing vehicle 'never saw it coming, Fox61, Jan. 18, 2018, <http://fox61.com/2018/01/13/tow-truck-driver-murdered-repossessing-vehicle-never-saw-it-coming/>Accessed 15 May 2018.

leased good under the financial leasing law[114] and (b) the right of the creditor to repossess aircrafts and aircraft engines under Cape Town convention (CTC) and the aircraft protocol.[115]

The leasing industry is infant in Ethiopia which requires encouraging investors in this sector, *inter alia*, by creating conducive legal regime for the enforcement of lessors' right. The idea of efficient enforcement of security rights is equally important in the airlines industry, perhaps more pronounced as international financiers often seek legal framework for efficient enforcement. Regarding requirements for executing repossession, the leasing law and the CTC follow different standards.

Under the leasing law, the lessor can take possession of the collateral upon giving 30 days' notice to the debtor to remedy the default or the breach of contract.[116] What happens if the lessee does not surrender the good peacefully? What if the lessee has paid 90% of the price? Doesn't the lessee have stronger claim in the good than the lessor? If the latter is true, doesn't the law need to strike a balance may be by prohibiting self-help repossession in those circumstances?

Under the CTC, the secured creditor can take possession of the collateral upon the debtor's default if the debtor has agreed to it at any time.[117] Therefore, one difference between the leasing law and the CTC is that in the latter, the debtor's agreement to the repossession is a pre-requisite. If an agreement has not been reached in the security agreement or subsequently, repossession is not an option.

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114 *The* Capital Goods leasing Proclamation No. 103/1998 Article 5.

[115] The Cape Town Convention, Article 8(1) and the Aircraft Protocol Article XI (2) Alternative A. Signed on 16.11.2001 ratified on 21.11.2003 and the convention came into force on 01.03.2006.*See* <http://www.unidroit.org/status-2001capetown> Accessed 31 January 2018. The signature, ratification, and effective dates of the Aircraft protocol is the same to that of the CTC. <http://www.unidroit.org/status-2001capetown-aircraft>Accessed 31 January 2018.

[116] The Capital Goods Leasing Proclamation Art. 6.

[117] The CTC Art. 8(1) (a).

Under the CTC as well as the aircraft protocol, notice to the debtor is not a requirement.

Based on the comparison of the Ethiopian leasing law and the CTC, I argue that the CTC is more informed in its enforcement regime. The CTC "While promoting its foundational policy, i.e., efficient enforcement of security rights, strikes the balance between the right of the creditor on the one and the debtor on other hand, by subjecting repossession to prior agreement."[118]

The Ethiopian leasing law not only ignores circumstances where the debtor might have better stake in the leased good relative to the lessor but also neglects the undesirable and unfortunate results that might occur during the repossession for instance resistance from the lessee and an ensuing exchange of potential physical violence. The draft Ethiopian PPSRs' law makes the process even worse (*see infra* section 5.5).

5.2.4. Prerequisites for Self-Help Repossession under the Draft Ethiopian PPSRs' Law

There are two conditions for pursing self-help repossession under the draft law - (1) default and (2) prior agreement of the debtor or absent such an agreement, lack of objection by the debtor during the repossession.[119] There are plethora of issues that arise under the self-help repossession clause of the draft law.

First, considering that this is relatively new legal procedure for Ethiopia, it takes time for consumer debtors to be familiarized with the procedure. Hence, with the current level of literacy in Ethiopia, creditors could impose standard self-help

[118] Asress Adimi Gikay and Cătălin Gabriel Stănescu (2018), 'The Reluctance of Civil Law Systems in Adopting the UCC Article 9 "Without Breach of Peace" Standard—Evidence from National and International Legal Instruments Governing Secured Transactions'(2018), 10 J. Civ. L. Stud. 100, 138.

[119] The Draft Ethiopian PPSRs' law Art. 83(1).

repossession clauses on debtors that could be hidden in a long security agreement that may not necessarily be brought to the consumer debtors' attention. This means that consumer could be taken by surprise when the secured creditor shows up to take possession of the collateral, with no court order and no prior notice. Second, in cases where there is no prior agreement for the repossession, the draft law merely states that the creditor can take possession of the collateral if the debtor does not object to it. What form should the objection take? Does the silence of the debtor when the creditor takes possession of the collateral constitute lack of objection? Does the mere statement by the debtor for instance as "it is my car, do not take it?" not accompanied by any other act constitute an objection capable of stopping the creditor from repossessing the collateral? What if the repossession agent shows up with an armed police officer?

It is surely intimidating enough for certain persons to see an armed police officer accompanying the repossessor, even if the police officer does not actually assist the repossessor. It could prevent the debtor from making reasonable objection to the repossession. In the US, a court has found that since "an officer's mere presence has the ability to intimidate the debtor into compliance with the repossession, the officer's involvement constituted a breach of the peace as a matter of law."[120] The draft Ethiopian PPSRs' law does not address these issues.

The draft law does not state under what conditions the creditor can execute the repossession even in the instance where the debtor has consented to it in a prior agreement. Assuming that the creditor has security right in a car (a leased car), parked in a locked premise, can the creditor break into the premise? May the creditor take possession of the car from a parking lot without the debtor's knowledge and inform the debtor on the telephone of the repossession? Shouldn't the debtor be given a notice of the creditor's intention to repossess the collateral

[120] *Stone Mach,* 463 P.2d at 652. *See also* Aaron Lowenstein, 'Law-Enforcement Officers, and Self-Help Repossession: A State-Action Approach' (2013), 111 Mich. L. Rev. 1361, 1367.

and thereby be given the opportunity to rectify the default? None of these questions are answered by the draft law.

The draft law also foresees that "if the grantor or any other person in possession of the collateral objects to giving possession of the collateral to the secured creditor, the collateral registry office shall have the power and duties to order the police force."[121] Supposedly, this provision applies where there has been prior agreement for repossession and the debtor refuses to surrender the collateral. However, this provision does not clarify what the Collateral Registry Office orders the police to carry out. Is it to carry out the repossession on behalf of the creditor? If so, can the police use force to that effect? What if the debtor protests the repossession on the ground that it did not default on its obligation? Aren't the creditor and the Collateral Registry Office acting as ultimate umpires in their own cases at the expense of the debtor's right to present his/her case before an independent judge? These are legitimate question to ask. To the author's best knowledge, the draft law has the most aggressive private enforcement clause in modern secured transactions law, not just because it fails to safeguard consumer debtors from abuses but because it goes further to empowering the Collateral Registry Office to order the police to effect repossession without court proceeding.

5.2.5. Lessons from other Civil Law Jurisdictions on Self-Help Repossession

Most civil law countries are skeptical about self-help repossession. If they do embrace the procedure in their legal systems, they provide tools for protecting consumers from abusive enforcement practices.

In Romania, prior to 2011, self-help repossession was subjected to the express consent of the debtor where the repossession clause should be inserted in the

[121] The Draft Ethiopian PPSRs' law Art. 83(2).

security agreement in a specifically prescribed format i.e., in bold capital letters.[122] This requirement was introduced to ensure that the repossession clause is brought to the attention of consumers in the proper form.

In United States, the civil law state of Louisiana refused to adopt self-help repossession in its UCC Article 9 form by prohibiting self-help repossession as a general principle.[123] Hence, in Louisiana, the creditor has no right to repossess the collateral without court involvement except for one type of collateral, i.e., an automobile.[124] Under Louisiana's Revised Additional Remedies Act, a secured creditor can repossess an automobile collateral (1) by sending notice to the debtor upon default,[125] (2) by clearly stating in the notice that "Louisiana law permits repossession of motor vehicles upon default without further notice or judicial process and (3) without breaching peace."[126]

Besides limiting self-help repossession to automobiles and subjecting it to strict standards, the Louisiana Revised Additional Remedies Act illustratively lists the conditions under which breach of peace occur. For instance, there is breach of peace in case of unauthorized entry into the debtor's premise (locked or unlocked) by the creditor/repossessor to conduct the repossession or when the repossession takes place despite the debtor's oral objection.[127]

Louisiana is averse to self-help repossession due to the incompatibility of the procedure with keeping peace[128] as confirmed by courts in multiple occasions.[129] The ultimate result of Louisiana's stance on self-help repossession is the protection consumer debtors from abusive security rights enforcement practices.

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[122] Catalin -Gabriel Stanescu(n 95) 105.
[123] LA Rev Stat § 10:9-609
[124] La. R.S. § 6:966 (2015).
[125] Ibid § 6:966(2).
[126] LA Rev Stat § 6:965.
[127] La. R.S. § 6:966 (2015), § 6:965. C.
[128] Paul Joseph Ory, 'Non-Judicial Disposition under Louisiana Commercial Law Chapter Nine' (1991), 51(6) *La. L. Rev. 1253, 1254.*
[129] 319 So. 2d 766 (La. 1975) & Guidry v. Rubin, 425 So. 2d 366, 371 (La. App. 3d Cir. 1982).

In Ethiopia, a country which has much less literacy level, low respect for rule of law and high tendency for abuse of power and police violence, the draft law's failure to provide safeguards for consumer rights during enforcement of security rights by conferring on the creditor and the Collateral Registry Office the power to order the police is troubling. There is no legal provision under which consumer debtors can challenge the wrongful conducts that could occur during private enforcement of security rights and ask for redress.

General Recommendations

The new Ethiopian secured transactions legal regime marks the end of half a century old obsolete secured transactions law. The draft law introduced many novel approaches to the Ethiopian secured transactions law that could positively contribute to access to credit for businesses and consumers. First and foremost, it adopts the functional approach to security interests by defining all transactions that secure payment or performance of obligation as secured transactions. It disregards formal label of transactions for substance and function. It also introduced a notice filing system as a method of registering security rights that substantially reduces transaction costs relative to the traditional authenticated registration system. To that end, the establishment of a single collateral registry is another good step forward in the right direction. However, the draft law has several flaws that should be rectified before it is enacted. Most of these defects, as I argued extensively, are the result of the drafter(s) lack of regard for the Ethiopian local context.

The article has examined five flaws in the draft Ethiopian PPSRs' law in detail and has attempted to hint at possible areas of revision of the draft law and how to carry out the revision. Due to space constraint and the breadth of the issues addressed, it is indeed difficult to provide recommendations for the revision of specific provisions. But the key areas of improvement and the policy approach to be adopted are highlighted hereunder.

The first defect in the draft law is the implementation of electronic registry for a country with significant electricity and internet access impediment. As noted earlier, other jurisdictions including US states have adopted hybrid system, i.e., paper based and electronic registration system, something the draft law should seriously consider adopting. The second defect is the exclusion of real estate mortgage from the ambit of the law which has the consequence of subjecting real estate mortgage creditors to the costly and lengthy old method of authenticated registration. The author sees no economic explanation for why real estate mortgage should be excluded from the umbrella of the prospective law.

Third, the draft law has serious conceptual/terminological defects in that some of the security devices that it covers are defined neither in the draft law, nor in the Ethiopian legal system in general. This is the case for instance of commercial consignment and charge. The drafter(s) have either copied these concepts from foreign law or did not do the task of examining the Ethiopian legal system overall to determine the significance of defining these institutions or maintaining them at all. The author has clearly shown how defining concepts and terminologies is necessary. Fourth, the draft law does not clearly delimit the scope of floating security interest, which is problematic as it could result in uncertainty of transactions.

Since the draft Ethiopian PPSRs' law is a derivative of UCC Art. 9, there is ample of lessons to learn from both the text of UCC Art. 9 and case law to draft better provisions dealing with floating security interest. Fifth, the draft law introduced an unfamiliar procedure of private of enforcement of security rights- self-help repossession without its essential components that are devised to protect consumer debtors from potential abuses even in the most advanced systems as the US. Four essential aspects of self-help repossession are missing under the draft law These are the requirement of (1) advance notice in addition to (2) prior agreement, (3) the conducting of the repossession in a peaceful manner and (4) the right of the debtor

to challenge the repossession before a court and the power of the court to order return of the collateral if wrongfully possessed and to levy sanctions on secured creditors who involve in abusive conducts.

These requirements are found not only in the laws of emerging civil law countries such as Romania but also in the most advanced jurisdictions such as Louisiana or under the most liberally designed UCC Article 9. If the aforestated defects in the draft law are not acknowledged and fixed, Ethiopian policy makers and legislators should prepare for another round of reform and the costs associated with enforcement problems and further reform effort.

Increasing Constitutional Complaints in Ethiopia: Exploring the Challenges♣

Gebremeskel Hailu♦ and Teguada Alebachew♠

Abstract

Constitutional complaint, a right of recourse for constitutional review, is deemed one of the best instruments for keeping the supremacy of constitutions through the act of the decisions of constitutional adjudicators. Constitutional complaints are critical to bring decisions deemed unconstitutional to the attention of the adjudicator so that the adjudicator sets standard for future treatment of similar cases. The quantity and quality of constitutional complaints has its own significance in the realization of human rights through constitutional review. Therefore, this paper seeks to explore the challenges for an increased flow of constitutional complaints in Ethiopia, emanating either from the institutional design of the review body or the legal framework guiding the review. For doing so, in addition to the theoretical inputs and the legal instruments regulating constitutional review, a record of constitutional interpretation made by the offices of the CCI and the HoF is consulted. Interviews have been conducted with key individuals in the area. The composition and working condition of the HoF and the CCI are properly analyzed with regard to the existing context. Accordingly, other things being constant, the research has noted that the restrictive standing rules and the limited physical accessibility, impartiality and effectiveness of the HoF and the CCI as challenges to an improved surge of cases for constitutional review in Ethiopia. For such reasons, the number of constitutional complaints that have been brought to and decided by both the House and the Council remained insignificant and the visibility and impact of constitutional review for ensuring constitutionally guaranteed human and democratic rights have been negligible.

Keywords: constitutional complaint, constitutional review, effectiveness, accessibility, standing and impartiality

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Introduction

A constitutional complaint is recourse of action made against alleged violations of fundamental rights and freedoms before the constitutional adjudicator; may it be the ordinary court like in the US or constitutional court like in Germany or the House of Federation in Ethiopian. Constitutional complaints, beyond addressing constitutional violations, are mechanisms used to enforce the constitution and thereby help the realization of constitutionally protected rights and principles. However, the specific designs countries adopt have their own impact on how the institutions function. In this regard, Ethiopia has uniquely entrusted the task of constitutional review to the upper house, the House of Federation, composed of representatives of Nation, Nationalities and Peoples.

According to Art 84(1) of the FDRE Constitution, the House is assisted by the Council of Constitutional Inquiry designed to hear cases and provide recommendations, if constitutional interpretation is required. Beyond constitutional adjudication, the House assumes numerous other constitutional mandates. Hence, it would be remarkable to investigate the effectiveness of this institutional arrangement on constitutional complaints and the overall system of constitutional review. Therefore, the main objective of this paper is to explore the challenges pertaining to an increased flow of constitutional complaint to the review bodies, the HoF and the CCI. In doing so, it scrutinizes the practical experiences of the HoF and the CCI with data collected in their experience for almost twenty years. It has also analyzed literatures and laws addressing the constitutional review system in Ethiopia.

The content of this article is structured into two interrelated parts. The first part addresses the theoretical and legal discourses relating to constitutional complaints. It elucidates the meaning, object and importance of constitutional complaint and tries to investigate the factors, which actually affect the flow of constitutional complaints. The second part emphasizes on the Ethiopian constitutional review

system and it specifically addresses the challenges of the Ethiopian constitutional review system. Among others, it examines the challenges related to accessibility, effectiveness and impartiality of the HoF and the CCI. It also studies the effect of restrictive standing rules, the absence of oral hearing and the poor enforcement of remedies and their effect on constitutional complaints and constitutional entrenchment of rights in general. The article finally winds up by drawing some conclusions.

1. Constitutional Complaints and their Object

Constitutional complaint refers to the right of an individual to have recourse to a constitutional review body[1] when one thinks his/her fundamental rights are violated.[2] Constitutional compliant triggers the review of supposedly unconstitutional laws and decisions. Constitutional complaint makes review possible by bringing allegedly unconstitutional laws and actions to the attention of the constitutional adjudicator. To this end, constitutional complaint serves as an instrument of guaranteeing human rights through the instrument of constitutional adjudication.[3]

A right to lodge a constitutional complaint is a legal right conferred to seek for the exercise and protection of human rights and fundamental freedoms.[4] Right to lodge a constitutional complaint does not, however, necessarily lead to the review

[1]A Constitutional review body could be a constitutional court like the case in Germany, French and South Africa; an ordinary court as in America, Canada and Kenya; or other bodies like the case in Ethiopia i.e. the upper house of parliament.

[2]Constitutional complaint is possible not only for physical persons but also for juridical persons. See Taamás Pásztor, *Constitutional complaints in Hungary*, the Lawyer Briefing, 28 May 2012, <http://www.nt.hu/dinamic/letoltesek/5/constitutional-complaints-hungary-2012.pdf> Accessed on Nov 15, 2017. State bodies can also file constitutional complaint as it is the case in most of the European legal traditions, see Gerhard Dannemann, see, *fn* 16, p.147.

[3]E lp, *Constitutional Review as a Political Investment: Evidence from Singapore and Taiwan*, Institute of Law, Economics and Policy, Political Economy Working paper No.2, 2011, p.18.

[4]Tea Mealrt, Lea Zora, *The Individual Constitutional Complaint in Slovenia, Comparing Constitutional adjudication*, A summer School on Comparative Interpretation of European Constitutional Jurisprudence, 3rd edition, 2008, p.3.

of the decision to which its constitutionality is objected.[5] In other words, constitutional complaint does not impose a duty on the adjudicator to automatically review any decision. The constitutional review body hence enjoys discretionary power to decide on either to proceed with the review or reject the complaint for lack of a constitutional cause.[6]

Constitutional complaint is purported to be first established in 1803, on Marbury vs. Madison case where the Chief Justices of the Supreme Court emphasized that the Constitution of USA is an expression of the will of the people and, hence, is the supreme law of the land.[7] Any law or actions of a government must, therefore, conform to the Constitution; otherwise, it is subject to nullification to the extent of its contradiction.[8] The Spanish *law of amparo (recurso de amparo)*, issued in 1978, also noted as an important historical incident in the development of the notion of constitutional complaint.[9] The Spanish law was intended to protect rights of citizens through the judiciary. The law provided a list of rights where citizens can file complaint to the court demanding for judicial protection of those rights.[10]

Constitutional complaint while it is a matter of last resort legal mechanism in Europe, it is part of the regular legal recourse in USA.[11] In Europe, constitutional complaint can only be instituted after exhausting all other legal remedies in the national legal system whereas in USA it can be brought to the attention of the

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[5]Tanja karakamisheva, *Procedural and Legal Instrument for the Development of Constitutional Justice, Case Study of Republic of Germany, Republic of Croatia, Republic of Slovenia and Republic of Macedonia*, available at http://www.ven-ice.coe.int/, consulted on 16 December, 2017 p.5-6. Also see Ayse Özkan Duvan, 'Possible Effects of the Constitutional Complaint; Mechanism on Human Rights Practices' in *Annales* XLV, N. 62, 39-42, 2013, p.35

[6]*Ibid*, see also, Pásztor, *Constitutional complaints, fn.* 2.

[7]Marbury v. Madison, 5 U.S. 137, 2 L. Ed. 60, 1 Cranch 137, 1803 U.S LEXIS 352, <https://www.courtlistener.com/opinion/84759/marbury-v-madison/> accessed on 16 May ,2018.

[8] karakamisheva, *Procedural and Legal Instrument, fn.* 5, p. 3.

[9]*Ibid.*

[10]The rights listed includes: the right to free expression of the thoughts, the right to association, the right of dignity, the right of home privacy, the freedom of movement and etc., *ibid.*

[11]Ayse Özkan Duvan, *supra note 5*, p.35.

court any time without the requirement of exhaustion provided other criteria are fulfilled.

The range of justiciable constitutional disputes upon which a complaint can be lodged varies from jurisdiction to jurisdiction. For example, in the US a constitutional complaint can be brought against any decision of the executive and laws of the congress.[12] The US Supreme Court in the '*Over breadth doctrine*' established that an individual who thinks a given statute unduly discourages his/her protected speech in the First Amendment can file complaint to the court against such a statute.[13] Yet, in US, the fact that constitutional review occurs only in the existence of 'concrete cases' narrows down the chance of the flow of complaints.

The case in Europe is relatively better as both the object of constitutional complaint and the procedures are broad. In most of European countries, there are broad grounds of constitutional complaints. In Germany, for instance, constitutional complaint is possible against any action or omission of the executive, the decision of a court, the law of the parliament and even against a constitutional change.[14] Likewise, in France, Portugal, Austria, Spain, and Romania constitutional complaint can be filed against any act of a public authority or statute.[15] Complaint on the constitutionality of statutes can also be brought both before and after the coming into force of the law. In countries such as France, Portugal, Hungary and Romania constitutional complaints can be filed objecting the constitutionality of a law beforeit is passed by the parliament.[16] In these countries, constitutional complaint against the laws of the parliament,

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[12]Victor Ferreres Comela, *The European Model of Constitutional Review Legislation: Toward Decentralization?* I.CON, Vol. 2, No. 3, Oxford University Press and New York University, 2004, p.190.
[13]*Ibid.*
[14]Gerhard Dannemann, 'Constitutional Complaints: The European Perspective' in *The International and Comparative Law, Quarterly,* Vol. 43, No 1, 1994, p.145.
[15]Ibid.
[16]Such kind of review also called as preventive constitutional review. See, *ibid*, pp. 143-144.

which have come into force can be brought to the court and such a complaint would be raised either in the form of claiming for an abstract review of the legislation regardless of its application on individual cases[17] or in the form of incidental review with regard to its application to a court case at hand.[18]

However, a complaint to challenge legislation in the abstract is reserved primarily to public institutions such as the state governments against the federal government or the otherwise, or the parliamentary oppositions/minorities against laws voted by the majority in a parliament.[19] In Germany, for a legislation to be challenged by an individual, the later must first show that he/she is affected directly and personally by the application of the law.[20] Nevertheless, in exceptional circumstances, constitutional complaint to challenge legislation in the abstract can be filed by individuals where it is impossible to resort to legal recourse and is unreasonable to expect a complaint to be lodged to the court.[21] This is particularly true in cases related with criminal and regulatory offences where it is not normally expected the individual to commit an offence first so that he/she can challenge the law on a concrete case. Besides, where the challenged law does not naturally require execution, it is considered that the individual is affected directly and hence can file a constitutional complaint.[22]

In France, Portugal, Hungary, and Romania it is also possible to file a constitutional complaint to challenge legislations, which have not come in to

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[17]*Ibid.*
[18]*Ibid.*
[19]*Ibid*, pp.142-153.
[20]The Constitutional Court of Germany, official home page, <http://www.bundesverfassungsgericht.de/EN/Verfahren/WichtigeVerfahrensarten/Verfassungsbeschwerde/verfassungsbeschwerde_node.html> as accessed on Nov.10, 2017.
[21]*Ibid.*
[22]*Ibid.*

force.[23] Yet, such a right is reserved for public institutions as opposed to individuals.

2. Importance of Constitutional Complaints

Constitutional recognition of rights alone cannot ensure the full realization of the rights. Mechanisms that can implement the rights generally stated in the constitution should therefore be in place. Constitutional review is regarded as one of the most powerful mechanisms for the protection and enforcement of constitutionally protected rights.[24] It is an important component of any credible system of constitutionalism.[25] As a result, most constitutions in the world have provided for some sort of review mechanisms to control the conformity of laws and decisions of the government with the standards, norms and contents of constitutionally protected rights and freedoms.[26]

Constitutional review is particularly significant to enforce the human right provisions, which are the major and most important component of constitutions in modern era.[27] The particular significance of constitutional review for the enforcement of human rights is related with the following reasons.

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[23]Such kind of review also called as preventive constitutional review; see, *Supra note* 14, pp.143-144.

[24]*Supra note* 14, p.142.

[25]H. Prempeh, Marbury in Africa: Judicial review and the challenges of constitutionalism in contemporary Africa, *Tulane Law Review Vol.80, No.4,* 2006, p.80; Seton Hall Public Law Research Paper No. 1018752. < https://ssrn.com/abstract=1018752> as accessed on Dec 6, 2017.

[26]Dannemann, Constitutional Complaints fn. 14, p.142. Nevertheless, in many countries-such as the United Kingdom, judicial review of acts of administration and public authority is severely limited, and some States (such as the Netherlands) prohibit judicial review of the constitutionality of Acts of Parliament unless it is contrary to the international treaty obligations such as the European Convention on Human Rights. See article120 of the Grondwet (Dutch Constitution).

[27]Human rights are one of the 21st century values that makeup or supposed to makeup contemporary constitutions. Human rights are, in fact, validation requirement for modern constitutions. To this end, many modern constitutions comprise human rights provisions. See, *supra note* 12, p.30. For instance, 1/3rd of the provisions of the Constitution of the Federal Democratic Republic of Ethiopia(FDRE) address human rights. Not only this, the FDRE constitution has given special emphasis/focus to the chapter three (which address human rights). See the Constitution of the Federal Democratic Republic of Ethiopia(FDRE), Proc.1/1995, Addis Ababa, art 13. Even in

One is because constitutional language is often imprecise, inconclusive, and the circumstance of its application is often unforeseeable by its authors.[28] Thus, this makes intervention of the constitutional review body essentially necessary so as to give effect to the appropriate meaning, scope and the circumstance of application of human rights in question. The constitutional review body makes the imprecisely provided constitutional rights practically enforceable rights. Constitutional review defines the meaning and ramification of the right concerned. As a result, constitutional adjudication, beyond resolving controversies at hand, guide future treatment of similar rights, and thus increases future compliance of individuals and government bodies with the human right norms.[29] Constitutional adjudication of human rights kindles and underpins social mobilization and awareness on what constitute an appropriate meaning and treatment of human rights.

Secondly, litigation in general and constitutional review in particular is capable of shaping public policy through challenging the existing political and social *status quo* regarding the understanding and treatment of human rights.[30] For instance, the transformation on the recognition of civil rights entitlements to all including to Black Americans in 1960s in the US, the recognition of the rights of sexual minorities in South Africa, and the recognition of socioeconomic rights as justiciable rights in India are all the results of constitutional review litigations.[31] Thirdly, Constitutional review is a viable means for individuals to defend their

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countries like Canada, UK, Israel and New Zealand where human rights are provided in separate document, such instruments are regarded as higher laws, which are accompanied with such as special amending provision. See, Teguadda Alebachew, *When Constitution Lacks Legitimacy in the Making: The Case of Ethiopia*, LL.M thesis, submitted to Addis Ababa University, School of Law, 2011, pp. 22-23.

[28]James J. Brudney**,** Recalibrating Federal Judicial Independence, *Ohio St. L.J. Vol.64*, No.1, 2003, pp. 173 & 175.

[29]Adem Abebe, The Appropriateness of Constitutional Review as a Tool of the Realization of Human Rights, University of Pretoria citing interview with Ndubisi Obiorah in litigating human rights: Promise Perils, Human rights Dialogue 22, Carnegie Council on Ethics and International Affairs, 2002, p. 29.

[30]Ruth Cown Women's Rights through Litigation: An Examination of the American Civil Liberties Union, Women's Right Project, 1971-1976, *Colum. Hum. Rts Rev vol. 8*, (1976-1977), p. 373.

[31]P. Bhagwati, Judicial Activism and Public Interest Litigation, *Columbia Journal of Transitional Law, Vol.23, No.1*, 1984, p. 561.

rights against human rights violations by a government especially those committed systematically through enacting laws, policies and practices.[32]

Apparently, any system of constitutional review is relevant to the extent that there are complaints, which flow consistently and with good number to the review body. A system of constitutional review is unserviceable without a complaint. Constitutional complaint brings constitutional disputes to the attention of the constitutional adjudicator.[33] A constitutional complaint also signifies access to the constitutional adjudicator, and hence access to constitutional justice.[34] Access to the adjudicator in turn expands protection and knowledge about constitutional rights.[35] More so, access to the adjudicators is a right in itself recognized both under the international and national legal instruments.[36]

3. Factors Affecting Flow of Constitutional Complaints

The submission of constitutional complaints is dependent on a number of factors such as on whether the public has an appropriate awareness towards his or her right and to the adjudicator, the culture of the society asserting for one's right and their ability and resource to initiate cases.[37] Epp, a well-published scholar, noted that the right to revolution in US was ascribed to the constitutional recognition of human rights, judicial independence, judicial activism in applying the

[32]Adem, The Appropriateness, fn. 29.
[33]*Ibid*, p.41 citing C Epp, the Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective, 1998.
[34]Richard S. Kay, *Standing to Raise Constitutional Issues: Comparative Perspectives*, University of Connecticut School of Law Articles and Working Papers, 2006, 257-286 p.1.
[35]*Ibid*.
[36]See for example arts 7 and 8 of the Universal Declaration of Human Rights (1948); art 14 of the International Covenant on Civil and Political Rights (1966); also see art 7 of the African Charter on Human and Peoples Rights (1981). Also see article 37 of the Constitution of Federal Democratic Republic of Ethiopia, proclamation no 1/1995.
[37]S Gloppen Courts and Social transformation: An analytical framework in R Gargarella et al (ed.) Courts and Social transformation in new democracies: An institutional voice for the poor, 2006, p.35.

constitutional provisions, and the rise of public awareness of rights.[38] He particularly noted that the judicial attention to and protection of human rights in US grew primarily out of the pressure from below in the form of strategic litigation deliberately made by the right advocates.[39] It can generally be said that the existence of independent, efficient and effective constitutional review body, strategic litigation through organized and capable litigants are determinants to the success of a constitutional review system as a mechanism for the realization of constitutionally guaranteed rights.

3.1. An Independent Constitutional Review Body

An independent constitutional review organ is at the heart of a successful constitutional review system. Independence of the body refers to the degree to which the constitutional judges decide cases free from coercion, flattery, interference, or threats from governmental authorities.[40] Independence also refers to the degree to which the organ is institutionally free from actual and structural influence, which could come from other organs.[41]

There should, therefore, be a clear constitutional and legislative framework that stipulates appropriate mechanism of appointment, code of conduct, dismissal, working procedure, logistical and financial safeguard against unwarranted influence and intervention of government bodies in the workings of constitutional adjudicators. It is also a logical consequence for the adjudicator to be detached structurally and substantially from the organs or persons that it watchdogs.

A constitutional adjudicator which is independent of government control directly or indirectly would obviously be in a position to interpret constitutional rights

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[38]C. Epp, '*The Rights Revolution: Lawyers, Activists, and the Supreme Courts in Comparative Perspective' (*The University of Chicago Press, 1998 pp.3-4.
[39]*Ibid.*
[40]K Rosenn, 'The Protection of Judicial Independence in Latin America' in *Miami Inter-Am. L. Rev.* Vol.19, issue ½, 1987 p.7. See also the Bangalore Principles of Judicial Conduct, 2000, Principle.1.
[41]*Ibid.*

appropriately and is free to acknowledge the violation. Judicial independence puts the court in a position to fearlessly identify and recognize government transgression of constitutional rights.[42] At a time, judicial independence also refers to making a decision, which is unpopular whether it is for the government, the lawmaker, the general public or for the culture or custom of the society.[43] By far, judicial independence is not limited to its exoneration from the influence, which could come from the government, but also from the influence, which could come from private citizens, the general public and the culture and custom of the society.

An independent and competent adjudicator is likely to be active.[44] An active adjudicator is in a position to understand the meaning and content of human rights from different perspectives than a restrained one.[45] Independence of the adjudicator tends to be lauded by liberals and decried by conservatives when the decision follow a liberal bent.[46] Independence, competence and activism of the adjudicator determines the success of constitutional review as mechanism of correcting human rights violations.[47] Yet, independence is relative as opposed to an absolute notion.[48] Courts or other constitutional adjudicators cannot simply become an island from their environment. Rather it is about the degree to which the organ must be free to fairly apply the law and appreciate the facts to render a reasonable decision.

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[42]Shirley Abramson, 'Thorny Issues and Slippery Slopes: Perspectives on Judicial Independence' in *Ohio State Law Journal, Volume 64, No.1,* 2003, pp. 3-4.
[43]*Ibid.*
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Adem, The Appropriateness, fn. 29, p. 40.
[45]*Ibid.*
[46]Keith S. Rosenn, *The* Protection of Judicial Independence in Latin America, *Miami Inter-Am. L. Rev. Vol.19, No.1,* 1987, p.8, < http://repository.law.miami.edu/umialr/vol19/iss1/21987> as accessed on Dec 2, 2017.
[47]M Sepluveda et.al., *Human Rights Reference Handbook,* 2004, pp. 489-508.
[48]Keith S. Rosenn, The Protection of Judicial Independence in Latin America, University of Miami Inter-American Law Review, 19 *U. Miami Inter-Am. L. Rev. 1,* 1987, p.3.

3.2. Institutional Efficiency and Effectiveness

Quality of justice is a culmination of different factors including the existence of an efficient and effective right adjudicator. Efficiency and quality are connected. A quality of justice is dependent on the existence of an enhanced system of right adjudication starting from the point of entry, during the judicial process, and at its conclusion. Institutional efficiency and effectiveness is not an end itself, but a means to deliver better/quality justice.

The long-standing legal maxim of "Justice delayed is justice denied" impliedly requires an efficient and effective right adjudicator.[49] Speedy trial is also one of the fundamental rights of individuals protected under national and international laws. It is also widely noted as a feature of a legal system that is most devoted for the protection of rights of citizens. Equally, too much emphasis on the speed of the process would also lead to miscarriages of justice ('justice hurried is justice buried').[50]

As a result, measuring efficiency and effectiveness of a justice system is not an easy task. Yet, it can generally be said that an effective justice is the one which interprets and applies the law fairly, impartially and without undue delay. The EU's Justice Scoreboard stated that an effective justice system takes into account three essential aspects, namely: the quality of the justice system, institutional independence and the efficiency with which it operates.[51]

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[49]Strengthening the Quality of Judicial Systems: Theme 6: p. 343, <http://ec.europa.eu/esf/BlobServlet?docId=13949&langId=en> as accessed on Nov.10, 2017.

[50]*Ibid.*

[51]See generally, the 2014 EU Justice Scoreboard edition, <http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_2014_en.pdf>, consulted on 18, December, 2017. The EU's Justice Scoreboard definition of effective justice drew on a range of sources, including The European Commission for the Efficiency of Justice (CEPEJ), Eurostat, World Bank, World Economic Forum and the European judicial networks, as well as pilot field studies. The EU's Justice Scoreboard was first launched in 2013 as an information tool to achieve more effective justice by providing objective, reliable and comparable data on justice systems in all Member States.

Quality: existence of monitoring and evaluation of court activities (including surveys) to shorten the length of proceedings, availability of ICT systems to help reduce the length of proceedings and facilitate access to justice, the availability of Alternative Dispute Resolution (ADR) methods to help reduce the workload on courts, the compulsory and continuous training of judges, and available resources;

Independence: perceived judicial independence, plus five indicators from a first comparative overview, concerning safeguards on non-consensual transfer, dismissal of judges, allocation of incoming cases, withdrawal and recusal of judges, and procedures in case of threats to a judge's independence; and

Efficiency: length of proceedings, clearance rates, number of pending cases and results of the pilot studies (average time needed for judicial review of competition authority decisions applying EU law and to resolve EU consumer law cases).

An effective justice system is regarded as a fundamental right of citizens as enshrined in many national, regional and international instruments. The European Convention on Human Rights (ECHR), for instance, protects the the right to a public hearing before an independent and impartial tribunal within reasonable time as fundamental right of individuals.[52]

3.3. The Requirement of Standing

Standing also called as '*locus standi'* refers to whether a particular applicant is entitled to seek redress from the courts in respect of a particular issue.[53] Standing

[52]Article 6 of *the European Convention on Human Rights*, opened for signature in Rome on 4 November 1950 and came into force in 1953,

[53]Lovemore Chiduza and Paterson Nkosemntu Makiwane, Strengthening Locus Standi in Human Rights Litigation in Zimbabwe: An analysis of the Provisions in the New Zimbabwean Constitution, *PELJ 2016(19) – DOI*, p.3, < http://dx.doi.org/10.17159/1727-3781/2016/v19i0a742> as accessed on Nov 2, 2017.

determines whether an individual or group of individuals or an entity has the right to claim redress on a justiciable matter before a body with a judicial power. The requirement of standing to raise a constitutional complaint is an important precondition that determines citizens' access to the constitutional review court, and therefore to a constitutional justice.[54] The scope of the standing rules determines the reach of constitutional justice.[55] A liberal rule of standing facilitates the reach of citizens to the constitutional review court whereas strict rules reduce such an opportunity.[56] A relaxed requirement for standing allows an increased number of citizens to have access to the courts. Contrarily, a restricted standing limits access to constitutional adjudicators.

The traditional rule of standing, where the prospective complainant is required to prove that his/her personal interest has been invaded by the defendant is widely noted unfavorable to human rights litigation.[57] Firstly, it is because human right violations have naturally a diffusing effect. A violation of human right is not an individual matter where only the person whose right is actually violated can have the standing.

The Spanish Tribunal Constitutional, in its recent decision on a case concerning whether a person belonging to an ethnic minority can lodge a complaint against racist statements made by another person, stated that the complaint is admissible regardless of the existence of a vested interest.[58] The court asserted that an efficient protection of human rights provides a yardstick whether the complainant can show a vested interest in the case.[59] Secondly, human right violations are largely caused by government organs and the individual victim lacks the courage and resource to confront the government. It is very unlikely that individual victim institutes a case

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[54]Richard Kay. S, *Standing to Raise Constitutional Issues: A Comparative Analysis*, University of Connecticut School of Law Articles and Working Papers, Paper 57, 2006, p.1.
[55]*Ibid.*
[56]Ibid.
[57]*Ibid.*
[58]*Supra note* 14, pp.147-148.
[59]*Ibid.*

against government violations. This is particularly true in communities where there is poor culture of claiming for once right, particularly against the authorities. Thus, human right litigation requires organized litigants who would then be fearless to confront the government than individual victims. Thirdly, litigation naturally requires time, knowledge and resource which are not always within the reach of the individual litigant.

Organized litigants are important not only to bring complaints as they see it, but also for the successful compilation of the case and implementation of the declared rights. As opposed to individual litigant, organized litigants can come up with well-articulated and well-framed constitutional complaints which would win the minds of the adjudicators. To this end, a liberal rule of standing presents opportunity for organized groups, civil societies, and right advocates to involve on strategic and public interest litigation.[60]

As opposed to restrictive rules of standing, liberal rules of standing are also credible for increased number of constitutional complaints to come to the court. For instance, in Israel, where standing rules are relatively liberal, thousands of complaints come to the Supreme Court every year.[61] Whereas in Canada, where the threshold test for standing is high the Supreme Court hears not more than 80 cases yearly.[62]

4. Constitutional Complaints in Ethiopia: Exploring the Challenges

This section tries to explore the challenges of reviewing constitutional complaints by the House of Federation (HoF). In doing so, it explores the complications related to the institutional design and composition of the House of Federation and

[60]Human right litigation requires relentless and organized plaintiffs; *supra note* 29, p.41.
[61]See generally Ajit Singh, Public Interest Standing before the Supreme Courts of Israel and Canada: Are our Canadian Courts Accessible Enough? 2016, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1963105>, accessed on January 6, 2018
[62]*Ibid.*

Council of Constitutional Inquiry (CCI). As part of that examination, it further explores the challenges related to the legal rules governing these two institutions. However, before delving into the main task, it is proper to highlight the constitutional review system of the country as a stepping-stone, particularly regarding who are the players in constitutional interpretation and the extent of their mandates.

4.1. Overviewing the Ethiopian Constitutional Review System

The 1995 Ethiopian Constitution vests the power of constitutional interpretation in the HoF[63], which represents the Ethiopian Nations, Nationalities and Peoples. One representative represents each Nation, Nationality and People.[64] Besides, there is one additional representative for each one million population.[65] The CCI, predominantly composed of legal experts, is setup as an advisory body to the HoF. It determines whether there is a constitutional issue that needs resolution, and, if so, provides recommendation to the latter.[66] Nevertheless, the HoF has the discretion to adopt, modify or reject the recommendations.

The interpretative and adjudicatory power of the constitution seems within the command of the HoF.[67] If interpretative and adjudicative powers are within the exclusive mandate of the HoF, what is left to the courts is a question calling further inquiry. On this subject matter, there are two arguments; on the one hand, evoking the mandatory expression 'shall' used in article 83(1) and resorting to the

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[63]Constitution of Federal Democratic Republic of Ethiopia (1995), *Procla.* No.1/1995, Ar 62 (1).
[64] *Ibid*, Art 61(1).
[65] *Ibid*, Art 61(2).
[66] *Ibid*, Art 82(2) and 84(1).
[67] K. I. Vibhute, Non-Judicial Review in Ethiopia: Constitutional Paradigm, Premise and Precinct**,** *African Journal of International and Comparative Law*, Vol. 22 No.1, 2014 P. 124. According to him, "Interpretation of a constitutional provision may be undertaken by the HoF simply to make it more precise or to bring it in tune with the spirit of the Constitution. On the other hand, the settlement of a constitutional dispute involves the interpretation and application of the relevant provisions of the Constitution to a set of asserted and denied facts."

constitutional making history, one may argue that each and every case that involves the resolution of a constitutional dispute falls within the province of the HoF.

On the other hand, resorting to the inherent judicial powers of courts and with explicit reference to their powers recognized in article 13(1) of the constitution, one may assert that the HoF does not have an exclusive constitutional mandate to decide on each case with constitutional flavor. At this juncture, C. Wells has observed the situation and forwarded his view in the following way; "*to conclude each and every decision that involves constitutional interpretation must be brought to the HoF, is not only absurd, but is an absolute nightmare!*"[68] According to him, the practical effect of such a stance renders the regular judiciary irrelevant and shackles the constitutional process to the point of making it a painful hoax.[69]

The source of the controversy originates from the constitutional language employed in article 84(2) of the constitution. While stating which 'law' is subject to the powers of the CCI, the English version says '*any Federal or State law*' but the Amharic version utters '*laws enacted by federal as well as state law making bodies*'.

If the term 'law' is taken in the sense of the English version, the expression is broad that includes all categories of law; proclamations, regulations and directives. However, if it is taken in the sense of the Amharic version, the phrase seems to imply laws made by the federal and regional legislatures thereby excluding other laws including; regulations, directives and decrees out of the sphere of powers given to the CCI/HoF. Such contradiction can be resolved pursuant to article 106 of the Constitution which gives final legal authority to the Amharic version. Accordingly, one can say when laws other than the federal and regional

[68] C. Wells cited in *ibid*, p.110.
[69] *Ibid.*

proclamations are contested as unconstitutional; the judiciary should have the mandate to examine their constitutionality.

Assefa Fiseha, a published scholar on the area, advocates this line of argument.[70] Takele Soboka[71] and Ibrahim Idris[72] in their respective works also reflected the same conclusions. However, Getachew Assefa, also a well cited scholar in the area, forwarded solid argument resorting to the minutes of the constituent assembly that embody the discussion in relation to Arts.62(1), 83 and 84 of the constitution. He has maintained that any scenario that invites the interpretation of the Constitution is within the exclusive scope of the powers of the HoF.[73]Yonatan Tesfaye concurs with Getachew saying anything that involves constitutional interpretation shall be decided by the HoF and he concludes that courts do not have the power to interpret the constitution.[74]

Such controversy is also reflected in the decisions of the CCI/HoF. For instance, in a case between Ethiopian Blind Persons Association vs. Oromia Education Bureau and Jimma College of Teachers' Education, the CCI overruled the case arguing it does not need constitutional interpretation since *the law contested as unconstitutional had not emanated from the legislative bodies*.[75] It goes on to argue that such cases involving issues of constitutionality of subsidiary laws are within

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[70]Assefa Fiseha, Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation (Hof), *Mizan Law Review Vol. 1, No.1*, p. 32, 2007.

[71]Yonatan Tesfaye, 'Whose Power is it Anyway: The Courts and Constitutional Interpretation in Ethiopia' in Journal of Ethiopian Law (Vol. 22, No.1, 2008).

[72] *Ibid.*

[73] Getachew Assefa, All about Words: Discovering the Intention of the Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation, *Journal of Ethiopian Laws,* (Vol. 24(2) 2010), p. 150.

[74]Yonatan Tesfaye, 'The Courts and Constitutional Interpretation in Ethiopia: Judicial Review and Democracy: A Normative Discourse on the (Novel) Ethiopian Approach to Constitutional Review'in *African Journal of International and Comparative Law,* Vol.14, No.1, 2006, P.134.

[75]Mulu Beyene, '*Assessing the House of Federation in light of the Exhaustion of Local Remedies Rule under the African Charter:* Ethiopian Blind Persons Association v. Oromia Education Bureau and Jimma College of Teachers Education', File No. 4/94 (Decided in November 2003, unpublished), p. 18, 2017.

the jurisdiction of courts.[76] Likewise, the HoF in a case between two individuals that involved a disguised sale of rural land in the form of mortgage acquisition argued that the relevant courts should have set aside these transactions in line with their obligation to respect and enforce the constitution enshrined under Art 13(1) of the Constitution.[77] Once more, in another case, the HoF said that courts should on their own initiative render a contract that would ultimately deprive the land rights of farmers under various mischiefs unconstitutional.[78] In contrast, the HoF entertained a recent constitutional complaint against a 'decision of a school administrator' and found it unconstitutional based on the right to access to justice.[79] Hence, there is no consistency even in the decisions of the HoF on the exact powers that should be extended to the courts and of itself.

Against this practical trend, proclamation No.250/2001 and proclamation No.798/2013 which replaced the former are consistent with the recent decision of the HoF in a way to totally excluding courts from the mandate of constitutional interpretation.[80] For instance, Art 3 of this latter proclamation states, "any law or customary practice or decision of government organ or official if contested unconstitutional should be adjudicated by the CCI/ HoF".[81] Yet, for Assefa, as discussed above, the constitutionality of such legal rules is questionable.[82]

This said about the controversy on the exact mandate of the HoF and the CCI, the subsequent discussions will try to scrutinize the challenges of increasing constitutional complaints pertaining to these institutions, which come either from their institutional design or the legal rules by which they are governed.

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[76] *Ibid.*
[77] *Ibid, Hasay vs. Tensa'A Kutale and others* (HoF, decided on March 2016, unpublished).
[78] *Ibid, Kelebie Tesfu vs. Ayelign Derbew* (HoF, decided on June 2015, unpublished).
[79] *Ibid, Tariku Mekonnen v Education Bureau of Addis Ababa, Yeka Sub-Sity* (HoF File no. 018/15; September 2016, unpublished decision).
[80]Council of Constitutional Inquiry Proclamation No.789/2013, Federal Negarit Gazette, No. 65, 30th August, 2013, article 3.
[81] *Ibid.*
[82]*Supra note* 70 p.15.

4.2. The Challenges for Constitutional Complaints

The HoF, with the help of the CCI, is in charge of ensuring the supremacy of the constitution through constitutional interpretation. Specifically, it is meant to ensure the constitutionality of laws and protecting individual and collective rights asserted in the constitution. However, there are difficulties impeding the House from achieving its purpose.

In relation to such concerns, this section tries to deal with some practical questions including: whether individual citizens are physically able to bring constitutional complaints to the HoF/CCI? Whether the HoF and the CCI are seen as independent and trusted institutions that are able to give neutral decisions? Are the HoF and CCI institutionally competent to deliver constitutional decisions timely? Whether the HoF has institutional mechanisms of enforcing its decisions? And whether the standing requirement for constitutional complaint is inhibiting access to constitutional justice? The succeeding discussions try to tackle these questions with regard to theoretical arguments and practical facts.

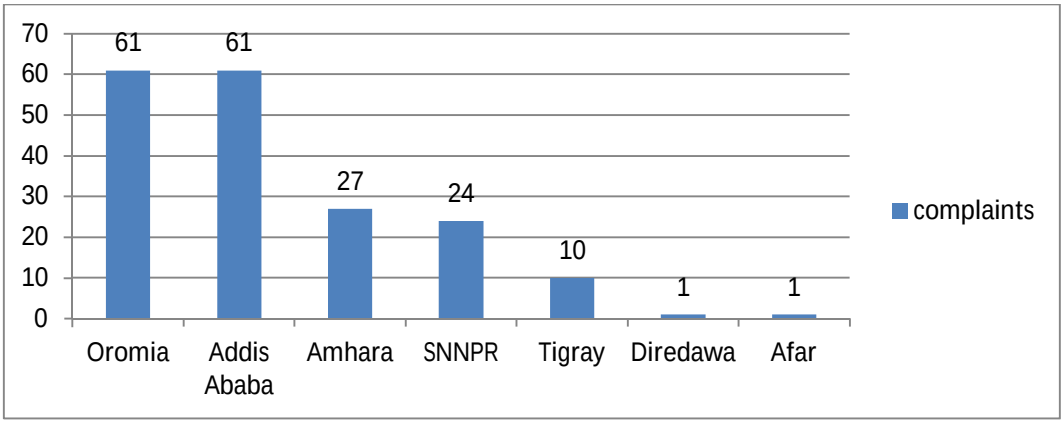
4.2.1. Accessibility of the HoF/CCI

When dealing with accessibility of constitutional adjudicators, among others, physical accessibility is one aspect of it. When the HoF and the CCI are examined on this point, despite the large geographical setup of the country, the institutions are centrally located in Addis Ababa. Thus, applicants from peripheries may face difficulties of bringing constitutional complaints because of distance and lack of the means to travel including finance. In view of this problem, proclamation No.798/2013 under its Art 27(3) requires the CCI to open branch offices in selected regional states. But so far, there is no such move. [83]

[83] Interview with Ato Kebebe Tadesse, a special assistant to the head and office of the CCI, conducted at Addis Ababa, office of the CCI, October 27, 2017.

In actual terms, one might wonder if geographic inaccessibility hinders access for bringing constitutional complaints. Taking some data on constitutional complaints that are brought to the CCI, here is the dependence between distance and constitutional complaints.[84]

Figure 1-summary on the regional distribution of constitutional complainants



The graph reveals that long distance and increased constitutional complaints are inversely related; as distance increases, constitutional complaint decreases and the vice versa. For instance, Oromia Region, which surrounds Addis Ababa and Addis Ababa itself, which is the seat of the HoF and the CCI, covered 66% of all the constitutional complaints brought to the CCI in three months' time. As a complement to this, an interview with Dr. Fasil Nahom, a member of the CCI since its inception, stated distance inhibits access to constitutional complaints.[85] According to him, lack of awareness is another critical problem, which also correlates with distance i.e. the more proximate to the institutions, the more the public knows about them. People in the rural areas and more importantly in the peripheries are not informed about the existence of such institutions and what cases

[84]The data represents three constitutional complaints for the months of July, August and September, 2017.

[85]Interview with Fasil Nahom, Member of the CCI, conducted at Addis Ababa, Office of the CCI, October 27, 2017.

they entertain and how complaints are brought.[86] If they have the information, they may also lack the means including time and finance.[87] Hence, the centralization of the institutions has become one concrete defy over the diminished number of constitutional complaints in Ethiopia.

4.2.2. Effectiveness of the HoF/CCI

Even though constitutional review should be a full-time responsibility, the fact to the HoF and the CCI speaks otherwise. Members of both institutions are part-timers as far as constitutional interpretation is concerned. For instance, all members of the HoF are members of regional councils and are office holders in their respective regional governments. As a result, cases are not disposed timely.[88] Besides, the HoF is supposed to assemble twice a year largely to do other constitutional responsibilities.[89] Hence, constitutional interpretation in Ethiopia is given to a part-time institution.

This can be evident from the cases that are entertained by the HoF since its commencement more than twenty years. During such long period, the HoF has disposed 348 cases either with a recommendation from the CCI or through appeal after rejection by the latter.[90] Of which, the HoF merely decided 44 cases in favor of the complaints and the rest 304 cases were rejected as not warranting constitutional interpretation.[91] Hence, the success rate of all constitutional complaints made to the CCI or the HoF is below 2%.

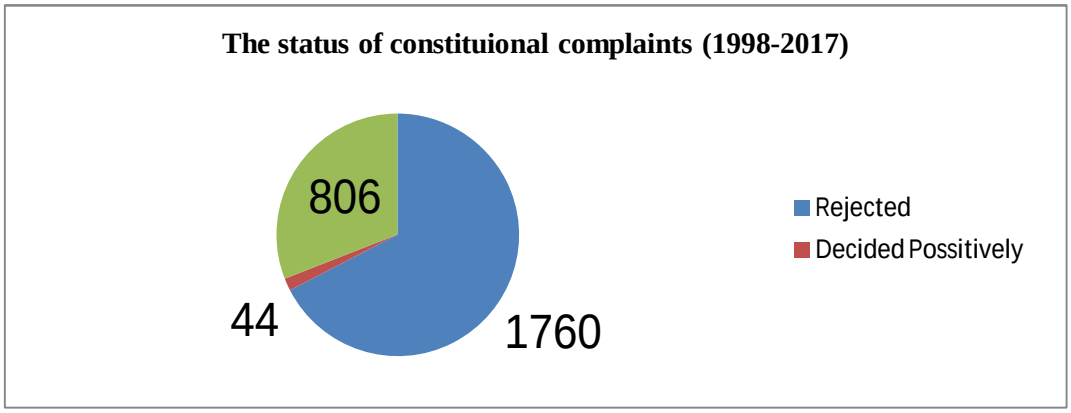
Likewise, when it comes to the CCI, its members are part-timers; they are either higher officials or lawyers working privately. It has eleven members of different mix, including six legal experts of "proven professional competence and high

[86]Interview with Ato Kebebe, fn. 83.
[87] *Ibid.*
[88] *Ibid.*
[89] There are a bundle of powers given to the HoF in Art 62 (1-17) of the Constitution.
[90] Information from the Office of the House of Federation, September 27, 2017.
[91] Data gathered from the Office of the House of federation, October 28, 2017.

moral standing" to be appointed by the head of state upon recommendation by the House of Peoples' Representatives.[92] The other five members include; the president and vice-president of the Federal Supreme Court who occupy the position *ex officio* chairperson and deputy chairperson of the Council,[93] and three persons designated by the HoF from among its members.[94] In the last 20 years, the CCI has entertained 1804 complaints, of which 1760 cases are rejected as not needing constitutional interpretation on procedural and substantive grounds.[95] The average yearly performance of the CCI is limited to 90 cases.

Overall, 2610 cases have been submitted to the CCI Registrar in the entire twenty years.[96] One cannot but marvel at such insignificant number of complaints in a country with one hundred million people that experiences substantial human rights issues.[97]What is dismaying further is that out of such insignificant number of complaints, 806 cases are still pending.[98]

Figure 2-summarizes disposed and pending cases by the CCI[99]

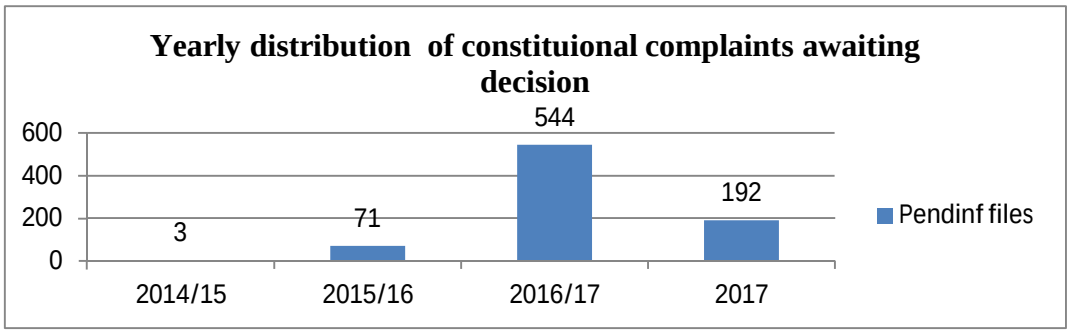


[92] The FDRE constitution, fn. 63, Art 82(2)(c).
[93] *Ibid*, Art 82(2) (a & b).
[94] *Ibid*, Art 82(2)(d).
[95] Information from the Office of the CCI, October 25, 2017.
[96] *Ibid*, the figure only represented cases that have submitted to the CCI since October 27, 2017.
[97] *Supra note* 85.
[98] Data gathered from the office of the CCI, October 27, 2017.
[99] *Ibid.*

As expected, the HOF and CCI could not manage to expeditiously entertain the very limited cases so far submitted. This is visible from the large portion of pending cases. As illustrated above, 31% of the complaints so far instituted to the CCI are pending.[100] As part-timers, the HoF and the CCI are overburdened by their principal mandates as opposed to entertaining constitutional complaints.

As depicted in the following chart, among the cases pending, there are some that stayed in the hands of the CCI for about four years.[101]

Figure 3-summarizes the pending complaints on yearly basis



As can be seen from the chart, there are three cases, which are submitted in 2014/15 and which are not yet entertained by the Council. There are 71 cases, which have continued to wait nearly three years for the decision of the CCI. 544 cases have also stayed in the shelf of the council for more than a year and nothing is said about them.[102] Currently, there are cases flowing to the CCI, among which 192 cases are brought at the third quarter of the 2017 and many more cases are coming on daily basis.[103] However, the delay is intolerable. The phenomenon of the maxim 'justice delayed is justice denied' can have a prohibitive effect on potential complainants that could have come to the HoF/CCI for constitutional justice.

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[100] *Ibid.*
[101] Data received from the CCI office, October 2107.
[102] *Ibid.*
[103] *Ibid.*

4.2.3. Impartiality of the HoF/CCI

The constitution provides two alternative mechanisms of electing members of the HoF; directly by popular election or indirectly by state councils.[104] The second option is adopted in practice. As a result, all members of the HoF are members of state councils. Specifically, the president, vice president and speakers of the regional councils are *de facto* members of the House. By this, as Assefa noted, the composition of the HoF gives the impression that it is "a political organ."[105] Yonatan also concurs stating 'the House is obviously a political body."[106]

Moreover, many of the members of the HoF work either in the executive branch of the regional governments and some even hold a higher office at the federal level.[107] Actually, the office of the House Speaker of the HoF was for a considerable time held by a minister.[108] Despite all these, there is no legal clause in the relevant laws that require a member to abstain from participating in a discussion that concerns the constitutionality of a law or decision, which he or she is involved, in the drafting or adoption of the law, as a minister or member of the federal or state executive or legislative branch.[109]

As a result of these, the question that has to be addressed here is that when laws or decisions adopted by the federal or state legislative or executive organs are contested as unconstitutional, would it be logical to expect impartial resolution from an adjudicator who happens to seat on his/her own case? In such situations, in one or the other way, the HoF becomes a party to the case but at the same time happens to be an arbitrator that decides over the case. Therefore, save for cases of minor implications, the HoF is not expected to furnish neutral decisions.

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[104] The FDRE constitution, supra note 63, article 61(3).
[105] Assefa, Constitutional Adjudication, *fn.* 70, p.31.
[106] Yonatan, 'The Courts, *fn. 74*, p.73.
[107] Ibid, p.78.
[108] *Ibid.*
[109] Ibid.

Consequently, the composition and institutional design of the HoF can be considered as a challenge for bringing constitutional complaints and for an entrenched constitutional practice.

Furthermore, the composition of the CCI raises some other concerns. First, the fact that the President and Vice-President of the Federal Supreme Court are respectively the chairperson and deputy chairperson of the Council[110] might trigger unwarranted conflict of interest in the sense that they may consider a case twice or more.[111] There does not seem any bar against such incidents. A case summarized in the following paragraph is one such instance[112]

> *In one of the cases now before the House,[113] the complainant, a former shari'a court judge is challenging the constitutionality of a disciplinary action taken against him that the President of the Federal Supreme Court had the chance to decide on his case three times, namely (1) on a complaint that the complaint lodged against the decision of a court administrator in his capacity as an administer of the Supreme Court to which judges of the sharia courts belong;[114](2) as a chairperson of the Federal Judicial Administration Council[115] to which an appeal was lodged;[116] and then (3) as a chairperson of the CCI.*

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[110] FDRE Constitution, *supra note* 63, Article 82(a-b) and Proclamation No.798/2013, *Supra note* 80, Article 15 (a-b).

[111] Tsegaye Beru, An Outline for the Study of Ethiopian Constitutional Law, *43 Int'l J. Legal Info. 234, 312 (2015*), pp. 246-247 as cited by as cited by Mulu Beyene, *Supra note* 75.

[112] Mulu Beyene, *supra note* 75, recaptured from his personal Interview with the Shiek Adem Abdela, 27/09/2017, Addis Ababa.

[113] *Ibid*, as cited from *Adem Abdela v Federal Judicial Administration Council*, HoF File no. 120/2015.

[114] This seems to be pursuant to Proclamation No. 188/99, Federal Courts of Sharia Consolidation Proclamation, Art. 20(2).

[115] See, Proclamation No. 684/2010, Amended Federal Judicial Administration Council Establishment Proclamation, Art. 5(1(a)).

[116]For a comprehensive appraisal of the Sharia Courts administration, See, Mohammed Abdo, Legal Pluralism, Sharia Courts, and Constitutional Issues in Ethiopia, *Mizan Law Review Vol. 5 No.1*, Spring 2011

Second, the fact that members of the CCI, except the chairperson and deputy chairperson, can be removed with simplicity deteriorates the appearance of the CCI to stand the test of independence, including tenure.[117] Different bodies can remove the nine members of the CCI. The relevant rule reads that these members "may be removed from membership by the designating or appointing organ before the end of his term" and provides commission of disciplinary offences or incompetence as grounds.[118] This would mean that the House of Peoples' Representatives or the President of the state might remove the six experts.[119] For the remaining three members that come from the House, either the House or their respective regional councils can remove them, as they are merely appointed to represent their respective regional states.[120] Hence, the council is not likely to be independent looking at the tenure of its members too.

4.2.4. Absence of Oral Hearing

The Constitution mandates both the HoF and the CCI to adopt rules of procedures that can ensure fair hearing process in carrying out the constitutional interpretations. [121] However, there is no one yet. So far, complaints are only allowed through a written application[122] and thus do not normally allow complainants to be heard orally.[123] This falls short of the 'right to be heard', including the right to defense.[124] Both institutions are handling complaints in closed doors, despite an indication that "the Council may hear cases in a public transparent manner according to article 10(4) of the Proc.No.789/2013, the details

[117] African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Part A (4), <http://www.achpr.org/files/instruments/principles-guidelines-right-fair-trial/achpr33_guide_fair_trial_legal_assistance_2003_eng.pdf>, as accessed on Oct 24, 2017.
[118] Proclamation No.798/13, *supra note* 80, Article 19.
[119] *Ibid*, Article 15(c).
[120] The FDRE Constitution, fn. 63, Art 61(3); see also, *fn.* 74, p. 72.
[121] Ibid. Arts 62(11) and 84(4).
[122] Proc. No. 798/2013, *fn.* 80, Art 3(1).
[123] Mulu, *Assessing the House of Federation, fn. 75.*
[124] *Ibid.*

of which is indicated to be regulated by a directive that the Council may adopt.[125] As far as fair hearing procedure of the House and the Council is concerned, one author has the following to say;[126]

> *What transpires from the relevant legal provisions and interviews with the relevant officers is that complainants as of right neither can present their cases in person nor examine the evidences presented by opposing party. As an "adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence" is one of the core elements of fair hearing, it is clear that the House cannot qualify as such.* [127]

Part of the problem comes from the unmanageable number of members of the HoF who are supposed to hear the cases. Let alone hearing cases, the HoF particularly is challenged to have detailed deliberation on the constitutional complaints submitted to it. This substantially affects the degree of deliberation that should have existed. Practically, it is the committee on constitutional interpretation, which deliberates on specific cases, and it simply presents the summary of cases just for approval to the House.[128] It is very difficult to argue within the House for and against, as it should have been.

4.2.5. Remedies and Enforcement of Remedies

What are the remedies that are given by HoF and how are such remedies enforced on the ground? Who should enforce such remedies or decisions?

It is obvious that an organ like the HoF, empowered to interpret the highest law, must be given the power to grant final and injunction remedies for constitutional

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[125] Art 10(4) of Proc.No.798/2013.
[126] Mulu, *Assessing the House of Federation, fn. 75* p.22.
[127] *Ibid.*
[128] Interview with an anonymous official who work in the office of the House of Federation, October 26, 2017.

violations that can address a wide range of situations. For example, the HoF may need to issue interim orders while a case is pending for a final decision. However, the jurisprudence of the HoF for the last 20 years shows that injunction order was not issued despite repeated requests.[129] The existence of unreasonable delays in case dispensation can be problematic for granting injunction orders. But, most importantly, neither the CCI nor the HoF is willing to use this power. Such failure might substantially affect the final decision of the House to the extent of making it useless. The other biggest challenge is, once final decision is given by the HoF, how is it going to be enforced and who is in charge of enforcing it, remains a baffling concern.[130] There are instances of such scenarios and it is being an evolving test to the HoF.[131]

4.2.6. Restrictive Standing

Standing by nature is a preliminary issue, the lack of which precludes any form of determination over the merits of any complaint.[132] It determines whether an individual or group of individuals or an entity has the right to bring constitutional claim before redress is sought. The enforcement of constitutionally entrenched rights through constitutional interpretation is largely determined by the '*locus standi'* of the complainants.[133] The issue of standing significantly determines the reach of constitutional justice to potential applicants from approaching the relevant bodies.[134] To be specific, while liberal standing rules may enhance an active enforcement of human rights, prohibitively strict rules, on the other hand, restrict the opportunity for review, and hence ignore an unconstitutional behavior.[135] In

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[129] *Ibid.*
[130] *fn.* 83.
[131] *Ibid.*
[132] *Adem Abebe*, 'Towards More Liberal Standing Rules to Enforce Constitutional Rights in Ethiopia', *African Human Rights Law Journal, Vol.10,* 2010, P.408.
[133] *Ibid.*
[134] *Ibid.*
[135] *Ibid.*

this regard, it is good to see the standing rule of constitutional complaint in Ethiopia.

Apart from the general rules of standing provided under Art 37, a specific reference to the rules of standing for constitutional review is indirectly addressed under Art 84(2) of the constitution. Art 84(2) reads; "*where any Federal or State law is contested as being unconstitutional and such a dispute is submitted to it by any court or interested party, the Council shall consider the matter and submit it to the House of the Federation for a final decision*." This provision has impliedly noted that constitutional complaints can only be activated either by the referral of courts or by the interested party, the party who claims to have a personal interest in the subject of dispute.

Besides, the proclamation, which established the council of constitutional inquiry ,specifically stipulates the rules of standing saying "*any person who alleges that his fundamental rights and freedoms have been violated by the final Decision of any government institution or official may present his case to the Council of Inquiry for constitutional Interpretation."*[136] Still, it is only persons who have directly and actually incurred personal loss that can instigate constitutional complaint before the council. Neither the constitution nor the subsidiary law grants civil societies and charities to have *locus standi* on behalf of the right holders. The experience of the council also reveals that no charity or civil society has brought constitutional complaint to it.[137] Had there been any, it is the conviction of the council that it would reject it.[138] However, the council is not as such strict on who has to 'submit' the complaint to the council as long as the signature of the interested party is fixed in the written complaint.[139] In fact, the council has now started receiving

[136]A proclamation to establish the council of the constitutional inquiry No.789/2013, article, 5(1).
[137]*Supra note* 75, See also, interview with Ato kebeb kebede, *supra note* 83.
[138] *Ibid.*
[139] Article 7(2) of Proc. No.798/2013.

complaints through a postal mail and also through the web of the council.[140] Such flexibility of the council has come partly because the council does not conduct oral litigation of the parties save for very exceptional cases. On such cases, it is only the interested parties or their legal representatives that can appear before the council for oral hearing.[141]

From the reading of Art 84(2) and Art 5(1) of Proclamation No.798/2013, unlike for cases that can be brought to the court as per article 37(2) of the FDRE constitution, any association or group cannot initiate constitutional complaints before the council representing collective or individual interest of its members. To this end, the Council has rejected a case submitted by the Islamic Affairs Supreme Council requesting the position of the constitution regarding the appealability of the final decisions of the Shari'a courts to the ordinary courts.[142] The Council then decided that only the parties to the case have standing to refer the case to it and not the Islamic Affairs council on behalf of the Islam community or the Islamic court.[143]

The standing rule under the council's establishment proclamation is generic and hence applies to all cases; whether the complaint is against a legislation, decision, or omissions of a government bodies. Of course, constitutionality of legislation will not be invoked unless a party has sustained an actual injury by its enforcement or otherwise.[144]Thus, an individual cannot bring constitutional complaint anticipating a violation of his right or threats of violation by legislation. The experience of the

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[140]Interview with Rahel Birhanu, Director of the Flow of Cases and Administration, Council of Constitutional Inquiry, October, 27, 2017, Addis Ababa, Also interview with Ato Kebeb *fn.* 83.
[141] *Supra note 85.*
[142]Assefa Fiseha 'Federalism and the Adjudication of Constitutional Issues: The Ethiopian Experience' (2005) 52
Netherlands International Law Review 1, 26-27. The case was submitted to the Council in October 1999 and the Council delivered its decision on 17 January 2001
[143] *Ibid.*
[144] Proc.No.798/2013, *supra note* 80, Art 3(2(a&b)).

council also shows the same trend.[145] In all of the cases brought to the council, constitutionality of laws is challenged in the court in the course of court ligation and referred to the council by the courts.[146]

In nutshell, one can say that the Ethiopian constitution is completely against the emerging African constitutions[147] as far as standing is concerned. Latest developments on standing in some African countries shows that constitutions are becoming more generous in granting standing rights to various stakeholders on the assumption that constitutional complaint is an important part of any system of constitutional review.[148] Hence, the restrictive standing rules coupled with the institutional problems of the HoF and the CCI obviously affects the number of constitutional complaints that would come to these review bodies. The HoF/CCI ever since their establishment received only 2610 complaints.[149] Yet, there is progress since the establishment of the council as a separate body.[150]

Conclusions

Constitutional complaint is an important instrument of enforcing constitutional rights by way of empowering the right holders. It enables right holders to initiate

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[145] *Supra note* 85.

[146] An instance in this regard could be the case between *Melaku Tefera vs. Public Prosecutor and CUD vs. Meles Zenawi.*

[147]The Constitution of Zimbabwe, the South African and Kenyan Constitution are good examples of emerging African constitutions, which not only specifically addressed rules of standing, but they are good examples of liberalized rules for constitutional review. section 85(1) of the *Constitution of Zimbabwe*, for instance , states "any of the following persons, namely (a) any person acting in their own interests; (b) any person acting on behalf of another person who cannot act for themselves; (c) any person acting as a member, or in the interests, of a group or class of persons; (d) any person acting in the public interest; (e) any association acting in the interests of its members" is entitled to approach a court, alleging that a fundamental right or freedom enshrined in this Chapter. See generally Lovemore Chiduza and Paterson Nkosemntu Makiwane *supra note* 53. Also see, the Constitution of Kenya, 2010.

[148] *Ibid.*

[149]The figure represents cases brought to the CCI until October 27, 2017 where the researchers in person visited the office of the CCI. The figure increases every day as complaints are filing new cases to the CCI.

[150] Previously the council of constitutional inquiry was working being as an office within the house of federation. However, after the new proclamation No.789/2013, the CCI is established as a separate office.

the review of unconstitutional actions. Constitutional adjudication on the other hand makes sure that actions of government bodies and individuals are in line with the constitutionally granted rights. It is therefore important that constitutional complaints come to the adjudicator consistently and with good number. However, the quantity and consistency of flow of constitutional complaints are dependent on various factors such as; the existence of non-restricted rules of standing, citizen's awareness of the rights granted and the constitutional review body, physical accessibility of the review body and the existence of an effective, independent and neutral constitutional review organ.

In Ethiopia, the House of Federation, the upper house of the federal parliament, uniquely responsible to carry out constitutional review. It is composed of representatives of Nations, Nationalities and Peoples as assigned by the state councils of the regional governments. The members are hence political representatives as opposed to legal professionals who are supposed to make constitutional adjudications. Anticipating the gap in legal skills on the part of the members of the House of Federation, the constitution has foreseen the establishments of the CCI to give technical support to the former in the course of constitutional interpretation. Yet, even though the HoF and CCI are in charge of constitutional review power, constitutional review is not their full-time job. While the HoF meets twice a year, the CCI meets twice a month.

More so, the two bodies are physically located at the center despite their nationwide constitutional review responsibility. They lack liaison offices at states so that citizens at periphery would have equal access to them. The unequal accessibility of the house to all citizens is actually depicted on the cases that have come to the house in the past twenty or so years. Despite their own limitations, the recent efforts made by the CCI to receive constitutional complaints virtually by postal and email communications is a good start in this regard.

Recent developments in relation to standing rules for constitutional review dictates that relaxed rules of standing are favorable for the success of constitutionally granted rights. However, in Ethiopia, the rule of standing for constitutional review is based on the principle of 'vested interest' making the rules of standing restrictive. Only individuals who can show that their personal interest actually affected by the decision of the government body or individuals can file a constitutional complaint either directly to the House of Federation or to the CCI. Strategic litigation in the form of public interest litigation through civil societies and organized litigants is not legally possible. Besides, the awareness of the citizenry towards constitutional review as legal recourse and the physical availability and location of the review body is slagging behind.

All the factors stated above have constrained the flow of constitutional complaint in Ethiopia. Only 2610 complaints have managed to come to the HoF/CCI in over twenty years of their service. The figure can be regarded as very small given the total number of the Ethiopian population and the expected violation of rights resulting from the poor culture of democracy and constitutionalism both on the part of the government and the citizenry at large. Of the 2610 cases filed to the CCI, 806 cases are yet waiting the resolution of the CCI on whether they would warrant constitutional review or not.

Given the importance of constitutional complaints to enforce the constitutionally granted rights and the actual status of the enforcement of constitutional rights in Ethiopia, it is important that the constitutional review system in general the constitutional review bodies in particular needs a serious reconsideration. Specifically, the problems in relations to the composition, independence and organizational setup of the review bodies, the rules of standing and the low level of awareness on the part of the society needs to be worked out very closely.

Strengthening Shareholders Control of Companies in Ethiopia: Minimizing Agency Cost

Woldetinsae Fentie[♣]

Abstract

Shareholders are normally owners of the corporation's assets and the fact that such assets are controlled by the management body is the cause for many of the problems in corporate governance. Agency problems arise when the agent does not share the principal's objectives. Shareholders meeting as management organ can play sizeable (significant) roles in minimizing the departure between these interests. The query of the paper is how to enhance role of shareholders in corporate governance upon which they invested their capital. The proliferation of initial public offering of shares while it is not thoroughly regulated is leaving its black spot on future development of corporate culture in Ethiopia. The researcher firmly urges that reforms meant to enhance shareholders control on a company should be made to reduce agency costs. They include, among other things, possibility of derivative suits by shareholders, access of electronic voting, possibility of voting by mail, facilitating sufficient information disclosure mechanisms, adopting advisory voting and the rules necessary to such vote, facilitating easy exit mechanism to shareholders dissatisfied by majority holders, fixing maximum number of shareholders to avoid dispersed share ownership structure, avoiding short time and resource encumbrances to challenge resolutions adopted contrary to the law and the company statutes, and avoiding unnecessary bureaucracy when shareholders petition to the Ministry to appoint investigators.

Key Terms: Derivative Suit, Corporate Governance, Agency Cost, Stock Market.

Introduction

Economic theory of agency posits that business firms are fundamentally contractual in character and seeks to explain their structure as an efficient

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contractual response to agency costs. From this perspective, much of corporate law therefore consists of the provision of default terms into corporate contracts.[1]

Agency costs can manifest in various forms, including self-serving behavior on the part of managers focused on status, excessive gratuity consumption, non-optimal investment decision-making or acts of accounting mismanagement or corporate fraud.[2] The adverse implications of these actions are then felt in the form of the destruction of shareholder wealth and wider impacts on other corporate stakeholders. The empirical literature on the role of shareholders in mitigating agency cost is very limited and there is empirical evidence in support of this argument.

John Armour provides that:

> *Agency costs are, in short, the costs of conflicts of interest between various participants in the corporate bargain. These costs arise wherever (i) rights to control income producing assets are separated - in whole or in part - from the rights to receive the returns, and (ii) it is costly for the party in whom the rights to return reside (the "principal") to observe the actions taken by the party in control (the "agent"). The problem is that the agent may exercise his or her control rights to serve his or her own self-interest at the expense of the principal.*[3]

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[1]Easterbrook, Frank H., and Fischel, Daniel R., *The Economic Structure of Corporate Law* (Boston: Harvard University Press, 1991), p.12.

[2]Sajid Gul and others, 'Agency Cost, Corporate Governance and Ownership Structure: The Case of Pakistan' *the International Journal of Business and Social Science* (Vol. 3 No. 9; May 2012), p. 269.

[3]Armour J., *Capital Maintenance* (*ESRC Centre for Business Research, University of Cambridge*), p. 7.
*<http://citeseerx.*ist.*psu.edu/viewdoc/download?doi=10.1.1.175.7065&rep=rep1&type=pdf>*
Accessed on 5/19/2018

However, it is suggested that agency costs can be reduced by internal governance mechanisms. Shareholders as those actors in the corporate governance structure could play their part in reducing agency cost if the legal framework concerning corporate governance structure is properly designed.[4] Shareholders, particularly those in large corporations, are forced to rely on the honesty and competence of their managers. The costs associated with reducing or eradicating these risks is called agency costs.[5]

1. An Overview of Literature

In Ethiopian academics, a number of research works have been made recently focusing on corporate governance issues. For instance, Fekadu Petros highlights the growing separation between ownership and control in Ethiopia, and he submits some empirical evidence in this regard.[6] He attempts to show the deficiency of the Commercial Code in protecting the rights of minority shareholders in the context of publicly held companies. Tewodros Meheret in his attempt to assess the legal regime applicable to governance of share companies in Ethiopia explores the theoretical background and legal framework of corporate governance and examines the rules of governance in light of available standards.[7] In particular, he discusses the structural choice, appointment and removal, powers, duties and responsibilities, remuneration, and the working methods and mechanism for controlling the boards of directors. Tewodros states that 'a share company is managed by its board which is composed of directors appointed by the general meeting of shareholders.'[8]

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[4]Nicolai Foss**,** *The Theory of the Firm: An Introduction to Themes and Contributions* (London: Routledge, 1999), p. 24.

[5] Le Talbot, Critical company law, (Rutledge-Cavendish, 2008), pp125-126.

[6]Fekadu Petros, 'Emerging Separation of Ownership and Control in Ethiopian Share Companies: Legal and Policy Implications' *Mizan Law Review* (Vol. 4, No.1, 2010.), p. 4.

[7] Hussen Ahmed, 'Overview of Corporate Governance in Ethiopia: The Role, Composition and Remuneration of Boards of Directors in Share Companies', *Mizan Law Review* (Vol. 6 No.1, June 2012), p50

[8] ibid

Hussein Ahmed makes a distinction between corporate governance and corporate management and contends that corporate governance is different from corporate management; and share companies are governed by a non-executive board while management is the task of the executive of a company. He further argues that there is inadequacy in the law on the composition and independence of directors and forwards recommendations.[9]

A number of scholarly works are available on the literature on how to minimize agency cost and protect interest of shareholders. These works identified that institutional shareholding, smaller board size; managerial share ownership, existence of independent board, and existence of remuneration structure to managers have significant role in reducing agency costs.[10]

Institutional shareholders have important contribution in mitigating agency problem because they can monitor firm performance and action of managers and can influence managerial decision making. According to Pound institutional investors as compared to private shareholders who are less informed can monitor managerial performance at lower cost because of greater expertise and resources.[11] Agency costs will be reduced with higher managerial share ownership. Because when the ownership of managers in the firm increases, it will result in the convergence of interests between company managers and shareholders.[12] In contrast Florackis and Ozkan in a study during 1999-2003 on a sample of UK public listed companies, found that large size of board increases agency cost because of less efficiency.[13] Larger board independence is perceived as a monitory mechanism which can play an important role in limiting or controlling the agency

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[9]Hussen, Overview of Corporate, fn 7, pp. 75-76.
[10]Sajid Gul and others, Agency Cost, fn 2, p.21.
[11] Pound, J. 'Proxy Contests and the Efficiency of Shareholder Oversight' Journal *of Financial Economics* (Vol. 20, 1988), p. 237.
[12] Jensen, M.C. and Meckling, W.H. 'Theory of the firms: managerial behaviour, agency costs and ownership structur', Journal *of Financial Economics*, (vol 3 issue 4, 1976), p. 310.
[13]Florackis, C. and Ozkan 'Agency Costs and Corporate Governance Mechanisms: Evidence for UK Firms' Working Paper, University of York, UK. (2004), p.16.

problem.[14] There are numerous studies in the literature which shed light on the role of independent directors and suggest that they are more likely to work for the shareholders interest.[15] It is also proved that the higher the remuneration of directors the lower will be the agency cost because these incentives will induce managers to work in the best interest of company shareholder in order to continuously receive these benefits and to protect their job security.[16]

As indicated here above works focusing on Ethiopian corporate law, have dealt with the importance of the remuneration of directors, protection of minority shar holders, compared Ethiopian corporate governance rules with that of international standards and principles. This article tries to deal with issues that have not been addressed by making specific reference to the furthering roles of shareholders in reducing agency costs. To the best of the author's knowledge it is the first study done in Ethiopia in order to investigate role of shareholders in reducing agency costs.

2. Some conceptual frameworks

2.1. Models of share ownership

The reasons for preference of a certain structure are explained differently by two polarized views: neo-classical and path-dependent.[17] Neoclassical economists insist that firms choose their corporate structures based on simple efficiency considerations: the most efficient ones are chosen accordingly. Path dependence

[14]J. W. Byrd and Hickman, K. A. 'Do outside Directors Monitor Managers?' *Journal of Financial Economics.* (vol. 32, 1992), p.198.
[15] ibid
[16] Henry, D. 'Corporate governance and ownership structure of target companies and the outcome of takeover bids', *Pacific-Basin Finance Journal.* (Vol. 12, 2004): p440.
[17]Davies M. and Schlitzer B., The impracticality of an international "one size fits all" corporate governance code of best practice available at <www.emeraldinsight.com/0268-6902.htm>. Accessed on 03/02/2018

assumes that corporate governance structures are deeply rooted in countries' historical traditions and initial ownership structures of organizations.[18]

2.1.1. The diffused Ownership Model

This model is also known as shareholder-based model. It is dominant in the Anglo American legal system.[19] The fundamental question of corporate governance here, unlike the concentrated model, is how to assure suppliers of finance that they get a return on their investment.[20]

Dispersed ownership model of corporate governance is characterized by "strong securities markets, rigorous disclosure standards, and high market transparency, in which the market for corporate control constitutes the ultimate disciplinary mechanism"[21] on management. Various market instruments do serve to deter self-serving managerial conduct in widely held public companies. They do not, however, entirely eliminate the problem. Instead, those in charge retain some scope to pursue their own agenda at the expense of shareholders.[22]

Whereas the agency cost problem is, to some degree, endemic in a widely held firm, managerial fidelity is much less likely to pose a problem in companies where control ultimately rests in the hands of one party or a closely allied set of investors (eg, a family).[97] This is because large block holders will tend to be

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[18]Geoffrey Owen and etals, Since the 1980s there has been a partial convergence between the shareholder-based and the stakeholder-based systems of corporate governance. What has caused this convergence and is it likely to continue? Pp.2-3, see also Le Talbot, *Critical Company Law.* fn 5, p. 141.

[19]Themistokles Lazarides and Evaggelos Drimpetas, 'Corporate governance regulatory convergence: a remedy for the wrong problem' *International Journal of Law and Management* (Vol. 52 No. 3, 2010), p.522. available at <www.emeraldinsight.com/1754-243X.htm> accessed on April, 2018.

[20]Ibid

[21] John D. Coffee 'The Rise of Dispersed Ownership: The Role of law and State in the Separation of Ownership and Control' *the Yale Law Journal, (vol. 3.* no 1, 2001), p.3.

[22]John C Coffee, 'The Future as History: Prospects for Global Convergence in Corporate Governance and its Implications' *Northwestern University Law Review.* (1999), p.10. <http://www.austlii.edu.au/au/journals/UNSWLJ/2002/25.txt/cgibin/download.cgi/download/au/journals/UNSWLJ/2002/25.rtf.>accessed on 12/02/2018

better monitors than dispersed shareholders.[23] To elaborate, controlling shareholders are likely to have a financial stake which is large enough to motivate them to keep a careful watch on what is going on.[99] As well, these 'core' investors should have sufficient influence to gain access to high quality information concerning firm performance and to orchestrate the removal of disloyal or ineffective managers if things are going awry.[24]

The managers may thus be tempted to using their control over corporate assets to promote their own interests at the expense of that of the shareholders. To the extent that the management pursues its own interest at the expense of the shareholders, it imposes what economists call agency cost.[25]

However, there are mechanisms of minimizing agency cost which are part and parcel of legal systems utilizing this model. First, the labor market for corporate executives has a disciplinary role on the conduct of managers. Managers want to perform well in order to impress potential employers at a better term.[26] Secondly, bad management which sufficiently causes a decline in the market share for products or services can cost management its job. The most effective disciplinary tool in the widely held company however is the third mechanism hostile takeover. Hostile takeover occurs when shareholders unhappy with the performance of their company opt to walk out by selling their shares to a control bidder. If managers perform persistently badly, an outsider may take over by buying a majority of the shares through a hostile takeover i.e., one rejected by managers but accepted by shareholders.[27]

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[23]John C Coffee, 'The Future as History: Prospects for Global Convergence in Corporate Governance and its Implications' *Northwestern University Law Review.* (1999), pp. 12-13.
[24]Ibid.
[25]Ibid p. 9.
[26]John Coffee, The Future as History, fn 22, p.9.
[27] ibid

The Anglo-American model has other merits as compared with systems characterized by concentrated ownership.[28]The dispersion of shareholders creates a convenient working environment for professional managers since dispersed owners are unable to interfere with the business of the management. Thus, the agency cost problem may to some extent be counterbalanced by this benefit.[29] It has also better liquidity of stocks and benefit of distribution of risk than the continental counterpart.[30]

In some countries, companies employ anti-take-over devices. The OECD Principles of Corporate Governance states that anti-take-over devices should not be used to shield management and the board from accountability.[31] However, both investors and stock exchanges have expressed concern over the possibility that widespread use of anti-take-over devices may be a serious impediment to the functioning of the market for corporate control.[32] In some instances, take-over defenses can simply be devices to shield the management or the board from shareholder monitoring.

2.1.2. Concentrated Ownership Model

German and Japanese are predominantly using this model.[33] It is mostly used in the continental Europe and Asia and is also known as stakeholder-based model. Countries with this paradigm of corporate governance tend to have weak securities markets, and low disclosure and market transparency standards.[34] As opposed to the case in diffuse ownership governance systems, only a modest role is played by

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[28]Ibid p.10.
[29]Fekadu, Emerging Separation, fn 6, p.9.
[30]ibid
[31]OECD Principles of Corporate Governance, (2004), p.19. <http://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf> accessed on May 2018.
[32]ibid
[33]Fekadu, Emerging Separation, fn 6, p.11.
[34]Ibid

the market for corporate control, a greater part of the monitoring role being played by large banks with the dual role of shareholders and major creditors.[35]

It is presented by I.J. Alexander Dyck that:

> *Up through the early 1990s, many analysts of German and Japanese corporate governance systems suggested that a key to the relatively strong performance of firms in these countries has been the ownership and control structure that involved banks, workers and concentrated owners*.[36]

This system in continental Europe and Asia is associated with concentrated ownership structures. This ownership structure is also known as relationship-based system, meaning that ownership of most publicly quoted companies is in the hands of few long-term committed shareholders, directly involved in governance. The large number of investors here is less prevalent, and the owners are very often represented by families or few individuals.[37]

An immediate effect of the concentrated ownership model on stock market development seems to be negative. The reason is that large block holders that manipulate corporate power may not easily liquidate their holding or more technically do not change their market positions, negatively affecting liquidity. Secondly, the few small holders cannot create enough liquidity as the volume of stocks on the market will be lower.[38] On the other end of the spectrum, small investors will not be ready to buy shares for fear of domination by block holders. Concentrated ownership tends to reduce agency cost. Block holders will tend to be efficient monitors than dispersed shareholders. To elaborate, controlling

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[35] Ibid

[36] I.J. Alexander Dyck, Ownership Structure, Legal Protections and Corporate Governance. P.23. available at http://siteresources.worldbank.org/DEC/Resources/84797-1251813753820/6415739-1251814020192/dyck.pdf accessed on 04/02/2018

[37]Fekadu, Emerging Separation, fn 6, p.11.

[38] ibid

shareholders are likely to have a financial stake which is large enough to motivate them to keep a careful watch on what is going on around the company.

> *Beginning with Berle and Means (1932), American financial economists have taken dispersed ownership as the norm and asked whether observed or alleged problems in the governance of U.S. firms might stem from their widely held ownership structures. As U.S. economists became aware of the peculiar nature of U.S. corporate ownership, a number of authors, notably Porter (1998) and Roe (1991), argued that atomistic ownership is a competitive disadvantage for the United States and that more concentrated ownership might be a good idea.*[39]

The greater the ownership stake, the greater the personal returns to monitoring and exercising voice and the more information that these owners will collect. Coffee, among others, suggests the corporate finance evidence shows that the activism of shareholders is proportional to the extent of ownership concentration.[40] Concentrated owners often become what Jensen calls the active investor, one who holds large equity and/or debt positions and actually monitors management, sits on boards, is sometimes involved in dismissing management, is often closely involved in the strategic direction of the company and, on occasion, even manages.[41]

3. Shareholders role in corporate governance

Technically speaking, shareholders are primarily concerned corporate actors as they own the residual assets of the company. A close watch of shareholders on the activities of the company has its role on corporate success. One of the organs of corporate governance, shareholders meeting, is one of the avenues wherein they could play their significant role.

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[39]Randall Morck, 'Introduction to Concentrated Corporate Ownership', (University of Chicago Press, January 2000), p.2. <http://www.nber.org/chapters/c9003.pdf> Accessed on 12/02/2018
[40]I.J. Alexander, Ownership Structure, fn 36, p.22.
[41]ibid

The ultimate control of the corporation is placed in the hands of the shareholders through those provisions which provide for annual election of directors and for shareholder votes on basic changes.[42] However there is wider gap between the theory and the reality which indicates that such shareholder control is fictional.[43] Especially this is highly true in the Anglo American system where in ownership structure is dispersed.[44]In the continental legal system where in there are large block holders and there is concentrated ownership structure, the problem is a bit different. Majority shareholders are watchful to participate in the governance process. But this has in turn its own problem of minority shareholders concern.[45]

After examining the status of shareholders' power, commentators concluded that it is very low and ask a normative question that is what to do about it? Some of them try to perfect shareholder power, polish up the proxy system or establish separate shareholder standing committee to supervise active managers. Others would proceed to strip the shareholder of what little authority remains to him.[46]

Although shareholders as owners of the business are a principal party to corporate governance, some writers like Janice Dean hold the view that good corporate governance rests firmly with the board, and auditors and shareholders only play a secondary role.[47] They are of the view that shareholders cannot play a leading role in corporate governance, they are subject to financial constraints, are free to buy and sell their shares, and they are not experienced business managers.[48]

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[42] ibid

[43]Fekadu, Emerging Separation, fn 6, p.1.

[44]ThemistoklesLazarides and EvaggelosDrimpetas, Corporate governance regulatory convergence: a remedy for the wrong problem, *International Journal of Law and Management* (Vol. 52 No. 3, 2010), p.184. available atwww.emeraldinsight.com/1754-243X.htm.

[45]ibid

[46] Ibid p.354.

[47]Janice Dean, 'Directing Public Companies: Company Law and the Stakeholder Society', (Cavendish Publishing Limited, 2001) p.4.

[48] Suruhanjaya securities commission, 'Shareholders' Rights and Responsibilities in General Meetings' p.6. <www.maicsa.org.my/download/technical/technical_clr_capital.pdf> accessed on 10 May, 2018.

Nevertheless, it should be emphasized that shareholders can play a strategic role in enhancing corporate governance if they realize the opportunities provided by annual and other general meetings. So as to enable them play their part in corporate governance, shareholders should be provided with quality information concerning their company. That role of shareholders is always shackled by information asymmetry. As I.J. Alexander Dyck states that:

> *The importance of quality information for investors had long been appreciated, but the great stock market crash of 1929 revealed the inadequacy of previous attempts to address information asymmetries through simple disclosure rules. Restoring the faith of investors was intimately entwined with the passage of the Securities Act of 1933, the Securities Exchange Act of 1934 (that created the SEC) and years of work by SE officials to get the details right. To reduce information asymmetries, and increase incentives for disclosure and enforcement, some penalties were imposed by the SEC itself.*[49]

Information disclosure requirements should be supported by strong regulatory institutions enforces such rules of right to detailed information of shareholders. As I.J. Alexander Dyck provides attempts to address information asymmetries through simple disclosure rule were not sufficient. It requires vibrant institutions which will give life to such disclosure requirements and rules.

4. Shareholders role in reducing agency cost in Ethiopia

4.1.Shareholders' meetings

General shareholders meeting have a significant place in the management of a company for shareholders have an inherent right to vote in the decision of a company, particularly in the appointment of directors or auditors, decision concerning their remuneration, approval of statement of account decision about

[49] I.J. Alexander, Ownership Structure, fn 36, p.15.

dividends and amendment of company constitution.[50] Second board members being appointed by general shareholders meeting have the power to appoint officers of a company and set basic corporate policy.[51]

Shareholders, often times are not experts to different legal issues and accounting statements. It is based on the reports provided by other organs of the corporate governance i.e. board of directors and board of auditors that they make decisions. Shareholders may not understand professional jargons and hence such may minimize shareholders role in corporate control. Thus, liability should be attached to presentation of irrelevant and falsified information or to the purposive jargons.

The general meeting of shareholders has a significant role in the management of a company for shareholders have an inherent right to vote in the decision of a company, particularly in the appointment and removal of directors and auditors, decision concerning their remuneration, approval of statement of account, decision about dividends and amendment of company constitution.[52]Meetings of shareholders are important organs of corporate governance where in various crucial decisions are passed.

a. Removal of directors

The law empowers the shareholders to remove a director by general meeting before the expiry of term of office. Even if there is no agenda regarding removal of directors[53]. However, a director so removed shall not be deprived of any compensation payable to him in respect of the termination of his appointment in

[50] Mohammed Aliye, Affiliate Companies In Ethiopia: Analysis of Organization, Legal Frame Work and The Current (LLM thesis, Faculty of Law of the Addis Ababa University, Jaunary, 2010), p.21. [foot not omitted]
Practice
[51] ibid
[52]Mohammed, Affiliate Companies, fn 50, p. 21.
[53]Commercial Code of Ethiopia, Art 397.

the absence of good cause.[54] Directors can also be removed if shareholders representing one-fifth of the capital (20%) adopt a resolution to institute a proceeding.[55]A general meeting may at any time revoke the appointment of any auditor without prejudice to any claim he may have for wrongful dismissal.

b. Appointment of directors and auditors

The first directors may be appointed under the memorandum or articles of association[56]. This appointment shall be submitted to a meeting of subscribers for confirmation.[57] If such confirmation is not given, the meeting shall appoint other directors. Subsequent directors shall be appointed by a general meeting.[58]

As per article 368 of the commercial code, the general meeting shall elect one or more auditors and assistant auditors. Shareholders representing not less than 20% of the capital may appoint an auditor selected by them. According to Art 372 the general meeting is to determine the remuneration to auditors. If the meeting fails to reach consensus on the remuneration, the ministry of commerce and industry may fix the remuneration when any interested party applies to it. Now the problem here is where there is dispute with regard to remuneration of auditors, third party is to fix the remuneration. In such cases auditors will not be diligent so as to protect interests of shareholders. Therefore, such provision should be amended as it endangers right of shareholders to get quality accounting report.

Shareholders' rights to influence the corporation center on certain fundamental issues such as the election of board members, or other means of influencing the composition of the board, amendments to the company's organic documents, approval of extraordinary transactions, and other basic issues as specified in

[54]Ibid, Art 354.
[55] Ibid, Art 365.
[56]Ibid, Art 350
[57] Ibid.
[58] ibid

company law and internal company statutes.[59] There should be a mechanism to the shareholders so that they may know about the qualification and other relevant personal details of the nominee. It is also necessary to prescribe the ways the shareholders can appoint a nominee. In short transparency is required in order that the shareholders can make informed vote. To that effect there should be independent, concerned and strong regulatory body. Several countries have introduced an advisory vote which conveys the strength and tone of shareholder sentiment to the board.[60]

4.1.1. Types of Shareholders Meetings

Shareholders meetings can make significant decisions concerning the corporation's future fate. Therefore, they constitute considerable organ of the corporation in corporate governance. Hence the meetings are governed by mandatory and non-mandatory rules.[61] The shareholders' meeting may be classified as special and general meetings. Special meeting of shareholders is that meeting which constitutes owners of special classes of shares. The general meeting may be ordinary or extra ordinary based on the agenda of the meeting. In these meetings all shareholders regardless of the class of the share they own can participate.

4.1.2. Meeting of the subscribers

The subscribers are those persons who have purchased shares of the would-be company or the company which is under the process of establishment. Such meeting is arranged by the founders following the same procedure as an extraordinary general meeting as soon as the time for application to subscribe share has expired.[62] The shareholders control on the company commences at this

[59]OECD, Principles, fn 31, p. 32.
[60] ibid, p. 34.
[61]Commercial code of Ethiopia, Art. 399.
[62]Commercial Code of The Empire of Ethiopia (1960) Art 320, (hereafter Commercial Code of Ethiopia).

moment. In such meetings, verification as to fulfillments of requirement related to formation of a company is made, drawing up the final text of the memorandum of association is made, approval of contribution in kind, approval of share in profits allocated to the founders, making all appointments as it is provided by the memorandum of association.[63] This is one critical avenue through which they could extend their control on the company. However, it is plain at this moment that they could not be in a position to make well informed decisions. Thus, they should be assisted by professional advisors. Hence the law should devise mechanisms so that subscribers could get professional support so as to make informed decisions.

4.1.3. Ordinary general meetings

As per Art.390, shareholders general meetings may be ordinary and extra ordinary and comprise shareholders of all classes. Ordinary general meeting can be held only if the shareholders present or represented represent at least one-quarter of the shares of the voting shares. If this quorum requirement is not met, the meeting must be called a second time, and on that occasion no quorum is required. Resolution is passed at ordinary meeting by a simple majority of the voter held by the shareholders present or represented. Accordingly, a shareholder who abstains is disregarded.[64]

Any shareholder has the right to attend such meeting regardless of the number of shares he holds.[65]This is always true though there is contrary provision in the statutes of the company. He may also be represented by a third party whether shareholder or not.

Ordinary general meetings may take all decisions within the competence of the shareholders, except those which are required to be taken by an extra ordinary meeting. The most important kind of ordinary meeting is, of course the annual

[63] Commercial Code of Ethiopia, Art 321.
[64] Ibid, Art 421.
[65]Ibid, Art 420.

meeting, which must be held within four months after the end of each financial year.[66]

4.1.4. Extraordinary meetings

Extraordinary meetings are subject to rigorous rules as to quorum and majority than ordinary meetings. At least half of the holders of all shares having voting rights of the company must be represented or presented at the meeting. Resolutions are passed at extra ordinary meetings by two-thirds majority of the votes held by shareholders present or represented.[67]

Resolutions to change the nationality of the company or increment of investment in the company require the attendance of all shareholders.[68] We can comment this provision as it does not take the reality into consideration for there is practical difficulty to get such unanimity. However, we can at the same time take it as important provision which attempts to strengthen control of shareholders on a company if ways are available for electronic voting and proxy voting.

An extra ordinary meeting may alter any provision of the company statutes provided that it does not increase the financial obligations of the shareholders, take away the basic rights of the shareholder, such as the right to transfer his shares of the right to vote at meetings or change.[69]

4.1.5. Special meeting

Unlike general meetings which may be attended by all shareholders of any class, special meetings may be attended by only the holders of a particular class of shares. For example, the holders of preference share, special meetings must be

[66] Ibid, Art 418, 419.
[67] Ibid, Art 425.
[68] Ibid, Art 425.
[69]Ibid, Art 423,425.

called to approve decisions of general meetings modifying the special rights attached to shares of the class in question.[70]

The rules as to quorum for special meeting and majority required to pass resolutions are the same as the rules governing extraordinary meeting.[71] Therefore two-third majority is required to pass a resolution abstentions and blank ballots being disregarded. The quorum is said to be fulfilled if shareholders holding not less than half of all voting shares. It seems with the view to take practical situations into consideration, in a second meeting, the presence of one-third of the shareholders can satisfy the forum requirement.

a. Substantial rules common to all meetings

i. Disclosure of information (the right to information)

In corporate governance propose that one of the more immediate needs is to allow investors access to timely and accurate information on the financial and non-financial aspects of the corporations.[72]

ii. Right to vote

Many companies in OECD countries are seeking to develop better channels of communication and decision-making with shareholders.[73] Efforts by companies to remove artificial barriers to participation in general meetings are encouraged and the corporate governance framework should facilitate the use of electronic voting in absentia.[74]

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[70]Ibid, Art 426.
[71] Ibid, Art 428.
[72] OECD, *Principles*, fn. 31, p. 18.
[73]OECD, Principles, fn 31, P44
[74] ibid, p. 44

Each share carries one vote, and the number of votes which any shareholder may cast at general meetings is calculated accordingly. However, there are certain exceptions to this rule.[75] There are scenarios where in exercise of voting right results in conflict of interest.

Every shareholder's freedom to vote as he wishes is to be respected. Agreements or resolution restricting the free exercise of the right to vote shall be null and void. Shareholder must exercise their voting rights in the collective interests of all the members of the company, and not in order to promote individual interest.

iii. Voting by proxy

A proxy means a lawfully constituted agent. Every member of a company entitled to attend and vote at a meeting of a company is entitled to appoint another person or persons, whether a member or not, as his proxy to attend and vote on his behalf. The proxy shall have the same right as the member to vote at the meeting for he is representative of a shareholder.[76]

Any shareholder may take part in and vote at meetings either personally or by proxy. Where the shareholder appoints proxy, he may not vote personally.[77] The form of the proxy is determined by board of directors. The place and time of deposit of proxy is also determined by the board directors.[78]

The OECD Principles recommend that voting by proxy be generally accepted.[79] Indeed, it is important to the promotion and protection of shareholder rights that investors can place reliance upon directed proxy voting. The corporate governance framework should ensure that proxies are voted in accordance with the direction of

[75] Commercial Code of Ethiopia, Arts 400 & 409(1)(3).
[76]Ibid Arts 398,402 & 403.
[77]Commercial Code of Ethiopia, Art. 398.
[78]Ibid, Art 402.
[79]OECD, Principles, fn 31, p. 35.

the proxy holder and that disclosure is provided in relation to how undirected proxies will be voted.[80]

4.2. Other Areas of Shareholders Leverage under Ethiopian law

4.2.1. Ownership structure and shareholders control

The Ethiopian law on share companies provides no thing than fixing the minimum number of shareholders with regard to maximum number of shareholders.[81] As a result, there is high probability of either dispersion or concentration for share ownership in Ethiopia. Both concentration and dispersions have their own limitations. Absence of limitation on number of shares by a shareholder will result in block shareholders and that in turn could raise issues of minority shareholders protection. On the other hand, absence of fixing maximum number of shareholders could result in dispersed shareholders. As it is provided by various researchers dispersed share ownership is not advisable. A number of authors, notably Porter (1998) and Roe (1991), argued that atomistic ownership has a competitive disadvantage and concentrated ownership is better.[82]

In countries which have dispersed ownership stricter of shareholder, the shareholders are deemed to be short term investor. Shareholders could easily exit by selling their stock. It is also characterized by presence of strong stock market. In the absence of stock market, as a result regulatory benefit of such market is unavailable, dispersed ownership of shareholders is not recommended. But if shareholding is concentrated, shareholders tend to be long term investors and stock market does not provide enough liquidity for stock holders. Concentrated shareholders will stir their eyes on the company as they have greater ownership stake. The greater the ownership stake, the greater the personal returns to monitoring and exercising voice and the more information that these owners will

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[80] Le Talbot, Critical Company Law, fn 5, p. 36.
[81] Commercial Code of Ethiopia, Art 307(1).
[82]Randall Morck, *Introduction to "Concentrated Corporate Ownership"*, (University of Chicago Press, 2000), p. 2. <http://www.nber.org/chapters/c9003.pdf> Accessed on 12/02/2018

collect. Coffee (1999), among others, suggests the corporate finance evidence shows that the activism of shareholders is proportional to the extent of ownership concentration.[83]

4.2.2. Calling shareholders meetings

Shareholders representing 20% of the capital can require auditors to call general meetings.[84] Shareholders could exert influence on the company by this method too. However, this requirement is too cumbersome to meet and they should be empowered to call themselves than requesting auditors to call. Where there are several auditors, they may jointly call the meeting.

Where shareholders representing one tenth of the share capital show that an appointment of an officer is necessary, the court of the place where the head-office is situated may appoint such an officer of the court to call a meeting and to draw up the agenda for consideration.[85] The claims that should be provided and evidences presented to convince the court are not clear. However, we expect that there should be suspicion on the management body of the company or some sort of administrative mal practice.

To further role of shareholders on the company the law should allow auditors to inform shareholders at any time when they see any irregularity. But the law permits directors to inform to the general meeting.[86]

4.2.3. Challenging decisions of the company

Shareholders have natural rights inherent in membership of a company. These are rights which, under the law or the memorandum or articles of association, do not

[83] I.J. Alexander, Ownership Structure, fn 36, p. 22.
[84] Commercial Code of Ethiopia, 377(2)
[85] Ibid, Art 391(2).
[86] Ibid, Art 376(1).

depend upon decisions of the general meeting or board of directors or which are connected with the right to take part in meetings, right to vote, to challenge a decision of the company or to receive dividends and a share in a winding-up.[87] Now the point is what does the right to challenge decisions of the company mean? And how could this right could be exercised are not clear. Therefore, these phrases should be interpreted widely and enable shareholders to enable them get out of the company. For this measure to be effective there should be a means to purchase shares of dissatisfied shareholders with reasonable prices or else the legal system should introduce stock exchange to increase share liquidity.

Resolution adopted contrary to the law, memorandum of association or article of association could only be challenged by any share holder within three months from the resolution is registered in the commercial register.[88] As per art 377 shareholders are among those claimants who could challenge such resolution. The law provides that the court may require the claimant to provide security for costs. Here there are two main problems. Firstly, the period of time within which to file an application to challenge is too short and it is not proper to permit illegal resolutions to sustain after the lapse of three months. Secondly, the law does not provide means to remunerate claimants, at least those who are successful rather than adding burden on a shareholder who is trying to protect the company's interest.

4.2.4. Investigation on the positions of a company

Shareholders representing at least one tenth of the shares may request the Ministry of Commerce and Industry to appoint one or more qualified inspectors to make an investigation and report on the company's state of affairs.[89] The petition shall contain such evidence as the Ministry deems necessary and the petitioners may be

[87] Ibid, Art 389.
[88] Ibid, Art 416(2)
[89] Ibid, Art 381

required to guarantee up to a maximum of 500 Ethiopian dollars which will be allotted to covers the expenses of the investigation.[90]

So as to strengthen control of shareholders on their company the law should directly capacitate the Ministry of Commerce and Industry to appoint directly inspectors than require permission of the court or resolution of the general meeting.[91] Firstly, this should be the natural regulatory mandate of the Ministry. Secondly, it creates unnecessary bureaucracy to wait for order of the court or resolution of the general meeting. More over amount of money required from the petitioners which is meant to cover expenses of the inspectors is unnecessary detail. Because such issues of logistics could be provided by directives or regulations than in the preliminary legislations like the Commercial code. Furthermore, at this time, the finance required to make investigations could not be covered by 500 Ethiopian dollars.

4.2.5. Right of withdrawal from the company.

Shareholders are allowed to withdraw from the company in limited circumstances. The circumstances which could enable shareholders to withdraw are two in number. These are dissent from a resolution concerning any change in object or nature of the company and change in address of the company abroad.[92] When the shareholders withdraw in such a manner the company is bound to redeem the shares at the average price on the stock exchange over the last six months and where the shares are not quoted on the stock exchange, they shall be redeemed at a price proportionate to the company's assets as shown in the balance sheet of the last financial year.[93]

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[90] Ibid,
[91] Ibid, Art 382
[92] Ibid, Art 463
[93] ibid

We can observe here that it is only when the listed circumstances are there that the shareholders can enjoy such rights. Therefore, there seems no easy exit in Ethiopian company law. It seems better to further simplify the exit mechanism to any unsatisfied shareholder. That way shareholders influence on the management body can be furthered.

Such measure in other jurisdictions is known as compulsory bid or oppressed minority mechanism. According to this rule, a shareholder who acquires control over a company is obliged to buy shares of minorities at the same price he paid for control.[94] In order to expedite these exit rights there is an urgent need to introduce stock exchanges. The absence of such institution may contribute to share illiquidity and individuals may decline from buying share.[95]Such easy exit mechanism plays important role to shape sharking managerial behavior in the diffused model of corporate governance.

This could also be one way to influence on those who are in charge of the day to day activity of the company. But to give such chance to shareholders, this provision should be amended to include other circumstances like repeated mismanagement by board of directors and evident embezzlements.

4.2.6. Availability of ex-post redress for shareholders

A. Shareholder's right to initiate suits

One of the ways in which shareholders can enforce their rights is to be able to initiate legal and administrative proceedings against management and board members. Experience has shown that an important determinant of the degree to which shareholder rights are protected is whether effective methods exist to obtain redress for grievances at a reasonable cost and without excessive delay.[96] The

[94]Sajid Gul and others, *Agency Cost*, fn 2, *p.29.*
[95]Fekadu, Emerging Separation, fn 6, p.29.
[96]OECD, Principles, fn 31, p. 40.

confidence of minority investors is enhanced when the legal system provides mechanisms for minority shareholders to bring lawsuits when they have reasonable grounds to believe that their rights have been violated. The provision of such enforcement mechanisms is a key responsibility of legislators and regulators.[97]

There is some risk that a legal system, which enables any investor to challenge corporate activity in the courts, can become prone to excessive litigation. Thus, many legal systems have introduced provisions to protect management and board members against litigation abuse in the form of tests for the sufficiency of shareholder complaints, so-called safe harbors for management and board member actions (such as the business judgment rule) as well as safe harbors for the disclosure of information.[98]

A balance must be kept between allowing investors to seek remedies for infringement of ownership rights and avoiding excessive litigation. Some countries have found that alternative adjudication procedures, such as administrative hearings or arbitration procedures organized by the securities regulators or other regulatory bodies are an efficient method for dispute settlement, at least at the first instance level.[99]

B. Derivative actions

Shareholders derivative actions are law suits brought by individual company shareholders in the name of the corporation in which they hold stock. They arise when one or more stockholders believe managements are acting improperly or are failing to take action to defend the company's rights. Here it is important to note that any benefit the suits are brought in the name of the company and any

[97] ibid
[98] ibid
[99] ibid

compensation won goes to the company, not to the shareholders who initiated the suit.

There was a case against directors of Amanuel StegaYenigid Sukoch Aksion Mahiber initiated by shareholders of the company in the Federal Supreme court Cassation division in 1999 under file no 23389. The applicants argued that the directors allocated the front rooms to themselves improperly. The respondents argued that they have no capacity to bring such suits. Even if we say they can initiate such suits the requirements under Art 365 of the commercial code are not fulfilled. Under this article a resolution of general meeting has to be adopted by shareholders representing one fifth of the capital so as to institute a proceeding to enforce directors' liability. In addition to such resolution the shareholders need to wait for the company to institute the proceeding for three months. If the company fails to initiate the proceeding, the shareholders themselves may jointly institute the suit.[100]

The cassation court stated that the applicants can institute a suit if they can proof that their right is prejudiced. It argued that their suit is based on Article 367 of the commercial code and not by the provisions cited by the lower courts. Therefore, the shareholders have ex-post redressing mechanisms if they can show that the directors acted to the prejudice of them.

The question here is whether the shareholders are empowered to initiate a suit against third parties representing the company if they believe that the company is prejudiced by the act of third parties. There seems no provision does exist to that effect. Art 365 is about directors' liability to the company and to the shareholders.

[100]Commercial code of Ethiopia, Art 365.

Conclusion

Shareholders are technically owners of the corporation's assets and such assets are controlled by the management body. This is the cause for many of the problems dealt by corporate governance. Shareholders meeting as management organ can play considerable roles in corporate governance. The problem addressed by this article is therefore what necessary measures can further strengthen the shareholders controlling mechanisms on the corporation upon which they invested their capital. There are various ways that are recommended by author of various disciplines to minimize agency cost. These works identified that institutional shareholding, smaller board size; managerial share ownership, existence of independent board, and existence of remuneration structure to managers have significant role in reducing agency costs.

Shareholders meetings can influence the corporation's governance by creating and amending statutory documents and other resolutions. The shareholders participation in the meeting and their voting properly handled and utilized can have positive impact in the corporation. Therefore, the rules governing such meetings should be well designed in a way of enabling them play their crucial part. It includes access of electronic voting, possibility of voting by mail, facilitating sufficient information disclosure mechanisms, adopting advisory voting and the rules necessary to such vote, facilitating easy exit mechanism to shareholders dissatisfied by majority holders, introduction of stock exchange market, fixing maximum number of shareholders etc.

Existence of stock exchange can increase shares liquidity and increase the stock owners' security as it enables them to exit easily if they feel discomfort by the management. It can also promote disclosure of information and transparency which is crucial to shareholders so that they can make informed decision in meetings or in any other way.

Moreover, possibility of derivative suits by shareholders is also another mechanism that should be available to them to promote control. Rules as to derivative suits, proceedings representing the company against third party and the directors with the view to protect the company, should be adopted in Ethiopian commercial law. There are provisions that govern ex-post redressing mechanisms to shareholders against the directors. The law is silent about the possibility of instituting suits against third parties if the directors fail.

The minimum threshold to adopt a resolution to institute proceeding to enforce director's liability seems very high. Shareholders representing one-fifth of the capital should agree to adopt such resolution. It could be difficult to get such minimum requirement as it requires vote of shareholders holding 20% of the capital.

Challenges in Implementation of Casual Rental Income Tax: The Case of Selected Towns in Tigray Regional State

Berhane Gebregziher♣, Mebrahtom Tesfahunegn♦ and Tesfay Asefa♠

Abstract

Income tax from casual rent of property (sometimes called transient rental) has considerable potential to generate significant revenue to finance local projects of the Tigray regional state. In principle, these incomes are categorized as taxable incomes under schedule D of the Federal and Regional Income Tax Proclamations. This research aimed to study the practical, legal and institutional challenges of the implementation of the casual rental of property income tax in the Tigray Regional State taking Mekelle, Shire Indasilasie, Alamata and Wukro cities as a sample. The research employed qualitative research methodology. Accordingly, the legal analysis reveals that the law is blurred and suffering from lack of sufficient directions. It does not clearly define the scope and meaning of casual rental and the income tax therefrom. This research reveals that the implementation of the casual rental income tax is almost none. The non-taxation of income from casual rental of property is, in turn, defeats the purpose of basic taxation principles. The research found out that the failure of the tax authorities to identify the real and potential tax payers, the failure of the tax payers to report their tax obligations, the practical income characterization problems, the lack of awareness and ignorance of the tax assessors and tax collectors are the main challenges for the failure to implement taxation of income from casual rental of property. Stepping from these findings, the researchers recommend enactment of specific and comprehensive directives. They also place a clear direction (based on empirical data) for the tax authorities to enable them effectively implement casual rental income tax.

Key Words: Casual rental of property, income tax, Tigray

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Introduction

Despite commendable efforts, Ethiopia has a narrow tax base benchmarked against different jurisdictions like most developing countries. The composition and trend of its taxation base is inconsistent with international practice when we see its tax to GDP ratio, for example. Though there is huge parity among different sources, the tax to GDP ratio of Ethiopia is about 15% compared to 45% in the European Union, 57% in Finland and 27% in the world.[1] At the end of the GTP I of the country, the tax to GDP ratio has slightly increased from 14.2% to 14.6%.[2] The same is true for the Tigray Regional state. Similarly, the share of tax revenue to the total regional revenue in Tigray region was below 30%, in the 2016 for example, according to sources from the Bureau of Finance and Economic Development (BoFED) of the State.[3] Therefore, narrow tax base is one of the challenges that the region is facing.

Therefore, policies and programs that aim at reforming the current deficiencies within the tax system of the country should take the problem arising out of the existing narrow tax base into account. In this regard, the GTP 2 of the country plans, among others, to increase tax to GDP ratio.[4] The Working Manual for Revenue Enhancement Plan Guide for Ethiopian City Administrations also plans to broaden the tax base.[5] However, the evidence obtained recently shows that the tax

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[1] Central Statistics Agency, The World Fact Book <https://www.cia.gov/library/publications/the-world-factbook/fields/2221.html> Accessed August 26, 2017

[2] UNDP, Analysis of the Overall Development Financing Envelope in Ethiopia and Implications for the UN, UNDP Ethiopia No. 2/2015, p.5. <file:///C:/Users/abiewerkdell/Downloads/Financing%20for%20Development_January2015updated.pdf> Accessed on August 24, 2017

[3] Bureau of Finance and Economic Development of Tigray Region, Public Prosecutors and Crime Investigators Training Manual, October 2015.

[4] National Planning Commission, FDRE, Growth and Transformation Plan II, (GTP II) 2015/16-2019/20, p. 9. <http://dagethiopia.org/new/images/DAG_DOCS/GTP2_English_Translation_Final_June_21_2016.pdf> Accessed on August 26, 2017

[5] Working Manual for Revenue Enhancement Plan Guide for Ethiopian City Administrations, p.32. <http://www.ecsu.edu.et/sites/www.ecsu.edu.et/files/manual_revenue_enhancement_planning_english.pdf >, Accessed on April 30, 2018

to GDP ratio of Ethiopia has decreased. According to Ministry of Finance and Economic Development (MOFED), this is specifically due to the prevalence of a high number of non-complying tax payers.[6] There could be different options to broaden the income tax base of the region. Taxation of the income from casual rental of property seems to offer one solution in the reform to broaden the tax base.

The point is income tax from the casual rental of property, if it is properly administered, may be used to broaden the tax base of the country as well as the region enabling to revenue and the tax to GDP ratio. The proper implementation of casual rental of properties could also have advantages in the assurance of tax equity, tax efficiency, and tax neutrality. It could also generate significant income to finance some local government projects.

In this regard, Art 58 of the Federal Income Tax Proclamation categorizes income from casual rental of properties as schedule D income taxes. The Proclamation obliges every person deriving income from the casual rental of asset not related to a business activity to pay tax on the annual gross rental income at the rate of 15%.[7] Similarly, the Income Tax Proclamation of the Tigray Regional State, under its Art 55 imposes a 15% tax rate on the gross amount of income from the casual rental of assets, movable or immovable.[8]

The personal observation of the researchers similar to expert opinions is that there are problems hindering the proper implementation of the casual rental income tax law.

Failure of the law to define what is casual, absence of list of rent types subject to the tax, lack of clear characterization from rental income tax (schedule B)-

[6] National Planning Commission, fn 4.
[7] Federal Income Tax Proclamation No. 979/2016, Art 58.
[8] Tigray Regional Income Tax Proclamation No. 283/2017 Art. 55 (1).

treatment of buildings under both schedules, for example, are fundamental loopholes in the law.

With regard to the term "casual", the Federal Income Tax Regulation states casual income refers "…income derived by a person who is not engaged in regular business of rental of movable or immovable assets."[9] However, this is not sufficient for the application of the casual rental income tax. What if they are engaged in a business that is not related to a casually rented asset? In practice, different property owners in Tigray region are generating income by renting idir properties, private car, temporary buildings and business equipment. But, the tax authorities reported that the "tax payers" understate (by a substantial amount) or fail to report their taxable income.

Hence, the main concern of this research is to scientifically assess the legal and practical challenges in the effort of the implementation of the casual rental income tax law of the region with particular emphasis on Alamata, Wukro, Shire-Indasilase, and Mekelle. These towns are deliberately selected because they have relatively high business transaction thereby casual rent of property may be (presumably) relatively high.

For this purpose, data was collected through key informant interview with tax authorities and tax assessors and the sufficiency and relevance of the law for the proper implementation of casual rental incomes. Data was also collected from different government documents such as reports and policy documents.

Finally, qualitative approach was used to analyze the data collected. Legal analysis was applied in portraying legal regime. Information gathered from different sources is substantiated and triangulated with each other.

[9] Federal Income Tax Regulation No. 410/2017, Art 50.

1. The Concept of Taxation of Income from Casual Rental of property

1.1. Casual Rental of Property

There is dearth of literature on the conceptual clarity of casual rental of property. Even if there is plenty of literature on rental of property for tax purposes, we do not find a clear reason on what makes rental of property as "casual" or permanent. The same is true in the Ethiopian tax system in general and the Tigray income tax system in particular. The law hardly defines the term 'casual' nor does it define the phrase 'casual rental of property.' Literally speaking, the Black's Law Dictionary defines the term casual as "occurring without regularity; occasional."[10] But, how occasional is occasional? What makes rental of property occasional so as not to make it regular? Why is a certain income said to be "casual rental income"? All these issues are not yet clearly explained in the relevant laws.

How the concept of casual property rental income tax is entertained in the regional tax laws? The Tigray Regional State Council has directly adopted and translated the Federal Income Tax Proclamation No. 979/2016 with some minor changes under the Regional Income Tax Proclamation No. 283/2017.[11] Art 2 (14) of the respective proclamations define "income" as "every form of economic benefit including non-recurring gains, in cash or in kind, from whatever source derived and in whatever form paid, credited or received."[12] This is a very broad definition that includes every economic benefit. It shows that the casual rental of property income falls within this broader definition of income which is subject to "taxation of income from casual rental of property."

Art 58 of the Federal Income Tax Proclamation and Art 55 of the Regional Income

[10] Bryan A. Garner (ed), *Black's Law Dictionary*, (8th edn, 2004), p. 651.
[11] Tigray Regional Income Tax Proclamation (fn 8).
[12] Federal Income Tax Proclamation (fn 7) Art. 2(14) See also Tigray Regional Income Tax Proclamation (fn 8) Art. 2 (14)

Tax Proclamation also state that a person who derives income from casual rental of asset in Ethiopia/Tigray shall be liable for tax on the annual gross rental at a rate of fifteen percent.[13] However, neither the proclamations nor the Federal income Tax Regulation[14] well define what "causal rental income" is. The above stated provisions simply state "income from the casual rental of asset" includes renting any land, building or movable asset. The law is silent on how, when andfor how long. The researchers have tried to consult the experience of other tax systems but unable to, literally, find the term "casual rental income".

A similar concept is found in few tax systems of other countries. We found the experience of the state of Hawaii of the USA relevant in this regard. If we take the experience of Hawaii, there is a type of tax termed as "transient accommodations tax" or "hotel room tax". In this regard, a manual prepared by the Department of Taxation of the State of Hawaii states:

> *A transient accommodation is an apartment, house, condominium, beach house, hotel room or suite, or similar living accommodation furnished to a transient person for less than 180 consecutive days in exchange for payment in cash, goods, or services.*[15]

The concept of this type of income tax is similar with that of the "casual rental income tax" in the sense that both are temporary or transient or casual. The term "transient" refers that the accommodations are being furnished (i.e. provided or rented) to a person who does not have the intention of making the accommodation a permanent place of domicile.[16] The State of Hawaii Department of Taxation elaborates that the tax is imposed up on every operator of transient

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[13] Federal Income Tax Proclamation (fn 7) Art 58 (1).
[14] See discussions above.
[15] Benjamin Cayetano and Ray Kamikawa, *An Introduction to the Transient Accommodations Tax*, State of Hawaii Department of Taxation (1998). p. 3.
[16] State of Hawaii Department of Taxation, Transient Accommodations Tax Technical Memorandum No. 1 January 12, 1987, p. 2. <http://files.hawaii.gov/tax/legal/memorandums/tatmem-01.pdf> Accessed on January 14, 2017

accommodations including owner, proprietor, lessee, sub lessee, mortgagee in possession, licensee, or any other person who is engaged in any service business which involves the furnishing (providing) of transient accommodations.[17] This definition covers all persons who are involved in any way with the furnishing of transient accommodations which brings an income from the same. Here, very important issue may be raised as to the distinction between this type of rental income and the rental income as a business. For the purpose of this distinction, transient accommodations are defined as:

> *the furnishing of a room, apartment, suite, or similar facilities which is customarily occupied by transients for a period of less than 180 consecutive days by a hotel, apartment hotel, motel, horizontal property regime rooming house or other place where lodgings are regularly furnished to transients for a consideration.*[18]

From the above expression, we can understand transient accommodation, unlike rental of house or buildings and other properties: (1) is for a limited duration which does not exceed 180 days (2) the receiver of this type of service does not have the intention to permanently use the property subject to transient accommodations.

It should be noted that transient accommodation is not exactly the same as casual rental of property as recognized under the Ethiopian Income Tax Proclamation and its regional counterparts. However, it minimizes the literature gap on the area. Transient accommodation deals with accommodation which seems limited only to lodging, housing, room and space. Therefore, it does not include renting properties other than immovable (buildings). However, casual rental in Ethiopia includes both movables and immovable for any purpose, even other than dwelling or accommodation which is different from the rental income tax under schedule C of

[17] Ibid
[18] State of Hawaii Department of Taxation, fn 17.

the Federal and Regional income tax regulations. For the purpose of this study, transient accommodation tax and casual rental income tax are used interchangeably.

1.2. Casual Rental Property Income Tax

Under this part, we will try to elaborate what constitutes transient accommodations tax (TAT) what are the exemptions, exclusions and the tax rate.

We do not, again, find any definition for the phrase casual rental property income tax. Thus, we need to take "transient accommodations tax" (though narrower) of other countries as a "benchmark". This term does not look to be exactly the same as casual rental income tax because the tax payers under the former include hotels, apartment hotels, motels, horizontal property regimes, cooperative apartments, rooming house or other place in which lodging are regularly, i.e. for less than one hundred and eighty days, furnished to transients for consideration.[19] They use this reference of 180 days to determine whether the facility is transient or not and to determine whether or not the revenue derived is subject to the tax.[20] This covers, therefore, real property not personal property. However, casual rental of income in the Ethiopian context includes casual rental of assets including movable or immovable assets.[21] The duration required for this purpose is provided neither in the proclamations nor in the regulation.

Discussion of tax base, tax payers, and exemptions may also add some clarity to the concept.

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[19] Ibid
[20] Ibid
[21] Federal Income Tax Proclamation (fn 7) Art 58 (1).

1.2.1. The Tax Base

TAT (Transient Accommodations Tax) requires every person who derives revenue from transient accommodations to pay income taxes. TAT is strictly a tax upon room revenues derived from transient accommodations.[22] Inherently, TAT is a tax imposed on certain rental activity.[23] It is levied on gross rental income including amounts paid to the tax payer in the form of cash, goods, or services as compensation for furnishing a transient accommodation without any deductions for costs incurred in the operation of the transient accommodation.[24]

1.2.2. Exemptions

The tax systems applying transient accommodations tax provide different classes of exemptions under their tax laws. For instance, accommodations provided by health care facilities, school dormitories of public or private education institutions, lodging provided by non-profit making corporations, military living accommodations and low-income renters are excluded from the transient accommodations tax in Hawaii.[25]

1.2.3. Identification of Tax Payers

Another important point is how to identify potential tax payers. Every operator of transient accommodations is required to register with the Department of Taxation.[26] Therefore, transient accommodations tax follows a separate registration requirement and procedure because of its special nature. It also demands for a separate and clear report format.

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[22] State of Hawaii Department of Taxation (fn 16).
[23] Cayetano and Kamikawa (fn 16).
[24] Ibid, P.2
[25] State of Hawaii Department of Taxation (fn 17).
[26] Ibid.

2. The Tigray Income tax system: The Place of Casual Rental Income Tax

This part of the research deals how the tax system of Tigray State is designed and organized.

The FDRE constitution has assigned tax powers among the regional and federal governments following the adoption of federalism as a system of governance. Accordingly, the constitution divides powers of taxation as (1) federal taxation powers (Art 96, (2) State Taxation powers (Art 97), (3) federal and state concurrent taxation powers (Art 98) and (4) powers of taxation that are assigned neither to the federal government nor to regional governments (Art 99).[27] Accordingly, the Tigray Regional State does have powers to levy and collect different income taxes. Art 97 of the federal constitution states that regional states can levy income taxes employees of the region and of private enterprises, on individual traders carrying outbusiness within theri territories, transport services rendered on waters within their territories, income derived from private houses and other properties within states, houses and other properties a state owns and income of enterprises owned by the State.[28] The Tigray region has directly adopted, with insignificant changes, the federal income tax proclamation[29]

The Income Tax Proclamation No. 283/2017,[30]provides for the taxation of income in accordance with five schedules; Schedule 'A', income from employment; Schedule 'B', income from rental of buildings; Schedule 'C', income from

[27] Constitution of Federal Democratic Republic of Ethiopia, Proclamation No.1/1995, Arts 95-99.
[28] Ibid, Art 97.
[29]Although the current Income Tax Proclamation is silent as to why it directly translated the Federal Income Tax Proclamation, the third paragraph of the preamble of the preamble previous Tigray Regional State Income Tax Proclamation No.68/2003 stated that the very need for having that proclamation is to harmonize the income tax systems of the region with the tax system of the country.
[30] The Repealed Income Tax Proclamation of Tigray, Proclamation No. 68/2003

business and schedule 'D', Other incomes and schedule E exempted incomes.[31] Thus, it adopts a schedular tax system. This is clearly incorporated throughout the whole body of the Income Tax Proclamation and under its Art. 8.

How is the topic of this research entertained in the tax laws? Under schedule D of the Income Tax Proclamation, there are a number of taxable incomes including casual rental income tax. However, the rules seem insufficient. One problem that we see in the Income tax laws, federal as well as regional, is the huge discrepancy between the general definition and the specific schedules of income. This is attributable to the broad nature of the definition of "income" under the proclamation but lack of detailed implementing laws. The gap also applies to the law governing casual rental income tax.

Under the general definition in the proclamation, income is defined as "every form of economic benefit including non-recurring gains in cash or in kind from whatever source derived and in whatever form paid, credited or received."[32] Art 3 of the Federal Income Tax Proclamation and Art 59 of the Regional Income Tax Proclamation, strengthening the general rule under Art 2 (14) of both proclamations also read as "a person who derives any income that is not taxable under schedule A, B, C or D" of this proclamation shall be liable for income tax at the rate of 15% on the gross amount of the income."

However, tax to GDP ratio of Ethiopia as well as Tigray Region still remain very low which may be attributed to different factors. Different problems may be responsible for the inability to achieve desired revenue targets. When we come to the practice, there are different incomes that escape income tax due to different reasons. But, this research does not purport to address all income tax assessment

[31] However, this concept of "other incomes" could create jurisdictional conflict between the Federal and Rregional governments because in schedule "D", there are different incomes that are exclusively given to the Federal Government.
[32] Tigray Regional Income Tax Proclamation, fn 8, Art 2 (14).

challenges rather it focuses on the challenges in the tax assessment and collection activities from the income generated from the casual rental of properties.

3. An Assessment of Potential Casual Rental Income Tax payers

In the absence of any clearly identified potential tax payers made by the tax authorities, the researchers were forced to conduct a temporary assessment of the potential of this type of tax. This assessment was made in selected cities and towns in the region. Despite the differences in magnitude, we find all of the identified possible tax bases in all the study areas.

i. Construction materials and machineries

Such construction materials include water tankers, mixers, and construction woods. These types of activities are mostly performed casually by large contractors. They rent these construction materials to small and medium scale contractors who do not have the full capacity to participate in the construction industry by their own capital. But, the renters, i.e. the large contractors, do not report the income generated from such activity in their financial reports. Sometimes, the renters report the renting cost they have paid to as a deductible cost in their balance sheet. However, the tax authorities do not follow up to enforce the taxes that should be paid by the renters from the casual rental of these materials.

ii. Private cars

The assessment of the researchers revealed that automobile owners derive significant revenue by renting private automobiles from which tax should be collected.

iii. *Idir* materials

Though it may be questionable whether income from the rent of Idir materials should be taxed or not, in all the study areas, we find a number of *idir* associations generating thousands of Birr from casual rent. This income is generated from activities that are not related to their purpose.

iv. Games instruments

There are also individuals who generate incomes by renting game instruments such as pools, billiards, jetton (to other persons who are interested to run the business) but do not pay taxes to the authorities. Note, here, that those who are licensed as businessmen and regularly renting the games for customers are not casual.

v. Hotel furniture

Some hotel owners also rent different hotel furniture like refrigerator and chairs. This specially occurs when they have extra goods or when they stop their hotel business.

vi. **Private individuals renting ceremony stuff**

In all the study areas there are individuals (mostly traders of the same stuff) who rent different goods for wedding and similar ceremonies without license for this purpose. Such goods, among others include tent, sitting woods, cups, cooking and feeding materials.

vii. **Rental of hall**

This business is mostly practiced by hotels and guest houses. While the hotels and guest houses are registered as business income tax payers under schedule C of the Income Tax Proclamation, they casually generate income by renting halls to different customers. But, the tax authorities reported that they do not collect revenues from these types of revenues.

viii. Rental of volos

This is mostly done by some business peoplewho work as licensed beauty salon service providers but incidentally rent bridegroom volos.

4. The Legal and Practical Challenges in the Implementation of Casual Rental tax in Tigray Regional State

As we have seen in the previous discussions, income tax system of Tigray region as well as that of Ethiopia is divided into five schedules the fifth schedule (E) of which deals with exemptions that are allowed under each schedule of income. Casual rental income tax falls under schedule D of the income tax proclamation of the region which imposes taxes on different incomes. Specifically, Art 58 of the Federal Income Tax Proclamation states that:

> *A person who derives income from the casual rental of asset in Ethiopia (including any land, building, or movable asset) shall be liable for income tax on the annual gross rental income at the rate of 15% of the gross amount of the rental income.*

It further stipulates that casual rental income tax shall not apply to income from royalty. There is no law (proclamation, regulation or directive or precedent-setting cassation decision) that explains the concept of casual rental income tax other than this single provision of the law. One could, therefore, ask if a certain type of tax could be sufficiently regulated by a single provision. This issue is expounded hereunder.

4.1. The legal gaps in Casual Rental Income tax

What makes a rental activity as casual or permanent? What rental activities do attract rental income tax? Who is the tax payer? Could any person, legal or physical, be responsible to pay causal rental tax? Who should be exempted and who should be liable for the payment of this type of income tax? The general "definition" put under the law does not clearly address these questions.

4.2. Practical Challenges in the Implementation of the Law

The practical challenges are investigated in one topic for all areas of the study because there is no significant disparity between and among the four towns where this research was conducted. Based on the data collected from these sources, the implementation of the casual rental of property income tax is almost none.

4.2.1. Lack of Clear Identification of Tax Payers

Any tax authority is expected to identify the potential and real tax payers under each type of tax and each schedule. Not only a one-time identification but also the authority must make the necessary regular follow-up. Tigray Regional State Revenue Authority planned to clearly identify the tax bases in the region on each schedule of the income, to know the number of taxpayers and their respective incomes based on concrete evidences on the ground. However, there is no practice of identification of casual rental income taxpayers. In all the study areas the tax authority as well as the tax assessors do not clearly identify what constitutes the subject matter of this tax. They understand that any income that is not exempted under the law should be taxed and this could have been a good source of revenue for local projects.

For example, when we see the plan and achievement of the Regional Revenue Authority in the 2008 and 2009 E.C there was no separate plan or achievement regarding casual rental. Under the list of direct tax, we find tax on income of civil servants and private employees, rent, businesses, share dividend, capital income, agricultural income, royalty, income from interest, income from trading in *chat*, and "other direct taxes".[33] We do not find income tax from rental of property under this list. The data base of the authority has reported to the researchers that in 2016 and 2017 a total amount of 27,081.30 and 28,942.26 was collected from the rent of goods, respectively, but without any plan. But, it is not known from which woreda

[33] Tigray Revenue Authority, Tax Revenue Plan and Achievement Document by Income Category, 2016 and 2017

how much revenue was collected. When we ask the woreda tax assessors, they reply that they do not have data for each tax category.

4.2.2. Failure of the Tax payers to Report

The income tax under schedule D is either self-reporting or withholding system. When we see income tax from casual rent, Art 83 (7) shows that income under schedule D which are not subject to withholding have to be reported within two months. If it is not subject to withholding, then self-reporting by the tax payers is mandatory.

Despite the fact that the research shows that there are incomes generated by individuals and organizations collected from the causal rental of properties, the tax authorities of the research areas reported that neither the tax authority follow these incomes, nor the tax payers report their incomes for the purpose of taxation.

All tax authorities of the research areas reported that the parties who are engaged in casual rental agreements do not report their dealings to the authorities. In rare cases they undertake their agreements in front of the justice bureau; however, in most cases they enter into a contract privately. Even in the cases where agreement is signed in front of the justice bureau, the later do not report to the tax authorities for tax purposes. Actually, there is no such legal obligation on the part of the justice bureau. The gap lies in the law. It is only sometimes where those who rent the property are registered as business income tax payers that they report to the tax authority to enjoy the advantage of deduction in calculating their business income tax.

4.2.3. Income characterization problems: understanding

Before elaborating this practical challenge, it could be proper to explain the concept of income characterization. Under schedular tax systems, we need to create

a linkage between certain type of income and its source or schedule in order to apply special income tax rules on that income. Unlike in the case of global tax system, the schedular system presupposes the designing of different schedules for disintegrating sources of income into different categories. In a purely schedular system, it is unusual to apply tax rules of one schedule on incomes categorized in another schedules. The schedules help to categorize incomes into different groups so that it is possible to apply different tax rules, such as tax rate, deduction/exemption, accounting system and computation methods, on each type of income. This in turn means two tax payers shall have different tax liability even if they earn the same amount of taxable income.

The issue of income characterization is serious in the schedular income tax structure unlike the case with global tax system which does not worry about classification of sources of personal incomes into different schedules. Though there could be different challenges that the scheduling system face in the job of classifying incomes into different categories, the main challenge which is relevant to this research is the problem of overlapping of incomes. The other challenge that income characterization face with is that there might be incomes that are allocated to neither of the schedules which makes difficult to tax these incomes and which in turn results in disqualification of the overall purposes of taxation. Ethiopian income tax as schedular income tax system income characterization problem is unavoidable.

Obviously if tax is computed based on the wrong schedules the whole purpose of taxation may not be realized. Either the tax system become inefficient in the sense that there can be unwanted administrative and compliance costs or it become inequitable to say it failed to treat equals equally and unequal's unequally.

First there exist difference in income brackets and tax rates of schedules. This is the case especially for incomes under schedule D, which is a miscellany schedule,

containing around seven incomes. Therefore, characterizing certain income as schedule B or C taxable income and characterizing the same income as schedule D taxable income can create considerable difference on the tax burden of taxpayer and on the revenue accumulation on the side of the government.

The second basic difference is accounting systems that make a difference in tax burdens. Schedule 'A' taxpayers may be subject to higher tax burdens due to the adoption of monthly accounting method combined with PAYE (Pay-As-You-Earn). But, when we see Schedule B C and some part of D they are annually paid taxes. The methods of accounting may also be different. Schedule A and D taxpayers are generally required to account on cash basis; while Schedule B and C taxpayers may use either cash or accrual basis accounting, depending on the circumstances. There are also significant differences in the accounting /tax periods of the schedules. Schedule 'A' uses monthly accounting and simple PAYE; Schedule 'B' makes use of annual accounting; Schedule 'C' applies annual accounting; Schedule 'D' is event realization based.

Thirdly, the rules of exclusions, deductions and exemptions are not uniform across the schedules. These differences may lead to significant differences in tax burdens among the different categories. Though deductions are common for Schedule 'B' and 'C' taxpayers, there are still puzzling differences. Schedule B has standard deductions unlike Schedule C. Some expenses which are deductible under Schedule C may not be deductible under Schedule B and some expenses can be denied deduction solely because a taxpayer is a schedule B taxpayer.

There might also be differences in assessment methods between the Schedules although assessment methods are not differentiated strictly along schedular lines. Schedule A and D are mostly withholding based; Schedule B and C are self-assessment based. There is also presumptive income taxation – standard assessment for small taxpayers in Schedule B and C.

This all differences make the equitability and efficiency of the tax system suspicious, if there is a wrong characterization of incomes. Some taxpayers may be subject to heavier tax and tax related burdens although their income is equal and similar to others. Hence, the schedules may violate the principles of both horizontal and vertical equity.

In practice, the interview made with the tax assessors reported that the income from excavators and loaders used to be taxed as casual rental of property at 10% tax rate though the problem is rectified at this time. This was serious income characterization problem. The concern of the researchers, in this regard, is the concept of casual rental income tax is not yet clear among the tax assessors and the tax authorities. Therefore, this needs a legal intervention to clarify the concept.

4.2.4. Awareness of the Tax Assessors

An interview with high expert prosecutors (legal experts) from the Tigray Regional State Revenue Authority reveals that the tax authority is not aware about the intention of the legislature on the issue of "casual rental of property". They stated that:

> *I was a participant in the deliberation of the proclamation that was held in Adama last year. I was not clear on the phrase "casual rental of property" and I asked the resource person for further explanation. However, the resource person was not clear for himself. He raised only one example saying "for example if hotel owners generated income from the rent of meeting halls which is not part of their regular business". I am not still clear what constitutes this type of tax* (translation mine).

Similarly, a tax assessor working in Shire-Indasilasie City was totally unaware of the concept of casual rental income tax. When the researchers asked "for what type of activities do you apply the casual rental income tax of property" citing the

provision of the law, she did not totally understand the concept. Nor could the tax assessment core process owner of the city understand it. He diverted the question and he reported that there are different types of incomes in the city that are left untaxed recommending the city to broaden its tax base.

From the above sources, we can understand that the tax authority and the tax assessors are not clear with what is subject to casual rental income tax.

5. Assessment of the Consequences on the Principles of Taxation

Under this topic, the researchers have tried to correlate taxation of income from casual rental of assets and some relevant principles of taxation. Principles of taxation are standards based on which a tax system is said to be good or bad. Let's see taxation of incomes from casual rental of property in the eyes of old principle of taxation; equity or fairness, neutrality and efficiency.

Let's take one example to evaluate the casual rental income tax in the eyes of these principles. An interview made with an *idir* leader revealed that the *idir* association attracts a minimum of annual income of 70,000.00 birr by renting *idir* materials. Under the three schedules of income, A, B and C, a person who collects an income of this amount pays around 17, 500 income taxes. These schedules impose taxes even on persons who derive lesser incomes per annum. But, the *idir* associations are not paying taxes from their income resulting in horizontal and vertical inequity. Let's see the non-taxation of these incomes from the casual rental of property from the perspective of the principle of neutrality.

The principle of neutrality requires that the choices of peoples shall not be affected by taxation, other things remaining constant. When we see the case at hand, non-taxation of income from the casual rental of property, business income tax payers under schedule C of the income tax proclamation and those who rent their furniture with their buildings under schedule B may be forced to shift their business to the

informal sector, casual rental of property in order to get the benefit of tax avoidance. Thus, the non-taxation of these incomes is against the principle of neutrality.

From the perspective of the principle of efficiency, we could say the government is inefficient on the taxation of this sector because the effect of failure to tax casual rental income on neutrality can have negative repercussion on efficiency as it causes deadweight loss. Moreover, the researchers believe that the casual rental income tax can be collected with reasonable cost.

Thus, the non-taxation of incomes from the casual rental of property implies significant negative impact on the old principles of tax equity, tax neutrality and tax efficiency.

Conclusion

The law is not clear enough to define what casual rental income tax constitutes. It is blurred and suffering from lack of sufficiency of implementing directions. The law is not clear about the scope and meaning of casual rental. The practical problems are magnified as a result of these legal lacunas. Hence, there are incomes escaping tax from the sector due to lack of focus of the tax authorities. The regional tax authority in general and the revenue authorities of the research areas in particular are non-attentive to casual rental of property. The tax authorities do not make assessments on the area, each department under the tax authorities is not discharging their respective obligations regarding the casual rental income tax nor is there cooperation between and among the tax authorities and the justice bureau. The non-taxation of incomes from the casual rental of property is against the old principles of equity, neutrality and efficiency.

Therefore, the legislature needs to add some clarity on the law, possibly by enacting a specific regulations and directives because detailed and comprehensive

rules are a matter for the next step. Such detail laws should at least be provided in the regulations and directives and may also be supported through byelaws or manuals. The type of activity is which is subject to tax must be clearly put. In the mean time, it is necessary to apply the general principles as found in the proclamation and the regulations. The effort of doing so helps to identify the problems of taxing the area and it suggests the appropriate detailed solution. The tax authority needs to make an assessment of the potential of this type of tax and apply it carefully. This kind of assessment also needs a reassessment and revision any time. There must be collaboration between the Bureaus of Justice and the Tax authorities; the bureaus of justice must report agreements of casual rental to the tax authorities for tax purpose.

The tax authorities must organize awareness rising schemes for the tax assessors and tax payers on taxation of casual rental income.

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አልዩ አባተ ይማም*

አህጽሮተ-ጽሁፍ

የኢትዮጵያ ሸሪዓ ፍ/ቤቶች ከኃይሉ-ሥላሴ ዘመኑ-መንግሥት በፊት ጀምሮ በሥራ ላይ የነበሩ ሲሆን፣ ግማሽ ምዕተ-ዓመታትን ተሻግረዉ፣ በኢትዮጵያ ፌዴራዊ ዲሞክራሲያዊ ሪፐብሊክ (ኢፌዲሪ) ሕገ-መንግሥት የተሰጣቸዉን የአቋም ማጠናከሪያ ተንተርሰዉ፣ በፌዴራል እና በክልል መንግሥታት ደረጃ ከመጀመሪያ ደረጃ እስከ ጠቅላይ ፍ/ቤት ተደራጅተዉ በመሥራት ላይ ይገኛሉ፡፡ ይህ እዉነታ፣ ከሕግ እዉቅና ዉጪ ካለዉ የሕግ ብዝኃነት ሌላ ሕጋዊ መሠረት ባለዉ የብዝኃነት መድረክ ላይ ከመደበኛዉ 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 የሚቀርቡላቸዉን የግልና የቤተሰብ ክርክሮች ለመዳኘት ተፈጻሚ የሚያደርጉት ሕግ ሸሪዓ እንደሆነ ተደንግጓል፡፡ ከሸሪዓ ሕግ ምንጮች መካከል ቀዳሚዉ ደግሞ ቅዱሱ-ቁርአን ነዉ፡፡ የቁርአን ሕግ-ነክ አንቀጾች ብዛት ከእምነት-ነክ አንቀጾቹ አንጻር በጣም ጥቂትና 1/10ኛዉን የቁርአን ክፍል ብቻ የሚይዙ ናቸዉ፡፡ ከእነዚህም መካከል ብዙዎቹ የጥቅልነት ባህሪ ያላቸዉና፣ በዋና ዋና የሕግ ዘርፎች ላይ ጠቅላላ መርሆዎችንና ዓላማዎችን የሚቀርጹ ናቸዉ፡፡ የቁርአን ሕግጋት የጥቅልነት ባህሪ የተላበሱ መሆናቸዉ፣ ሸሪዓ በሕግ ምርምር (ኢጅቲሓድ) አማካይነት ከተለዋዋጭ ማህበረሰባዊ እዉነታዎች አኳያ ተለማጭ (flexible) መሆን እንዲችል፣ እና በጊዜ እና በሥልጣኔ ደረጃ ሳይወሰን ገዢነቱ ቀጣይነት እንዲኖረዉ ያደርገዋል፡፡ በተጨማሪም፣ ቁርአናዊ ሕጎች በአመክንዮኣዊ እሳቤ ሊብራሩ የሚችሉ እና ዓላማ አዘል መሆናቸዉ፣ ተጨባጭ ወቅታዊ እዉነታዎችን ያገናዘቡ አዳዲስ የሕግ ምልከታዎችን ለመጨመር በር የሚከፍት ሲሆን፣ በኢትዮጵያ ሸሪዓ ፍ/ቤቶች ተፈጻሚ እየሆነ ባለዉ የሸሪዓ የቤተሰብና የዉርስ ሕጎች ላይ አስፈላጊዉን የሕግ አተረጓጎምና የአፈጻጸም ማሻሻያዎችንና ለዉጦችን በማድረግ፣ የዘርፉን ንዑስ ዓላማዎችና ጠቅላላ የሸሪዓ ግቦችን (መቃሲድ አሹ-ሸሪዓሕ) ማሳካት የሚቻልበትን መሠረት ይጥላል፡፡

Primary Source of Sharia Law - Quran

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 which has a legal and moral authority upon the followers of the religion. Out of the many thousand provisions of the Quran, only 1/10th have legal content; and such legal rules are predominantly characterized as general rules outlining broad principles and objectives of the various branches of Sharia law including those that govern personal and family matters. This has enabled Islamic law to be flexible to the changing realities of communities through divergent juristic interpretations and application (Ijtihad). Furthermore, the absence of specific rules in the Quranic legal framework opens a door to introduce new legislative insights based on the general rules and legal objectives of the Quran and taking the prevailing circumstances of a society into consideration. Taking the long-standing application of Sharia law, either at the official level or informally across the Muslim communities of the country, the effort to make Sharia law go in line with the Ethiopian realities and the supreme norms of the FDRE Constitution shall start from the reexamination and correct understanding the legal characteristics of the Quran and its general and theme-specific objectives (Maqasid Ash-Sharia). This paper delves into the introduction of the basic legal underpinnings of the Sharia as represented in its primary source – the Holy Quran.

ቁልፍ ቃላት፡- የሕግ ብዝኃነት፣ የሸሪዓ ሕግ ምንጭ፣ ቁርአን፣ ሸሪዓ፣ ፊቅሕ፣ ሂደታዊነት፣ ተለማጭነት፣ ኢጅቲሓድ

መግቢያ፡- የርዕሰ-ጉዳዩ አግባብነትና ጠቀሜታ

ቁርአን ቀዳሚዉ የሸሪዓ ምንጭ መሆኑን መሠረት በማድረግ፣ የሕግ ገጽታዎቹን የሚያስተዋዉቅ ጽኑፍ ለኢትዮጵያ የሕግ ሥርዓት ያለዉ አግባብነትና ጠቀሜታ ምንድን ነዉ የሚል ጥያቄ በአንባቢዉ በኩል ሊነሳ ይችላል፡፡ ለዚህ ምላሹ ደግሞ የኢትዮጵያ ፌዴሬሽን ማቋቋሚያ ሠነድ ከሆነዉ የፌዴራል ሕገ መንግሥት አንቀጾች የሚገኝ ነዉ፡፡[1] የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ ሕገ-መንግሥት አንቀጽ 34(5) እና 78(5) ላይ እንደተደነገገዉ፣ ከኦፌሴላዊ የመንግሥት የሕግና ፍትሕ ሥርዓት በተጓዳኝ እዉቅና ሊሰጣቸዉ የሚችሉ የሕግ ሥርዓቶች አሉ፤ እነሱም ባህላዊ እና ሃይማኖታዊ ሕጎች ናቸዉ፡፡ በሕብረተሰቡ ዉስጥ ለሚነሱ ግላዊና እና የቤተሰብ ግጭቶች፣ በባለጉዳዮቹ ፈቃድ በባህል ዉይም በሃይማኖት ሕጎች መሠረት ሊዳኝ እና እልባት ሊሰጠዉ እንደሚችል ሕገ-መንግሥቱ ያትታል፡፡

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

ተቋማዊ አደረጃጀቱን በተመለከተ በሕገ-መንግሥቱ አንቀጽ 78(4) ላይ እንደተመለከተዉ፣ የግልና የቤተሰብ ግጭቶችን የመዳኘት ሥልጣን ያላቸዉ ሃይማኖታዊና ባህላዊ ፍ/ቤቶችን የማቋቋም ዉሳኔ የማሳለፍ ሥልጣን፣ ለፌዴሬሽኑ የሕግ አዉጪ 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 ያለና አስፈላጊቱ ከታመነበት፣ በሕግ አዉጪዎቹ ይሁንታ ባህላዊና ሃይማኖታዊ ፍ/ቤቶች ተቋቁመዉ የሕግ ብዝኃነቱ አካልና ተዋናይ እንዲሆኑ ሊደረግ እንደሚችል መረዳት ይቻላል፡፡ ከመደበኛ ፍቤቶች ዉጪ ያሉ የዳኝነት አካላት የሚቋቋሙበት ይህ ሥርዓት፣ ለሸሪዓ ፍ/ቤቶች ተፈጻሚ አይሆንም፤ እንዴት ከተባለ ምላሹ በአንቀጹ ንዑስ 5 ላይ ይገኛል፡፡ ይኸዉም፣ ሕገ-መንግሥቱ ከመጽደቁ በፊት፣ በመንግሥት እዉቅና አግኝተዉ ሲሰራባቸዉ የነበሩ የባህል ወይም የሃይማኖት ፍ/ቤቶች እዉቅና አግኘተዉ እንዲደራጁ የሚያስገድድ በመሆኑ ነዉ፡፡ በኢትዮጵያ የሕግ ሥርዓት ታሪክ ደግሞ፣ ሸሪዓ ፍ/ቤቶች ከአጼ ሐይለ-ሥላሴ ሥርዓተ-መንግሥት በፊት ጀምሮ በሥራ ላይ የነበሩ በመሆኑ፣[2] በንጉሱ ዘመን ደግሞ የቃዲና የናኢባ ፍ/ቤቶች ተብለዉ በ1934 እና በ1936 በወጡ የማቋቋሚያና የማሻሻያ አዋጆች ተደራጅተዉ ሲሰሩ የነበሩ ናቸዉ፡፡[3] ስለሆነም ሸሪዓ ፍ/ቤቶች ከመንግሥታዊ የዳኝነት ተቋማት በተጓዳኝ በመሥራት ከሕገ-መንግሥቱ መጽደቅ በፊት ሲሠሩ የነበሩ በመሆኑ፣ እነዚህን ፍ/ቤቶች በፌዴራልና በክልል ደረጃ አቋቋሞ ሥራቸዉን እንዲቀጥሉ ማድረግ በሕግ አዉጪዎች ፈቃድ ላይ የተመሠረተ ሳይሆን፣ ሕገ-መንግሥቱ ራሱ ያቋቋማቸዉ፣ እና እዉቅና ማግኘታቸዉ በሕግ አዉጪ አካላት ላይ የተጣለ ሕገ-መንግሥታዊ ግዴታ መሆኑን ይገነዘቧል፡፡

የፌዴራል ሕግ-መንግሥቱን አስገዳጅ አንቀጽ መሠረት በማድረግ፣ የፌዴራልና የክልል ም/ቤቶች የሸሪዓ ፍ/ቤቶን አቋም የሚያጠናክሩ እና እንደገና የሚያደራጁ አዋጆችን አዉጥተዋል፡፡ የሕዝብ ተወካዮች ም/ቤት፣ ‹የፌዴራል ሸሪዓ ፍ/ቤቶችን አቋም ለማጠናከር የወጣ አዋጅ ቁጥር 188/1992› በተሰኘ አዋጅ፣ ሸሪዓ ፍ/ቤቶች በይበልጥ ተጠናክረዉና ተደራጅተዉ እየሰሩ መሆናቸዉ የታወቀ ነዉ፡፡ በተመሳሳይ፣ የክልል መንግሥታትም በበኩላቸዉ፣ የፌዴራል ሕግ መንግሥቱን አንቀጽ 78(5) መሠረት በማድረግ፣ የየራሳቸዉን ክልላዊ ተፈጻሚነት ያላቸዉ፣ የሸሪዓ ፍ/ቤቶች ማጠናከሪያ አዋጆችን አዉጥተዉ፣ በሃገሪቱ ዙሪያ በወረዳ፣

[2] ዛኪ ሙስጠፋ፣ በኢትዮጵያ ዉስጥ በሚገኙት የእስላም ፍርድ ቤቶች የሚሰራበት ሕግ፤ ለሸሪዓ ሕግ በሥራ ላይ መዋል መቀጠል ምክንያት የሆኑ ነገሮች፣ የኢትዮጵያ ሕግ መጽሔት፣ ቅጽ 9፣ ቁጥር 1፣ 1965፣ ገጽ 173 ይመለከቷል፡፡ ጽሁፉን በ፡ <http://journals.co.za/docserver/fulltext/jel/9/1/211.pdf?expires=1513428722&id=id&accname=guest&checksum=61C6511681864827D9D37CAE4B9444CE> ፊለገ-ገጽ ላይ ይገኛል (በታህሳስ 12፣ 2010 ዓ.ም የተገኘ)፡፡ See also: Mohammed Abdo, Legal Pluralism, ‘Sharia Courts, And Constitutional Issues In Ethiopia’, Mizan Law Review, Vol. 5 No.1, Spring 2011, p. 78. <https://www.ajol.info/index.php/mlr/article/view/68769/56835>

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

በዞንና በክልል ደረጃ፣ የመጀመሪያ፣ ከፍተኛና ጠቅላይ ሸሪዓ ፍ/ቤቶች ተደራጅተዉ፣ በተከራካሪዎች ፈቃድ ላይ ተመርኩዘዉ፣ በግልና በቤተሰብ ጉዳዮች ላይ ሸሪዓዊ ፍትሕን በማድረስ ላይ እንደሚገኙ ይታወቃል፡፡ ይህም ሕጋዊ እዉቅና ያገኘ የሕግ ብዝኃነት (*Legal Pluralism*) በሃገሪቱ እንደሰፈነ የሚያሳይ እዉነታ ነዉ፡፡[4]

በፌዴራል ሸሪዓ ፍ/ቶች ማጠናከሪያ አዋጅ አንቀጽ 6(1) መሠረት፣ ለሸሪዓ ፍ/ቤቶች የሚቀርቡ ጉዳዮች፣ በሸሪዓ ሕግ መሠረት እንደሚዳኙ ይደነግጋል፡፡ ሸሪዓ ሕግ ደግሞ በጥቅሉ ሁለት ምንጮች አሉት፤ እነሱም ራዕያዊ *(ነቅሊያሕ/Revealed)* እና አመክንዮኣዊ *(ዐቅሊያሕ/Rational*) ናቸዉ፤ ራዕያዊ ምንጮች በመለኮታዊ ራዕይ *(ወሀይ)* የተገለጹ ሲሆኑ ቁርአን እና *ሱናህ* በዚህ ምድብ ስር ይወድቃሉ፡፡[5] ለዝርዝር ሕጎች ምንጭ ከሆኑ የኢጅቲሓድ መርሆዎች መካከል ምሥሥሏዊ አመክንዮ *(ቂያስ)*፣ የሕዝብ ጥቅም *(መስላሃሕ/Public Interest)*፣ ከምንጩ ማድረቅ (*ሰድ ኣዙ-ዘራኢዕ*/Blocking the Means)፣ ርትዕ *(ኢስቲህሳን/Equity)* ወዘተ.. የመሳሰሉ ጥቅል አመክዮኣዊ የሕግ መርሆዎች ይገኙበታል፡፡[6] በሸሪዓ ምንጮች የአስረጂነት ተዋረድ ዉስጥ፣ ራዕያዊ ምንጮች የበላይነት ያላቸዉ ሲሆን፣[7] ሰብዓዊ-አመክንዮዊ የሕግ ምርምሮች ከራዕያዊ የሕግ ቀኖናዎችና ድንጋጌዎች ጋር ቢጣረሱ ጽኑእነት እና ተፈጻሚነት አይኖራቸዉም፡፡[8] በቁርአንና በ*ሱናህ* መካከል ግጭት ቢያጋጥም ደግሞ፣ ምንም እንኳ በመሠረቱ ሁለቱም ምንጮች መለኮታዊ መነሻ ቢኖራቸዉም፣ የነቢዩ *ሙ*ሀመድ ነቢያዊ ንግግሮችና ተግባራት *(ሱናህ)* የተላለፉባቸዉ ዘገባዎች ተዓማኒነት አጠራጣሪ ሊሆን ስለሚችል፣ ከቁርአን ያነሰ የአስረጅነት ደረጃ ያላቸዉ

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[4] በሕግ እዉቅና ካገኘ የሕግ ብዝኃነት *(De-jure)* በተቃራኒ፣ ሕግ የማይፈቅደዉና እዉቅና ያልተሰጠዉ፣ የፍሬ-ነገር የሕግ-ብዝኃነት *(De-facto)* አለ፡፡ ይህ የብዝኃነት ጽንሰ-ሐሳብ፣ በአንድ የሕግ ሥርዓት ዉስጥ በተጨባጭ የሚታየዉን፣ ከመንግሥታዊ የፍትሕ ሥርዓት በተጓዳኝ የግለሰቦችንና የማህበረሰብ ባህርይ እና ምግባር የሚቀርጹና የሚመሩ ሕጎች ተግባራዊ የሚሆኑበትን ነባራዊ እዉነታ የሚያመለክት ነዉ፡፡ ለምሳሌ፣ በኢትዮጵያ የሸሪዓ ሕግ ወይም ባህላዊ ሕጎች በባህላዊ እና ሃይማኖታዊ የፍትሕ ተቋማት አማካይት ከተፈቀዱበት ወሰን አልፈዉ፣ በፍትሐ-ብሔራዊ፣ በንግድ እና በወንጀል ጉዳዮች ላይ ተፈጻሚ የሚደረጉ መሆኑ የማይካድ ሃቅ ነዉ፡፡ ከሕግ እዉቅና ዉጪ የሆነዉ ነባራዊ ብዝኃነት፣ በሃገራዊ የፍትሕ ሥርዓት፣ በጾታ እኩልነት እና ሰብዓዊ መብት፣ በልማታዊ የፖሊሲ አፈጻጸም እርምጃዎች ላይ የራሱ የሆኑ አሉታዊ ሚናዎች ያሉት ሲሆን፣ ለባህላዊና የሃይማኖት የሕግ ሥርዓቶች የተሰጣቸዉ የእዉቅና ደረጃና የተፈጻሚነት ወሰን የተወሰነዉ፣ ግጭቶችን ለመፍታት ካላቸዉ ዉጤታማነት *(Instrumental Function)*፣ በሰብዓዊ መብቶች፣ በእድገት እና ሥልጣኔ ለይ የሚጋርጧቸዉ ችግሮች እና ሌሎች ታሳቢዎች ግምት ዉስጥ ገብተዉ መሆኑ ይታወቃል፡፡ ከእነዚህ እሳቤዎች አንጻር ደጋፊ ወይም ነቃፊ የመከራከሪያ ሐሳቦች ሊቀርቡ የሚችሉ መሆኑ እና እየቀረቡ ያሉ መሆኑ ሊታወቅ ይገባል፡፡

[5] Ahmad Hasan, The Sources of "Fiqh": A General Survey, Islamic Studies, Vol. 29, No. 2 (Summer 1990), p. 114. <http://www.jstor.org/stable/20839989> (Accessed: 20-11-2017).

[6] ዝኒ ከማሁ፣ ገጽ 115

[7] ከአመክንዮኣዊ የሕግ እሳቤዎች ይልቅ በመለኮት የተገለጹ ራዕያዊ ሕጎች የበላይነት ያላቸዉ መሆኑ፣ በሸሪዓ የሕግ ፍልስፍና የሉዓላዊ ሥልጣን ባለቤትነት የአምላክ መሆኑን፣ ከዚያ በሻገር ሰፊዉን የሸሪዓ ሕግ ማዕቀፍ የሚሸፍዉ አመክንዮኣዊ የሕግ ምርምር *(ኢጅቲሓድ)* በማድረግ ሰዉ የተከታይነትና አስፈጻሚነት *(ሱልጣን ኣት-ተፊንዚ)* ሚና የተሰጠዉ መሆኑን፣ ባጠቃላይ ሰዉ የምድር ገዢ *(ኸሊፋሕ)* ሆኖ ሲወርድ ከራሱ ፈቃድ በላይ የፈጣሪን ፈቃድ ሊያስቀድም፣ ሊፈጽም እና ሊያስፈጽም መሆኑን የሚያስተምረዉ የኢስላም የሕይወት ፍልስፍና *(ተዉሂድ)* ነጸብራቅ ነዉ፡፡ (Kamali, *Principles*, fn 9, p. 7; and Kamali, *Sharia*, fn 27, p. 14)

[8] Hasan, The Sources of "Fiqh", fn 5, p. 115.

በመሆኑ፣ ግጭቱ በቁርኣን ተቀዳሚነትና የበላይነት የሚፈታ ይሆናል፡፡[9] ይህ በንድፈ-ሐሳብ ደረጃ የተቀመጠ የሕግ ምንጮች የተቀዳሚነት ቅደም-ተከተል ቢሆንም፣ ቁርአን በአብዛሀኛዉ ጥቅል መርሆዎችን የያዘ በመሆኑ፣ ከሱናህ ጋር ያለዉ ግንኙነት ከተደጋጋፊነት ባለፈ፣ የሚጋጭበት ሁኔታ እጅግ ጠባብ መሆኑን ይገነዘቧል፡፡[10]

ቁርአን፣ በሸሪዓ ምንጮች ፒራሚድ ቁንጮ ላይ የሚገኝና የበላይ የእዉቀትና የሕግ ምንጭ መሆኑን መሠረት በማድረግ፣[11] የሕግ ገጽታዉን መዳሰስ የዚህ ጽሁፍ ዋነኛ ትኩረት ነዉ፡፡ ቁርአን በሕግ ክፍሉ የሚገለጽባቸዉን ባህርያቶቹን መገንዘብ፣ በኢትዮጵያ ሸሪዓ ፍ/ቤቶች ተፈጻሚ እየተደረገ ያለዉን የሸሪዓ የግልና የቤተሰብ ሕግ በትክክል ለመተርጎም እና ተፈጻሚ ለማድረግ እጅግ አስፈላጊ መሆኑን መረዳት ያሻል፡ ፡ ስለቁርአን ጠቅላላ ገጽታዎች ራሱን በቻለ፣ *ዑሉም ኡል-ቁርአን* (የቁርአን አረዳድ መሠረታዊ መርሆዎች ጥናት - ወይም የቁርአን ጥናቶች/*Quranic Studies)* በሚል የእዉቀት ዘርፍ ሥር በስፋት የሚዳሰስ ሲሆን፣[12] ቁርአንን ከሕግ አኳያ በመፈተሽ፣ የሕግ ምንጭነቱን በአግባቡ ለመጠቀም እና በዚህ ረገድ ተያይዘዉ የሚነሱ የአተረጓጎም እና የአረዳድ ግድፈቶችን ለማረቅ፣ ጥልቅ የመርሆዎች እና የአተረጓጎም ደንቦች ጥናት የሚደረገዉ *በኡሱል ኡል-ፊቅሕ* (የሸሪዓ መሠረተ-ሐሳቦች ጥናት) በተሰኘ እዉቀት መስክ ሥር ነዉ፡፡[13]

ቁርአን በይዘቱ ዘርፈ ብዙ ርዕሰ-ጉዳዮችን የሚያነሳ መለኮታዊ ቃል ሲሆን፣ በአጠቃላይ አነጋገር የሕግ መጽሃፍ ተብሎ ሊፈረጅ የማይችል፣ ዋነኛ ትኩረቱና ዓላማዉ ከሕልዉና እና ምድራዊ ሕይወት፣ እንዲሁም በድሕረ-ሕልፈት ዙሪያ የሚነሱ መሠረታዊ ጥያቄዎችን መልስ ለመስጠት ታስቦ የወረደና በይዘቱም በእነዚህ

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[9] Muhammad Hashim Kamali, *Principles of Islamic Jurisprudence*, (Cambridge: Islamic Texts Society, 1991), p. 58-59. <http://www.targheeb.com/phocadownload/Fiqh/ISLAMIC%20LAW%20HISHAM%20KAMALI.pdf> (Accessed on: 24, Nov, 2017). ከዚህ መጽሃፍ የተጣቀሱት ገጾች በወረቀት ታትሞ የወጣዉን የመጽሃፉን ቅጂ የገጽ ቁጥሮች የሚያመለክቱ ናቸዉ፡፡ የድረ-ገጽ ፈለጉን በመከተል የሚገኘዉ መጽሃፍ ላይ ያሉት ገጾች ከሕትመቱ ጋር የሚለያይ መሆኑን፣ ሆኖም የገጾቹ ልዩነት እጅግ የተራራቀ ባለመሆኑ፣ ሕትመቱ በሌለበት ዲጂታል ቅጂዉን አዉርዶ መጠቀም ፋይዳዉ የማይተናነስ መሆኑን እገልጻለሁ፡፡

[10] Ibid., p. 59

በቁርአን እና ሱናህ መካከል ባለዉ ትስስር ዙሪያ፣ እንዲሁም ስለሸሪዓ ምንጮች አጠቃላይ ዳሰሳ፣ kamali, Sources, fn 14, pp. 215-224, and Kamali, *Principles*, fn 9, pp. 57-65 ይመለከቷል፡፡

[11] Ahmad Hasan, 'The Qur'an: The Primary Source of Fiqh', Islamic Studies, Vol. 38, No. 4 (Winter 1999), pp. 475-502), p. 493, <http://www.jstor.org/stable/20837059> (Accessed: 20-10-2017).

[12] Abbas Jaffer & Masuma Jaffer, *Qura'nic Sciences*, (ICAS Press, London, 2009), p. 1

[13] Mohd Daud Bakar, 'The Origins of Islamic Legal Theory (*Usul Al-Fiqh*)', Intellectual Discourse, Vol 5, No 2, 1997, pp. 121-122. <http://journals.iium.edu.my/intdiscourse/index.php/islam/article/view/395> (Accessed: 10 January 2018)

ርዕሰ-ጉዳዮች ዙሪያ የሚሸከረከር የመመሪያ መጽሃፍ ነዉ፡፡[14] ስለዚህ ሸሪዓዊ ሕግ እና የሕግ ሥርዓት፣ በቁርአን እና *በሱናህ* ከተገለጸዉ በበለጠ *በኡሱል ኣል-ፊቅሕ* እና *ፊቅሕ* (ዝርዝር ሸሪዓ ሕጎች ጥናት) ሊቃዉንት የዳበረዉ የአንበሳዉን ድርሻ እንደሚይዝ በሁሉም ሊቃዉንት ዘንድ የታመነ ነዉ፡፡ ይህ ሲባል፣ ለሰፊዉ ምሁራዊ የፊቅሕ ሕግ ዝርጋታ መሠረት የሆኑ፣ ሸሪዓዊ የሕግ ምርምር እና አተረጓጎም ልቅ እና ዘፈቀደ እንዳይሆን የሚያደርጉ መሪ የሕግ ንድፈ-ሐሳቦች *(ኡሱል ኣል-ፊቅሕ)*፣ ዓላማዎችና ግቦች *(መቃሲድ)* በቁርአን (እንዲሁም *በሱናህ)* ተዘርግተዋል፡፡ ስለዚህ፣ ቁርአን ለሸሪዓ የሕግ አቀራረጽ የበላይ ተቆጣጣሪ እና ፈር-ቀዳጅ በመሆን የመሪነት ሚና ይጫወታል፡፡

የቁርአን የሕግ መርሆዎችን እና የሕግ አተረጓጎም ዘዴዎችን መተንተን የአጠቃላይ የኡሱል ኣል-ፊቅሕ ዓላማ እና ተግባር ሲሆን፣ የዚህ ጽሁፍ ዓላማ ቁርአን በሸሪዓ ምንጭነቱ ያካተታቸዉን የሕግ መርሆዎች፣ ሁለተኛዉ የሸሪዓ ምንጭ ከሆነዉ ከ*ሱናህ* የሕግ ክፍል ጋር በማቀናጀት አንድ በአንድ በሚጠናበት በኡሱል ኣል-ፊቅሕ ጥናት ሥር በመግቢያነት የሚቀርበዉን፣ ስለ ቁርአን የሕግነት ባህርያት አጠቃላይ መንደርደሪያ ነጥቦችን መዳሰስ ነዉ፡፡

1. ስለቁርአን አጠቃላይ የመግቢያ ነጥቦች

ቁርአን ‹*ቀረኣ*› ከሚለዉ *ሥርወ-ቃል* የተወሰደ ግሳዊ ስም ሲሆን፣ ትርጉሙም ምንባብ (የሚነበብ፣ የሚደገም) ማለት ነዉ፡፡[15] ቁርአን ከአንድ የሥነ-ፍጥረቱ አስገኝ አምላክ ወደ *ሙሀመድ* የወረደ፣ እና በበርካታ የዘገባ *ሠንሰለት (ተዋቱር)* ለአማኞች የደረሰ መለኮታዊ ቃል ነዉ፡፡[16] ቁርአን ለአማኞች (ሙስሊሞች) የእምነት ቀኖናዎችን የሚዘረጋ መጽሃፍ ብቻ ሳይሆን፣ ዝርዝር መተዳደሪያ መርሆዎችንና ሕግጋትን አካቶ የያዘ የተሟላ የሕይወት መመሪያ ነዉ፡፡[17] መለኮታዊ ራዕዩ ‹አንብብ - ኢቅራእ (96፡1)›

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[14] Mohammad Hashim Kamali, ‘Source, Nature and Objectives of Shariah’, *Islamic Quarterly*, p. 219,<http://www.hashimkamali.com/index.php/publications/item/113-sources-nature-and-objectives-of-the-sharicah> (Accessed on: 24, Nov, 2017)

[15] ቁርአን፣ ሌሎች እንደ *ኪታብ* (መጽሃፍ)፣ *ዚክር* (ማስታወሻ፣ ተግሳጽ) ወዘተ ስሞች ያሉት ሲሆን፣ ስያሜዎቹ ቁርአን በግለሰብ እና በማህበረሰባዊ ሕይወት ዉስጥ ያለዉን ሚና በተለያየ ገጽታ የሚያሳዩ ናቸዉ፡፡ ቁርአን በአረብኛ አጠራሩ ‹ኣል-ቁርአን› ከተባለ ሙሉ መጽሃፉን የሚያመለክት ሲሆን፣ ‹ኣል› የሚል ምዕላድ ሳይታከልበት እንዲሁ ‹ቁርአን› ብቻ ከተባለ ደግሞ ሙሉዉን ወይም ከፊሉን የቁርአን ክፍል ይወክላል፡፡ (Kamali, Principles, fn 9, p. 41, footnote no. 1). የቁርአን ሙያዊ የትርጓሜ ክፍሎች ላይ ዝርዝር ማብራሪያ ለማግኘነት፣ በመግቢያ ደረጃ፣ ለአዲስ ተደራሲያን ቀላል አቀራረብ የተከተለዉን የያሲር ቃዲ መጽሃፍ፣ Introduction to the Sciences of the Quran, fn 27, pp. 25-29 ይመልከቱ፡፡

[16] Kamali, Principles, fn 9, p. 14, በተጫማሪም፣ Yasir, Introduction, fn. 27, p. 24 ይመለከቷል፡፡ ቁርአን፣ በሥነ-መለኮትም ሆን በሕግ ይዘቱ፣ አጠቃላይ ገጽታዉን በትክክል ለመረዳት መሠረት የሆኑ መርሆዎች በ*ሁሉም ኣል-ቁርአን* (የቁርአን ጥናቶች/Quranic Studies) የእዉቀት መስክ ሥር በስፋት የሚጠና ሲሆን፣ መስኩ የካበተ የሥነ-ጽሁፍ አሻራ ያለዉና ጥንታዊ የኢስላምየ ጥናት ዘርፍ ነዉ፡ ፡

[17] Hasan, The Qur'an, fn 11, pp. 492-493.

በሚል ጀምሮ ሰዉ ከሕልፈት በኋላ በትንሳኤ ለምድራዊ ሕይወቱ ተጠያቂ የሚሆንበትና በፍትሕ የሚዳኝ መሆኑን በማሳሰብ (2፡28)፣ ወርዶ ያለቀ መጽሃፍ ነዉ፡፡[18]

ቁርአን፣ 114 ምዕራፎች (*ሱራህ/ሱወር*) እና በርዝመት የተላያዩ 6235 አንቀጾች ያሉት ሲሆን፣ አጭሩ የቁርአን ምዕራፍ አራት አናቅጽ (*አያት*)፣ ረዥሙ ደግሞ 286 *አያት* አሉት፡፡ ረዣዥም የሆኑት *ሱራዎች* በመጽሃፉ መጀመሪያ ጀምረዉ የሚገኙና፣ የመጽሃፉ ገጾች ወደ መጨረሻዉ በተገለጡ ቁጥር የምዕራፎቹ ስፋት በአንጻሩ እያነሰ የሚሄድ፣ በምዕራፎች ሥር ያሉ አንቀጾች አሰዳደር እና የምዕራፎች ተርታ በመጨረሻዎቹ የሙሀመድ የሕይወት ዘመናት ላይ በመለኮታዊ አመራርነት የተጠናቀረ፣ በዚህም መሠረት *በሱራህ አል-ፋቲሃሕ* ጀምሮ በ*ሱራህ አን-ናስ* የሚያልቅ መጽሐፍ ነዉ፡፡[19]

የቁርአን ይዘት በአርዕስት የተደራጀ ሳይሆን፣ ልዩ ልዩ ሐሳቦችን ያዘሉና ተያያዥነት የሌላቸዉ አንቀጾቹ አንዱ በሌላዉን እየተካ፣ በሰዉ አመክንዮኣዊ አረዳድ የማይጠበቅ የሐሳብ ፍሰት ያለዉ ልዩ መጽሃፍ ነዉ፡፡ ለምሳሌ፣ የሥግደት አምልኮ ትዕዛዝ፣ ስለ ፍቺ በሚናገሩት አንቀጾች (2፡228-248) መሃል ይገኛል፡፡ በተመሳሳይ ስለ አስካሪ መመጦች እና ጦርነት የሚናገሩ አንቀጾችን ተከትሎ ስለ ወላጅ-አልባ ሕጻናት አያያዝ እና አማኝ ያልሆነችን ሴት ስለማግባት የሚደነግጉ አንቀጾች ተቀምጠዋል፡፡ እንዲሁም፣ ስለ ጋብቻ እና ፍቺ የሚገልጹ ድንጋጌዎች በ*ሱራህ* አል-በቀራሕ (196-203)፣ በአጥ-ጦላቅ እና አን-ኒሳእ ተበታትነዉ ይገኛሉ፡፡[20] ከዚህ የቁርአን ልዩ ባህሪ ላይ በመነሳት፣ ቁርአን የማይከፋፈል፣ ስለ እምነትና ሕግ ጉዳይ ትክክለኛዉን መለኮታዊ አቋም ለመረዳት ሙሉ የቁርአን ምዕራፎች እና አንቀጾች በጥልቀት ተፈትሸዉ በአንድነት የሚሰጡት መልዕክት ካልተመረመረ በስተቀር፣ ከፊሉን የቁርአን ክፍል ተንተርሶ ድምዳሜ ላይ መድረስ ተቀባይነተ የሌለዉና[21] የቁርአንን ሥነ-ጽሁፋዊ አቀራረብ ታሳቢ ያላደረገ ዉድቅ አረዳድ መሆኑ ሁሉም ምሁራን ይስማሙበታል፡፡[22]

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[18] Kamali, *Principles*, fn 9, p. 16.
መጨረሻ በወረደዉ የቁርአን አንቀጽ ላይ በ*ዉለማእ* መካከል ልዩነት ተንጸባርቋል፤ የመጨረሻ ናቸዉ ተብለዉ አቋም ከተያዘባቸዉ አንቀጾች መካከል በብዙሃኑ ምዕመናን ዘንድ የሚታወቀዉ፣ በ*ሱራህ* አል-ማኢዳህ፣ ‹ዛሬ ሃይማኖታችሁን ሙሉ አደረኩ…› የሚለዉን የቁርአን አንቀጽ (5፡ 3) ቢሆንም፣ ከላይ የድሕረ-ሕልፈት ተጠያቂነት ጋር የተያያዘዉ የ*ሱራህ* አል-በቀራሕ አንቀጽ (2፡ 281) መህመድ በሕይወት በቆዩባቸዉ የመጨረሻ ጥቂት ቀናት ላይ የወረደ መሆኑን እና ያዘለዉን መልዕክት መሠረት በማድረግ የመጨረሻ ራዕይ መሆኑ ይበልጥ አሳማኝ እንደሆነ ያሲር ቃዲ በ*ራሱም አል-ቁርአን* መጽሃፋቸዉ ያስረዳሉ፡፡ (Yasir, *Introduction*, fn 27, p. 94) ሌሎች የመስኩ ምሁራን ለሰነዘሯቸዉ የተለያዩ ሐሳቦች እና ያቀረቧቸዉን ማስረጃዎችና የክርክር ሐሳቦች ለመመርመር ከፈለጉ፣ Yasir, *Introduction*, fn 27, pp. 91-94 ይመለከቷል፡፡
[19] Kamali, *Principles*, fn 9, p. 14.
[20] Kamali, *Principles*, fn 9, pp. 14-15.
[21] ቁርአን፣ 5፡ 52
[22] Kamali, *Principles*, fn 9, p. 15.

ቁርአን ለሙሀመድ የወረደ ግልጽ መለኮታዊ ራዕይ *(ወሀይ ፯ሒር)* ነዉ፤ በዚህም ቁርአን በቃልም ሆነ በሐሳብ ሙሉ በሙሉ የፈጣሪ መሆኑ፣ መልዕክቱ ብቻ ለነቢዩ ከተገለጸዉ ሐሳባዊ ራዕይ *(ወሀይ ባጢን/ኢልሃም)* እና ቋንቋዊ አገላለጹ የነቢዩ ሙሀመድ ከሆነዉ *ሀዲስ/ሱናህ* የተለየ ያደርገዋል፡፡[23] ከነቢዩ የተላለፉ ሁሉም ንግግሮች በፍሬ-ሐሳብ መለኮታዊ ሆነዉ፣ ቋንቋዊ አወቃቀራቸዉ ግን የሙሀመድ በመሆናቸዉ ሐሳባዊ ራዕይ *(ወሀይ ባጢን)* እየተባሉ ይጠራሉ፡፡[24] *ሀዲስ ኣል-ቁድሲ* (የተቀደሰ *ሀዲስ)* የተባለዉ የ*ሀዲስ* ክፍልም ቢሆን በጽንሰ-ሐሳቡ ከፈጣሪ የመጣ ሆኖ በቃሉ የሙሀመድ እንደሆነ፣ እና ነቢዩ በ*ቁድሲ ሀዲስ* እና በሌሎች ንግግሮቻቸዉ መካከል ልዩነት እንዳላደረጉ፣ በሁለቱ መካከል ያለዉ ግልጽ ልዩነት የአቀራረብ ቅርጽ መሆኑን ከማሊ ያስረዳሉ፡፡[25] ሌሎች ምሁራን ደግሞ *ሀዲስ ኣል-ቁድሲ* በቃሉም ሆነ በፍሬ-ሐሳቡ ከአምላክ የተገለጸ ነዉ፤ ከቁርአን ጋር ያለዉ ልዩነት በሌሎች ነጥቦች መሆኑን ያስረዳሉ፡፡[26]

ቁርአን ሙሉ በሙሉ በአረብኛ ቋንቋ የወረደ እንደሆነ ራሱ ቁርአኑ ይገልጻል፤[27] ምንም እንኳ ምንጫቸዉ አረብኛ ያለሆኑ ቃላት በቁርአን ዉስጥ የሚገኙ ቢሆንም፣ እነዚህ ከሌሎች ቋንቋዎች የተወረሱ ቃላት ቁርአን ከመዉረዱ በፊት ከአረብኛ ቋንቋ ጋር የተዋሃዱ እና የራሱ የቋንቋዉ አካል በመሆናቸዉ፣ ቁርአን በንጹህ

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[23] *ሱናህ* እና *ሀዲስ* የተሰኙት ቃላት፣ የኢስላም *ዑለማእ* በተተካኪነት እያለዋወጡ ቢጠቀመባቸዉም፣ የ*ሀዲስ* ምዘና መሰረተ-ሐሳቦች *(ኡሱል ኣል-ሀዲስ)* ጥናት ዉስጥ ያላዉ መያዊ ፍች ግን የተለያየ ሆኖ እናገኘዋለን፡፡ ይኸዉም፣ *ሀዲስ* ማለት አንድን ኩነት የሚነ ግር ዘገባ ወይም ወሬ ማለት ሲሆን፣ *ሱናህ* ማለት ደግሞ በዘገባዉ የተላለፈዉን ቁም ነገር ወይም ፍሬ-ሐሳብ የሚወክል ቃል ነዉ፡፡ በኢስላም ሳይንሶች ዉስጥ ባላቸዉ አገባብ፣ *ሀዲስ* የነቢዩ *መሀ*መድን ንግግር ወይም ተግባር የሚዘግብ ዘገባ ሲሆን፣ ዘገባዉ ያዘለዉ አስተምህሮት እና ድንጋጌ ደግሞ *ሱናህ* ይባላል፡፡ (Kamali, *Priciples of Islamic Jurisprudence*, fn 34, p. 47 ይመለከቷል፡፡)
የ*ሀዲስ* አዘጋገብ፣ አሰባሰብ፣ ምዘናና ተዓማኒነት እና ሌሌች ተያያዥ ርዕሶች በ*ኡሱል ኣል-ሀዲስ* የእዉቀት መስክ ስር በስፋት የተጠኑ ሲሆን ከብዙ የእንግሊዝኛ ዋቢዎቹ መካከል የ*መሀ*መድ ዙበይር አስ-ሲዲቂ ‹Hadith Litrature: its origins, development and Special Feature, Islamic Texts Society, London, 1993› እና የ*መሀ*መድ መስጠፉ አዕዞሚ ‹Studies in Hadith Methodology and Litrature, American Trust Publications, Indianapolis, 1977› የተሰኙ *ሥራ*ዎች ጠቃሚ እንደሆኑ ያሲር ቃዲ በ *‹Introduction to the Sciences of the Qura'n›* መጽሃፋቸዉ ገጽ 24፣ የግርጌ ማስታወሻ ቁጥር 19 ላይ ገልጸዋል፡፡ እነዚህንና ሌሎች የ*ኡሱል ኣል-ሀዲስ* ዋቢዎችን ከ <http://kalamullah.com/> ድረ-ገጽ ማግኘት ይቻላል፡፡

[24] Kamali, *Principles*, fn 9, p. 15.

[25] ዝኒ ከማሁ
በ*ሀዲስ*ና በ*ሀዲስ ኣል-ቁድሲ* መካከል ያለዉ ልዩነት የቅርጽ ነዉ ሲባል፣ በተራ የ*ሀዲ*ስ ዘገባዎች በራዕይ የተገለጸዉ መለኮታዊ ፍሬ-ሐሳብ በነቢዩ *መሀ*መድ አንደበት የተገለጸ ሲሆን፣ ‹አምላክ እንደተናገረዉ ..› የሚል አገላለጾችን ከያዘ ደግሞ ከተራ *ሀዲ*ሶች በተለየ ከፍ ያለ ትኩረት ሊሰጠዉ እንደሚገባ እና ጥልቅ መለኮታዊ መልዕክት ያዘለ መሆኑን የሚያመላክት እንደሆነ የዚህ ጸኃፊ እይታ ነዉ፡፡

[26] Yasir Qadhi, *Introduction to the Sciences of the Qura'n*, (Al-Hidayah Publishing and Distribution, UK, 1999), pp. 72-73, <http://www.kalamullah.com/Books/ulum-al-quran.pdf> (Accessed on: 24, Nov, 2017) ጥቂት ሊቃዉንት፣ በ*ሀዲ*ስ *ኣል-ቁድሲ ሥ*ግደት ማከናወን የማይቻል መሆኑ፣ መለኮታዊ ጥበቃ ያልተደረገለት መሆኑ ወዘተ በመሳሰሉ ነጥቦች *ሀዲ*ስ *ኣል-ቁድሲ*ን ከተራ *ሀዲ*ሶች የተለየ እንደሆነ ለማስረዳት ቢሞክሩም፣ ያነሷቸዉ ነጥቦች ከራዕዩ ቋንቋዊ ወይም ሐሳባዊ መገለጽ ጋር ያልተያያዙ ናቸዉ፡፡ (Yasir, *Introduction*, fn 27, p 73 ይመለከቷል፡፡)

[27] ቁርአን፣ 16፡ 30

አረብኛ ቋንቋ የወረደ ነዉ ቢባል ስህተት የለዉም፡፡ ምሳሌ ለመስጠት፣ *ቂስጧስ* (ሚዛን - 17፡35) እና *ሲጂል* (የተጠበሰ ሸክላ - 15፡74) ከግሪክ፣ *ገሰቅ* (በረዷማ ቅዝቃዜ - 78፡25) ደግሞ ከቱርክ የተወሰዱ ቃላት ናቸዉ፡፡[28] ከዚህ የቁርአን አረብኛነት ባህሪ በመነሳት፣ በሌሎች ቋንቋዎች የተዘጋጁ የቁርአን ትርጉም ሥራዎች ወይም ማብራሪያዎች ‹ቁርአን› እንዳይደሉ ይገነዘባል፡፡[29]

ባህሪንና ምግባርን በአንዴ መግራት ፈጽሞ የማይቻል ከመሆኑ አንጻር፣ ቁርአን በ23 ዓመታት ዉስጥ ተከፋፍሎ የወረደ መሆኑ *(ተንጂም)*፣ ቃል በቃል ለማጥናት፣ መልዕክቱን ለመረዳትና ለመተግበር፣ ባጠቃላይ በማህበረሰብ ዉስጥ ሂደታዊ ተሃድሶ እና ለዉጥ ለማምጣት አስችሏል፡፡ በተለይ መጻፍና ማንበብ በማይታወቅበት፣ የጽህፈት መሳሪያ በሌለበት ኋላቀር ማህበረሰብ ዉስጥ ሙሉ ቁርአኑ በአንድ ጊዜ ወርዶ ቢሆን ለመረዳት እጅግ አስቸጋሪ፣ ብሎም የማይቻል ያደርገዉ ነበር፡፡[30] በተጨማሪም፣ ለቁርአናዊ ጥሪ አዎንታዊ ምላሽ ሰጥቶ ለነበረዉ አማኝ የሕብረተሰብ ክፍል ለከፍተኛ የአካልና የሥነ-ልቦና ግፍና መከራ ይደርስበት የነበረ በመሆኑ በተለያየ ጊዜ ሲወርድ የነበረዉ የቁርአን ራዕይ ጽናትና መንፈሳዊ ብርታትን የሚለግስ፣ እንዲሁም መነቃቃትን የሚፈጥር ነበር፡፡[31]

ለሂደታዊነት የቁርአን ሕግ ባህሪ ጥሩ ምሳሌ የሚሆነዉ፣ አስካሪዎችን መዉሰድ ለመከልከል የተቀመጡት እርከኖች፣ ቁርአን በሕግ አወጣጥ ላይ የያዘዉን ሂደታዊ አቋም አቀራረብ ቁልጭ አድርጎ የሚያሳይ ነዉ፡፡ መጀመሪያ አስካሪዎችን መጠቀም ምንም አይነት የሕግ ገደብ ያልተቀመጠበት ተግባር ነበር፡፡ በኋላ፣ አልኮል ጠቀሜታና ጉዳት አንዳለዉ፣ ነገር ግን ጉዳቱ የሚያመዝን መሆኑን ምክረ-ሐሳብ ብቻ የሚያቀርብ ቁርናዊ አንቀጽ ወረደ (2፡219)፡፡ ይህ አንቀጽ አስካሪ ነገሮችን *(ኸምር)* በተመለከተ በእዉቀት ላይ የተገነባ የአመለካከት ለዉጥ ለመፍጠር ያለመ የመጀመሪያዉ ቁርአናዊ እርምጃ ነዉ፡፡ ከዚህ በመቀጠል በስካር ዉስጥ ሆኖ ስግደት መፈጸም ተከለከለ፡፡ ይህም አልኮል መጠጣት ከጥንትም ጀምሮ በአረቢያ ማህበረሰብ እንደ ጥፋት የማይታይ መደበኛ ተግባር እና ስር የሰደደ ልማድ በመሆኑ፣ ከአመለካከት ለዉጥ በኋላ በተግባርም ቢሆን ሂደታዊ መሆንና ልምምድ የሚያስፈልገዉ በመሆኑ፣ አስካሪ መጠጥ ላይ ገደብ ተጣለ (4፡43)፡፡ በመጨረሻም አስካሪ ነገሮች እና ቁማር ጥላቻንና ግጭትን የሚወልዱ ሰይጣናዊ ተግባራት መሆናቸዉ ተገልጾ፣ ከዚህ በኋላ ሙሉ በሙሉ የተከለከሉ መሆናቸዉ ተደነገገ (5፡93)፡፡[32]

ቁርአን፣ ለፈጠራ ወይም የሐሰት ወሬ ወይም ለስህተት በር በማይከፍት አኳኋን እንያንዳንዱ አንቀጽ በበርካታ የዘገባ መስመር (*ተዋቱር*) ተላልፎ ለኛ የደረሰ መሆኑ ላይ *ዑለማእ* (ሊቃዉንት) በአንድ ድምጽ

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[28] Kamali, *Principles*, fn 9, p. 15.
[29] ዝኒ ከ ማሁ
[30] ዝኒ ከ ማሁ፣ ገ ጽ 16
[31] ቁ ር አ ን ፣ 23፡ 32፣ 17፡ 106፣ 87፡ 6
[32] Kamali, *Principles*, fn 9, pp. 16-17.

ይስማማሉ፤ ልዩ ልዩ የቁርአን የንባብ ዘዬዎችም *(አህሩፍ)* ቢሆኑ ተቀባይነት ያገኙ ዘንድ በ*ተዋቱር* ደረጃ መተላለፍ አለባቸዉ፡፡[33] በዚህም መሰረት፣ ከኢብን መስዑድ እንደሆኑ የተዘገቡ፣ ነገር ግን በ*ተዋቱር* ያልተረጋገጡ የጥቂት የቁርአን ቃላት አነባበቦች የቁርአን አካል አይደሉም፡፡ ለምሳሌ፣ የሐሰት መሐላ ቅጣት *(ከፋራሕ)* ሦስት ቀን መጾም እንደሆነ በ5፡90 ተደንግጓል፡፡ በኢብን መስዑድ ንባብ ደግሞ ሦስት ‹ተከታታይ› ቀናት በማለት፣ የተከታታይነት መስፈርት አክለዋል፤ ነገር ግን ይህ ንባብ በ*ተዋቱር* ደረጃ ተላልፎ የደረሰን ባለመሆኑ ጭማሬዉ ዋጋ ቢስ ነዉ፡፡[34]

በነቢዩ *ሙ*ሀመድ የሕይወት ዘመን፣ ቁርአን በቃል ብቻ ሳይሆን በጽሁፍ ላይ ሰፍሮ፣ ተጠብቆ የተላለፈ ነዉ፡ ፡ በወቅቱ ባለዉ፣ እንደ ጠፍጣፋ ድንጋይ፣ እንጨት እና አጥንት ላይ እንዲሰፍር ተደርጓል፤ የወረቀት ወይም የብራና ሥልጣኔ ያልነበረ በመሆኑ፣ ቁርአን በአንድ ጥራዝ ሊዘጋጅ አልቻለም፡፡[35] ከነቢዩ ሕልፈት በኋላ የመጀመሪያ ተተኪ አመራር *(ኸሊፍ)* በነበረዉ በአቡ-በክር ጊዜ በተደረገዉ የየመማህ ጦርነት ላይ ከ 70 በላይ ቁርአንን በቃል ያጠኑ ባልደረቦች *(ሶሃቢዩን)* መሞታቸዉን ተከትሎ፣ ቁርአን ላይ አደጋ ሊፈጠርበትን የሚችልበትን እድል ከወዲሁ ለማስወገድ፣ በዘይድ ኢብን ሳቢት የሚመራ የቁርአን ሊቃዉንት ግብረ-ሐይል ተቋቁሞ ቁርአንን የማሰባሰብ ሥራ ተሰርቷል፡፡ ነገር ግን በግለሰቦች የተዘጋጁ የቁርአን ቅጂዎች እና የአቡ-በክር ጥንቅር ልዩ ልዩ አነባበቦች በግዛቱ ዉስጥ ተሰራጭቶ ስለነበር፣ አቡ-በክርን የተካዉ ኸሊፍ ዑስማን፣ ዘይድን በድጋሜ ሰብሳቢ አድርጎ በመሰየም ቁርአን በአንድ ጥራዝ እንዲጠናቀር የማድረግ ሥራ እንዲሰራና፣ ሌሎች በግዛቱ የተሰራጩ የቁርአን ቅጂዎች እና የንባብ ዘዬዎች እንዲወገዱ አድርጓል፡፡ በዚህ ጥበብ የተሞላበት አስደናቂ እርምጃ ምክንያት አሁን በዓለም ዙሪያ አንድ ትክክለኛ የቁርአን ቅጂ ብቻ ጥቅም ላይ እንዲዉል ሆኗል፡፡[36]

ቁርአን በሁለት ጥቅል የጊዜ እርከኖች ላይ ወርዷል፤ የመጀመሪያዉ *ሙ*ሀመድ መካህ በቆዩባቸዉ 13 ዓመታት ላይ ሲሆን፣ በዚህ የወረደዉ የቁርአን ክፍል የመለኮት ጸንሰ-ሐሳብን፣ ከሞት በኋላ ተጠያቂነትን፣ ከሕልፈት በኃላ ስለሚኖረዉ ሕይወት፣ ባጠቃላይ እምነትን የሚመለከቱ ምዕራፎችና አንቀጾች ናቸዉ፡፡ ከሠላሳ የቁርአን ክፍሎች፣ አስራ ዘጠኙ በመካህ ጊዜ የወረዱ *መኪ*ይ አንቀጾች/ምዕራፎች ናቸዉ፡፡[37]

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[33] ዝኒ ከማሁ፣ ገጽ 17
ቁርአን በአረብኛ ቋንቋ የተገለጸ ከመሆኑ ጋር ተያይዞ የሚነሳዉ ጥያቄ በየትኛዉ የአረብ ነሳ ዘዬ ነዉ የወረደዉ የተባለ እንደሆነ፣ በሰባት የንባብ ዘዬዎች እንደወረደ የሚያስረዱ የ*ሀዲ*ስ ዘገባዎች ይገኛሉ፡ ፡ በፊደላት መጨመር መቀነስ ወይም በቃላት ንባብ ላይ የሚኖር እያንዳንዱ የዘዬ *(አህሩፍ)* ልዩነት፣ *በኡሱል አል-ሀዲ*ስ ሊቃዉንት ዘንድ *ተዋቱ*ር ተብሎ በሚታወቀዉ የዘገባ ደረጃ፣ እስካልተረጋገጠ ድረስ ተቀባይነት አይኖረዉም፡ ፡ ስለ ቁርአን ዘዬዎችና የንባብ አይነቶች ዝርዝር ማብራሪያ፣ Yasir, *Introduction*, fn 26, pp. 172-191 ይመለከቷል፡ ፡
[34] Kamali, *Principles*, fn 9, p. 17
[35] ዝኒ ከማሁ
[36] ዝኒ ከማሁ
[37] ዝኒ ከማሁ

በሁለተኛዉ የሙሀመድ የሕይወት ምዕራፍ፣ ማለትም ከመካህ ተሰደዉ መዲና ከሰፈሩ በኋላ፣ የኡማህ (ሙስሊም ማህበረሰብ አስተዳደር) ጽንሰ-ሐሳብ እያደገ መምጣቱት ተከትሎ፣ ግላዊ እና ሕብረተሰባዊ ግንኙነቶችን የሚገዙ፣ እንዲሁም ሙስሊሞች እንደ ፖለቲካዊ ማህበረሰብ ከሌላ እምነት ተከታይ ማህበረሰቦች ጋር ያላቸዉን ግንኙነት የሚመለከቱ የሰላምና የጦርነት ሕጎች፣ መዲና የወረዱት 11 የቁርአን ክፍሎች *(መደኒ)* አካል ናቸዉ፡፡[38] የመካህ እና የመዲና የቁርአን ክፍሎችን ማወቅ፣ ሻሪ *(ናሲኽ)* እና ተሻሪ *(መንሱኽ)* የቁርአን ድንጋጌዎችን ለመለየት፣ እንዲሁም ቁርአንን ከ*መኪይና መደኒ* ምዕራፎቹ ማዕከላዊ ጭብጥ አኳያ በትክክል ለመረዳት፣ ለማብራራትና ለመተግበር ያስችላል፡፡[39] የ*መኪይ-መደኒ* ምዕራፎችና አንቀጾች አመዳደብ፣ ከቁርአን የሕግነት ባህርያት አንዱ ከሆነዉ የሂደታዊነት ባህሪ ጋር በቀጥታ የሚያያዝ በመሆኑ፣ ከታች የቁርአን የሕግ ገጽታዎች በሚዳሰሱበት ርዕስ ሥር መጠነኛ ማብራሪያ ተሰጥቶበታል፡፡[40]

የዕለትተዕለት የሕይወት እንቅስቃሴን የሚገዙ የቁርአን ድንጋጌዎች (*አል-አህካም አል-ዓመሊያሕ*) የቁርአን የሕግ ክፍል (*ፊቅሕ አል-ቁርአን - Juris corpus of the Qur'an)* በሚል የሚታወቁት ናቸዉ፡፡ ከአጠቃላይ 6235 የቁርአን አናቅጽ መካከል ወደ 350 የሚሆኑት (1/10ኛዉ የቁርአን ክፍል ብቻ) የሕግ ይዘት ወይም አንደምታ አላቸዉ፤[41] ከዚህ አንጻር ቁርአን በቀዳሚ የሸሪዓ ምንጭነቱ በዉስጡ የያዛቸዉ የሕግ ድንጋጌዎች ብዛት ጥቂት በመሆኑ እንደ ሕግ መጽሃፍ ሊወሰድ አይችልም፡፡ ቁርአን፣ ከሕግነት ገጽታዉ ይልቅ አጠቃላይ ምድራዊ ርዕዮተ-ዓለምን የሚቀርጽ፣ እምነትን እና መልካም ሰብዕናን በመገንባት ላይ የሚያተኩር መሆኑን በሚያንጸባርቅ መልኩ፣ ራሱን የሕግ መጽሃፍ ሳይሆን የሕይወት *መመሪያ (ሁዳ)*፣ ተግሳጽ/አስታዋሽ *(ዚክር)* በተሰኙ ስያሜዎች ይጠራል፡፡[42] በአንጻሩ ያካተታቸዉ ጥቂት የሕግ መርሆዎችና ልዩ ድንጋጌዎች ለአንድ ሕብረተሰብ ዓለማዊ አስተዳደር፣ ፍትሓዊ የሕግ ሥርዓት ለመዘርጋት መሠረታዊ የሕግ ማዕቀፍ በመሆን ያገለግላሉ፡፡ ከቁርአናዊ የሕግ መርሆዎችና ንድፈ-ሐሳቦች በመነሳት፣ የወቅቱን ማህበረሰብ ተጨባጭ እዉነታዎች መሠረት ያደረገ የሕግ ምርምር *(ኢጅቲሓድ)* በማድረግ ተስማሚና ፍትሓዊ የሆነ ሕግ ሥርዓት መገንባት የሕግ ሊቃዉንት *(ፉቅሓእ)* ድርሻ ይሆናል፡፡[43]

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[38] ዝኒ ከማሁ፣ ገጽ 17-18

[39] ዝኒ ከማሁ፣ ገጽ 18

[40] የ*መኪይ* እና *መደኒ* ምዕራፎች ጥናት፣ የቁርአንን የሕግ አወራረድ ፍልስፍና ለመረዳት ያለዉን ፋይዳ ያህል፣ የእምነት *(ዓቃኢድ)* ከፍሉን በማጥናት ሂደት ምደባዉ የጎላ ፋይዳ እና አንድምታ አለዉ፡፡ ስለሆነ ም፣ በአጠቃላይ ቁርአንን በትክክል በመረዳት ረገድ፣ ርዕሱ ያለዉን ድርሻ ለማወቅና በስሩ የሚኒሱ ተዛማጅ ነጥቦችን በዝርዝር ለመረዳት የሁሉም *አል-ቁርአን* ድርሳናትን ማመሳከር ያስፈልጋል፡፡ ለመገቢያ ያህል፣ Yasir, *Introduction*, fn 26, pp. 97-106 ይመለከቷል፡፡

[41] Kamali, Source, fn 14, p. 219.

[42] ዝኒ ከማሁ

[43] ዝኒ ከማሁ

ብዙዎቹ ሕግ-ነክ የቁርአን አንቀጾች የጥቅልነትና የመርሆዎነት ባህሪ ያላቸዉ ሲሆኑ፣ ከዝርዝር ድንጋጌዎቹ መካከል አብዛሕኛቹ ደግሞ በተጨባጭ ያጋጠሙ ችግሮችን ለመፍታትና ሲነሱ ለነበሩ የሕግ ጥያቄዎች ምላሽ ለመስጠት የወረዱ ናቸዉ፡፡ ቀሪዎቹ ሕግጋት ደግሞ ጎጂ ልማዳዊ አስተሳሰቦችንና ተግባራትን የሚኮንኑ እና ለአንዳንዳድ ባህሎች ደግሞ የወንጀልነት ቅርጽ በመስጠትና በቅጣት በማጀብ በሕግ መሣሪያነት ማህበረሰባዊ ተሃድሶ እና ለዉጥ ለማምጣጥ ያለሙ ናቸዉ፡፡ በመርህ ደረጃ፣ ቁርአን የወቅቱን የአረብ ማህበረሰብ (ወይም የማንኛዉንም ማህበረሰብ) ባህል ዉድቅ የማያደርግ ሲሆን፣ ጎጂ እና ተቀባይነት የሌላቸዉ ልማዳዊ አስተሳሰቦችና ተግባራት ላይ ብቻ ሕጋዊ እገዳ ጥሏል፡፡[44] ከ350 የሕግ አንቀጾች (ኣያት ኣል-ኣህካም) መካከል 140 የሚሆኑት እንደ *ሶላህ* (ስግደት)፣ *ዘካህ* (ምጽዋት)፣ *ሀጅ* (መንፈሳዊ ጉብኝት) ለመሳሰሉ አምልኳዊ ተግባራት የአፈጻፀም ሥነ-ሥርዓቶችን የሚደነግጉ ናቸዉ፤ ወደ 70 የሚሆኑ አንቀፆች ደግሞ ጋብቻን፣ ፍቺን፣ አባትነትን፣ የልጅ አያያዝን፣ ቀለብን፣ ዉርስን እና ኑዛዜን የሚመለከቱ የቤተሰብ ድንጋጌዎች ናቸዉ፡፡ ወደ 30 የሚሆኑ አንቀፆች የወንጀል ድርጊቶችን እና ቅጣቶችን የሚደነግጉ ናቸዉ፡፡ 10 የሚሆኑ አንቀፆች ደግሞ ኢኮኖሚያዊ፣ እና የአሰሪና ሰራተኛ ግንኙነትን የሚመለከቱ ናቸዉ፡፡[45]

በቁርአን ዉስጥ በሚገኙ ሕግ-ነክ አንቀጾች *(ኣያት ኣል-ኣህካም)* ብዛትም ሆነ የጉዳዮችን አይነት መሠረት በማድረግ በተቀመጠዉ አኃዝ ላይ የተለያዩ አስተያየቶች ያሉ ሲሆን፣ ልዩነቱ ሊፈጠር የቻለዉ ጥቂት ምሁራን የሕግ አንድምታ አለዉ ብለዉ የወሰዱትን አንድ የቁርአን አንቀጽ፣ ሌሎች የሕግ አስረጂነት የለዉም በሚል ሳይቀበሉት ይቀራሉ፤ አንዳንዶቹ ደግሞ ከቁርአናዊ ታሪኮችና እና ዘይቢያዊ አገላለጾች ሳይቀር የሕግ ብያኔዎችን የሚቀስሙ በመሆኑ ነዉ፡፡[46] ያም ሆኖ ጠቅላላ ቁርአናዊ የሸሪዓ ድንጋጌዎች ቁጥራቸዉ ከላይ ከተጠቀሰዉ አኃዝ እምብዛም የማይርቅ መሆኑን ይገነዘቧል፡፡

ባጠቃላይ ቁርአን፣ እንደ መለኮታዊ መጽሃፍ እምነትንና አመለካከትን የመቅረጽ ዓላማ ያለዉ፣ ለታላላቅ የሕልዉና ጥያቄዎች ምላሽ በመስጠት የሕይወትን ትርጉም፣ ዓላማና ግብ የሚያስገነዝብ መጽሃፍ ነዉ፡፡ ይህ እንደተጠበቀ ሆኖ፣ ሰዉ በምድር ሲኖር ግላዊ እና ግብረ-ገባዊ ምድራዊ ሕይወቱ የሠመረ ይሆን ዘንድ፣ በልዩ ልዩ ዘርፎች ላይ ጠቅላላ እና ዝርዝር የሕግ መመሪያዎችን አቅርቧል፡፡ የሰዉን የጎንዮሽ ግንኙነት የሚገዙ ምድራዊ የቁርአን ሕጎች *(ሙዓመላት)*፤ ግለሰባዊ አቋምን የሚወስኑ ድንጋጌዎች *(ኣህካም ኣሽ-ሸኽሲያ)*፣ የፍትሐ-ብሔርና የንግድ ሕጎች *(ኣህካም ኣል-መደኒያሕ)*፣ የወንጀል ሕጎች *(ኣህካም ጀናዒያህ)*፣ የዳኝነትና የሥነ-ሥርዓት ሕጎች *(ኣህካም ኣል-ቀዷኢያሕ)*፣ ሕገ-መንግስታዊ ሕጎች *(ኣ ህካም ኣድ-*

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[44] Kamali, *Principles*, fn 9, pp. 19-20.
[45] Kamali, Source, fn 14, p. 219.
[46] ዝ ኒ ከ ማሁ

ዱስቱሪያህ)፣ ዓለም-አቀፍ ሕጎች (አህካም ኣድ-ዱዉሊያሕ)፣ እና የኢኮኖሚና የፋይንናስ ሕጎች *(አህካም ኣል-ኢቅቲሷዲያ ወ ማሊያሕ)* በተሰኙ ንዑስ የሕግ ዘርፎች ሥር ሊደለደሉ ይችላሉ፡፡[47]

2. የቁርአን የሕግነት መገለጫዎች

2.1. ሂደታዊነት *(ተንጂም - Gradualness)*

ቁርአን፣ በአንድ ጊዜ አንደ ወጥ መጽሃፍ ሆኖ አልወረደም፤ ይልቁንም የሙሀመድን የነቢይነት ተልዕኮ ሂደት እና የወቅቱን ማህበረሰብ እምነታዊ፣ ማህበረሰባዊ እና ፖለቲካዊ አደረጃጀት መሠረት በማድረግ በ23 ዓመታት ዉስጥ እንደ አስፈላጊነቱ የለዉጥ ሂደቱን እየተከተለ፣ የተለያዩ የእምነትና የሕግ እሴቶችን ከጊዜ ጊዜ እየጨመረ ወርዶ ያለቀ መለኮታዊ መመሪያ ነዉ፡፡ ይህ አጠቃላይ የቁርአን የሂደታዊነት ባህሪ፣ ከእምነት ገጽታዉ በተጨማሪ፣ በሕግ ክፍሉ ላይ በጉልህ ተንጸባርቋል፡፡ የቁርአን ሂደታዊ የሕግ ፍልስፍና፣ የግለሰብና የሕብረተሰብን ሁለንተናዊ ተሃድሶን እዉን ለማድረግ ይችል ዘንድ፣ የ‹ለዉጥን› ሂደታዊነት ተፈጥሮ ያገናዘበ እና ለነባራዊ እዉነታዎች ጭፍን ያልሆነ እንደሆነ መረዳት ይቻላል፡፡[48] *ተንጂም፣* ከቁርአን የመካህ እና የመዲና ምዕራፎችና አንቀጾች ክፍፍል ጋር በጥብቅ የተቆራኘ በመሆኑ፣ የ*መኪይና የመደኒ ሱራህ/ኣያት* በሚል ለምደባ መነሻ የሆኑ ሐሳቦችን እና ሁሉቱ ክፍሎች ለየራሳቸዉ ያሏቸዉን የጋራ ባህርያት ቀጥለን እንመለከታለን፡፡

መኪይ እና *መደኒ* አንቀጾች ሊለዩባቸዉ የሚችሉ ሦስት ዘዴዎች (አቀራረቦች) በመስኩ ምሁራን ተለይተዋል፡፡ አንደኛዉ፣ አንቀጾች የወረዱበትን ጊዜ መሠረት በማድረግ፣ በ*መኪይ* እና በ*መደኒ* መካከል መለያ የተደረገዉ የጊዜ ወሰን *ሒጅራ* ነዉ (አማኞችና መልዕክተኛዉ ከመካህ ወደ መዲና የተሰደዱበት ጊዜ ሲሆን፣ ይህ ኩነት ኢስላማዊ ካሌንደር የሚጀምርበት ማጣቀሻ ተደርጓል)፡፡ በዚህ መሰረት ከ*ሒጅራ* በፊት የወረዱ አንቀጾች *መኪይ* ሲባሉ፣ ከ*ሒጅራሕ* በኋላ የወረዱት ደግሞ *መደኒ* ይባላሉ፡፡ በዚህ *መመዘኛ* መሠረት አንቀጾች የወረዱበት ቦታ ግንዘቤ ዉስጥ አይገባም፤ ስለሆነም ‹የስንብት *ሀጅ*› ተብሎ በሚታወቀዉ ነቢያዊ የአምልኮ *ሥነ-ሥ*ርዓት (8ኛ ዓመተ-*ሒ*ጅራ (ዓ.ሒ)) ወቅት፣ ወይም ሙስሊሞች መካህን

[47] Hasan, The Qur'an, fn 11, pp. 495-496.

[48] Muhammad Hashim Kamali, 'The Sharia: Law as the Way of God, Islam Hadhari, A Model Approach for Develeopment and Progress' (ed. Abdullah Ahmad Badawi), MPH Publishing, p. 168, <http://www.hashimkamali.com/index.php/publications/item/107-the-sharia-law-as-the-way-of-god> (Accessed on: 24, Nov, 2017).

በተቆጣጠሩ ጊዜ (*ፈትህ መካህ* - 10ኛ ዓ.ሒ) የወረዱት አንቀጾች፣ ከቦታ አኳያ መካህ የወረዱ ቢሆንም እንኳ፣ ከጊዜ አንጻር ከሒጅራ በኋላ የወረዱ በመሆኑ *መደኒ* ይባላሉ ማለት ነዉ፡፡[49]

ሁለተኛዉ አቀራረብ ቦታን መሠረት ያደረገ ሲሆን፣ በዚህ መመዘኛ መሠረት አንቀጹ የወረደዉ መካህ ከሆነ መኪይ ሲሆን፣ መዲና በነበሩ ጊዜ የወረደ ከሆነ ደግሞ *መደኒ* ይሆናል ማለት ነዉ፡፡ ስለዚህ በመሰናበቻዉ *ሀጅ (ሀጅ አል-ወዳዕ)* ወይም በመካህ መከፈት *(ዓም አል-ፈትህ)* ወቅት የወረዱ አንቀጾች ምንም አንኳ ከሒጅራ በኋላ የወረዱ ቢሆንም፣ *መኪይ* ይባላሉ ማለት ነዉ፡፡ እዚህ ላይ መመዘኛዉ ቦታ እንጂ ጊዜ አይደለም፡፡ የዚህ ትርጓሜ ችግር፣ በመካህም ሆነ በመዲና ያልወረዱ የቁርአን አንቀጾች አመዳደብ *መኪይ* ወይም *መደኒ* ተብለዉ ሊፈረጁ የማይችሉ መሆኑ ነዉ፡፡ ለምሳሌ፣ በተቡክ[50] ወይም በእየሩሳሌም የወረዱት አንቀጾች *መኪይ* ወይም *መደኒ* ሊባሉ አይችሉም፡፡[51]

ሦስተኛዉ መመዘኛ የአንቀጹን ይዘት መሠረት በማድረግ፣ ስለ ቁረይሾች እና የመካህ ጣዖታዉያን የሚናገሩ አንቀጾች *መኪይ* ሲሆኑ፣ የመዲና ሙስሊሞችን እና መናፍቆችን የሚመለከቱ አንቀጾች ደግሞ *መደኒ* ይባላሉ፡ ፡ ነገር ግን ጠቅላላዉን የሰዉ ዘር የሚመለከቱ፣ ወይም ሌሎች ዓለማዊ እና መንፈሳዊ ፍሬ-ሐሳቦችን ያዘሉ የቁርአን አንቀጾች በዚህ ትርጓሜ መሠረት በየትኛዉም ምድብ ሥር ሊወድቁ የማይችሉ በመሆኑ ይህ ዘዴ እንከን ያለበት ነዉ፡፡[52]

ከእነዚህ ሦስት መመዘኛዎች መካከል ተመራጭ የሆነዉ በጊዜ ላይ የተመሠረተዉ የመጀመሪያዉ ትርጓሜ ነዉ፤ ምክንያቱም በዚህ ዘዴ ሁሉም የቁርአን አናቅጽ በማይቀሩበት ሁኔታ *መኪይ/መደኒ* በሚል ለመፈረጅ የሚያስችል በመሆኑ፣ እንዲሁም ከአንቀጾቹ ሥልት እና ይዘት አኳያም ቢሆን ከሒጅራ በፊትና በኋላ የወረዱ አንቀጾች በአንድነት ሊታዩ የሚችሉ በመሆናቸዉ ነዉ፡፡[53] ከሒጅራ በፊትና በኋላ የወረዱ የቁርአን ምዕራፎችና አንቀጾች በሚል መነሻነት *መኪይ* እና *መደኒ* ብሎ መመደብ፣ ሳይደለደሉ የሚቀሩ የቁርአን አንቀጾች የማይኖሩ ከመሆኑ አንጻር በዑሱም አል-ቁርአን ምሁራን ዘንድ ተመራጭ የአመዳደብ ዘዴ ከመሆኑም ባሻገር ይሁን፣ ከስደት በፊትና በኋላ የወረዱ አንቀጾች የጋራ የሚያደርጋቸዉ ልዩ አቀራረብ እና

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[49] Yasir, Introduction, *supra* note 27, pp. 99.

[50] ተቡክ፣ ከሂጃዝ ሰሜን ጫፍ፣ ከመዲና ከተማ 778 ማይል ርቀት ላይ የሚገኝ ስፍራ ሲሆን፣ ዘመቻዉ በጠረፋዊዉ የመስሊም ተቡክ ግዛት አካባቢ ጸብ-አጫሪ የግዛት ማስፋፋትና ወረራ ሲያደርግ የነበረዉን የሮማ ኃይል ለመመከት መቀመጫዉን መዲና ባደረገዉና በአምላክ ነቢይ የሚመራዉ የመስሊሞች ኃይል መንቀሳቀሱን ተከትሎ የተከሰተ ታሪካዊ ዘመቻ ነዉ፡ ፡ (Faisal Shafeeq (tr.), Ali As-Sallaabee, *The Noble Life of the Prophet*, Vol. 1, pp. 1813-1815 <http://www.kalamullah.com/Books/Noble%20Life%20of%20The%20Prophet.pdf> (Accessed: 07 January 18) ይመለከቷል፡ ፡

[51] Yasir, *Introduction*, fn 27, p. 99.

[52] ዝኒ ከማሁ፣ ገጽ 98

[53] ዝኒ ከማሁ፣ ገጽ 99

መልዕክት ያዘሉ በመሆናቸዉ፣ ቁርአንን በተለይም የሕግ ማዕቀፉን ዓላማ ለመረዳትና ትክክለኛ አተረጓጎም ለመከተል ወሳኝ ሚና አለዉ፡፡[54]

በመካህ የነበሩ አማኞች ብዛት አናሳና ነበረና፣ ከነበሩበት የአስተሳሰብ እና የምግባር አዘቅት ለመላቀቅና፣ በአዲስ የእምነት እና የሥነ-ምግባር እሴቶች ለመታነጽ፣ ጊዜ የሚስፈልገዉና ሂደታዊ መሆን ስለነበረበት፣ ለ 13 ዓመታት በመካህ ሲወርዱ የነበሩ የቁርአን ምዕራፎች የሕግ ድንጋጌዎችን የያዙ አልነበሩም፣ ይልቁም በእምነትና አመለካከት ላይ ያተኮሩ ነበሩ፤ እነዚህ ምዕራፎች የሕግ ይዘት ባይኖራቸዉም እንኳ አቀራረባቸዉና ግባቸዉ ሂደታዊነትን የተላበሰ ነበር፡፡[55] የመካህ ሙስሊሞች እምነታቸዉን በነጻነት ማወጅና ማራመድ የማይችሉበት አጣብቂኝ ዉስጥ ሲገቡ እና ከዚያ ባለፈ በማህበረሰባቸዉ ክንድ ግፍና መከራ ሲደርስባቸዉ፣ ሃገራቸዉን ለቀዉ ወደ መዲና ተሰደዋል፡፡[56] መዲና የነበረዉን አንጻራዊ ሰላም እና ምቹ ሁኔታ በመጠቀም፣ እምነቱን የሚቀበሉ ሰዎች ቁጥር መበራከቱን እና አንድ የራሱ ማንነት እና ሥርዓተ-እሴቶች ያለዉ ማህበረሰብ መፈጠሩን ተከትሎ ግለሰባዊ፣ ቤተሰባዊ፣ ማህበራዊ፣ ኢኮኖሚያዊና ፖለቲካዊ ግንኙነቶቹን የሚቆጣጠር እና የሚመራ የሕግ ሥርዓት አስፈላጊ የሆነበት ሁኔታ በመፈጠሩ፣ ሕግ-አዘል መለኮታዊ ራዕዮች መዉረድ ጀመሩ፡፡[57] ስለሆነም የቁርአን ሕጎች በመዲና የወረዱ፣ እና በአወራረዳቸዉም ሂደታዊ የነበሩ ከመሆኑ የተነሳ፣ ሕብረተሰቡን በሸሪዓ እሴቶች ለመቅረጽና ለመግራት ሲባል 10 ዓመታት ፈጅቷል፡፡[58]

ከሂደታዊ የቀርአን ፍልስፍና መገለጫዎች መካከል አንዱና ዋነኛዉ፣ የሻሪና *(ናሲኽ)* ተሻሪ *(መንሱኽ)* የቁርአን አንቀጾች መኖራቸዉ ነዉ፡፡ ከሙስሊም ማህበረሰብ እና አስተዳደር መመስረት ጋር ተያያዞ፣ በመጀመሪያዎቹ ጊዜያት ሲወርዱ የነበሩ ሕጎች የማህበረሰቡን ለዉጥ ተከትለዉ አስፈላጊዉ መለኮታዊ ማሻሻያ እና ለዉጥ እየተደረገባቸዉ፣ የቀደሙት ድንጋጌዎች በኋላ በወረዱት የተሻሩባቸዉ በርካታ አጋጣሚዎች ይገኛሉ፡፡[59] *ከነሰኽ* (መሻር) በተጨማሪ፣ በጥቅል አነጋገር ሲወርዱ የነበሩ የሕግ መርሆዎች፣

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[54] ዝኒ ከማሁ፣ ገጽ 105-106

[55] ዝኒ ከማሁ፣ ገጽ 100፤ በተጨማሪ ም፣ Kamali, *Principles*, fn 9, pp. 17-18 ይመለከቷል፡፡

[56] ዝኒ ከማሁ

[57] ዝኒ ከማሁ

[58] ከቁርአን ሠላሳ ከፍሎች *(ኣጅዛእ)*፣ አሥራ ዘጠኙ በመጀመሪያዉ በመካህ የመስሊሞች ምዕራፍ የወረዱ ሲሆን፣ ቀሪዎቹ 11 ከፍሎች ደግሞ በመዲና የወረዱ ናቸዉ፡፡ መኪይ እና መደኒ ምዕራፎችን ማወቅ፣ አንቀጾቹን ለመረዳት በሚደረገዉ ጥረት የወዱበት ከባቢያዊ ሁኔታ እና ማህበረሰባዊ ተጨማጭየ ሚያመላክት በመሆኑ፣ ትክክለኛ አዉዳዊ ማብራሪያ ለመስጠት ይረዳል፡፡

[59] Kamali, *Principles*, fn 9, p. 18
ስለ መሻር እና ተ¤ሲስ የቁርአን እና የሀዲስ ጥንዶች ሁሉም ዋና ዋና የሉሉል ኣል-ፊቅሕና የዉሉም ኣል-ቁርኣን ድርሳናት ራሳቸዉን የቻሉ አርዕስት ይዘዉ ይዳስሷቸዋል፡፡ ለተጨማሪ ማብራሪያ፣ Kamali, *Principles*, fn 9, pp. 149-167 (Chapter 7) ይመለከቷል፤ እንዲሁም፣ ያሲር ቃዲ፣ ‹የቁርአን ጥናቶች መግቢያ› በተሰኘ መጽሃፉቸዉ ምዕራፍ 13 ሥር ሰፋ ባለ አቀራረብ ትንታኔ ሰጥተዉበታል (Yasir, *Introduction*, fn 27, pp. 232-256)፡፡

በሂደት ልዩ ድንጋጌዎች እየታከለባቸዉና አፈጻጸማቸዉም እየተገደበ የሄደ በመሆኑ፣ የአንቀጾችን የአወራረድ ጊዜ ቅደም-ተከተል መለየት፣ ሻሪ *(ናሲኽ)* እና ተሻሪ *(መንሱኽ)*፣ ጥቅል *(ዐም)* እና ልዩ *(ኻስ)* ድንጋጌዎችን በትክክል አቀናጅቶ ለመተርጎም የሚረዳ መሆኑ የሂደታዊነቱ አንዱ ነጸብራቅ ነዉ፡፡[60]

2.2. ግልጽነት *(ቀጥዒ)* እና አሻሚነት *(ዞኒ)*

የቁርአን ድንጋጌዎች ከግልጽነታቸዉ አንጻር *ቀጥዒ* (ግልጽ) እና *ዞኒ* (አሻሚ) በሚል በሁለት ምድብ ተከፍለዉ ሊታዩ ይችላሉ፡፡ *ቀጥዒ* ድንጋጌ በሐሳቡ አንድ መልዕክት ብቻ ያዘለና ለሌላ ትርጉም ወይም ማብራሪያ ያልተጋለጠ ነዉ፡፡ ለምሳሌ፣ በሸሪዓ ሕግ ባል እና ሚስት የሚወራረሱ መሆናቸዉን መሠረት አድርጎ፣ ሚስት በሞተች ጊዜ፣ ልጆች የሌላት ከሆነ፣ ባል ከንብረቷ ግማሹን የሚወርስ መሆኑን የሚገልጸዉ የቁርአን ድንጋጌ (4፡12) ሌላ ትርጉም ሊሰጠዉ የማይችል ግልጽ ዓረፍተ-ነገር በመሆኑ *ቀጥዒ* ድንጋጌ ይባላል[61]፡፡ በተጨማሪም፣ የቁርአን የአምልኮ ድንጋጌዎች በመርህ ደረጃ ለተጨማሪ ትርጉም ያልተጋለጡ በመሆናቸዉ፣ ለኢጅቲሓድ (አመክንዮኣዊ የሕግ ምርምር) ክፍት አይደሉም፡፡[62]

በተቃራኒዉ፣ ለትርጉምና ኢጅቲሓድ ክፍት የሆኑ የቁርአን አናቅጽ *ዞኒ* (አሻሚ - *Speculative*) ይባላሉ፡፡ ከጥቂት ልዩ ድንጋጌዎች በስተቀር፣ ሁሉም ሕግ-ነክ የቁርአን አንቀጾች ጥቅል እና ለትርጉም የተጋለጡ በመሆናቸዉ፣ *ዞኒ* ናቸዉ፡፡[63] ቁርአን እንደ ዘገባ በበርካታ የዘገባ ሠንሰለቶች የተላለፈ በመሆኑ፣ የተዓማኒነት ጥያቄ ሊነሳበትና በዚህ ምክንያት *ዞኒ* ሊባል እንደማይችል ሁሉም *ዑለማእ* ይስማማሉ፡፡ ስለዚህ ቁርአን አከራካሪነት (*ዞኒ*-ነት)፣ ከዘገባ አኳያ *(ዞን ኣሱ-ሰነድ)* ሳይሆን፣ ከመልዕክት አንጻር *(ዞን ኣድ-ደላላህ)* ብቻ ነዉ፡፡[64]

ዞኒ የሆኑ የቁርአን ድንጋጌዎችን በመረዳት ሒደት ሁልጊዜም ተመራጭ የሆነዉ የአተረጓጎም ዘዴ፣ ራሱ ቁርአኑ ስለተያዘዉ ጭብጥ በሌሎች አንቀጾቹ የሚገልጸዉ ነገረ ቢኖር ማመሳከር፣ እና ተመሳሳይና ተያያዥ ሐሳቦችን ያዘሉ የሕግ አንቀጾችን በአንድነት ለመረዳት መሞከር ነዉ፡፡ ቁርአን አንድ ወጥ መጽሐፍ እንደመሆኑ፣ አንዱ ክፍል ወይም አንቀጽ ከሌላዉ ጋር ሳይገናዘብ እና በሌለዉ ሳይደገፍ ድምዳሜ ላይ የሚደረስበት አቀራረብ የተሳሳተ እንደሆነ ግልጽ ነዉ፡፡[65] በቁርአን ዉስጥ ያልተገኘ ትርጉም፣ ቀጥሎ በሱናህ ዉስጥ ሊፈለግ ይገባል፡፡ *ሱናህ* የቁርአን ማብራሪያ እንደመሆኑ፣ የቁርአን የሕግ አንቀጽ በሱናህ ሲብራሩ፣

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[60] Kamali, Principles, fn 9, p. 18
[61] ሌሎች *ቀጥዒ* ድንጋጌዎችን በቁርአን 2፡ 196፣ 24፡ 4፣ ይመለከቷል፡፡
[62] Hasan, The Sources of "Fiqh", fn 5, p. 116
[63] Kamali, Source, fn 14, p. 221.
[64] Hasan, The Sources of "Fiqh", fn 5, p. 116.
[65] Kamali, Source, fn 14, p. 221.

ሱናህ (በተዓማኒ *ሀዲሶች* እንደተላለፈ) የቁርአን አካል ይሆንና፣ ሁለቱ በአንድነት የሸሪዓዉን ደንጋጌ ይቀርጻሉ፤ *ዞኒ* የሆነዉ የቁርአን አንቀጽ በ*ሱናህ* ሲብራራ *ቀጥዒ* ይሆናል ማለት ነዉ፡፡[66]

ከቁርአንና *ሱናህ* ጥምር ንባብ እና አረዳድ በኋላ፣ ቀጥሎ ያለዉ የአተረጓጎም ዘዴ፣ በጉዳዮ ላይ የሙሀመድ ባልደረቦች *(ሶሃቢዩን)* አተረጓጎምና ትግበራ ምን ይመስል ነበር የሚለዉ ነዉ፡፡ ባልደረቦች ከማንም በላይ ለነብዩ አስተምህሮት ቅርብ በመሆናቸዉ እና ሕግጋት የወረዱበትን መንስኤና ከባቢያዊ ሁኔታ የሚዉቁ በመሆኑ፣ በግልም ሆነ በበጋራ የነበራቸዉ የሕግ አረዳድ ለኋላኛ ትዉልዶች አስረጅና መመሪያ በመሆን ያገለግላል፡፡[67]

ለ*ዞኒ* ቁርአናዊ ድንጋጌ ምሳሌ ለመስጠት ያህል፣ በምዕራፍ አል-ማኢዳህ (5፡33)፣ ለአደባባይ ዝርፊያ *(ሒራባህ)* ወይም በሌላ ትርጓሜዉ በአግባቡ በተቋቋመ መንግሥታዊ ሥርዓት ላይ አፍራሽ ወታደራዊ አመጽ የፈጸመ፣ ቅጣቱ የወንጀል ድርጊቱ ከተፈጸመት ማህበረሰብ ወይም ሃገር እንዲባረር ማድረግ *(ነፍይ)* እንደሆነ ይገልጻል፡፡ ይህ የቁርአን የወንጀል ድንጋጌ፣ ለወንጀል ድርጊቱ ከሰጠዉ ትርጓሜ ጀምሮ ያሰቀመጠዉ ቅጣት በግልጸ ተለይቶ ያልተቀመጠ በመሆኑ በመዝኃቦችና የሕግ ሊቃዉንት መካከል የአተረጓጎም ልዩነት ሊፈጥር ችሏል፡፡ ብዙኃኑ *ዑለማእ* ከሃገር ማስወጣት የሚለዉን ትርጉም ሲይዙ፣ ሃነፊዎች ደግሞ *ነፍይ* ማለት ወንጀል አድራጊዉ ከሕብረተሰቡ ጋር እንዳይቀላቀል ነጻነቱን መገደብ ወይም ባጭሩ እሥራት ነዉ በማለት ተርጉመዉታል፡፡ እንደ ሃነፊ እይታ፣ አንድን ከባድ ወንጀለኛ ከአንድ አካባቢ እንዲባረር ማድርግ፣ ወንጀሉን የማያቅብ እና አስተማሪ ሊሆን የማይችል በመሆኑ፣ እንደዉም ወንጀለኛዉ ወደ ሌላ አካባቢ ሂዶ የወንጀል ድርጊቱን የሚቀጥልበትን ምቹ ሁኔታ የሚፈጥር በመሆኑ፣ *ነፍይ* (ማስወገድ) ማለት በአካል ከሕብረተሰቡ ይዉጣ የሚል ቋንቋዊ ትርጓሜ ያለዉ ሳይሆን፣ ወንጀለኛዉ *ሥጋት* መሆኑን በሚያስቀር አኳኋን፣ ብሎም ማህበራዊ ኑሮዉንና ትስስሩን የሚያቋርጠዉን የእሥራት ቅጣት ለማመልከት ነዉ የሚል አቋም አላቸዉ፡፡[68]

አንድ የቁርአን የሕግ አንቀጽ በአንድ ጊዜ *ቀጥዒና ዞኒ* ድንጋጌዎችን ሊይዝ ይችላል፤ ለምሳሌ፣ በማኢዳህ 5፡6 ላይ ለስግደት ቅደመ-ሁኔታ የሆነዉ የትጥበት *(ዉዱእ)* አፈጻጸም *ሥነ-ሥርዓት* ላይ ጸጉርን መጥረግ/ማበስ

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[66] ዝኒ ከ ማሁ
[67] ዝኒ ከ ማሁ
[68] Kamali, Principles, fn 9, pp. 22-23.
ሌሎች የአተረጓጎም ልዩነት የተስተናገደባቸዉ *ዞኒ* የቁርአን ድንጋጌዎች በ 5፡ 92 እና 4፡ 23 ይመለከቷል፡ ፡

(መሰህ) የሥርዓቱ አስገዳጅ አካል በመሆኑ ላይ አከራካሪ ባለመሆኑ፣ ግልጽ *(ቀጥዒ)* ቢሆንም፣ ምን ያህሉ የራስ ቅል ክፍል ነዉ የሚታበሰዉ የሚለዉ ጭብጥ የአተረጓጎም ልዩነት ሊፈጥር ችሏል፡፡[69]

ቀጥዒ በሆኑና ለትርጉም ወይም ለኢጅቲሓድ ክፍት ያልሆኑ የቁርአን አንቀጾችን እንዳሉ መቀበል የእምነት መስፍርት እና መገለጫ ነዉ፡፡ የአንድ የቁርአን ድንጋጌ *ቀጥዒነት* ወይም *ዞኒነት* ላይ ልዩነት ሊኖር የሚችልበት ሁኔታ እንደተጠበቀ ሆኖ፣ *ቀጥዒ* መሆኑ እስከታመነ ድረስ፣ በሐሳቡ መስማማት ግዴታ ሲሆን፣ ተቃራኒ አቋም መያዝ ደግሞ ከእምነት ማዕቀፍ ዉጪ የሚያደርግ ነዉ፡፡ አንቀጹ *ዞኒ* ከሆነ ግን፣ በድንጋጌዉ መልዕክት ወይም አንድምታ ላይ በሚኖር ማንኛዉም የኢጅቲሓድ ምልከታ አለመስማማት ይቻላል፡፡ ምዕመኑ ኢጅቲሓድ የማድርግ አቅም ካለዉ፣ ግላዊ እይታ የማዳበርና ድምዳሜ ላይ መድረስ ይችላል፤ ኢጅቲሓድ የማድረግ የሕግ ሙያዊ ችሎታ የሌለዉ ከሆነ ደግሞ ከዖለማእ ኢጅቲሓዳዊ እይታዎች መካከል አሳመኝ ሆኖ ያገኘዉን የመከተል መብት አለዉ፡፡[70] አጀንዳዉ ሕብረተሰባዊ ፋይዳ ያለዉና ወጥ አተገባበር እንዲኖረዉ የሚፈለግ ከሆነ፣ የአመራርነት ሥልጣን ያለዉ አካል ካሉት የኢጅቲሓድ አማራጮች መካከል ጠቃሚዉን በመምረጥ ተፈጻሚ እንዲሆን ማድረግ ይኖርበታል፡፡ የአንድ *ሙጅተሒድ* ልዩ አተረጓጎም ተመራጭ ከሆነ በኋላ፣ ለአንድነት ሲባል ሌሎች *ሙጀቲሒዶችና* የሕብረተሰብ አባላት የተመረጠዉን አቋም የመከተል እና የመፈጸም ግዴታ አለባቸዉ፡፡ ይህ ሲባል በሐሳብ ደረጃ ከመንግስታዊዉ ኢጅቲሓድ ጋር መስማማት ማለት አይደለም፣ በተግባር ተከታይነታቸዉ እንዳለ ሆኖ፣ በሐሳብ የመቃረን እና የመተቸት፣ እንዲሁም ሌሎች የተሻሉ የሕግ አማራጮችን ማቅረብ ከ*ሙጀቲሒዶች* የሚጠበቅ ነዉ፤ የማሰብ እና የተለያየ አቋም የመያዝ መብታቸዉም የተከበረ ነዉ፡፡[71]

የአተረጓጎም ልዩነቶች የተፈጠሩት በቁርአናዊ ዝርዝር ድንጋጌዎች ላይ ብቻ ሳይሆን ከቁርአን በተወሰዱ የሕግ መርሆዎች እና በአተረጓጎም ደንቦች ምንነት እና ዉጤቶቻቸዉም ጭምር ነዉ፡፡ ለአብነት ያህል፣ የቁርአን ድንጋጌዎች ካላቸዉ የሐሳብ ወሰን አኳያ *ዐም* (ጥቅል) እና ¥ስ (ልዩ) ተብለዉ ሊከፈሉ ይችላሉ፡፡ በእነዚህ ሁለት የድንጋጌ አይነቶች አተረጓጎም እና የሕግ ዉጤት ላይ ልዩነት አለ፡፡ የሃነፊ የሕግ ት/ቤት *(መዝሓብ/School of Law)* ምሁራን፣ *ዐም* ድንጋጌዎችን *ቀጥዒ* አድረገዉ ሲወስዱ፣ ሌሎቹ *መዝሓቦች* ደግሞ *ዞኒ* ናቸዉ ይላሉ፡፡ ለምሳሌ፣ በ2:275፣ ሽያጭ (ግብይት) ተፈቅዶ ወለድ/አራጣ ተከልክሏል፡፡ የትኛዉም የግብይት አይነት የወለድ ባህሪ እንዳለዉ በተወሰነ ደረጃ በሱናህ ተብራርቷል፡፡ ወለድ ምን እንደሆነ በቁርአን በግልጽ ያልተቀመጠ፣ ያልተለየ በመሆኑ አንቀጹ *ዐም* (ጥቅል) ድንጋጌ ያዘለ ነዉ፤ ወለድ የገባባቸዉ ግብይቶች ምን አይነት እንደሆኑ በሱናህ የተብራራዉን ያህል *ዐም* የሆነዉ የቁርአን ድንጋጌ

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[69] ዝኒ ከ ማሁ፣ ገ ጽ 23
[70] ዝኒ ከ ማሁ
[71] ዝኒ ከ ማሁ፣ ገ ጽ 23-24

ተለይቷል (*¥ስ* ተደርጓል)፤ በሱናህ ተለይቶ በተገለጸዉ መጠን የቁርአኑ ጥቅል፣ አሻሚ (*ዞኒ*) ድንጋጌ ግልጽ (*ቀጥዒ*) የተደረገ ሲሆን፣ ያልተብራራዉ ክፍል ደግሞ *ዞኒ* እንደሆነ ይቀጥላል ማለት ነዉ፡፡[72]

በመርህ ደረጃ፣ የብዙኃኑን *ፉቅሓእ* እይታ መሠረት በማድረግ፣ ልዩ (*¥ስ*) ድንጋጌዎች *ቀጥዒ* ቢሆኑም፣ አንዳንድ ጊዜ *¥ስ* ድንጋጌዎች በራሳቸዉ የ*ዞኒ* ባህሪ ሊኖራቸዉ የሚችልበትና ለትርጉም የተጋለጡ የሚሆኑባቸዉ አንዳንድ ቁርአናዊ ድንጋጌዎች አሉ፡፡ በዚህ ረገድ ሃነፊዎች፣ ልዩ ድንጋጌዎችን እንደ *ዞኒ* መዉሰዳቸዉ አሳማኝ የሚሆንባቸዉ ቁርአናዊ ድንጋጌዎችም ይገኛሉ፡፡ ለምሳሌ፣ ለሐሰት መሐላ የተቀመጠዉ ማካካሻ ቅጣት (*ከፋራሕ*) *ዐሥር* ድሆችን መመገብ ነዉ፤[73] ይህ ድንጋጌ ልዩ (*¥ስ*) ቢሆንም፣ እንደ ብዙሃኑ *ዑለማእ* ለትርጉም ክፍት ባይሆንም፣ ሃነፊዎች እንደ *ዞኒ* በመዉሰድ *ዐሥር* ድሆችን በማብላት ፈንታ አንድን ድሀ አሥር ጊዜ ማብላት ይቻላል የሚል እይታ አላቸዉ፡፡[74]

ሌላዉ *ኻስ* ድንጋጌ *ዞኒ* ሊሆን የሚችልበት አጋጣሚ፣ የቁርአን ልዩ ትዕዛዛዊ እና ከልካይ ድንጋጌዎች ከአገላለጻቸዉና ከይዘታቸዉ በመነሳት፣ *ቀጥዒ* ወይም *ዞኒ* ሊሆኑ የሚችሉ መሆኑ ነዉ፡፡ *ኻስ* ትዕዛዝ በመርሕ ደረጃ አስገዳጅ (*ዋጂብ*) ድንጋጌ ቢሆንም፣ በአንዳንድ ቁርአናዊ ድንጋጌዎች ላይ የምክረ-ሐሳብነት/ተወዳጅነት (*መንዱብ*) ወይም የፍቁድነት (*ሙባህ*) ባህሪ ሊይዝ ይችላል፡፡ በተመሳሳይ፣ ልዩ (*¥ስ*) ከልካይ ድንጋጌዎች በዋናነት አስገዳጅ ቢሆኑም፣ ከአገላለጻቸዉ አኳያ *የከራሓ* (የተጠላ) የሕግ ቅርጽ ሊይዙ ይችላሉ (ስለቁርአን ልዩ ልዩ የሕግ ቅርጾች ከታች ተብራርቷል)፡፡ ስለዚህ አንድ ድንጋጌ ተለይቶ የተገለጸ መሆኑ ብቻ፣ ሁልጊዜ *ቀጥዒ* እንደማያስብለዉ መገንዘብ ያስፈልጋል፡፡[75]

አንድን ድንጋጌ *ቀጥዒ* ወይም *ዞኒ* እንዲሆን ከሚያደርጉ ሌሎች ምክንያቶች መካከል አንዱ በሕጉ አንቀጽ ዉስጥ ጥቅም ላይ የዋሉት ቃላት፣ የተለያየ የፍች ገጽታ ሊኖራቸዉ የሚችል መሆኑ ነዉ፤ ይኸዉም አንድ ቃል ያልተለየ (*ሙጥለቅ/absolute*) ወይም የተለየ (*ሙቀየድ/qualified*)፣ እንዲሁም ፍካሬያዊ (*መጃዝ/metaphorical*) ወይም እማሬያዊ (*ሃቂቂ* /literal) ፍች ሊሰጠዉ ይችላል፡፡[76] ያልተለየ (*ሙጥለቅ*) ፍቺን በተመለከተ እንደ *ዐም* (ጥቅል) ትርጉም ሁሉ የአፈጻጸም ወሰኑ ያልተገደበ፣ ልቅ ፍች ያለዉ በመሆኑ፣ እንዲሁም የተለዩ (*ሙቀየድ*) ቃላት ትርጉማቸዉ የተገደበ/የተወሰነ ቢሆንም እንኳ

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[72] ዝኒ ከማሁ፣ ገጽ 24
ሌሎች *ዐም* እና *¥ስ* የቁርአን ድንጋጌዎች በቁርአን 4፡ 23 (ጋብቻ)፣ 24፡ 4 (ሐሰተኛ ዉንጀላ - ስም ማጥፋት (*ቀዝፍ*) ይመለከቷል፡፡
[73] ቁርአን፣ 5፡ 92
[74] Kamali, *Principles*, fn 9, p. 25.
[75] ዝኒ ከማሁ፣ ገጽ 25-26
[76] ስለ *ዐም* እና *ኻስ*፣ *መጥለቅ* እና *መቀየድ*፣ *ሃቂቂ* እና *መጃዚ* የቃላት ክፍሎች፣ ባጠቃላይ በቁርአንና *ሱናህ* የሕግ አንቀጾችና ዘገባዎች ዉስጥ ጥቅም ላይ ስለ ዋሉ ቃላት እና ዓረፍተ-ነገሮች ሸሪዓዊ የአተረጓጎም ደንቦችን በተመለከተ የከማሊን ‹Kamali, *Principles*, fn 9, pp. 86-123 (Chapter 4) and pp. 124-148 (Chapter 5)› ያንብቡ፡፡

አንዳንዴ ወሳኝ/መጣኝ ሆኖ የገባዉ ቅጽል ቃል በራሱ አሻሚ ሊሆን ይችላል፡፡ ነገሩን በምሳሌ ግልጽ ለማድረግ፣ ከፍቺ በኋላ ባል ሚስቱን ለመመለስ ቢፈልግ (*ሪጅዓህ)*፣ ይህ ድርጊት በሁለት ብቁ *(ዘዊል ዓድል)* ምስክሮች ፊት መሆን አለበት በማለት ይደነግጋል (65፡2)፤ በሌላ በኩል በሽያጭ ግብይት ላይ ምስክር እንዲኖር ቁርአኑ ይደነግጋል (2፡282)፡፡ በመጀመሪያዉ የቤተሰብ ድንጋጌ የምስክሮቹ የችሎታ ደረጃ ተለይቶ ተቀምጧል *(ሙቀየድ)*፤ ይ¤ዉም ብቁ መሆን *(ዓዳላህ)* ነዉ፡፡

የሽያጭ ዉልን በተመለከተ የቁርአኑ አንቀጽ ግብይቱ ምስክር ባለበት እንዲሆን ከማስቀመጥ ባለፈ ምስክር የሚሆኑት ሰዎች ችሎታ ተለይቶ አልተቀመጠም *(ሙጥለቅ)፡፡* የዓዳላሕ የምስክርነት መስፈርት ለሽያጭ ዉል ተፈጻሚ ይሆናል በሚለዉ ላይ በምሁራን መካከል ክርክር ባያስነሳ እንኳ ድንጋጌዉ *ሙጥለቅ* መሆኑ ለተለያየ እይታ በር የሚከፍት መሆኑን እንረዳለን፡፡ በተጨማሪም የዓዳላሕ መስፈርት በሁለቱም የሕግ ክንዉኖች ላይ ተፈጻሚ ይሆናል ቢባል እንኳ፣ አንድ ምስክር ‹ዓድል (ብቁ)› ነዉ የሚባለዉ ምን ሲያሟላ ነዉ ለሚለዉ ምሁራን የተለያዩ ቅድመ-ሁኔታዎችን አስቀምጠዋል፡፡ ስለዚህ *ሙጥለቅ* (ያልተለዩ) ቃላት ድንጋጌዉን *ዞኒ* (አሻሚ) የሚያደርጉትን ያህል፣ *ሙጥለቅ* (ያልተለየ) የሆነዉን ቃል *ሙቀየድ* (የተለየ) ለማድረግ የተቀመጠዉ ገላጭ ቃል በራሱ አሻሚ ይሆንና የድንጋጌዉን አሻሚነት ሙሉ በሙሉ ላይቀርፈዉ ይችላል፡፡[77]

የአንድ የድንጋጌን ግልጽነት ደረጃ ከሚወስኑ የቃላት ፍቺ ጥንዶች መካከል ፍካሬያዊ *(መጃዝ/Metaphorical*) ወይም እማሬያዊ *(ሃቂቂ* /Literal) ፍች አንዱ ነዉ፡፡ የቃሉን ቋንቋዊ ፍች *(ሃቂቂ)* መሠረት በማድረግ የሚሰጥ የሕግ ትርጉም በመርሕ ደረጃ ዋነኛዉ የሕግ አተረጓጎም ሲሆን፣ ከሕጉ ቃላዊ ትርጉም በማፈንገጥ ፍካሬያዊ *(መጃዚ)* መልዕክት መስጠት ለተለያዩ ሐሳቦች በር የሚከፍትና አከራካሪ ሊሆን የሚችል በመሆኑ፣ *መጃዚ* ፍቺዎች በመርህ ደረጃ *ዞኒ* ናቸዉ፡፡ ነገር ግን በአንዳንድ ልዩ ሁኔታዎች ከሕጉ የቃል በቃል ትርጓሜ መዉጣትና ፍካሬያዊ መልዕክቱን መከተል አስፈላጊ ሊሆን ይችላል፤ ለምሳሌ፣ ‹*ጦላቅ*› በቋንቋዊ ፍቺዉ ‹መልቀቅ፣ ነጻ ማድረግ› ማለት ሲሆን፣ በ*መጃዚ* ትርጓሜዉ ግን ‹የጋብቻ ፍቺ› ማለት ነዉ፤ በድንጋጌዉ አዉድ አንጻር ከሁለቱ ፍችዎች መካከል ተቀባይነት ያለዉ *መጃዚ* ፍችዉ ሆኖ እናገኘዋለን፡፡ ባጠቃላይ፣ በሕጉ አንቀጽ ዉስጥ ያሉት ቃላት *ሃቂቂ* እና *መጃዚ* ፍች አዘል መሆናቸዉ ድንጋጌዉን *ዞኒ* እንዲሆንና ለትርጉም እና ኢጅቲሓዲ የሚጋብዝ እንዲሆን ያደርጉታል፡፡[78]

ለማጠቃለል ያህል፣ በ*ዞኒ* ድንጋጌዎች ላይ ያለዉ የአቋም ልዩነት ምሁራንን በአብዛኛዉ ለሁለት ጎራዎች ሲከፍል የሚስተዋል ቢሆንም፣ አንዳንድ ጊዜ በአንድ ቁርአናዊ የሕግ አንቀጽ ላይ ሥምንት የተለያዩ

[77] Kamali, *Principles*, fn 9, p. 26.
[78] ዝኒ ከ ማሁ፣ ገ ጽ 27

አስተያየቶች የተንጸባረቀባቸዉ ዛሂ ድንጋጌዎች እንዳሉ ማህሙድ ሸልቱት ይገልጻሉ፡፡[79] ሁሉም አስተያየቶች ትክክል ሊሆኑ ባይችሉም፣ የዚህ አይነት የኢጅቲሓድ ልዩነት ሸሪዓዉ የሚፈቅድ ብቻ ሳይሆን የሚያበረታታ መሆኑን፣ ችሎታዉ ያለዉ ማንኛዉም ግለሰብ ሸሪዓዊ ድንጋጌዎችን መርምሮ የራሱን አቋም የመያዝ ሙሉ መብት ሸሪዓዉ እንደሚያረጋግጥለት ሸልቱት ያስረዳሉ፡፡[80] ሸሪዓ በመንግሥት ደረጃ እዉቅና ባገኘበትና ተፈጻሚ በሚሆንበት ማህበረሰብ ዉስጥ ደግሞ የተለያዩ ኢጅቲሓዳዊ አቋሞች መኖራቸዉ፣ መንግሥት ካሉት አማራጭ የሕግ አተረጓጎሞች ተስማሚዉን የሚመርጥበት እድሉን የሚያሰፋዉ መሆኑን፣ ሸሪዓዊ የሕግ አስተያየቶች በመርህ ደረጃ አስገዳጅ ባይሆኑም፣ ሕብረተሰባዊ ጠቃሜታቸዉ ተመዛዝኖ መንግሥት የመረጠዉ የሕግ አተረጓጎም ከመሠረቱ አስገዳጅ ያልሆነ ተራ የኢጅቲሓድ አስተያየት መሆኑ ቀርቶ አስገዳጅ እንደሚሆን፣ ይህም የማህበረሰብና የሥርዓት አንድነትንና መረጋጋትን ለመፍጠር አስፈላጊ መሆኑን ሸልቱት አክለዉ ይገልጻሉ፡፡[81]

2.3. ጥቅልነትና ዝርዝርነት (*አል-ኢጅመል ወት-ተፍሲል*)

ቁርአን ጥቂት ዝርዝር ሕግጋት ያሉት ቢሆንም፣ ሰፊዉ የቁርአን የሕግ ክፍል ጥቅል መርሆዎችን የያዘ ነዉ፡፡ እንደ አቡ-ዘሕራሕ እና ኢብን ሃዝም ያሉ የሑሱል ምሁራን፣ ቁርአን በሁሉም የኢስላም ሕግ ርዕሶች ላይ ጠቅላላ መርሆዎችን ይዘረጋል፡፡ ዝርዝር ድንጋጌዎቹም ቢሆኑ የጥቅል መርሆዎቹ ማብራሪያ እና ምሳሌ በመሆን የቀረቡ ናቸዉ፡፡[82] ቁርአናዊ የሕግ መርሆዎች፣ በጥቂት ዝርዝር ድንጋጌዎቹ ከተብራራዉ

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[79] ዝኒ ከማሁ፣ ገጽ 23
[80] ዝኒ ከማሁ
[81] ዝኒ ከማሁ፣ ገጽ 23-24
[82] Kamali, *Principles*, fn 9, p. 29.
ፕ/ር አህመድ ሀሰን ደግሞ፣ የጥቅልነትን ደረጃ ይበልጥ ግልጽ በሚያደርግ አኳኋን፣ ጠቅላላ መርሆዎች *(ቀዋዒድ አል-ዓማህ)*፣ ጥቅል ድንጋጌዎች *(አህካም አል-ኢጅማሊያ)* እና ዝርዝር ሕግጋት *(አህካም አት-ተፍሲሊያ)* በሚል በሦስት ምድብ ፈርጀዋቸዋል፡፡ (Hasan, The Qur'an, fn 11, p. 496)
በጠቅላላ መርሆዎች ስር ከሚመደቡ የቁርአን መርሆዎች መካከል፤ የጋራ ምክክር *(ሹራ)* እንደ ሕብረተሰባዊና ሕገ-መንግሥታዊ መርሆ (42፡ 38)፣ ፍትሕ *(ዐድል)* (16፡ 90)፣ ግለሰባዊ የሕግ ተጠያቂነት *(ዊዝር አን-ነ ፍሰ)* (35፡ 18)፣ ከወንጀል ድርጊት ጋር የሚመመጣጠን ቅጣት *(ውቁባህ ቢ ቀድር አል-ጀሪማህ)* (42፡ 40)፣ የሌሎችን ንብረት መጠቀም ከልክል ስለመሆኑ *(አክል አል-ሀራም)*፣ በበጎ ተግባር መረዳዳት *(ተዓዉን ዐለል ቢር)*፣ ቃልን መፈጸም *(ኢፋእ አል-ዐሕድ)* (5፡ 1)፣ ችግርን/እንግልትን ማስወገድ *(ረፍዕ አል-ሐረጅ)* (22፡ 78)፣ ሃይማኖታዊ ገርነት/ቀላልነት *(ዩሰር ፊ አድ-ዲን)* (2፡ 185)፣ የአስገዳጅ ሁኔታዎች ታሳቢነት *(ዶሩራሕ)* (2፡ 173)፣ እና ሌሎችም የቁርአን መሠረታዊ የሕግ መርሆዎች ናቸዉ፡፡ (Hasan, The Qur'an, fn 11, pp. 496-497 ይመለከቷል፡፡)
በጥቅል ቁርአናዊ መርሆዎች *(አህካም አል-ኢጅማሊያ)* በሚል በአንድ ምድብ ስር የተፈረጁት መርሆዎች፣ ከጠቅላላ መርዎች *(ቀዋዒድ አል-ዓማህ)* አንጻር ሲታዩ መጠነኛ የዝርዝነት (ልዩ-ነት) ባህሪ ያላቸዉ፣ ወይም የጥቅልነት ደረጃቸዉ ከቀዋዒዶች ያነሰ ነዉ፤ ይህ ሲባል አንድን ልዩ ጭበጥ ለመፍታት በቀጥታ ተፈጻሚ ሊደረጉ የማይችሉ በመሆናቸዉ፣ እና ኢጅቲሓድ ሊደረግባቸዉና ለዝርዝር ድንጋጌዎች መንደርደሪያን በመሆን የሚያገለግሉ በመሆኑ የጥቅልነት *(መጅመል)* ባህሪያቸዉ እንዳለ መሆኑን ይገነዘቧል፡፡ በዚህም ምክንያት ሌሎች የሑሱል ምሁራን

በተጨማሪ፣ በነቢዩ ሙሀመድ ራዕያዊ ንግግሮችና ተግባራት *(ሱናህ)* ተብራርተዋል፡፡[83] አሽ-ሻጢቢን ጨምሮ ሌሎች ፉቅሓእ እንደሚያረጋገጡት፣ በቁርአን ዉስጥ ሕግን ጨምሮ የትኛዉም የእዉቀት መስክ ላይ ዝርዝር ፍሬ-ሐሳቦችን ማግኘት ባይቻል እንኳ፣ ጠቅላላ የሕግ እሳቤን የሚነድፉ መርሆዎች *(ሩኡሰ ኣል-ኣህካም)* እንደማይታጡ ከኢስላም ምሁራን የሕግ ሥነ-ጹሁፍ አሻራ ያስረዳል፡፡[84] በቁርአን 6፡38 ላይ ‹በመጽሃፍ ዉስጥ የተዉነዉ ነገር የለም› በማለት የተገለጸዉም ይህንኑ ሐሳብ የሚያንጸባርቅ እንደሆነ የበርካታ ኢስላም ሊቃዉንት እይታ ነዉ፡፡[85] የቁርአን ድንጋጌዎች በአብዛሀኛዉ የጥቅልነት *(ኢጅመል)* ባህሪ ያላቸዉ በመሆኑ ዝርዝር ማብራሪያ የሚያስፈልጋቸዉና ይህም ከሞላ ጎደል ከሱናህ ሲገኝ ቀሪዉ በተለይ የሕግ ጉዳዮች ሰፊ ሽፋን የሚያገኙት ከኢጅቲሓድ (አመክንዮኣዊ የሕግ ምርምር) ነዉ፡፡[86]

ቁርአን በቀጥታ ሲወርድላቸዉ የነበሩ የመጀመሪያዉ የሙስሊም ትዉልድ፣ ልዩ ጥያቄዎችን ለሙሀመድ በማቅረብ ለሁሉም ጉዳዮች ዝርዝር መለኮታዊ መመሪያዎች እንዲወርድላቸዉ መጠበቅ እንደሌለባቸዉ ቁርአን ራሱ ያሳስባል፣[87] ይህ ካልሆነ ዝርዝር ድንጋጌዎች በመለኮታዊ ራዕይ ሲገለጹ ከተለዋዋጭ የማህበረሰቡ ሁኔታዎች ጋር ላይጣጣሙና ችግር-ፈቺ ላይሆኑ ይችላሉ፡፡ ስለዚህ አማኞች ለሚገጥማቸዉ ማንኛዉም የሕግ ጥያቄ፣ ከጥቅል የቁርአን የሕግ መርሆዎች ላይ በመነሳት፣ የራሳቸዉ ድምዳሜ ላይ እንዲደርሱ ይበረታቱ ነበር፡፡[88] የቁርአን የጥቅልነትና የመርሆነት ባህሪ፣ በሥልጣኔ መለዋወጥ ሳይሻር፣

(ሉሉሊዩን)፣ ከቀዋዒዶች ጋር በአንድነት መድበዉ የሚመለከቷቸዉ፡፡ (ለምሳሌ፤ Kamali, The Sharia: Law as the Way of God, fn 46, p. 154 ይመለከቷል፡፡)

ብዙዎቹ የቁርአን የሕግ አንቀጾች ጥቅል እና ዉስን የገላጭነት (ዝርዝርነት) ባህሪ ያላቸዉ ናቸዉ፡፡ *በኣህካም ኢጅማሊያ* ሥር ከሚመደቡ ቁርአናዊ ሕግጋት መካከል ጥቂቶቹን ለመግለጽ ያህል፣ ንግድ የተፈቀደ ሆኖ፣ ወለድ/አራጣ የተከለከለ መሆኑ፣ ከግል ሐብት ተቆራጭ የሚሆን የግዴታ ምጽዋት *(ዘካሕ)* የተደነገገ መሆኑ፣ የግድያ ወንጀሎች ላይ ተፈጻሚ የሚሆነዉ ቅጣት ከድርጊቱ ጋር ተመጣጣኝ መሆን ያለበት ስለመሆኑ፣ የዝሙት እና ሥርቆት ወንጀሎች ላይ ተፈጻሚ የሚሆኑት የቅጣት አይነቶች መለ ወጣቸዉ ወዘተ… ምሳሌዎች ናቸዉ፡፡ (Hasan, The Qur'an, fn 11, p. 498) እነዚህ ቁርአናዊ ድንጋጌዎች፣ ተጨማሪ ሕጋዊ ብይን ካልታከለባቸዉ፣ በቀጥታ ተግባራዊ ሊደረጉ የማይችሉ በመሆኑ፣ ሊብራሩና እና ልዩ የሕግ አፈጻጸማቸዉ ተለይቶ ሊቀመጥ የሚገባ በመሆኑ፣ ወይም በሌላ አገላለጽ ለተጨማሪ የሕግ ምርምር *(ኢጅቲሓድ)* የሚጋብዙ በመሆኑ እነዚህ የቁርአን የሕግ ክፍሎችም ቢሆኑ የጥቅልት ባህሪ እንዳላቸዉ መረዳት ያስፈልጋል፡፡

ሦስተኛዉ አይነት የቁርአን የሕግ ክፍሎች፣ ዝርዝር እና ልዩ ሲሆኑ፣ የዚህ አይነት ቁርኣናዊ ድንጋጌዎች ብዛት በጣም ጥቂት ሲሆኑ፣ ብዙዎቹ በቤተሰብና ዉርስ ጉዳዮች ላይ የሚያጠነጥኑ ናቸዉ፡፡ ከእነዚህ ድንጋጌዎች መካከል ጋብቻ የሚከለከለዉን የዝምድና ደረጃ፣ የፍቺ ደረጃዎች እና የዉርስ መጠንን የሚወስኑት የቁርአን አንቀጾች ይገኙበታል፡፡ (Hasan, The Qur'an, fn 11, p. 498).

[83] Kamali, *Principles*, fn 9, p. 29.

[84] ዝኒ ከማሁ

[85] ዝኒ ከማሁ

[86] ዝኒ ከማሁ

[87] ቁርአን፣ 5፡ 101

[88] Kamali, *Principles*, fn 9, p. 31.

የዒባዳት (የአምልኮ) ሕግጋት በባህሪያቸዉ በሕግ ምርምር ሊወሰኑ የማይችሉ በመሆናቸዉ፣ ይልቁንም አምላክ ራሱ እንዴት እንደሚመለክ በዝርዝር ይደነግጋል ተብሎ ይጠበቃል፡፡ ይህን ምክንያታዊ እሳቤ በሚያረጋግጥ መልኩ የኢስላም የሕግ ምንጮች በአንድነት ለየትኛዉም አምልኮ

በቦታ ሳይገደብ፣ በየዘመናቱ ለሚተካካዉ የሙስሊም ትዉልድ እና ተጨባጭ አግባብነት እንዲኖረዉና ተለማጭ እንዲሆን አስችሎታል፡፡[89]

ቁርአን በፍትሐ-ብሔር እና በንግድ ግንኙነቶች ላይ ጠቅላላ መርሆዎችን፣ የሕግ ዓላማዎችንና ግቦችን በመቅረጽ ላይ ብቻ የተወሰነ ነዉ፡፡ ለምሳሌ፣ የንብረት መብት ሕጋዊ ጥበቃ ያለዉና መከበር ያለበት ስለመሆኑ፣ እና ዉል በተዋዋዮች ነጻ ፈቃድ ላይ የሚመሠረት ስለመሆኑ (4፡29)፣ የዉል ግዴታን የማክበርና የመፈጸም ግዴታ (5፡1)፣[90] የሸያጭ/ግብይት ፍቁድነትና የወለድ ሕገ-ወጥነት (2፡275)፣ የብድር እና ሌሎች ወደፊት የሚፈጸሙ ዉሎች በጽሁፍ መሆን ያለባቸዉ ስለመሆኑ (2፡282)፣ የመሳሰሉ ጠቅላላ መርዎችን ያዘሉ አንቀጾችን ብቻ አካቷል፡፡ እነዚህ የፍትሐ-ብሔርና የንግድ ግንኙነትን የሚገዙ የቁርአን አንቀጾች ዝርዝር ድንጋጌዎችን ሳይሆን ጠቅላላና እና ዝቅተኛዉን የሕግ ቁጥጥር ደረጃ የሚያስቀምጡ መሆኑን፣ ዝርዝር ድንጋጌዎችን የመቅረጹን ተግባር በየዘመኑ ለሚነሱት *ሙጅተሒዶች* የተተወ መሆኑን ይገነዘቧል፡፡[91]

በመንግሥት አደረጃጀትና የፍትሕ አስተዳደር ዙሪያ፣ ቁርአን ስለ ምክክር *(ሹራ)*፣ ፍትሕ፣ ርትዕ፣ እኩልነት፣ እና የዜጎችን መብትና ግዴታዎች በጥቅሉ ከመግለጽ ባሻገር ስለ ዳኛነት፣ የማስረጃ አቀራረብ ሥነ-ሥርዓት እና ምዘና ያስቀመጠዉ መመሪያ የለም፡፡ በአነዚህ ጉዳዮች ላይ እያንዳንዱ ማህበረሰብ የዘመኑን የሥልጣኔ እና የእሳቤ ደረጃ መሠረት ያደረገ ተስማሚ የመንግሥት አወቃቀርና እና የፍትሕ ሥርዓት እንዲዘረጉ፣ አሰራራቸዉንም በሊጅቲሓድ አማካይነት እንዲወስኑ አድርጓል፡፡[92]

በወንጀል ጉዳዮች ላይ፣ ቁርአን በአምስት የወንጀል አይነቶች ላይ ብቻ ልዩ ቅጣት-አዘል ድንጋጌዎች አሉት፤ እነዚህም ግድያ፣ ሥርቆት፣ የአደባባይ ዝርፍያ፣ *ዚና* (አመንዝራነትና ዝሙት) እና ሐሰተኛ ዉንጀላ ናቸዉ፡፡ ሌሎች የወንጀል አይነቶችን በተመለከተ የማህበረሰቡን ሁኔታ እና ጠቅላላ የሸሪዓ መርሆዎችንና ዓላማዎችን[93] ተንተርሰዉ የአመራርነት ሥልጣን ያላቸዉ የመንግሥት አካላት *(ኡሉል አምር)* ሕግ

ሥነ -ሥርዓት ለሊጅቲሓድ በር በማይከፍት ሁኔታ ዝርዝርና ሕጎችና መመሪያዎችን አካተዋል፡፡ በተመሳሳይ፣ በእምነት እና በገይቢያት (በማይታዩ ድሕረ-ሕልፈት እዉነታዎች) ላይም ቢሆን ቁርአን ከሱናህ ጋር ተዳምሮ እጅግ ግልጽ እና የተሟላ መርሆዎችና ልዩ ቀኖናዎችን አካቷል፡፡ እነዚህ ጉዳዮች ከባህሪያቸዉ አኳያ ሊጅቲሓድ ሊያደርግባቸዉ አይችልም፡፡

[89] Kamali, Principles, fn 9, p. 32.

[90] በተጨማሪም፣ ቁርአን፣ 61፡ 2 እና 4፡ 58 ይመልከቱ፡

[91] Kamali, *Principles*, fn 9, p. 30.

[92] Kamali, *Principles*, fn 9, pp. 30-31.

[93] ቁርአን ካስቀመጣቸዉ የወንጀል መርሆዎች መካከል አንዱ በ 42፡ 40 ተገለጸዉ ሲሆን፣ አስከፊ ተግባር ቅጣቱ ራሱ አስከፊ ነዉ› የሚለዉ እና በ 16፡ 126 የተገለጸዉ የቅጣት ተመጣጣኝነት መርሆ ነዉ፡፡

እንዲያወጡና፣ የተሟላ የወንጀል ፍትሕ አስተዳደር የመዘርጋት ሰፊዉን ድርሻ ለሕብረተሰቡ *ሙጅተሒዶችና* እና አመራሮች ትቷል፡፡[94]

ቁርአን በቤተሰብ እና የዉርስ ጉዳዮች ላይ በአንጻሩ ሰፋ ያለ ዝርዝር ድንጋጌዎችን ይዟል፡፡ ለዚህ ምክንያቱ ደግሞ ቤተሰብ የሕብረተሰብ መሠረት በመሆኑ፣ እና የሰዉ ተፈጥሯዊ ፍላጎቶች የሚሟሉበትና እና ከፍተኛ ግጭቶች የሚነሱበት ተቋም በመሆኑ ነዉ፡፡[95] ጋብቻን የሚከለክሉ የሥጋ እና የጋብቻ ዝምድና ደረጃዎች፣ የሴቶችን ቤተሰባዊ እና ማህበረሰባዊ ደረጃ የሚያርሙና የሚያድሱ፣ እኩልነታቸዉን የሚያረጋግጡ ድንጋጌዎች የቁርአን የሕግ ክፍል አካል ናቸዉ፡፡[96]

በመጨረሻም፣ ቁርአን ዓለም-አቀፍ ግንኙነቶችን በተመለከተ፣ አንድ ፖለቲካዊ ሙስሊም ማህበረሰብ ከሌሎች ሕብረተሰቦች ጋር ያለዉን ግንኙት የሚገዙ የሰላምና የጦርነት ጥቅል የሕግ መርሆዎችን አካቷል፡፡[97]

3. የቁርአን ድንጋጌ ቅርጾች

ሸሪዓ፣ ከዓለማዊ የሕግ ቀኖናዎች *(ኡሱል ኣል-ቃኑን)*፣ በተለየ ሰፋ ያለ የድንጋጌ ቅርጾች አሉት፡፡ በዓለማዊ የሕግ ድንጋጌዎች የትዕዛዝ ወይም የክልከላ ቅርጽ ብቻ ያላቸዉ፣ ሲሆን ሸሪዓ ከእነዚህ ሁለት አስገዳች የሕግ ቅርጾች በተጨማሪ ምክረ-ሐሳቦችን ያዘሉ፣ የተወደዱ ተግባራት *(መንዱባት)* እና የተጠሉ ተግባራት *(መክሩሓት)* የሚገልጹ የሕግ ቅርጾች ይገኛሉ፡፡[98] እነዚህ የሕግ ቅረጾች አስገዳጅ ባለመሆናቸዉ ዳኝነት

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[94] Kamali, *Principles*, fn 9, p. 30.
[95] ዝኒ ከማሁ፣ ገጽ 31-32
[96] ዝኒ ከማሁ፣ ገጽ 32
[97] ዝኒ ከማሁ፣ ገጽ 30
መስሊም ማህበረሰቦች ከሌሎች ሕዝቦች ጋር ያላቸዉ ዓለም-አቀፋዊ ግንኙነት፣ 60፡ 8-9 እንተደገለጸዉ፣ እምነትን በነጻነት ከማራመድ ጋር ተያያዞ፣ ክልከላዎችና እስካልተቀመጠና የኃይል ጥቃት እስካልተሰነዘረ ድረስ፣ ሁልጊዜም የሰላምና የፍትሕ፣ ከዚያም አልፎ በጎ ትግባራትን ለሌሎች ወገኖች መፈጸም፣ በአምላክ ዘንድ የተወደደ መሆኑን ያስረዳል፡፡
በሌላኛዉ የሸሪዓ የሕግ ክፍል ማለትም በአምልኮ ጉዳዮች ላይ የቁርአን ሕጎች፣ እንደ ዓለማዊ *(መዓመላት)* ሕጎች ሁሉ፣ የጥቅልነት ባህሪ የተላበሱ ናቸዉ፡፡ ቁርአን በእምነትና፣ በርዕዮተ-ሕይወት፣ በርዕዮተ-ዓለም፣ ድሕረ-ሕልፈት *(ገይቢያት)* ጉዳዮች ላይ እጅግ ሰፊና ዝርዝር ቀኖናዎችንና ገላጻዎችን የሚያደርገዉን ያህል፣ በአምልኮ ተግበራት ላይ ያሉት አንቀጾች በጣም ጥቂትና አጭር ትዕዛዞችን የያዙ ድንጋጌዎች ናቸዉ፡፡ ለምሳሌ፣ በ 16፡ 44 እነ 3፡ 97 ላይ፣ *ሶላህ (ሥግደት) መፈጸም፣ መንፈሳዊ ጉብኝት ማድረግ (ሀጅ)* እና ምጽዋት መስጠት *(ዘካህ)* አስገዳጅ እንደሆነ በመግለጽ፣ ለእነዚህ አምልኮዎች በየትኛዉም ክፍሉ ተጨማሪ ዝርዝር ድንጋጌዎችን አያስቀምጥም፡፡ ይህ በመሆኑ፣ በዒባዳት ላይ ኢጅቲሓድ በማድረግ የአምልኮ ሥነ -ሥርዓቶች ይዘረጋሉ ማለት ሳይሆን፣ የአምልኮዎች ዝርዝር አፈጻጸም በቁርአን ከመተንተን፣ በነቢዩ በኩል ተግባራዊ ምሳሌ በመሆን እንዲገለጹ የተደረጉ በመሆኑ ነዉ፤ ዒባዳት በባህሪያቸዉ ሐሳብ ባዘሉ አንቀጾች ከሚገለጹ ይልቅ፣ በነቢዩ በኩል በተግባር በታጀበ ገለጻ *(ዐመሊ)* ይፋ ቢደረጉ ዉጤታማ ስለሚሆን ነዉ፡፡ ስለዚህ፣ ቁርአን ባወሳቸዉ የአምልኮ አይነቶች ሁሉ ዝርዝር አተገባበሩ በበቂ ሁኔታ በሱናህ የተሸፈነ በመሆኑ፣ ኢጅቲሓድ ሊደረግባቸዉ አይችልም፡፡ (Kamali, Principles, fn. 9, p. 31).
[98] Kamali, *Principles*, fn 9, p. 7.

ሊጠየቅባቸዉ የማይችሉ (*non-justiciable*) ከመሆናቸዉ አኳያ በዓለማዊ የሕግና ፍትሕ አስተዳደር ላይ እንደ ‹ሕግ› ላይቆጠሩ ቢችሉም፣ ሸሪዓ፣ በእምነት ማዕቀፍ ዉስጥ ያለ የሕግ ሥርዓት እንደመሆኑ፣ ከሕልፈት በኋላ በአምላክ ፊት ለሚኖረዉ ተጠያቂነት፣ በዓለማዊ ተግባራት መመዘኛ ሚዛን ላይ የሚያርፉና ዉጤቱን በመወሰን ረገድ ፋይዳ እንዳላቸዉ በእምነቱ ተከታዮች ዘንድ የታመነ በመሆኑ፣ በዓለማዊ የግልና ማህበራዊ ሕይወት ዉስጥ ሰብዓዊ ባህርይና ምግባርን የመቅረጽ ከፍተኛ ሚና አላቸዉ፡፡[99] ስሊዘህ ባጠቃላይ የሸሪዓ የድንጋጌ ቅርጾች አምስት *(አህካም አል-ሽምሳሕ)* ሲሆኑ፣ እነሱም፣ አስገዳጅ ትዕዛዝ *(ዋጂብ)*፣ አስገዳጅ ክልከላ *(ሀራም)*፣ የተወደደ ድርጊት *(መንዱብ)*፣ የተጠላ ድርጊት *(መክሩሕ)* እና ፍቁድ *(ሙባህ)* ናቸዉ፡፡[100]

የቁርአን አንቀጾች ያላቸዉን የዓረፍተ ነገር አወቃቀር ወይም ቋንቋዊ ትርጉም መሠረት በማድረግ የድንጋጌዎችን ቅርጽ መለየት አስቸጋሪ ነዉ፤ ምክንያቱም የአንቀጹን ቃላት እማሬያዊ ፍች ብቻ በመመርኮዝ የድንጋጌዉን አይነት መወሰን ለስህተት የሚዳረግ በመሆኑ፤ በምትኩ የአንቀጹን አዉዳዊ መልዕክት፣ የድንጋጌዉን ይዘትና ከሌሎች ተዛማጅ የሕግ አንቀጾች ጋር ያለዉን ትስስር ማጤን አስፈላጊ ነዉ፡፡[101] ቁርአን አንድን ተግባር ሲያዝ፣ ሲያወግዝ፣ ወይም አዎንታዊ ወይም አሉታዊ ምክረ-ሐሳብ ሲያቀርብ፣ የአስገዳጅነት ወይም የምክረ-ሐሳብነት ቅርጽ ሊይዝ የሚችል በመሆኑ፣ ከድንጋጌዉ እማሬያዊ (ቋንቋዊ) ትርጉም በተጨማሪ ሌሎች ተያያዥ ነጥቦች ታሳቢ ሊደረጉና ሕግ አዉጪዉ ያሰበዉ የድንጋጌ ቅርጽ ላይ መድረስ ያስፈልጋል፡፡[102]

የአንቀጹ ትዕዛዝ መልዕክት ግልጽ *(ቀጥዒ)* ከሆነና የነገሩን አስገዳጅነት አስረግጦ የሚገልጽ ከሆነ ድንጋጌዉ *ዋጂብ* ነዉ ማለት ነዉ፡፡ አንቀጹ በትዕዛዛዊ አገላለጹ አንክሮ የሌለበትና ልዝብ ከሆነ፣ ወይም ተግባሩን በመፈጸም ከፈጣሪ ዘንድ የሚያስገኘዉን ምንዳ የሚገልጽ ከሆነ፣ የ*መንዱብ* ቅርጽ ይኖረዋል፡፡[103]

በተመሳሳይ መልኩ፣ ክልከላዉ ግልጽና ጠንካራ ባልሆነ አነጋገር የተገለጸ ካልሆነ፣ የ*ሀራም* ሳይሆን፣ የ*መክሩሕ* ቅርጽ ይይዛል ማለት ነዉ፡፡ ለምሳሌ፣ ተግባሩ የተገቢ እንዳልሆነ፣ ሰይጣናዊ ወይም የረከሰ እንደሆነ፣ ወይም ጉዳቱ እንደሚያመዝን፣ ወይም አፈንጋጭ ባህሪ ወይም ድርጊት *(ኢስም፣ ፈሰቅ)* ነዉ በሚል የተገለጸባቸዉ አንቀጾች በሙሉ አስገዳጅ የክልከላ *(ሀራም)* ወይም የተጠላ/ዉጉዝ *(ከራሓሕ)* ቅርጽ ሊይዙ ይችላሉ፤ ስለዚህ የአንቀጹን ግልጽነትና የአንክሮ ደረጃ በመመዘን ከሁሉቱ የትኛዉን የድንጋጌ ቅርጽ

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[99] ዝኒ ከ ማሁ

[100] Mohammad Hashim Kamali, *Sharia Law: An Introduction*, (Oneworld Publications, 2008), p. 47.

[101] Kamali, *Principles*, fn 9, p. 34.

[102] ዝኒ ከ ማሁ፣ ገጽ 33-34

[103] ዝኒ ከ ማሁ፣ ገጽ 33

እንደያዘ መወሰን ይቻላል፡፡ አንድ ድርጊት መፈጸም ኃጢያት አለመሆኑን፣ የሚያስነቅፍ አለመሆኑን፣ ወይም ክልክል አለመሆኑን ወይም በግልጽ አምላክ ፈቅዶታል የሚሉ አገላለጾች የያዙ ቁርአናዊ የሕግ አንቀጾች የፍቁድነት *(ኢባሃሕ)* ቅርጽ የያዙ ናቸዉ፤ እነዚህ ድንጋጌዎች ባነሷቸዉ ጉዳዮች ላይ ግለሰቦች ነጻ ምርጫ *(ተኸይር)* እንዳላቸዉ ያመለክታሉ፡፡[104]

አንድን የቁርአን የሕግ አንቀጽ የያዘዉን የድንጋጌ ቅርጽ ከአዉዱ እና ቋንቋዊ አገላለጹ በመነሳት መወሰን አስቸጋሪ በሆነ ጊዜ፣ በአማራጭነት ከቀረቡት የሕግ ቅርጾች የትኛዉ ቢመረጥ የድንጋጌዉን ዓላማ ያሳካል፣ ብሎም ከጠቅላላ የሸሪዓ መርሆዎችና ዓላማዎች ጋር የተጣጣመ ነዉ በሚሉ አተያዮች ሊመዘንና ሊወሰን እንደሚገባ ሊቃዉንት ያስረዳሉ፡፡[105]

ቁርአናዊ ወይም አጠቃላይ የሸሪዓ ደንጋጌዎች ከቋንቋቸዉና ከይዘታቸዉ አንጻር ተገምግመዉ የተለያዩ የአስገዳጅነት የፍቁድነት ደረጃ ሊሰጣቸዉ የሚችል መሆኑ፣ ወይም በጥቅሉ ለምርምርና ለተለያየ ኢጅቲሓዳዊ አተረጓጎም የተጋለጡ መሆናቸዉ፣ ሸሪዓ ከጊዜ ሂደትና ከሁኔታዎች መለዋወጥ ጋር መጣጣም የሚችልበት የተለማጭነት ባህሪ እንዲኖረዉ አስችሎታል፡፡[106] ከላይ እንደተገለጸዉ፣ አንድ የቁርአን ድንጋጌ በአስገዳጅነትም ሆነ በመከሩሕ ሊተረጎም መቻሉ፣ በአንድ ዘመንና ተጨባጭ እዉነታ ላይ ክልክል የተደረገ ተግባር፣ ከከባቢያዊ ሁኔታዎች መለዋጥ አኳያ አስገዳጅነቱ እንዲረግብና የመከሩሕ ቅርጽ እንዲይዝ፣ ወይም በተቃራኒዉ ሊተረጎም መቻሉ፣ በተመሳሳይ በአንድ ወቅት መንዱብ በሚል የተተረጎመ ድንጋጌ፣ ሁኔታዉ የሚያስገድድ ሲሆን የዋጂብ ቅርጽ ሊሰጠዉ የሚችልበት፣ ወይም በተቃራኒዉ ተግባራዊ ሊደረግበት የሚችል መሆኑ፣ የሸሪዓን ተለዋዋጪነት ካረጋገጡት ገጽታዎቹ መካከል አንዱ መሆኑን የመስኩ ምሁራን ያስረዳሉ፡፡[107]

4. የሕግ ምክንያት *(ተዕሊል)* በቁርአን

ተዕሊል (*ratiocination/causation*) ማለት አንድ የሕግ ድንጋጌ የተደነገገበትን ምክንያት ለመለየት የሚደረግ አመክንዮኣዊ ምርምር ሂደት ሲሆን፣ በዉጤቱም ከሕጉ አንቀጽ ጀርባ ያለዉን የድንጋጌ ምክንያት *(ዒላሕ/ratio legis)* ወይም ለማሳካት የታሰበዉን ዓላማ *(ሂክማሕ)* የሚጠቁም ነዉ፡፡[108] በምክንያታዊ የሕግ ምርምር *(ኢጅቲሓድ)* አማካይነት የሕጎችን የድንጋጌ ምክንያት መለየት ትክክለኛ የሕግ አተረጓጎም ለመከተል፣ ለአዳዲስ የሕግ ጭብጦች እልባት ለመስጠት ይቻል ዘንድ ለሕግ ምርምር መንደርደሪያ በመሆን የሚያገለግል በመሆኑ የተዕሊል ጠቀሜታ ከፍተኛ ነዉ፡፡ ሆኖም የቁርአን (የሸሪዓ) ድንጋጌዎች ጽኑእነትና

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[104] ዝኒ ከ ማሁ፣ ገ ጽ 33-34
[105] ዝኒ ከ ማሁ፣ ገ ጽ 34
[106] ዝኒ ከ ማሁ
[107] ዝኒ ከ ማሁ
[108] ዝኒ ከ ማሁ

ገዢነት ከሕጉ ምክንያት መገለጽ ጋር ያልተያያዘ እንደሆነ፣ የሕጉ ገዢነት በሕጉ ዒላሕ መገለጽ ወይም አለመገለጽ ላይ ጥገኛ አለመሆኑ ሊታወቅ ይገባል፡፡[109] በሌላ አገላለጽ፣ በሸሪዓ የሕግ ፍልስፍና፣ የተደነገገበትን ምክንያትና ዓላማ የማይታወቅ ሕግ ጽኑእነት ወይም ገዢነት አይኖረዉም ሊባል አይችልም፤ ምክንያቱም ሸሪዓ ከአመክንዮኣዊ እሳቤ በላይ በእምነት ማዕቀፍ ሥር ያለና የመለኮታዊ ራዕይ የበላይነትና ገዢነት በሰብዓዊ ግንዛቤ ላይ የማይወሰን መሆኑ ሊዘነጋ አይገባም፡፡[110]

ይህ እንደተጠበቀ ሆኖ፣ የድንጋጌ ምክንያታቸዉንና ሕጉ እዉን ሊያደርገዉ ያሰበዉን ጥቅም ወይም ሊከላከለዉ የፈለገዉን ጉዳት የሚገልጹ በርካታ ቁርአናዊ የሕግ አንቀጾች ይገኛሉ፡፡ ለምሳሌ ያህል በ 24፡30፣ ተቃራኒ ጾታዎች በሚደባለቁባቸዉ አጋጣሚዎች ላይ እይታን መቆጣጠርና መገደብ ታዟል፤ ከዚሁ ጋር ተያይዞ የድንጋጌዉ ምክንያትና ዓላማ የአማኞችን የባህሪና የሥነ-ምግባር ጨዋነትን ለማስጠበቅ እንደሆነ አብሮ ተገልጿል፡፡[111] የሰዉን ሥጋዊና ሥነ-ልቦናዊ ተፈጥሮ መሠረት በማድረግ ልቅ የሆነ የተቃራኒ ጾታ ተራክቦዎች አስከፊ ዉጤቶችን የሚያስከትሉ መሆኑ፣ እና በእንደዚህ አይነት ግንኙነቶች ወቅት አንድ ግለሰብ ሊይዘዉና ሊከተለዉ የሚገባዉን አካሄድ ማሳየትና መገደብ፣ ማህበረሰባዊ ግብረ-ገብነትን የሚያረጋግጥ፣ እና የሞራል ዝቅጠትን ለመከላከል አስፈላጊ እንደሆነ አከራካሪ አይደለም፡፡ በ 59፡7 ደግሞ፣ የጦር ምርኮ ለተዋጊዎች፣ ድሆች እና ለአባት-አልባ ሕጻናት የሚከፋፈል መሆኑን ሲደነግግ፣ የድንጋጌዉ ዓላማ ደግሞ ፍትሐዊ የሐብት ክፍፍልን ማስፈን እንደሆነ ተገልጿል፡፡ በእነዚህና በመሰል የቁርአን አንቀጾች ላይ ሕግጋትን ከመደንገግ ባሻገር የሕጎቹ ምክንያትና ዓላማ የተገለጸ ሲሆን፣ በሌሎች ደግሞ ምክንያታቸዉ ሳይገለጽ እንዲሁ ድንጋጌዉ ብቻ የተላለፈባቸዉ በርካታ አንቀጾች ይገኛሉ፡፡ የእነዚህን ድንጋጌዎች ዒላህ መለየት ለኢጅቲሓድ የተተወ ነዉ፡፡[112] በኢጅቲሓድ የተለዩ የሕግ ምክንያቶች (ዒለል) በግልጽ የቁርአን ድንጋጌ ያልተገለጹ በመሆናቸዉ የሸሪዓ ሊቃዉንት (ሙጅተሒዱን) በተለያየ የተዕሊል መነጽር ሊመለከቷቸዉና የተለያዩ ድምዳሜዎች ላይ ሊደርሱ (ኢኽቲላፍ) ይችላሉ፡፡[113]

የሕጎችን የድንጋጌ ምክንያት መመርመር እና አተረጓጎማቸዉንና አፈጻጸማቸዉን ዓላማቸዉን በሚያሳካ መልክ እንዲሆን ማድረግ፣ እንዲሁም ምክንያታቸዉና ዓላማቸዉ የሕግ ማሻሻያዎችንና ለዉጦችን እንዲሁም አዳዲስ ሕጎችን ለመቅረጽ መንደርደሪያ መሆን እንዳለበት የብዙኃኑ የሸሪዓ ምሁራን አቋም ነዉ፡፡[114] ከዚህ በተቃራኒ፣ የዟሒሪ የሸሪዓ መዝሓብ (የሕግ ት/ቤት) ሊቃዉንት ደግሞ የቁርአን ድንጋጌዎችን ምክንያት (ዒላሕ) ለመለየት የሚደረግ ማንኛዉም ምርምር፣ ለአምላክ ሕጎች ያለዉን ተገዢነት ጥያቄ ዉስጥ

[109] ዝኒ ከ ማሁ፣ ገ ጽ 35
[110] ዝኒ ከ ማሁ፣ ገ ጽ 7
[111] ዝኒ ከ ማሁ፣ ገ ጽ 35
[112] ዝኒ ከ ማሁ
[113] ዝኒ ከ ማሁ፣ ገ ጽ 35-36
[114] ዝኒ ከ ማሁ፣ ገ ጽ 36

የሚያስገባ ስለሚሆን፣ እንዲሁም በምርምሩ የሚገኘዉ ድምዳሜ ከግምት ያላለፈና ለስህተት የተጋለጠ በመሆኑ፣ የ*ተዕሊል* ምርምር ተገቢነት የጎደለዉ ነዉ በማለት ይከራከራሉ፡፡[115]

አብዛህኞቹ *ዑለማእ* በበኩላቸዉ፣ ያለ አንድ ምክንያት ወይም ዓላማ የተደነገገ የሸሪዓ ሕግ ሊኖር አይችልም፤ ዝርዝር ሕግጋትን ማዉጣት በራሱ የሕግ አዉጪዉ የመጨረሻ ዓላማ ተደርጎ ሊወሰድ አይችልም፤ ይልቁንም ከሕጎቹ ጀርባ አንድ የታሰበ ዓላማ መኖር አለበት፡፡ ስለዚህ የሸሪዓ ድንጋጌዎችን ምክንያት መፈተሽ (*ተዕሊል*)፣ የሕጎች አፈጻጸም የሸሪዓ ዓላማዎችን (*መቃሲድ*) የሚያሳካ እንዲሆን ለማድረግ፣ እንዲሁም የሕግ ማሻሻያዎችንና ለዉጦችን ለማምጣት፣ ብሎም ለአዳዲስ ችግሮች የሕግ መፍትሔዎችን ለመቅረጽ እጅግ አስፈላጊ እንደሆነ ምሁራን ይስማማሉ፡፡[116] ቁርአን፣ ነጻ እና ተጠየቃዊ እሳቤ እንዲሰርጽ በተደጋጋሚ ጉትጎታ የሚያደርግ መሆኑ፣[117] በቁርአናዊ ድንጋጌዎች ላይ የሚደረግ የ*ተዕሊል* ምርምርን አስፈላጊነት የሚያጠናክር ነዉ፡፡[118] ከዚህ ጋር በተያያዘ፣ ከሸሪዓ የሕግ ምርምር መርሆዎች መካከል ዋነኛ የሆነዉ ምስስሏዊ አመክንዮ (*ቂያስ*/analogical deduction) በድንጋጌ ምክንያት (*ዒላሕ*) ላይ የሚገነባ መሆኑ ሊጠቀስ ይገባል፤ ቁርአናዊ ድንጋጌን ተመሳሳይ ምክንያት ወይም ዓላማ ላላቸዉ አዳዲስ የሕግ ጭብጦች ላይ ተፈጻሚ ለማድርግ በቅድሚያ የቁርአኑ ድንጋጌ ምክንያት (*ratio of the law*) በአንቀጹ በግልጽ የተነገረ መሆን አለበት፣ አሊያም በአመክንዮኣዊ የሕግ ምርምር (*ኢጅቲሓድ*) የተለየ መሆን ይኖርበታል፡፡ ስለሆነም *ዒላህ፣ ምሥሥሎኣዊ* ምርምር (*ቂያስ*) ለማድረግ ወሳኝ ቅድመ-ሁኔታ መሆኑን መረዳት ያስፈልጋል፡፡[119] የሕጉ ምክንያት በግልጽ በቁርአን ከተገለጸና በዚህ *ዒላህ* ላይ ተንተርሶ የሚደረግ *ቂያስ* በቁርአን በግልጽ የተደገፈ *ምሥሥሎኣዊ* ምርምር (*ቂያስ መንሱስ ዓለ-ዒላሕ*) ይባላል፡፡ በዚህ ጊዜ *ዒላሕን* ለመለየት *ኢጅቲሓድ* ማድረግ አያስፈልግም፡፡ ነገር ግን ምክንያታቸዉ ወይም ዓላማቸዉ ከድንጋጌዉ ጋር በግልጽ (*ኑሱስ*) የተገለጸባቸዉ አንቀጾች ብዛት አናሳ በመሆኑ፣ *ተዕሊል* ማድረግ ለ*ቂያስ* እና ለጠቅላላዉ የ*ኢጅቲሓድ* ምርምር ወሳኝ ሚና አለዉ፡፡[120]

ለማጠቃለል ያህል፣ ቁርአን በሸሪዓ ማዕቀፉ ጠቅላላ የሕግ ዓላማዎቹንና ግቦቹን ከማመላከት በተጨማሪ፣ በአንዳንድ ዝርዝር ሕጎቹ ጀርባ ያሉ የድንጋጌ ምክንያቶችንና ንዑስ-ዓላማዎችን በግልጽ ያስቀምጣል፡፡ እጅግ በርካታ በሆኑ አንቀጾቹ ደግሞ በቁርአን ላይ አመክንዮኣዊ ምርምር ማድረግ እንደሚገባ በተደጋጋሚ የሚጋብዙ መሆኑ፣ ምክንያታቸዉ በግልጽ ያልተቀመጡ ድንጋጌዎች ጀርባ ያለዉን ዓላማ ማወቅ፣ ከእምነት ባሻገር፣ አፈጻጸማቸዉ አቅጣጫዉን የሳተ እንዳይሆንና ወደ ግቡ የሚያመራ እንዲሆን ለማድረግ

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[115] ዝኒ ከ ማሁ
[116] ዝኒ ከ ማሁ
[117] ቁ ር አ ን ፣ 51፡ 20፣ 38፡ 29፣ 4፡ 8 ይ መለ ከ ቷ ል ፡ ፡
[118] Kamali, *Principles*, fn 9, p. 42
[119] ዝ ኒ ከ ማሁ፣ ገ ጽ 37
[120] ዝ ኒ ከ ማሁ

የሚያስችል ነዉ፡፡ የቁርአን (የሸሪዓ) ሕጎች ምክንያታዊ እና ዓላማ-አዘል መሆናቸዉ፣ የተቃና ትግበራን ከማረጋገጡም በላይ ተለዋዋጭ ማህበረሰባዊ እዉነታዎችን ያገናዘበ የሕግ ማሻሻያዎችን እና ለዉጦችን ለማድረግ የሕግ ምርምር መሠረት የሚጥል ሲሆን፣ በዉጤቱም የሸሪዓዉን ቀጣይነትና ተለማጭነት የሚያረጋግጥ ነዉ፡፡

5. ሕጎች የወረዱበት መንስኤና ከባቢያዊ ሁኔታዎች (አሰባብ አን-ኑዙል)

አንድ ሠማያዊ ሕግ ሲወርድ፣ የወረደበትን ልዩ መንስኤ እና ከባቢያዊ ሁኔታ (*አሰባብ አን-ኑዙል*) ማወቅ ድንጋጌዉን በአግባቡ ለመረዳት እና ለመተግበር ከፍተኛ ፋይዳ አለዉ፡፡ *አሰባብ አን-ኑዙል* ከባልደረቦች በተላለፈ ዘገባ መሠረት ብቻ የሚታወቅ (*ነቅሊ*) እንጂ፣ በአመክንዮኣዊ ምርምር (*ኢጅቲሓድ*) የሚደረስበት የእዉቀት አይነት አይደለም፡፡[121] የ*አሰባብ አን-ኑዙል* ዘገባዎች ተዓማኒነት ከሚለካባቸዉ መመዘኛዎች መካከል አንዱ ዘገባዉን ከመሠረቱ ያስተላለፈዉ ግለሰብ (ባልደረባ - *ሶሃቢ*) በተነገረበት ጊዜና ቦታ በአካል መገኘት አለበት፡፡ በአጠቃላይ፣ የ*አሰባብ* ዘገባዎች እንደ ማንኛዉም የ*ሀዲሰ* ዘገባ ሁሉ ተዓማኒነቱ የሚፈተሽ እና ደረጃ የሚሰጠዉ መሆኑን ይገነዘቧል፡፡ ለምሳሌ፣ የዘገባ ቅጥልጥሎሹ *ታቢዑን* (ተከታዮች) ላይ የቆመ እና ከነቢዩ ሙሀመድ ጋር ያልተያያዘ የ*አሰባብ ሀዲሰ* ደካማ (*ዶዒፍ*) አስረጂነት ያለዉ ነዉ፡፡[122]

ሕግጋት የወረዱባቸዉ ተጨባጭ ሁኔታዎች እና ማህበረሰባዊ እዉነታዎች ግንዛቤ ዉስጥ ሳይገቡ፣ የአንቀጹን ቋንቋዊ መልዕክት እና ጽንሰ-ሐሳብ ብቻ ማወቅ ለተሳሳተ ግንዛቤ እና አፈጻጸም የሚዳርግ ነዉ፡፡ ለምሳሌ፣ በቋንቋዊ አገላለጹ ፍቁድነትን (*ኢባሃሕ*) የሚያመልክት ድንጋጌ፣ አንቀጹ የወረደበትን ምክንያት እና አጃቢ ሁኔታዎች፣ የድንጋጌዉ ቅርጽ ምክረ-ሐሳብ (*መንዱብ*) መሆኑን መለየት ይቻላል፡፡[123] የሕጎችን ድንጋጌ ምክንያት አለማወቅ፣ አማኝ ያልሆኑ ወገኖችን ብቻ የሚመለከቱ አንቀጾችን ለጠቅላላዉ ማህበረሰብ ተፈጻሚ እንዲሆኑ፣ በተጨማሪም፣ የቁርአን ራዕይ ከመዉረዱ በፊት የሞቱ ሰዎችን የሚመለከቱ አንቀጾች ለሕጉ መዉረድ በኋላ ላለዉ ጠቅላላ አማኝ ሕብረተሰብ ተፈጻሚ እንዲደረጉና ለመሠረታዊ የሕግ ስህተት ሊዳረግ ይችላል፡፡

ለምሳሌ፣ በዑመር የአመራርነት ዘመን፣ ቁዳማህ ኢብን መዝዑም የተባለ ግለሰብ አስካሪ መጠጥ ጠጥቷል በሚል ወንጀል ተከሶ ሲቀርብ፣ ተከሳሹ በ*ሱራህ* አል-ማኢዳህ (5:93)፣ ‹እነዚያ አምነዉ በጎ *ሥራ*ዎችን የሰሩት በተመገቡት ነገር ተጠያቂነት (ኃጢያት) የለባቸዉም…› የሚለዉን የቁርአን አንቀጽ እንደ መከላከያ አድርጎ ጠቅሷል፡፡ አንቀጹ የወረደዉ አስካሪ ከመከልከሉ በፊት የሞቱ አማኞችን በተመለከተ መሆኑን፣

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[121] ዝኒ ከ ማሁ፣ ገ ጽ 39
[122] ዝኒ ከ ማሁ
[123] ዝኒ ከ ማሁ

እንዲሁም በጠቅላላዉ ሕግ ባልወጣበት ተጠያቂነት የሌለ መሆኑን የሚያረጋግጥ የሕጋዊነት መርሆ (The Principle of Legality) እንጂ[124] ክልከላዉ ይፋ በተደረገበት ጊዜ በሕይወት ያሉ አማኞችን የማይመለከት መሆኑን ኢብን ዐባስ ያስረዱ በመሆኑ ተከሳሽ ያቀረበዉ፣ በሰበብ አጉኑዙል ላይ ያልተመረኮዘ የክርክር ሐሳብ ዉድቅ ተደርጓል፡፡[125] በተመሳሳይ፣ በሸሪዓ ምሁራን መካከል ያልተገባ ልዩነት (ኢኽቲላፍ) በመፍጠር አይነተኛ ምክንያት የሚሆነዉ በቂ የአሰባብ አጉኑዙል እዉቀት አለመኖር እንደሚሆን፤ አሻሚ የሆኑ የቁርአን ድንጋጌዎችና ሌሎች አንቀጾች፣ የተደነገጉበት ምክንያት እና ከባቢ እዉነታዎች ቢታወቁ ኖሮ ልዩነቱ ሊወገድ ሲችል፣ የሐሳብ ብዝኃነት በማይጠበቅባቸዉ ጉዳዮች ላይ ኢኽቲላፍ እንዲፈጠር ምክንያት እንደሚሆን ኢብን ዐባስ[126] ሥጋታቸዉን ገልጸዋል፡፡

ከቁርአን ማብራሪያ (ተፍሲር) ምንጮች መካከል አንዱ ቁርአን በመጀመሪያ የወረደበትን የአረቢያ ማህበረሰብ ቋንቋ እና ልማድ ነዉ፡፡[127] ይህ የተደረገበት ምክንያት ደግሞ፣ ምንም እንኳ ቁርአን ከሙሀመድ በኋላ ላለዉ የሰዉ ዘር በጠቅላላ በጊዜ እና በቦታ ሳይገደብ መመሪያ ሆኖ የወረደ የአምላክ ቃል ቢሆንም፣ አንዳንድ የሕግ አንቀጾች የወቅቱን የአረቢያ ሕብረተሰብ ታሳቢ በማድረግ የተደነገጉ በመሆኑ፣ እነዚህን በሁኔታዎች የታጀቡ አዉዳዊ የቁርአን ሕጎች በትክክል ለመረዳት እና ለመተግበር አሰባብ አጉኑዙል እጅግ አስፈላጊ ነዉ፡፡[128] የወረዱበት ልዩ መንስኤ ያላቸዉ እና ከአካባቢያዊ ተጨባጭ እዉነታዎች ጋር በጥብቅ የተሳሰሩ ቁርአን ሕጎች መኖራቸዉ፣ እነዚህን ድንጋጌዎች ከመንስኤዎቻቸዉ ጋር ያገናዘበ አተረጓጎም በመከተል፣ ሸሪዓ ተጨባጭ እዉነታዎችን መሠረት ያደረገ እንዲሆን፣ ሕብረተሰባዊ የአስተሳሰብ እና የሥልጣኔ ለዉጦችን ተከትሎ የሚሻሻልና የሚለወጥ እንዲሆን የሚያስችል የቁርአን የሕግነት መገለጫ ነዉ፡፡[129]

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[124] በሸሪዓ የሕጋዊነት መርሆ ላይ ሰፋ ያለ ማብራሪያ ለማግኘት የመሀመድ ሐሺም ከማሊ ‹*Sharia law*, fn 100, pp. 179-198 (Chapter 9)› ይመለከቷል፡፡

[125] Kamali, *Principles*, fn 9, p. 43, fn. 56.

[126] ዐብደላሕ ኢብን ዐባስ የነቢዩ መሀመድ አጎት ሲሆኑ፣ ከሶሃቢ የቁርኣን ሊቃዉንት መካከል ግንባር ቀደም ተጠቃሽ ናቸዉ፡፡

[127] ዝኒ ከማሁ፣ ገጽ 45

በተፍሲር መርሆዎች ላይ፣ በተለይ ልማድ እና ቋንቋ አንዱ የቁርአን ማብራሪያ መርህ መሆኑ ላይ ሰፋ ያለ ትንታኔ ለማግኘት የያሲር ቃዲ ‹*Introductioon to the Sciences of the Quran*› ሌሎች የዑሉም ኣል-ቁርኣን የአረብኛና የእንግሊዝኛ ሥራዎች ያገናዝቧል፡፡

[128] Kamali, *Principles*, fn 9, p. 40.

[129] ዝኒ ከማሁ፣ ገጽ 40-41

ሕግ በተፈጥሮዉ ለየትኛዉም ጊዜ እና ማህበረሰብ ተስማሚ እንዲሆን ተደርጎ ሊወጣ አይችልም፡፡ ምናልባትም አንዳንድ ጠቅላላ የሕግ መርሆዎች ማሻሻያ እና ለዉጥ ሳያስፈልጋቸዉ ዘመን ተሻግረዉ ለየትዉልዱ ሊያገለግሉ ይችላሉ፡፡ የሸሪዓ ሕግም ቢሆን ከዚህ የሕግ ባህሪ የተለየ አይደለም፡፡ አላህ በወሀይ (ራዕይ) አማካይነት ጥቅል የሕግ መርሆዎችን ከመዘርጋቱ በተጨማሪ፣ የወቅቱን የአረቢያ ማህበረሰብ በፍትሕ ለማስተዳደር አስፈላጊ የሆኑ ጥቂት ዝርዝር ሕጎች በቀዳሚምንጮች እንዲካተቱ አድርጓል፡፡ ታዲያ እነዚህ ሕግጋት የአረቢያን ልማድ እና አስተሳሰብ መሠረት ያደረጉ በመሆናቸዉ፣ የሕግጋቶቹን ትክክለኛ መንፈስና ዓላማ ለመረዳት የሕብረተሰቡን ልማድ

በተጨማሪም *አሰባብ አን-ኑዙል* የሕጉን ዓላማና መንፈስ ለመረዳት ያስችላል፡፡ ኢብን ዓባስ ምሁራዊ እይታ፣ ከባልደረቦች በኋላ ባለዉ የኢስላም ትዉልድ ዉስጥ ባሉ የሸሪዓ እና የሌሎች የኢስላም ምሁራን መካከል ልዩነትን ከሚፈጠርባቸዉ ምክንያቶች መካካል መለኮታዊ ራዕይ የወረደበትን መንስኤ አለማወቅ መሆኑን አስረድተዋል፡፡[130]

ማጠቃለያ

የሸሪዓ ሕግን ተፈጻሚ በማድረግ ሂደት ዉስጥ፣ የኡሱል አል-ፊቅሕ ሊቃዉንት የለዩአቸዉ የቁርአን ሕጎች ባህሪያት ሁልጊዜም ታሳቢ ሊደረጉ ይገባል፡፡ የቁርአን ሕጎች፣ በመዲና የሙስሊም ማህበረሰብ መመስረቱን ተከትለዉ የሕብረተሰቡን የእምነት ጥንካሬ እና የተገዢነት አቅም መሠረት በማድረግ፣ ባህሪያቸዉንና ምግባራቸዉን ከሥር ከሥር በመኮትኮት ማህበራዊ፣ ኢኮኖሚያዊ እና ፖለቲካዊ እሴቶችን በሂደት የተከሉ መሆናቸዉን መረዳት ያሻል፡፡ ሕግ፣ ማህበረሰቦችን ወደ ተሻለ ጎዳና ይመራ ዘንድ ወይም ሕግ-አዉጪዉ ጠቃሚ ናቸዉ ያላቸዉን እሴቶች በግለሰቦችና በሕብረተሰብ እሳቤ ዉስጥ ለመትከል ቢፈልግ፣ የመጨረሻዉን የሕግ ግብ የሚያሳካዉን ድንጋጌ በአንድ ጊዜ በመጫን ሳይሆን፣ ችግሩን ቀስ በቀስ ከሥር-መሠረቱ ይቀረፍ ዘንድ ተደጋጋፊና ወደ አንድ ዓላማ የሚመሩ፣ የማለማመድ አቀራረብ ያላቸዉ ሕጎች በማዉጣት የተፈለገዉን ዉጤት በሂደት ማምጣጥ ይቻላል፤ ቁርአንም በሕግ ክፍሉ የ*ተንጂም* (ሂደታዊነት) አቀራረብ የነበረዉ መሆኑን ታሳቢ በማድረግ፣ በኢትዮጵያ ባለዉ የሸሪዓ የግልና የቤተሰብ ሕግ አፈጻጸም ተመሳሳይ የሕግ አተረጓጎምና አፈጻጸም እዉን ሊደረግ ይገባል፡፡

የቁርአን ሕጎች፣ የወቅቱን ማህበረሰብ በተጨባጭ ሲያጋጥሙ የነበሩ ችግሮችን ለመፍታትና ይነሱ የነበሩ ጥያቄዎችን ለመፍታት ሲወርዱ የነበሩ መሆኑ (*አሰባብ አን-ኑዙል*)፣ የከባቢያዊነት ወይም የአዉዳዊነት ባህሪ ያላቸዉ ናቸዉ፡፡ ከንድፈ-ሐሳባዊነት ይልቅ ለተጨባጭ ችግሮች እልባት ለመስጠት ከባቢያዊ ሁኔታዎችን ተንተርሰዉ የተገለጹ በመሆናቸዉ፣ በአተረጓጎማቸዉም ሕጎቹ የተደነገጉበት ልዩ ምክንያትና በዙሪያቸዉ የነበሩ ወሳኝ እዉነታዎች ምንጊዜም ከተርጓሚዉ እይታ ሊርቁ አይገባም፤ የቁርአን ሕጎችን ባለንበት ዘመን ተፈጻሚ በማድረግ ሂደት ላይ የሕጎቹ *አሰባብ አን-ኑዙል* ከወቅታዊ ሁኔታዎች ጋር ፍጹም የተራራቀ ከሆነ፣ ጥሬ ሕጉን ቃል በቃል ማስፈጸም የሕግ አዉጪዉን ዓላማ የማያሳካ መሆኑን መገንዘብ ያስፈልጋል፡፡

ማወቅ ጠቃሚነዉ፡፡ ሕጎች የተደነገጉበትን አካባቢያዊ ሁኔታ ማወቅ፣ የዘመናችንን የመስሊም ማህበረሰብ ተጨባጭ ጋር የሚጣጣሙ መሆኑን ለመመርመርና፣ እንደ አስፈላጊነቱ በኢጅቲሓድ አማካይነት ማሻሻያና ለዉጥ ለማድረግ መነሻ ይሆናል፡፡ ለዚህም ነዉ የተፍሲር ምሁራን፣ ቁርአንን ለማብራራት ከሚጠቀመባቸዉ መንደርደሪያዎች መካከል የወቅቱን የአረቢያ ቋንቋ እና ባህል አንዱ የሆነዉ፡፡

[130] Kamali, *Principles*, fn 9, p. 45.

የቁርአን የሕግ ድንጋጌዎች በአብዛሀኛዉ የመርሆዎነትና የጥቅልነት ባህሪ ያላቸዉ መሆኑ *(አህካም አል-ኢጅማሊያ)*፣ እንዲሁም ዝርዝር ድንጋጌዎችም ቢሆኑ ለትርጉም የተጋለጡ፣ *ዛሂ* መሆናቸዉ፣ ነባሩን ሕግ በመተርጎም እና አዲስ ሕጎችን በመቅረጽ ረገድ ጊዜዉን እና ሁኔታዊን ግምት ዉስጥ ያስገቡ ተለዋዋጭ ሕጎችን ለመንደፍ የሚያስችል ነዉ፤ በአጠቃላይ ቁርአን በሸሪዓ የሕግ ምንጮች መሠላል ቁንጮ ላይ መሆኑና የተለማጭነት ባህሪ የተላበሰ መሆኑ፣ የሕግ ማዕቀፉ ኢጅቲሓድ ሊሻሻልና መለወጥ እንዲችል፣ በተጨማሪም በሥሩ አዳዲስ መንግሥታዊ፣ ሕብረተሰባዊና ግለሰባዊ ግንኙነቶችን የሚገዙ ንዑስ የሕግ *(ፊቅሕ)* ማዕቀፎችን ለማዳበር እንዲያመች አድርጎታል፡፡

በመጨረሻም፣ ዓለማዊ ግንኙነቶችን የሚገዙ የቁርአን (የሸሪዓ) ሕጎች *(ሙዓመላት)*፣ ከአምልኳዊ ሕግጋቱ *(ዒባዳት)* በተለየ፣ በምክንያታዊ እሳቤ ሊብራሩ የሚችሉና በሚገዙት ጉዳይ ላይ የሚያሳኩት አንድ ጥቅምን የማስገኘት ወይም ጉዳትን የመከላከል *(መሰላሃሕ)* ዓላማ ያላቸዉ ናቸዉ፡፡ ይህ የምክንያታዊነትና የዓላማ-አዘልነት ባህሪ፣ ከላይ እንደተጠቃለሉት ቁርአናዊ የሕግ መገለጫዎች ሁሉ፣ የሕብረሰተብን የሥልጣኔ እና የእሳቤ ተራማጅነት ያገናዘበ፣ ኢጅቲሓዳዊ የሕግ ትርጉም እና ማሻሻያዎችን ማድረግ የሚፈቅድ እንዲሆን አድርጎታል፡፡ የድንጋጌዉን ልዩ ምክንያት እና ጠቅላላ የቁርአን ሸሪዓዊ ዓላማዎችን *(መቃሲድ አሹ-ሸሪዓሕ)* ከግብ የማያደርስ፣ የቃል በቃል የሕግ አረዳድ የሸሪዓ ፍርድ ቤቶቻችንም ሆኑ የመስኩ ምሁራንና ተማሪዎች ሊከተሉት የማይገባ መሆኑን በማሳሰብ ጽሑፌን እቋጫለሁ፡፡

The Requirements of Language and Publication of Directives in Ethiopia: A Case Comment

Yonas Mekonnen♣ and Sitelbenat Hassen♠

Introduction

Traditionally, in Ethiopia, people tended to refer to the House of Peoples' Representatives (HPR) only when they thought of law making power; HPR was thought as a sole legislator. However, nowadays due to different practical reasons, such lawmaking power has also passed to administrative agencies and the concept of delegated legislation comes into the picture. The limitation of parliamentary time, technicality of subject matters, the flexible nature of administrative rulemaking and the need to have speedy actions in case of an emergency situation are among the practical reasons that make delegation a necessary phenomenon. Accordingly, in Ethiopia, delegated (subsidiary) legislations referred to as directives and regulations are issued by administrative agencies and Council of Ministers (CMs) respectively. However, this paper will focus on directives.

As a result, these organs enact some rules based on the power vested in them by the legislator, and the rules have the same effect as if the legislature itself has enacted them. More importantly, the legislature has some rule and procedures of rulemaking, similarly, the delegated organs need to follow such procedures if they have to enact rules based on the legislator's blessing. Thus, they need to follow some steps and procedures in order not to negatively interfere with individual rights and liberties. Among the procedures, prior consultation, laying procedure, and publication are the common ones, though there may appear a little discrepancy among jurisdictions. Indeed, these specific procedural requirements are governed

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by a specific rule; known as administrative law. However, a comprehensive administrative law is inexistent in the Ethiopian scenario. This fact raises the basic issue as to which law governs enactment procedures of the Ethiopian delegated legislation. Currently, the formality requirements of publication and language are governed by Federal Negarit Gazeta Establishment Proclamation No. 3/1995.

According to Art 2 of this Proclamation, all federal laws are required to be published in the official Negarit Gazette both in Amharic and English versions. Contrary to this, the Federal Supreme Court Cassation Bench has passed a judgment, in light to the requirements of language and publication of Directives, stating that directives do not need to be published in the Federal Negarit Gazeta and should not be written in Amharic in order to have a binding effect. The main aim of this paper is to critically analyze the errors made by the cassation bench in reaching its decision and to bring the issue to the forefront for further academic or practical discourse. The comment is organized as follows. The second section of the work is devoted to the summary and presentation of the facts of the case and the holding of the courts and the third part deals with the analysis of the cases and the accompanying comments. The fourth section deals with brief concluding remarks and recommendations.

1. Summary of the Facts and Holding of the Court

(The Ethiopian Revenue and Customs Authority V Daniel Mekonnen, Federal Supreme Court Cassation Bench, Cassation File No. 43781, Hamle 14/2002 E.C)

In this case, the Ethiopian Revenue and Custom Authority has sued Ato Daniel Mekonnen in the Federal First Instance Court, alledgingthat the defendant was seized in possession of 46.96 kg gold in a place somewhere between Welenchite and Metehara. The defendant was said to be travelling to Djibouti in order to illegally smuggle the gold outside Ethiopia. As a result, the Authority has alleged that the defendant has committed a contraband crime in violation of Arts 2(28) and

66(2) of Customs Proclamation No. 368/95. Alternatively, the authority has sued him l with a felony [this is a common law terminology] on the economy of the country alleging that he has violated the stipulation of art 59(2(b)) of the Monetary and Banking Proclamation and Art 1 and 2 of the Ethiopian National Bank Directive No CTG/001/87, that was issued to regulate gold transaction in the country.

The Federal First Instance Court has decided on the first suit holding that the defendant is not guilty. On the alternative suit, however, the court found the defendant guilty and sentenced him for five years rigorous imprisonment and a fine of one million birr. In addition, the court ordered for the seizure of the gold by the state and deprivation of the right to elect, be elected and to serve as a witness for three years after the conviction. [1]

The defendant, Ato Daniel aggrieved by the decision of the Federal First Instance Court, lodged an appeal to the Federal High Court. The appellate court, having heard the arguments of both sides, has reversed the decision of the Federal First Instance Court on July 23/1999 holding that first, there is no prohibition in Proclamation No 83/86 regarding possession of gold. Moreover, with respect to the Ethiopian National Bank Directive No 001/97, the Federal High Court held that the directive has no binding effect and it couldn't impose punishment to make the defendant criminally liable. The Federal High Court reached such conclusion based on the argument that according to Proclamation No 3/95 and 14/96, the directive has not been published in the Federal Negarit Gazeta and also it is not available in Amharic version.[2] Unsatisfied with the position of the FHC, then, the Ethiopian Revenue and Customs Authority has lodged an appeal to the Federal Supreme

[1] የ ኢትዮጵያ ገ ቢዎችና ጉ ምሩ ክ ባ ለ ሥል ጣን ከ ዲ ን ኤ ል መ ኮ ን ን ፤ የ ፌ ደ ራ ል የ መ ጀ መ ሪ ያ ደ ረ ጃ ፍ /ቤ ት ፤ መ.ቁ . 46204፤ 1999 ዓ .ም.

[2] የ ኢ ት ዮ ጵ ያ ገ ቢ ዎ ች ና ጉ ም ሩ ክ ባ ለ ሥ ል ጣ ን ከ ዳ ን ኤ ል መ ኮ ን ን ፤ የ ፌ ደ ራ ል ከ ፍ ተ ኛ ፍ /ቤ ት ፤ ይ .መ.ቁ . 56547፤ 1999 ዓ .ም.

Court but the appellate division of the Supreme Court affirmed the decision of the Federal High Court.[3]

As the authority was discontented by the decisions of the Federal High Court and the Federal Supreme Court, it lodged an application to the Cassation Division of the Federal Supreme Court. The Cassation Division accepted its application. The Ethiopian Revenue and Customs Authority prayed the Cassation Bench for the reversal of the decisions of the Federal High Court and the Federal Supreme Court while Ato Daniel prayed for the affirmation of those decisions. The Cassation Division after examined the case framed two issues. The issue framed by the Cassation Division was: Whether the fact of the directive being not publicized and not written in Amharic has an effect on the current case? Whether the directive, if found enforceable and binding, would govern the alleged act of the defendant?[4]

In the course of the litigation and by examining the files of the lower courts, the Cassation Division realized the fact that the HPR is the primary legislator of laws in principle and these laws are called primary legislation. In addition, the cassation bench established situations by which the primary legislator may delegate its lawmaking power to other organs of the government so as to enact subsidiary legislation. And such delegated legislation is justified both legally and based on practical reasons. In addition, it is an established practice in the country.

Moreover, the cassation bench noted the fact that the currently applicable HPR rulemaking procedure proclamation no 14/96, as stipulated in art 2(1), has listed out those which are considered as laws. Accordingly, Proclamations, Regulations, and Directives are included in the list. Besides, it stipulates for the publication in the Negarit Gazeta when they are enacted by the HPR; however, what the cassation bench needs to give emphasis is that there is no any binding rule of procedure in

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[3] የኢትዮጵያ ገቢዎችና ጉምሩክ ባለሥልጣን ከ ዳንኤል መኮንን፤ የፌደራል ጠቅላይ ፍ/ቤት የወንጀል ይግባኝ ሰሚ ችሎት፤ መ.ቁ. 32664፤ 2001 ዓ.ም.

[4] የኢትዮጵያ ገቢዎችና ጉምሩክ ባለሥልጣን ከ ዲንኤል መኮንን ፤ ጠቅላይ ፍርድ ቤት ሰሚ ችሎት፤ መ.ቁ.፤ 43781 ፤ 2002 ዓ.ም.

this proclamation which obliged the publications of Regulations and Directives when enacted by government organs other than the primary legislator, i.e. HPR. The Cassation Division stressed that since the proclamation is a proclamation for HPR rulemaking procedure, rulemaking procedures of laws which are enacted by other organs are not the concern and scope of the above-cited proclamation.

Furthermore, the Cassation Bench has put the option of looking to the experience of other countries and has found that other countries have governed the issue of rulemaking procedure of subsidiary legislation in their administrative rulemaking procedure laws, which is non-existent in Ethiopia. Besides, the practice in Ethiopia shows that much of the subsidiary legislations are enacted without publication, especially directives. Owing to this, the Cassation Division reversed the decisions of the lower courts on the 14th of *Hamle* 2002 EC.[5] More importantly, the Cassation Bench noted that the decisions rendered by the Federal High Court and the Federal Supreme Court failed to consider the current practice and also stated that such decisions could leave the currently working directives in the country without binding effect and enforcement. Instead, the Cassation Division affirmed the decision of the Federal First Instance Court.

The Cassation Division maintained that the decisions of the Federal High Court and the Federal Supreme Court contained a fundamental error of law as they denied the power of the authority to sue Ato Daniel. The Cassation Division decreed that the decision and the punishments should be executed in accordance with the decision of the Federal First Instance Court [6]which declared the guiltiness of the defendant and which accordingly ordered five years rigorous imprisonment, fine of one million-birr, seizure of the gold by the state and deprivation of his right

[5] *Ibid.*
[6] *Ibid,*

to participate in the electoral process and barred him from serving as a witness for three years.[7]

2. Analysis of the case

The decision of the Federal Supreme Court Cassation Bench in the present case is erroneous to the opinion of the writers. In this part, an attempt will be made to analyze the decision of the bench and its reasoning in reaching such decision from the legal, theoretical and practical view point. The bench in its decision mentions that there is no binding law which demands the publication of directives in Amharic language and Negarit Gazeta. This appears, however, to be apparent ignorance of Federal Negarit Gazeta Establishment Proclamation[8].

Regarding publication of directives, Art 2(2) of the proclamation states that, all laws of the federal government shall be published in the Federal Negarit Gazeta. Despite the fact that the proclamation fails to define the term *laws*, it is crystal clear that the definition of law includes proclamation, regulation and directive in the Ethiopian setup. This definition can also be witnessed from different proclamations enacted by the legislator. For instance, if we look at Art 2(2) of proclamation No.251/2001, it states that law shall mean proclamations issued by the Federal or State legislative organs, and regulations and directives issued by the Federal and States government institutions and it shall also include international agreements that have been ratified by Ethiopia. [9]

Besides, looking at the hierarchy of laws in the Ethiopian legal system is essential. The hierarchy of laws, in turn, is a reflection of the authority of the organs that enact the laws. To this end, as far as the federal laws are concerned, the constitution is at the top of the ladder followed by proclamations enacted by the

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[7] የ ኢትዮጵያ ገ ቢዎችና ጉ ምሩ ክ ፡ ማስ ታዎሻ 1.
[8] Federal Negarit Gazeta Establishment Proclamation, No3/1995, Art. 2,.
[9] Consolidation of the House of the Federation and Definition of its Power and Responsibilities ProclamationNo.251/2001, Art.2. ,

legislative organ, i.e., the House of Peoples Representative and international agreements ratified by it. Next, a regulation enacted by the council of minister comes into the picture followed by directives issued by administrative agencies and/or ministry. All these laws are deemed to be federal law and directives are not exception. So, apart from the clear definition of law under proc.No.251/2001, looking merely at the hierarchy of federal laws signifies the intention of the legislator to make directives part of the federal law and consequently, Art 2(2) of the federal Negarit Gazetta establishment proclamation will be applicable which plainly requires directives to be published in Negarit Gazeta.

In relation to language, the same proclamation under Art 2(4) clearly provides that the federal Negarit Gazeta should be published in both Amharic and English languages. And based on the above analysis directives need to be written in Amharic as well.

Thus, the reasoning of the bench that states there is no clear law which requires directives to be published and be written in Amharic is wrong.

Actually, the bench in deciding the case has not consulted this essential law, rather its focus was on the HPR's legislative procedure law, Proclamation No.1 4/96.[10] This proclamation in the first place has no relevance to the case at hand. It is meant to provide and regulate the legislative procedure of the legislative organ, i.e., the House of People's Representative. The bench reiterates the definition of law given under Art 2(1) of this proclamation which states that law means proclamations, regulations or directives that come into force upon approval by the House of Peoples' Representatives and subsequent publication in the Federal Negarit Gazeta, under the signature of the president, in accordance with the procedure laid down

[10] Currently, at the time of writing this comment, the governing law for the House of People's Representative Legislative Procedure is Proc 503/2006, which repealed proc 470/2005 which had in turn repealed procl.271/2002.

here.[11] Of course, this provision only talks about the laws enacted by HPR; this is because the cumulative reading of Arts 57 and 71(2) of the constitution reveal that it is only the law that is proclaimed by the HPR that needs to be signed by the president.[12]

This type of law bears the name proclamation. The term regulation and directive refer to administrative rules enacted by the executive organ. However, sometimes the HPR may issue a regulation. For instance, under Art59 (2) of the constitution, it may issue internal rule having the name regulation which is neither published nor signed by the president. The bench in assuming clear law on the matter may think of the absence of administrative procedure act.

It is not dubious that, the rulemaking procedure of administrative rule is governed by administrative procedure act. In this regard, the administrative procedure act in Ethiopia remains to be draft. The draft act provides different mandatory rules including publication of administrative rules.[13] However, this is a special law. And, until the time the draft ratifies, the rule prescribed under the federal Negarit Gazeta establishment proclamation serves as a general rule regarding publication and language requirements of federal laws including directives.

So, the bench should have rather consultted the most relevant law regarding publication and language of laws in Ethiopia, i.e., the Federal Negarit Gazeta establishment proclamation.

Moreover, the cassation bench in its reasoning mentioned the poor practice in the country to publicize subsidiary legislation; especially with regard to directives. However, Administrative bodies may be reluctant to adhere to the law and may find obedience cumbersome due to the alarming issuance of directives. Thus, the non-existence of publicized directive by itself can't justify the assertion of the

[11] House of Peoples' Representative Legislative Procedure Proclamation No. 14/1995o.
[12] Constitution of the Federal Democratic Republic of Ethiopia (1995) 1995, Arts 57&71(2.
[13] Draft Federal Administrative Procedure Proclamation, 2004, Art.7.

bench that states there is no binding law on publication of directives. Besides, there is a practice of publication of directive in Negarit Gazeta. For instance, the national electoral board of Ethiopia has issued a directive on the determination of the procedure for expression by the electorate of the loss of mandate of deputies' national electoral board regulation.[14]

The other comments stem from the theoretical view point. As well said in the preceding part of this comment, administrative rules are justified and come into picture to complement the primary legislation. In other words, Delegated legislations are, *inter alia*, passed to implement the primary legislation and do not stand on their own. Moreover, these legislations are very specific and may directly relate to individual rights and freedoms, thus, are highly sensitive.

Despite this, delegated legislation come into existence in order to elaborate the general stipulation in the primary legislation and thereby help the implementation of it and, then, for all intent and purposes deemed to be a law. And this seems why they are considered as a necessary evil. Be that as it may, they need to be crafted within the mandated given in the parent legislation and in accordance with the procedure followed for the primary legislation. And, this is also the jurisprudence elsewhere. For instance, in UK and U.S there is a mandatory requirement for publication of administrative rule through the modality of publication differs. [15]

Thus, taking these experiences could be helpful if adapted to Ethiopia. Moreover, directives, being one of the delegated legislation in Ethiopia need a due care. And, one of the ways of doing this is through the vehicle of publications in the same manner as the parent laws that brought the directives into place. Alongside with the parent laws, directives should be made known to the subjects. Indeed, laws

[14] See, Regulation No 2/199. This actually bears the name regulation but is, in fact, a directive as the electoral board is an administrative agency having the power to issue a directive.

[15] Aron Degol and Abdullatif kedir, *Administrative rulemaking in Ethiopia: Normative and institutional framework*, Mizan Law review, Vo. l7, No.1, Sep. 2013, p.16.

generally should be accessible to the public. As it is well said, all laws ought either to be known or at least laid open to the knowledge of the entire world in such a manner that no one may in impunity offend against them under the guise of ignorance.[16] Besides, people cannot be expected to comply with rules of which they are unaware. And, this can only be made possible through publication. This also relates to the principle of ignorance of the law has no excuse. The general basis of the requirement of publication is that if every person is to be presumed to know the law, then the contents of the law must be accessible to him/her.[17] This is because that if the law is not known individuals could not be in a position to regulate their behaviors in compliance with the laws. The other and in fact, the most important theoretical justifications goes to the nature of the delegated legislation. Administrative rules in the form of directives are as important as the primary laws since they are issued for the implementation of the later, and, are for all intent and purposes considered as laws made by the legislator.

Thus, apart from the legal stipulation, the need for publication of directives in Ethiopia is supported by the theoretical justification seen above and in light with this, the cassation bench ruling appears to be wrong.

The third comment emanates from the practical view point. The decision of the bench is also wrong practically. From the very beginning, it is very difficult to have access to laws if it is not for publication. For instance, art 2(3) of the federal Negarit Gazeta establishment proclamation provides that all federal or regional legislative, executive and judicial organs, as well as any natural or juridical person, shall take judicial notice of laws published in the Federal Negarit Gazeta. This might be appropriate because causing the published laws in the official Gazeta would be an easy task. However, taking judicial notice of unpublished laws in the

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[16] Bangndu Ganguly cited in Aron Degol and Abdullatif Kedir, *Administrative Rulemaking in Ethiopia: Normative and Institutional framework,* Mizan Law Review, Vol.7, No.1, Sep.2013, p.13.

[17] Mesfin Getachew, *Administrative Agencies Power in Ethiopia with Particular Reference to Administrative Rule Making in Ethiopia: A Comparative Study*, LLM Thesis, AAU, School of Law, 2015, p.46.

official Gazeta is contrary to the clear stipulation of the proclamation and practically cumbersome for all concerned ones including judges. The cassation bench in a different case clearly states that:

"…በመንግስት የሚወጡ ሕጎች እና መመሪያዎች፣ ደንቦች፣ ወዘተ በግልጽ የሚታወቁ እንደመሆናቸው ፍ/ቤቶች (ዳኞች) ግንዛቤ የሚወስዱባቸው ናቸው፡"[18]

Which can be literally translated to as:

Since laws, directives and regulations enacted by the government are apparently known, courts (judges) would take judicial notice. (*Translation ours*)

What could be raised as an issue in this regard is that what makes the laws, directives, and regulations enacted by the government apparently known? It is clear that publication has a role to play here. So, the main reason that makes judicial notice of laws, directives and regulations to be taken is the fact of publication which consequently contributes to knowing the laws apparently.

Coming to the main theme of the article, taking judicial notice of unpublished directives is very difficult and also has its own negative implication to evidentiary issues and impede justice, to say the least. And, this is especially true whenever the party issuing the directive is not involved in the litigation. Currently, in Ethiopia, the issuance of directives is increasing alarmingly. And, since they are not publishing in the official Gazeta, there is a problem regarding the effective date. For instance, in some directives, the effective date is established by the signature of the issuing authority[19] and in other cases, it is established by effective date clause.[20] Thus, there is no uniform practice. For ones' surprise, it appears to be difficult even to the extent of distinguishing the active and binding directives from the amended

[18] ዳን ዲቦሩ ዩኒቨርስቲ ኮሌጅ ከእነ ተከሉ ኡርጋ ኢደኤ 2 ሰዎች፤ ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ፤ መ.ቁ. 40801፤ 2001 ዓ.ም.

[19] See, for instance, directives issued by the Ethiopian Revenue and Customs Authority.

[20] See, Directives Issued by The Ethiopian Charities and Societies Agency.

and repealed ones. In this regard, a research conducted very recently regarding the foreign exchange regime in Ethiopia, in its empirical investigation, states that even those officers at NBE who have closer interaction with the foreign exchange law have difficulty in understanding and identifying active laws from the repealed one.[21] And, this will be worse for individuals which the directives may have an impact on. Owing to this, the current practices of administrative agencies for not publishing directives need to be condemned by the bench rather than taking this practice as a benchmark for its decision.

The other practical comment relates to the journey that the country is underway to accede to the World Trade Organization. Art III of the GATS stipulates transparency principles. Accordingly, each member is expected to publish promptly all relevant measures affecting the GATS agreement and other agreements affecting trade in service. For instance, a directive issued by the national bank of Ethiopia, which is party to the present case has a bearing on trade in service. However, this failure of publication of laws in the official Gazette will have a negative implication on Ethiopia's journey to accede WTO, since such failures of publication hinder the county from complying with its obligation of transparency[22] if acceded.

On the top of these, the decision of the cassation bench will serve as a law for all level of courts.[23] In this regard, the decision of the bench in the present case will encourage the already spoiled practice in the country in relation to the publication of directives. And, this will open room for corruption, administrative malfeasance, abuse of power and ultra vires.

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[21] Eyader Teshome, *Legal and Regulatory Issues of the Ethiopian Foreign Exchange Regime and Transaction*, LLM thesis, Bahir Dar University, 2017, p.111 (unpublished).

[22] Semahagn Gashu, *Ethiopia's Accession to World Trade Organization and the Implications to its Financial Sector Policies*, Ethiopian Journal of Economics, Vol. XIX, No. 1, April**,** 2010, pp. 50-51.

[23] Federal Courts Re-Amendment Proclamation No.454/2005, Art 2.

Eventually, the following remarks are worth stating in relation to language requirements of directives.

The decision of the cassation bench that states there is no binding law that demands the publication of directives as well as their issuance in the Amharic language is wrong and it disregards the practical reality of issuance of directives in Ethiopia.

The cassation bench, pertaining to issues of publication and language of publication would have to consult the federal Negarit Gazeta establishment proclamation in the first place. As well said previously, it is crystal clear that the proclamation provides that all federal laws, including Directives, should be published in the Federal Negarit Gazeta both in Amharic and English language. Regarding the practice, there is no uniform trend so far. For instances, almost all, directives issued by the National Bank of Ethiopia has appeared in English language only. While the directives issued by the Ethiopian Revenue and Customs authority are in Amharic language only. In spite of this, there shall be both Amharic and English version.

Moreover, the decision of the bench that declares there is no need for directives to be in Amharic version violates the constitution. Art 5(2) of the constitution states that Amharic shall be the official language of the federal government.[24] Thus, the federal government speaks through this language. And, the language of the federal government is reflected in its action including law making process. Thus, administrative agencies being one wing of the federal government, their activities including the directives they issue need to be in Amharic. Actually, it is not intended to say that there shall only be an Amharic version of the laws. It is obvious that foreigners in different instances will be the subjects of Ethiopian law. So, there is a need to have English language version in the laws. And, whenever, there is a discrepancy between the two, the Amharic version shall prevail over. The

[24]Constitution of the Federal Democratic, fn. 12, Art. 5(2).

decision of the bench does not even take in into consideration the illiteracy rate in the country. The preponderance majority of the Ethiopian people cannot speak, read and understand the English language.

Thus, the English version of the directives will be difficult to understand and enforce in the courts of law. Indeed, it is not even appropriate for the cassation bench to entertain the case upon the directives not translated in Amharic version. Besides, crafting laws in a language other than Amharic has been also a problem in the country. For instance, the drafting of the Ethiopian codified laws in English and French has brought many difficulties.[25] This is because the language of the law is difficult to translate because words or expressions in a particular language often carry concepts which do not exist in another.[26] The decision of the bench will have its own impact on the courts, especially to the first instance and high court judges who mostly, are not equipped with the necessary skills.

Conclusions and Recommendations

The federal Supreme Court cassation division has been endowed with the huge power to alter the decision of any courts that constitutes basic error of law. And, the interpretation of a law by the Federal Supreme Court rendered by the cassation division with not less than five judges shall be binding on federal as well as regional council at all levels. Thus, this is a great opportunity to make interpretations of laws uniform and predictable in the country. However, this is only true whenever there is a well reasoned and articulated decision. On the contrary, wrong decisions will have negative repercussion. One of such instances is the case at hand. The cassation division on file no.43781 decided that directives issued by administrative agencies are not required to be published in the official Negarit Gazeta and not translated in the Amharic language.

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[25] Roger Briottet, *French, English, Amharic: The Law in Ethiopia*, Mizan Law Review, Vol.3, No.2, 2009, pp.331-340.
[26] Ibid. 331.

This is erroneous. Firstly, this is contrary to the federal Negarit Gazeta establishment proclamation which provides mandatory rule for the publication of all federal laws including directives in Negarit Gazeta and both in Amharic and English language. The bench, however, fails to consult this law. Secondly, the decision also erodes the essence of administrative rule where delegated legislations are required to follow the forms of the parent act. The practice regarding to directives in Ethiopia is not uniform and worse. While stringent requirements have to be followed because their impacts to individual right and freedom are high compared to the primary legislation. Thus, it was a best coincidence to the cassation bench to rectify the practice of issuance of directives in Ethiopia. But, it left to be a missed opportunity.

The bench, by rendering binding decision that serves as a precedent, formalizes the trend in the practice and worsens the problem. Eventually, in order to rectify this, the writers recommend ratifying the draft administrative procedure act, which, *inter alia*, provides for the mandatory rule regarding publication of directives. This would be a permanent solution as it incorporates different mandatory procedures. The second recommendation goes to the cassation division. As the decision of the cassation division serves as a precedent for similar cases arise in the future, need to be well reasoned, critically examined and above all, expected to be in line with the clear stipulation of laws. Unfortunately, this is not what we have witnessed in the present decision.

Thanks to the very article that makes the decision of the cassation bench binding to all levels of courts, which also gives the power to the division to reconsider its earlier decision. This is based on the presumption that, errors of whatsoever may occur during interpretation. Thus, using this golden opportunity, the cassation division needs to reconsider its decision in similar future cases and decide in favor of publication of directives in the Negarit Gazeta both in Amharic and English language.

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Notes on Interpretation of Article 1030 of the Commercial Code of Ethiopia

Yehualashet Tamiru Tegegn♣

Abstract

One core policy justification behind bankruptcy law in general and suspect transaction in particular is equitable treatment of creditors. One of the core tools to do so is invalidation of what is called suspect transactions or preferred transaction as common law legal system call it. Our commercial law is very archaic and it does not fit the existing situation. On top of this, those clear provisions of the law, for various reasons, misinterpreted by the actors of bankruptcy mainly court and commissioner. In this note I wish, if I can, try to set a guide as to the correct interpretation of Article 1030 of the Commercial Code in which both commissioner and court goes wrong. Unless this provision interpreted correctly it will affect not only the individual's rights but also defeats the whole essence of bankruptcy law.

Key words: Bankruptcy; Invalidation; Suspect transactions; Commercials Code; Commissioner; Trustee; Favored (Preferred)

Introduction

The year from 1955-1965 is known as codification decades for Ethiopia. This is because Ethiopia successfully managed to transplant four substantive laws and two procedural laws from various countries and legal systems. One of which is Commercial Code; especially Book V of the Commercial Code is devoted to bankruptcy.[1] However, this area of law is general neglected area in the study of field of law.[2] As a result, there is jurisprudence dearth. Recently, however,

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♣ LL.B., Addis Ababa University. My special thanks go to an anonymous reviewer for helpful comments in the earlier draft of the paper and Mr. Tadesse Melaku for his ever welcoming face. Needless to mention, however much help I received, any error of this article is entirely my own. The author can be reached through email at yehuala5779@gmail.com

[1] This Book run from Article 968- 1173 of the Commercial Code

[2] "*Yekeser Negade*" the Amharic equivalent for bankrupt debtor was/is considered as deceiver, frauder, offenders even squanderer.

bankruptcy cases have been brought to court.[3] The case which will be dealt with in depth in this article is Holland Car PLC though.[4]

The central and whole purpose of bankruptcy proceeding is equitable treatment of creditors.[5] One way to do so is by invalidating suspect transactions.[6] While making clear this House Committee Report on the 1978 bankruptcy act reform state that:' The purpose of invalidation of suspect transactions are twofold……second, and more important, it facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor.'[7]

There are clear incentives for both the debtor and some creditors to reach agreement that is harmful to other creditors before bankruptcy proceeding begin. Creditors can raise the probability of getting their money back and the debtor can maximize the expected value of his commercial relationship discriminating in favor of those creditors that will be able to help him in other business.[8] These are favored creditors by the debtor. On the other hand, the very principle of bankruptcy is equitable treatment of creditors. So, such detrimental transactions will be subject to attack. This in turn leads to floodgate myriad of questions. Who are entitled to attack? What type of creditors i.e. secured and unsecured subject to attack? What will be the fate of invalidated transactions? Will Creditors lose all rights altogether or will they be put on the ladder of unsecured creditors' position? What criteria are set in the law i.e. is it objective yardstick or subjective index? How this

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[3] Holland car PLC and *Aelaf* Construction are the prominent and recent once.

[4]There are other pending Bankruptcy cases

[5]United Nation Commission on International Trade Law (UNCITRAL), *Legislative Guide on Insolvency Law* (2005), p. 11.

[6] The concept of suspect transactions is a very basic one it enables that one creditor, who has been advantaged by the pre-bankruptcy transfer from an insolvent debtor of cash or security, should return that cash top the bankruptcy estate (or lose of security) in order to ensure equality among all of the debtor's similarly positioned creditors. Lawrence Ponorof, Bankruptcy Preferences: Recalcitrant Passengers Abroad the Flight from the Creditor Equality, American Bankruptcy Law Journal Vol. 90 (2016), p. 337.

[7] The House of Committee Report on Bankruptcy Reform Act of 1978 as quoted by Lawrence Ponorof fn. 6.

[8]Francisco Carbrillo, *Bankruptcy Proceeding* (unknown publisher,1999), p. 11.

invalidation of suspect transactions will actually help and improve the position of other creditors? What is the basic difference between invalidation of contract and invalidation of suspect transactions and their similarity if any? Among the above-mentioned queries this article we will try to come up with a solution for the quest: what are the criteria for invalidation of suspect transaction especially in reference to Article 1030.

Elements and Predicament of Article 1030

Despite bankruptcy is not well practice as expected, in the last five years we witness bankruptcy cases were brought before the court. Even on those few instances and cases there are many error actors of bankruptcy commit. One of this is Article 1030 of the Commercial Code. This is one of the most important provisions and citing the whole article may be relevant here.

> *Other payment made by the debtor in respect of debts due and all acts for consideration entered in to by the debtor after the date of suspension of payment may be invalidated on the request of the trustees where the parties who have received payment or have dealt with the debtor did so knowing that suspension of payment has taken place.*

It is important to break down the element of this article so that anyone easily understands the content of this article clearly as it contains many elements, indeed.

1. Transactions for Consideration

Broadly speaking, transactions can be either onerous or for free/gratuitous assignment of right. Gratuitous transactions are those in which one party obligates himself without doing so to obtain any advantage in return. By contrast, an onerous

transaction exists when each party assumes an obligation to obtain an advantage in exchange for his obligation.[9]

As per this requirement any transactions entered by the bankrupt debtor for consideration shall be subject to invalidation. As stated under Article 1029 (a) gratuitous assignments can be invalidated and under Article 1030 transaction for consideration will be invalidated. This in effect means under Ethiopia's bankruptcy law after the suspension of payment any transactions can be subject to invalidation.

2. After the suspension of payment

Article 977 (2) of the Commercial Code put in place the default period of suspension of payment accordingly, the date of declaration of bankruptcy is considered to be the day of suspension of payment. As clear requirements have been set out for this field, further discussion will not be needed.

3. There must be intent on the part of receiver

This is one of the biggest challenges for the trustee. It is next to impossible to prove the mental status of the receiver at the time that the transfer or payment occurs. The intent of the creditor is irrelevant for suspect transactions law purposes since the overriding purpose of suspect transactions law is equitable treatment of similarly situated creditors.[10]

We have to clear the confusion that suspect transactions can either be subjective[11] or objective.[12] Of course, going back to the history of suspect transactions law, the mental element of the creditor was important and considered as one element for

[9] Ronald J. Scalise, Classifying and Clarifying Contracts, Louisiana Law Review, Vol. 76 No. 4(2016) p. 1086
[10] Charles J. Tabb, Rethinking Preference, South Carolina Law Review, Vol. 43 No. 4 (1992) p. 987
[11] In case of subjective suspect transactions means the intent of the debtor and creditor must be proven before invalidating the transaction.
[12] In case of objective suspect transaction mean the intent of the parties are irrelevant.

attacking suspect transactions. Nevertheless, this requirement of mental element was abolished long ago.[13]Bankruptcy principally aims to give the debtor a fresh financial start while allowing creditors to share equally to a fair and equitable extent, in the debtor's accumulated assets that form the bankrupt estate.[14] This broad objective and its constituent goals are undermined by pre- and post-bankruptcy transfer of property that unfairly or discriminatorily withhold or rob property from the estate to the prejudice of his creditors.[15] The only way to undo this injustice is invalidating the transactions. In doing so, we do not look into the mental state of the creditor or debtor. This is because as stated above the very purpose is to protect the interest of other creditors who are affected by such transaction.[16]

In addition to this, this requirement of the law also fails to include the presumptive requirements of knowledge. In many instances we face the requirement of intention and usually there is a proviso, which states: "he known or should have been known".[17] Such proviso will help the trustee bring circumstantial evidence. If such provision was there, it would mitigate the drastic effect of this provision. To rectify this problem two recommendation can be made:

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[13] Dr. Taddese Lencho argued that there are two types of transaction; objective and subjective approach. The objective approach singles out certain transactions and declared that they are (or shall be) invalid a mere proof of the type or characteristics of the transaction irrespective of the mental state of the parties. The subjective approach, on the other hand, makes reference to the mental state of the parties at the time of occurrence of the transaction in addition to identifying the transaction. To put in other word, Taddese demarked objective and subjective approach based on the state of mind of the parties. Tadesse Lencho, Ethiopia Bankruptcy Law: A commentary (part II), Journal of Ethiopia Law, Vol. 24 No.2 (2003) p. 57 et seq.

[14] Elizabth Warren, A Principled Approach to Consumer Bankruptcy, American Bankruptcy Law Journal, Vol. 71(1993)

[15] Robert l. Jordan, William D. Warren and Daniel J. Bussel, *Bankruptcy* (5th ed., New York Foundation Press 1999), p. 373.

[16] However, it is only in fraudulent transactions we look in to the mental status of the party

[17] The same generous can be found in Civil Code. For instance Article 2958(3) states that: 'Nothing shall affect the rights of the lessor to claim damages where the reason of his opposition was *known or should have been known* by the lessee on the making of the contract.'(emphasis supplied)

A. There must be a presumption of knowledge or intent on the part of creditors within the suspected period, in our case it will go back two years as per Article 978 of the Commercial Code.

B. Avoid the requirement of intentional element from this provision altogether.

If we look at the first and second requirements, the application of this article will be very devastating and perhaps frustrating to the business. This provision does not even put qualifications and exceptions. It would be down-to-earth if Article 1030 should be drafted in the following manner.

Article 1030- Prior Act

Sub (1) all acts for consideration with or without the knowing of the suspension of payment of the debtor after suspension of payment may be invalidated up on the request of trustee.

Sub (2) notwithstanding sub (1), the act shall not be invalidated if there is a (n)

a. Ordinary course transfer
b. Contemporaneous exception
c. Subsequent advantage of new value
d. Domestic relation obligation
e. Transfer less than 500 Ethiopia Birr[18]

On top of the above discussion for invalidation to exist there must be transfer of asset from debtor to his creditors.[19]This is one of the core important elements in invalidation claims. The debtor must transfer his property to the creditor. Actually,

[18] Article 1149 of the draft Commercial Code simply replicates the existing provision.
[19] Richard B. Levin(ed.), Kenneth N. Klee and others, *Fundamentals of Bankruptcy Law* (6th ed. American Law Institute-American Bar Association (ALI- ABA),2009) p.195

creditors are looking for their shares from the property of the debtor.[20] Their concern is therefore debtor property. If the favor of one creditor over the other from property of another person, it is not within the ambit of preference law. In short, the legal concern with preference is not that one creditor of the debtor gets paid while others do not but, that the payment to that creditor is to the corresponding prejudice of the other creditors. [21] Moreover, the transfer of debtor asset should benefit the creditors.[22]

In Holland car PLC case[23] for an unknown reason[24] the Commissioner rejected the claim of the applicant, Sister *Asha Ketebo*, by invoking, among other things, Article 1030. However, for suspect transactions to occur there must be transfer of debtor property for antecedent debt. No transfer, no suspect transactions.

The Commissioner before rejecting the applicant's claim should ask whether or not there was a transfer of assets from debtor to creditors?[25] If the answer is no, then

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[20] The debtor property is the common security of the creditor and hence suspicion will be there when there is a transfer of the debtor's property to creditor(s) Brook E. Gotberge, Conflicting Preferences in Business Bankruptcy: The Need for Different Rules in Different Chapters, LOWA Law Review, Vol. 100 No. 51(2014) p.66

[21] Charles Tabb, *The Law of Bankruptcy* (3rd ed. West Academic Publisher, 2013) p. 496

[22] Ibid

[23]Civil Case File No. 221667, decided by the Federal First Instance Court, in the case the applicant was Sister Asha Ketebo and the respondent was Holland car PLC. Justice of the Federal First Instance Court was *Ato. Sentayeh Zeleke*. Sister *Asha Ketebo*, who is the cause for declaration of bankruptcy for Holland car, Submit her claim to the commissioner. However, the commissioner by invoking Article 978(3), Article 1026 and Article 1030 denies or reject the applicant claims of 145,000 birr. Then she appeals to the court by saying those provisions mentioned by the commissioner as a ground for rejection of her claim is not applicable to her and pray the court to accept her claim of 145,000 birr. The court accepts the claim of the applicant and order the inclusion of the applicant in the bankruptcy proceeding.

[24]*Assefa Ali*, Commissioner of Holland car PLC, strongly believes that invalidation means any transfer either from the debtor to creditor or from creditor to debtor. Furthermore, he frequently blames the bankrupt debtor for the misfortunes. Interview with Assefa Ali, Commissioner for Holland car PLC case (Addis Ababa ,22 January 2019)

[25] Creditors broadly define to the transfer should be for or to the benefit of the creditor the 'creditor' basically means any entity that has a claim against the debtor. Claim in turn broadly defined to mean right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable secured or unsecured or right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed secured or unsecured.

there is nothing to examine because the asset of the debtor in any way is unaffected. As stated in the case the creditor, Sister *Asha Ketebo*, effect an advance payment of 145,000 Birr to Holland car PLC. The transfer is from creditor to debtor but not from debtor to creditor and hence, there is nothing to suspect about it.

The Commissioner seemingly thought that if he invalidates the transaction then the whole right of the creditor will end there. It is wrong to understand like that. It goes without saying that if there is a right, there is always a remedy. Invalidation in bankruptcy will bring the creditor to claim only pro rata in contradiction to full payment.

Even under general law of contract invalidation of the transaction will lead to retroactive effect.[26] Meaning the parties will reinstate to their original position, on the position before transaction took place. There is no bankruptcy system which need enhancement of the creditor's chance of repayment at the cost of innocent third party as the Commissioner thinks. 145,000 birr is not the money of the debtor and creditors have only the right to share in proportion from the property or asset of the debtor. Let alone creditor transact in good faith, like sister *Asha ketebo,* even if the creditor was in bad faith they have undivided right to get what they paid.

In the case under consideration, the stance taken by the court on Article 1030 is problematic. From a purposive point of view the court should have invalidated the transaction concluded between Holland car PLC and Sister *Asha Ketebo* on the basis of Article 1030. According to this provision all acts for consideration entered in by the debtor after the date of suspension of payment may be invalidated.[27] The

[26] Article 1815 of the Civil Code
[27] See the above discussion on page 3

transaction was concluded after the suspension of payment since the date of suspension goes back to two years.[28]

True, Article 1030 of the Commercial Code requires the proving of knowledge of the creditor. However, for suspect transactions law the intention of the creditor is irrelevant and the overriding interest is equitable treatment of similarly situated creditors. All the same, bear in mind, the fact that the contract is invalidated it does not mean that the right of the creditor will relinquish altogether.[29]

In the case at hand the court knowingly or unknowingly put a distinction between creditors, insider[30] creditors and non-insider creditors; this is not known in the Ethiopian bankruptcy law. The relevant part of the judgment reads as follows *`...ክፍያ መከፈል ማቋረጡን እያወቀ ነው ሊባል የሚችለው የድርጅቱን የሥራ እንቅስቃሴ የባንክ ሂሳቡን*

[28] In this case the Commissioner, Mr. Assefa Ali, successful extends the suspect period to two years.

[29] There are a lot of difference between invalidation under general law of contracts and invalidation under bankruptcy law one of which is the effect of invalidation. Under general law of contract if the contract is invalid then the contractual parties as possible as possible reinstate to their original or zero position, Article 1815 of the Civil Code. However, the main effect of invalidation in bankruptcy proceeding is recovery of asset and relegation of secured creditor into unsecured one.

[30] It is recommended that we should adopt USA approached of what means by insider. The USA bankruptcy law does not define what means by 'insider' it simply describes a wide sampling of relationship with a debtor that makes a creditor an insider. Accordingly, insider includes:

a. If the debtor is an individual
    i. Relative of the debtor or of a general partner of the debtor
    ii. Partnership in which the debtor is a general partner
    iii. General partner of the debtor, or
    iv. Corporation of which the debtor is a director, officer or person in control.
b. If the debtor is a corporation
    i. Director of the debtor
    ii. Officer of the debtor
    iii. Person in control of the debtor
    iv. Partnership in which the debtor is a general partner
    v. General partner of the debtor
    vi. Relative of a general partner, director, officer or person in control of the debtor.
c. If the debtor is a partnership
    i. General partner in the debtor
    ii. Relative of a general partner in general partner of or person in control of the debtor
    iii. Partnership in which the debtor is a general partner
    iv. General partner of the debtor or
    v. Person in control of the debtor

በቅርበት እያወቀ_እነዚህ ሁኔታዎችም ድርጅቱ በመከሰር ላይ መሆኑን የሚያስገነዝቡ ከሆነ ነው፡፡' (emphasis supplied).

Insider creditors like boards of directors and managers of share-companies are in a better position than any other creditor, i.e. non- insider creditor, bankruptcy is approaching to the debtor.[31] This distinction is important for two reasons.

1. The first glaring importance is that it puts a presumption. As per Article 1030 the trustee must prove the mental status of the creditor at the time of the transfer. Thus, this presumption shifts the burden from the trustee to the creditor. There are several ways the creditor may rebut this presumption. One of which is that there is no reasonable cause to believe that the debtor is on the verge of bankruptcy.[32]
2. It takes into account the real problem of asymmetry of information between creditors.[33] The basic reason for suspect transaction is the asymmetry of information. Those who have close relations with the debtor better know the financial soundness of the debtor and try to get their best from the distress debtor by doing so they defeat equitable treatment of similarly situated creditors.

In the case reaches the Cassation Division[34] the trustee should have invoked Article 1030 of the Commercial Code. In this case Holland car PLC agreed to sale a car and it received a pre-payment (advance payment) for this effect. However, Holland car were unable to perform the obligations as per the terms and conditions of the

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[31]In USA the status of insider creditor depends on ownership or ability to control the debtor supra note 15

[32]Paul Giorgianni, The Small Preference Exception of Bankruptcy Code Section 547(c)(7), Ohio State Law Journal, Vol. 55 No. 3(1994) p.677

[33] Grielle Smith, In search of the Equality: New Zealand's Voidable Preference Regime, (LLB thesis, University of Otago, 2011) p.24-25

[34] Civil Case File No. 200820, decided by the Federal Cassation Division Court, in the case the applicant was *Zemen* Bank S.C. and the respondent was Holland car PLC. Justice of the Federal Cassation division were: *Ato. Alimaw Wele, Ato. Ali Mohammed, Ato Suletan Abate, Ato. Musetefa Mohammed and Ato.Tekelit Yemeles.*

contract. The Federal Higher Court found Holland car liable and ordered the repayment of the money including the interest. The judgment creditor filed execution of judgment to this effect the judgment creditor's stays cars that would be used for execution. In between the Federal First Instance Court declared Holland car PLC bankrupt.

Then the Higher Court sent the execution file to the Federal First Instance Court. However, the court rejected it by saying it does not implement any decision given after the declaration of bankruptcy and if there are any questions, it should be presented through a commission and a trustee.

Afterwards, the Higher Court ordered issuance of auction in which the applicant wins the auction. However, the Higher Court issued a stay of execution due to the current respondents' claim that the cars belong to them, not to Holland Car PLC. The applicant appealed to the Supreme Court. But the Supreme Court also confirmed the decision of the Higher Court. Then it appealed to Cassation by alleging that the lower court made a basic and fundamental error of law.

By virtue of Article 978 (2) of the Commercial Code the trustee successfully managed to extend the suspect period by two years back from the date of declaration of bankruptcy. Transactions that have taken place within this period of time may be invalidated since the creditor effected the payment prior to getting the car. Therefore, the debt is incurred before the transaction is taken place. This leads to the fulfillment of the entire requirement of suspect transactions. As per Article 1030 of the Commercial Code any transfer of property, even if it is made for consideration, may be invalidated. The trustee rather than asking the court to stay of execution he should ask for the invalidation of the transaction. Invalidating the transaction will turn those judgment creditors in to unsecured creditors.[35] Their claim will not be affected but they cannot get the full amount of what they paid.

[35] Supra note 21 p.463

This is obvious because from the very beginning issues of bankruptcy arise when the debtor liability is greater than its accumulated asset.[36]

The Supreme Court Cassation Division, if confirmed, the stay of execution will rectify this mistake of the trustee. The stay of execution will lead the judgment creditor on equal footing with the other creditors. This is mainly because in due course those creditors become judgment creditors and hence they will divide the property of the debtor on a pro rata base. This failure on the part of Supreme Court Cassation makes those judgment creditors favored over the other.

This judgment of Cassation is watershed since it established judicial preference. Therefore, by virtue of this decision by now in our legal system there are two ways of creating a favored creditor over the others. These are favoritism created by the debtor and favoritism created by judiciary. Despite the fact that both of them are preference, there is a big difference between the two. The preference created by debtor may be invalidated by trustee. However, preference created by judiciary by way of judgment will not be invalidated. Moreover, this decision of Cassation will have tremendous effect on the subsequent bankruptcy cases since as per Article 2(1) of Proc. No. 454/05; the interpretations given by Cassation shall have a binding effect on the lower courts.

This decision has the effect of race to the court room.[37] Those resorting to bankruptcy like Sister *Asha Ketebo*, who is the cause for declaration of bankruptcy of Holland car PLC, gets less than what she claimed i.e. 145,000 Birr: however, those who resort to normal court preceding a like *Ato. Andualm* get the full amount of what they claim as a result of the judgment. This fear is not an imaginary one. Assume that the manager of the company who is also the creditor of the company knows very well about the insolvency of the company. If, he with other managerial

[36] R.Andrew, The Insolvency factor in the Avoidance of Antecedent Transaction in Corporate Liquidation, Monash University Law Review, Vol. 21 No. 2 (1995)p.307

[37] As per this rule race of the diligent who come first will be first in right too.

stuff, files voluntary bankruptcy, he will receive only a portion of his claim. However, if he resorts to the court room so as to demand the enforcement of his right no doubt that he will receive a judgment (decree) from the court, which will be enforced or executed like any other judgment in full but not on a pro rate base. Therefore, the decision will potentially serve as a race to the most diligent which bankruptcy law tries to avoid.

Furthermore, this decision of Cassation is in contradiction with the very objective of suspect transactions law. The main objective, as we stated earlier on, is equitable treatment of similarly situated creditors.[38] However, this decision favors those who resort to the normal court by awarding full amount of their claim and punish those creditors who resort to bankruptcy by awarding lesser amounts to their claim and hence creating inequality between parties defeating the very purpose of bankruptcy.

The only way to rectify this problem and ramification of this decision is through the Cassation bench itself. As per Article 2(1) of Pro No. 454 /05 only the Cassation itself can nullify its previous decisions. This is the single way to imagine this decision will be reverse by another bankruptcy case if the case comes in to Cassation with miracle.

Conclusion

Among many objectives of bankruptcy, maximization of asset, equitable treatment of similarly situated creditors and deterrence effect to debtor and creditor are the prominent one. These objectives of bankruptcy are defeated by preference payment to some selected creditors. One of the tools, in fact the major tools, to undo such type of favoritism is invalidation of suspect transactions. Terminologically

[38] See the above discussion on page 1

speaking, the word suspect transaction is hardly known in common law country like that of USA.

The law with the view to crate equality of creditors put in place the ground for invalidation of suspect transactions. Among other provisions Article 1030 is the prominent one. This provision by and on itself has many loopholes. For instance, it requires intention elements of the debtor to make the transaction invalid which is actually very burdensome and goes against the objectives and principle of bankruptcy. It is up to the legislature to make the change; however, the court and the commissioner should interpret correctly. For invalidation to exist there should be transfer of asset from debtor to creditor for the benefit of the latter.

In many instances the actors of bankruptcy misinterpreted Article 1030 of the Commercial Code. It should be clear from the outset that it is impossible to think about invalidation of suspect transaction while there is no transfer from the debtor to creditors. Furthermore, despite Article 1030 requires intentional element for two reasons this requiring should be abolish. First and foremost, the overriding interest in bankruptcy proceeding is equitable treatment of creditors and second the law as living document should be interpreted according to the living circumstance. Currently there is no legal system that requires intention. So this requirement should be avoided.

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Notes on Issues and Concerns in the Hybrid Court of South Sudan

Daniel Behailu Gebreamanuel♣

Introduction

IGAD[1] still spearheaded by Ethiopia has been doing its best to find amicable solution to the raging conflict in South Sudan. The effort has been futile for a reason; one of the main reason has got to do with the criminal (war crimes) track record of the leaders of the belligerent groups, and the possibility of indictment for war crimes. Yet again, included in the peace package is both the idea of reconciliation and the concept of Hybrid Court where criminal investigation is to take place. The question is, if reconciliation is to find solution to the conflict, is it not conflicting with the idea of criminal investigation. Thus, is the idea of the hybrid court (in the peace package) hindering the peace process in South Sudan? Hence, this note.

The purpose of this note is to encourage more readings and debates (in the framework of Africa and African conflict resolution systems) on the peace package of South Sudan. One of the most important issue is whether still European [dictated] model dispute resolution is effective in Africa or should we adopt more like '*African conflict resolution mechanism'*. Are there social capitals that we should pay attention to, to resolve African conflict in African way?

South Sudan (SS) is the youngest nation in the world.[2] After protracted civil war; it has recently gained its independence only to be immersed [in the aftermath] in its

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[1] The Mission of the Intergovernmental Authority on Development (IGAD) is to help the people of Africa to have food and to promote a peaceful existence. They also oversee security and economic situations. Together with the eight countries that make up this organization, they try to create harmonious living environments, which also affect all fields of business and everyday life. They encourage and enable foreign trade, which is essential to African survival

[2] SS got its independence from the current republic of Sudan in 2011.

own power struggle and bloody civil war.[3] Presently, SS is close to hell for its people and a headache for the world community. However, SS is rather a nation blessed with natural resources,[4] like fertile land; and it can easily make use of its gifts if peace and inclusive governance are realized.

On the other hand, the world community is doing its best to find an amicable solution to the current conflict. Despite frequent negotiations and seemingly proximate deal on peace, still it is yet to see the peace climate under its sky and that the people of SS are yet to enjoy the benefits of peace and order. Nevertheless, the effort made by African Union via IGAD and the international community is commendable.

Agreement on the Resolution of Conflict in South Sudan

The Agreement on the Resolution of Conflict in South Sudan (ARCSS) signed in 2015 is one robust move on the brink of closing deal on peace and inclusive governance. The ARCSS is also an instrument which suggested for transitional justice institutions. Among these transitional justice institutions, the Hybrid Court of South Sudan (HCSS) is notable and quite interesting.

ARCSS is yet to be implemented and signs of frustrations are common. Ensuring its full and inclusive implementation is a huge task and second high level revitalization forum took place as recently as February, 2018. These forum are about finding consistencies, wining trust of the actors and minimizing points of conflict to further ensure the implementation of the instrument. Yet the question is why such slow-moving implementation efforts. The factors affecting the agreement could be summed up into two:

[3] The new conflict has got to do with deep suspicion and factions created during the war for independence among the Dinka and Nuer ethnic power groups.

[4] However, the economy of SS is totally dependent (up to 80%) on oil money which is also exacerbating corruption and conflict; thus, the economy base need to be diversified.

First, the challenges have to do with terms and conditions of the agreement itself. Some conditions are quite freighting[5] and potentially entails indictment for the officials despite the promise of reconciliation. Transitional justice system functions under the climate of mistrust (YIHR Croatia: 2015) and hence, it is important to work on social capital that can dissipate rather these well founded mistrust.

Second, practical implementation is hindered by interest groups benefiting from the *status quo ant*e. Usually strong interest- groups hinder reforms to maintain the current benefit schemes and power upper hand. Thus, catering to their fear and concern is a must.

In the existing situation of SS both factors seem to play against effective implementation of the ARCSS. The agreement talks of reconciliation, truth and healing yet again it purports to punish master minding criminals [often officials] of the current active actors of the conflict. Perhaps, it is wise to indicate in the implementing laws of the agreement to pay attention to assurances and guarantees, especially based on local capacity (social capital) for peace and reconciliation.

Essence of Hybrid Court of South Sudan

The Hybrid Court of South Sudan (HCSS) is a very good idea as one among three component of the transitional justice institutions.[6] The court is to function within the intent of the ARCSS and towards helping the effort of finding solution to the raging conflict in SS. The court is to be guided by AUC and that its personnel is largely to be constituted of other African states. The functioning of the court is supposed to be outside of SS. Also, the court is directed to function under the principles of judicial independence and with the spirit of separation of power. The HCSS is independent of the local courts and has primacy over it.

[5] The possibility of being indicted under international law for genocide and other war crimes; given the conflict is on ethnic line.

[6] There are two other institutions forming the transitional justice: these are Commission for Truth, Reconciliation and Healing, and Compensation and Reparation Authority.

However, a number of issues crop up for the effective functioning of the HCSS. The court is one among the transitional justice institutions supposedly anchoring the transitional government for national unity. If so, the relation of the court with the other two institutions and local court must be indicated clearly in the statute of the court to come. It is also erudite to tap to the experiences of other previous similar courts and analyze its faultiness.

Among the contentious issues with regard to the nature of the court is the agreement that the court is to operate from other African state and funding matters. The rationale for the location decision is to allow witnesses to be free, frank and fearless to witness atrocities. But, these facts are not well taken by the incumbent government affecting the whole peace project. Thus, the statute of the court and revitalization forums need to find a balance in this rather baffling issues.

Furthermore, the ARCSS pays homage to traditional peace processes, and such effort is quite significant in African context. But, the court's role vis-à-vis the traditional peace processes is not well mooted out and is also a huge assignment for the drafters of the statute for the court.

Additionally, the CTRH does its own fact findings on victims and nature of crimes committed; again here too there is a need to fine-tune this efforts with the role of the court as well. Conceivably, if not well coordinated, one might destroy the effort of the other; undermining the general objective of the agreement.

One additional contentious issue is the role of local experts in expediting the functioning of the court. Conflict in Africa has that usual color and camouflage of identity, especially ethnic identity and these kind of effort requires expert level insider understanding. The statute of HCSS must focus on enhancing the role of locals; using the loophole that the agreement states "…*majority of judges* …not all the personals of the court" will be from other African nations.

Conclusion on HCSS and ARCSS

Sustained peace and inclusive governance is thought to be achieved via ARCSS. Nevertheless, such effort seem to face difficulty at implementation level. Above all, unity of purpose need to be achieved. The overall aim of the laws and institutions proposed under ARCSS is geared towards finding sustainable peace and achieving inclusive governance. It is wise to limit the court's investigation and sentence to that part which does not frustrate the overall aim the agreement and that its benefit outweighs its downside. Hence, the challenging task is how to reconcile the court's effort with the overall aim of peace and reconciliation endeavor thereby achieving inclusive governance. The core of the matter is that indictment of an official when translated in terms of ethnic identify (often that is the case in Africa) might ruin the whole project of peace. Again, in the high level revitalization effort consistency among the terms and conditions of the agreement requires to be achieved towards stopping the conflict and sustaining the peace project.

Recommendation for Revitalization Efforts and Drafters of the Statute of HCSS

Strengthen institutions of rule of law and democracy: Drafters need to pay attention to social capital amongst societies of SS. Law and anthropology need to marry here and donors are well situated to help research and development endeavors to find solutions based on interdisciplinary approach.

Strengthen civil political parties and culture of dialogue: The military need to be divorced from party politics and ethnic line compositions. Professionalizing the military is one huge pillar of the peace project.

Assurance need to be offered to power groups (critical among them are influential figures in the warring factions)[7] in the event that they helped the peace processes; they will be pardoned of past criminality after being prosecuted.

Consolidate external help and intervention efforts toward achieving inclusive governance and avoiding effort duplications.

Help and train on the downside of ethnic politics and de-ethicize political rhetoric and forge national unity.

Draft the statute of the HCSS in a manner that utilize local capacity for peace and reconciliation, and pay homage to traditional dispute resolution mechanism. Perhaps, it is a good idea to have principles on how to reconcile traditional dispute resolution with the court power and functions.

Drafter of the statute of the HCSS need to pay attention to the general objective of the ARCSS.

[7] In a study conducted by Rens Willems & David Deng (2015) in street of Juba, 'In relation to the conflict that erupted in December 2013, the majority of respondents place the root of the problems in South Sudan at the leadership level (62%)'

Environmental Protection in the WTO System: Issues to Worry About

Anbesie Fura Gurmessa[♣]

> *If trade were responsible for environmental degradation, then presumably those countries that trade the least, such as Ethiopia and Sudan, would have the best environments. We know that is not the case. Trade creates wealth, and wealth cleans up the environment.*[1]

Abstract

The debate on trade and other issues has been a hot subject in the WTO for a long period of time. The question relating to the linkage between trade and environment, however, transcends the debating issue, sometime leading scholar to absurd conclusions. The above quoted idea can represent the absurdity of some of the conclusions that writers can arrive at by standing only on one side of debate. This modest reflection tries to do the balancing of the two important subjects by way of demonstrating the failure of the WTO to properly deal with the environmental concern of the international community. As such, it is the conviction of this paper that environmental issues have remained unattended to and hence, it still remains for the international community to come up with reconciliatory mechanisms that can address the two concerns. In this regard, this paper will try to surface some of these proposals forwarded just to do that and see the advantages and pitfalls of these proposals particularly in relation to the developing countries.

Key words: WTO, environment, linkage, compromising interests, dispute settlement, developing countries,

Introduction

The issue of the linkage of trade and environment has got a prominence recently, particularly following the decision in the Tuna/Dolphin Case. Moreover, it has led

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[1] Marino Marcich, "Trade and Environment: What Conflict?", *Law & Policy International Business*, (Vol. 31, 2000), p. 920

to a lot of controversy among scholars by raising the question whether the World Trade Organization (WTO) has sufficiently addressed the issue of environment or not. In this article we will raise this question once again and attempt to see if the answer is in the affirmative or otherwise. For that purpose, we will consider the position of environmental protection as contained in the General Agreement on Trade and Tariffs (GATT) Agreements beginning from 1947 to the WTO establishment. However, since there are more changes in the WTO era, we pay more attention to this system by way of analyzing the substantive laws and considering the ways these laws are applied to the cases brought before the WTO tribunals. And, finally we put the two together and see if the environmental issue is addressed properly, and suggest some reforms required to address the issue better.

1. Environmental issues: Confrontation or Conformity

Environmental issues were paid 'little attention'[2] before the 1990`s even if beginning from 1970`s some movements were there.[3] Based on the movements in the environmental areas, the GATT Council established the Environmental Measures and International Trade Working Group (EMIT) in 1971 to deal with the effect of environmental regulations on trade.[4] However, since no request was lodged from member states to convene it, the EMIT did not hold any meeting, and remained inactive in general.[5] The issue of trade and environment dramatically changed following the Tuna/Dolphin Case wherein the GATT Panel decided that the embargo imposed by the US to protect dolphin that are killed by the use of

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[2] Kohei Saito, 'Yardsticks for "Trade and Environment": Economic Analysis of the WTO Panel and the Appellate Body Reports regarding Environment-oriented Trade Measures', *Jean Monnet Working Paper 14/01(2001) at www.*centers.law.nyu.edu/jeanmonnet/papers/01/013701.html, *at p.1.* see generally also Rachel McCormick, "A Qualitative Analysis of the WTO's Role on Trade and Environment Issues," *Global Environmental Politics,* Vol. 6 No:1, (February 2006), Halina Ward, "Common but Differentiated Debates: Environment, Labour and the World Trade Organization," International *and Comparative Law Quarterly,* (Vol. 45, 1996)

[3] Ibid.

[4] Information obtained from the WTO website, at http://www.wto.org/english/tratop_e/envir_e/envir_backgrnd_e/c1s1_e.htm.

[5] Thomas J Schoenbaum, 'International Trade & Protection of the Environment: The Continuing Search for the Reconciliation', *American Journal of International Law (Vol. 91, 1997),* at p.268.

inappropriate fishing methods is illegal.[6] Numerous writings have been published outlining the absence of appropriate channel to address the issue of environment in the WTO.[7] Steve Charnovitz sarcastically laid down the areas where the issue of environmental protection and international trade has provoked a debate in the fashion that incorporate all stakeholders from parliament to the UN general Assembly, form the learn journals to free press and the like.[8] In spite of these far reaching debates and discussions, there seems on ground breaking consensus on the modality of addressing environmental issues at the WTO.[9]

The reason behind the failure of international attempt to address the issues amicably by the proponents of the two regimes is attributable to the difference in culture, what Daniel calls "clash of cultures". [10] According to this theory, there is a glaring gap between the proponents of the two regimes both in terms of point of starting the debate and the ultimate goal of their debates. For the environmentalist, protection of the environment at any cost is the ultimate goal while for the support of free trade, any regulation that has the slightest feature of restricting trade will be regarded discriminatory and it will be dealt with the harshest possible reversal strategies.[11] Daniel concludes that "these differences contributed to the rocky start of the WTO's trade and environment program."[12]

Daniel C. Esty empathically argues that "ensuring that the international trading system reflects sufficient sensitivity to environmental matters and that environmental regulation does not become an obstacle to trade remains important

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[6] Ibid., at p.269.
[7] Ibid.
[8] Steve Charnovitz, "Free Trade, Fair Trade, Green Trade: Defogging the Debate," *Cornell International Law Journal* (Vol. 27, 1994), pp. 459-460
[9] Ibid, at p. 461
[10] Daniel C. Esty, Greening World Trade, *Institute for International Economics, available at https://piie.com/publications/chapters_preview/66/4iie2350.pdf,* p. 70
[11] Ibid
[12] Ibid

challenges for the WTO."[13] This is because as we have stated in the preceding part and as we will see it in detail in the forgoing parts, any time a clash occurs between the two and presented to the WTO organs, the triumphant regime is already determined: the trade regime. But that is exactly the kind of problem that has hindered the reaching of any meaningful agreement.

This is because; both environment and trade cannot be isolated from one another and operate for the prosperity of the global community. Dominic Gentile argues in this relation that "unfortunately, the nature of the problem cannot be addressed unilaterally as it does not relate exclusively to any individual state."[14] The solution, it seems, is that both the experts in the field of trade and environment should come together with the sense of addressing common global concerns with the goal of grating "...recognition of the interrelationship between trade liberalization and the environment."[15] Anyways what is the place of environment in the WTO laws? The next part will address the place of environmental protection in the WTO.

2. WTO Laws on Environment

As well known, the WTO does not have any separate agreement addressing the protection of the environment, but obviously, there are certain provisions in each of the separate agreements attempting to address the environmental protection.[16] These protection provisions are treated as an exception to the general rule and as we will see it later, this treatment has its own negative effect on the endeavor to protect the environment. For the time being, the consideration of the substantive wing of the issue will be related to these exceptions.

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[13] Ibid at p. 69

[14] Dominic Gentile, "International Trade and The Environment: What Is the Role of the WTO?," *Fordham Environmental Law Review,* (Vol. 19 Number 1, 2009), p. 195

[15] Ibid

[16] Robyn Eckersley, 'The WTO and Multilateral Environmental Agreements: A Case of Disciplinary Neoliberalism?' *Refereed paper presented to the Australian Political Studies Association Conference University of Tasmania*, Hobart 29 September – 1 October 2003, at https://www.peacepalacelibrary.nl/ebooks/files/Eckersley_WTO-MEAS.pdf *at p.8*

As stated above, the consideration of GATT/WTO laws demonstrates that the subject is treated only under the exceptions included in the agreements, starting with the GATT 1947.This seems strange when compared to the scenario on the other side of the story, meaning Multilateral Environmental Agreements (MEAs hereinafter), devoting more time and space for the regulation of trade unlike the trade agreements.[17] In terms of trading agreements, the North Atlantic Free Trade Agreement (NAFTA) has been a good exception in this regard having its own environmental agreement alongside the trade one, unlike the WTO agreements.[18] So, the bias starts from this exclusion of the importance of environmental issues from the main framework of trade agreements. That being as it may, minor additional improvement made by the establishment of the WTO is, for one thing the subject is given a place in the preamble of the WTO establishing agreement, which particularly recognized for the first time the need for 'protecting and preserving the environment'.[19] But this recognition, as we have seen it above, is not turned into a meaningful regulatory framework which attempts to balance the two important elements of global reality.

So, the main issue in this part like we said above is the consideration of the exceptions inserted in all the agreements under the WTO. Although all the particular agreements have their own provision dealing with environmental issue,[20] the most known exception is the one we find under the GATT.[21] For environmental purpose, paragraphs (b) and (g) are important. The former one deals with the

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[17] Schoenbaum, *International Trade & Protection of the Environment, fn 5*, pp. 282-283.
[18] Ibid.
[19] Marrakesh Agreement Establishing the World Trade Organization, (1995) at *www.**wto**.org/english/docs_e/legal_e/04-**wto**_e.htm,* Preamble para.1.
[20] Information available at the WTO Website, at www.wto.org/english/tratop_E/envir_e/envir_e.htm, *Based* on this website we can understand that all the agreement: namely the GATS, SPS, TBT, AoA, SCM have some exceptions allowing the taking of environmental measures.
[21] The General Agreement on Tariffs & Trade, Article XX. This provision is dubbed as the General exception clause under the WTO and in terms of regulating matters of exceptional importance, this provision is considered the most prominent one and it has also served as a model for other agreements the Organization has entered into.

protection of human, animal and plant life and health while the latter is there to protect the exhaustible natural resources.

The importance of these exceptions should be evaluated in terms of their application in aiding the member states who wants to impose certain environmental measures. Accordingly, the exceptions, on top of being seriously constrained by the restrictive interpretation employed by the WTO Panel and the Appellate Body (AB hereinafter), they are already difficult to apply because of the way they are drafted.[22] Although it relatively seems relaxing following the *Shrimp/Turtle* case where the AB tried to interpret the provision of the WTO agreement in relation to the preamble we have mentioned in the preceding part[23]. The procedural burden of proof they impose on the claiming party has been the other constraining factor working against the restriction imposing state,[24]and this formal requirement of proving the WTO consistent approach has significantly reduced their importance in defending certain environmental measures.

If we take one o the exception under Article 20 of the GATT, and analyze it in relation to the above understand, what we see is that the dispute settlement organs have over stretched the meaning and the requirement for application, rendering the exception almost irrelevant. Article 20 (b) states that members are allowed to take measures "*necessary* to protect human, animal or plant life or health." The dispute settlement organs of the WTO analyzed the applicability and conformity of this provision on the basis of the following two cumulative requirements. The first element is that the state has to prove that the measure is necessary for the protection of the 'human, animal or plant life or health.' The problem is not that the

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[22] Saito, *Yardsticks for, fn 2,* p. 5, see also Schoenbaum, *International Trade & Protection of the Environment, fn 5,* p.15

[23] Ibid

[24] United States- Restrictions on Imports of Tuna, Report *of the Panel September 1991(DS21/R - 39S/155) at www.worldtradelaw.net/reports/gattpanels/tunadolphinI.pdf.* The issue of shifting the burden of proof was emphasized very well in this decision, para, 5.22, See also fn. 15 at p. 2, the writer underscored that this burden of proving the matter not only applies in the dispute settlement systems, but also in all MEAs negotiations.

measure has been required to be necessary to protect the designated elements, but rather the way the necessity element is interpreted. The interpretation has been so restrictively that members almost are prohibited from adopting any GATT inconsistent measures for the fear of reversal at the dispute settlement stage.

Tania Voon wrote emphasizing the challenge members face in applying environmental protective measures because of the policies of the dispute settlement of the WTO that "such bodies have construed the word "necessary" in Article XX(b) such that a measure is not necessary if a different measure that is least inconsistent with the GATT (i.e. that is least restrictive to trade) could reasonably be employed"[25] The consequence of the above approach by the WTO dispute resolution has been that many member states have been frustrated by the decision and had to refrain from taking any measure which is aimed at protecting the environment. This is because, to justify the measure, they not only have to prove that the measure is necessary but it also has been their duty to demonstrate to the dispute settlement organs that the measure they have taken is the least GATT inconsistent measure given the alternatives that are available to them.

The second tier of test is the test of the chapeau (the heading). With regard to this test, the application of the member state`s measure is gauged against the requirement of the chapeau of article XX, which requires that the measure should be applied in a manner that it does not discriminate against the product or producer concerned in the issue. To be specific, the wording of the GATT article XX (b) states that the measures should not be "...a means of *arbitrary or unjustifiable* discrimination between countries where the same conditions prevail, or a *disguised restriction* on international trade..." (Emphasis added). In the normal course of things, no state should be allowed to use measures meant for the purpose of protecting the environment to discriminate against the member states where the

[25] Tania Voon, "Sizing Up the WTO: Trade-Environment Conflict and the Kyoto Protocol", *10 Journal of Transnational Law & Policy No.* 71 (2000). P. 80

same conditions prevail. This is because the interest of the state to protect the environment and the desire to uphold the motto of free trade in the WTO has to be balanced for the purpose of running the two side by side and without prejudicing the performance of one against the other.

That being said, the way the restriction is worded makes it quite confusing for the member states, particularly the newly joining ones and the aspirant members inhibiting them from applying the measures. Besides, balancing the two interests has been the usual practice of the WTO dispute settlement system, whereby preferring the trade interests against the environmental interests. It is stated in this regard that "an assessment of whether discrimination is arbitrary or unjustifiable will depend, of course, on the assessor's views about trade, the environment and how best to deal with the conflict between them."[26] And so far, the assessment has been deliberately in favor of the trade regime and sidelining the environmental issues.

The total effect of this trend has been that the exceptional provision that has been provided for the purpose of protecting the environment has been ineffective, not only because of their drafting challenges as we have seen above, but also because of the interpretive approach the dispute settlement at the WTO has followed. Because of these two reasons, as the net effect, the rules under article XX are far from accessibility by members to protect the environment. The more dumping fact about this article is that the rest of the Agreements in the WTO followed the pattern of providing for exceptions in a similar fashion with article XX and as such, if this provision is not effective in protecting the environment, the rest of the exceptions that are established in other agreements stand to face the same challenges in their application.

[26] Ibid at p. 81

Accordingly, by using its very successful and powerful nature, and the effective dispute settlement system,[27] the Organization has managed to effectively constrained governments from engaging in important environmental regulations.[28]The major problem caused by this is that including environment, all the other values have been seriously prejudiced in favor of the flourishing of trade at their expense.[29]

The insignificant attention given to environmental protection can also be observed from the very weak attempt that the tribunals make to reconcile the potential conflict between trade and environment, by frequently deciding in favor of the former.[30]Accordingly, in the majority of the cases brought before the dispute settlement system, it was only the trade element that was underlined both by the Panel and the AB. For instance, if we consider at least the recent cases starting from the Tuna/Dolphin I,[31] national measure put in place to protect environment were generally regarded as non- GATT conforming, 're-enforcing' the holdings in Tuna/Dolphin.[32] The dispute settlement at WTO continued to pass its trade biased judgments except very recently in Shrimp/Turtle Case.[33] The decision reversed the way environmental issues were handled at the WTO dispute settlement system by trying to balance the two competing values based on the preamble and the other

[27] Andrew Guzman, `Global Governance and the WTO`, 45 *Harvard International Law Journal,* No. 2 (2004), at p. 322. The WTO has a membership of 164 and 31 countries are negotiating accession into this giant Organization, information available on UNDERSTANDING THE WTO: THE ORGANIZATION: Members and Observers, <http://www.wto.org/english/news_e/news09_e/tar_09jul09_e.htm> accessed 24 2018.

[28] Jeffrey L. Dunoff, 'Rethinking International Trade Law', 19 *University of Pennsylvania Journal of International Economic Law,* (1998), p. 374, See also Guzman, *Global Governance, fn 27,* p.386

[29] Eckersley, *The WTO and Multilateral,* fn 16, p.3

[30] Guzman, *Global Governance, fn 27,* p.386

[31]*United States- Restrictions on Imports of Tuna, fn 24*

[32] Saito, *Yardsticks for, fn 2,* p. 13

[33] United States-Import Prohibition of Certain Shrimp & Shrimp Products, Report of the AB, October 1998, WT/DS58/AB/R, at *www.wto.org/english/tratop_e/envir_e/edis08_e.htm.*

MEAs.[34] However, that is just the beginning and we do not know how far that decision would take us in line with the protection of the environment.

3. Developing Countries and Environmental Issues

Issue to worry about for developing countries that are either the members of the organization already or some aspirant countries applying to join the WTO like Ethiopia is how to handle this overarching power of the WTO and the ever growing out reach of the dispute settlement system. This is because these countries are already the victims of environmental degradation of the worst type and by joining the WTO they face the difficulty of regulating the activities of the foreign investors that are trying to maximize their benefits at any cost. For instance, the Ethiopian situation has been described by a group of experts that have conducted research on the environmental issues in the country as "the country faces many environmental challenges including declines in soil fertility and water quality, loss of biodiversity, deforestation and soil erosion."[35]

This fact is true despite the fact that the government is desirous of establishing green economy which cannot be affected by development. Based on the environmental policy, development should be planned and executed with the goal of protecting the environment. In line with that endeavor, the government has laid down the guiding principle in relation to the overall environmental policy. Accordingly, the overall goal of the policy is to "...improve and enhance the health and quality of life of all Ethiopians and to promote sustainable social and economic

[34] Ibid., see for instance paras, 129-131.

[35] Colby Environmental Policy Group 2011, *Environmental Policy Review 2011: Key Issues in Ethiopia 2011*. Waterville, Maine: Colby College Environmental Studies Program, p. 1 available at http://web.colby.edu/eastafricaupdate/. Accessed on May 27, 2018

development through *the sound management* and use of natural, human-made and cultural resources and the environment as a whole..."[36] (Emphasis added).

The desire of the government is clearly put in this document, understanding the predicament the state is in. As we have seen above, however, the achievement of the goals in the WTO is a bit challenging because of the factors that are spelt out in the preceding parts. Therefore, developing countries that are in the WTO need to devise strategies that can help them get around this challenge if there is any and the other countries like Ethiopia that are knocking at the door of the Organization for membership need to be aware of the hurdles of membership with regard to regulating and protecting their already seriously compromised environment. That being underlined in relation to the developing and poor economies, what are the possible way forward considered by experts in the field? The next part will deal with this question before we conclude the consideration of environmental issues at the WTO.

4. Potential Reform Proposals

The next question then is what should be done if the WTO system as it stands today cannot adequately address environmental issues? One of the major proposals many agreed to is the possibility of amending the GATT general exceptions to allow trade restricting measures on the basis of MEAs.[37] Based on the possibility of incorporating such an exception, it is believed that we can reduce the likelihood of the panels considering the exceptions with contempt. In this relation, the NAFTA experience has been praised for accommodating a separate environmental

[36] Environmental Policy of Ethiopia p. 3 available at http://phe-ethiopia.org/pdf/ENVIRONMENT%20POLICY%20OF%20ETHIOPIA.pdf accessed on May 25, 2018

[37] Frederic Kirgis, 'Environment & Trade Measures after the Tuna/Dolphin Decision', *49 Washington and & Lee Law Review* (1992), p.1224. See also Schoenbaum, *International Trade & Protection of the Environment, fn 5,* p.284, and Eckersley, *The WTO and Multilateral, fn 16,* p.3.20

agreement alongside trade.[38] This idea of amending the general exception as stated above is also considered to have been supported both by the Committee on Trade and Environment and the EU, with multiple other NGOs.[39] The establishment of an administrative organ dealing with such matter, without serious formality requirement like ratification, based on the experience of International Civil Aviation Organization and International Maritime Organization has been another.[40] The organ considers the matter and member states accept unless a significant number of them reject the proposal.[41]

Besides, there has been an argument to enhance the capability of the WTO dispute settlement system by equipping it with expertise, not only specialized in trade, but with environment background,[42] so that the decision making in the system can be balanced. The idea seems plausible in relation to the fact that the panels are 'ill-equipped' to deal with matters outside the trade areas, circumscribing themselves to trade issues.[43]

In relation to the reform for the protection of environment Guzman argues that the effectiveness of the Organization has facilitated the widening of its scope.[44] As such, the argument that WTO is exclusively a trade organization[45] would not take us any further, but we need to expand it.[46] Accordingly, in the expanding line, he emphasizes the need to restructuring the WTO along 'departmental line', wherein the major areas, including environment, will have their own departments.[47] This

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[38] Schoenbaum, *International Trade & Protection of the Environment, fn 5,* p.284.
[39] Eckersley, *The WTO and Multilateral, fn 16,* p. 20.
[40] Kirgis, *Environment & Trade Measures, fn, 37,* p. 1225.
[41] Ibid.
[42] Eckersley, *The WTO and Multilateral, fn 16,* p. 21.
[43] Dunoff, *Rethinking International Trade Law, fn 28,* p. 388.
[44] Dunoff, *Rethinking International Trade Law, fn 28,* p. 305. See also Alan Oxley, 'Environmental Protection and the WTO', in Julian Morris (ed) *Sustainable Development: Promoting Progress or Perpetuating Poverty? (*London, Profile Books, 2002), p. 5
[45] Alan Oxley, 'WTO and the Environment', *International Trade Strategies Pty Ltd,* at www.opec.org.au/docs/oxley2001.pdf. at p. 1.
[46] Dunoff, *Rethinking International Trade Law, fn 28,* p. 307
[47] Ibid.

reform, if can be effected, plays double purposes. On the one hand, it enables the Organization to cover additional areas with increased competence and more importantly it, reduces the possibility of establishing additional institutions for this purpose.[48]

The most difficult and the best solution for the protection of environment is to have a separate global environmental organization. It is most difficult because there is no sign with regard to the political commitment from the international community.[49] But, it is the most effective in relation to balancing the overarching presence of the WTO, by way of warding-off the undue encroachment of trade on the environment.[50]

Conclusion

To conclude, we have seen that despite the positive endeavor at the WTO, environmental issues are not well addressed. So, we need change to come in any way, but more feasibly by including measures form MEAs as an exception in GATT, unless we are very lucky to have environmental organization. Otherwise, in the future it seems that the over-widening power of the WTO coupled with the far-reaching influence of the MNCs can cripple the argument in favor of any meaning of regulation of the environment and trade. The role of the dispute settlement organ in the WTO cannot be underestimated for protecting the free trade at any cost and frustrating the members that attempting to restrict trade in favor of the environment. Therefore, if we are to see a meaningful incorporation of the environmental concern at the WTO, we need to see the amendment of the WTO agreements allowing restriction on the basis of MEAs or establish an environmental administrative organ in the WTO whose sole purpose is to devise a balancing strategy for the protection of the environment and trade. Without those

[48] Ibid, p.322.
[49] Eckersley, *The WTO and Multilateral, fn 16,* p. 15
[50] Ibid, at p. 21.

possible remedial measures, the environmental concern will remain to be alien to the WTO agendas.

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