'BEJIROND TEKLEHAWARIAT TEKLEMARIAM' IN LEGAL THEORY: AN OBSERVATION ON HIS LECTURES

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Abstract

'Bejirond Tekelehawariat Teklemariam' was the drafter of the 1931 constitution of Ethiopia. In the following two years after the adoption of this constitution, he delivered lectures for members of the nobility/ruling class on the meaning and nature of constitution and law. The meaning and nature of law has been a controversial issue that gave rise to different school of thoughts including the positivist and natural law legal theories. Tekelehawariat's lectures will also trigger questions as which legal theory/ies are reflected therein. By employing doctrinal research methodology, this article aims to examine Tekelehawariat's lectures in light of the positivist and natural law legal theories. Accordingly, this article argues that despite few elements of natural law theory, Tekelehawariat's lectures are dominantly in the positivist legal theory.

Key terms: Lectures, *Teklehawariat*, Naturalism, Positivism, the 1931 Constitution.

INTRODUCTION

'Bejirond[1] *Tekelehawariat Teklemariam* (here after refereed as *Tekelehawariat*)*'* was the drafter of the 1931 constitution of Ethiopia at the time of emperor *Haileselassie* I.[2] In the two consecutive years following the adoption of the constitution, *Teklehawariat* delivered lectures on constitution and law for members of the nobility/ruling class. The lectures were published in the book written by *Bilatengeta Mahitemeselasie Woldemeskel*, titled " *Zekere Neger*".[3] In his lectures, *Tekelehawariat* raised various points on the meaning and nature of law and constitution.

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[1] '*Bejirond'* is a title given to the person who is Royal Treasurer or guardian of Royal Property. See, IAN CAMPBELL, THE PLOT TO KILL GRAZIANI, xxii (Addis Ababa University Press, 2010). *Tekelehawariat* was the Minister of Finance at the time when the 1931 constitution was drafted.

[2] TEKELEHAWARIAT TEKELEMARIAM, AUTOBIOGRAPHY, 400-402 (Addis Ababa University Press 1996 (Amharic)). ABERA JEMBERE, AN INTRODUCTION TO THE LEGAL HISTORY OF ETHIOPIA 1434-1974, 166 (Shama Books 2019). BAHIRU ZEWDE, PIONEERS OF CHANGE IN ETHIOPIA: THE REFORMIST INTELLECTUALS OF THE EARLY TWENTIETH CENTURY, 182 (Ohio University Press & Addis Ababa University Press 2002).

[3] MAHITEMESELASSIE WOLDEMESQEL, ZIKRE NEGER, 800-819 (2nd ed , 1962 e.c, Addis Ababa).

As the meaning and nature of law has been a controversial issue for so long, there are various theories on the question "what is law?". Positivist and natural law legal theories are the two main theories that can be mentioned in this respect. Though the debate on the meaning and nature of law is theoretical or philosophical, it has also practical aspects.[4] Among others, the theoretical debates will influence the law making as well as adjudication of real court cases.

As *Tekelehawariat* stated in his memoir, he was offered with reference books containing the constitutions of different countries; while he assumed the responsibility of drafting the constitution.[5] *Tekelehawarait* did not clearly state the reference materials he used to prepare the draft constitution and his lecturers though. As *Teklehawariat's* lectures are on the nature of law and constitution, they beget questions as which legal theory/ies are reflected therein.

This article aims to examine *Tekelehawariat's* lectures in the positivist and natural law legal theories. Examining the lectures in light of legal theories will be helpful to know *Tekelehawariat's* inclination and ascertain the place of legal theories in the drafting of the 1931 Constitution; which in turn will be significant for the study on Ethiopian legal history from legal theory perspective. By employing a doctrinal research methodology and consulting the lectures (as published on *Zekere Neger)*[6], the 1931 constitution, books and scholarly articles, this article concludes that , despite the existence of few elements of natural law theory, *Tekelehawariat's* lectures are dominantly in the positivist legal theory which is also reflected in some of the provisions of the 1931 Constitution.

The rest of this article is structured in to five sections. The first section sets the historical context by briefly discussing *Tekelehawariat's* background and his role in the drafting of the 1931 Constitution. The second section is devoted for discussing the positivist and natural law legal theories. The third and the forth sections discuss the relevant parts of the lectures and examine them in light of the positivist and natural law legal theories respectively. In doing so, these sections use the approximate English translations of the lectures while the exact Amharic

[4] ROBERT ALEXY, LAW'S IDEAL DIMENSION, (Oxford University Press, 2021).
[5] TEKELEHAWARIAT, *supra* note 2, at 401.
[6] MAHITEMESELASSIE, *supra* note 3.

expressions of the lectures are presented in the footnote sections. The paper then ends in the fifth section which provides concluding remarks.

1. '*BEJIROND TEKLEHAWARIAT TEKLEMARIAM*' AND THE 1931 CONSITIUTION

'*Bejirond Teklehawariat Tekelemariam'* was born around the year 1884 and later raised in the court of '*Ras Mekonnen'* of *Harrar*.[7] *Tekelehawariat* went to Russia in his early ages so to get modern education (including military education).[8] He had also travelled across Europe and observed their experience in multiple aspects.[9] *Tekelehawariat* had served in various governmental positions, including being the Minister of Finance and also representing Ethiopia in different international platforms.[10]

As it is stated in his memoir, *Tekelehawariat's* exposure to the outside world had influenced and shaped his way of thinking; which sometimes made him to deviate from the outlooks that used to be shared among his compatriots.[11] *Tekelehawariat* had firm believe in serving the public, rule of law and establishing institutional and legal frameworks to bring about the culture of rule of law in Ethiopia.[12] Even at personal level, *Tekelehawariat* also tried to draw a line between serving Emperor *Haileselassie* I personally and serving Ethiopia; that he wanted his relationship with the emperor to be defined by law.[13] *Tekelehawariat* also used to offer his advices to the emperor regarding the importance of having a constitution and constitutionalism.[14] The 1931 Constitution was adopted during the reign of Emperor *Haileselassie* I. It was starting from his time as the regent of Empress *Zewditu* that Emperor *Haileselassie* I (*Teferi Mekonnen* back then) wished to adopt a constitution. But he was not successful because his proposal was rejected by the conservative members of the nobility; who perceived the idea of a constitution as his way of ascending to the throne, by limiting the power of the Empress *Zewditu*.[15]

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[7] TEKELEHAWARIAT, supra note 2, at 2 & 26.
[8] *Id*., at 88.
[9] *Id*., at 138, 173.
[10] *Id*., at x, 403.
[11] *Id*.
[12] *Id*., at xviii, xix.
[13] *Id*., at 334, 335, 338, 339 & 343.
[14] *Id*.,at xviii.
[15] EMPEROR HAILESELASSIE I, HIWOTE ENA YE ETHIOPIA ERMEJA, ANDEGENA METHEHAFE 147(Birhane ena Selam Haileselassie I Publisher, 1929 e.c (Amharic).

But shortly after his coronation, Emperor *Haileselassie* I, once again started the initiative to establish a written constitution in Ethiopia.[16] Even this time, except '*Ras Emiru Haileselasie', 'Fetawrari Biru Woldegebriel'* and *'Tsehafe tezaze Woldemeskel Tariku'*, majority of the nobility/ruling class did not believe in the importance of having a constitution and also considered the same as if it is against Ethiopia's traditional and religious values.[17]

Despite the opposition, the emperor ordered *Tekelehawariat* to prepare the first draft of the constitution. *Tekelehawariat's* experience and the advice that he had been offering for the emperor made him to be chosen to prepare the first draft constitution.[18] *Tekelehawariat* used the following two guiding principles while preparing the first draft of the constitution. The first one is maintaining the emperor's (his descendant's) entitlement to the throne and secondly, recognizing public's participation in law making, by establishing a legislature composed of representatives elected by the people.[19]

After *Tekelehawariat* prepared his draft, the emperor established a committee that is responsible to review the first draft and prepare final draft that is ready for adoption.[20] During his time in this committee, *Tekelehawariat* faced challenges from the side conservatives who disagree with the contents of the first draft. The conservatives (lead by *Ras Kassa Hailu*) wanted for the old feudalist type of rule to be preserved; so that in addition to the throne, governors for Ethiopian provinces shall be inherited following blood line. The conservatives did not also approve the proposal regarding public participation in law making.[21]

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[16] *Id*., at 147 &148. See also ZEWDE RETA, YE KEDAMAWI HAILSESELASIE MENGIST, 20 (Laxmi Publications Pvt. Ltd (2012) (Amharic)).

[17] ZEWDE RETA, YE KEDAMAWI HAILSESELASIE MENGIST, 22&25 (Laxmi Publishications Pvt. Ltd (2012) (Amharic)

[18] TEKELEHAWARIAT, *supra* note 2, at xviii, 400, 402.

[19] *Id*., at 401 & 410. The Amharic name that *Teklehawariat* gave for the legislature is " **ሕገ-ሰሪ ጉባዔ**" (see, TEKELEHAWARIAT, *supra* note 2, at 410.

[20] HAILESELASSIE I, *supra* note 15, at 148; Zewde, *supra* note 17, at 24 '*Ras Kassa Hailu* (Chairman of the Committee)*', 'Ras Hailu Tekelehaimanot', 'Ras Seyome Mengesha', 'Ras Gugsa Areaya', 'Ras Emiru Haileselassie', 'Fetawrari Biru Woldegebriel' , 'Tsehafe tezaze Woldemeskel Tariku', 'Belatene Geta Heruye Woldeselassie', 'Dejazmache Yegezu Habte', ' Dejazmache Woldetasadik Goshu' and 'Bejirond Teklehawariat Tekelemariam'* were members of the committee established to prepare the final draft of the Constitution.

[21] HAILESELASSIE I, *supra* note 15, at 148; ZEWDE, *supra* note 17, at 25-26; TEKELEHAWARIAT, *supra* note 2, at xxii-xxiii.

On the other hand, the progressives[22] (lead by *Tekelehawariat*) argued in favor of maintaining the emperor's (descendant's) entitlement to throne; whereas the appointment of provincial governors shall be made by the emperor ,based on merit, as opposed to blood line.[23] Furthermore, the progressives also *argued* in favor of ensuring public participation in law making by establishing a legislature composed of elected representatives.[24] In so doing, the progressives presented their argument by mentioning the experience of other countries to show how the opinion of "*Ras Kassa Hailu et al*(the conservatives)" was obsolete.[25]

And after considering the submission of both groups, Emperor *Haileselassie* decided for the abolishment of feudalism in principle; while maintaining the discretion of the emperor to award provinces that can be inherited through blood line.[26] And regarding public participation in law making, the people's representatives were made to be appointed by the emperor himself.[27] After incorporating these, the draft constitution was finally adopted on 16th July 1931.

As significant numbers of the nobility/ruling class lack proper understanding on the nature and relevance of the constitution, Emperor *Haileselassie* ordered *Tekelehawariat* to prepare and deliver lectures on constitution so as to improve their awareness.[28] With this purpose in mind, *Tekelehawariat* delivered two rounds of lectures on the meaning and nature of constitution and law.

2. LEGAL POSITIVISM AND NATURAL LAW THEORIES: GENERAL OVERVIEW

In the study of law, one of the puzzling issues is defining what law is, which is intertwined with the debate in understanding the concept and nature of law.[29] And in this debate, one of the controversial points is the relationship between law and morality.[30] Based on the answers they

[22] '*Bejirond Tekelehawariat Tekelemariam", 'Ras Emiru Haileselasie', 'Fetawrari Biru Woldegebriel' and 'Tsehafe Tezaze Woldemeskel Tariku'* were in the progressives group. (see, ZEWDE, *supra* note 17 at 22&25)
[23] HAILESELASSIE I, *supra* note 15, at 148-149; TEKELEHAWARIAT, *supra* note 2, at xviii, 401, 410; ZEWDE, *supra* note 17, at 26.
[24] HAILESELASSIE I, *supra* note 15, at 148-149; ZEWDE, *supra* note 17, at 26.
[25] ZEWDE, *supra* note 17, at 26.
[26] HAILESELASSIE I, *supra* note 15, at 149.
[27] TEKELEHAWARIAT, *supra* note 2, at 410
[28] HAILESELASSIE I, *supra* note 15, at 154; TEKELEHAWARIAT, *supra* note 2, at 402.
[29] ALEXY, *supra* note 4.
[30] *Id*.

provide for this question, theories can be divided in to two main categories namely legal positivism and natural law theories.[31]

A. Legal Positivism

In the positivist theory of law, study of law should separate the law "as it is" from the "ought to be".[32] In other words, "the study of law should separate the law that actually exists (is) from the one which is morally desirable (ought to be)".[33] Positivism in its extreme form denies the relationship between law and morality and gives sole focus on the former which is taken as the only authoritative reason.[34] This is called the "separation thesis" according to which there is no connection between "law as it is" and "law as it ought to be", as a result of which legal validity is different from moral validity.[35]

By isolating law from morality, the positivist theory of law as proponed by John Austin and Jeremy Bentham studies law by associating it with command from the sovereign.[36] As such, for Austin law is a command "…set by political superiors to political inferiors"[37] that entails sanctions in the case the latter failed to comply. The source of the command is expected to be "sovereign" which is an identifiable human being who himself is not receiving orders/commands from others.[38] Moreover, the sovereign should be in a position of receiving "habitual obedience from the bulk of the society."[39] Furthermore, for a command of the sovereign to be called as law, it should be "expressed" *i.e.* clearly stated (in written form) in the text of legislations and "general" that is not meant to regulate isolated incidents or individuals.[40]

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[31] *Id.*
[32] RAYMOND WACKS, PHILOSOPHY OF LAW: A VERY SHORT INTRODUCTION 19 (Oxford University Press 2006), ALEXY, *supra* note 3.
[33] WACKS, *Id*.
[34] ALEXY, *supra* note 4.
[35] *Id.*
[36] WACKS, *supra* note 32 , at 18&19.
[37] IAN MCLEOD, LEGAL THEORY, 73 (Palgrave Macmillan, 2008).
[38] *Id*.
[39] *Id.*
[40] *Id.*

Nevertheless, the classification of theories as "positivism" and "naturalism" does not mean that all theorists that belong to each respective group agree in everything.[41] Rather, there are differences of opinions even among positivists as well as naturalists. In this respect, while early positivists Austin, Bentham and Kelsen did not recognize the impact of morality on law, H.L.A Hart, a modern legal positivist, believes that fundamental principles of justice; which he calls "minimum content of natural law" are mandatory in a legal system.[42]

According to Hart's positivist theory of law, law is composed of two types of rules namely primary and secondary rules.[43] Primary rules are duty imposing rules on citizens stating what to do and what not to do that their non-compliance may entail sanction. On the other hand, secondary rules which comprise of rules of change, rules of recognition and rules of adjudication are power conferring.[44] It is through the instrumentality of these secondary rules that laws will be amended/repealed and/or practically applied to practical cases. In particular, rules of recognition are useful to identify valid/ binding law from the non-binding one.[45] Hart stated that a certain rule will be considered as law only when it satisfies the criteria that are stipulated by rules of recognition.[46]

In addition, H.L.A Hart had also drew a line differentiating "to be obliged to respect the law" and "….to be under obligation to respect the law."[47] For H.L.A Hart, while the former shows the effect of sanction in making people to comply with the law, the later represents the sense of responsibility in the mind of the people that makes them to respect law, without the need of sanction.[48]

B. Natural Law Theory

[41] William C. Starr, *Law and Morality in H.L.A. Hart's Legal Philosophy*, 67 MARQ. L. REV., 673, 673-689 (1984), available at: http://scholarship.law.marquette.edu/mulr/vol67/iss4/8 , accessed on (May 31, 2022). ALEXY, *supra* note 4.
[42] *Id*.,WACKS, *supra* note 32 at 28.
[43] HLA HART, THE CONCEPT OF LAW, 79 &80 (Claredon Press 2nd ed., 1994) Starr, *supra* note 41 at 676; WACKS, *supra* note 32 at 29.
[44] *Id*.
[45] WACKS, *supra* note 32 , at 28 & 29.
[46] *Id*., at 30.
[47] HART, *supra* note 43 at 82 &83. WACKS, *supra* note 32 at . 30. Elise G. Nalbandian, *Positivist Theory of Law – H. L. A Hart: Hart's Concept of Law*, 3(1) MIZAN LAW REVIEW, 139, 138-148 (2009).
[48] *Id*.

As opposed to positivism, naturalist theory of law rejects the distinction between law and morality. In the thesis which is called "the connection thesis", naturalism argues that law and morality are quite connected and there is a relationship between legal validity and moral correctness.[49] A natural theory of law is a moral conception of law that evaluates law based on higher moral principles.[50] Accordingly, morally defective laws cannot be considered as valid laws.[51]

Naturalists are best represented by the St. Augustine and St. Thomas Aquinas who opined that law shall conform to the measurement of justice that is discoverable by reason from natural law. As proponed by Cicero and later on by St. Thomas Aquinas, natural law is a law of God as identified by man through reason.[52] The law that is not in line with natural law is unjust and thereby entails no biding effect on individuals.[53] St. Thomas Aquinas's saying "unjust law is not a law"[54] summarizes the influence that morality has in law in natural law theorists. Moreover, the natural law theory also considers the emperor as "…a representative of God on earth and there was no limit to his power."[55]

3. TEKELEHAWARIAT AND LEGAL POSITIVISM

T*eklehawariat's* lectures on constitution and law had elements of a positivist theory of law proponed by early positivists like John Austin and Jeremy Bentham. *Tekelehawariat* was known to be a proponent of legislation and positivization of law.[56] In addition, even if *Tekelehawariat's* lectures were delivered in 1932 and 1933[57]; long years before H.L.A Hart published his book in 1961[58], there are common features between *Tekelehawarit's* lectures and modern positivist H.L.A Hart.

[49] ALEXY, *supra* note 4.
[50] Simeneh Kiros Aseffa, "Ethiopia's Criminal Law Evolution from the Perspectives of Major Legal Theories: An Overview", 16(2) *MIZAN LAW REVIEW*, 244, 241-272, (2022).
[51] ALEXY, *supra* note 4; Simeneh, *Id*.
[52] WACKS, *supra* note 32, at 3 &5. MCLEOD, *supra* note 37, at 50&53.
[53] WACKS, *supra* note 32 , at 3-5. MCLEOD, *supra* note 37*,* at 50 *&* 53.
[54] WACKS, *supra* note 32, at 4.
[55] Simeneh, *supra* note 50, at 249.
[56] *Id*., at 252.
[57] MAHITEMESELASSIE, *supra* note 3, at 800& 814.
[58] WACKS, *supra* note 32 , at 27.

Like a typical early day's positivist, *Tekelehawariat* defined/characterized law in terms of "command", "sovereignty" and "sanction". Though *Tekelehawariat* did not use these three elements consistently and together in all of his definitions of law, the combined reading of his statements scattered in different parts of his lectures show that "command", "sovereignty" and "sanction" are at the center of his conception of law.

A. Command

In his lecture, *Teklehawariat* stated that "….. law stipulates the rights that can be enjoyed by an individual together with the limits thereto. Law also prescribes, *in command and warnings*, the obligations that everyone shall comply with."[59](translation and emphasis mine) *Tekelehawariat* also added that "law is *a sacred command ordered* to earn absolute respect from individuals as an enormous force shall not be transgressed in any way."[60] (translation and emphasis mine)

The above mentioned definitions of law show that command is an important variable in *Tekelehawariat's* conception of law. However, unlike Austin, who is criticized for not recognizing right conferring laws (civil laws) in his theory of law[61], *Tekelehawariat* stated that "….. law stipulates the rights that can be enjoyed by an individual together with the warning on the limits thereto".[62] (translation mine) *Tekelehawariat* also classified interests as individual and collective interests; encompassing "property interests, the pursuit of knowledge or wisdom, and moral pleasure (love and religion)."[63] As *Tekelehawariat* used the notion of command in a way that accommodates both the imperative and the permissive aspects, this shows that he gave due recognition to laws conferring rights in his definition of law. This is said despite the fact that he used the Amharic phrase "**…..ወሰኖ ያስጠነቅቀዋል**"[64] which can be approximately translated as "…limits and warns" which is a strong expression to be used in relation to rights emanating

[59] MAHITEMESELASSIE, *supra* note 3, at 806. The Amharic text of his definitions reads as "…**ሕግ ለ ሰው እንዲጠቀምበት የሚፈቀድለትን መብት ለይቶ፣ወሰኖ ያስጠነቅቀዋል። ደግሞም እንዲፈፅም ግዴታ የሚሆንበትን ምግባር እያስጠነቀቀ ያዘዋል።**"

[60] *Id.* at 807. The Amharic expression in his lectures read as "**ሕግ ማለት በሰዎች መካከል በቅድስና በንፅህና ተከብሮ ለመኖር የታዘዘ የማይደፈር ፅኑ ሃይል ነውና….**".

[61] MCLEOD, *supra* note 37, at 77.

[62] MAHITEMESELASSIE, *supra* note 3, at 806 . The Amharic expression in the lectures states that "…**ሕግ ለ ሰው እንዲጠቀምበት የሚፈቀድለትን መብት ለይቶ፣ወሰኖ ያስጠነቅቀዋል።**"

[63] Simeneh, *supra* note 50, at 253.

[64] MAHITEMESELASSIE, *supra* note 2, at 806.

from civil laws. But here, though *Tekelehawariat* used command as an important variable in his statements on the definition of law, he did not say that every command is law. Rather, *Tekelehawariat* added requirements regarding the nature and source of the command for it to be considered as law.

In addition to other requirements, according to early legal positivists a rule is valid when it is passed following the right procedure.[65] As the focus of legal positivists is the law "as it is in" the text of the legislations, laws shall be expressed in written form.[66] Likewise, *Tekelehawariat* also shared this requirement of written formality of law. This can be seen from the parts of his lectures that read "law is decided in written form."[67](translation mine) Moreover, he also added that "as the law is published and made accessible, everyone can study the law and used its contents to defend himself."[68] (translation mine) These elements of his lectures show that for *Tekelehawariat,* law is what is stated / published in legislations, which is one of the typical characteristic features of the positivist legal theory.

In the 1931 constitution, promulgation was a mandatory requirement for laws to start their legal effect and the emperor was also expected to ensure the observance of the laws according to the letter and spirit of the law.[69] These requirements of promulgation and duty to enforce laws according to their letter are the manifestations of positivist theory in the 1931 constitution.

B. Sovereignty

The second element of law in *Tekelehawariat's* conception of law is the source of the law. For positivists like John Austin, the source of the law shall be "a sovereign" which is an identifiable human being who himself is not receiving orders/commands from others.[70] In his lectures, *Tekelehawariat* presented that the source of the law is the emperor (Emperor *Haileselasie* or his descendant/s to the throne). In this respect, he stated that " by accepting and respecting *the law*

[65] Simeneh, *supra* note 27, at 250.
[66] MCLEOD, *supra* note 37, at 73.
[67] MAHITEMESELASSIE, *supra* note 3, at 817. The Amharic text of the lectures reads as " **ሕግ የሚወሰነው በፅሀፈት ነው።።**"
[68] *Id*. at 811. The Amharic text of the lectures read as "…….**የሕጉ መፅሃፍ ተፅፎ (ታ·ትም) በየትም እንዲገኝ ተደርጓል እና ማንም ሰው ሕጉን እያጤነ በሕጉ መካችነት ራሱን ከጥቃት ለማዳን ይችላል።።**"
[69] The Constitution of Ethiopia, 16th July 1931, Chapter II, Art 7 and Art 10.
[70] MCLEOD, *supra* note 37, at 73.

given by imperial majesty, we can make our future life promising and certain."[71] (translation and emphasis mine).

Furthermore, as per *Tekelehawarait*, the emperor is the source of the constitution which is the law that establish the Ethiopian state; the law that solidifies his rule; the law that recognized the existing laws and put in place the procedure for adopting new laws in the future. And hence, this depiction of the emperor as the "law giver" shows that *Tekelehawariat* took the emperor as the sovereign source of the law. The 1931 Constitution also clearly stipulated that the sovereign power rests in the hand of the emperor.[72] And the fact that the emperor (*Haileselasie* I or his descendant/s to the throne)[73] is an identifiable human being makes *Tekelehawariat's* conception similar to that of Austin.

When it comes to the question of whether the emperor is obedient to a certain form of authority above him. For instance, Austin presented the sovereign as "… an omnipotent law giver"[74] who is obedient to no-one and there is no restriction imposed on his power in any form.[75] Nevertheless, the opinion that *Tekelehawariat* had on this matter is different from that of Austin. This is said because *Tekelehawariat* presented his lectures in such a way that the emperor's power is limited by the law that he himself gave to the people. In other words, the emperor (sovereign) shall be considered to have willfully limited his power, by the law that he gave to the people.

This is particularly evident from the part of his lecture that reads as "**ንጉሰ ነገስቱ ሕግ በመስጠቱ እና በዚያው የሕዝቡን ጥቅሙን እና ጉዳቱን ጠባቂ በመሆኑ በልዩ የሆነ እድል**

[71] MAHITEMESELASSIE, *supra* note 3, at 808. The Amharic text of the lectures reads as "**ጃንሆይ ለኛ ሕግ በመስጠታቸው እኛም አክብረን በመቀበላችን እና በመፈፀማችን የዚህን ዓለም ትዳራችንን ተስፋ ያለበት ታማኝ ልናደርገው እንችላለን።**"

[72] See, the Constitution of Ethiopia, 16th July 1931, Chapter II, Art 6. This provision reads as "In the Ethiopian Empire *supreme power rests in the hands of the Emperor*. He ensures the exercise thereof in conformity with the established law." (emphasis mine)

[73] *Id*., Chapter I, Art 3. This constitutional provision reads as "The law determines that the imperial dignity shall remain perpetually attached to the line of His Majesty Haile Selassie I, descendant of King Sahle Selassie, whose line descends without interruption from the dynasty of Menelik I, son of King Solomon of Jerusalem and the Queen of Ethiopia, known as the Queen of Sheba."

[74] WACKS, *supra* note 32, at 19.

[75] *Id*.

ከፍተኛ ስልጣን እና መብት ተሰጥቶታል።።"[76] which can be translated as " as the king of kings gave the law, *based on which he protects the interest of the public*, he is granted with special and enormous authority to exercise." (translation mine) This indicates that the emperor's special authority (his entitlement to the throne and legitimacy to administer law) is gained in exchange to his commitment to protect the interest of the people based on the law, which means the law shall be guiding the emperor's actions/decisions. For *Tekelehawariat,* "…..law is the principal instrument of the Monarch to govern its people; it is also a shield for the public in the process of governance."[77] It is the limits imposed on the power of the emperor that would shield members of the public from the emperor's arbitrary actions.

In addition, *Tekelehawariat* also stated that the law that is given by the emperor can only be changed by the emperor, according to the law.[78] *Tekelehawariat* was also said to have criticized the emperor for making the constitution solely as an instrument of protecting his dynasty; without making him under the terms of the constitution.[79] All these show us that *Tekelehawariat* believed in limiting the power of the emperor by law. Indeed, the power of the emperor was limited by the 1931 Constitution because he was duty bound to ensure that the exercise of his sovereign power is in accordance with the established law.[80]

At this juncture, it is worth to make a comparison between Jeremy Bentham's theory and *Tekelehawariat's* lectures. Unlike Austin, Bentham acknowledged the restriction imposed on the power of the sovereign by an express convention.[81] And if we consider the law that the

[76] MAHITEMESELASSIE, *supra* note 3, at 809.
[77] Simeneh, *supra* note 50, at 253.
[78] MAHITEMESELASSIE, *supra* note 3, at 804 & 813. The exact Amharic expressions used in the lectures read as "**ሕግ ያዘዘውን ሁሉ በንጉሰ ነገስቱ ፈቃድ ሕጉ በመታደስ ሊሻረው ይችላል እንጂ ማንም ሌላ ሰው ሊሻረው አይችልም።።** (MAHITEMESELASSIE, *supra* note 3, at 813) **ሕጉን ለማደስ ወይም ጨርሶውኑ ለማስለወጥ እንደ ሕጉ ተመክሮበት ይደረጋል** (MAHITEMESELASSIE, *supra* note 3, at 804) In addition to what has already been stated, the statement that reads "**በጃንሆይ እና በሕዝቡ መካከል የቃል ኪዳን ውል መታሰሩ ለመተባበራችንም ውዴታም ፣ግዴታም ለሁለቱም ወገን ሲሆን ነው እንጅ ላንዱ ወገን ብቻ ሊሆን አይደለም።።**" (MAHITEMESELASSIE, *supra* note 3, at 808) can also be presented to show that *Tekelehawariat* believed that both the emperor as well as members of the general public are below the law that all (including the emperor) should respect the law.
[79] ABERA, *supra* note 2, at 166 ; BAHIRU, *supra* note 2, at 182.
[80] The 1931 Constitution, *supra* note 72, Chapter II, Art 6. The full text of this provision reads as "In the Ethiopian Empire supreme power rests in the hands of the Emperor. *He ensures the exercise thereof in conformity with the established law*. " (emphasis mine)
[81] WACKS, *supra* note 32, at 25.

emperor gave to the people as an "express convention", then we can say that *Tekelehawariat's* opinion on restricting the power of the emperor is similar to Jeremy Bentham's idea. *Tekelehawariat* opined that through the law that was given by the emperor, a (social) contract has been entered between the emperor and the people of Ethiopia.[82]

C. Sanction

Like other positivists, sanction is the other element that was used in *Tekelehawriat's* conception of law. In this regard, *Tekelehawariat* stated that "anyone shall be punished according to law, in case when s/he failed to act according to law or committed an act prohibited by the law."[83] (translation mine) And the other part of his lecture reads "law holds the person who violates its terms liable and transfers him to the organ with a coercive power for punishment."[84] (translation mine) *Tekelehawariat* also added that "one who denies what is permitted by the law or disturbs the peaceful enjoyment of it shall be considered as a rioter and punished by the king." [85] (translation mine).

As it can be discerned from these sentences, for *Teklehawariat* , law, in addition to determining the rights of individuals and what individuals shall do and shall not do, it also provides the punishment that shall be imposed against those who violate the law.

And with respect to the one who is authorized to impose the sanction, *Tekelehawariat* has expressed that the emperor should have the power to inflict the punishment against those who

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[82] MAHITEMESELASSIE, *supra* note 3, at 808. The Amharic text of the statement reads as "…**ስለሆነም ሕግ ከሁሉ የበለጠ የበላይ ሃይል ሆኖ ሊከበር የተገባ ነውና እኛም የኢትዮጵያውያ ተወላጆች ለወደፊት ሕጉን ማክበር ግዴታችንም ውዴታችንም መሆኑን አውቀነው ወደን ቃልኪዳን መግባታችንን ለመቼውም እንዳንረሳው አጥብቀን ልንተጋበት ይገባል።**" But here, Despite Tekelehawarit's appeal to social contract, Simeneh argued that "*Tekelehawariat* is not purely contractarian , in relation to the constitution. Because first, according to his views, the Constitution is granted by the Monarch; second, he rather argued from the collective good perspective that it is for the benefit of both: the public governed under the Constitution and the Monarch who wants to govern the public. …..although the king claims his authority to be divine, that was positivized into the constitution and the signatories were those who had religious, political and social influence at the time." (Simeneh, supra note 50, at 254.)

[83] MAHITEMESELASSIE, *supra* note 3, at 808. The Amharic text of the lecture reads "**ሰው ሕግ ያዘዘውን ሳይፈፅም ቢቀር ወይም ሕግ የወሰነውን ተላልፎ ቢገኝ በሕግ መቀጣት የተገባው ነው።**"

[84] *Id*. at 806. The Amharic text reads as "…. **ሕግ ማለት ከውሉ የተላለፈውን ሰው አላፊ አድርጎ ፈርዶ አስገዳጅነት ላለው ሃይል አሳልፎ ለቅጣት የሚሰጥ ነው።**

[85] *Id*. at 808. The Amharic text reads as "**በሰው ሁሉ በሕግ የተፈቀደለትን አኗኗር ለመከላከል ወይም ሁከት ለማድረግ የሚፈልግ ሰው ……በንጉስም ፊት እንደ አመፀኛ መቀጣት የተገባው ነው።**"

would trespass the law. According to him, the emperor is the one in charge of protecting the interest of individuals according to the law and coercing individuals not to commits what is prohibited by the law.[86] But here, when he referred to the emperor, it does not mean that he referred the emperor personally. Rather, he was referring to the system that the emperor established according to the law. This is specifically clear from the part of his lecture which states that " ....*the imperial majesty's government* has an actual capacity, more than enough, to prevent the violation of law and anarchy."[87] (translation and emphasis mine).

D. *Tekelehawariat* vs. H.L.A Hart

As it has been stated earlier, though *Tekelehawariat* had delivered his lectures a couple of decades earlier than H.L.A Hart published his book (The Concept of Law), there are commonly shared features between *Tekelehawariat's* lecture and Hart conception of law.

First of all, H.L.A Hart made an assumption based on what would otherwise happen on human beings in the absence of law. According to Hart, in the absence of law the life of human being is insecure because of attacks on his life and property coming from other fellow human being. This assertion is based on natural law.[88] And hence, Hart stated that laws are important to protect the life and property of the people and also to make sure that laws themselves are respected.[89]

Tekelehawariat raised points that are similar to the above mentioned idea of H.L.A Hart. One of the points to be mentioned in this respect is his characterization that portrayed life without law as "nothing but full of uncertainties, mayhem and persecution."[90] And as a way-out from this predicament of life, *Tekelehawariat* opined that accepting and being committed to respect the law that the emperor had given will change life (to the better) and make it certain, secured and hopeful.[91] *Tekelehawariat's* characterization of life with law is similar to Thomas Hobbes who

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[86] *Id*.
[87] MAHITEMESELASSIE, *supra* note 3, at 813 "……**እንደዚሕ ያለው ስራ እንዳይደረግ የንጉሰ ነገስቱ መንግስት ሃይል በጣም የበቃ መሆኑን መናገር የማያስፈልግ ትርፍ ነገር ይመስለኛል።**"
[88] WACKS, *supra* note 32, at 28.
[89] *Id*.
[90] MAHITEMESELASSIE, *supra* note *3* at 809; the Amharic words of the lectures reads as "……..**ሕግ ባይኖር ከግፍ እና ከበደል በቀር ምንም ታማኝነት ለመሆን የሚበቃ ተስፋ አይገኝምና ልባችንም ይሰንፍብን ነበር።**"
[91] *Id*. at 808, the exact Amharic text reads as "**ጃንሆይ ለኛ ሕግ በመስጠታቸው እኛም አክብረን በመቀበላችን እና በመፈፀማችን የዚህን ዓለም ትዳራችንን ተስፋ ያለበት ታማኝ ልናደርገው እንችላለን።**"

described life in the state of nature as " …continual fear and danger of violent death ; and the life of man, solitary, poor, nasty, brutish and short."[92]

Moreover, H.L.A Hart drew a line differentiating "to be obliged to respect the law" and "….to be under obligation to respect the law".[93] While the former shows the effect of sanction in making people to comply with the law, the later represents the sense of responsibility in the mind of the people that makes them to respect law, without the need of sanction.[94]

Like H.L.A Hart, *Tekelehawariat*, put other deriving force (other than sanction) that should make people respect the law. In this respect, he raised social contact and the importance of honoring/ respecting words/ promises entered in the social contact/pact. This is inferred from the statement in his lecture that reads "As the law should be above all and respected, we Ethiopians should duly acknowledge that it is incumbent up on us to respect the law and always remember that it is a pact that we willfully entered in to."[95] (translation mine).

The quoted statement of *Tekelehawariat's* speech shows that he, in addition to sanction, presented the idea of "respecting promises" as deriving force that will/should make individuals to comply with the law. This is related to what H.L.A Hart described as internal element that leads people to feel that they are "...under obligation to respect the law". However, unlike Hart, *Tekelehawariat* took a presumption about the existence of a social contract/pact agreed by all. Based on this presumption he formulated people's obligation to respect the law/ their promises.

The other point of similarity between H.L.A Hart concept of law and *Tekelehawarit* lecture is regarding primary and secondary rules. As it is stated earlier, H.L.A Hart took law is composed of primary and secondary rules. [96] Though *Tekelehawariat* did not make a clear classification of law as primary and secondary rules, there are statements in his lecture that can be taken as

[92] MCLEOD, *supra* note 37, at 56
[93] HART, *supra* note 43, at 82 &83; Albanian, *supra* note 47.
[94] *Id*.
[95] MAHITEMESELASSIE, *supra* note 3, at 808. The Amharic text of the statement reads as "**ስለሆነም ሕግ ከሁሉ የበለጠ የበላይ ሃይል ሆኖ ሊከበር የተገባ ነውና እኛም የኢትዮጵያውያ ተወላጆች ለወደፊት ሕጉን ማክበር ግዴታችንም ውዴታችንም መሆኑን አውቀነው ወደን ቃልኪዳን መግባታችንን ለመቼውም እንዳንረሳው አጥብቀን ልንተጋበት ይገባል።**"
[96] HART, *supra* note 43; Starr, *supra* note 41 at 676; WACKS , *supra* note 31 at 29.

reference to primary and secondary rules. For instance, one of his definition/characterization of law reads as "…. law stipulates the rights that can be enjoyed by an individual together with the limits thereto. *Law also prescribes, in command and warnings, the obligations that everyone shall comply with*."[97] (translation and emphasis mine) When this is seen in the light of Hart's theory that considered primary rules as obligation imposing rules[98], the quoted statement of *Teklehawariat* can be taken as reference to primary rules.

In addition to primary rules, *Tekelehawariat* also referred to secondary rules *i.e.* rules of change and rules of recognition. This is particularly evident from the statements that talks about how new laws shall be enacted and how the existing laws shall amended or repealed. In this respect, *Tekelehawariat* noted the practical difficulty in legislating laws in all subject matters at once.[99] And hence, he opined that should legislating additional laws are needed, the House of People's Representative deliberate and approve the draft bill and later approved by the emperor and proclaimed as law.[100] And should there be a need to amend or repeal an existing law, it shall be done following the procedures established by law.[101] In addition, *Tekelehawariat* also stated that " law is decided in written form."[102] (translation mine). All these statements of the lectures are about rules of change and rules of recognition.

The 1931 Constitution also incorporated rules of change and rules of recognition. In this respect, "no law shall be put in force before it is discussed by the chambers and confirmed by the

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[97] MAHITEMESELASSIE, *supra* note 3, at 806.

[98] HART, *supra* note 43 at 79 ; Starr, *supra* note 41, at 676; WACKS , *supra* note 32, at 29.

[99] MAHITEMESELASSIE, *supra* note 3, at 809 , The Amharic texts on this points reads as "**የመንግስት አቋቋም የሚሆነው መሰረት ሲተከል ሕግም ሲወሰን ለየዝርዝሩም ጉዳይ የሚሆነው ውሳኔ ሁሉ ባንድ ጊዜ ተጠንቅቆ ሊነገር ሊደረግም አይችልም።**"

[100] *Id*. at 810. The relevant part of the lecture on these points reads as "……**ጃንሆይ ለመንግስታቸው አቋቋም መሰረት ተክለው ,ለሕግ አወሳሰን ለሕዝባቸው ነፃነትን ፈቀዱ ….. እንደ አገሩ ልማድ እንደ ሕዝቡ እውቀት እንደ ትዳሩ ችግር እና እንደ ጊዜው ፈሊጥ እንዲሆንለት ብለው ራሱ ሕዝቡ የሚስማማውን እየመከረ…….ሃሳቡን እያመለከተ እንዲኖር ፈቀዱለት።። በዚህ አግባብ በምክርቤት …..እየተመረመረ …..ሕግ ለመሆን የበቃ ሲሆን የንጉሰ ነገስቱ ስልጣን እያፀደቀው ሊታወጅ ነውና ከዚህ የተሻለ አወሳሰን ላሁኑ ጊዜ አይገኝለትም።**"

[101] *Id.* at 804. And on this point the lecture reads as "**ሕጉን ለማደስ ወይንም ጨርሶ ለማስለወጥ እንደ ሕጉ ተመክሮበት ይደረጋል።** "

[102] *Id*. at 817. The Amharic texts on this points reads as " …**ሕግ የሚወሰነው በ ፅሀፈት ነው።**"

emperor".[103] Furthermore, the constitution also contains detailed provisions regulating the initiation, deliberation and adoption of laws.[104]

4. TEKELEHAWARIAT AND NATURAL LAW THEORY

Tekelehawariat's lectures are not only reflective of positivist legal theory. Rather, there are few elements in his lectures having similar contents with natural law legal theory. One of the aspects in the lectures showing feature of natural law theory is what he said with respect to an ideal quality of a human being. As such, *Tekelehawariat* stated that "The greatness of a human being is manifested in his character of employing reason to identify the law of God and abiding the same."[105] (translation mine) Natural law theory proponed by Cicero and later on by St. Thomas Aquinas stated that natural law is a law of God as identified by man through reason.[106] And *Tekelehawariat's* association of the great qualities of a human being with law of God and reason indicates his naturalist thought about law.

Moreover, *Tekelehawariat* also included the following statement in his lecture.

> Ethiopia has been recognized as a state for more than three thousand years. Since then, Ethiopia has been stretching her hands towards God and patiently waiting for a gift. And today she received the blessing of God through the hands of your majesty.[107](translation mine).

This shows *Tekelehawariat's* appeal to natural law as a source of positive law. This is similar to the commentary of Sir William Blackstone that considered laws of England as if they are derived from natural law.[108] Moreover, *Tekelehawariat* characterized the emperor as "someone who is appointed to be below God and above the rest of the public and is the first to be elected in terms

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[103] The 1931 Constitution, *supra* note 72, Chapter IV, Art 34.
[104] *Id*., Chapter IV, Art 30-47 on "Deliberative Chambers of the Empire."
[105] MAHITEMESELASSIE, *supra* note 3, at 801. The exact text of the lecture reads as "**የሰው ታላቅነቱ በልዩ የሚታወቀው የፈጣሪውን ሕግ እየተመራመረ በመግለፁ እና ያንኑም በመከተሉ ነው።**"
[106] WACKS, *supra* note 32, at 3 &5. MCLEOD, *supra* note 37, at 50&53.
[107] MAHITEMESELASSIE, *supra* note 2, at 801. The exact Amharic texts reads as "**ኢትዮጵያ በመንግስትነት ከታወቀች ከ ሶስት ሽህ ዘመን በላይ ይበልጣል። ከዚያን ዘመን ጀምሮ እስከ ዛሬ እጆቿን ወደ ሰማይ ዘርግታ አንዳች ታላቅ ችሮታ በትእግስት ስትጠባበቅ ቆይታ ነበርና፣ ዛሬ የእግዚያብሄር ቡራኬ በግርማዊነታዎ እጅ ለመታደል ደረሳት።**"
[108] WACKS, *supra* note 32, at 4.

of right, authority and conduct."[109] This characterization of the emperor and his responsibility based on divine assumptions shows the natural law elements of *Tekelehawarit's* lecture. This is also somehow reflected in the 1931 constitution which stipulates that the emperor is anointed by virtue of his imperial blood line descending from the dynasty of *Menelik I*, son of King Solomon of Jerusalem and the Queen of Sheba; that makes him sacred and endowed with indisputable power.[110]

But here, though natural law theory considered the king as "…a representative of God on earth and there was no limit to his power"[111], *Teklehawariat* put limits to the power of the king by stating that the king has the responsibility to respect the law of God and to rule his people based on law.[112] The power of the emperor was also limited by the 1931 Constitution because he was duty bound to ensure that the exercise of his sovereign power is in accordance with the established law.[113]

CONCLUSION

Tekelehawarit Tekelemariam, who was the drafter of the 1931 constitution, delivered two rounds of lectures for member of the nobility and ruling class. When these lectures are evaluated against the two legal theories, namely positivist legal theory and natural law theory, it can be concluded that they are dominantly reflective of the positivist legal theory proponed by early positivists like John Austin and Jeremy Bentham, which can also be seen in some provisions of the 1931 constitution.

Tekelehawariat defined/characterized law in terms of "command", "sovereignty" and "sanction". For him, law is command of the emperor *Haileselasie*, who was the source of the law and

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[109] MAHITEMESELASSIE, *supra* note 3, at 815. The Amharic text reads as "**ንጉስ ማለት ከእግዚአብሄር በታች ከሕዝብ በላይ ሆኖ ተሰይሞ በመብት እና በስልጣን በምግባርም ከሁሉ ይበልጥ ቀደምት ባለብልጫ ለመሆን የተመረጠ ነው።**"

[110] The 1931 Constitution, *supra* note 49, Art 3 and 5. See, foot note number 73 for the full contents of Art 3 of the constitution. And Art 5 of the constitution reads as "By virtue of his imperial blood, as well as by the anointing which he has received, the person of the Emperor is sacred, his dignity is inviolable and his power indisputable. He is consequently entitled to all the honors due to him in accordance with tradition and the present Constitution. The law decrees that anyone so bold as to seek to injure His Majesty the Emperor will be punished.

[111] Simeheh, *supra* note 50, at 249.

[112] MAHITEMESELASSIE, *supra* note 3, at 815.

[113] The 1931 Constitution, *supra* note 72, Chapter II, Art 6.

empowered and capable of administering punishment against those who violated the law. Though, not in all the cases, the 1931 constitution also used law in a way that reflects these three elements. Nevertheless, unlike Austin, *Tekelehawariat* did not recognize an absolute power of the sovereign. In this respect, *Tekelehawariat* shared similar thoughts with Bentham than Austin. Art 6 of the constitution also put restrictions on the sovereignty of the emperor.

Tekelehawariat presented written formality of law that "law is decided in written form". This shows that he took law "as it is" in texts of the legislation than "as it ought to be" which is a legal positivist outlook that is also seen under Art 7 and 10 of the constitution.

In addition, there are also features that are commonly shared between *Tekelehawariat's* lectures and H.L.A Hart theory of law, who was modern positivist. The features to be mentioned in this respect includes the characterization that portrayed life without law as "nothing but full of uncertainties, mayhem and persecution." In addition, to primary rules, *Tekelehawariat* also incorporated ideas about "rules of change" and "rules of recognition", which H.L.A Hart called them as "secondary rules". In this regard, provisions from Art 30- 47 concerning the initiation, deliberation and adoption of legislations can be taken as elements of secondary rules in the 1931 constitution.

Moreover, Like H.L.A Hart, *Tekelehawariat*, put other deriving force (other than sanction) that should make people respect the law. On this point he raised social contact and the importance of honoring/ respecting words/ promises entered in the social contact/pact as the reason that should make people respect the law.

When it comes to the natural law elements of the lectures, *Tekelehawariat* stated that "the greatness of a human being is manifested in his character of employing reason to identify the law of God and abiding the same." This is similar to the natural law theory proponed by Cicero and St. Thomas Aquinas. In addition, he also presented that Ethiopia had been stretching her hands toward God and patiently waiting for a gift that received through the hands of the emperor. This association of law and divinity is another indication of natural law theory. This aspect can be seen under Art 5 of the 1931 Constitution.

Despite the existence of the above mentioned natural law thoughts, natural law cannot be taken as the dominant theory reflected in *Tekelehawarit's* lecture. Though he referred to law of God and reason, he did not expressly make them a validity requirement for the law of man (as it is given by the emperor). As a result, it is not clear on the relationship that should exist between the law of God and the law that the king should use to rule the people. This shows that *Tekelehawarit's* lectures are not that much committed to natural law theory than legal positivism.