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Editorial – A Message from the Editorial Committee

Dear authors, reviewers, and readers:

It gives us immense pleasure to wish you all a Happy New Year 2023 from the *International Journal of Ethiopian Legal Studies* (IJELS). We feel honored and fortunate to be a part of this peer-reviewed international journal and are working as a highly effective team to ensure it continues to be a trusted source in the field of legal science.

We are delighted to publish Volume 7 No. 1 of the IJELS. The Editorial Committee extends its gratitude to those who keep on contributing and assisting us in various ways. Importantly, we are grateful to all manuscripts contributors, reviewers, and layout editors who did the painstaking editorial work of this issue. As in our previous issue, the Committee would like to amplify that the IJELS is destined to serve as a forum for the scholarly analysis of Ethiopian law and contemporary legal issues. It encourages professionals to conduct research works in the various areas of law and practice. Research works that focus on addressing existing problems, or those that contribute to the development of the legal jurisprudence as well as those that bring wider national, regional, supranational and global perspectives are welcome. The Editorial Committee makes a call to all members of the legal profession, both in academia and in the world of practice, to assist in establishing a scholarly tradition in this well celebrated profession in our country. The past few years have shown an increase in scholarly papers from different legal practitioners. However, more needs to be done for the research and writing community to put their imprints on the legal and institutional reforms that are still underway in Ethiopia and beyond. It is highly praiseworthy to conduct a close scrutiny of the real impacts of old and new laws upon the social, political, economic and cultural life of our society today. It is equally important to study and identify areas that really demand legal regulation and to advise the legislature to issue appropriate legal instruments in time. In this process, the IJELS serves as a forum to make meaningful contributions to our society and to the international community at large.

As we move forward, we expect our readers to provide us feedback that will inform us on how we are satisfying their needs and the extent to which they feel we are fulfilling our mandate to publish a scientific journal that provides the highest quality literature that is both informative and practical for students, researchers and practitioners in the field.

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

Bebizuh Mulugeta Menkir*

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.

JUDICIAL INDEPENDENCE AND THE PROTECTION AND ENFORCEMENT OF HUMAN RIGHTS IN FEDERAL COURTS IN ETHIOPIA: THE NEED TO WALK THE CONSTITUTIONAL TALK

Nega Ewunetie Mekonnen* ; Demelash Kassaye Debalkie**

Abstract

This article examines the role of the Ethiopian federal judiciary in the protection and enforcement of human rights from the perspective of judicial independence. Specifically, it examines the interplay between judicial independence and the protection of human rights and the implications of the manifestations of institutional and personal independence of the judiciary on the role of courts in the enforcement and protection of human rights. The article mainly uses the relevant literature, the relevant laws (domestic legislation, treaties, and international jurisprudence), concluding observations and recommendations of different human rights monitoring bodies, recommendations of the Ethiopian Human Rights Commission, internationally and regionally accepted legal principles, standards, and guidelines, different documents, and empirical data collected through interviews and focus group discussions as sources of data. The interviews and focus group discussions involved federal court judges, public prosecutors, and attorneys. A thorough examination of the law and the collected and analyzed data reveal that the institutional and personal independence of the federal judiciary is not protected in law and practice. As a result, federal courts cannot play a significant role in the adjudication and enforcement of human rights in Ethiopia.

Keywords: Ethiopia, Federal courts, Institutional Judicial Independence, Personal Judicial Independence, Protection of Human Rights.

INTRODUCTION

There is no doubt that having an independent and impartial judiciary is a prerequisite for the protection of human rights.[1] In particular, the right to a fair trial cannot be conceived in the

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[1] Letsebe Piet Lesirela, "Providing for the Independence of the Judiciary in Africa: A Quest for the Protection of Human Rights", LLM Thesis (unpublished), The Catholic University of Central Africa, the Faculty of Social and Management Sciences, (2003), at 19.

absence of an independent and impartial judiciary. Moreover, a "fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law."[2]

Commonly, judicial independence is conceptualized as freedom from interference from the two contending branches of the government, the legislative and executive branches, both institutionally and personally.[3] The independence of the judiciary and the protection of human rights are mutually reinforcing. An independent judiciary is a prerequisite for the protection of human rights. The UN HRC has underscored the role of an independent judiciary for the enforcement and protection of human rights. In its Resolution, the Council underlined that an independent and impartial judiciary, among other things, is a prerequisite for the protection of human rights and the application of the rule of law.[4] Writers such as Javier Couso capitalize on the role of an independent judiciary in the enforcement of human rights and argue that judicial independence is essential and a *sine qua non-element* for the effective enforcement and protection of human rights.[5]

This article empirically examines the independence of the judiciary and its role in the protection of human rights in the federal courts of Ethiopia.[6] In addition to the relevant laws, the article employs empirical data as a source of information. Empirical data were mainly collected from selected judges, public prosecutors, and attorneys through interviews and focus group discussions (FGDs) in federal courts in Addis Ababa and Dire Dawa. Empirical data were collected from a total of 17 interviewees, including judges, public prosecutors, attorneys, and a director from the Federal Judicial Administration. In addition, empirical data were collected from three FGDs, each composed of attorneys and public prosecutors, attorneys, and judges. Interviewees who hold positions such as a representative judge, the Deputy Director General at the Ministry of Justice, the Public Prosecutor and Coordinator of Economic Crimes, and the

[2] UN Human Rights Committee, "Right to Equality Before Courts and Tribunals and to a Fair Trial", General Comment No. 32, Article 1423 August 2007, CCPR/C/GC/32

[3] *See* Ishmael Gwunireama, The Executive and Independence of the Judiciary in Nigeria, Pinsi Journal of Art, Humanity and Social Studies, Vol. 2, No. 1, (2022).

[4] UN Human Rights Council, "Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers", 16 June 2020 available at: file:///C:/Users/DELL/Downloads/A_HRC_RES_44_9-EN.pdf (accessed 25 July 2022).

[5] Javier Couso, *Sine Qua Non*: On the Role of Judicial Independence for the Protection of Human Rights in Latin America, 33 *Neth. Q. Hum. Rts.* (2015), at 252.

[6] Note that Ethiopia is a federal country, and state courts are not within the scope of this article.

Judgement Inspection Director at the Federal Judicial Administration Council were purposefully selected because of the position they had assumed. Other research participants in the interview and in the FGDs were selected because of their availability at the time of data collection and willingness to participate.[7]

The article discusses how judicial independence contributes to the judicial protection and enforcement of human rights in Ethiopia. The article examines the interplay between judicial independence and the protection of human rights. It scrutinizes the independence of the judiciary in the selection and appointment procedures of judges, budgetary issues, the infrastructure of courts, and the implications of these manifestations of institutional and personal independence of the judiciary on the role of courts in the enforcement and protection of human rights. The article ends with concluding remarks and corresponding recommendations.

1. THE MEANING OF JUDICIAL INDEPENDENCE

Judicial independence refers to the principle that courts should not be subject to improper influence from the executive and legislative branches of government.[8] The goal of judicial independence is to enable judges to make decisions based solely on the law and the facts of the case, free from interference or influence from the two branches of government.[9] In effect, this enables the judiciary to act as a check on the other branches of government, promoting the rule of law and safeguarding human rights and freedoms.[10]

Pragmatically, judicial independence can also be defined as a response and solution to concrete problems that the judiciary may naturally face. In this regard, John Bell identifies particular problems from the perspective of judicial independence.[11] These are the following: courts seen as politicized institutions; political influence on judicial decisions; political influence over the

[7] This research partly uses some of the primary empirical data collected by members of the research team from Bahir Dar University, School of Law (in which the first author was a member), who were employed by the Federal Justice and Law Institute to conduct assessments on the causes of judicial misconduct at the Ethiopian federal courts.
[8] *See* Gwunireama, *supra* note 3.
[9] Basic Principles on the Independence of the Judiciary, Adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 Aug. to 6 Sept. 1985, and endorsed by General Assembly resolutions 40/32 of 29 Nov. 1985 and 40/146 of 13 Dec. 1985, Principle 2.
[10] Gretchen Helmke & Frances Rosenbluth, "Regimes and the Rule of Law: Judicial Independence in Comparative Perspective", Annual Review of Political Science, No. 12, (2009), at 345–366.
[11] John Bell, "Judicial Cultures and Judicial Independence", 4 Cambridge Y.B. Eur. Legal Stud., (2001-2002).

allocation of resources for justice; political involvement in the selection and career progression of judges; and the involvement of judges in extrajudicial activities.[12] According to Bell, the meaning given to judicial independence should reflect this, and its constitutive elements are expected to reflect this in such a way that the judiciary can naturally face and curtail these and other practical problems. It is possible to argue that, although the magnitude and severity might differ from jurisdiction to jurisdiction, the problems that are potentially posed by the executive and legislative branches of government and, to some extent, by the judiciary itself are the problems of every judicial system. In effect, "[b]y separating the adjudicatory function and placing it in a body independent of the political branches, we promote impartiality, fairness, and regularity in the interpretation and application of law-benefits that can be viewed together as a form of public or collective good."[13]

Judicial independence, as a generic term, entails both personal and institutional independence. In the following sections, after discussing the nexus between judicial independence and the protection of human rights, we examine judicial independence from the perspective of these two components in general and in the context of the Ethiopian legal and judicial systems in particular.

2. THE NEXUS BETWEEN JUDICIAL INDEPENDENCE AND THE PROTECTION OF HUMAN RIGHTS

As "[t]he judicial system in a country is central to the protection of human rights and freedoms,"[14] the independence of the judiciary forms the bedrock of a fair and just legal system in which human rights are protected and duly enforced. An independent judiciary serves as a shield, protecting human rights from potential violations by other branches of government, individuals, or powerful entities, including non-state actors. As Alemayehu G. Mariam argues, "[w]here there is a high degree of judicial independence, there is also likely to be a high degree of respect for human rights and civil liberties, political stability, and other effective democratic

[12] *Id*., at 50-51.
[13] John A. Ferejohn and Larry D. Kramer, Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint, New York University Law Review, Vol. 77, (2002), at 967.
[14] International Principles on the Independence and Accountability of Judges, Lawyers, and Prosecutors, A Practitioners' Guide Series No. 1, International Commission of Jurists, Geneva, 1 (2004).

institutions."[15] In particular, judicial independence guarantees fair trial rights, access to justice, and the application of the law without fear or favor. Without judicial independence, human rights can be easily undermined, leading to arbitrary and unjust decisions that erode the rule of law.[16]

Keith S. Rosenn depicts the role of an independent judiciary in society as follows: "Societies in which justice is rarely obtainable tend to be highly unstable. Furthermore, the personal and transactional insecurity arising from the type of justice delivered by a dependent judiciary is likely to retard socio-economic development by deterring productive economic activity."[17] This researcher shares Rosenn's opinion, but would like to examine the impact of an independent judiciary further. The researcher believes that a non-independent judiciary not only retards socioeconomic development and the society in which it operates tends to be highly unstable, but also fails to create an environment conducive to the protection and enforcement of human rights. An independent judiciary plays a key role in safeguarding basic rights and freedoms. It is generally agreed that "[independent] judges play the crucial role of checking executive overreach, protecting against corruption, and upholding core human rights, including freedom of speech and assembly, physical integrity and due process, and the rights of marginalized communities."[18] Through impartial adjudication, judges ensure the protection of civil liberties, such as freedom of speech, assembly, religion, and the right to privacy. They act as guardians of fundamental rights, preventing the arbitrary restriction or violation of these rights, and thus reinforce democratic values in society. The ability of the judiciary to exercise its powers without interference is indispensable for upholding fundamental human rights.

Under international human rights law, judicial remedies are not the only means of ensuring effective remedies. In addition to judicial remedies, administrative and other remedies can be

[15] Alemayehu G. Mariam, "Human Rights Matters in the New Millennium: The Critical Need for an Independent Judiciary in Ethiopia", *International Journal of Ethiopian Studies*, 123 (2008).
[16] *See* Ines Vargas, The Independence of the Judiciary and the Protection of Human Rights, 7 Mennesker og Rettigheter, (1989), at 3.
[17] Keith S. Rosenn, "The Protection of Judicial Independence in Latin America", 19 *U. Miami Inter-Am. L., Rev.* Vol. 19, No.1, 8 (1987).
[18] Margaret Satterthwaite, UN Special Rapporteur on the Independence of Judges and Lawyers, Speech During the Opening Session of the Asia Pacific Justice Forum (December 8-9, 2022, available at https://worldjusticeproject.org/news/role-independent-judiciary-protecting-rule-law (accessed 27 July 2022).

used to redress human rights infringements.[19] However, international human rights law imposes a duty on states to investigate, prosecute, and use judicial mechanisms to remedy violations in cases of gross human rights violations.[20] The obligation of states to investigate, prosecute, and punish gross violations is important to prevent such violations.[21] The duty of states to investigate and prosecute serious human rights violations can be seen from the perspective of the rights to justice of victims of human rights violations, and it can be established from a close reading of the provisions of different international human rights instruments and principles.

Articles 4 and 5 of the Genocide Convention; Article 4 of the CAT; Articles 3, 7, 9, and 11 of the ICPPED; Article 6 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; and Principle 19 of the Updated Set Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity impose the duty on states to investigate and prosecute serious human rights violations. The ability of states to discharge this obligation very much depends on having an independent judicial mechanism, as the investigation and prosecution of serious human rights violations are inconceivable without an independent and impartial judiciary. The importance of having an independent judicial mechanism for the investigation and prosecution of serious human rights violations is subsumed under the Updated Set Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity. According to these Principles, when national courts cannot offer satisfactory guarantees of independence and impartiality or are materially unable or unwilling to conduct effective investigations or prosecutions, international and internationalized criminal tribunals may exercise concurrent jurisdiction.[22] To ensure accountability and combat impunity, an independent judiciary holds all individuals, including those in power, accountable for human rights violations. By doing so, an independent judiciary

[19] For instance, the right to administrative remedy, in addition to judicial and other remedies, is recognized under Article 2(3)(b) of the ICCPR.

[20] Gross violations of human rights include torture and similar cruel, inhuman, or degrading treatment; extra-judicial, summary, or arbitrary executions; slavery; enforced disappearances; and rape and other forms of sexual violence of comparable gravity. *See* United Nations, Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice, (2010), at 4.

[21] United Nations, Guidance Note of the Secretary General on Transitional Justice: A Strategic Tool for People, Prevention and Peace, (2023), at 16.

[22] Commission of Human Rights, Updated Set Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Report of the Independent Expert to Update the Set of Principles to Combat Impunity, E/CN.4/2005/102/Add.1, (2005), Principle 20.

acts as a check on the executive and legislative bodies, ensuring that their actions adhere to constitutional provisions and international human rights obligations.[23] By ensuring that justice is served impartially and fairly, an independent judiciary discourages impunity. When the judiciary is free from external pressures or political interests, perpetrators of human rights abuses can be brought to justice, enhancing the protection of human rights.[24] Therefore, as Javier Couso convincingly argues, "notwithstanding how sophisticated and refined our understanding of rights is, without the structural support of a truly independent judiciary, human rights would continue to be systematically violated even under democratic regimes."[25]

The interplay between the independence of the judiciary and the protection of human rights is addressed in the resolutions of the General Assembly of the United Nations, human rights instruments, and the general comments of human rights monitoring bodies. In its resolutions, the UN General Assembly underlined the nexus between judicial independence and the protection and enforcement of human rights. In this regard, it acknowledges that an independent judiciary is essential to the full and non-discriminatory realization of human rights and indispensable to democratization processes and sustainable development.[26] In addition to the resolutions of the UN General Assembly, international and regional human rights instruments recognize the right to a fair trial by "an independent and impartial tribunal."[27] The UDHR, the ICCPR, the Convention on the Rights of the Child, and human rights monitoring bodies, in their general comments and communications, underline the nexus between judicial independence and the judicial protection and enforcement of human rights. According to Article 10 of the UDHR, "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." Similarly, Article 14 of the ICCPR states that "in the determination of any criminal charge

[23] *See* Linda Camp Keith, Judicial Independence and Human Rights Protection around the World, 85 Judicature, (2001).
[24] For a comprehensive review of academic works on the nexus between judicial independence and the protection of human rights, *see* Randall Peerenboom, Human Rights and Rule of Law: What's the Relationship?, *Georgetown Journal of International Law*, Vol. 36, (2005).
[25] Couso, *supra* note 5, at 257.
[26] General Assembly, Human Rights in the Administration of Justice, G.A. res. 50/181, U.N. Doc. A/RES/50/181, (1995), Para. 2; General Assembly, Human rights in the administration of justice, G.A. res. 48/137, 48 U.N. GAOR Supp. (No. 49) at 256, U.N. Doc. A/48/49 (1993), Para. 4.
[27] International Principles on the Independence and Accountability of Judges, Lawyers, and Prosecutors, *supra* note 14, at 15.

against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." Rights and obligations in a suit at law should be determined by a judiciary that is independent of the executive and legislative branches of government.[28] The Human Rights Committee is of the view that the right to be tried by an independent and impartial tribunal is an absolute right that does not allow any limitation.[29] In addition, the Committee against Torture underscored the role of an independent judiciary in enforcing the principle of legality.[30] Moreover, in its general comment, the Committee underlined the obligation of state parties to take actions that will reinforce the prohibition against torture through judicial actions that must, in the end, be effective in preventing it and make available to detainees and persons at risk of torture and ill-treatment judicial and other remedies that will allow them to have their complaints promptly and impartially examined, to defend their rights, and to challenge the legality of their detention or treatment.[31] The Convention on the Rights of the Child provides for the right of a child to have access to an independent judiciary to challenge the legality of the deprivation of his or her liberty.[32]

By faithfully interpreting international treaties and conventions, judges can ensure consistency and adherence to global human rights norms, providing redress for victims of human rights violations. From this, one can understand that the right to be tried by an independent and impartial tribunal, as a human right obligation of a state, is a human right by itself, and it is also a means to enforce human rights. Hence, the independence of the judiciary can be considered "an essential requirement of the guarantee of human rights and freedoms."[33]

[28] Human Rights Committee, General Comment No. 32, *supra* note 2. Para. 18.
[29] Human Rights Committee, Communication No.263/1987, Case of *Miguel González del Río vs. Peru*, *op. cit*., Para. 5.2, cited *in* International Principles on the Independence and Accountability of Judges, Lawyers, and Prosecutors, *supra* note 14, at 15.
[30] Committee against Torture, Concluding Observations: Nicaragua, CAT/C/NIC/CO/1, (2009), Para.12.
[31] Committee against Torture, General Comment No. 2, Implementation of Article 2 by States Parties, CAT/C/GC/2, (2008), Para. 2 and 13.
[32] Convention on the Rights of the Child, Article 37(d). It should also be noted that the nexus between judicial independence and the judicial protection and enforcement of human rights is addressed under Articles 7 and 26 of the African Charter on Human and Peoples' Rights.
[33] The Universal Charter of the Judge, approved by the International Association of Judges (IAJ), (1999).

3. JUDICIAL INDEPENDENCE IN ETHIOPIA: LEGAL AND INSTITUTIONAL FRAMEWORKS

In many jurisdictions, the legitimacy of the judiciary in general and the recognition of judicial independence in particular "stem from the constitution,"[34] the legal culture, and the political experience of the nation in question also matter. However, it is in the domain of common knowledge that the constitutions of Ethiopia are notoriously short-lived and often violated. In the constitutional history of Ethiopia, four constitutions were adopted in less than seven decades. In this regard, Rosenn's description of the constitutions of Latin American countries also applies to the constitutional history and culture of Ethiopia: "Each *golpe* ruptures the preexisting constitutional order, leaving the judiciary in the unenviable position of trying to maintain a *de jure* institutional authority in a *de facto* regime."[35] This constitutional instability, coupled with a long history of monarchy and authoritarian rule, limited the independence of the judiciary. In the following subsection, an overview of judicial independence under the 1995 FDRE Constitution is provided.

3.1 Judicial Independence under the FDRE Constitutional Framework

The FDRE Constitution explicitly acknowledges and establishes an independent judiciary. Articles 78 and 79 outline the constitutional mandate of the judiciary. Article 78(1) of the Constitution establishes an independent judiciary. In particular, the Constitution prohibits the establishment of "special or ad hoc courts which take judicial powers away from the regular courts or institutions legally empowered to exercise judicial function and which do not follow legally prescribed procedures."[36]

In addition to the explicit constitutional recognition of the establishment of an independent judiciary under Articles 78 and 79 of the Constitution, other constitutional provisions reinforce the constitutional recognition of an independent judiciary. One such constitutional recognition is the separation of powers. The Constitution provides for the separation of powers, a fundamental

[34] Rosenn, *supra* note 17, at 33.
[35] *Id*.
[36] Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, Federal Negarit Gazette, 1st Year No.1, Article 78 (4).

principle that reinforces judicial independence.[37] In this regard, the most important avenue that helps secure judicial independence is the power of judicial review. As John A. Ferejohn and Larry D. Kramer convincingly argue, "[f]or many, the question of judicial review and the question of judicial independence are one and the same [...]."[38]Conferring constitutional decision-making power upon the House of Federation instead of the judiciary has been identified as one of the "practical and structural impediments to judicial independence that remain to be addressed and overcome."[39] Even if the power of judicial review is not vested in courts, by dividing powers among the executive, legislative, and judicial branches, the Constitution promotes checks and balances, preventing any branch from overpowering the others. In principle, this separation of powers allows the judiciary to act impartially, free from the influence of other branches of government.

With regard to the personal independence of the judiciary, the Constitution provides that judges shall be independent and directed only by the law.[40] Legally, these constitutional provisions protect the judiciary from undue interference, ensuring its independence in decision-making processes. In addition to the constitutional guarantee, Ethiopia has enacted different laws to strengthen judicial independence. The Federal Judicial Administration Proclamation is one of such laws.[41] This Proclamation established the Judicial Administration Council, a separate body responsible for the administration and appointment of judges. This body is composed of members from various branches of the government, the judiciary, the Ethiopian Bar Association, a legal academician, and others,[42] ensuring a multi-stakeholder approach to judicial administration and reducing the possibility of executive control over the judiciary. According to the Federal Judicial Administration Proclamation, in the administration of justice, it is important to ensure that courts exercise their judicial functions free of all internal and external influences and in the spirit of complete independence; establish a legal framework and procedures that ensure transparency, impartiality, and public confidence in the process by which judges are appointed, as well as by ensuring that members of the judiciary conduct their judicial functions

[37] *Id.,* Articles 50 (2), 55, and 72-79.
[38] Ferejohn and Kramer, *supra* note 13, at 1033.
[39] Ethiopia, Legal and Judicial Sector Assessment, The International Bank for Reconstruction and Development/the World Bank, (Washington Dc, First Publication), 24 (2004).
[40] Constitution of the Federal Democratic Republic of Ethiopia, *supra* note 36, Article 79 (3), (4), and (5).
[41] Federal Judicial Administration Proclamation, Proclamation No. 1233/2021.
[42] *Id*., Article 6.

with complete independence; and enable the judiciary to exercise its judicial function free from any and all internal and external influences.[43]

The other relevant law in which the concept of judicial independence is enshrined is the Federal Courts Proclamation.[44] The Federal Courts Proclamation provides a legal framework to safeguard the independence of the judiciary in Ethiopia. This Proclamation can be taken as a tool that helps establish an independent and autonomous federal court system that is separate from the executive and legislative branches of government. Like the Federal Judicial Administration Proclamation, the Preamble, Articles 23, 39, 43, 52, and 53 of the Federal Courts Proclamation are provisions that have been provided to give effect to constitutionally recognized judicial independence. In addition to the Constitution and these subsidiary laws, it has to be noted that Ethiopia has adopted international and regional human rights instruments, including the ICCPR and the African Charter on Human and Peoples' Rights, which stress the importance of an independent judiciary.

Despite these constitutional and legal provisions, arguments claiming challenges to judicial independence and the existence of a subservient judiciary in Ethiopia persist.[45] A thorough examination of institutional and individual judicial independence will be made in the following sections, in light of the previously described legal and constitutional frameworks, accepted norms, guidelines, and standards, and the collected empirical evidence.

3.2 Institutional and Personal Independence of the Judiciary and Protection and Enforcement of Human Rights in Ethiopia

As examined previously, courts in general and an independent judiciary in particular are important avenues and prerequisites for protecting and enforcing human rights, respectively. This section examines the two components of judicial independence—institutional and personal independence—in the Ethiopian legal framework and examines the practice in federal courts.

[43] *Id*., Preamble, and Article 3.
[44] Federal Courts Proclamation, Proclamation No.1234/2021.
[45] *See* Simeneh Kiros Assefa, Conspicuous Absence of Independent Judiciary and 'Apolitical' Courts in Modern Ethiopia, *Mizan Law Review*, Vol. 15, No. 2, (2021).

3.2.1 Institutional Independence of the Judiciary and Protection and Enforcement of Human Rights in Ethiopia

The institutional or collective independence of the judiciary refers to the importance of the judiciary functioning without interference or pressure from the two branches of the government, mainly the executive. In effect, this scheme helps the judiciary function independently of the executive and legislative branches of government. This duty is clearly provided under the United Nations Basic Principles on the Independence of the Judiciary. According to the Basic Principles, "It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary."[46]

In the FDRE Constitution, the core principles of judicial independence in general and institutional independence in particular are enshrined under Article 79(2). According to this constitutional provision, "courts of any level shall be free from any interference or influence of any governmental body, government official, or any other source." In addition, the financial autonomy of federal courts is recognized under Article 79(6) of the Constitution. According to this constitutional provision, "the Federal Supreme Court shall draw up and submit to the House of Peoples' Representatives for approval the budget of the Federal courts, and upon approval, administer the budget." As will be discussed in detail in the section to follow, the institutional independence of federal courts is also secured by giving the judiciary a significant role in the appointment of judges.[47]

The abovementioned constitutional principles of the independence of the judiciary are further elaborated in the Federal Judicial Administration Proclamation. The Preamble, Articles 3, 8, 9, 20–23, and 42 of the Proclamation are the most important provisions on judicial independence; courts exercise their judicial functions free of all internal and external influences and in the spirit of complete independence. The important aspects of institutional independence are decision-making independence, judicial jurisdiction over all issues of a judicial nature, financial autonomy, and the availability of sufficient resources. The following subsection examines the

[46] Basic Principles on the Independence of the Judiciary, *supra* note 9, Principle 1.
[47] Constitution of the Federal Democratic Republic of Ethiopia, *supra* note 36, Article 80.

significance of institutional judicial independence and its implications for judicial human rights protection and enforcement, using relevant laws and empirical data.

3.2.1.1 Decision-making Independence

The institutional independence of courts, to be free from the interference of the executive, includes noninterference in judicial proceedings. The duty of noninterference in judicial proceedings, among other things, protects and ensures the decision-making power of the judiciary. In its concluding observations on Slovakia, the Human Rights Committee stated that "states should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making."[48] The decision-making institutional independence of the judiciary is enshrined in the UN Basic Principles. Principle 4 states that "there shall not be any inappropriate or unwarranted interference with the judicial process […]." In general, the decision-making independence of the judiciary aims "at safeguarding judges' ability to carry out their functions fully without incursions from other state actors."[49]

As mentioned in the preceding section, the Ethiopian constitutional and legal frameworks clearly recognize the decision-making institutional independence of the judiciary. However, the data collected in assessing the practice in federal courts reveal that there are problems with respecting the decision-making independence of the judiciary and noninterference in judicial proceedings. In this regard, an attorney said, "If the defendant in possessory action is the government, there are pressures on the judges. If the interest of the government is at stake, interventions come from different directions.''[50] A discussant in a focus group discussion, composed of judges, and an interviewed public prosecutor are of the same opinion as this attorney. In connection with this, a judge in a FGD said, "With regard to intervention, no one may directly call or order to do this and decide that. But they come through the court administration. Court administrators are often in trouble, I hear. In connection with injunctions, they are ordered behind the curtain to do something about matters that are considered to be in the government's interest. This goes to the extent of removing a judge from handling the case and replacing him or her with a judge who is

[48] Concluding observations, Slovakia, CCPR/C/79/Add.79 (1997), Para. 18.
[49] Keith, *supra* note 23, at 196.
[50] Interview with an Attorney (Anonymous), Federal First Instance Court, Bole Bench, (Addis Ababa, June 2022).

believed to act according to the given order. I consider this an intervention in itself."[51] An interviewed public prosecutor describes the interventions from different interest groups, including the executive, in criminal judicial proceedings as follows:

> Serious cases of partiality in judgment due to political influence, lobbyist influence, and mob influence appear. It can be said that these things actually exist. In particular, in view of political and security problems, we investigated criminal cases and opened files. We saw many gaps in this process. In terms of influence and independent decision-making, we have seen mob-based decisions. From this point of view, there is a gap.[52]

These opinions demonstrate direct interventions in the decision-making independence of the federal courts. In addition, as decision-making is naturally extended to the power to enforce a given decision and order, the decision-making independence of the judiciary can be explained in terms of the reciprocal duty of the other branches of the government, mainly the executive, to enforce and execute. As Rosenn truly argues, the "[r]efusal of the executive to enforce judicial decisions that it does not agree with seriously undermines the independence of the judiciary."[53] In effect, the refusal of the executive or lack of cooperation from it to execute and enforce decisions and orders of the court can be taken as the usurpation of the principle of separation of powers. The implementation and enforcement of judicial decisions as an extension of the notion of judicial independence and the nexus of these two with human rights protection are summarized by Lovemore Chiduza as follows:

> Respect for the independence of the judiciary should also be extended to implementing its judgments irrespective of whether those decisions are against state policy. Such measures will no doubt enhance accountability, respect for the rule of law and separation of powers, and the independence of the judiciary. Human rights protection thrives where there is respect for the rule of law and respect for the independence of the judiciary.[54]

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[51] FGD with Judges, Federal First Instance Court, Dire Dawa Bench, (Dire Dawa, May 2022).
[52] Interview with a Public Prosecutor (Anonymous), Dire Dawa Branch Office, Ministry of Justice, (Dire Dawa, June 2022).
[53] Rosenn, *supra* note 17, at 30.
[54] Lovemore Chiduza, The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe, PhD Dissertation, the Faculty of Law of the University of the Western Cape, South Africa (unpublished), (2013), at 328 .

In the collected empirical data, the research participants mentioned instances of the refusal of the executive (the police) to execute and enforce judicial decisions and orders as follows: "The executive does not enforce and execute orders, and when measures are taken, it reacts inappropriately. The police say that it is beyond their control. This makes the decision of the courts meaningless."[55] An attorney and criminal suspect described the interference of the police and its lack of cooperation as follows: "The influence of the police is evident in the courts. There is a possibility that the police will detain an accused to whom the courts grant bail, open a new criminal charge, or even detain the accused incommunicado. Courts have the power to enforce their orders even by ordering police officers to bring them before them."[56] Because courts are subservient to the executive, they are reluctant to take appropriate measures against police officers and others who fail to comply with the decisions and orders of courts.[57] For instance, a criminal suspect who had been granted bail had to give birth at the police station because of the refusal of the police to release the woman according to the order of the court.[58] Even if some judges are courageous enough to question police officers who detain criminal suspects who are granted bail, it is common to see them removed from benches following the measures they had taken.[59] A Federal High Court judge also shares these opinions.[60] The refusal of the police to execute the decision of the courts is common not only in criminal cases but also in high-profile political cases.[61] In practice, in the Ethiopian criminal justice system, it is common to categorize criminal cases into two categories: "high-profile political criminal cases," in which the interest of the government is the top priority,[62] and other criminal cases, in which the government is not very interested. The refusal of the police to execute the decision and order of the courts is common in high-profile political cases.

[55] FGD with Attorneys, Federal First Instance Court, Guelele Bench, (Addis Ababa, May 2022).
[56] Interview with an Attorney (Anonymous), (Addis Ababa, June 2022); Interview with Mr. Alelegn Mihretu, a criminal suspect and an attorney, (Addis Ababa, October 2023).
[57] *Id.,* Interview with Mr.Alelegn Mihretu.
[58] Interview with a Judge (Anonymous), Federal High Court, Ledeta Bench, (Addis Ababa, October 2022).
[59] Interview with Mr.Alelegn Mihretu, *supra* note 56.
[60] Interview with a Judge (Anonymous), *supra* note 58.
[61] *Id*.
[62] Terrorism and related crimes under the Prevention and Suppression of Terrorism Crimes Proclamation No.1176/2020, and crimes against the constitutional order and internal security of the state under Articles 238 ff. of the Criminal Code fall in this category.

In addition to the aforementioned empirical data collected from the research participants, there are various known cases in which the police refuse to enforce the court order. In particular, the police refuse to release criminal suspects who have been granted bail. A number of criminal suspects whom the police have refused to release according to the court order have reported their grievances to the Ethiopian Human Rights Commission. To mention some illustrative cases, the following grievances were reported to the Commission against the refusal of the police:[63] Kirkos Sub-City Police Department, Addis Ketema Sub-City Police Department, Federal Police Criminal Investigation, Akaki Kality Sub-City Police Department, Bole Sub-City Police Department, Lemi Kura Sub-City Police Department, and Nefassilk Lafto Sub-City Police Department.[64] These police departments detained a total of more than 80 criminal suspects by ignoring court orders.[65] In addition, in *Chief Seregnet Metiku Teshome v. Federal Public Prosecutor*,[66] the court ordered the release of the criminal suspect. However, irrespective of the court's order, the police detained the person in a different place, which was not under police custody or in a prison. Similarly, in *Colonel Gemechu Ayana et al. v. Federal Public Prosecutor,*[67] the first applicant in the petition stated that after he was released from detention by the verdict of the Federal High Court, he had been detained by the Oromiya Region Special Forces and the Federal Police in different places.

The executive's interference in judicial proceedings and the refusal of the police to enforce judicial decisions violate the constitutionally guaranteed institutional independence of the judiciary. These acts of interference and refusal by the executive directly violate the rights of arrested persons to be released on bail and their right to liberty, as guaranteed in international human rights treaties and the FDRE Constitution. They also compromise the judiciary's institutional independence and impair its ability to protect and enforce human rights.[68] In effect,

[63] To protect the wellbeing of criminal suspects and because most of the cases are pending before the Commission, the researcher will mention only the police department that refused to release criminal suspects, irrespective of a court order.
[64] Statistical Data from the Ethiopian Human Rights Commission, (February 2022).
[65] *Id.*
[66] *Chief Seregnet Metiku Teshome v. Federal Public Prosecutor,* Federal High Court, File No. 253309.
[67] *Colonel Gemechu Ayana et al. v. Federal Public Prosecutor,* Federal Supreme Court Cassation Division, File No. 222914.
[68] Constitution of the Federal Democratic Republic of Ethiopia, *supra* note 36, Articles, 19 (1) (6) and 17.

this would, as I. Mahomed cautions, "implode the power of the judiciary into nothingness, and much, much worse, human rights could irreversibly be impaired."[69]

3.2.1.2 Jurisdictional Monopoly: Exclusive Jurisdiction over Judicial Issues

One of the most important aspects of judicial independence is the exclusive jurisdiction of courts over all judicial issues.[70] The independence of the judiciary also requires courts to have the power "to decide whether an issue submitted for its decision is within its competence as defined by law."[71] In this sense, exclusive judicial power extends beyond the adjudication of cases brought before courts by contending individual parties. In addition to resolving "ordinary cases according to the law," enabling judicial review is at the core of judicial independence.[72] As Christopher Larkins argues, judicial independence "is not meaningful if the courts cannot exercise it to check the arbitrary or unjust exercise of power by political and social actors."[73] As the guardian of human rights and fundamental freedoms, the judiciary, among other things, protects individuals from unjust and partial laws adopted by the legislature and enforced by the executive. However, the judiciary can discharge this important function only if it has the power of judicial review. In Ethiopia, judicial power is vested in the courts.[74] The FDRE Constitution provides that "[e]veryone has the right to bring a justiciable matter to and to obtain a decision or judgment by a court of law or any other competent body with judicial power."[75] In addition, the Constitution gives exclusive judicial power to courts and bans the establishment of special or *ad hoc* courts, which take judicial powers away from the regular courts or institutions legally empowered to exercise judicial functions.[76]

However, the constitutionally bestowed judicial power excludes the right to challenge unconstitutional laws and acts of the government before a court of law. As repeatedly pointed out, the judiciary in Ethiopia does not have the power to strike down legislation and acts of the

[69] I. Mahomed, The Independence of the Judiciary, 115 S. AFRICAN L.J. 658, 661 (1998).
[70] Basic Principles on the Independence of the Judiciary, *supra* note 9, Principle 3.
[71] *Id*.
[72] Stephen B. Burbank, The Architecture of Judicial Independence, 72 S. Cal. L. Rev., 336 (1999).
[73] Christopher M. Larkins, Judicial Independence and Democratization: A Theoretical and Conceptual Analysis, American Journal of Comparative Law 44, 611 (1996).
[74] Constitution of the Federal Democratic Republic of Ethiopia, *supra* note 36, Article 79(1).
[75] *Id.,* Article 37(1).
[76] *Id.,* Articles 78(4) and 71(1).

government that are deemed to be in violation of human rights and fundamental freedoms; this power is given to the HoF according to Article 83 of the FDRE Constitution. This dwindles the role of the judiciary in the protection and enforcement of human rights; "[i]t is, of course, a misconception to expect a judiciary without any power to police the actions of the other branches of the government to deliver in ensuring rule of law and protection of human rights."[77]

There are also major pieces of legislation, such as the Defense Forces Proclamation, that oust the jurisdictional monopoly of courts and bring civilians under military courts.[78] According to Article 38 of this Proclamation, the jurisdiction of military courts extends beyond members of the defense force and includes offenses committed by civilians. The Article cross refers to offenses listed under Articles 284-332 of the Criminal Code. Therefore, from the listed provisions of the Criminal Code, it can be understood that there are offenses that can be committed by civilians. For instance, offenses such as refusal to perform military service, failure to comply with a calling-up order, and intentionally contracted unfitness listed under Articles 284-86 of the Criminal Code are offenses to be committed by civilians, not members of the armed forces. Therefore, Article 38 of the Defense Forces Proclamation, similar to Article 9(5) of the State of Emergency Proclamation, violates the right of civilians to be tried by an independent and impartial tribunal enshrined in Articles 14 and 15 of the ICCPR, the stated international principles and standards.

3.2.1.3 Financial Autonomy and the Availability of Adequate Budgetary Resources

The other important aspect of institutional independence is the financial or fiscal autonomy of the judiciary and the availability of adequate budgetary resources. As is commonly said, the financial power of the government, or purse, is not held by the judiciary but rather by the legislative branch. Therefore, it is clear that the judiciary gets its financial budget and other resources mainly from the legislative branch. It is clear that the judiciary, as one of the three branches of the government, should be allocated adequate resources, and the power to administer the resources should be given to it.

[77] Diagnostic Study of the Ethiopian Criminal Justice System, The Legal and Justice Affairs Advisory Council of the Federal Democratic Republic of Ethiopia, Attorney General, 201 (2021).
[78] Defense Forces Proclamation, Proclamation No. 1100/2019.

The importance of allocating adequate financial resources and the financial autonomy of the judiciary are recognized under different international legal instruments. One such instrument is the United Nations Basic Principles on the Independence of the Judiciary. According to Principle 7, member states of the United Nations have the duty "to provide adequate resources to enable the judiciary to properly perform its functions." The Guidelines on a Right to a Fair Trial in Africa has a provision with similar content. It states that it is the duty of states to "endow judicial bodies with adequate resources for the performance of their functions."[79] In addition, it is also the duty of states to consult the judiciary "regarding the preparation of budgets and their implementation."[80] The Human Rights Committee underlines the importance of allocating supplementary budgetary resources for the administration of justice where there are delays in judicial proceedings caused by a lack of resources and chronic underfunding.[81] To enhance the financial autonomy of the judiciary, it is also common for constitutions in different jurisdictions to provide that "a fixed percentage of the country's total budget be allocated to the judiciary."[82] In these jurisdictions, it is common to allocate up to 3% of the total national budget to the judiciary.[83] M. Dakolias and K. Thachuk suggested that this constitutional measure helps to limit the budgetary influence of the other branches of government on the judiciary.[84]

According to the Ethiopian constitutional and legal frameworks, as mentioned before, the budget of federal courts is prepared and submitted to the House of Peoples' Representatives for approval, and upon approval, the judiciary administers the budget. In addition to the budget of the judiciary, the House of Peoples' Representatives allocates funds to the Federal Judicial

[79] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the African Commission on Human and Peoples Rights,'(2003), Principle A, Para. 4 (h); *see* also the European Charter on the Statute for Judges, DAJ/DOC (98), Para. A, 4 (v).
[80] *Id.*
[81] Human Rights Committee, Concluding observations: *Democratic Republic of Congo*, CCPR/C/COD/CO/3 (2006), Para. 21, *Central African Republic*, CCPR//C/CAF/CO/2 (2006), Para. 16, cited by the Human Rights Committee in its General Comment No. 32, Para. 27.
[82] Rosenn, *supra* note 17, at 16.
[83] *Addis Zemen*, Amharic Daily, Interview with Mr. Solomon Areda, Vice President, the Federal Supreme Court of Ethiopia (hereinafter *Addis Zemen*, Interview with Mr. Solomon Areda), January 2020, available at https://www.press.et/Ama/?p=25768.
[84] *See* M. Dakolias and K. Thachuk, "Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform", *Wisconsin International Law Journal*, Vol.18, No. 2, (2000).

Administration Council, an important body that supports institutional judicial independence.[85] The budgetary administration and autonomy of federal courts are also reinforced by the Federal Courts Proclamation.[86] Despite this clear constitutional stipulation, the budget of the judiciary had not been approved by the House of Peoples' Representatives for 25 years. Before the 2019/2020 fiscal year, the budget of the judiciary was submitted to the Ministry of Finance. Then, the Ministry of Finance submitted it to the House of Peoples' Representatives as part of the overall budget of the federal government. The budget of the judiciary for the fiscal year 2019/2020 was approved by the House for the first time; since then, the budget of federal courts has been approved by the House of Peoples' Representatives. Even after 25 years, it was not easy to break the *status quo* and get the budget of the judiciary approved by the House for the first time. The former vice president of the Federal Supreme Court, Mr. Solomon Areda, stated this challenge as follows: "We insisted and put pressure to go to the Parliament to get our budget approved by it."[87]

The approval of the budget of the judiciary by Parliament can be taken as a breakthrough and an important step forward to secure the financial autonomy of the judiciary. However, the financial autonomy of the judiciary is not an end by itself in guaranteeing institutional judicial independence; it is equally important to ensure that adequate funding and resources are allocated to the judiciary. The government allocates about 0.3% of the total national budget,[88] which is much lower than the internationally accepted standard of 3%. In connection with the allocation of adequate funding to the judiciary, the FDRE Constitution and the stated relevant laws are silent. The possible justification that can be raised by the government for allocating the stated percentage of funding is the inability of the country's economy to afford more. Even if it is not binding and applicable in Ethiopia, we can draw a lesson on the issue from the jurisprudence of the Beijing Principles.[89] In this regard, the Beijing Principle states that:

[85] Federal Judicial Administration Proclamation, *supra* note 41, Article 40.
[86] *See* the Preamble, Articles 17(2) (c) (e) (i), 19 (2) (4), 36, 37, and 40, Federal Courts Proclamation.
[87] *Addis Zemen*, *supra* note 83.
[88] *Id.*
[89] Beijing Statement of Principles of the Independence of the Judiciary, the LAWASIA Region, adopted by the LAWASIA Council, (2001).

> Where economic constraints make it difficult to allocate to the court system facilities and resources which judges consider adequate to enable them to perform their functions, the essential maintenance of the Rule of Law and the protection of human rights nevertheless require that the needs of the judiciary and the court system be accorded a high level of priority in the allocation of resources.[90]

If we import and inject this logically sound principle into the Ethiopian legal framework, the government should prioritize the judiciary in the allocation of funding and resources for the nation. If we examine the current allocation of budget and resources to the judiciary, it is not only inadequate and insufficient, but also unfair. In this regard, Mr. Solomon said, "We are not claiming the amount of budget and resources allocated in other jurisdictions, like the US judiciary; the nation cannot afford that. What we are claiming is the fair and equal distribution of the resources generated by the nation's economy."[91]

Without adequate funds and resources, the judiciary cannot effectively and properly perform its functions, and its independence, both institutional and personal, would be jeopardized. Lack of an adequate budget, courtrooms and buildings, an environment conducive to work, and infrastructure are the main problems that the judiciary is facing.[92]As Ferejohn and Kramer correctly put it, "an underfunded court is a distinctly unpleasant place to work."[93] Specifically, a lack of adequate funding and resources affects the administration of justice in general and the judicial protection of human rights in particular, such as the right to a fair trial. In this regard, as Mr. Solomon argues, "without allocating adequate resources and budget [to the judiciary], it is not possible to think about the rule of law, constitutionalism, and justice."[94]

In other jurisdictions, in addition to allocating a consolidated judicial fund, courts retain their internal revenue, which is a portion of their budget and is collected from court fees and other services, rather than having it transferred to the national treasury.[95] In Ethiopia too, the Federal Supreme Court suggested that the internal revenue of courts be made part of the budget of the

[90] *Id.,* Para. 42.
[91] *Addis Zemen*, *supra* note 83.
[92] *Id.*
[93] Ferejohn and Kramer, *supra* note 13, at 985.
[94] *Addis Zemen*, *supra* note 83.
[95] *Addis Zemen*, *supra* note 83.

judiciary and be regulated in the two would-be adopted proclamations, the repeatedly cited Federal Courts Proclamation and the Federal Judiciary Administration Proclamation.[96] Regretfully, the parliament rejected this recommendation and excluded it from the stated proclamations. This shows the unwillingness of the legislative branch to allocate an adequate and sufficient budget and resources to the judiciary, even by letting the latter retain its internal revenues.

3.2.2 Personal Independence, and the Protection and Enforcement of Human Rights in Ethiopia

One mechanism for guaranteeing judicial independence is securing the personal independence of individual judges. Personal judicial independence refers to the autonomy and impartiality of judges in the judicial process and administration of justice. Therefore, it can be argued that "individual judicial independence exists primarily for the benefit of institutional independence" of the judiciary.[97] In other words, as Lord Phillips convincingly argues, "[personal] independence is inseparable from institutional independence, as the latter contributes enormously to the former."[98] To guarantee the judiciary that protection, judges should be independent and protected from interference and pressure from the two branches of the government and the people.

Personal judicial independence can be manifested in different ways. One manifestation of personal independence is the freedom of judges to decide cases. To maintain personal judicial independence, judges must have the freedom to decide cases solely on the basis of the law and the evidence presented before them. External influences, whether through public opinion, public protests, or pressure from interest groups, should not interfere with the judge's impartiality. Judges must evaluate cases without compromising objectivity and resist the temptation to align their decisions with external factors. Judges must be able to approach each case with an open mind and free from any bias or predetermined outcome. The other related protection is protection

[96] *Addis Zemen*, *supra* note 83.
[97] Stephen B. Burbank, "Judicial Independence, Judicial Accountability, and Interbranch Relations", 95 Geo. L.J., (2007), at 912.
[98] Lord Phillips, "Judicial Independence and Accountability: A View from the Supreme Court, UCL Constitution Unit", launch of research project on "The Politics of Judicial Independence," London, (2011), cited *in* Laura-Stella Eposi Enonchong, Judicial Independence and Accountability in Cameroon: Balancing a Tenuous Relationship, 5 *Afr. J. Legal Stud*., (2012), at 331.

from political interference. Protecting judges from political interference is vital for ensuring personal judicial independence. Judicial immunity shields them from arbitrary removal, disciplinary actions, or intimidation arising from their judgments or opinions. All would help judges ensure impartiality. In turn, impartiality assures judges that they can make decisions solely on the basis of the law and the facts presented before them, guarding against any personal or external influence.

Second, the appointment procedure is a vital aspect of personal judicial independence. The manner in which judges are appointed is a key factor in ensuring personal judicial independence. Judicial recruitment processes that prioritize merit-based appointments over political or patronage-based selections further contribute to personal judicial independence. Personal judicial independence also requires safeguards against external interference. This entails protection from political, economic, or other pressures that may seek to compromise the independence of judges and influence their decisions.

The concept of personal judicial independence recognizes the need for judges to be free from any undue influence that may cloud their judgment or impede their ability to uphold the rule of law and protect human rights. In the following subsection, these different manifestations and components of personal judicial independence will be discussed and examined in light of the United Nations Basic Principles on the Independence of the Judiciary, the Ethiopian constitutional and legal frameworks, different principles and guidelines, the established conceptual frameworks, the collected empirical data, and other relevant sources of information.

3.2.2.1 Impartiality

The literature distinguishes "two interrelated aspects of judicial independence: impartiality and insularity."[99] In the context of judicial independence, insularity, generally, refers to the importance of shielding the judiciary from the interference and pressure of the executive and the personal independence of judges. However, impartiality "refers to the state of mind of a judge or

[99] Menberetshai Tadesse, "Judicial Reform in Ethiopia", PhD Dissertation (unpublished), University of Birmingham, School of Law, 251 (2010).

tribunal towards a case and the parties to it."[100] The notion of impartiality, as enshrined under Article 14 of the ICCPR, is clarified by the Human Rights Committee as follows: "Impartiality of the court implies that judges must not harbor preconceptions about the matter put before them and that they must not act in ways that promote the interests of one of the parties."[101] Therefore, since impartiality refers to the duty of judges to be transparent, neutral, and free, it cannot be taken as the independence of judges. However, the impartiality of judges can be taken as an invaluable input to safeguard and ensure judicial independence. Therefore, it is plausible to argue that the notion of judicial independence, especially personal independence, cannot be fully conceived unless it is coupled with one of its components, namely the impartiality of judges.

Impartiality, like an independent judiciary, is "at the heart of a judicial system that guarantees human rights in full conformity with international human rights law."[102]As a component of judicial independence, the notion of impartiality is enshrined in different legal instruments, principles, and guidelines. One such instrument is the UN Basic Principles. According to Principle 2, "the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats, or interferences, direct or indirect, from any quarter or for any reason." The importance of the impartiality of judges is also recognized under the Ethiopian constitutional and legal frameworks. According to Article 79(3) of the FDRE Constitution, "judges shall exercise their functions in full independence and shall be directed solely by the law." This general constitutional stipulation is addressed in detail under the Federal Judicial Administration Proclamation; the preamble and Articles 3, 35-38, and 43 are the relevant provisions. In addition, Articles 26, 29 (4), 32, 33-34 of the Federal Courts Proclamation are the relevant provisions provided to ensure impartiality in one way or another.

Lack of impartiality "in the administration of justice may take different forms: economic, social, or political interests of judges in the outcome of a particular case resulted from judicial corruption, lack of integrity on the part of the judges, political affiliation of judges, and grounds

[100] International Principles on the Independence and Accountability of Judges, Lawyers, and Prosecutors, *supra* note 14, at 20.
[101] Human Rights Committee, Communication 387/1989, *Arvo. O Karttunen v. Finland,* UN Document CCPR/C/46/D/387/1989 (Jurisprudence), Para. 7.2.
[102] International Principles on the Independence and Accountability of Judges, Lawyers, and Prosecutors, *supra* note 14, at 2.

of such sort inducing the judges to develop bias or prejudice towards one of the parties."[103] The collected data on the impartiality of federal court judges show that there are instances in which federal court judges are not impartial. According to the research participants, a lack of impartiality is witnessed in putting convicts on probation, granting bail, and cases in which the interest of the government is at stake. The research participants mentioned that the causes of the lack of impartiality are ethnic-based relations, personal relations, judicial corruption, political interests in the outcome of the case, and indirect pressure from court administrators.

With regard to putting convicts on probation and releasing criminal suspects on bail, among the stated instances of lack of impartiality, a number of research participants mentioned that judges are inconsistent in releasing convicts on probation. In this regard, an attorney said, "The rich and the poor are not treated equally; the one who can pay is released on bail and can be placed on probation. It makes you lose faith in judicial institutions."[104] This opinion is shared by an interviewed public prosecutor, who mentioned his opinion on the lack of impartiality in releasing convicts on probation as follows: "Someone may believe that criminals who commit serious economic crimes are placed under probation, while others who commit a minor crime are sentenced to prison. This is because he can't pay money as a bribe."[105] Interviewed public prosecutors at the Ministry of Justice are of the same opinion. The first one said, "It's a problem when you decide different things for different people in similar cases. In particular, some convicts are placed on probation, while others are sent to prison. Even if it is difficult to take it for granted and conclude, the rumor is that a convicted person who can pay money as a bribe is placed on probation, and someone who cannot afford it will be sent to prison."[106]A public prosecutor, who is also a Deputy Director General for Corruption Crimes Prosecution at the Ministry of Justice, is also of the same opinion and said, "For example, when there is an option between incarceration and fine, the judge will be bribed to impose a fine instead of incarceration. It is common to hear that convicts who cannot pay bribes are not released on probation."[107]

[103] Diagnostic Study, *supra* note 77, at 216.
[104] Interview with an Attorney at Law at Federal Courts (Anonymous), (Dire Dawa, June 2022).
[105] Interview with a Public Prosecutor and Coordinator of Economic Crimes (Anonymous), Dire Dawa Branch Office, Ministry of Justice, (Dire Dawa, June 2022).
[106] Interview with a Public Prosecutor (Anonymous), Ministry of Justice, (Addis Ababa, June 2022).
[107] Interview with the Deputy Director General (Anonymous), Corruption Crimes Prosecution Directorate General, Ministry of Justice, (Addis Ababa, May 2022).

Concerning the lack of impartiality in releasing suspects of crime on bail, the research participants mentioned the inconsistency and disparity with the law as follows: "Regarding bail, there is an issue that bothers us as public prosecutors. Sometimes a serious crime is committed and bail is granted, and sometimes bail is granted on serious conditions for a simple crime."[108] Moreover, "the lower court denies the release on bail of persons suspected of committing economic crimes. However, the appellate court reverses the decision and grants bail. I think the problem is based on ethnic ties or economic connections. These suspects released on bail have never been brought back to court. As a result, 80%–90% of the sentences are not executed."[109]

An interviewed attorney is of the opinion that courts lack impartiality regarding cases in which the interests of the government are at stake. In this regard, the attorney said, "There is something called government interest, especially one that is related to politics. Everyone is equal before the law, but when the executive is a litigant, there are judges who conclude that the government is right, and they side with the government. Some judges are even more concerned than the police; they are biased."[110] Especially in high-profile cases, court administrators reshuffle judges, remove judges from handling cases, and assign "favorable" judges to cases by "anticipating the outcome of the case."[111] Judges of the Federal High Court are heard complaining about internal interventions from court administrators concerning the assignment of judges to benches and the stepping down of judges from cases.[112] This internal pressure from court administrators, "notably from the officials assuming higher positions in the hierarchy of courts," has also been reported as a threat to judicial independence.[113] The Director of Judgment Inspection and Judge's Discipline Committee at the Federal Judicial Administration Council is also of the opinion that there is a practice of lack of impartiality mainly based on personal relations and financial bribes.[114]

[108] Interview with a Public Prosecutor and Coordinator of Economic Crimes (Anonymous), *supra* note 105.
[109] *Id*.
[110] Interview with an Attorney (Anonymous), at the Federal First Instance Court, Bole Bench, (Addis Ababa, June 2022).
[111] Interview with Mr.Alelegn Mihretu, *supra* note 56.
[112] Interview with a Judge (Anonymous), Federal Supreme Court Cassation Division, (Addis Ababa, October 2023).
[113] Diagnostic Study, *supra* note 77 at 208.
[114] Interview with the Director (Anonymous), Judgment Inspection and Judge's Discipline, Federal Judicial Administration Council, (Addis Ababa, June 2022).

From the analysis of the data collected from different participants, including judges, it can be inferred and understood that a lack of impartiality is manifested in federal courts. The political implications of cases, administrative pressures, judicial corruption, and ethnic and interpersonal ties are the main causes of judges' partiality. Specifically, there is abuse of judicial discretion and partiality in putting convicts on probation, granting bail, and in possessory action cases. There is also pressure and interference from the executive in possessory action cases, which in effect results in the lack of impartiality of the judge handling the case.

3.2.2.2 Recruitment and Appointment Procedure

One of the procedural measures that help ensure the independence of the judiciary is the recruitment and appointment of judges. Generally, what is important in the recruitment and appointment procedure of judges is to ensure that it is conducted without the interference and manipulation of the two branches of the government, specifically the executive branch. This is because "[u]nless judges are appointed and promoted on the basis of their legal skills, the judiciary runs the risk of not complying with its core function: imparting justice independently and impartially."[115]

The Human Rights Committee has examined the impact of judge appointment criteria on judicial independence. As the Committee mentioned in its general comment, "[t]he requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges […]."[116] States are also required to "take specific measures guaranteeing the independence of the judiciary through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment of the members of the judiciary."[117] In its concluding observation on Slovakia, the Committee underlined the importance of taking "specific measures guaranteeing the independence of the judiciary [and] protecting judges from any form of political influence through the adoption of laws regulating [their] appointment."[118]

[115] International Principles on the Independence and Accountability of Judges, Lawyers, and Prosecutors, *supra* note 14, at 38.
[116] Human Rights Committee, General Comment No. 32, *supra* note 2.
[117] *Id*.
[118] Concluding Observations of the Human Rights Committee on Slovakia, UN Document CCPR/C/79/Add.79, Para. 18.

The generally agreed-upon selection criteria of judges, among other things, should be based on the candidate's merit, integrity, and qualification; it should not be based on the political loyalty or affiliation of the candidate to the government. The United Nations Guiding Principles on the Independence of the Judiciary provide for the selection and appointment criteria of judges as follows:

> Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, color, sex, religion, political or other opinion, national or social origin, property, birth or status […].[119]

Similar appointment criteria are provided under the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa: "The sole criteria for appointment to judicial office shall be the suitability of a candidate for such office by reason of integrity, appropriate training or learning and ability."[120] Setting the appointment criteria of judges does not by itself guarantee judicial independence; there has to be an appointment procedure to be followed in the process of appointment that ensures the observance of the appointment criteria. In this regard, the accepted requirement is the selection of judges, and the appointment procedure should be conducted by an organ independent of the two branches of the government. For instance, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa underline the importance of establishing an independent body that will ensure transparency and accountability in the appointment of judges.[121]

In the Ethiopian legal and constitutional framework, the legislative organ, the Prime Minister, and the Judicial Administration Council participate in the selection and appointment of federal judges.[122] Here, it is important to distinguish between the appointment procedures of the president and the vice president of the Federal Supreme Court, the presidents and the vice presidents of lower courts, and federal judges. The president and the vice president of the Federal Supreme Court are appointed by the House of Peoples' Representatives upon recommendation

[119] Basic Principles on the Independence of the Judiciary, *supra* note 9, Principle 10.
[120] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, *supra* note 79, Principle A, Para. 4 (i).
[121] *Id*., Principle A, Para. 4 (h). *See* also the European Charter on the Statute for Judges, *supra* note 79, Para. 1.3.
[122] Constitution of the Federal Democratic Republic of Ethiopia, *supra* note 36, Article 81.

by the Prime Minister.[123] Therefore, as far as the appointment of the leadership of federal courts in general and the Federal Supreme Court in particular is concerned, the power of the executive is limited to recommending candidates to the stated offices, and the Judicial Administration Council does not play any role. However, it can be perceived that, in recommending the president and the vice president for appointment, the Prime Minister cannot be free of political considerations and the interests of the executive. Given the considerable power that the president and the vice president of the Federal Supreme Court have over the Supreme Court and lower federal courts, it "would induce judges to anticipate that 'wrong' decisions in particular cases could have career consequences, thus negatively impacting their independence."[124]

Unlike the appointment of the president and the vice president of the Supreme Court, the nomination and appointment of the federal judges, presidents, and vice presidents of the Federal High Court and the Federal First Instance Court is the same; candidates are nominated for appointment by the Judicial Administration Council and submitted to the Prime Minister, and their appointment is approved by the House of Peoples' Representatives.[125] Regarding the role of the Prime Minister in the appointment of federal judges and the presidents and the vice presidents of the two lower courts, one question worth further inquiry is whether the role of the Prime Minister is limited to submitting candidates to the House, or does he have the power and discretion to reject nominations made by the Council before submitting them for approval? Neither the Constitution nor the Judicial Administration Proclamation is clear on this issue. It can be argued that as the Prime Minister is the bridge between the Council and the House in the nomination procedure, he can avail himself of the silence of the Constitution and the Proclamation and reject the nomination. The Council does not have legal grounds to challenge the rejection of the Prime Minister, bypass it, and submit candidates for the approval of the House. Therefore, it can be concluded that the Prime Minister or the executive plays an important role in the appointment of presidents and vice presidents of all levels of courts and federal judges. In the latter case, his role goes beyond submitting judges for appointment, and he has the power and discretion to reject nominations made by the Council. The possibility of this

[123] *Id*., Article 81(1).
[124] Diagnostic Study, *supra* note 77, at 209.
[125] *See* Articles 8 (1) (2) and 9 (3) of the Federal Judicial Administration Proclamation and Article 81(2) of the Constitution of the Federal Democratic Republic of Ethiopia.

intricacy and legal uncertainty would undermine the role of the Judicial Administration Council and pave the way for the interference of the executive in the appointment procedure of federal judges.

With regard to the criteria for the selection and appointment of judges, the Constitution is silent. However, it should be noted that "[o]ne of the foundations for a capable and legitimate judiciary is the professional competence of individual judges."[126] In addition, "[a]ccess to professionally competent adjudication is considered a human right of court service users."[127] In this regard, the Judicial Administration Proclamation provides for the general requirements for the appointment of federal judges and additional requirements for the appointment of the Federal First Instance Court, Federal High Court, and Federal Supreme Court.[128]As general requirements, according to Article 20 of the Proclamation, a person is required to fulfill the following requirements to be appointed as a federal judge: be an Ethiopian national; have a proven reputation for probity, integrity, honesty, and be free from morally repugnant conduct; be of good health and display a sense of duty, responsibility, and diligence of the highest standard fitting the position by virtue of his competence to assume the responsibility of being a judge; have a sense of justice and is committed to respecting the rule of law; be willing to serve as a judge; be free from criminal conviction except for minor contraventions; be not less than the age of 30; and hold at least an LLB degree from a recognized institution of higher learning. From the reading of these general requirements, it can be concluded that the selection criteria are objective and based on the merit, competence, integrity, and qualification of the candidate as enshrined under different instruments and recommended by the Human Rights Committee. This will, in turn, help ensure a competent, independent, and impartial judiciary.

This researcher empirically assessed the practice of the recruitment and appointment of judges in light of the stated general requirements, and the research participants questioned the observance of some of the legally stipulated recruitment and appointment requirements. The opinion of the research participants is that the recruitment and appointment of judges is not based on merit,

[126] The Comprehensive Justice System Reform Program Baseline Study Report, Ministry of Capacity Building, Justice System Reform Program Office, 161 (2005).
[127] *Id*.
[128] Federal Judicial Administration Proclamation, *supra* note 41, Articles 20-23.

competence, integrity, or qualification. Specifically, they mentioned that the recruitment and appointment of judges is mainly based on the political inclination and ethnic origin of the candidates. In this regard, the interviewed attorney opined:

> One of the reasons for judicial misconduct is that there is an ethnic-based appointment rather than a merit-based one. The appointment is based on an ethnic-based quota, not merit. It is not a problem that underrepresented ethnic groups in the judiciary are given some quotas. A meritorious competition should be held, and the best of those underrepresented should be selected. Competition should be held among the Somalis, Amharas, and Oromos, and the one who is capable and fit should be selected and appointed. The problem is that politics impact appointments and selections based on ethnicity.[129]

Other interviewed research participants and discussants in the focus group discussions shared the opinion of the quoted informant.[130] These research participants are of the opinion that the recruitment and appointment of judges is mainly based on the political inclination, ethnic origin, network, and personal relations of the candidates, not on their merit, competence, integrity, or qualification. Specifically, the research participants pointed out that recruitment and appointment are mainly based on the quota given to ethnic groups.[131] An interviewed public prosecutor said, "Judgeship is a profession; the judiciary should never be staffed by judges based on the quota given to ethnic groups as it is not a political organ like the House of Federation."[132] The practices mentioned by the research participants, even if they might have been used to a limited extent, are not in tandem with the recruitment and appointment criteria accepted by international instruments and the requirements under the Judicial Administration Proclamation. This will, in turn, hamper the right to trial by independent and impartial courts in general and the role the judiciary can play in the protection and enforcement of human rights in particular.

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[129] Interview with an Attorney at Law at Federal Courts (Anonymous), *supra* note 104.
[130] Interview with a Judge (Anonymous), Federal Supreme Court Cassation Division, (Addis Ababa, May 2022); FGD with Attorneys and Public Prosecutors, Federal First Instance Court, Bole Bench, (Addis Ababa, May 2022); FGD with Attorneys, Federal First Instance Court, Guelele Bench, *supra* note 55; Interview with a Representative Judge (Anonymous), Federal High Court, Dire Dawa Assigned Division, (Dire Dawa, June 2022); Interview with an Attorney at Law (Anonymous), (Addis Ababa, May 2022).
[131] *Id*.; Interview with a Judge (Anonymous), Federal Supreme Court Cassation Division, *Id.*; FGD with Attorneys and Public Prosecutors, Federal First Instance Court, *Id.*; FGD with Attorneys, Federal First Instance Court, Guelele Bench, *Id*..
[132] Interview with a Public Prosecutor (Anonymous), Guelele Branch Office, Ministry of Justice, (Addis Ababa, May 2022).

CONCLUSION AND RECOMMENDATIONS

The institutional independence of federal courts in Ethiopia is compromised by the executive branch meddling and police reluctance to enforce court decisions and orders. This diminishes the courts' inherent power to protect human rights. The jurisdictional monopoly of the judiciary has also been eroded by Article 38 of the Defense Forces Proclamation and Article 9(5) of the recently adopted State of Emergency Proclamation. Even if the judiciary's budget is approved by parliament, the allocated resources are insufficient for effective justice administration and safeguarding human rights. Adequate funding is crucial for upholding the rule of law and constitutionalism.

Concerning the individual independence of judges and their impartiality, the analyzed empirical data reveal a lack of impartiality in federal courts, with abuse of discretion, partiality in putting convicts on probation, granting bail, executive interference, and pressures in possessory action cases. The recruitment and appointment criteria of judges align with international guidelines and the jurisprudence of the Human Rights Committee. However, some of the legally stipulated recruitment and appointment requirements are not always observed, and the recruitment and appointment of judges mainly consider the political inclination and ethnic origin of the candidates. This practice is not in tandem with the legally recognized importance of the "de-politicization of the process by which judicial personnel are appointed and removed."[133] Specifically, the Prime Minister plays an important role in the appointment of presidents and vice presidents of all levels of courts and federal judges. His role goes beyond submitting judges for appointment, and he has the power and discretion to reject nominations made by the Council. As far as the president and the vice president of the Federal Supreme Court are concerned, the Judicial Administration Council does not play a role in their selection and appointment; the executive and the parliament control the entire process.

In general, it can be concluded that most of the constitutional provisions and subsidiary laws on judicial independence in Ethiopia are inspired by internationally recognized guidelines,

[133] Bruce M. Wilson et al, "The Best Laid Schemes" (2004); Gang Aft A-Gley, "Judicial Reform in Latin America: Evidence from Costa Rica", *Journal of Latin American Studies*, Vol. 36, No. 3, 514 (2004), cited *in* Elias N. Stebek, Judicial Reform Pursuits in Ethiopia, 2002-2015: Steady Concrete Achievements - versus - Promise Fatigue, *Mizan Law Review*, Vol. 9, No. 2, (2015), at 221.

standards, and the jurisprudence of human rights monitoring bodies. However, these constitutional provisions and subsidiary laws have not been fully implemented and practiced. As J. Mark Ramseyer rightly asserts, "Judicial independence is not primarily a matter of constitutional text."[134] Therefore, a "constitutional provision stating that the judiciary shall be independent merely indicates a commitment but does not suffice."[135] Most importantly, "judicial independence waxes and wanes with changes in the political composition."[136] Similarly, this researcher believes that constitutional and legal recognition can be taken as one of the instruments to guarantee judicial independence in Ethiopia. However, it is not an end in itself. Judicial independence develops and is guaranteed in a legal system and political culture where the rule of law and real separation of governmental power prevail. Four constitutions have been adopted in the constitutional history of Ethiopia. Unfortunately, these constitutions, including the apparently democratic ones, have not significantly impacted changes in the judicial administration of justice, the protection and enforcement of human rights in general, and judicial independence in particular.

In sum, the Ethiopian government should go beyond the mere declamation of its constitutional commitment to judicial independence and start to "walk the constitutional talk" by fully and properly enforcing the constitutionally entrenched principles of judicial independence so that the judiciary can play its inherent role in the protection and enforcement of human rights. If not, as Mahomed rightly concludes and cautions, subverting judicial independence and attacking the independence of the judiciary is "[attacking] and [subverting] the very foundations of the freedoms articulated by the constitution to protect humankind from injustice, tyranny, and brutality."[137] The judiciary, in general, and the Federal Judicial Administration Council, in particular, should strive to fully exercise their constitutionally guaranteed judicial independence and power to play a significant role in the protection and enforcement of human rights, safeguarding them from undue interference and pressure from the executive.

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[134] J. Mark Ramseyer, The Puzzling (In)dependence of Courts: A Comparative Approach, 23 J. LEGAL STUD. (1994), cited *in* Stephen B. Burbank, The Architecture of Judicial Independence, 72 S. *Cal. L. Rev*., (1999), at 332.
[135] Laura-Stella Eposi Enonchong, Judicial Independence and Accountability in Cameroon: Balancing a Tenuous Relationship, 5 Afr. J. Legal Stud., (2012), at 334.
[136] McNollagast, "Positive Political Theory and the Law: Conditions of Judicial Independence", *Journal of Contemporary Legal Issues* 15, (2006), at 108.
[137] Mahomed, *supra* note 69, at 666.

DEVELOPMENTAL STATE MODEL VIS-À-VIS MULTILEVEL GOVERNANCE: AN ASSESSMENT OF THE ETHIOPIAN EXPERIENCE

Ermias Yemanebirhan Hailemariam*

Abstract

Ethiopia's experiment with the developmental state model (DSM) within its federal system has been widely contested on the grounds of its compatibility with the country's constitutional democratic and federal system of governance. The study examines the state of democratic federalism under the DSM as once pursued by the now defunct Ethiopian Revolutionary Democratic Front (EPRDF). The study employs a qualitative research methodology anchored on a retrospective study approach where data is collected through in-depth interviews, focus group discussion and desk review of a broad range of official government and party documents. The study argues that even though the model tends to favor centralized state structure and authoritarian governance system, these features however are not necessarily inherent features of the model as the experiences of countries like India and South Africa demonstrate which managed to build democratic developmental states under constitutionally decentralized state structures. The article argues that Ethiopia's experiment with DSM had largely been characterized by centralized and authoritarian governance especially after the 2005 national election when EPRDF began taking a series of measures meant to establish developmentalism as a hegemonic ideology. The result was de facto one-party rule that contributed not only to shrinking democratic space but also to undermining multilevel governance. This has had far-reaching repercussions in shaping the course of politics in the country, eventually triggering a reshuffle within the country's top leadership in 2018 and a profound shift in power balance and dynamics within the country's current political landscape.

Keywords*:* Developmental State Model, Multiparty Democracy, Multilevel Governance, and Ethiopia.

INTRODUCTION

Following the Ethiopian government's official adoption of the developmental state model (DSM) as a viable path to realise rapid economic growth and industrialisation, the model has served until recently (2018, a year of major political change) as the driving ideological framework for the country's political economy. However, the DSM's implementation under the leadership of the now-defunct Ethiopian Peoples' Revolutionary Democratic Party

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(EPRDF) has been a subject of debate in academic and policy circles.[1] The debates relate to, among other things, the question of whether the DSM harmoniously co-exists with the constitutionally decentralised and democratic federal system of Ethiopia.

On the one hand, proponents of the Ethiopian DSM (EDSM) argue that the model was essentially grounded in federal and democratic governance. They maintain that the democratic DSM implemented by the EPRDF delivered tangible results, as seen in the country's double-digit economic growth and the legitimation of its top leadership in successive national elections[2]. On the other hand, others argue that the application of the DSM under the EPRDF's leadership was characterised by and large by "development authoritarianism" that significantly undermined democratic federalism, in particular regional autonomy, multiparty democracy, freedom of the press, and freedom for civil society organisations (CSOs).[3]

Indeed, the DSM status as a distinct developmental path and its compatibility with democratic governance has been widely contested issue among scholars and policy-makers[4]. Two main arguments are espoused: the "incompatibility thesis" and the "compatibility thesis" of the model with democracy and pluralism. Indeed, many studies of the nature of the DSM have linked it to "authoritarianism".[5] As a considerable number of scholars who studied the experiences of the East Asian developmental states (DSs) have argued the model tends to promote a governance system which is "hegemonic, centrist and interventionist" and whose priority is to realise economic development above everything else, even democracy.[6]

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[1] Ermias Yemanebirhan, "Developmental State Model and Democratic Decentralization in Ethiopia: The Compatibility Dilemma", 5 *Journals of Political Science and International Relations*, (2022), at 24, 37, available at: https://doi.org/10.11648/j.jpsir.20220501.14 (accessed on 15 November 2022).

[2] Bereket Simon, "A Tale of Two Elections: A National Endeavour to Put A Stop to an Avalanche: Ye-Hulet Merchawoch Weg: Nadan Yegeta Hagerawi Rucha" (Amharic) (2011); Meles Zenawi Foundation, "Ethiopia's Renaissance Journey: Development and Democracy Building Essays", Addis Ababa: Meles Zenawi Foundation, (2017).

[3] Christopher Clapham, "The Ethiopian Developmental State," 39 *Third World Quarterly,* (2017), at 1151 - 1165, available at: https://doi.org/10.1080/01436597.2017.1328982 (accessed on 15 November 2022); Asnake Kefale, "Narratives of Developmentalism and Development in Ethiopia: Some Preliminary Explorations", The Eur. Conf. on Afr. Stud, (2011).

[4] Thandika Mkandawire, "From Maladjusted States to Democratic Developmental States in Africa. *In: Edigheji, Omano",* (Ed.) *Constructing a Democratic Developmental State in South Africa: Potentials and Challenges*, Human Sciences Research Council, (2010). Adrian Leftwich, "Democracy and development: Is there institutional incompatibility?" 12 Democratization , (2005), at 686, available at: https://doi.org/10.1080/13510340500322 173 (accessed on 2 November 2022).

[5] *Id*.,: Vivek Chibber, "The Developmental State in Retrospect and Prospect", (2014), at 30-54.

[6] Prado *et a*l., "The Dilemmas of the Developmental State: Democracy and Economic Development in Brazil", 9 *L. & Dev. Rev*, (2016), available at: https://doi.org/10.1515/ldr-2016-0015 (accessed on 10 September 2022).

However, even though dominant scholarly views on the DSM associate it with authoritarianism, there is a counterargument, albeit less dominant. There are some that opposes such an association and argues for the possibility of building a democratic developmental state model (DDSM).[7] According to proponents of this view, who argue that there indeed are 21st century DDSMs, authoritarianism is an exogenous, rather than endogenous, feature of the DSM and the model can thus be democratic. But as several studies of successful East Asian developmental states such as South Korea, Singapore and Taiwan, the prototypes of the DSM, have found, the DSM is antithetical to a democratic and decentralised governance system, which weighs in favour of the "incompatibility thesis".[8] As the result, the application of the DSM in a federal political system associated, at least in theory, with federal democracy raises serious questions about the compatibility of the former with the latter.

In federal political system (FPS), the essence of federal democracy lies in constitutionally entrenched multilevel governance anchored on division of state power that confers autonomy to regional states along political pluralism.[9] It is true that a well-functioning federal democracy is essential for the meaningful exercise of both self-rule and shared rule in a federal political system.[10] Hence, the experiment of DSM within the Ethiopian federation should examine within such broader context of these on-going debates, as well as of the country's constitutional federal political system, which provides for decentralised and democratic governance of development.

There are studies which have explored the EPRDF's conception and execution of the DSM as well as the model's interplay with the country's federal system. These studies can generally be placed into two broad categories. The first comprises studies that support the "incompatibility thesis"[11], and the second, those that support the "compatibility thesis"[12].

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[7] Thandika Mkandawire, *supr*a note 4 and Vivek Chibber *supra* note 5, at 30-54.
[8] Ha-Joon Chang, "Kicking Away the Ladder: Infant Industry Promotion in Historical Perspective (2003), available at: https://doi.org/10.1080/1360081032000047168 (accessed on 13 September 2022). Eun Mee Kim, "Crisis of The Developmental State in South Korea: Asian Perspective", (1999), at 2.
[9] Ronald W., "Federalism, Federal Political Systems, And Federations", Annual Review of Political Science. , (1998), at 117 .
[10] Elazar D., "Community and polity: The organisational dynamics of American Jewry", (1995).
[11] Christopher Clapham, *supra* note 3; Mesay Kebede, "Meles Zenawi's Political Dilemma and The Developmental State: Dead Ends and Exit", available at: https://bit.ly/3Jx4ith (accessed on 25 August 2020).
[12] Bereket Simon, *supra* note 2, and De Waal, "The theory and practice of Meles Zenawi. African Affairs", (2012), at 148–155, available at: https://doi.org/10.1093/afraf/ads081(accessed on 25 August 2022).

Indeed, even within these broad categories, the studies vary in terms of their focus of investigation and approach of enquiry as well as final outcomes.

In terms of their focus of investigation, studies that support the "incompatibility thesis" typically address at least one of four major themes: 1) the challenges and desirability of building a DSM; 2) the relationship between the DSM and democracy; 3) the relationship between an ethnic-based federal arrangement and the DSM; and 4) the pitfalls of applying the DSM in certain policy areas. Generally, most of the studies that support the "incompatibility thesis" share the argument that the practice of the DSM in Ethiopia by the EPRDF has undermined the country's federal system.

These studies, however, fall short of providing a comprehensive explanation of the EDSM's interplay with, and impact on, on Ethiopia's federal system. They are also scanty and not sufficiently empirically rigorous in their analysis of specific policy areas and institutions. Specifically, the studies have two major limitations. First, they do not adequately explore how the DSM in and of itself (i.e. independently of other factors such as the EPRDF's ideology of "revolutionary democracy", the nature of political culture in the country, and the design of the Constitution with respect to the vertical division power between tiers of government) is actually linked to the tendency towards centralisation. Secondly, the studies appear to succumb to the myopic argument that because the DSM has worked well in East Asian countries within a context of unitary state structures and centralised systems of governance, it would not work in countries with a decentralised governance system, such as Ethiopia.

Similar is the case with studies that generally appear to support the "compatibility thesis" and the possibility of building a DDSM, and which, in fact, argue that the EDSM has been executed harmoniously with the country's federal system. These studies also fall far short of critically examining and adequately explaining how the model's authoritarian tendency and the EPRDF's hegemonic rule under the EDSM have actually played out in the country's federal system, particularly when it comes to running a democratic and decentralised development governance system. That is, they do not specifically indicate how the implementation of the model – which is often associated with a largely authoritarian and centrist governance approach – could actually be reconciled with the core values and

institutions of a genuine federal political system, such as democratic governance, subnational policy autonomy, policy innovation, and accountable and responsive governance.

Against this backdrop, this article assesses Ethiopia's experiment with the DSM *vis-à-vis* its impacts on democratic federalism from late 2002 until April 2018 (a critical juncture that saw key political changes, namely the demise of EPRDF). In doing so, the specific objectives of this study are twofold. First, it points out the impact of the EDSM on multiparty electoral democracy in Ethiopia; and secondly, it pinpoints the impact of the EDSM on the country's constitutional multilevel development governance system, which guarantees autonomy for regional states to make and execute their own regional development policies, as outlined under the 1995 Constitution of the Federal Democratic Republic of Ethiopia (FDRE).[13]

2. METHODOLOGY

This study predominantly is a qualitative one based on a retrospective research design that looks back at Ethiopia's experiment with the DSM to examine the latter's interaction with and impact on the norms and institutions of democratic federalism enshrined in the FDRE Constitution. This study employs mainly qualitative procedures for collecting and analysing data from primary and secondary sources. The primary sources include policy documents, strategic plans, and legislation. In addition, semi-structured interviews and focus group discussions (FGDs) were conducted from with opposition party figures as well as senior government officials and technical experts who occupied various posts at the federal and regional state level under the EPRDF-led government. The interviews were conducted between March 2018 and November 2019 at venues and times of convenience and preference of the interviewees.

In selecting samples, the study relied on purposive sampling techniques, and due consideration was given to ensure that the selection of participants was fairly representative of the different socio-economic development levels of regional states across Ethiopia. Accordingly, a total of five regional states were identified and selected as participants in this

[13] The FDRE Constitution provides for a decentralized and democratic governance of development underpinned by the core values and principles of a federal democracy and a constitutionally delineated vertical division of power between tiers of government. See the FDRE Constitution Proclamation No. 1/1195, Articles 1; 8; 9; 10; 12; 13; 39(1), (2) and (3); 41; 43; 50(2), (3), (4) and (8); 88; 89; 90; and 92.

study: the Gambella Peoples' National Regional State (GPNRS) and the Benishangul-Gumuz National Regional State (BGNRS), from the 'emerging regions'; and the Amhara National Regional State (ANRS), the Oromia National Regional State (ONRS), and the Southern Nations, Nationalities and Peoples' Region (SNNPR), from the 'developed regions. These regions represent the different levels of socio-economic development that exist across the various regions and parts of Ethiopia. Out of the five regional states categorized as 'developed' regions, except the Tigray National Regional State (TNRS), the remaining ones (i.e. the ANRS, the ONRS, and the SNNPR) have been included to participate in the study, whereas two regional states (i.e. the BGPNRS and the GPNRS) have been selected from the category of 'emerging' regions. Such center-periphery relations (i.e. as 'ruling party' and 'affiliated party') and power dynamics between the parties and the respective regions administered by those parties is an important variable, with significant implications within the country's political landscape, whereby the ANRS, the ONRS, and the SNNPR, as core members of the EPRDF coalition, almost exclusively control decision-making powers on the overall socio-economic and political direction of the country, including national development policies[14]. On the contrary, the BGNRS and the GPNRS, which are ruled by regional parties that have a designated status of 'affiliated parties' but not member of the EPRDF, have historically occupied a periphery position or status with a largely insignificant role within the country's political sphere in terms of the level of their participation, influence and leverage in policy and other important decisions at the central government level.[15]

The article is organized in 7 sections. The first section is this introduction. Section two provides methods and material of the study. Section three discusses the theoretical and conceptual framework of, and normative discourses on, the DSM in general. Section four describes the relation between DSM and authoritarianism. Section five provides the core normative and institutional underpinnings of EPRDF's DSM. Section six presents the empirical analysis and findings of the paper specifically on the implication of EPRDF's experiment with the DSM against multiparty democracy and multilevel development governance (MLDG). Section Seven, concludes the paper by recapping the core arguments and findings of the study.

[14] Abbink Jon, "Land to The Foreigners': Economic, Legal, And Socio-Cultural Aspects of New Land Acquisition Schemes in Ethiopia", 29 *Journal of Contemporary African. Studies*. (2011), at 513, 535.
[15] *Id*.

3. THE DSM: THEORETICAL AND CONCEPTUAL FRAMEWORK

It is widely argued by many scholars that the DSM draws on aspects of all of the conventional paradigms or models of economic development; as a result, it is often seen as a mid-way point between socialism and market-led liberalism.[16] While experiences with the DSM differ from one country to another, one can point out certain core elements that are shared by all of the countries that have adopted it. First and foremost, the DSM emphasises the importance of active state intervention in managing, governing and regulating the economy. The state plays an active role in regulating the market, building essential public infrastructure, redistributing resources as well as producing and providing goods and services which the private sector is unwilling or unable to provide[17]. The DSM specifically allows for a state-led capitalism within liberal economic principles. This in turn requires the "developmental" state to have at least two essential attributes: the state must have the capacity to control a vast majority of its territory, and it must possess a set of core capacities that enable it to design and deliver various development policies.[18] Secondly, nationalism and a national vision lie at the heart of the DSM as propelled in the form of hegemonic developmentalism. This means people from the apex of power all the way down to farmers in villages need to align themselves with, and sing to the tune of, the "development agenda" set by the leadership at the top.[19]

Thirdly, embedded autonomy is another key tenet of the DSM. "Embedded autonomy" refers to the nature of the relationship that should exist between a strong interventionist state and other social agents, such as influential private businesses, landlords and the like.[20] According to Evans, under the DSM, the state is believed to be autonomous as long as it has a rationalised bureaucracy characterised by meritocracy and long-term career prospects – traits

[16] Adrian Leftwich, "Bringing Politics Back In: Towards A Model of The Developmental State", 31 *The Journal Of Development Studies,* (1995), at 400, 427; Woo-Cumings, M., "Introduction: Chalmers Johnson and the politics of nationalism and development", *The Developmental State*, (1999), at 1–31, available at: https://doi.org/10.7591/9781501720383-003 (accessed on 25 August 2022).
[17] *Id*.
[18] Ghani, A., Lockhart, C., & Carnahan, "Closing the sovereignty gap: An approach to state-building", Overseas Development Institute, (2005).
[19] Woo-Cumings, *supra* note 16, 1–31.
[20] Chang, H. J. & Evans, P, *The role of institutions in economic change*: *Reimagining growth*, (2005), a t 99–129, available at: https://doi.org/10.1590/0101-31572022-3334 (accessed on 25 August 2022).

that make civil servants more professional and detached from the influence of powerful rent-seeking groups.[21]

Meanwhile, another important institutional factor for the DSM relates to the party system. Under the DSM, the party system plays a crucial role in defining the appropriate ideological orientation, institutions and policies to be adopted; the success of the DSM is often linked, among other things, to the party system in that the latter is the main driver of the ideology of developmentalism and its translation into institutions and practices.[22] In developmental states, party politics are usually associated with either a dominant-party or a hegemonic-party system.[23] According to Woo-Cumings[24], a dominant-party system, otherwise known as a hegemonic-party system, is in one in which the incumbent is dominant to such an extent that its victory at elections is a mere formality. In these systems, incumbents face a very limited degree of competitive electoral challenge. The DSM often tends to embrace party politics that expedite developmental policy-making and enforcement with little or no procedural hurdles.[25] Under the DSM, therefore, a dominant, if not hegemonic, party system is viewed as apposite for expedited collective action that facilitates centralised rent creation and distribution.[26] The importance of a hegemonic party under the DSM is underlined by Leftwich:

> In the DSM, without a dominant-party political rule, developmental elites would be divided or paralysed and relative state autonomy would have been impossible, and the bargaining demands of special interests would have come to predominate and the bureaucratic continuity and capacity may be compromised in a way that would be unlikely to serve national developmental goal/national development goals.[27]

Last but not the least, the other feature of the developmental state is its tendency to change itself towards authoritarian regimes. Indeed, studies conducted on the nature of the DSM have often linked the model with 'authoritarianism. As a considerable number of scholars

[21] *Id*.
[22] Bogaards, M, "Exchange: Reexamining African elections", *Journal of Democracy*, Vol. 24 No. 4, (2013), at151–160.
[23] Woo-Cumings, *supra* note 16.
[24] *Id*.
[25] *Id*.
[26] Booth D. "Development as a collective action problem.", *Africa Power and Politics Programme Policy Brief*, (2012), at 9.
[27] Adrian Leftwich, A, Forms of the democratic developmental state: Democratic practices and development capacity. The democratic developmental state: Political and institutional design, Oxford University Press, (1998), at 400.

who have studied the experiences of the East Asian DSs have often argued, the model is largely viewed as tending to promote a governance system which is 'a hegemonic, centrist and interventionist' whose priority is to realize economic development more than anything else, even democracy.[28] East Asian DSs often described to have had traditional marks of heavy temptations toward authoritarianism which is in the words of Samuel Huntington 'legacies of oriental despotism' as their shared behavior.[29] Some of the explanations given to the authoritarian governances embedded with the DSM are the state must ease itself from the procedural hurdles of democracy to deliver fast economic growth not to mention that governments need to stay in power for a longer period so as to ensure continuity of policy that would transform the country.[30]

As seen earlier, even though the dominant scholarly views on the DSM associate it with authoritarianism, there is a counter narration, albeit not dominant, that opposes such association and argues for the possibility of building a democratic developmental state model (DDSM). According to the proponents of DDSM, authoritarianism is an exogenous, rather than endogenous, feature of the DSM and the model can be democratic arguing that there indeed are 21st-century democratic developmental states.[31] Similar is the case in Ethiopia as indicated earlier where the dominant view is that the EPRDF's DSM have had authoritarianism as its dominant characteristic feature while others however few though are who argue that of the EDSM has been one of a DDSM, and implemented in a manner that complements the country's federal arrangement. Let's then see the relationship that DSM have with authoritarian mode of governance.

4. DSM AND AUTHORITARIANISM: ARE THEY INHERENTLY LINKED?

As Leftwich[32] argued, the DSM tends towards an authoritarian governance system as necessary evil to address the underdevelopment problem by curtailing the consolidation of democracy. In this regard, the dominant conception of the DSM is, as argued by considerable

[28] Prado *et al*., supra note 6.
[29] Adrian Leftwich, *supra* note 4, at 686.
[30] Emanuele Fantini, *Developmental state, economic transformation and social diversification in Ethiopia*, 163, Ispi Analysis (2013).
[31] Vivek Chibber, *supra* Note 5; Evans, P, Constructing the 21st century Developmental State: Potentialities and pitfalls in**:** Edigheji, O. (Ed.), "Constructing a democratic Developmental State in South Africa: Potentials and Challenges", (2010), at. 37-58.
[32] Adrian Leftwich*, Developmental States, Effective States and Poverty Reduction: The Primacy of Politics*, Indian Journal of Human Development 5(2), January 2018, DOI:10.1177/0973703020110205.

scholars[33] pays little heed to the democratic governance but for development authoritarianism. Indeed, one of the contending issues that often arise in the case of DSM is the interaction of the model with democracy.[34] This is, noted by Fritz & Menocal)[35] as 'historically, many developmental states have been based on various forms of non-democratic political regimes: monarchies in nineteenth-century Europe, capitalist dictatorships in South Korea and Taiwan, and communist authoritarian regimes in contemporary China and Vietnam. Furthermore, in describing the importance of expedient governance system under the DSM over democracy which is viewed as a hindrance for it provides procedural cumbersome in decision making and enforcement, it is pointed out by Fritz & Menocal as follows:

> In case of authoritarian developmental states, power tends to be centralized in the hands of a few key actors and/or institutions, enabling political leaders to make and implement decisions (especially 'difficult' ones that may be opposed by certain segments of the population) more quickly. One of the characteristics of a democratic system, in contrast, is the diffusion of power among various sets of actors and institutions both inside and outside the government, which inevitably slows down the decision-making process, and makes it more difficult to take decisions that hurt important constituencies.[36]

In fact, some scholars even considered authoritarianism as an essential element for the success of DSM and as one of the factors that enhanced developmental capacities of the Asian developmental states in the 1970s and 80s.[37] For instance, Huntington[38] in his analysis of the incompatibility of democracy and development in transitional poor societies pointing that democratic governments would simply be too "soft" and hence unable to mobilize resources, curtail consumption, and promote investment so as to achieve a high growth rate. Therefore, he stresses that, during the process of political development in the developing countries, the political leaders must focus on strengthening political authority, maintaining social order and promoting political institutionalization to create a favorable political environment for economic development.[39]

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[33] Huntington, S. P. (1987). The goals of development. *Understanding Political Development*, *27*. (1987), at , 14–15; Robinson, M. & White, G. (Eds.), "The Democratic Developmental State: Politics and Institutional Design", (1998).
[34] Woo-Cumings, *supra* note 16; Vivek Chibber, *supra* note 5.
[35] Fritz, V. & Menocal, A. R. (2007). Developmental States in the new millennium: Concepts and challenges for a new aid agenda. *Development Policy Review*, *25*(5), 531-552.
[36] *Ibid*.
[37] Huntington, S. P., "The goals of development", *Understanding Political Development*, (1987), at 14–15.
[38] *Ibid.*
[39] Woo-Cumings, *supra* note 16, 1–31.

Similarly, Leftwich[40] argues that the discourse that dominates the course of development governance under the DSM is overcoming the 'structural contradiction' between democracy and development represents the most significant challenge in realizing democratic developmentalism. This is due to length of process and sometimes stalemate that may arise in democracies where consultation, deliberation and consents as ingredient of the process of democratic decision-making. Whereas, in DSM expedite radical decision making is more desirable than the lengthy and costly democratic process.[41] In a similar vein, Bolesta[42] asserts that the DSM would be difficult to sustain in a fully democratic system in which people enjoy extensive political rights. According to this view, if the management of the state is developmental in nature, then a form of authoritarianism can probably replace a democratic system, where the power legitimacy drawn from developmental achievements and not directly from public elements.

Indeed, successful East Asian developmental states were authoritarian in their approaches to enforcing developmental policies to realize fast growth within a short period of time.[43] In these countries, fearing that adherence to democracy would lead to unruliness and disorderly conduct that would be disadvantageous to development, they considered democracy in the short-term as a luxury they could hardly afford, and thus they focused more on developing discipline than democracy.[44] Their impressive success as some claims that should not be implicate that states need to be authoritarian in order to be developmental.[45] For the proponents of this view, they point out several authoritarian but anti-developmental or non-developmental states in Africa and Latin America. In this regard, Brazil, Botswana, Mauritius and South Africa are very good examples.[46]

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[40] Adrian Leftwich, *supra* note 32.
[41] *Id.*
[42] Bolesta, A., "China as Developmental State", *Montenegrian Journal of Economics,* 5, (2007).
[43] Mkandawire, T, "Thinking about developmental states in Africa"*, Cambridge, Journal of Economics*, 25(3), 289–314, (2001).
[44] Mackie, J., "Development and Democratization in East and Southeast Asia, A Journal of Policy Analysis and Reform", (1998), at 335-346.
[45] Mkandawire, T, *supra* note 43.
[46] Mackie J., "Development and Democratization in East and Southeast Asia", *A Journal of Policy Analysis and Reform*, (1998), at 335-346.

However, the fact that it is possible to name a good number of authoritarian developmental states does not settle the issue as there are however few democratic experiments.[47] In contrary to the description of the DSM as authoritarian in its tendency, there are, however they are few, who argue that development authoritarianism is rather an exogenous than endogenous factors in the DSM and it can be democratic and even there are essentially 21centuray democratic developmental state.[48] According to this view, unlike the 20th century's DSM, in the 21st century, the DSM is conceived as being primarily concerned with human well-being, and development strategies and policies cannot be formulated by technocrats, but must be derived from organized public deliberations.[49] In this regard, deliberative and participatory democratic institutions are seen as central to a 21st century conception of the DSM.[50]

The general assertion that the DSM is inherently authoritarian is therefore challenged as it is hardly possible to make simple generalization about the inherent relationship between the DSM and authoritarianism given some democratic experience such as Japan.[51] Randall, for instance, contends that it is necessary for the DSM to be democratic as authoritarian systems are a major hindrance not only to political development but also to economic progress.[52] Democracy has a detrimental role in enhancing the effectiveness of the state in bringing about development.[53] As Mkandawire [54] argues, a democratic DSM that embraces a system of checks and balances and one that is based on broad-based state-society alliances ensures popular participation in governance and in the transformative processes. Thus, the conclusion is drawn that the DSM is autocratic by nature and thus not fitting with a democratic context. Such a conclusion is erroneous because first, not all the east Asian tigers were authoritarian. For instance, Japan was democratic while South Korea was authoritarian. Second, that the Asian type of the DSM was autocratic does not mean that others too have to be also autocratic.[55]

[47] Vivek Chibber, *supra* note 5,
[48] *Id*.,; Thandika Mkandawire, *supra* note 4,
[49] Evans, P, *supra* note 31
[50] *Id*.
[51] Vivek Chibber, *supra* note 5.
[52] Randall V., "Political Parties and Democratic Developmental States", *Development Policy Review*, 25(5), (2007), at 633-652.
[53] Lange, Rueschemeyer & Matthew (Eds), "States and Development, Historical antecedents of Stagnation and Advance", (2005).
[54] Thandika Mkandawire, "From Maladjusted States to Democratic Developmental States in Africa. In: Edigheji, Omano, *(Ed.) Constructing a Democratic Developmental State in South Africa: Potentials and Challenges"*, Human Sciences Research Council (2010).
[55] Randall, V. Political parties and democratic Developmental States. *Development Policy Review*, 25(5), 633-652, (2007).

Generally, even though it may not be appropriate to describe the DSM as inherently undemocratic, but as shown above, a considerable number of scholars that characterize it as being often associated with 'development authoritarianism'. For example, Woo-Cumings[56] notes that the DS can be "good in terms of its effectiveness but it can also be ugly for its undemocratic and authoritarian tendencies, explicitly or implicitly" Given such a normative depiction of the DSM as an authoritarian mode of governance, what would be the issues of incompatibility - at least in principle - that the application of the DSM in a FPS may raise given that the latter is often attributed to democratic governance that promotes political pluralism and multilevel governance system. Let's then assess the Ethiopian experience in relation to multiparty and multilevel governance perspective.

5. AN OVERVIEW THE EPRDF'S DSM

As recorded in various party and official government documents, the EPRDF's DSM largely draws on the emulation of the development path of the NICs, such as South Korea and Taiwan that had proclaimed the essence and aspects of its hegemonic developmentalism under its DSM.[57] In this regard, for example, the Ethiopian government had invited Japanese and Korean experts to advise the country on industrial policy.[58] The various development policies prepared by the federal government exhibit policy parallels with that of the east Asian DSs where they state, as their pillars, early focus on boosting agricultural productivity to accumulate capital; increasing supply for agro-industries; providing incentives for export-orientation; and implementing 'carrot and stick' policies for enterprises.[59]

Generally, as often argued by the EPRDF (2010), the DSM that the party sought to build in Ethiopia has at least three core features.[60] These are: a firm conviction that development must be considered and treated as an existential question; political and

[56] Woo-Cumings, *supra* note 16.
[57] EPRDF, "Ye Tehadso Mesmerand Ethiopia's Renaissance", Addis Ababa, (2010); Abbink Jon, "Ethnic-based Federalism and Ethnicity in Ethiopia: Reassessing The Experiment After 20 Years", *Journal of Eastern African Studies*, (2011), at 596, and 618 available at: https://doi.org/10.1080/17531055.2011.642516 (accessed 22 November 2022).
[58] Altenburg, T. (2010). Industrial policy in Ethiopia (No. 2/2010).German Development Institute/Deutsches Institut für Entwicklungspolitik (DIE), (2010).
[59] Abbink Jon, *supra* note 57
[60] EPRDF, *supra* note 57; Meles Zenawi Foundation, *supra* note 2.

economic independence of the state or government from the influence of the economic elite; and ensuring the hegemony of developmental thinking. According to EPRDF, by embracing these principles and features, the EDSM will eventually help to extricate the country from poverty, with a goal to attain a middle-income economy as of 2020-2023.[61] Consequently, undertaking development and bringing about structural transformation is considered to be not only an economic objective but also – perhaps primarily – a political one as well.[62] This, as some argue, is an indication of the EPRDF's motive and intent that it had sought legitimacy to stay in power that is derived not from the ballot box but principally on its developmental success.[63] This has been implemented by the EPRDF by blending its old political program known as revolutionary democracy' propelled by 'democratic centralism' with DSM which it had sought to make a hegemonic ideology to govern the political economy of the country. This is underlined in one of the front political documents as "The Developmental State Model needs a developmentally-oriented dominant party that would stay in power until and up to its developmentalist mission is achieved when the core tents of developmental objectives are realized.[64]

Indeed, as can be gleaned from major party and government policy documents, such as democracy and development (2006), rural development and transformation (2002), capacity building (reforms on civil service, education, justice sector) etc., the influence of revolutionary democracy tuned developmentalism is apparent. As some argued, by blending the ethos and institutions of the DSM and revolutionary democracy together, it seems the EPRDF sought to project itself as a vanguard party and sought to obtain 'legitimacy' from its developmental success through the proper implementation of the DSM.[65] Hence, as Lefort[66] noted that the EPRDF in its effort to institutionalize the DSM in Ethiopia includes undertakings to build a vanguard capitalist state where the party (EPRDF) is the omniscient and omnipresent propeller of the political-economy of the state, along the principles, paths and goals of developmentalism.

[61] *Id*.
[62] Altenburg, T. *supra* note 58 and Abbink Jon, *supra* note 57.
[63] Bach, J. N. (2011). Abyotawi democracy: Neither revolutionary nor democratic – A critical review of EPRDF's conception of revolutionary democracy in post-1991 Ethiopia. *Journal of Eastern African Studies*, *5*(4) 641–66 .https://doi.org/10.1080/17531055.2011.642522(accessed on 10 September 2022).
[64] EPRDF, *supra* note 57.
[65]Abbink Jon, *supra* note 57.
[66] Lefort R., "The Theory and Practice of Meles Zenawi: A Response to Alex de Waal", African Affairs, (2013), at 460–470.

The EPRDF however has often claimed that the developmental success recorded over the past two decades was the result of its efforts and effective leadership in applying a democratic DSM in Ethiopia.[67] In this view, the EPRDF's efforts in building a democratic DS helped the party to get the legitimacy to stay in power through the free consent of the public, who expressed their approval to the party at the various national elections, as recognition of its success in entrenching democracy while achieving a commendable double-digit economic growth since late 2002. On the contrary, critics have often castigated the mode of execution of the DSM by the EPRDF, claiming that it was characterized by development authoritarianism, specifically by undermining regional autonomy and multiparty democracy, press freedom and freedom for civil societies.[68] Let us now turn to see the impact that the experiment with the DSM made on democracy and multilevel development governance as enshrined in the FDRE Constitution.

6. IMPACTS OF THE EPRDF'S DSM ON MULTIPARTY DEMOCRACY AND MULTILEVEL GOVERNANCE SYSTEM IN ETHIOPIA

The federalization of the post-1991 Ethiopian state was carried out with promises to institutionalize, among other things, a multilevel (self and shared) governance system anchored on the principles of sub-national autonomy, democratic governance and political pluralism.[69] Regarding, multiparty democracy, the constitution provides under Chapter three list of bill of rights that guarantees various civil and political rights from freedom of thought, expression, assembly, the right to elect and be elected etc. On multilevel governance, the FDRE Constitution empowers the federal government (under Article 51(2)) to "formulate and implement the country's policies, strategies and plans in respect of overall economic, social and development matters...; ...establish and implement national standards and basic policy criteria for public health, education, science and technology...". At the same time, for regional state, the Constitution confers the power to "formulate and implement development policies, strategies and plans in respect of overall economic, social and development matters of the regional states" [FDRE Constitution, Article 52(2-c)]. The wording of Article 52(2-c) seems to suggest that the regional states entrusted not just with administrative powers but with the power to formulate and execute economic, social and development policies as well. This

[67] Bereket Simon, *supra* note 2.
[68] Hagmann, T., Abbink, J., 2011, "Twenty years of revolutionary democratic Ethiopia, 1991 to 2011", *Journal of Eastern African Studies,* Vol. 5, No 4, (2011), at 579-595.
[69] Abbink Jon, *supra* note 57; Assefa Fisseha, "Ethiopia's Experiment in Accommodating Diversity: 20 Years", Balance Sheet. Regional & Federal Studies, (2012), at 435-473.

gives the impression that the two levels of government have concurrent power to make policies covering the bulk of social, economic and development spheres.[70] In nutshell, multilevel development governance in the Ethiopian federation basically entrenched under Articles 51(2) and 52(2-c).

In entrenching multilevel development governance in the Ethiopian federation, the FDRE Constitution does not stop by merely outlying division of power. It has also provided the democratic principles based on which the process of development governance (policy formulation and execution by any level of government needs to adhere.[71] The FDRE Constitution provides that governance including development governance needs to be carry out in transparent, accountable, participatory, responsive manner (see the FDRE Constitution, for example, Articles 12, 52(1-a &2-c), 43 (2) and 89(6)), offering adequate platform that enable the grassroots better to exercise their democratic rights. Specifically, under its Chapter 10, the FDRE Constitution provides for the respective tiers of governments in the federation, the objectives of and governing principles in the formulations and executions of development policies on economic, social and environmental matters (see: Article 85 of the FDRE Constitution).

Be the above constitutional provisions as they are, in spite of the fact that the federalization of the Ethiopian state brought some success in terms of institutional recognition of the ethno-linguistic and cultural diversity of the country and conferring them with self- and shared administration rights at federal, national and local levels. In spite of this, however, the federalization project, as some would argue, has nevertheless, been undermined by the highly centralized and authoritarian governance system that has dominated much of the EPRDF's rule This, as some have argued, is partly attributable to the EPRDF's manner of execution of the DSM in Ethiopia.[72] According to this view, Ethiopia's experiment with the DSM has been widely criticized for entrenching a centrist and authoritarian governance system in such a way that undermines a democratic federal system guaranteed under the FDRE Constitution.

[70] Assefa Fiseha and Zemelak Ayele, "Concurrent Powers in the Ethiopian Federal System In: Concurrent Powers in Federal Systems Authors: at, 241–260, available at: https://doi.org/10.1163/9789004337572_014 (accessed on 10 September 2022).

[71] Zemelak Ayele, "Local Government in Ethiopia: Still an Apparatus of Control? Law, Democracy & Development, Meheret Ayenew, "Decentralization in Ethiopia: Two Case Studies on Devolution of Power and Responsibilities to Local Authorities", in Bahru Zewde and S. Pausewang (eds), *The Challenge of Democracy from Below,* (2002).

[72] Emanuele Fantini, *supra* note 30; Abbink Jon, "Paradoxes of Electoral Authoritarianism: The 2015 Ethiopian Elections as Hegemonic Performance", 35 *Journal of Contemporary African Studies,* (2017).

Various scholars argue that the adverse consequences of the practice of the EDSM by the EPRDF began to make themselves felt in the country's political space and democratisation process following the much-contested 2005 general elections. The post-2005-election period is thus often depicted as the climax of the EPRDF's hegemonic rule, but unfortunately it is also marks an apparent regression in political pluralism in general and multiparty democracy in particular. [73]

Such a practice of a dominant-party politics by the EPRDF under the guise of pursuing a DSM in Ethiopia has been widely criticised for undermining political pluralism, as the party's hegemonic developmental discourse and practice adamantly adhered to exclusionary politics and policies. As one informant put it:

> The intention and the practice on the ground had been to keep an iron grip on political power where the EPRDF has long been controlling the political space and all of the state apparatus. The EPRDF, especially following the historic 2005 elections, had been unleashing widespread smear campaigns against the political opposition, independent media, civil society and the like, using such humiliating labels as "enemies of [the] developmental path", "agents of neoliberalism", "anti-peace elements", and, in the worst cases, branding them as terrorists, which makes them a legitimate target of the party's clampdown measures taken in the name of development[74]

The adoption of the DSM in Ethiopia has led to a regression in the country's electoral democracy, with a reversal taking place in the trend of progressive increase in representation of opposition parties in Parliament witnessed during the first three national elections prior to 2010 and culminating in literally no opposition representation at all in the 2015 elections.

In spite of this regression in electoral democracy and political pluralism in a supposedly multiparty system, some see the matter otherwise. In this regard, one key informant stated the following:

> [The party] had been able to win the hearts and minds of the rural majority [which] led to its victory in the last four general elections held in the country. And its long-standing political dominance and stay in power in the country is a result of changes in the political culture in the country where it is getting into a new era where we have one dominant party – the EPRDF – which played the game

[73] Abbink Jon, *supra* note 57

[74] Interview with an opposition party member and former member of the HoPR during the 3rd Parliamentary Season, in Addis Ababa, (5 November 2018).

> according to [the game's] rules, [rules that] paved the way for its [victoriousness] within the context of a multiparty setting as outlined under the [FDRE] Constitution.[75]

For those who are of the view that the DSM is compatible with a democratic system, the EPRDF's practice under the EDSM is seen as similar to the experience of countries like Japan and South Africa, where a dominant-party system exists within a democratic milieu. Such commentators thus try to justify their claims by equating the EPRDF with the African National Congress (ANC) in South Africa and the National Democratic Party (NDP) in Japan, which would imply that the EPRDF had been obtaining the popular mandate to rule the country through democratic elections in a competitive multiparty context where state power follows rules of the game that accord with principles and institutions set forth under the 1995 FDRE Constitution. Such a view, however, is fiercely opposed by the EPRDF's critics, who see the party's conception and implementation of the DSM in general and its conduct of dominant-party politics in particular as a cover-up for iron-fisted, authoritarian rule.[76] According to these critics, the EPRDF's politics falls within the ambit not of a dominant-party system but of an authoritarian, hegemonic-party system – one where the outcomes of elections are a foregone conclusion and there is a lack of strong opposition parties. Accordingly, EPRDF sought to project itself as a hegemonic developmental party, and in so doing acted against the values and principles of the FDRE Constitution by undermining multiparty democracy.[77] This is also true with multilevel governance system where EPRDF's revolutionary driven DSM unleashed coercive, intrusive and exclusionary development governance that undermined regional states constitutional autonomy to make and execute their own development policies as provided in the FDRE Constitution in the form of democratic multilevel development governance.

True that democratic multilevel development governance is embedded within the FDRE Constitution, which prescribes that development governance has to carry out in transparent, accountable, participatory and responsive ways.[78] Specifically, Chapter 10 of the FDRE Constitution provides for the respective tiers of government in the federation and sets out, in

[75] Interview with the head of the Institute of Policy Studies, in Addis Ababa, (March 2018).
[76] Mesay Kebede, *supra* note 11; Lefort Rene, "Free Market Economy, Developmental State and Part State Hegemony in Ethiopia: The Case of the Model Farmer", 50 *Journal of Modern African Studies,* (2012), at 681-706.
[77] Interview with the head of the Press Secretariat at the Office of the Prime Minister, in Addis Ababa, (10 March 2018).
[78] The FDRE Constitution Proclamation No. 1/1995, Articles 12, 52(1)(a), 52(2)(c), 43(2), and 89(6).

Article 85, the objectives and governing principles for the formulation and execution of policies on social, economic and environmental matters. The question is how the authoritarianism that characterised the EPRDF's developmentalism affected democratic multilevel development governance in Ethiopia.

The approach to development governance under the EPRDF's "developmental hegemonism" was characterised largely by the federal government's extremely centralised and authoritarian policy-making and execution practices. This was reaffirmed by participants in the FGDs, specifically those who were members of the House of People Representatives (HoPR and regional councils, who said it was a grave disciplinary offence to challenge policies already endorsed by the party's executive committee. This, as most of the FGD participants noted, was due to the unwritten rule that members may raise questions only on issues of implementation rather than on the policies themselves. According to one participant from the HoPR, "challenging the party's policies would be tantamount to challenging the party itself … it could result in one being subjected to criticism and self-criticism, and even sometimes disciplinary measures for those who persisted in their stand".[79] Similarly, an informant from the ONRS observed as follows:

> The EPRDF created conditions in which, far from being able to exercise their policy-making and implementation autonomy as clearly provided in the FDRE Constitution, regional states were not permitted to have a say about policies developed at the centre. Instead, once a policy was endorsed by the party, it simply rolled down to regions, where regional officials had to enforce it, with little to no opportunity available to them to challenge it.[80]

The informant mentioned, as an example, the case of the Integrated Addis Ababa-Oromia Master Plan, which affected surrounding areas of the ONRS. Some of the participants said that the EPRDF's tight party control intensified, especially following the much-disputed 2005 national elections, with top-down intervention justified on the basis of an urgent need to serve the national interest. This deprived the platform of entertaining diverse views and critical voices that could have helped to ensure better ownership of the government's development projects by the public.[81] The EPRDF's exclusionary approach to development policy

[79] Interview with a member of the HoPR and Chairperson of the Trade and Industry Affairs Standing Committee on Addis Ababa, in Addis Ababa, (14 July 2019).
[80] Interview with members of ONRS State Council, in Addis Ababa, (8 February 2019).
[81] Interview with an official at ONRS Plan and Development Commission, in Addis Ababa, (5 December 2019).

planning and execution, as one informant described it, "hindered the building of a common national development agenda."[82]

The EPRDF seems to have been attempting to apply the DSM on the basis of its age-old Leninist belief in a vanguard party guided by the "I know for you" logic – all of which contributed to the apparent lack of ownership among the public of the policies made by the central government, not to mention the disfranchisement of the grassroots and the erosion of the accountability of regional and local administrations to the general public. For example, the Large Scale Commercial Farming (LSCF) projects, which are based on geographical differentiation, are often mentioned as an illustration of the EPRDF-led government's elitist and exclusionary approach to developmental policy planning and execution. These projects were oftentimes designed and executed with little or no prior consultation with the concerned bodies, be they regional and local administrators, or the general public that would be affected by the projects.[83]

Indeed, some research participants criticised the government's choice of lowland areas for LSCF projects, saying it evinced an intrusive and exclusionary approach.[84] In turn, the government sought to justify its actions by pointing out the need to exploit the comparative advantages of these lowlands, given their combination of sparse population density and vast expanses of land with flat topography that makes it particularly suitable for irrigated mechanised farming.[85] The government's preferred policy approach here has been to promote the leasing of land to foreign and domestic investors.[86] This approach, as one informant from the GPNRS commented, constitutes:

> [a] double-standard approach between the highland areas and the lowland areas. People in the lowland areas, such as the GPNRS, have been at the periphery of the power relations with rulers at the centre in Ethiopia since the 19th century. And the EPRDF has simply maintained this historically lopsided centre-periphery political relationship, where the centre dominates the peripheries and dictates to

[82] Interview with a member of the HoPR, in Addis Ababa, (14 July 2019).
[83] Interview with a member of BGNRS State Council and a former official at the GPNRS Agriculture and Natural Resource Bureau, in Addis Ababa, (5 December 2019).
[84] Interview with the former President of the GPNRS and an official at the GPNRS Agriculture and Natural Resource Bureau, in Addis Ababa, (14 October, 2019).
[85] Interview with a former official at the Ministry of Agriculture, in Addis Ababa, (9 July, 2019).
[86] Abbink Jon, *supra* note 14.

> them to execute development plans formulated by the centre with little or no consultation.[87]

In a similar vein, a key informant from the BGNRS noted that there has been a hierarchical relationship between the centre, led by the EPRDF, and the peripheries, led by affiliated parties.[88] There is no doubt that, as far as developmental policy-making and execution is concerned, the EPRDF dominated the entire process in an apparent violation of what is enshrined in the FDRE Constitution, be it the sovereignty of nations, nationalities and peoples or the regional states' autonomy to make and execute their own policies without undue influence by the federal government. The practice, moreover, has been that the central government's development plans result in a dispossession of resources from the peripheries for mega-development projects such as industrial parks, hydroelectric dams and LSCFs. In most of these projects, deals were made with domestic and foreign companies without the involvement or consent of the respective regional state governments and local residents, particularly so in lowland areas such as the GPNRS and BGNRS.[89]

Similarly, in the case of Industrial Park Development Projects (IPD), informants from the respective IPD agencies of the ANRS and the ONRS underscored that the federal government often obligated the regional states to provide land for the development of industrial parks in their respective regions by the federal government, parks which were designed with little or no consultation.[90] The absence of regional-state participation in the planning and execution of development projects such as LSCFs and IPDs, as an informant from the ONRS Planning Commission explained:

> closes up avenues that could create democratic and non-authoritarian social, political, and economic relations between and among the federal government and regional states, eventually ensuring that peoples' right to development and their freedoms and democratic rights are not undermined in the name of developmentalism as pursued by the EPRDF under the helm of the DSM.[91]

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[87] Interview with a former official at the GPNRS Agriculture and Natural Resources Bureau, in Addis Ababa, (19 October, 2019).
[88] Interview with an official at the GPNRS Office of the Chief-Administrator, in Addis Ababa (19 October, 2019).
[89] Interview with a former official at the GPNRS Agriculture and Natural Resource Bureau and member of the central Committee of the then ruling party of the BGNRS, in Addis Ababa, (19 October, 2019).
[90] Interview with an official at the ANRS Industrial Parks Development Corporation and an official at the ONRS Industrial Park Development Cooperation, in Addis Ababa, (20 July, 2019).
[91] Interview with an official at the ONRS Plan and Development Commission, in Addis Ababa, (7 November, 2018).

Similarly, as informants from the SNNPR noted, the absence of participation by regional states in policy and project design at the federal level denied them platforms which are important, inter alia, for expressing regional interests and priorities in the exercise of the rights to self-determination, self-rule and shared governance enshrined in the FDRE Constitution.[92]

The lack of participation and engagement of stakeholders and citizens often resulted in severe criticism and grievances which, according to some observers, led the EPRDF to dig its own grave, as seen in the case of the Integrated Addis Ababa-Oromia Master Plan (IAOMP).[93] This has been mentioned as a typical case that shows the ramifications of the EDSM's authoritarian developmentalism.[94] The IAOMP was widely castigated by observers for being carried out in an authoritarian manner, as manifested, among other things, in the top-down, exclusionary and coercive formulation and implementation of development policies with no, or little, consultation with and consent from concerned stakeholders such as the ONRS, local administrators and farmers.[95] Aberra describes the practice as follows:

> The plan is imposed "from above" as has always been, while a real development plan needs a free and informed consent of the affected people and includes measures to avoid or minimise any possible destruction to local communities. The designers of the Master Plan refuse to recognise examples from other parts of the world concerning legitimate development and ignore Oromo protests of unprecedented scale that has already led to hundreds of innocent victims. Such patterns are clear indicators of the designers' intent to destroy the Oromo identity in the area under the guise of the "Addis Ababa Integrated Master Plan".[96]

These sentiments were confirmed by an informant from the ONRS, who explained the process of planning and (attempted) execution of the IOAMP as follows:

> The problem with this Master Plan is both in its content and manner of enforcement. When I say "content", I mean the federal government does not have the power to make detailed plans such as the IAOMP and oblige regional states and local governments to enforce [them]. The fact on the ground was that in the

[92] Interview with an official at the SNNPR Council, in Hawassa, (April 18, 2019).
[93] The IAOMP, the tenth subnational integrated plan, was designed to be implemented from 2014 to 2037. The aim of the Master Plan, as stated in the original document, is "to developmentally link Oromia special zones and the City of Addis Ababa to improve the quality of life of citizens as well as contribute to the economic growth and development of the nation" (AACPO, 2017).
[94] Interview with an official at the ONRS Urban Development Bureau, in Addis Ababa, (December 5, 2019)
[95] Interview with a member of the ONRS Council, in Addis Ababa, (November 7, 2018)
[96] Aberra Degefa, "Addis Ababa Master Development Plan: A Program for Development or for Ethnic Cleansing?", 19 *RUDN Journal of Sociology* (2019), at 2 .

> case of the Master Plan, the administration in the ONRS was pressured by the EPRDF's officials at the party's higher echelon to enforce the IAOMP, which [was] prepared from the very beginning with little consultation and consent from the region, which, as seen later, erupted in fierce disagreements between the EPRDF leadership and the OPDO [Oromo People's Democratic Organisation].[97]

What the IAOMP illustrates is that plans are often prepared with little or no consultation with the stakeholders concerned, be they regional or local officials or people at the grassroots.[98] Most of the informants from the ONRS stated that the IAOMP was prepared by a few elites, with little consultation, coordination and cooperation between officials of the ONRS and Addis Ababa from the inception of the plan up to the stage where it was to be implemented.[99] The IAOMP was formulated within small circles, mainly by EPRDF "big men" on its executive committee and a few confidante-technocrats. One informant from the ONRS planning and development commission said that "if you want a textbook example of centralised governance by the EPRDF that disregarded the federal system in general, and regional state autonomy in particular, it's the Addis Ababa-Oromia Special Zone Integrated Master Plan".[100]

Indeed, the IAOMP is mentioned by a considerable number of scholars as a watershed moment that marks the pinnacle and decline of the centrist, top-down and exclusionary approach to development governance of the EPRDF. The announcement of the Master Plan triggered massive public protests across the ONRS, which eventually led to the disintegration of the EPRDF's democratic centralism and the resignation of Prime Minister Hailemariam Dessalegne in April 2018.

CONCLUSION

As seen in this article, the core ideological and institutional drivers of the EDSM – a dominant party politics and a hegemonic, centralized, top-down governance pursued by the EPRDF – had significantly undermined a democratic and multitier system of governance within the Ethiopian federation, as provided under the 1995 FDRE Constitution. Contrary to the FDRE Constitution, which guarantees a democratic multilevel governance underpinned by the core values and institutions of a federal democracy, including among other things, a

[97] Interview with a former official at the ONRS Finance and Economic Development Bureau, in Addis Ababa, (February. 18, 2019)
[98] Interview with an official at the ONRS Urban Development Bureau, in Addis Ababa, (December. 5, 2019)
[99] Interview with a member of the ONRS Council, in Addis Ababa, (November. 7, 2019)
[100] Interview with a member of the ONRS Council, in Addis Ababa, (November. 7, 2019)

transparent, accountable and participatory approach in the formulation and execution of various development policies, plans and projects, this study found that, under the EDSM, the EPRDF- led government of Ethiopia had been pursuing 'development authoritarianism' where formulation and execution of development policies and plans was carried out in an authoritarian, highly centralized, top-down and non-participatory manner. Moreover, due to the EPRDF's hegemonic developmentalism, the values and benefits envisaged under the Ethiopian federal system, such as policy innovation and competition, locally-tailored policies, popular participation, transparency and accountability, had been seriously compromised.

Generally, the practice of the DSM in Ethiopia under the leadership of the EPRDF has undermined the essence of MPDF, as outlined under the 1995 FDRE Constitution. The result of such a practice by the EPRDF has been a regression in multiparty democracy. Consequently, the EPRDF's mode of execution of the DSM in Ethiopia has had its own contribution to the frequent civil unrests and public protests that the country has been experiencing seen since 2015, which eventually culminated with a reshuffle of top political leadership within the EPRDF and the government. Moreover, there have since been a series of political developments in the country, triggering a profound change within the country's political arena that saw a significant shift of narrative towards a liberal political- economic model and the waning of the DSM and the EPDRF's long-held 'revolutionary democracy' ideology and even the subsequent dismantling and rebranding of the front into a new party called Prosperity Party, led by PM Abiy Ahmed.

THE EFFICIENCY OF THE HOUSE OF FEDERATION TO RESPOND TO THE QUESTION OF THE WOLKAITE PEOPLES IDENTITY RECOGNITION AND GEOGRAPHIC RESTORATION

Worku Adamu*

Abstract

This article looks at the identity recognition and geographic restoration question of Wolkaite people as Amharan. No studies of these people have been conducted from the question of identity recognition and geographic restoration perspectives. This study is, therefore, intended to investigate challenges faced in their response to identity recognition and geographical restoration. Hence, a qualitative research approach focusing on phenomenological design was employed. The respondents of the study were thirty-five, selected through a purposive sampling technique. Relevant and reliable data were gathered through structured questionnaires, in-depth informant interviews, focus group discussions, document analysis and secondary sources. The article's main objective is to investigate why the Wolkaite people's identity recognition and geographic restoration quest have not been responded to based on the FDRE constitutional framework. The findings of the study revealed the main challenges to the issue of Wolkaite people's quest for the implementation of their constitutional rights was denied due to a lack of committed, efficient independent institutions being involved. This implies that the law and it's practice are not matched in terms of the Wolkaite identity recognition. Therefore, to avoid the limitations of these institutions, reforming as well as empowering them at all levels would be a fruitful and productive solution to the question of identity matters.

Keywords: Wolkaite, Minority Right, Identity Recognition, Institution, House of Federation

INTRODUCTION

The issue of minority rights is commonly presumed to be a leading cause of conflict and insecurity in many parts of the world. Excluded groups who suffer from multiple disadvantages may join forces when they have unequal rights, but are denied a voice in political processes and feel marginalized from

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mainstream society.[1] If their request is not accommodated peacefully via the formal channel, groups are more likely to resort to violent conflict seeing no alternative.

In Ethiopia, the Ethiopian People's Revolutionary Democratic Front (EPRDF), a coalition party that replaced the *Derg* regime in 1991, opted for an ethnic-based federal state structure, later formalized by the 1995 Federal Democratic Republic of Ethiopia (FDRE) Constitution which introduced the principles of how the question of "nation, nationalities, and peoples" in general, and the issue of minorities in the implicit sense, responded based on the constitution.[2] According to Aklilu, "These measures, in theory, ensured the realization of political and economic rights of minorities in Ethiopia through a federal system of self-government.[3]

The FDRE constitution also recognized the rights of various ethnic groups to promote and preserve their language, culture, tradition, history and identity.[4] Despite the recognition of the rights of 'nations, nationalities, and peoples', how minority rights and demands are protected and addressed by the constitution remains vague to a large extent. As per the federal constitution, out of the 550 seats, 20 seats are reserved for special representation of minority groups in the Federal House of Peoples Representatives. Based on the electoral district, a seat in the House of Peoples' Representative's requires a population of 100,00 for a constituency. This may imply that the constitution implicitly defines "minorities are those groups whose population is less than 100,000".[5] Despite this, the constitution is silent in providing clear and adequate answers to questions such as which groups are minorities. What should be the historical, social and political bases for determining minority status? How would minority interests and rights be represented and guaranteed at national and regional levels ?[6]

The discussion in this article relates to the question of the Wolkaite people. For this purpose, an investigation on the extent of the right to recognition of this regional minority is being undertaken at the federal level. The most intriguing development in this regard is the non-existence of a clear and

[1] DFID, 'Reducing Poverty by Tackling Social Exclusion', A DFID Policy Paper, (2005), available at: https:/gsdic.org.(accessed 24 November 2022).
[2] Assefa F, 'Ethiopia's experiment in accommodating diversity: 20 years balance sheet', Ethiopian Journal of Federal Studies, (2013)1(1), pp.103–15
[3] Aklilu Habte, 'Federalism in Ethiopia Emergence, Progress and Challenge', January 2022 available at: https://www.researchegate.net (accessed 10 November 2022).
[4] FDRE Constitution, article 39(1).
[5] *Id*.
[6] *Id*.

objective criterion to be applied by the House of Federation (HoF) apart from Article 39(5) of the FDRE Constitution and Proclamation 1261/2021 for determining identity-related questions. Article 39(5) has far-reaching implications in the identity recognition question of social groups at the regional as well as sub-regional levels.

This article contains four parts: The first one provides this introductory part. The second part deals with the theoretical frameworks on minority ethnic groups. The third part explains the discussions and findings on the demand for identity recognition and geographic restoration of Wolkaite. The last part contains an overall conclusion. The research is based on fieldwork conducted from February 01 to June 15, 2022, document analysis and interviews, with an extensive review of secondary sources related to the matter.

1. THEORETICAL FRAMEWORKS ON THE ISSUE OF MINORITY ETHNIC GROUPS

The basic aims of the United Nations is to promote and encourage respect for human rights and for fundamental freedoms without distinction as to race, sex, language or religions. The International Covenant on Civil and Political Rights (ICCPR) article 1(1) states that states shall protect the existence of ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage condition for the promotion of that identity. Article 2 (1) also provides that persons belonging to national or ethnic religious and linguistic minorities have the right to enjoy their own culture, and to use their language in private and public freely without interference or any form of discrimination. Article 26 further expounds that all persons are equal before the law and are entitled, without any discrimination, to the equal protection of the law.

A major issue in any academic consideration of ethnic or ethnicity is the criteria by which a social group is labelled as ethnic. For the definition of minorities, the most important point of departure is the non-existence of a universally binding legal definition of the concept of a minority. In the absence of a binding and equally agreeable definition, for the identification of minorities what matters, in legal terms, is the legal recognition of a minority position and its subsequent legal treatment.

Such recognition ultimately depends on a political choice. However, states, even though faced with the recognizable complexity and diversity of the concept of minority, have denied the existence of minorities within their constituencies for various reasons. The paramount one is the fear of secessionist

movements, eventually leading to the breakup of nation-states.[7] As elaborated by Ramaga, the dilemma of defining minority identity has existed throughout history. Due to the varied experiences of different states, solutions to the understanding of minorities could hardly be formulated in universal principles, but rather in the particular circumstances of particular contexts.[8]

Regarding this, various scholars have forwarded various definitions, some of which emphasize objective markers of identity, such as race, language or religion that distinguish members of minorities from other ethnic groups, others have focused on subjective characteristics such as belief in common descent or possession of a common culture. However, in most of the definitions forwarded by the different stakeholders, there appears a certain pattern of resemblance. The best universally applicable definition made by Francesco Capotorti and that of Jules is the most known but still is not sufficient as it does not answer all the questions about the minority. The definitions is the following:

> ''A group numerically inferior to the rest of the population of a state, in a non-dominant position, where members being nationals of the state possesses ethnic, religious, or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, tradition, religion or language.''[9]

Minorities are groups set apart both objectively and subjectively in circumstances of numerical inferiority and non-dominance. As Capotorti himself claimed, the preparation of a definition capable of being universally accepted has always proved a task of such difficulty and complexity that neither the experts in this field nor the organs of the international agencies have been able to accomplish it to date. However, this definition is generally considered to be the most widely recognized definition to date, both in theory and practice, even though it never has become legally binding.[10] According to Copotorti, language and religion are essential elements in the formation of ethnicity, i.e. a 'collective identity', along with common culture and history. They are sources and forms of social, cultural and political identification.

[7] *Id.*
[8] Ramaga P.V., "Relativity of the Minority Concept: Madrid. University of Carlos", (1992),available at: https:/www.semanticscholar.org (accessed 21 November 2022).
[9] Francesco Capotorti, "Study on the Rights of Persons Belonging to Ethnic, Linguistic and Religious Minorities", (1977), para 568. Available at https:/digitallibrary.un.org (accessed 23 November 2022).
[10] Jelena Pejic, "Minority Rights in International Law", Human Rights. Quarterly 19, (1997), p. 670 at https:///chilot.me

During the author's fieldwork, many informants define themselves as a group belonging to the Amhara family whose ancestors spoke the Amharic language and who have a common history and culture different from the Tigray people. The recent HoF Interim Committee (2013 E.C) led by former speaker of the HoF, Honorable Adem Farah, whose survey research report also found that many people identified themselves as Amhara. In this regard, Wolkaite people's identity recognition quest fulfills Capotori's definition.

2. THE DEMAND FOR IDENTITY RECOGNITION AND GEOGRAPHIC RESTORATION OF WOLKAITE

2.1 Historical Background

Wolkaite Setit Humera town is an area located in the north western part of Ethiopia at the border between Sudan and Eritrea. It is 977 km from the Ethiopian capital Addis Ababa and 252 km from Gondar City a population of more than 500,000 inhabitants.[11] Currently, it is administered as part of the Amhara region. Economically, Wolkaite is fertile land, where mechanized agriculture can produce surplus consumables and export items, including sesame seeds, incense, cotton and valuable minerals. It is also strategically important to access the world through Sudan and is considered a corridor to the country and the TPLF.

Many foreign scholars have written about Wolkaite Tegede. Among the nineteenth-century notable writers about northern Ethiopia is Walter who travelled as a missionary in 1848, he wrote that the river Tekeze is the line separating the Tigray province and Gondar where the people of Wolkaite are located.[12] Another missionary Joseph-Émile of France wrote a book on the location and identity of the Wolkaite people as inhabitants of Gondar-Amhara. [13]A British writer Mansfield Parkyns documented that "Northern Abyssinia or Ethiopia may be considered as divided by the river Taccazy into two countries Tigre and Amhara; though, strictly speaking, these are only the names of two of the many provinces into which both countries are divided. But the people east of the river (Tigray) differ in

[11] Population and Housing Census of Ethiopia Administrative Report Central Statistical Authority. Available at https:/csa.gov.et (accessed 20 October 2022).
[12] Walter Chichele Plowden, "Travels in Abyssinia and the Galla Country: With an Account of a Mission to Ras Ali 8vo", London (1848), p.39.
[13] Joseph-Émile Coulbeaux, "Histoire politique et religieuse d'abyssinie: depuis les temps les plus recules jusqu'a l'avenement de Menelick II", (1929), p. 11.

language, and to a considerable extent in dress, manners, and customs, from that west (Amhara) of it".[14]

Samuel Gobalt also wrote a journal in 1850 that indicates the boundary of Amhara and Tigray people showing the location and identity of the Wolkaite people. He wrote that the Amhara and Tigre provinces are most extensive and separated by the Tekeze River, adding that the inhabitants are distinguished not only by different languages but also by different national feelings.[15] This is notable historical evidence of the river Tekeze marking the end of Tigray territory and the start of Gondar province where the people of Wolkaite reside soon after crossing the river. Hormuzd Rassam a British citizen, stated that the term "Amhara, as now used by the Abyssinians, in an ethnological sense, designates the inhabitants of the country lying west of the Takkaze, and also south of that river, as far as the province of Gojjam." [16]

There is also human and documentary evidence indicating Wolkaite was officially part of Gondar Province. However, as the Wolkaite committee claims and documents when the TPLF gained control of the country in 1991, and restructuring the regions under the TPLF-led party coalition, the indigenous, geographically and culturally Amhara territories of Wolkaite Tegede were demarcated as part of the Tigray region. During the previous regimes, Wolkaite was part of Wogera Aworaja, with its capital Dabat in Bgeimder province.[17]

The Tekeze River was recognized as a natural border between Tigray and Amhara before the 1991 transitional charter of Ethiopia. The river is considered one of the country's four major rivers, flowing westwards into the Nile. However, after the promulgation of the charter, regions are demarcated based on linguistic criteria.[18]

2.2 Application Letter of the Wolkaite Committee's to the House of Federation

[14] Mansfield Parkyns (16 February January 1894) was a British traveller, known for his travel book Life in Abyssinia: being notes collected during three years' residence and travels in the country that has been published in1853. In this book he described his experiences and observations during three years ( ) travels in Abyssinia, the modern territories of Eritrea and Ethiopia.
[15] Samuel G. and Rober Baird, "Journal of three years stay in Abyssiniya", (1850), p.37.
[16] James Bruce, "Bruce's Travels and Adventures in Abyssinia", (1860).
[17] Achamyeleh T "A Quest for Identity and Geographic Restoration of Wolkaite Tegede. Forceful Annexation, Violation of Human Rights and Silent Genocide Addis Ababa Amhara Council" (2016.
[18] *Id.*

This section restricts its scope to the case of the Wolkaite identity recognition claim to the HoF. The Wolkaite Amhara National Identity Question Committee (WANIQC) requested the HoF to identify recognition and geographic restoration of Wolkaite-Tegede, to Gondar, Amhara. They claim that when the government demarcated the regional borders and placed Wolkaite within the Tigray region, they violated the FDRE's article 46 (2) of the constitution. States shall be delimited based on settlement patterns, language, identity and consent of the people concerned. This request was written in a letter to the HoF with the petition of 18,000 (eighteen thousand) residents' signatures on 16 January 2016.

The letter of request is printed on the letterhead of the WANIQC, and received and numbered by the receiving HoF. The letter starts with a written authorization of the delegates to represent the Wolkaite committee and the Wolkaite Amhara, people. The centrality of the message is the Wolkaite Amhara National Identity question. Further, the letter enumerates the key contributions of Wolkaite citizens to the culture and history of Ethiopia stating that apart from their ancestors cultivating the Amhara identity, their land and property were acknowledged and respected.[19] Similarly, with great difficulty, the Wolkaite people have been challenging the government stating their Amhara identity has been stolen and their land forcefully incorporated under Tigray. The resistance was conducted on an individual and collective basis for over 25 years.

The unexpected voice of authorities has recently come to further affirm the historic facts of Wolkaite-Tegede belonging in Gondar. Former Governor of Tigray province during the Imperial regime, Ras Mengesha Seyoum, as well as from founding members of the TPLF Aregawi Berhe, Gidey ZeraTsion, Asegede Gebre Selassie, and Gebermedhin Araya, all have testified that Wolkaite has historically been within the Amhara province. No historic evidence or period is found that the Tigray administration has ever crossed the Tekeze River. The TPLF's tyrannical minority regime, however, continued to deny the historical facts and has continued to pursue repressive and deadly force against people in the region that at various times raised the issue.[20]

There have also been several reports of deaths and disappearances of Wolkaite people who have demanded their identity and their land be restored. As the people of Wolkaite-Tegede are persistently claiming their Amhara identity, several hundreds of unarmed civilians have paid for their precious lives. Attached to the HoF is a document detailing the names of people killed by the brutal TPLF

[19] Wolkaite Amhara National Identity Question Committee, Wolkaite Committee 2016, Gondar.
[20] See the applications of the Wolkaite to the HoF document on file 2016 Addis Ababa.

regime of Tigray since 1992 showing at least 308 innocent Wolkaite-Tegede people of Amhara have been killed since then.[21] Observers see the development in Wolkaite as one that the ethnocentric regime, which is rhetoric about respect for ethnic identities, would not and could not respond to positively, it instead resorted to crushing the demands of the Wolkaite people by force to maintain control of the vast fertile land.

Accordingly, the dispute of the Wolkaite encompasses two important sensitive elements: identity as well as geographic restoration to the Amhara region. Activists report a silent genocide on Amhara people in general and Wolkaite in particular and the settlement of Tigray people in the annexed districts was accelerating. Ethiopians and the international community need to take immediate action to save these people before they get wiped out once and for all from the land.

2.3 The Competing Claims for Wolkaite by Amhara and Tigray Regions

According to Amhara leaders, Wolkaite being their ancestral land, is supported by historical evidence. The people speak multiple languages, such as Amharic, Tigrigna and Arabic due to the territorial boundary interaction with neighbouring people and have no confusion about their Amhara identity. They claimed their demographic make-up was manipulated by the TPLF for legitimizing the annexation of their land. Tigray regional state's constitution denies ownership to Amhara, does not allow Amhara to use their language Amharic at school, services, social events, worship, etc. On the other hand, Amhara regional state constitution gives rights to the region to all its inhabitants and allows minority ethnic groups to use their language, develop their cultures and govern themselves like Kimant, Argoba, Agew-awi and Agew Himra.

Amhara further argues that TPLF's latest genocide in Maikadera is evidence they cannot imagine living under the Tigray region again.[22] TPLF's claim over Wolkaite has evolved. Earlier, backed by its strength, it boldly claimed Wolkaite had been part of Tigray but was taken from it and given as a favour to the governor of Gondar province by Emperor Haile Selassie,[23] which is refuted by historical records and historians. TPLF argued that states were structured based on linguistic similarities further indicating that according to the ethnic federalism it implemented, the people in Wolkaite speak

[21] *Id.*
[22] *Id*.
[23] *Id*.

Tigrigna and therefore the territory should belong to Tigray. This argument is refuted by the demographic engineering described earlier. Hence, the win-win solution for the Wolkaite identity and boundary demand is to organize a referendum by the HoF to the Indigenous Wolkaite people only and accept their decision, where historically Amhara and settler Tigrans were living in harmony, as they have always done.

2.4 The Rules of Procedures to be followed in Instituting Identity Questions

According to article 24(2) of Proclamation No 1261/2021, any community believing its self-identities are denied their right of self-administration, who claim to have the status of self-hood within the context of Article 39(5) of the FDRE Constitution and who believes that its self-identity is denied, may present its application to be named a nationality.[24]

The two preconditions for the institution of the application of an identity question are as follows. First, a question of identity must be presented in writing. A group of people must bring its case to the attention of the concerned organ of government in written form. The community must institute the question by applying/petitioning of identity question in the registry of an authority having jurisdiction over the case. Secondly, the application for a question of identity must consist of the details of the question.[25] It is provided that every question, including the question of identity, shall as far as practicable be framed to afford ground for the final decision. To put it differently, the application of the identity question must state the cause of the question.

The cause of the question gives occasion for and forms the foundation of the question. A cause of question may be defined as the facts, which give rise to the claim. This rule of procedure helps the application receiving authority to know the subject matter of the question or the nature of the question. Identifying the nature of the question from the outset may have four functions. One, it helps the application receiving body in determining whether it has the power to decide over the question at hand. Two, it also helps in determining whether the applying party has the right to present the question in the issue. Three, it has the utility of identifying pertinent substantive and procedural rules that govern the adjudication of the question.

[24] Federal *Negarit Gazette* Proclamation No.1261/2021.
[25] *Id.*

Four, the application for a question of identity must consist of the details of the question supported by the names, addresses and signatures of at least five percent of the inhabitants of the nation, nationality, or people. Fourthly, the individual or individuals who are delegated to present a petition for identity questions to the HoF shall produce reliable evidence of their delegation from the nation, nationality, or people. Particulars of this procedure shall be determined by the regulation to be issued by the HoF as the case may be. Such kind of application is known as a collective representative action within the context of article 9 of Proclamation No 1261/2021. Collective representative action is one in which the individual or individuals named as delegate/delegates represent the interests/rights of the nation, nationality, or people concerned as a whole. In this regard, the HoF has enacted rules of law that are envisaged under Article 28 of Proclamation No 1261/2021.

2.5 The Legal Ground of the Wolkaite Identity Recognition Question

As the title of the application of question, the applicant of the Wolkaite Question is purported to be the Wolkaite inhabitants. As the name of the question, of course, the applicant of the Wolkaite question is supposed to be the Wolkaite Amhara inhabitants. That means the question reflects the wishes of all Wolkaite dwellers since the Wolkaite people consist of considerable Amhara residents. Do the FDRE and the Tigray state Constitutions recognize and protect the right of Wolkaite dwellers to a distinct identity? Put in another form, whether the term a nation, nationality, or people as defined in article 39(5) of the FDRE Constitution includes also the community of Wolkaite residents.

As per article 24(2) of Proclamation, No 1261/2021, any community believing its self-identity is denied has the right to bring an identity question to the House. This stipulation imposes three per-requisits to the quest for self-hood status recognition at the country level. They are: The right to distinctive identity rests upon a group of people within the background of article 39(5) of the national Constitution and article 2(9) of Proclamation No 1261/2021 of Ethiopia. A group of people must meet the criterion for consideration of a nation, nationality, or people stipulated in the constitution.

Any nation, nationality, or people may not split its identity recognition claim in order to claim part/portion of a nation, nationality, or people at one time and part of the remaining nation, nationality,

or people at another time; the application of identity recognition must represent the whole of the concerned nation, nationality, or people members since it is a collective right of a nation, nationality, or people. To put it another way, the right to a distinct identity is indivisible in law. Within the context of the Wolkaite question, one may rightfully conclude the right to distinct identity rests upon an Amhara nation, nationality, or people.

As mentioned above, the applicant of the Wolkaite Question is alleged to be the Wolkaite inhabitants. The Wolkaite inhabitants qualify as a 'nation, nationality, or people' as per article 39(5) of the Federal Constitution and 2(9) of Proclamation No 1261/2021. Since the Wolkaite inhabitants qualify the definition of a nation, nationality, or people, they have the right to quest distinct identity questions, at least, in this regard.

The Federal and Tigray Constitutions accord an express recognition and protection to the right of distinct identity to nationalities alone. There is a provision whereby the Wolkaite community, even as a whole, can bring the question of identity recognition, the Wolkaite community remained without constitutional recognition and protection.

The government's duty to respect the identity of nationalities extends to the community of Wolkaite dwellers. It would, therefore, be logical to argue that the right of distinct identity that articles 39(5) and 88(2) of the Federal Constitution refers to applies to nationalities and Wolkaite dwellers. Most entertain the view that articles 2(9) and 24(2) of Proclamation No 1261/2021, and article 39(5) of the FDRE Constitution implies the recognition of the right of Wolkaite dwellers to distinctive identity. Therefore, the Wolkaite community does have the right to claim a distinct identity since there is a law that expressly guarantees such a right to them. Since it is a common/mutual right of the nation, nationality, or people concerned, it must be questioned collectively/mutually in the sense that all communities who have shared/joint interests with the identity must be represented in law. A group of people within the context of Article 2(9) of Proclamation No 1261/2021 of Ethiopia may present its application by way of linguistically representative action. Collective representative action is one in which the individual or individuals' named as representative /representatives are representing the interest of a nation, nationality, or people concerned.

Concerning the Wolkaite question, as it is notorious, the Wolkaite's people Amhara nation-hood identity question committee claimed to be representative of the Wolkaite inhabitants. This assertion, on its face, reassures us it is a required representative of the nation, nationality, or people concerned because of the two eyes of the law. The committee does have the right to apply the question in this context because it is a legal representative of the nation, nationality, or people concerned.

As stated beforehand, a group of people must have five ethnic characteristics different from those already with the status of nationhood at the federal level. A nation, nationality, or people is a group of people possessing ethnic characteristics differing from the rest of the population and show a sense of solidarity directed towards preserving their culture, traditions, religions or language. The issue of ethnic identity can only occur in pluralistic societies, defined as societies in which significant diversity and dissimilarities exist. Since the ethnically diversified character of the country is essentially present at the federal level, the FDRE Constitution has designed a system of ethnic diversity accommodation at the country level. This type of ethnic diversity accommodation scope of application is nationwide.

However, the ethnically diversified character of the country is present at the regional state level as per state Constitutions. Such kind of regional state ethnic diversity may be accommodated at the regional state level, if properly considered by the regional state concerned. The source of a distinct identity legal right may be either a national Constitution or a regional state's Constitution. The Wolkaite people's Amhara nation-hood identity question committee claimed a distinct identity legal right based on a national Constitution. In other words, the committee claimed identity recognition based on the Federal and Tigray regional state Constitutions. It is worth pointing out the Tigray regional state Constitution only granted a distinct right to two nationalities, Irob, and Kunama, in addition to Tigray. These ethnic/linguistic characteristics' diversity makes one ethnic group different from others. Therefore, the Wolkaite inhabitants do have ethnic characteristics different from those with the status of nationhood at the federal level.

In the broad spectrum, the Wolkaite inhabitants have the three pre-requisites to quest for self-hood status. Therefore, they do have the right to claim the Wolkaite's people Amhara nation-hood identity question as per article 24(2) of Proclamation No 1261/2021.

2.6 The Response of the House of Federation to the Question of Wolkaite People Identity and Geographic Restoration

Many years have passed and the HoF has not reacted yet to the petition. On 28 January 2016, a delegation of 81 Wolkaite Amhara people travelled to Addis Ababa intending to submit their letter personally to the HoF. When they reached Chancho, 40 km from the capital Addis Ababa, federal police stopped them. They interrogated the Committee in Tigrigna, refusing to speak Amharic, the national working language of Ethiopia.[26] They told them to stop raising this question, denied them entrance into Addis Ababa and deported them to Chancho in the Oromia region. The Committee informed the Oromia regional government about the incident and in return received their support. Two days later, the group split up and went to Addis Ababa in different groups. On 3 February 2016, delegates reached the HoF, and four entered the office to make an appointment with the then-speaker of the House, Yalew Abate. However, when they left, they were taken into custody and treated as criminals interrogated, intimidated, with photos and fingerprints taken by the national intelligence and security service.[27]

The following day, 4 February 2016, the delegation was held at HoF and given a letter signed by the then-speaker of the House to the Tigray region, stating that to raise the Wolkaite question is a constitutional right and has to be treated by the regional legal bodies properly. Six months later, the Tigray region still refused to deal with the question but sent the military to arrest all committee members. On 13 July 2016, four committee members were arrested in Gondar's Kebele 3, and taken straight from Gondar to Makelawi prison centre in Addis Ababa[28] where they were kept for the first 17 days in solitary confinement in a dark chamber. No communication was possible during the confinement. Usually, interrogations were held in the middle of the night, during the day, they were kept in dark rooms, limited toilet hours ensured separation from other prisoners. After 17 days, they were moved to a windowless room with 20 other people. "The air was very bad, it stank. Many people were sick, food without vegetables and fibre caused constipation as a method of torture. The Committee members, some elder men, handled the torture differently.[29]

[26] Interview held with Demeke Zewedu, Addis Ababa, 2021 .
[27] *Id.*
[28] Interview held with Atalay Zafe, Addis Ababa, 2021.
[29] *Id.*

After two years of imprisonment, the new democratic reform programme led by Abiy Ahmed took office and all committee members were released and joined their families. The committee members resumed their questions and submitted the Wolkaite identity question to different concerned federal and regional institutions including the House of Federation. However, so far no institutional entity responds to the Wolkaite identity petition implying that the institutions legally responsible to respond the identity question of the Wolkaite failed to exercise their role due to a lack of neutrality.

2.7 The Present Status of the Wolkaite Identity Recognition Question

The HoF organized an ad-hoc committee comprising of five persons from its members on 20 November 2020. The committee travelled to Wolkaite-Tegede to study the identity demand of the people for one month. The committee has conducted various public discussion forums with elders, youth, civil servants, Wolkaite committee members and various levels of political leaders in both Tigray and Amhara regions. The committee organized a consolidated draft report and it reads breifly as follows: They have expressed their feelings to the committee enthusiastically in Amharic in this way. The translation into English reads as follows:

> We, Wolkaite citizens, we're proud of our Ethiopian and Amharic identities. Oppression, violations of the law and other unpleasant incidents have forced us to justify our Amhara identity claim. The people stressed the question is not new but has been raised since 1991 based on the constitutional rights expressed in article 39, paragraphs 2 and 5, which suggests that the government, over the decades, repeatedly promised to answer this question democratically but failed to do so. Wolkaite people who kept their Amhara identity were harassed, dispossessed, killed, arrested, kidnapped and deported, many were missing during the TPLF regime. They went further to mention oppression and discrimination, children are forced to speak Tigrinia in school even though this is in total contravention of the constitution. Officials appointed from Mekele as governors of the area speak Tigrinia only. Names of places, rivers, lakes, mountains, springs, cities and regions have been changed from Amharic to different Tigran names.

Every year new proclamations are passed that dispossess Amhara. More specifically, while Amhara people used to receive two hectares of land per household, Tigrian received 50–100 hectares taken from dispossessed and displaced Amhara. The people end with the request to be protected by the constitution while they politely, democratically and peacefully want to engage with the public and the institutions to finally get an answer to this question without being harmed in person or losing property.[30]

[30] See HoF ad hock committee draft report document on file 15 April 2021 Addis Ababa.

As this analysis has shown, the WAIQC and the people did respect the legal and political institutions of the country and appealed to them to be heard. Government institutions have remained unresponsive, wilfully delaying the case, blocking legal pathways and obstructing the case through intimidation, imprisonment and killings. Still, since Prime Minister Abiy Ahmed assumed office, the state institutions have still not addressed or democratically answered the Wolkaite question.

Therefore, state institutions have failed to accommodate democratic processes. As a result, peaceful and democratic actors are weakened while violent ethnic conflict gains more support. Due to this, the current conflict and the impending bloodshed over Wolkaite has already been predicted by dignitaries and authors at the time of the annexation.

2.8 Challenges of the HoF in Responding to Claims for Identity Recognition and Geographic Restoration

2.8.1 Lack of Political Commitment and the Dominant Party System

The need to respond to the identity, self-government, and boundary demarcation questions has not been considered by the concerned and multi-level institutions as a device for building one political community and ensuring the stability of the federation. Political will has been in short supply. The Ethiopian federation operates under a dominant party system guided by the principle of 'democratic centralism' that had forced the HoF to follow the "central party's direction rather than by the constitutional mandates entrusted to it" as a federal second chamber. The HoF lacked institutional independence and freedom to discharge its constitutional powers and responsibilities. As a key informant[31] observes, the responses of the HoF to identity and self-government claims were made based on political considerations rather than constitutional rights. The fact that no single case has ever been responded to timely by the HoF is an indication of the role politics plays in the decisions of the House. The House remains subservient to the ruling party. According to one of our key informants,[32] what matters is the political influence/pressure that members of the petitioning community can put on the government. The genuineness of the claim and the fulfilment of procedural requirements is secondary. The informant justifies this point by referring to the Silte case. The Silte eventually managed to be recognized as a distinct nationality only because of the persistent pressure the Silte

[31] Interview: KII- 16 December 2020, HoF, Addis Ababa.
[32] Interview: KII- 25 December 2020, HoF, Addis Ababa.

Democratic Party put on the government to respond to their claims. The author of this article hasbeen a member of the House of Federation for the past four terms and also observed that the party discipline governs members of the House when passing decisions.

2.8.2 Lack of Coherent and Adequate Legal and Procedural Frameworks

It is not clear how the HoF should go about determining whether claimants fulfil the requirement to be recognized as a distinct community, it simply relies on the five general criteria (definition of an NNP) as enshrined in the constitution under Article 39(5). According to this constitutional provision, a 'Nation, Nationality or People' is "a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in common or related identities, a common psychological make-up and who inhabit an identifiable, predominantly contiguous territory." This definition is a combination of subjective and objective elements. Members of a community that claims distinct identity as a nation, nationality, or people must be able to show they share the tangible elements of a common culture or similar customs, possess mutual intelligibility of language, and are geographically concentrated in a particular area they consider their home. Beyond the objective elements, they must also demonstrate they have a sense of solidarity or belief in a common or related identity and a common psychological makeup.

As noted by the informants,[33] there are no sufficient procedural rules for responding to petitions related to identity and self-government. So far, the constitutional and legal frameworks put in place are Articles 62 and 39 of the FDRE Constitution and Proclamation No. 1261/2021 to deal with petitions. It has become clear by now that these provisions are not adequate to handle identity claims. This has affected the capacity and readiness of the House to respond to identity claims.

2.8.3 Lack of Law-Making Power and Double Membership

HoF can propose or initiate laws the House of People's Representatives (HoPR) enacts on civil matters essential to create and sustain one economic community.[34] The HoF cannot by itself enact a law on civil matters except by preparing and submitting a draft bill to the HoPR if it is convinced of the case.

[33] Interview: KII-1 30November 2020, HoF, Addis Ababa; Interview: KII-7 16 December 2020, HoF, Addis Ababa.
[34] The Revised Proclamation No. 1261/2021, Article 56.

It has a limited role in the national legislative process. As the key informant[35] notes, the HoF seems to be designed to act as an adjudicator more than anything else. Yet, because it is a political organ, the House has not been acting as an adjudicating body in the real sense of legal adjudication. The informant argues that, due to Proclamation No. 1261/2021 and through political practice, the HoF tends to perform like a federal executive body. By design or default, the informant argues, the HoF tends to play almost the roles of all three branches of government (legislative, executive and judiciary). Another informant puts HoF as an amorphous government organ as it acts simultaneously like a legislative, executive and judiciary body - "አንድ ምክር ቤት እንደ ሶስት የመንግስት አካላት".

It seems the HoF often finds itself caught in conflicts of interest due to both its constitutional mandates and its composition. Most of the issues discussed by the House originate from regional states, whose presidents are often members of the House.[36] Arguably, even the HoF, the body with the ultimate power to decide on issues of self-determination, may not be fully impartial to decide on such matters under certain circumstances.

One may hasten to conclude that the House, given its composition, is an institution with the well-being of ethnic communities at the centre of its deliberations and decisions, making it an appropriate institution to deal with petitions for recognition. Although the House is composed of representatives of ethnic communities where members could be elected directly by the people, the practice has been selection by the State Councils resulting in their service as de facto representatives of state governments. Given this practice of selection of members of the House by state governments, it is barely possible to take the House as an impartial decision-maker when members of a community challenge the decision of a state government that rejects their request for recognition. Members of the House lack job tenure as they are not directly elected by the people and can be removed by mere executive decisions of regional governments.

2.8.4 A Dearth of Competent Professional and Technical Capacities

[35] Interview: KII-3 16 December 2020, Addis Ababa.

[36] The HoF was, for example, requested to postpone the 6th national election because of the outbreak of the Coronavirus. How come the House be expected to refuse the postponement and to extend its tenure?

HoF lacks the institutional/structural and leadership capacities required to effectively respond to matters of identity, self-government and boundary disputes. Hence, the human and technical resources of the House do not match the significant constitutional powers and responsibilities the Constitution vests on it. The House has been in serious trouble in timely and professionally responding to several petitions due to a lack of professionals and experts who could help with the investigation of multiple cases and decision-making based on an adequate understanding of substantive issues of claimants. The Speaker[37] of the House underscores the need of leaders with relevant knowledge (constitution, federalism and related), attitude (the cognitive aspect of federalism), planning skills and abilities to execute and discharge its constitutional responsibilities and attain the desired goals.

2.9 The Remedy to Respond to Claims of Identity Recognition

2.9.1 Develop Coherent and Consistent Procedures

Indeed, the procedure that must be employed in the difficult task of identity determination is not given enough attention. The Constitution stays quiet on how the state government and eventually the HoF go about determining the identity of a group. So far, to respond to distinct identity claims, the HoF has developed a process that takes two complementary stages: conducting research about the claimant group and organizing a referendum. As discussed in this section of the study, the HoF and Tigray state council failed to consistently apply this identity determination. In the case of Silte, for example, the House of Federation and the state council found it necessary to organize a referendum to determine the distinctiveness of a Silte ethnic group. In the case of Manja, however, they dismissed the claim of some other group for distinct identity recognition without allowing the holding of a referendum. Others like Argoba in the Amhara region have been recognized as distinct nationalities at the level of the state council without necessarily conducting the referendum.

Therefore, the identity question of the Wolkaite requires verifying the elements mentioned under article 39(5) of the proclamation “People's interest shall be ensured in a secret ballot referendum based on the basic principles of the law of election.” In this regard, the HoF may delegate the National Electoral Board of Ethiopia to conduct the referendum.

2.9.2 Resolve the Ambiguities in the Exhaustion of State-level Procedures

[37] Interview: KII-1 30November 2020, HoF, Addis Ababa.

On the one hand, the HoF decides on the right to self-determination of NNPs. As for Article 24(2) of Proclamation No 1261/2021, any NNP who believes its self-identity is denied, its right of self-Administration is infringed, promotion of its culture, language and history is not respected in general, its rights enshrined in the constitution are not respected or, violated for any reason, may present its application to the House through the proper channels. The quest of the NNP could only be submitted to the House under conditions that the question has not been given due solution by the various organs in the administrative hierarchy of the state concerned.[38]

In addition, the procedures of application have to be first, presented in writing. Second, the application must include the details of the question supported with names, addresses and signatures of at least 5% of the inhabitants of the claimant group, and whenever necessary, it should bear the official seal and signature of the administration that presented the question.[39]

If the application is being submitted through a delegated individual or individuals, they shall produce reliable evidence of their delegation.[40] On the other hand, any NNP who claims the right to self-determination is required to not only seek answers first from the respective regional state but also has to exhaust the state-level remedies before bringing its petition to the HoF.[41] Nonetheless, as already discussed in this study, the essentials of exhaustion of state-level procedures are ambiguous. The HoF therefore, has to resolve the ambiguities around the exhaustion of state-level remedies by setting clear procedures enabling solutions.

In principle and unless the claims are politicized, it is assumed the demand for separate identity is a community demand, it is their natural right to decide who they are. No one has the right to categorize certain communities under certain others. Therefore, the HoF in collaboration with the concerned stakeholders should undertake a detailed study of the similarities and differences in the language, culture and psychological make-up of the community and make the decision based on the concrete evidence presented.

2.9.3 Holding Elections of MPs Directly by the People

[38] Article 27(1) of the Revised Proclamation No. 1261/2021.
[39] Article 28(2) of the Proclamation No. 1261/2021.
[40] Article 28(3) of the Revised Proclamation No. 1261/2021.
[41] Article 27(1) of the Revised Proclamation No. 1261/2021.

According to Article 61(3) of the FDRE constitution members of the HoF can be elected by state councils or may hold elections to have the representatives elected by the people directly to the House. Therefore, it is advisable to elect House members by the general public directly to avoid and minimize political pressure from the governing party.

CONCLUDING REMARKS

As can be seen from the above chronologically presented historical documentation and detailed interviews, Wolkaite and other territories found to the west of River Tekeze up to the Sudan border were parts of the old Begemedir and the current Gonder provinces of the state of Amhara. It is true the people of Wolkaite Tegede also speak Arabic and Tigrigna for marketing purposes. However, their feeling, thinking, psychology and identity are attached to the Amharic language and the Amhara culture. This total attachment to the Amhara culture and language is highly reflected in their daily routines and activities such as at local markets, in the spiritual ceremonies, at weddings, at funerals and many other occasions.

Due to this, since 2016, the Wolkaite people's movement has been engaged in active political struggle motivated by the desire for reclaiming Wolkaite's distinctiveness based on common descent, language, history and cultural tradition lost by the assimilation policies of TPLF. Yet, the question remains: why the Wolkaite people's continuing demand for identity recognition and geographic restoration is still a distant hope. One of the interesting findings of this research is the dominant party system and a lack of efficiency to the House of Federation to exercise its constitutional rights. This political factor has pushed the HoF to be led by "political direction" rather than relying on the constitutional frameworks on the question of identity recognition and geographic restoration. This shows state institutions have failed to accommodate a democratic processes. As a result, peaceful and democratic actors are weakened while violent ethnic entrepreneurs gain more support. The researcher recommends the reforming of the mandated institutions and empowering them to settle the Wolkaite identity and geographic restoration issue.

SHORT COMMUNICATION

THE CONSTITUTIONALITY OF OROMIA COURTS IN ADDIS ABABA CITY: THE IMPEDES

Adane Mandie Damtew*

Abstract

This commentary aims to provide a snapshot of the establishment of Oromia National Regional State's (ONRS) Courts in Addis Ababa City (AAC) and its impediments through a desktop archives review. As the FDRE Constitution under article 49 provides, the residents of AAC shall have a full measure of self-government but the administration shall be responsible to the Federal Government, the Constitution also acknowledges the special interest of the ONRS in Addis Ababa for the notion of the Capital City being located within the State of Oromia. However, recently, practical steps have been taken to establish all levels of ONRS courts in Addis Ababa, this is unconstitutional and lacks the political participation of the City's residents. Despite this, the Federal Government has sent a Draft Criminal Procedure and Evidence Law for approval to the House of Peoples' Representatives, which seems to be granted recognition for the act of ONRS. As the City is a home of various ethnicities, the act of ONRS and the Federal Government to establish courts for a region established based on ethnicity may result in unintended consequences, such as igniting violence and driving the country's politics to widespread unrest.

Keywords: Constitution, Oromia Regional State, Courts, Addis Ababa, Impediments.

INTRODUCTION

Since 1995, Ethiopia has adopted a federal structure with two tiers of government - the federal and regional governments.[1] The federation has eleven regions and two city administrations, Addis Ababa and Dire Dawa.[2] All governments, including the city administrations, are

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[1] Constitution of the Federal Democratic Republic of Ethiopia (hereinafter FDRE Constitution), Proclamation, 1995, Proclamation No 1/1995, Federal *Negarit Gazette* Year 1, No.1, Article 50(1).

[2] *Id*., Article 47.

autonomous, having their own three arms of government: legislative, executive, and judiciary organs.[3]

Founded in 1896 during the reign of Emperor Menelik II, Addis Ababa has served as the seat of successive regimes.[4] The City is growing both demographically and economically.[5] According to the World Bank report in 2015, the City is the home of a quarter of Ethiopia's urban population and accounts for half of the national economic output.[6] Both capital and chartered city in nature, Addis Ababa's historical, diplomatic, and political significance for the African continent is immense, serving as the headquarters of major international organizations such as the African Union (AU) and the United Nations Economic Commission for Africa.[7]

Unlike regions whose structure is based based on settlement patterns, language, identity, and consent of the people concerned, Addis Ababa is home to people with multiple identities and diverse ethnic and language backgrounds.[8] Addis Ababa's residents predominantly speak the Amharic language and have lived peacefully for over a century without any sense of grouping.[9] Earlier, following the establishment of the federal structure in 1991 under the Transitional Charter of Ethiopia,[10] the AAC was one of the then 14 regional governments.[11] However, the 1995 Constitution changed the structure, resulting in lost statehood status but has now an independent and sovereign city structure.

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[3] Regarding courts' structure, the FDRE Constitution proclaims the establishment of an independent judicial system at the federal and state levels and leaves the detail to subsequent laws. This portrays the Ethiopian judicial system is designed with a parallel court structure in which regions and the federal government have their own independent court structures and administrations. The allocation of powers is made based on subject-matter jurisdiction. Federal courts adjudicate issues of national concern, while state courts are best suited to handle regional matters. The main reason, *inter alia,* for establishing the courts at the federal and regional levels is to ensure the right to access to justice enshrined in the Constitution and international and regional human rights instruments, to which Ethiopia is a party.

[4] Richard Pankhurst, "Menelik and the Foundation of Addis Ababa", 2 (1) *The Journal of African History*, (1961), at 103-117.

[5]: Erena D. *et al*., "City profile: Addis Ababa", Report prepared in the SES (Social Inclusion and Energy Management for Informal Urban Settlements, project, funded by the Erasmus+ Program of the European Union, 2017).

[6] Marew Abebe Salemot, "Draft article threatens Addis Abeba's autonomy", available at: <https://www.ethiopia-insight.com/2021/03/12/draft-article-threatens-addis-abebas-autonomy/> (accessed on 21 September 2022).

[7] Wubneh, Mulatu, "Addis Ababa, Ethiopia – Africa's diplomatic capital", 35 *Cities 35*,255-269 (2013).

[8] FDRE Constitution, *supra* note 1, Article 46/2.

[9]Addis Ababa City Government Revised Charter Proclamation, 2003, Proclamation No 361/2003, Federal *Negarit Gazette,* Year 9, No. 89, Article 6.

[10] The transitional Charter was adopted in 1991. It provides for the recognition of self-determinative rights, up to and including independence, for the various ethno-nations of Ethiopia.

[11]Aaron P. Micheau, "The 1991 Transitional Charter of Ethiopia: A New Application of the Self-Determination Principle", 28 *Case W. Res. J. Int'l L.* (1996), at 367.

According to the Constitution, the City is autonomous but accountable to the Federal Government, and residents have a full constitutional right to self-administration.[12] For the details and to determine particulars – the House of Peoples' Representatives (HPR) has issued AAC Government Charter Proclamation No. 361/2003 (hereafter, the Charter Proclamation). Akin to regions, based on Article 10 of the Charter Proclamation, AAC has established three organs of the government: legislative (the council), executive (the administration), and judiciary (the city court). However, the City has no seat in the Upper House, i.e., the House of Federation, where almost all regions and ethnicities are represented and mandated to interpret the Constitution.[13] In the last three decades, it is only rarely the residents had the opportunity to elect their City's mayors who belong to the residents of the City.[14] Instead, the Federal Government appoints most mayors affiliated with the Oromo ethnic group.

As AAC is found within the ONRS, shared interests and responsibilities exist between the region and the City administrations. Aiming to manage the interests, the Constitution acknowledges the special interests of ONRS on AAC and refers particulars to be determined by law.[15]

Although Article 49(5) of the Constitution recognizes the special interest of ONRS on AAC, some emerging laws interpret the provision in light to the purpose and spirit of the Federal Democratic Republic of Ethiopia (FDRE) Constitution. Especially Article 25(3) of the Draft Criminal Procedure and Evidence Law (hereafter, the Draft Law)[16] and Articles 24(2) and 24(3)(d) of the Proclamation to redefine the structure, powers, and functions of the ONRS Courts' Proclamation No. 216/2018 (hereafter, ONRS courts proclamation) expressly deprive the sovereignty of AAC, violate vivid provisions of the FDRE Constitution and threatens the federation. It is mainly because powers given to AAC are going to be deprived by ONRS.

[12] FDRE Constitution, *supra* note 1, Article 49/2 & 3.
[13] *Id*. Article 62/1.
[14] See, Addis Zeybe, available at: https://addiszeybe.com/editorial/the-constitutional-and-political-representation-of-addis-ababans-or-the-lack-thereof (accessed on 20 September 2022).
[15] *Id*., Article 49/5.
[16] Draft laws in Australia and other common law countries are called bills. A bill becomes an Act—a law—only after it has been passed in identical form by both Houses and signed by the Governor-General (equivalent to the president in Ethiopia).

This paper aims to comment on the constitutionality of ONRS courts in AAC and show the impedes it may cause to the unity and security of the Capital City and the country. To this end, the paper is organized into three parts. The second part explains the relationship between AAC and ONRS in general and the constitutionality of courts that the ONRS claims to establish in AAC. The third section looks at the impediments posed to the country due to the establishment of ONRS courts in AAC. Lastly, concluding remarks are forwarded.

1. ADDIS ABABA'S SOVEREIGNTY *VIS-A-VIS OROMIA* NATIONAL REGIONAL STATE COURTS IN ADDIS ABABA: LAWFUL?

Although the Constitution empowers AAC to be independent in administration and accountable to the Federal Government, since 2018, the ONRS has been taking concrete steps to establish courts in AAC by pretending to be 'the special interest' stipulated under article 49/5 of the Ethiopian Constitution. However, the spirit of article 49/5 is different from that which ONRS is actually doing at AAC. The provision only puts a milestone for governing the relationship between the City and Oromia region. The provision reads:

> The special interest of the State of Oromia in the City, regarding the provision of social services or the utilization of natural resources and other similar matters, as well as joint administrative issues arising from the location of Addis Ababa within the State of Oromia, shall be respected. Particulars shall be determined by law.[17]

The provision underscores the protection of ONRS's special interest in specific matters, including (i) the utilization of natural resources and similar issues; (ii) social services; and (iii) joint administration matters. However, contrary to the Constitution and the Charter Proclamation, and without adopting particular laws to determine particulars, the ONRS has made new laws to establish courts in AAC which threaten the City's sovereignty and contradict the basic principle of sovereignty and equality of Regions in Ethiopia.[18] Moreover, the particular laws in the Constitution to determine the relationships between the City and the ONRS are not yet promulgated.[19]

[17] *Id*. Article 49/5.
[18] FDRE Constitution, *supra* note 1, Article 46(4).
[19] *Id*. Article 49(5).

The ONRS Court Proclamation stipulates "the region's courts shall have jurisdiction in AAC over matters that affect the interest of the regional government and the crimes commenced within the region's boundary but completed, or the suspects hides, in AAC".[20] This provision utterly contradicts the Constitutional provision that enacting a penal code is the power solely given to the House of Peoples' Representatives.[21] In addition, the law also contradicts the Federal Courts' Proclamation No. 1234/2021 (Hereafter Federal Courts' Proclamation) and AAC's Charter Proclamation.

The Federal Courts' Proclamation empowers AAC courts, *inter alia,* to bench over any disputes subject to the jurisdiction of the City association, civil disputes of money contracts, and loans between individuals up to Birr 500,000 (Five Hundred Thousand Birr).[22] It empowers the federal courts to have jurisdiction over residual issues not expressly given to AAC courts.[23]Apart from this, it neither empowers nor acknowledges the establishment of ONRS in AAC.

Similar contents are stipulated in criminal matters under the Federal Courts' Proclamation. In addition to reviewing cases related to violations of rules and criminal procedures, and procedure for code-based decisions of search, confession, arrest warrant, inquiry into appeals, and guarantees in appeal, the City Courts are empowered to see offences which can be entertained upon complaints.[24] Other criminal matters other than those stated are given to the Federal Courts. This provision also exclusively enables the City and Federal Courts to entertain crimes committed to or resulting in AAC.[25]

Moreover, the Federal Court's Establishment Proclamation vociferously speaks about the jurisdiction of cases that fall under the dominium of courts of different regions or are committed by persons who permanently reside in more than one state or city administration.[26] Accordingly,

[20] A Proclamation to Redefine the Structure, Powers and Functions of ONRS Courts, 2018, Proclamation No 216/2018, *Megeleta Oromia*, Year 27, No 7, Article 24 (2 &3).
[21] FDRE Constitution, *supra* note 1, Article 55 (5).
[22] Federal Courts Proclamation, 1995, Proclamation No 1234/21, Federal *Negarit Gazette* Year 27, No. 26, Article 5.
[23] *Id*.
[24] Id., Article 4/16.
[25] *Id*.
[26] The Federal Court Proclamation, *supra* note 21, Article 4 (4).

the Proclamation allocates these cases to be a federal matter adjudicated by the federal courts.[27] Hence, in any circumstance, ONRS courts have no jurisdiction over matters started in ONRS and completed in AAC and arising and committed in AAC, irrespective of the subject and object of the crime. The sentence stated under article 24/3/d of the ONRS courts' Proclamation is, thus, against the Constitution and the Federal Courts Proclamation and hence illegal.

As a counter-argument, some say AAC lacks its own court structure. However, this does not mean the City's cases failed in a vacuum. Instead, the Federal Courts' Proclamation empowers the City and federal courts to resolve the issues arising out of the City. Besides, advocates of ONRS courts establishment in the City claim it has no seat in the Upper House, where all regions are represented and mandated to interpret the Constitution. Nevertheless, this argument neither adheres to ONRS to establish its courts in the City nor has any bearing on this paper's issue. Moreover, the members of the Upper House have been deemed representatives of the country's Nations, Nationalities, and Peoples. In contrast, Addis Ababa is the home of all Ethiopians and does not need specific representatives in the House.

In addition, the Draft Law, which the Ministry of Justice sent to the HPRs for approval, came up with similar points to the ONRS courts' Proclamation. Article 25(3) of the Draft Law empowers ONRS courts to exercise jurisdiction over some criminal matters. This is also utterly against the federal system, AAC, and courts' jurisdiction (see the next sub-topic). Although the newly established 'Sheger City' surrounds AAC, residents of the City are from different regions and city administrations of Ethiopia.

According to the 2007 population and housing census, the population of Addis Ababa was home to 2,739,551 inhabitants. Of this number, groups from Amhara (47.42%), Oromo (19.51%), and Guragie (16.34%) ranked from one to three (see Table 1). This is an excellent showcase for the AAC, as it is the home of many people from different corners of the country. Thus, empowering ethnically based regions to have jurisdiction over matters of the heterogeneous City would cause unprecedented negative consequences, such as igniting violence among inhabitants from Oromia

[27] *Id.,* Article 4/8 & 5/1/h.

and other ethnic groups. It also weakens the unity and peaceful coexistence of the City's communities.

Ethnic Groups	No of Population (both Sex)	Percentage (%)
Affar	3,723	0.135
Amhara	1,299,251	47.42
Guragie	447,777	16.34
Hadiya	16,863	0.61
Harari	6,475	0.23
Oromo	534, 547	19.51
Silitie	80,660	2.94
Somalia	5,595	0.21
Tigrie	169,182	6.17
Wolaita	18,824	0.68
Others	158,654	5.79

Table 1: Number of inhabitants in AAC by major ethnic groups
Source: Self-developed

In addition to the above arguments, in accordance with Ethiopian criminal law, criminal matters' jurisdiction[28] is established based on the place of commission of the crime or the result that occurred, not on the identity of a person suspected.[29] The rationale behind this principle, *inter alia,* is that the punishment imposed on the perpetrator shall give lessons to the offender and the general public, who is affected by the wrongful act of the offender. Article 1 of the 2004 Criminal Code of Ethiopia has a similar objective. However, the Draft Law and ONRS Courts'

[28] There are about four principles of jurisdiction in criminal matters. (1) territorial that takes the position that criminal jurisdiction depends upon the place of perpetration. (2) Roman or personal theory makes the perpetrator responsible for his misdeed based on nationality, (3) injured forum emphasizes the crime's effect. (4) cosmopolitan has a position that any nation has jurisdiction over any crime committed anywhere, by anyone (*for more, visit:* Perkins, R.M. (1971) *The territorial principle in criminal law*, *UC Hastings Scholarship Repository*. Available at: https://repository.uchastings.edu/hastings_law_journal/vol22/iss5/2 (Accessed: 6 April 2023).

[29] The Criminal Code of Imperial Ethiopian Government (1961) *Criminal Procedure Code of Ethiopia*. Addis Ababa: Authority of the Ministry of Pen (Proclamation No.185).

Proclamation appeared with personal theory, which is against the existing Criminal and Criminal Procedure Law which adheres to territorial jurisdiction.

2. THE OROMIA REGIONAL COURTS IN ADDIS ABABA: THE IMPEDIMENTS

The establishment of ONRS courts in AAC has posed several impediments to the overall judicial system of the country. Here are some of them:

2.1 ONRS Court Proclamation and the New Draft Law are Acting against the Country's Federal Structure

AAC is a city administration accountable to the federal government, and the City's residents have full measures of self-governing.[30] However, the Draft Law and the ONRS courts' Proclamation empower the ONRS courts to act on matters committed or resulting in Addis Ababa while the ONRS is interested in the issues. Such authorization is a new development in Ethiopia's nearly three decades of federal experience where regions and the two city administrations were equal, at least in principle.[31] However, the Draft Law and the ONRS Courts' Proclamation go against the existing practice by enabling ONRS to establish courts in a city of all Ethiopians.

The establishment of ONRS courts in AAC violates the right to self-governance of AAC and warrants some inequality among the federation States and Cities. Interfering on the issues of a Constitutionally autonomous city contradicts the principle of 'independence' enshrined in the Constitution. The laws utterly disregarded other regions' interests and gave privileges only to ONRS, which is against the equality of the federation's member states. Such ignorance affects other regions, particularly those with properties in Addis Ababa. For instance, the Amhara National Regional State (ANRS) has branches for Amhara Mass Media and Amhara Credit and Saving Institution (now elevated to Tsedey Bank) but cannot establish courts in AAC to adjudicate cases arising from its properties. Thus, the laws shall disallow all regions to establish courts in AAC or respect the equality of all federation members. Moreover, the federal government is there to protect all states' interests, including ONRS. In light of this, there should not be regional courts in Addis.

[30] FDRE Constitution, *supra* note 1, Article 49 (2&3).

[31] Wondwossen Demissie, Questioning Jurisdiction of Oromia Courts over Crimes Committed in Addis Ababa, *Ethiopian reporter (English),* 30 January 2021. available at: <https://www.thereporterethiopia.com/article/questioning-jurisdiction-oromia-courts-over-crimes-committed-addis-ababa/> (accessed on 22nd September 2022).

2.2 Establishing ONRS Courts in AAC Contradicts International Laws that Ethiopia is a Party to

International Human Rights Instruments (IHRIs) are preachers of equality of all human beings from birth to death. Contrary to this, the Draft Law and ONRS Courts' Proclamation develop discriminatory provisions allowing the establishment of ethnic-based regional courts in a City where heterogeneous peoples reside. The specific provisions of the following two well-known IHRIs (ICCPR and ICESCEs) are excellent examples to show the wrongfulness of the draft law.

The provision of ICCPR reads:

> Each state party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth, or other grounds.[32]

As Ethiopia is among the signatory party to the convention, it is obliged to ensure and secure equal rights of the citizen enshrined in the convention.[33] To do so, this provision is pivotal, especially to secure the protection of rights, such as the right to justice, without discrimination on the ground, *inter alia,* social origin, or race.[34] This follows from the fact that the 'rules concerning the basic rights of the human person' are *erga omnes* obligations and that, as indicated in the fourth preambular paragraph of the Covenant, there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms.[35] Despite this, the Draft Law and ONRS Courts' Proclamation deprives the convention by creating distinction among ethnically based regions for providing justice by favouring ONRS to establish its courts in AAC but not for other regions.

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[32] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, Vol. 999, 171, Article 2.
[33] Ethiopia ratified ICCPR on 11 June 1993.
[34] Paul M. Taylor, *Article 2: To 'Respect and to Ensure' Covenant Rights*, *in* commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights, 58–86
[35] United Nations High Commissioner for Refugees (2004) *General comment no. 31 [80], the nature of the general legal obligation imposed on States parties to the Covenant*, *Refworld*, available at: https://www.refworld.org/docid/478b26ae2.html (Accessed on 7 April 2022).

The provision of the International Covenant on Economic, Social, and Cultural Rights (ICESCRs) reads: All peoples have the right to self-determination. By virtue of that right, they freely determine their political status and pursue economic, social, and cultural development.[36]

More importantly, the people of AAC have just, fair, and equal rights to justice, enshrined under the Constitution, the 2004 Criminal Code, and other domestic and international laws. Moreover, the problem is also in the mindset of the people, where, in the current regional structure, it is hard to find an individual who believes that s/he will get fair and accessible justice from other regional courts while s/he resides in AAC.

2.3 The Act of ONRS is Ultra-Virus

The main reason ONRS raised to establish courts in AAC is the phraseology 'special interest given to the region' stipulated under Article 49/5 of the Constitution. However, the establishment of ONRS courts in AAC is not on the list of issues ONRS has a special interest in AAC. The provision also anticipated a specific law determining "particulars" would be promulgated, albeit no law has been enacted yet.[37] Hence, establishing ONRS courts based on the non-existence of power and in the absence of particular laws is ultra-virus because the region exceeds the scope of the given privilege and power. Besides, no matter how generously the provision might be interpreted, it would not authorize an apportioning part of the AAC courts and the federal government's judicial power to ONRS.[38] Hence, acting against this constitutional provision is dangerous and may wither the flower (Addis Ababa's flower).

2.4 In the Current Federal Structure, a Person (Both Physical and Legal Person) Living in another Region is Governed under the Laws and Courts of the Area Where S/He/it is Residing. So, Why Does ONRS Want to Move Out of this Norm and Establish its Own Courts Outside its Jurisdiction in Addis Ababa?

[36] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, United Nations, Treaty Series, Vol. 993, (16 December 1966), at 3.
[37] Wondwossen, *supra* note 31.
[38] *Id.*

In Ethiopia, courts jurisdiction of regions, the two city administrations, and the federal government differ based on the type of matter and the place of commission of the crime and the result obtained, and, in rare circumstances, the identity of persons.[39] One of them is not allowed to interfere in the judicial matters of others. This is because Article 52 of the Constitution empowers federation members to maintain order within their jurisdiction. AAC shall maintain its peace and order as a federation member without regional or federal government interference. However, what the Draft Law and ONRS court's Proclamation are doing is utterly against the rule in the internal matters of AAC.

2.5 The Regional Structure in Ethiopia has Not Yet been Finalized

Since state structures in Ethiopia are ongoing and new regions are still being created, implementing the Draft Code and the ONRS Courts' Proclamation in AAC would face other challenges. For instance, the Southern Nations, Nationality, and Peoples' Region is an excellent example – it is now split into three and will be five after the referendum on 6 February 2023. There is also similar fear that ONRS and other regions may be split into two or more regions. When ONRS disintegrate and split into two or more states, there would be a problem with the mandate to administer AAC courts established based on the Draft Code and the ONRS Courts' proclamation. It poses another challenge to the judicial administration system. So, it is better to consider again and again before strides (Remembering the best Amharic proverb - አስር ጊዜ ለክተህ አንዴ ቁረጥ – meaning, measure ten times and cut once).

CONCLUSION AND RECOMMENDATIONS

This commentary has attempted to show the relationship between AAC and ONRS and the impediment due to the establishment of the ONRS courts in AAC. Regarding the relationship between AAC and ONRS, the Constitution vociferously acknowledges equal and horizontal relationships. Besides, despite the *defacto* claim of ONRS as a '*part*' of Oromia, there needs to be a clear *desire* for '*part'* recognition, i.e., the federal Constitution nowhere provides that AAC is part of ONRS. Under the FDRE Constitution, finding any provision that authorizes regions to establish courts in AAC is hard. While the constitutional phraseology of Article 49/5 '*Special*

[39] The Federal Courts Proclamation, *supra* note 21, Articles 4 (4) & 4 (16).

interest' is ambiguous and subject to various interpretations, it does not specify the establishment of ONRS courts in AAC, suggesting any enactment in doing so is entirely unconstitutional and ultra-virus.

The ONRS is now interfering in the judicial affairs of a self-administering City by establishing courts in AAC. Thus, AAC shall request an end of intervention based on Article 49/2 of the Constitution, and the federal government shall give sustainable solutions for the interferences. Amid the solutions, making laws that determine 'the special interest of ONRS' is the best panacea. However, in the law-making process, the HPR shall be pretty sure of the participation of pertinent bodies, especially the federation states and city administrations. The two federal houses shall also play crucial roles in the prevalence of the rule of law and constitutional supremacy/discipline.

The HPR shall reject Article 25(3) of the Draft Law before approving it. Optionally, if HPR sustained the provision, the scope shall be broadened, allowing other regions and city administrations to have similar jurisdiction over the capital, thereby guaranteeing logical consistency and equal treatment of states.

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መዝገቡ ተመርምሮ ከዚህ የሚከተለዉ የፍርድ ዉሳኔ ተሰጥቷል፡፡

ፍርድ

ጉዳዩ የመሬት ይዞታ ለማስለቀቅ የቀረበ ክርክር የሚመለከት ነዉ፡፡አመልካች በጉራፈርዳ ወረዳ ፍርድ ቤት በተጠሪ ላይ በመሰረቱት ክስ በጉራፈርዳ ወረዳ በበርጂ ቀበሌ መድሃኒአለም ቤተክርስቲያን ጀርባ 3ኛ ደረጃ ተብሎ በሚጠራዉ አካባቢ የሚገኝ አዋሳኙ በክሱ የተጠቀሰዉን 50ሜትር በ600ሜትር የሆነ 3 ሄክታር የእርሻ መሬት የበርጂ ቀበሌ አስተዳደር ጽ/ቤት በቀን 10/06/1999ዓ/ም በተጻፈ ቃለ ጉባኤ (ቨርባል) ሰጥቶኛል፡፡እስከ 2004ዓ/ም ድረስ ግብር እየገበርኩ የተለያዩ ተክሎችን ተክዬ የምጠቀምበትን እንዲሁም ዓመታዊ ሰብል የማመርትበትን መሬት በ2004ዓ/ም በአካባቢዉ በተነሳዉ አለመረጋጋት ምክንያት ቤተሰቦቼን ይዤ ከተፈናቀልኩበት ስመለስ ተጠሪ ይህንን መሬቴን በመያዝ እየተጠቀሙ እንደሚገኝ በማወቅ እንዲለቁልኝ ስጠይቃቸዉ ፈቃደኛ ስላልሆኑ የመሬት ይዞታዬን እንዲለቁ እንዲወሰንልኝ በማለት ዳኝነት ጠይቀዋል፡፡

ተጠሪ ለክሱ በሰጡት መልስ የአመልካችን ይዞታ በኃይል ወይም በህገ-ወጥ መንገድ አልያዝኩም፡፡ለክርክሩ መነሻ የሆነዉ ይዞታ በ2004ዓ/ም ከዳንቅላ ቀበሌ ስፈናቀል በነበረኝ ይዞታ ምትክ በልዋጭ በወረዳዉ መንግስት ፈቃዴ የተሰጠኝ ነዉ፡፡በቁጥር 150 የሚሆኑ የተለያዩ አትክልቶች ተክዬ ለፍሬ ካበቃሁ በኋላ አመልካች መጥተዉ የእኔ ነዉ አሉ እንጂ ተጠሪ የአመልካችን ይዞታ አልወሰድኩም፡፡የመንግስት የነበረ መሬት ስለሆነ ክሱ ዉድቅ ይደረግልኝ በማለት ተከራክረዋል፡፡

የወረዳዉ ፍርድ ቤት በመ/ቁጥር 11475 ላይ የግራ ቀኙን ክርክርና ምስክሮች ሰምቶና ማስረጃ አስቀርቦ መርምሮ በቀን 18/10/2011ዓ/ም በሰጠዉ ዉሳኔ ክርክር ያስነሳዉ የመሬት ይዞታ አመልካች አስቀድሞ በህጋዊ መንገድ ተመርተዉ የያዙት መሆኑ ተረጋግጧል፡፡ ይህ ይዞታ ቃለ-ጉባኤ (ቨርባል) ተይዞ ለአመልካች የተመራ መሆኑን አመልካች በእጃቸዉ በሚገኘዉ ሰነዴ (ቬርባል) አስረድተዋል፡፡ በፍርድ ቤቱ ትእዛዝ ከጉራፈርዳ ወረዳ የእርሻና ተፈጥሮ ሀብት ልማት ጽ/ቤት የመጣዉ ማስረጃ ተጠሪ ይዞታዉን የተመሩበትን ሁኔታ የሚያሳይ ምንም ማስረጃ በጽ/ቤቱ ዘንድ እንደማይገኝ ገልጿል፡፡ በ2004 ዓ/ም በአካባቢዉ በተፈጠረ አለመረጋጋት ምክንያት አመልካች ከአካባቢዉ ተፈናቅለዉ መሬቱን ለቀዉ ሲሄዱ ተጠሪ ከክልሉ የገጠር መሬት አስተዳደርና አጠቃቀም አዋጅ ቁጥር 110/1999 አንቀጽ 9 አግባብ ዉጭ በመያዝ አመልካች በ2009ዓ/ም ወደ አካባቢዉ ተመልሰዉ ሲጠይቁ ለመልቀቅ ፈቃደኛ እንዲልሆኑ በማስረጃ ማረጋገጡን ገልጾ ተጠሪ ኃጋዊ ባልሆነ ምሪት የያዙትን ለክርክሩ መነሻ የሆነዉን መሬት ለአመልካች ሊለቁ ይገባል በማለት ወስኗል፡፡

ተጠሪ በዚህ ዉሳኔ ቅር በመሰኘት ይግባኝ ለቤንች አካባቢ ከፍተኛ ፍርድ ቤት አቅርበዉ ፍርድ ቤቱም በመ/ቁጥር 19556 ላይ በቀን 26/10/2011 ዓ/ም በሰጠዉ ትእዛዝ ይግባኙን ሰርዞባቸዋል፡፡ በመቀጠል ተጠሪ ለደቡብ ክልል ጠቅላይ ፍርድ ቤት ይግባኝ አቅርበዉ ፍርድ ቤቱም በመ/ቁጥር 07642 ላይ ግራ ቀኙን አከራክሮ በቀን 30/12/2011ዓ/ም በአብላጫ ድምጽ በሰጠዉ ዉሳኔ የሥር የወረዳ ፍርድ ቤት አከራካሪዉን ይዞታ ተጠሪ በቀበሌ አመራር አማካኝነት ማግኘታቸዉን ተረጋግጧል፡፡ የአሁን አመልካች ይዞታዉን ያገኙት በህገ-ወጥ መንገድ ነዉ ተብሎ በ2004ዓ/ም ሳይሳካላቸዉ እንደቀረ በሰዉና በሥነድ ማስረጃዎች ተረጋግጦ ባለበት እንዱሁም አመልካች ህገ ወጥ ይዞታ መሆኑን ተቀብለዉ የነበረዉን የቆርቆሮ ቤት አፍርሰዉ ሄደዉ የመብት ጥያቄ ሳያቀርቡ ቆይተዉ በአከራካሪዉ ይዞታ ሊይ መብት እንዳለዉ ሰዉ በመሆን ተጠሪ ከስድስት አመት በላይ ቋሚ ተክሎችን በመትከልና ቤት በመስራት ግብር እየገበሩበት ይዘዉ የቆዩትን ይዞታ ለቀዉ ለአመልካች እንዲያስረክቡ በስር ፍርድ ቤቶች መወሰኑ ስህተት ነዉ፡፡ ስለሆነም አመልካች በአከራካሪዉ ይዞታ ላይ የተከሏቸዉ ቋሚ ተክሎች ካሉ በማስረጃ አረጋግጠዉ ግምት የመጠየቅ መብት ያላቸዉ መሆኑ እንደተጠበቀ ሆኖ ተጠሪ አከራካሪዉን ይዞታ ለአመልካች ሊለቁ አይገባም በማለት የሥር ፍርድ ቤቶችን ዉሳኔ በመሻር ወስኗል፡፡

አመልካች በዚህ ዉሳኔ ቅር በመሰኘት ለክልል ሰበር ሰሚ ችሎት አቤቱታ አቅርበዉ ችሎቱ በመ/ቁጥር 07877 ሊይ ግራ ቀኙን አከራክሮ በቀን 25/03/2012ዓ/ም በሰጠዉ ዉሳኔ የክሊለ ጠቅላይ ፍርድ ቤት የሠጠዉን ዉሳኔ በማጽናት ወስኗል፡፡ አመልካች በቀን 14/04/2012 ዓ/ም የተጻፉ የሰበር አቤቱታ ያቀረቡት በክልሉ ጠቅላይ ፍርድ ቤት ይግባኝ እና ሰበር ሰሚ ችሎቶች በተሰጡ ዉሳኔዎች መሰረታዊ የህግ ስህተት ተፈጽሟል በሚል ሲሆን የአቤቱታቸዉ ይዘት በአጭሩ የሚከተለዉ ነዉ፡፡

ለክርክሩ መነሻ የሆነዉን 3 ሄክታር መሬት አመልካች በህጋዊ መንገድ በቀን 10/06/1999ዓ/ም በተያዘ ቃለ ጉባኤ ተሰጥቶኝ የተለያዩ አትክልቶችን በመትከል እየተጠቀምኩ እስከ 2004ዓ/ም ግብር እየገበርኩ ይገኛ የቆየሁት ነዉ፡፡በ2004ዓ/ም አከራካሪዉን የመሬት ይዞታ ለቅቄ የወጣሁት በወቅቱ በአካባቢዉ የሚኖር የአማራ ተወሊጅ ለቆ ይዉጣ በሚል በተፈጠረ አለመረጋጋት ከቤተሰቤ ጋር ጥቃት ይደርስብኛል በሚል ነዉ፡፡ አካባቢዉ ላይ መረጋጋት ሲፈጠር ከ3 ወር በኋላ ወደ አካባቢዉ ተመልሼ ይዞታዬን በመያዝ ንብረቴን እየተጠቀሙ የሚገኙት የአሁን ተጠሪ ይዞታዬን እንዲለቁ ለማስደረግ ለሚመለከታቸዉ የመንግስት አካላት አቤቱታ ሳቀርብ ቆይቼ አቅጣጫ ሲሰጥ ቢቆይም ተጠሪ ይዞታዬን እንዲለቁ ማድረግ ስላልቻለ በፍርድ ኃይል ለማስለቀቅ ያቀረብኩት ክስ ሆኖ እያለ የክልሉ ጠቅላይ ፍርድ ቤት የመብት ጥያቄ ሳላቀርብ እንደቆየሁ አድርጎ የሥር ፍርድ ቤትን ዉሳኔ መሻሩ ስህተት ነዉ፡፡ ተጠሪ አከራካሪዉን መሬት በምሪት ተሰጥቷቸዉ ስለመያዛቸዉ በምንም አይነት ማስረጃ አላስረዱም፡፡ ተጠሪ በአመልካች የለማዉን መሬት ተሰጥቶኛል በማለት የሚያነሱት ክርክር ተቀባይነት የለዉም፡፡ መሬቱ ለተጠሪ ተመርቷል ቢባል እንኳን አመልካች በተመራሁበት እና ባለማሁበት መሬት ላይ ለተጠሪ ደርቦ ለመምራት የሚያስችለረ የህግ ስርዓት የለም፡፡ የጉራፈርዳ ወረዳ መንግስት አመልካች ከይዞታዬ እንዱፈናቀል የወሰነዉ ዉሳኔ የለም፡፡ የወረዳዉ እርሻ እና ተፈጥሮ ሀብት በጻፈዉ ደብዳቤ ሊይ እንደተመለከተዉ የአመልካች ይዞታ በወቅቱ ያልተለካዉ ህገ-ወጥ ስለሆነ ነዉ ያለበት ምክንያት አመልካች ከመጀመሪያዉም ይዞታዉን የያዝኩት በህገ-ወጥ መንገዴ ነዉ ለማለት ፈልጎ ሳይሆን በ2004ዓ/ም በጉራፈርዳ ወረዳ በነበረዉ የፖለቲካ አለመረጋጋት ከወረዳዉ የነበሩ አማራ አርሶአደሮች ከአካባቢዉ ይዉጡ ተብል ስለነበር አማራዎች የያዙት ይዞታ በህጋዊ መንገድ የተያዘ ቢሆንም ከክልላቸዉ ዉጭ መስፈራቸዉ ህገ-ወጥ ነዉ የሚል የተሳሳተ ስያሜ ተሰጥቶት እንጂ ከመነሻዉም መሬቱ በህገ-ወጥ መንገድ የተያዘ ነዉ ለማለት አይደለም፡፡ይህንን ባለሙያ ጭምር በማስቀረብ ማጣራት እየተቻለ የተሳሳተ ግንዛቤ በመያዝና አመልካች ከተጠሪ የተሻለ ማስረጃ በማቅረብ በህጋዊ መንገድ የያዝኩት ይዞታ መሆኑን አስረድቼ እያለሁ የክልሉ ጠቅላይ ፍርድ ቤት የሥር ፍርድ ቤትን ዉሳኔ መሻሩ መሰረታዊ የህግ ስህተት ነዉ፡፡እንዱሁም የክልሉ ጠቅላይ ፍርድ ቤት የሰጠዉ ዉሳኔ በኢ.ፌ.ድ.ሪ. ህገ መንግስት አንቀጽ 40/4 ላይ የኢትዮጵያ አርሶአደሮች መሬት በነጻ የማግኘትና ከመሬታቸዉ ያለህጋዊ ምክንያት ያለመፈናቀል መብት አላቸዉ የሚለዉን

የሚቃረን ስለሆነ መሰረታዊ የህግ ስህተት የተፈጸመበት በመሆኑ ተሽሮ የወረዳ እና የከፍተኛ ፍርድ ቤቶች ወሳኔ ይጽናልኝ በማለት አቤቱታቸዉን አቅርበዋል፡፡

የሰበር አጣሪ ችሎት አቤቱታውን መርምሮ ተጠሪ ለክርክሩ መነሻ የሆነዉን መሬት በህግ አግባብ ስላለመያዛቸዉ የሚመለከተዉ አካል እየገለጸ ባለበት አመልካች ከ1999 ዓ/ም ጀምሮ ሲጠቀሙበት ቆይተዉ በ2004 ዓ/ም ከአቅም በላይ በሆነ ምክንያት መልቀቃቸዉ ተረጋግጦ እያለ የክልሉ ጠቅላይ ፍርድ ቤት ይግባኝ እና ሰበር ሰሚ ችሎቶች አከራካሪዉ ይዞታ ለተጠሪ ይገባል በማለት የወሰኑበትን አግባብ ከመሰረታዊዉ የማስረጃ ምዘና መርህ አንጻር እንዲመረመር ጉዳዩ የሰበር ሰሚ ችሎት እንዲቀርብ ትዕዛዝ በመስጠቱ ተጠሪ በቀን 16/11/2012 ዓ/ም የተፃፈ መልስ ያቀረቡ ሲሆን ይዘቱም በአጭሩ፡-

የጉራፈርዳ ወረዳ እርሻና ተፈጥሮ ሀብት ጽ/ቤት ለፍርድ ቤቱ በጻፈዉ ደብዳቤ ‘ተጠሪ ይዞታዉን በወረዳዉ በስግሰጋ መልክ መዉሰዲቸዉን የሚያሳይ ምንም ገላጭ የሆነ መረጃ በጽ/ቤቱ ደረጃ እንደሌለ እንገልጻለን“ በማለት የጻፈዉ ደብዳቤ መረጃ እንደሌለዉ የገለጸበት ነዉ እንጂ ተጠሪ ይዞታዉን በህግ አግባብ አልያዙም ወይም አያያዙ ህገ-ወጥ ነዉ በሚል የሠጠዉ ማረጋገጫ አይደለም፡፡ የክልሉ ጠቅላይ ፍርድ ቤት ዉሳኔ ከመሰጠቱ በፊት ደብዳቤዉን የጻፈዉ ኃላፊ የአከራካሪዉ መሬት ህጋዊ ባለይዞታ የአሁን ተጠሪ ስለመሆኔ አረጋግጧል፡፡ በቀን 02/12/2011ዓ/ም ለተጠሪ የይዞታ ማረጋገጫ ደብተር ተሰጥቶኛል፡፡ ሁለም አቅርቤ ያሰማኋቸዉ ምስክሮቼ አከራከሪዉ መሬት የተሰጠኝ በዳንቅላ ቀበሌ በህጋዊ መንገድ በሰፈራ የተመራሁት መሬት በአካባቢዉ በነበረ አለመረጋጋት ምክንያት ተወስድብኝ ስለነበር የወረዳዉ መሬት አስተዳደር ከቀበሌ አስተዳደር ጋር በመሆን በልዋጭ መርቶኝ በቅጽ ተመዝግቦ ያገኘሁት መሆኑን አስረድተዋል፡፡መሬቱ በእጄ የሚገኝና ግብር የምገብርበት ነዉ፡፡አመልካች ይዞታዉን ከ1999ዓ/ም ጀምሮ በእጃቸዉ አድርገዉ በ2004ዓ/ም ከአቅም በላይ በሆነ ምክንያት የለቀቁ ስለመሆኑ በማስረጃ አላረጋገጡም፡፡አመልካች መሬቱን በምሪት ደብዳቤ (በቬርባል) አግኝቻለሁ በማለት የተከራከሩ ቢሆንም ሰነዱን ለስር ፍርድ ቤት በማስረጃነት አቅርበዉ አላስረዱም፡፡ አንዳችም የግብር ደረሰኝ በማስረጃነት አላቀረቡም፡፡አመልካች አከራካሪዉን ይዞታ መንግስት ሳይመራቸዉ በህግ አግባብ ዉጭ በመሬት ወረራ መያዛቸዉ በ2004ዓ/ም በተደረገ ማጣራት ተረጋግጦ እንደለቀቁ በስር ፍርድ ቤቶች በማስረጃ የተረጋገጠ ነዉ፡፡አመልካች ከህግ ዉጭ እንድለቅ ተደርጌያለሁ የሚል ከሆነ ያፈናቀላቸዉን አካል ከሚጠይቁ በስተቀር የነበራቸዉን ቤት አፍርሰዉና ንብረት አንስተዉ አካባቢዉን ለቀዉ ከሄደ በኋላ ተጠሪ መሬቱን በጉልበት እንዳልያዝኩ እያወቁ በመንግስት ምሪት በህጋዊ መንገድ የያዝኩትን እንድለቅላቸዉ ሊጠይቁኝ አይችሉም፡፡ ስለሆነም የክልል ጠቅላይ ፍርድ ቤት ማስረጃዎችን በአግባቡ መዝኖ ተጠሪ ይዞታዉን መልቀቅ እንደማይገባኝ በመወሰኑ የተፈጸመ ስህተት የለም በማለት ተከራክረዋል፡፡ አመልካችም በቀን 18/02/2013 ዓ/ም የተጻፈ የመልስ መልስ በማቅረብ ተከራክረዋል፡፡

ከዚህ በላይ የተመለከተዉ የግራ ቀኝ ክርክርና በስር ፍርድ ቤቶች የተሰጡ ዉሳኔዎች ይዘት ሲሆን እኛም የሰበር አጣሪ ችሎት ጉዳዩ የሰበር ችሎት ያስቀርባል ሲል ከያዘዉ ጭብጥ አንጻር የተፈጸመ መሰረታዊ የህግ ስህተት መኖር አለመኖሩን አግባብነት ካለዉ ህግ ጋር በማገናዘብ እንደሚከተለዉ መርምረናል፡፡

እንደመረመርነውም ለክርክሩ መነሻ የሆነዉን የመሬት ይዞታ አመልካች ከ1999ዓ.ም ጀምሮ በጉራፈርዳ ወረዳ በበርጂ ቀበሌ አስተዳደር ጽ/ቤት በቃለ ጉባኤ መርቶኝ የተለያዩ ቋሚ ተክሎችን በመትከሌና አመታዊ ሰብሌ በማምረት የያዝኩትን በ2004ዓ/ም በአካባቢዉ በተፈጠረ ግጭት ምክንያት ከጥቃት ለመዳን ቤተሰቦቼን ይዤ ከሄዴኩበት ስመለስ ተጠሪ ያለማሁትን ይዞታዬን ይዘዉ ለመልቀቅ ፈቃደኛ ስላልሆኑ እንዲለቁልኝ ይወሰንልኝ በማለት ዳኝነት ጠይቀዋል፡፡ ተጠሪ ደግሞ ለክርክሩ መነሻ የሆነዉ የመንግስት ይዞታ እንደሆነና በዚያዉ ወረዳ ዳንቅላ ቀበሌ በሚባልበት ከነበራቸዉ ይዞታ ሲፈናቀሉ በልዋጭ በወረዳዉ መንግስት በ2004ዓ/ም ተመርተዉ በመያዝ የተለያዩ ተክሎችን ተክለዉ የያዙት የመንግስት መሬት

እንደሆነ ገልጸዉ አመልካች ይዞታዉን ለማስለቀቅ ያቀረቡት ክስ ዉድቅ እንዲደረግላቸዉ በመግለጽ ተከራክረዋል፡፡

በወረዳዉ ፍርድ ቤት አመልካች አቅርበዉ ያሰሙት አራት ምስክሮች የሰጡት ምስክርነት ቃል ነዉ ተብሎ በዉሳኔዉ የሰፈረዉ"...ክርክር የተነሳበት ይዞታ የአመልካች ነዉ፡፡በ1999ዓ/ም የካቲት 7 ቀን ከቀበሌዉ ይዞታዉ የተሰጠዉ በቬርባል በመፈራረም ነዉ፡፡ከሳሽ ይዞታዉ ከተሰጠዉ በኋላ ይዞታዉን እያለማ 42 ቅጠል ቆርቆሮ ቤት ሰርቶበት ሲኖር ሳለ በ2004ዓ/ም ከአካባቢዉ አማራ ይዉጣ የሚል ብጥብጥ ተነስቶ ስለነበር ከሳሽ ሆነ ሌሎች አርሶ አደሮች አካባቢዉን ለቀዉ ሄደዉ ነበር፡፡የአካባቢዉ ሁኔታ መረጋጋቱን አዉቆ ከሳሽ ተመልሶ ሲመጣ ቤቱን አጥቷል፡፡በይዞታዉ ሊይ የነበሩ አትክልቶች አሁንም አለበት፡፡ በ2009 ዓመት መጥቶ በይዞታ ጉዳይ አቤቱታ እያቀረበ ምንም ምላሽ አላገኘም፡፡በኋላ በዞኑ የእርሻና ተፈጥሮ ሀብት ጽ/ቤት አመልክቶ በወረዳዉ አስተዳደር በኩል ይዞታዉ እንዲመለስለት ጽፎለት ነበር፡፡ሆኖም አልተለጸመለትም፡፡ተከሳሹ በምን ሁኔታ የከሳሽን ይዞታ ለመያዝ እንደቻለ አናዉቅም በማለት መስክረዋል፡፡" የሚሌ ነዉ፡፡እንዱሁም ከክሳቸዉ ጋር ከ1999ዓ/ም እስከ 2004ዓ/ም ግብር የገበሩበትን ሰነድች እና ከመሬት አስተዳደርና አጠቃቀም ኮሚቴና ከሚመለከታቸዉ አካላት የተጻፈላቸዉን ሰነዶች አያይዘዉ እንዲቀረቡ የወረዳዉ ፍርድ ቤት ዉሳኔ ይዘት ያሳያል፡፡

በሌላ በኩል በወረዳ ፍርድ ቤት ዉሳኔ ላይ እንደተመለከተዉ ተጠሪ አቅርበዉ ያሰሟቸዉ ሶስት ምስክሮች በሰጡት ምስክርነት ቃል፡-'...ክርክር የተነሳበት ይዞታ የለማና የተለያዩ አትክልቶች እያለበት በወቅቱ በነበረ የቀበሌ ተወካዮች እንደተሰጠዉ ገልጸዉ ከሳሽም ይዞታዉ የእኔ ነዉ ብሎ መከራከሩን እንደሚያዉቁ አስረድተዋል፡፡ይዞታዉ የለማዉ በከሳሽ ሲሆን አትክልቶቹን ተንከባክቦ ያሳደገዉ ተከሳሽ ነዉ ብለዋል፡፡ተከሳሽም ቀደም ብል በአቱዋ ቀበሌ በኬራንባ ጎጥ ዉስጥ እያለ ከሌሎች ጋር በመሆን ይዞታ እንዲሰጣቸዉ በጠየቁት መሰረት ይዞታዉ ለተከሳሽ እንደተሰጠዉ አስረድተዋል፡፡" በሚል መመስከራቸዉ ተመዝግቧል፡፡እንዱሁም ከመልሳቸዉ ጋር የ6 ዓመት የግብር ካርኒ በማስረጃነት አያይዘዉ እንዳቀረቡ በዉሳኔዉ ሊይ ተመልክቷል፡፡

ፍርድ ቤቱ ተጨማሪ ማስረጃ ከጉራፈርዳ ወረዳ እርሻና ተፈጥሮ ሀብት ልማት ጽ/ቤት ማስረጃ እንዲቀርብለት አዝዞ ጽ/ቤቱ በላከዉ ምላሽ 'አሁን ክርክር ያስነሳዉን ይዞታ ከሳሽ ይዞ እያለማዉ ሲኖርበት ሳለ በቀበሌዉ መሬት አስተዳደር በሚለካበት ጊዜ ከሳሽ በህገ-ወጥ መንገድ ነዉ የያዘዉ ተብሎ አልተለካለትም፡፡የከሳሽም ስም አሁን በጽ/ቤቱ ዉስጥ የሚገኝ ሲሆን ተከሳሽ ይዞታዉን ተመርቷል ይባላል እንጂ ግን ምንም መረጃ በጽ/ቤታቸዉ እንደሌለዉ በመግለጽ ጽፏል፡፡" የሚል ነዉ፡፡

በስር ፍርድ ቤቶች የቀረቡ የሰዉና የሰነድ ማስረጃዎች ከላይ በአጭሩ የተመለከተዉ ሲሆን ከእነዚህ ማስረጃዎች ዉጭ የክልሉ ጠቅላይ ፍርድ ቤት ተጨማሪ ማስረጃ አስቀርቦ ስለመመርመሩ ዉሳኔዉ አያሳይም፡፡በክልሉ ጠቅላይ ፍርድ ቤት ዉሳኔ ላይ ተጠሪ ይዞታዉን በ2004ዓ/ም የተመሩበትን ማስረጃ እንዳላቀረቡ ገልጿል፡፡

በኢ.ፌ.ዲ.ሪ ህገ መንግስት አንቀጽ 40/4 እና በተሻሻለዉ በደቡብ ብሄር በሄረሰቦችና ህዝቦች ክልል ህገ መንግስት ላይ በተመሳሳይ በተደነገገዉ መሰረት አርሶ አደሮች ዝርዝሩ በህግ በሚወሰነዉ መሰረት መሬት በነጻ የማግኘትና ከመሬታቸዉ ያለመፈናቀል መብት አላቸዉ፡፡በፌዴልም ሆነ በክልል ህገ መንግስታት አንቀጽ 40(7 እና 8) ስር እንደተደነገገዉ የመሬት ባለቤትነት የመንግስትና የህዝብ መሆኑ እንደተጠበቀ ሆኖ ግለሰቦች ባለይዞታ በሆኑበት የመሬት ይዞታ የመጠቀም መብታቸዉ ሊቋረጥ የሚችለዉ አግባብ ባለዉ ህግ መሰረት እንደነገሩ ሁኔታ በቅድሚያ ካሳ እና/ወይም ምትክ ቦታ ከተሰጣቸዉ ብቻ እንደሆነ፣ማንኛዉም በክልልና ከክልል ዉጭ የሚኖር ኢትዮጵያዊ በጉሌበቱ ወይም በገንዘቡ በመሬት ሊይ የሚገነባዉ ቋሚ ንብረት ወይም የሚያደርገዉ ቋሚ ማሻሻል ሙለ መብት እንዳለዉና ግለሰቦችም የመሬት ባለይዞታነት መብት ተጠቃሚ ሊሆኑ የሚችሉት አግባብ ባለዉ ህግ በተደነገገዉ ስርዓት መሰረት ነዉ፡፡

እንዲሁም በክልል የገጠር መሬት አስተዳደርና አጠቃቀም አዋጅ ቁጥር 110/1999 አንቀጽ 2/13 ስር በተመለከተዉ ትርጓሜ መሰረት የግል ይዞታ ማለት አርሶ አደሮች፣ ከፊል አርብቶ አደሮች እና ወይንም በሌሎች በህግ መብት በተሰጣቸዉ አካላት በግል ይዞታ ስር ያለ የገጠር መሬት ነዉ፡፡በአዋጁ አንቀጽ 5/1 የገጠር መሬት ስለማግኘትና ስለመጠቀም በተደነገገዉ ስር በግብርና ሥራ የሚተዳደሩ አርሶ አደሮች፣ ከፊል አርብቶ አደሮችና አርብቶ አደሮች የገጠር መሬት በነጻ የማግኘትና የመጠቀም መብት እንዳላቸዉ ተመልክቷል፡፡የአርሶ አደሮች፣ የከፊል አርብቶ አደሮችና አርብቶ አደሮች ላልተወሰነ ጊዜ በገጠር መሬት የመጠቀም መብት እንዳላቸዉ በዚሁ አዋጅ አንቀጽ 7/1 ላይ ተመልክቷል፡፡በዚሁ አዋጅ አንቀጽ 13/14 ስር በተደነገገዉ መሰረትም ማንኛዉም ግለሰብ ወይም ድርጅት ያለይዞታ ማረጋገጫ ደብተር የገጠር መሬትን መጠቀም እንደማይችል ተመልክቷል፡፡

በሌላ በኩል አንድ በክልሉ የገጠር መሬት ባለይዞታ የሆነ ሰዉ የባለይዞታነት መብቱን ሊያጣ የሚችልበትም አግባብ በህጉ በዝርዝር ተመልክቷል፡፡ ይኸዉም በአዋጁ አንቀጽ 9/1 ስር ስለገጠር መሬት ሽግሽግ እንደተደነገገዉ ባለይዞታዎች በህይወት የሌሉና ወራሽ የሌላቸዉ ወይም በሰፈራ ወይም በፍላጎታቸዉ ከተወሰነዉ ጊዜ በላይ አካባቢዉን ለቀዉ የቆዩ ከሆነ ይዞታቸዉ መሬት አሌባ ሊሆኑ ወይም መሬት ሊነሳቸዉ አርሶ አደሮች ከፊል አርብቶ አደሮችና አርብቶ አደሮች በደንብ ላይ ተዘርዝሮ በሚደነገገዉ መሰረት በሽግሽግ ሊሰጥ ይችላል፡፡በአዋጁ አንቀጽ 7/3 እና 13/11 በግል ባለይዞታነት የተያዘ የገጠር መሬትን ባለይዞታዉ በመሬቱ ላይ ላደረገዉ ማሻሻያና ላፈራዉ ንብረት አግባብ ባለዉ ህግ መሰረት ተመጣጣኝ ካሳ ተከፍሎትና በለቀቀዉ ምትክ ተለዋጭ መሬት እንዲያገኝ በማድረግ መሬቱን ለህዝብ ጥቅም በማዋል እንዲለቅ ማድረግ የሚቻል ሲሆን ከዚህ ዉጭ ባለይዞታዉ በመሬቱ የመጠቀም መብቱን ሊያጣ የሚችለዉ በአንቀጽ 10/1 እና 13/12 ስር እንደተደነገገዉ ዝርዝር አፈጻጸሙ በደንብ በተወሰነዉ መሰረት ባለይዞታዉ መሬቱን በአግባቡ የመጠቀምና የመንከባከብ ግዴታዉን ባለመወጣቱ የተነሳ በመሬቱ ላይ ጉዳት (በቅጣት ብቻ ሊታለፍ የማይችል ጉዳት) ማድረሱ ሲረጋገጥ ነዉ፡፡ከዚህ ዉጭ ባለይዞታዉ አግባብ ላለዉ አካል በግልጽ አሳዉቆ በመሬቱ የመጠቀም መብቱን በፈቃዱ ካልተወ በስተቀር የገጠር መሬት ባለይዞታነት መብቱን ሊያጣ አይችልም (የአዋጁ አንቀጽ 10/4 ይመለከቷል)፡፡

ከላይ በተጠቀሱት ህጎች የተደነገገዉንና በግራ ቀኝ ምስክሮችና ማስረጃዎች የተረጋገጡትን ፍሬ ነገሮች ከግምት በማስገባት አከራካሪዉን ይዞታ ተጠሪ ለአመልካች ሊለቁ አይገባም ተብሎ በመወሰኑ የተፈጸመ መሰረታዊ የህግ ስህተት መኖር አለመኖሩን መርምረናል፡፡ ከላይ እንደተመለከተዉ አመልካች ያቀረቡት ምስክሮች አመልካች አከርካሪዉን መሬት በ1999ዓ/ም ተመርተዉ እንደያዙ የመሰከሩላቸዉ ሲሆን ተጠሪ ያቀረቡት ምስክሮች ደግሞ አመልካች አልምተዉ ይዘዉ የነበረዉን መሬት በቀበሌ አስተዳደር አማካኝነት ለተጠሪ ተሰጥቷቸዉ ስለመያዛቸዉ መስክረዉላቸዋል፡፡ሆኖም አመልካችም ሆኑ ተጠሪ በሥነ ሥርዓት ህጉ አግባብ በስር ፍርድ ቤቶች ካቀረቡት የጽሁፍ ክርክር ጋር ወይም ህጉ በሚፈቅደዉ የክርክር ደረጃ ላይ አከራካሪዉን መሬት አግባብ ባለዉ ህግ መሰረት በሚመለከተዉ የመንግስት አካል ተመርተዉ (በድልድል) ስለማገኘታቸዉ የሚያሳይ ማስረጃ ወይም በስማቸዉ ተመዝግቦ የተሰጣቸዉን የባለይዞታነት ማረጋገጫ ምስክር ደብተር በማቅረብ አላስረደም፡፡ አመልካች መሬቱን በቀበሌ አስተዳደር ጽ/ቤት በቀን 10/06/1999ዓ/ም በተጻፈ ቃለጉባኤ (ቬርባል) ተሰጥቶኝ ነዉ የያዝኩት በሚል በክሳቸዉ ቢገልጹም ይህንን ማስረጃ በማስረጃነት ያቀረቡ ስለመሆኑ የስር ፍርድ ቤቶች ዉሳኔ ግልባጭ ባያሳይም የስር ፍርድ ቤቶች ይህ ማስረጃ እንዲቀርብ በማድረግ አለማጣራታቸዉን ተገንዝበናል፡፡ተጠሪም በይዞታዉ ላይ በስሜ ተመዝግቦ የይዞታ ማረጋገጫ ደብተር በቀን 02/12/2011ዓ/ም ተሰጥቶኛል ብለዉ ቢከራከሩም ይህንን ማስረጃ አግኝተዉ ከሆነም የወረዳ እና የዞን ከፍተኛ ፍርድ ቤቶች በጉዳዩ ላይ ዉሳኔ በመስጠት ይዞታዉን ለአመልካች እንዲያስረክቡ ከተወሰነና ጉዳዩ በይግባኝ በክልል ጠቅላይ ፍርድ ቤት ታይቶ ተጠሪ ይዞታዉን ሊለቁ አይገባም ተብሎ የስር ፍርድ ቤቶች ዉሳኔ ተሽሮ ከመወሰኑ በፊት በመሆኑ ለስር ፍርድ ቤቶች የቀረበ ማስረጃ ባሆመሆኑ ተጠሪ በሥነ ሥርዓት ሔጉ አግባብ እንዲቀረቡት ማስረጃ ተቆጥሮ ሊመዘን የሚችል አይደለም፡፡ እንዱሁም የወረዳዉ ፍርድ ቤት ከወረዳዉ የእርሻና ተፈጥሮ ሀብት ጽ/ቤት ግራ ቀኝ ይዞታዉን በምን አግባብ እንደያዙ በማጣራት ትእዛዝ ቢሰጥም አከራካሪዉን መሬት አስቀድመዉ የያዙትና ያለሙት አመልካች

ቢሆኑም መሬቱ በቀበሌ መሬት አስተዳደር በሚለካበት ጊዜ አመልካች መሬቱን በህገ-ወጥ መንገዴ ነዉ የያዙት በሚል ምክንያት ሳይለካላቸዉ መታለፉንና በኋላም ተጠሪ መሬቱን ተመርተዋል ከሚባል በስተቀር ሁለቱም ወገኖች መሬቱን በምን አግባብ አግኝተዉ እንደያዙ በጽ/ቤቱ መረጃ እንደሌለዉ በመግለጹ ሳይረጋገጥ ቀርቷል፡

ከላይ በተመለከተዉ መሰረት በስር ፍርድ ቤቶች የቀረቡ ማስረጃዎች የሚያሳዩት ከ1999ዓ/ም ጀምሮ እስከ 2004 ዓ/ም ድረስ አከራካሪዉን መሬት የያዙትና የተለያዩ ተክሎችን በመትከል እንዱሁም 2004ዓ/ም እስከደረሰበት ጊዜ ድረስ ቤት ጭምር ሰርተዉ በይዞታዉ ሲጠቀሙ የቆዩት አመልካች መሆናቸዉ ቢረጋገጥም ይህንን ይዞታ አመልካች በምን አግባብና በማን ፈቃጅነት ይዘዉ ሲጠቀሙ እንደቆዩ ግን ተገቢዉን ማስረጃ በማስቀረብና የቀረቡትንም በመመዘን በሚገባ ባለመጣራቱ የፍሬ ነገሩ መኖር አለመኖር አለመረጋገጡን ተገንዝበናል፡፡ በወረዳዉ የእርሻና ተፈጥሮ ሀብት ጽ/ቤት ለወረዳ ፍርድ ቤት በተላከ ማስረጃ ላይ ይዞታዉን አመልካች በህገ-ወጥ መንገድ ይዘዋል በሚል በአመልካች ስም ሳይለካ ቀርቷል በሚል የገለጸዉ አገላለጽ መሬቱን አመልካች ከመነሻዉ በህገ-ወጥ መንገድ በመያዛቸዉ ምክንያት ነዉ ወይስ በወቅቱ በአካባቢዉ በነበረ ግጭት ጋር በተያያዘ ለአመልካች መሬቱ አይገባቸዉም በሚል ነዉ የሚለዉን በግልጽ የማያሳይ በመሆኑ ተገቢዉ ማብራሪያ እንዱሰጥበት ሊደረግና ትክክለኛዉ ምክንያት ማረጋገጥ ይገባዉ ነበር፡፡ እንዱሁም ይዞታዉ በአመልካች የተያዘበት መንገዴ ካለመረጋገጡም በተጨማሪ አመልካች በአካባቢዉ በተፈጠረ አለመረጋጋት አማራ ናቸዉ በሚል ምክንያት ተፈናቅለዉ ከቤተሰቦቻቸዉ ጋር ጥቃት እንዲይደርስባቸዉ ያለፍላጎታቸዉ ይዞታዉን ለቀዉ በ2004 ዓ/ም ወደ ሌላ አካበባቢ ሲሄዱ ደግሞ ተጠሪ አከራካሪዉን መሬት በመያዝ ከ2004ዓ/ም ጀምሮ እየተጠቀሙ እንደሚገኙ ቢረጋገጥም ተጠሪም መሬቱን በምን አግባብና በማን ፈቃጅነት እንደያዙ ማስረጃዎችን ከሚመለከተዉ አካል በማስቀረብና የቀረቡትን ማስረጃዎች በመመዘን በአግባቡ እንደዳልተጣራ ተረድተናል፡፡

ለክርክሩ መነሻ የሆነዉን መሬት አስቀድመዉ ይዘዉ ሲጠቀሙ የቆዩት አመልካች ሲሆኑ መሬቱ ለህዝብ ጥቅም ያስፈልጋል በሚል ወይም መሬቱን ባለመንከባከብ ጉዳት እንዲደርስበት አድርገዋል በሚል እንዲለቁ ተደርገዋል የሚል ክርክር አልቀረበም፡፡እንዱሁም አመልካች በ2004 ዓ/ም መሬቱን የለቀቁት በአካባቢዉ በተፈጠረ ግጭት ምክንያት ከቤተሰቦቻቸዉ ጋር ጥቃት ይደርስብኛል በሚል ተፈናቅለዉ እንጂ በሰፈራ ወይም በፍላጎታቸዉ በህግ ከተወሰነዉ ጊዜ በላይ አካባቢዉን ለቀዉ በመቆየታቸዉ ምክንያት ባለመሆኑ የወረዳዉ ፍርድ ቤት በዉሳኔዉ ሊይ እንደገለጸዉ በክልል አዋጅ ቁጥር 110/1999 አንቀጽ 9/1 መሰረት በመሬት ሽግሽግ ምክንያት አመልካች ከያዙት መሬት እንዲለቁ የሚደረግበት አግባብ ባለመኖሩ ተጠሪ መሬቱን በሽግሽግ ያገኘሁት ነዉ ብለዉ ያሰሙት ክርክር አመልካች የያዙትን መሬት እንዱለቁ የሚያደርግ ምክንያት አይደለም፡፡

እንዲሁም አንድ የገጠር መሬት ባለይዞታ መሬቱን የያዘዉ አግባብ ባላቸዉ የፌዴራልም ሆነ የክልል ህግጋት ሊይ ከተደነገገዉ አግባብ ዉጭ ቢሆን እንኳን ግለሰቡ በዚህ አግባብ የያዘዉን መሬት በህግ በተደነገገዉ ስርዓት አግባብ ባለዉ የመንግስት አካል እንዲለቅ ይደረጋል እንጂ መሬቱን ከህግ አግባብ ዉጭ ይዟል በሚል ባለይዞታዉን አስለቅቆ ሌላ ግለሰብ መሬቱን በመያዝ ባለይዞታ የሚሆንበት አግባብ በህግ የተፈቀደ ተግባር አይደለም፡፡በዚህ መሰረት ግለሰቦች አንዱ የሌላዉን መሬት በማስለቀቅ የሚይዙ ከሆነ የህግ የበላይነት መርህ ተጥሶ በምትኩ በጉልበት መመራትን ስለሚተካ በህግ የሚደገፍ አይደለም፡፡በመሆኑም አመልካች አከራካሪዉን መሬት በህግ አግባብ ባይዙ እንኳን በህግ በተዘረጋዉ ስርዓት መሰረት አግባብ ያለዉ አካል እንዲያስለቅቃቸዉ ይደረጋል እንጂ አመልካች በጸጥታ ችግር ምክንያት ተፈናቅለዉ መሬቱን በለቀቁበት ጊዜ ዉስጥ ተጠሪ መሬቱን በቀጥታ ይዘዉ አሌለቅም ለማለት የሚችለበት የህግ አግባብ የለም፡፡ ተጠሪ አከራካሪዉን መሬት አለቅም በማለት መከራከር የሚችሉት በህግ አግባብ በሚመለከተዉ የመንግስት አካል አመልካች መሬቱን እንዲለቁ ተደርጎ መሬቱ በድልድል (በምሪት) ሲሰጣቸዉ ብቻ ነዉ፡፡

ከመሠረታዊዉ አንድን ፍሬ ነገር ማስረጃ አቅርቦ ከማስረዳት ሸክም መርህ (Basic Principle of Burden of Proof) መረዳት እንደሚቻለዉ አንድ አከራካሪ ፍሬ ነገር አለ ወይም የለም ብሎ

የሚከራከር ተከራካሪ ወገን ፍሬ ነገሩ መኖሩን ወይም አለመኖሩን ተገቢውንና ህጉ በተለየ ሁኔታ የሚጠይቀዉ ማስረጃ ካለም በህግ ተቀባይነት ያለዉ ነዉ ያለዉን ማስረጃ በማቅረብ የማስረዳት ሸክም (ግዴታ) አለበት (የፍ/ብ/ሔግ ቁጥር 2001 ይመለከቷል)፡፡እንዱሁም የምንከተለዉ የክርክር አመራር ሥነ ሥርዓት ፍርድ ቤቶች (ዳኞች) የገለልተኛነት መርህን በጠበቀ መልኩ ክርክሮችን በማስረጃ በማንጠር አንጻራዊ እዉነታን ከመፈለግ አንጻር ንቁ ተሳትፍ እንዲኖራቸዉ የሚጠይቅ በመሆኑ በራሳቸዉ አነሳሽነት ወደ እዉነታዉ የሚያደርስ ማስረጃ በትእዛዝ አስቀርበዉ እዉነታዉን ማጣራት ይጠበቅባቸዋል (የፍ/ብ/ስ/ስ/ህግ ቁጥር 136/1፣249፣264 እና 345/1 ይመለከቷል፡፡)

ሲጠቃለል አመልካች አከራካሪዉን መሬት ከ1999ዓ/ም ጀምሮ እስከ 2004 ዓ/ም ድረስ የተለያዩ ተክሎችን በመትከልና ቤት ሰርተዉ ሲጠቀሙ ቆይተዉ በአካባቢዉ በተፈጠረ ግጭት ምክንያት ተፈናቅለዉ ለቀዉ መሄዳቸዉ የተረጋገጠ ፍሬ ነገር ነዉ፡፡እንዱሁም ተጠሪ ከ2004ዓ/ም ጀምሮ ይህንን መሬት ይዘዉ እየተጠቀሙ እንደሚገኙ ተረጋግጧል፡፡ሆኖም አመልካች መሬቱን በህግ አግባብ የሚመለከተዉን የመንግስት አካል አስፈቅደዉ መያዝ አለመያዛቸዉ እንዲሁም ተጠሪ አከራካሪዉን መሬት ይዘዉ እየተገለገሉ የሚገኙት አግባብ ባለዉ ህግ መሰረት በሚመለከተዉ የመንግስት አካል ተፈቅዶላቸዉ ስለመሆኑ ሳይረጋገጥ የወረዳዉ እና የዞን ከፌተኛ ፍርድ ቤቶች ተጠሪ መሬቱን ለአመልካች ሊለቁ ይገባል ብለዉ መወሰናቸዉ እንዱሁም ጉዳዩን በይግባኝና በሰበር ያየዉ የክልሉ ጠቅላይ ፍርድ ቤት ተጠሪ መሬቱን ለአመልካች ሊለቁ አይገባም በማለት የስር ፍርድ ቤቶችን ዉሳኔ በመሻር የሰጠዉ ዉሳኔ በማስረጃ መረጋገጥ ያለበት ፍሬ ነገር እንዲረጋገጥ ሳያደርጉ የደረሱበትን ድምዳሜ እንደሆነ ስለሚያሳይ ሊታረም የሚገባዉ መሰረታዊ የሆነ የህግ አተገባበርና የክርክር አመራር ጉድለት ነዉ፡፡ ስለሆነም ተከታዩን ወስነናል፡፡

<u>ዉ ሳ ኔ</u>

1. የጉራፈርዳ ወረዳ ፍርድ ቤት በመ/ቁጥር 11475 ላይ በቀን 18/10/2011ዓ/ም የሰጠዉን ዉሳኔ፣ የቤንች አካባቢ ከፍተኛ ፍርድ ቤት በመ/ቁጥር 19556 ላይ በቀን 26/10/2011 ዓ/ም የሰጠዉ ትእዛዝ፣ የደቡብ ክልል ጠቅላይ ፍርድ ቤት በመ/ቁጥር 07642 ላይ በቀን 30/12/2011ዓ/ም የሰጠዉ ዉሳኔ እና የደቡብ ክልል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት በመ/ቁጥር 07877 ላይ በቀን 25/03/2012ዓ/ም የሰጠዉ ዉሳኔ በፍ/ብ/ስ/ስ/ህግ ቁጥር 348/1 መሰረት ተሽርዋል፡፡

2. የጉራፈርዳ ወረዳ ፍርድ ቤት መዝገቡን አንቀሳቅሶ አመልካች አከራከሪዉን መሬት በቀበሌ አስተዳደር ተመርተዉ መያዝ አለመያዛቸዉን፣ መሬቱ በአመልካች ስም ሳይለካ የቀረበትን ምክንያት፣ይህንን አመልካች አልምተዉ ሲጠቀሙ የነበረዉን መሬት በአካባቢዉ ተፈጥሮ በነበረ የጸጥታ ችግር ምክንያት ራሳቸዉንና ቤተሰባቸዉን ከጥቃት ለመከላከል ለቀዉ ከሄዱበት ሲመለሱ መሬቱን ተጠሪ ሊይዙ የቻሉት በምን አግባብ እንደሆነና አመልካች መሬቱን በህግ አግባብ እንዲለቁ ተደርጎ በሚመለከተዉ የመንግስት አካል ለተጠሪ የተላለፈ መሆን አለመሆኑን ከቀበሌ አስተዳደርና ከሌላ ከሚመለከተዉ አካል ማስረጃ አስቀርቦ አጣርቶና የቀረቡትን ማስረጃዎች መዝኖ ህግን መሰረት ያደረገ ዉሳኔ እንዲሰጥ ጉዳዩን በፍ/ብ/ስ/ስ/ህግ ቁጥር 343/1 መሰረት መልሰንለታል፡፡

3. ግራ ቀኝ በዚህ ችሎት ያወጡትን ወጭ የየራሳቸዉን እንዲችሉ ተወስኗል፡፡

የሰ/መ/ቁ. 187340
መጋቢት 29 ቀን 2013 ዓ/ም

ዳኞች፡- ብርሀኑ አመነው
ተሾመ ሽፈራው
ሀብታሙ እርቅይሁን
ብርሀኑ መንግስቱ
ነፃነት ተገኝ

አመልካቾች፡- 1. ወ/ሮ ዙፋን መንግስቱ
2. አቶ አየነው ቢሻው

ተጠሪዎች፡- 1. አቶ በሌስቲ አባተ
2. ወ/ሮ እመቤት አባተ
3. አቶ አንዷለም አባተ
4. ወ/ሮ የምስራች አባተ

መዝገቡ ተመርምሮ ተከታዩ ፍርድ ተሰጥቷል፡፡

ፍ ር ድ

ጉዳዩ ከገጠር መሬት ጋር በተያያዘ የሚቀርብ የውርስ ጥያቄ ሊይ ተፈፃሚ የሚሆነውን የይርጋ ደንብ የሚመለከት ሲሆን ክርክሩ በተጀመረበት አማራ ክልል ቡሬ ወረዳ ፍርድ ቤት አመልካቾች ከሳሽ፣ ተጠሪዎች ደግሞ ከሌሎች አራት ግለሰቦች ጋር ተከሳሾች በመሆን ተከራክረዋል፡፡ አመልካቾች በቀን 08/07/2009 ዓ.ም ጽፈው ባቀረቡት ክስ ሟች አያታችን በ1989 ዓ.ም በድልድል ያገኙት፣ እኛም ከአባታችን ጋር እንደልጅና ቤተሰብ የተቆጥርንበትን 13 ገመድ የውርስ መሬት ተከሳሾች በተለያየ መጠን ተከፋፍለው በመያዝ እየተጠቀሙበት በመሆኑ ለቀው ያስረክቡን በማለት ዳኝነት ጠይቀዋል፡፡ ተጠሪዎች በበኩላቸው በሰጡት መልስ አባታችን (የአመልካቾች አያት) የሞተው በ1997 ዓ.ም ሲሆን አመልካቾች ደግሞ የወራሽነት ማረጋገጫ ያወጡት በ2009 ዓ.ም ስለሆነ ክሱ በይርጋ ይታገዳል በማለት የመጀመሪያ ደረጃ መቃወሚያ ያቀረቡ ሲሆን በፍሬ ነገሩ ደረጃም የአማራጭ መልስ ሰጥተው ተከራክረዋል፡፡

የግራ ቀኙን ክርክር እና ማስረጃ የሰማው የወረዳው ፌርድ ቤት የተጠሪዎችን የይርጋ መቃወሚያ ውድቅ በማድረግ ከስር 1ኛ ተከሳሽ ውጭ ያሉት ተከሳሾች በሙሉ የያዟቸውን መሬቶች በመልቀቅ ለአመልካቾች ያስረክቡ በማለት ወስኗል፡፡ በዚህ ውሳኔ ቅር የተሰኙት ተጠሪዎች የይግባኝ አቤቱታ ለዞኑ ከፍተኛ ፍርድ ቤት ቢያቀርቡም ተቀባይነት ሳያገኝ ቀርቷል፡፡ በመቀጠል ለክልሉ ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት የሰበር አቤቱታቸውን ያቀረቡ ሲሆን ችልቱም በአቤቱታው ላይ ግራ ቀኙን ካከራከረ በኋላ ተጠሪዎች መሬቱን ከ2001 ዓ.ም ጀምረው እንደያዙት በማስረጃ ተረጋግጧል፤ አከራካሪውን መሬት በሚመለከት ግራ ቀኙ ወራሽ ሲሆኑ በወራሾች መካከል ለሚነሳ ክርክር ተፈፃሚነት ባለው በፍትሀብሄር ህግ ቁጥር 1000(1) መሠረት ሶስት ዓመት ጊዜ ስለሆነና አመልካቾች ክሳቸውን ያቀረቡት ተጠሪዎች መሬቱን ከያዙ ከሶስት ዓመት በኋላ በመሆኑ ክሱ በይርጋ ይታገዳል በማለት የወረዳው እና የዞኑ ከፍተኛ ፍርድ ቤቶች የሰጡትን ውሳኔ ሽሮታል፡፡ በዚህ ፍርድ መነሻ የሆነው የሰበር አቤቱታ የቀረበው ይህንኑ ለማስለወጥ ነው፡፡

አመልካቾች በቀን 10/04/2012 ዓ.ም በተፃፈ 03 ገጽ የሰበር አቤቱታ በስር ፍርድ ቤቶች ተፈፅመዋል ያሏቸውን ስህተቶች በመዘርዘር በዚህ ችሎት እንዲታረሙላቸው ጠይቀዋል፡፡ የአመልካቾች የሰበር አቤቱታ ይዘት በአጭሩ የክልሉ ሰበር ሰሚ ችሎት ተጠሪዎች ወራሽ ነን

ሳይለ፣ እንዱሁም የወራሽነት ማስረጃ ባላቀረቡበት ያልተነሳን የውርስ ይርጋ ክርክር እራሱ በማንሳት ክሱ በይርጋ ይታገዳል በማለት የሰጠው ውሳኔ መሠረታዊ የህግ ስህተት የተፈፀመበት በመሆኑ ሊታረም ይገባዋል የሚል ነው፡፡ የሰበር አቤቱታዉ በአጣሪ ችሎት ተመርምሮም በፍትሀብሄር ህጉ አንቀጽ 1000(1) ሊይ የተመለከተዉ የሦስት ዓመት የይርጋ ደንብ በእርሻ መሬት የዉርስ ጥያቄ ላይ ተፈፃሚነት ያለዉ መሆን አለመሆኑን አጣርቶ ለመወሰን ሲባል ያስቀርባል ብሏል፡፡ ተጠሪዎች በጉዲዩ ላይ መልስ እንዲሰጡ በሚል መጥሪያ የተላከላቸው ቢሆንም ባለመቅረባቸዉ መልስ የማቅረብ መብታቸዉ ታልፏል፡፡

የጉዳዩ አመጣጥ እና የክርክሩ ይዘት አጠር ባለ መልኩ ከላይ የተገለፀውን ሲመስል ይህ ችሎትም በሰበር አጣሪ ችሎት የተያዘዉን ጭብጥ ከጉዳዩ አግባብነት ካላቸዉ ድንጋጌዎች ጋር በማገናዘብ መዝገቡን እንደሚከተለዉ መርምሮታል፡፡ እንደመረመረዉም አዉራሽ ከዚህ ዓለም በሞት የተለዩት በ1997 ዓ.ም ሲሆን ተጠሪዎች የክርክሩ መነሻ የሆነዉን መሬት የያዙት በ2001 ዓ.ም መሆኑ ስለመረጋገጡ የክልል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ዉሳኔ ይዘት የሚያሳይ ሲሆን፣ አመልካቾች ይህን ፍሬ ነገር በመካድ አይከራከሩም፡፡ ክርክሩ በወራሾች መካከል ስለመሆኑም የታመነ ነዉ፡፡ አመልካቾች ተጠሪዎች ይርጋ መቃወሚያ አላነሱም በማለት የሚከራከሩ ቢሆንም፣ ተጠሪዎች ክሱ በይርጋ እንደሚታገድ የመጀመሪያ መቃወሚያ ያነሱ ስለመሆኑ የወረዳዉ ፍርድ ቤት በቀን 22/06/2010 ዓ.ም በዋለዉ ችሎት ከሰጠዉ ብይን ይዘት ለመገንዘብ የሚቻል ሲሆን፣ የወረዳዉ ፍርድ ቤት የይርጋ መቃወሚያን ዉድቅ ያደረገዉ ተጠሪዎች መሬቱን ከያዙት 10 ዓመት ያልሞላዉ መሆኑን ነዉ፡፡ በአንፃሩ የክልሉ ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ክሱ በይርጋ ይታገዳል በሚል ድምዳሜ ላይ የደረሰዉ ለጉዳዩ ተፈፃሚነት ያለዉ ይርጋ በፍትሀብሄር ህጉ አንቀጽ 1000(1) ሊይ የተመለከተዉ የሦስት ዓመት ጊዜ መሆኑን በመጥቀስ ነዉ፡፡ በመሆኑም ከዉርስ ይርጋ ጋር በተያያዘ በፍትሀብሄርህጉ ላይ የተመለከቱት ዴንጋጌዎች ተፈፃሚነት አላቸዉ ወይ የሚለዉን ነጥብ በሰበር አጣሪ ችሎት ከተያዘዉ ጭብጥ አንፃር መመርመሩ ተገቢ ሆኖ ተገኝቷል፡፡

ምንም እንኳ አሁን በአገራችን በስራ ላይ ባለዉ የመሬት ስሪት መሠረት መሬት የህዝብ እና የመንግስት በመሆኑ እንዲሁም መሬት የእራሱ የሆነ የተለየ ባህርይ ያለዉ ቢሆንም፤ ከመሬት ጋር በተያያዘ የሚፈጠሩ መብቶች እና ግዴታዎች፣ ግንኙነቶች የሚመሩት በንብረት ህግ አጠቃላይ መርሆዎች በመሆኑ የከተማም ሆነ የገጠር መሬት አስተዳደር እና አጠቃቀምን አስመልክቶ የሚወጡ ህጎች/አዋጆች በንብረት ህግ ማዕቀፍ ዉስጥ የሚመደቡ መሆኑን መገንዘብ ያስፈልጋሌ፡፡ ስለሆነም ከንብረት ጋር በተገናኘ ያሉ ጽንሰ ሃሳቦች፣ ህጎች እና መርሆዎች ከመሬት ጋር በተያያዘ ለሚቀርብ ክርክር እንደየአግባብነታቸዉ ተፈፃሚነት ይኖራቸዋል፡፡ በጽንሰ ሃሳብ ደረጃ የንብረት ህግ ማለት ለአንድ ንብረት ባለመብት ወይም ባለይዞታ የሆነ ሰዉ ከሌሎች ሰዎች ጋር የሚኖረዉን ግንኙነት የሚገዛ ነዉ፡፡ የንብረት ህግ አንዴ ሰዉ በአንድ ንብረት ሊይ ባለቤትነት ወይም ባለይዞታ ሊሆን የሚቻልበትን መንገዴ፤ የመብቱ ዓይነት፣ ስፊት እና ማዕቀፍ፣ መብቱ ከአንደ ወደ ሌላ ሊተላለፍ የሚችልበትን ሥርዓት የሚደነግግ የህግ ክፍሌ ነዉ፡፡ ንብረትን የመከታተል መብት፣ በመብቱ ማዕቀፍ ያለ ማንም ጣልቃ ገብነት የመጠቀም መብት እንዲሁም ክስ አቅርቦ መብትን የማስከበር መብት የንብረት ባለ ሀብት ወይም ባለይዞታ መሆን ከሚሰጣቸዉ መብቶች ዉስጥ ዋነኞቹ ናቸዉ፡፡

አንድ ሰዉ የአንድ ንብረት ባለመብት ወይም ባለይዞታ መሆኑ የሚታወቀዉ እና የንብረት ባለ ሀብት ወይም ባለይዞታ መሆን በሚሰጣቸዉ መብቶች ተጠቃሚ ሊሆን የሚችለዉ ንብረቱን በህግ አግባብ በቀጥታ ወይም በተዘዋዋሪ መንገድ በእጁ ካደረገበት ጊዜ ጀምሮ ስለመሆኑም ከአጠቃላይ የንብረት ህግ ጽንሰ ሃሳብ የምንገነዘበዉ ነዉ፡፡ ስለሆነም አንድን ንብረት አስመልክቶ የሚቀርበዉን ክስ ተከትሎ ንብረትን የሚመለከት የህግ ክፍል ተፈፃሚ የሚሆነዉ ከሳሽ ክሱን ያቀረበዉ ንብረቱን በቀጥታ ወይም በተዘዋዋሪ መንገድ በእጁ ካደረገ በኋላ በንብረቱ ላይ ያለዉ መብት እንዲከበርለት የቀረበ ክስ መሆኑ በክሱ የተረጋገጠ ሲሆን ነዉ፡፡ ይህም ማለት አንድ ከሳሽ ባቀረበዉ ክስ የጠየቀዉ ዳኝነት ንብረትን የሚመለከት መሆኑ ብቻዉን ጉዳዩን የንብረት ክርክር አያደርገዉም ማለት ነዉ፡፡ በአጠቃላይ ንብረትን የሚመለከት ለፍርድ ቤት የሚቀርብ ዳኝነት ሁለት ገጽታዎች ያሉት ሲሆን አንደኛዉ የንብረት ባለሀብትነት ወይም ባለይዞታነትን ወይም ከንብረቱ ጋር በተያያዘ ያለዉን ማንኛዉንም መብት

ለማስከበር የሚቀርብ ዳኝነት ሲሆን፣ ሁለተኛዉ የንብረት ባለቤትነት ወይም ባለይዞታነት መብት በፍርድ ኃይል እንዲተላለፍለት በዚህም የንብረቱ ባለሀብት ወይም ባለይዞታ ለመሆን የሚቀርብ ዳኝነት ነዉ፡፡ የመጀመሪያዉ በንብረት ህግ ማዕቀፍ የሚመራ ሲሆን፣ ሁለተኛዉ ዓይነት ለቀረበዉ የመብት ይተላለፍልኝ ጥያቄ መሠረት የሆነዉን ምክንያት መሠረት በማድረግ የሚወሰን ሲሆን እንደየጉዳዩ ባህርይ በተለያዩ የህግ ማዕቀፎች መሠረት የሚዳኝ ነዉ፣ ይህም ማለት ለቀረበዉ የመብት ይተላለፍልኝ ዳኝነት መሠረቱ ዉል ከሆነ የዉሉ ህግ ዴንጋጌዎች፣ ዉርስ ከሆነ የዉርስ ህግ ዴንጋጌዎች፣ ጋብቻ መፍረሱን ተከትሎ የቀረበ ከሆነ የቤተሰብ ህግን መሠረት በማድረግ ሊታይ የሚችልበት ሁኔታ ይኖራል ማለት ነዉ፡፡ ይህ ከፍ ሲል በተመለከተዉ ምክንያት፣ ከመሬት ጋር የተያያዘ ለሚቀርቡ የመብት ጥያቄዎችም እንደየአግባብነታቸዉ ተፈፃሚነት ይኖራቸዋል፡፡

ከዚህ አንጻር የተያዘዉን ጉዳይ ስንመለከት አመልካቾች ያቀረቡት ክስ ይዞታችን ያላግባብ ተይዟል በሚል ሳይሆን ተጠሪዎች በዉርስ በእጃቸዉ ካስገቡት መሬት ዉስጥ የዉርስ ድርሻቸዉን እንዲለቁላቸዉ ነዉ፡፡ ይህም የአመልካቾች የባለይዞታነት መብት ይገባናል ጥያቄ ዉርስን መሠረት ያደረገ ሆኖ በፍርድ ኃይል በዉርስ በሚተላለፍላቸዉ ይዞታ ላይ ባለመብት ለመሆን ያቀረቡት ክስ መሆኑን የሚያሳይ ነዉ፡፡ የክልሉ የገጠር መሬት አስተዳደር እና አጠቃቀም አዋጅ ቁጥር 252/2009ም ሆነ ከእርሱ በፊት የነበረዉ አዋጅ ቁጥር 133/98 የገጠር መሬት በዉርስ የሚተላለፍባቸዉን ሁኔታዎች በተመለከተ የተለየ ድንጋጌ ቢኖራቸዉም፣ የገጠር መሬት በዉርስ እንዲተላለፍ ዳኝነት የሚቀርብበትን የጊዜ ገደብ በተመለከተ የተለየ ድንጋጌ የላቸዉም፡፡ በአዋጅ ቁጥር 252/2009 አንቀጽ 55 ሊይ የተመለከተዉ የይርጋ ደንብም ቢሆን ያላግባብ የተያዘን የገጠር መሬት ለማስለቀቅ የሚቀርብ የዳኝነት ጥያቄ እንጂ (ይህ የይርጋ ደንብ ይዞታዬ ያላግባብ ተይዟል በሚል የሚቀርቡ ለሁሉም ጉዳዮች ተፈፃሚነት አላቸዉ ወይ? የሚለዉ ጥያቄ እንደተጠበቀ ሆኖ) የባለ ይዞታነት መብት ይተላለፍልኝ በሚል ዉርስን መሠረት በማድረግ የሚቀርብ ክስ ተፈፃሚነት ያለዉ አይደለም፡፡ ስለሆነም አመልካች ያቀረቡት የዉርስ ድርሻ ይገባኛል ጥያቄን በተመለከተ ተፈፃሚነት ያለዉ ህግ በፍትሀብሄር ህጉ አንቀጽ 1000 ላይ የተመለከተዉ የይርጋ ድንጋጌ እንጂ ከይዞታ ክርክር ጋር በተያያዘ ለሚቀርብ ክስ የተመለከተዉ የአዋጅ ቁጥር 252/2009 አንቀጽ 55 ላይ የተመለከተዉ ዴንጋጌ ሊሆን አይገባም፡፡ ከዚህ አንፃር ሲታይ የአማራ ክልል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት የፍትሀብሄር ህጉን አንቀጽ 1000(1) ላይ የተመለከተዉን ድንጋጌ በዋቢነት በመጥቀስ የአመልካች ክስ በይርጋ ቀሪ ነዉ በማለት የሰጠዉ ዉሳኔ በአግባቡ ነዉ ከሚባል በስተቀር መሠረታዊ የህግ ስህተት የተፈጸመበት ሆኖ አልተገኘም፡፡ ስለሆነም ተከታዩ ተወስኗል፡፡

<u>ዉሳኔ</u>

1. የአማራ ክልል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት በመ/ቁጥር 03-78188 በቀን 08/03/2012 ዓ.ም በዋለዉ ችሎት የሰጡት ትዕዛዝ በፍ/ብ/ሥ/ሥርዓት ህጉ አንቀጽ 348(1) መሠረት ጸንቷል፡፡

2. በዚህ ችሎት የተደረገዉ ክርክር ያስከተለዉን ወጪና ኪሳራ ግራ ቀኝ የየራሳቸዉን ይቻሉ፡፡

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UNIVERSITY OF GONDAR

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LL.M in Environmental and Water Laws (Extension)

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