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MESSAGE FROM THE EDITORIAL COMMITTEE

The Editorial Committee is delighted to bring Volume 6, No. 2 of *Bahir Dar University Journal of Law*. The Editorial Committee extends its gratitude to those who keep on contributing and assisting us. We are again grateful to all the reviewers, the language and layout editors who did the painstaking editorial work of this issue.

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

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

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

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The Power to Administer Land in Ethiopia: Scrutinizing Federal Legislative Interventions

Habtamu Sitotaw Semahagne[§]

Abstract

This article examines the legislative interventions of the Federal Government against States' power to administer land in Ethiopia. The Ethiopian federal system prohibits interventions against the functions assigned to one level of government. Nonetheless, when the Federal Government enacted the Urban Lands Registration Proclamation No. 818/2014 and it took the power to allocate land parcels above 5000hrs to investors from States by delegation, the process results for legislative intervention as it is contrary to what the federal system requires. Being qualitative methodologically, the article assessed the FDRE Constitution and relevant federal and regional rural land laws; reviewed related literature and conducted interviews. Following detailed analysis on the issues, the article recommends that the transferred land allocation power for investors shall be returned to States. Also, enacting urban land registration law should have been left to States by virtue of residual power under the Constitution.

Keywords: Federalism, Federal Government, Intervention, Land Administration, Regional Governments

1. Introduction

There is no universally agreed and single definition for the term federalism despite a number of efforts to define it based on different perspectives. Federalism is a form of government where the component units of a political organization participate in sharing powers and functions in a cooperative manner.[1] It demands cooperation between each level of government in order to promote the welfare of the people through their combined powers and involves, *inter alia,* the following elements: separateness and independence of

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[1] Oruwari N, Fiscal Federalism and Resource Control Agitations: Implications for Nigeria's Socio-Economic Development *Research on Humanities and Social Sciences ISSN* (Paper) 2224-5766 ISSN (Online) 2225-0484 (Online) Vol. 5, No. 18, 2015, p. 7.

each government; mutual non-interference of inter-government immunities; the question of equality between the state governments; the number of state governments whom a federal government can meaningfully exist; techniques for division of powers and a supreme constitution.[2] As well, it is a system which holds that the ideal organization of human affairs is best reflected in the celebration of diversity through unity.[3] It also refers to the doctrine which advocates and promotes the form of organization of a State in which power is dispersed or decentralized by contract as a means of safeguarding local identities and individual liberties.[4]

Constitutional arrangements in federations help to enable the sub-national entities to take part in the decisions of important matters that affect them at the national level.[5] In federations, land shall be administered with legal and policy frameworks and the policy shall usually be reflected and implemented through legislations enacted by organs authorized to do so.[6] As well, administering land requires activities to be done by various stakeholders including setting the legal framework that the administration process shall operate; establishing institutions working on it among many other activities.

Ethiopia has adopted a federal system of government *de facto* since 1991 and *de jure* dating 1995 with a view to decentralize power and resources from the center and to accommodate the diverse ethno-linguistic groups that exist in the country.[7] The federal constitution makes this quite explicit by establishing a Federal and Democratic state structure with autonomous state members to it.[8] Following this arrangement, powers and functions of the government are

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[2] Nwabueze, B., Constitutional History of Nigeria, *the Journal of Modern African Studies*, Vol. 23, Issue 1, (March 1985) p. 172-174. & Lagos Longman in Joseph C. Ebegbulem, Federalism and the Politics of Resource Control in Nigeria: A Critical Analysis of the Niger Delta Crisis, *International Journal of Humanities and Social Science*, Vol. 1 No. 12; (2011), p. 224.

[3] Getachew Assefa, *Ethiopian Constitutional Law with Comparative Notes and Materials: A Text Book*, 1st edition, School of law, Addis Ababa University, Addis Ababa, (2012), p. 372.

[4] Babawale T, The impact of the Military on Nigerian Federalism in Ngozi N and Adewale K, Fiscal Federalism and Resource Control in Nigeria, *IOSR Journal of Economics and Finance (IOSR-JEF) e-ISSN: 2321-5933, p-ISSN: 2321-5925. Vol. 6, No. 4, (2015),* p. 22.

[5] Ostrom V, *The meaning of American federalism: Constituting Self-governing Society*, 1st edition, San Francisco, California: A publication of the Center for Self-Governance, (1991), p. 7.

[6] Samuel Gebreselassie, Land Policy and Smallholder Agriculture in Ethiopia: Options and Scenarios, (2006) available at www.future-agricultures.org, last accessed on December 2015.

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

[8] See Federal Democratic Republic of Ethiopia Constitution, Proclamation No.1/1995, Fed. Neg. Gaz. 1st year No. 1 (Hereinafter FDRE Constitution), According to Art, 1, Ethiopia is a federal democratic and republic state. Also, pursuant to its Article 47, the federation

devolved in between the Federal Government and the federating States. While the Federal Government has the exclusive authority on those powers and functions that are listed under Article 51 and some other provisions in the constitution,[9] the States exercise residual powers, functions that are not exclusively given to the Federal and State Governments or concurrently to both.[10] Specific to land related powers, Regional States have the power to administer land in their territories while legislative powers concerning the utilization and conservation of land belongs to the Federal Government.[11]

While a federal constitution serves as a base in setting a federal system regulating the powers of the federating members, there is no room for a certain Federal Government to alter the power of the units without amending the constitution and the vice versa.[12] Similarly, in a federation, the self-governing status of the component states is constitutionally entrenched and may not be altered by a unilateral decision of the Central Government.[13] In a federal context, intervention of one level of government against the powers and functions of the other is a serious violation of constitutional principles, basically constitutional supremacy and non-interference in the powers and functions assigned to one level of government. This fact, added to the nature of the political system and the culture of democracy in Ethiopia, forces one to doubt the implementation of constitutionally stipulated principles including the power sharing scheme. The federal principle of constitutionally enshrined and guaranteed division of power implies that federalism is rigid and needs the participation of not only both levels of governments but also the citizens

constitutes the State of Tigray, the State of Afar, the State of Amhara, the State of Oromia, the State of Somalia, the State of Benshangul Gumuz, the State of the Southern Nations, Nationalities and Peoples, the State of the Gambela Peoples, the State of the Harari People are member states of the federation; and the Addis Ababa City Administration and the Dire Dawa City Administration which are accountable to the federal administration.

[9] Federal Government powers that are not mentioned under Article 51 but indicated elsewhere include the power to enact a labour code, commercial code, penal code, approval of federal appointments submitted by the executive, and the establishment of federal institutions (see FDRE constitution, supra notes 8, Arts 55(3), 55(4), 55(5), and 55(13)).

[10] *Ibid*, Art, 52 (1).

[11] *Ibid*, Arts 52(2, e) and 51(5).

[12] Abate Nikodimos, 'Ethnic Federalism in Ethiopia: Challenges and Opportunities' (Master thesis, University of Lund, 2004).

[13] Bin H, *Distribution of Powers between Central Governments and Sub-National Governments*, Conference paper presented to Committee of Experts on Public Administration Eleventh session New York, 16-20 April 2011, p. 1 (hereinafter, Bin H, *Distribution of Powers between Central Governments and Sub-National Governments).*

to amend it.[14] Legally speaking, in Ethiopia, it is a must to first amend the constitution before taking the power/s that is/are expressly or impliedly assigned to one level of government.[15]

However, there are incidents where the Federal Government has intervened against Regional States' power to administer land over the past few years without formally amending the constitution. When the Federal Government enacted the Federal Urban Lands Registration Proclamation No. 818/2014,[16] in effect, this level of government is involving itself in administering land which is constitutionally assigned to the States.[17] Similarly, the Federal Government took the power to allocate rural land parcels above 5000hrs to investors from States and assigned the Federal Ministry of Agriculture and Rural Development to lead the allocation of the land to investors.[18] The federal government defended the transfer due to upward delegation[19] though this delegation is not addressed in the constitution and the constitutional minute has clearly prohibited the delegation of State functions to the Federal Government.

The main thesis in this article is to examine the legislative interventions of the Federal Government against States' power to administer land in Ethiopia. Also, the constitutionality of the interventions in light with the nature of the federal approach in the country is explored. The types of data used in this piece are both primary and secondary where extensive library and web search along with interviews with individuals who are informed to the issues is made. With the motive to systematically scrutinize the legislative interventions of the Federal Government against States' power to administer land with a test

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[14] Assefa Fiseha, Ethiopia's Experiment in Accommodating Diversity: 20 Years' Balance Sheet (2012) available at http://dx.doi.org/10.1080/13597566.2012.709502 last accessed 25 January 2016, p. 446 (hereinafter, Assefa Fiseha, 'Ethiopia's Experiment in Accommodating Diversity: 20 Years' Balance Sheet').

[15] One exception, however, is the issue of delegation; by which transfer of power from one level of government to the other is possible without a need to go through constitutional amendments so long as this possibility is provided by the constitution in advance.

[16] Proclamation No. 818/2014, a Proclamation to Provide for Registration of Urban Landholding, Federal Negarit Gazette No 25, 21st February 2014 (hereinafter FDRE Urban Land Registration Proc No 818/2014).

[17] It was presented to the House of Federation (HOF) contesting the constitutionality of the proclamation during its draft stage. [See http://www.ethiopianreporter.com/index.php/news/item/4660].

[18] Sefanit Mekonnen, Rights of Citizens and Foreign Investors to Agricultural Land under the Land Policy and Laws of Ethiopia, *Haramaya Law Review*, Vol.1, No.1, (2012), p. 34.

[19] In this context, by upward delegation, I am referring to the delegation of power from regional states to the federal government.

against the Ethiopian federal system and the federal Constitution, the author assessed the FDRE Constitution and its minutes and other relevant laws; extensively reviewed literatures and conducted interviews.

The article is organized into five sections. The first section introduces the whole essence of the article in brief. Section two conceptualizes land administration while section three briefly examines power sharing on land matters in some federal states having some affiliations with the Ethiopian system. In this section, the power sharing scheme on land matters in Nigeria, India, United States of America (USA) and Russian federations is briefly reviewed. Section four examines federal interventions against States' land administration power in Ethiopia with a test for their constitutionality. This section identifies two legislative interventions and extensively examined their constitutionality in connection to the Ethiopian federal system. The last section concludes the main themes in the article with possible recommendations.

2. Conceptualizing Land Administration

Land administration has no commonly accepted and single definition. Since the term reflects the socio-cultural contexts in which it is being operated, its contents may vary from country to country and even within a country from time to time based on the changes in government land policy.[20] Despite this, there are attempts to define the term. For instance, the Food and Agricultural Organization (FAO) dealt on the basic components of land administration while defining the term as "*the way in which the rules of land tenure are applied and made operational; and it includes an element of enforcement to ensure that people comply with the rules of land tenure.*"[21] Also, the term is defined as:

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[20] Abebe Mulatu, 2009, *Compatibility between Rural Land Tenure and Administration Policies and Implementing Laws in Ethiopia*, in Muradu Abdo (ed), *Land Law and Policy in Ethiopia since 1991: Continuities and Changes*, Ethiopian Business Law Series Vol. III, Addis Ababa University, Faculty of Law, p. 5.

[21] FAO, Access *to Rural Land and Land Administration after Violent Conflicts*, Land Tenure Studies 8, Rome, (2005), p. 23. The elements and activities in land administration under this definition include: ***Land rights (***including activities like the allocation of rights in land; the delimitation of boundaries of parcels for which the rights are allocated; the transfer from one party to another through sale, lease, loan, gift or inheritance; and the adjudication of doubts and disputes regarding rights and parcel boundaries); ***Land use regulations*** (including land use planning and enforcement, and the adjudication of land use conflicts); ***Land valuation and taxation,*** (the determination of values of land and buildings; the gathering of tax revenues on land and buildings, and the adjudication of disputes over land valuation and taxation).

> *"The processes of recording and disseminating information about the ownership, value and use of land and its associated resources…the processes include the determination or adjudication of rights and other attributes of the land, the survey and description of these, their detailed documentation and the provision of relevant information in support of land markets."*[22]

In the above quoted definition, within the overall context of land resource management, land administration is concerned with three commodities; i.e. the ownership, value and use of land.[23] Also, the term encompasses, *inter alia*, institutional arrangements where land allocation and determination will be controlled and managed. Furthermore, it includes determination, allocation, administration as well as keeping information related to land, not diminishing the role of regulatory frameworks that will give effect for any of the above activities.[24]Moreover, for Nichols and McLaughlin, land administration is the operational component and part of land management that is concerned with the management and control of the tenure system. In distinguishing land administration from land management, they defined the latter as:

> *"The formulation of land policy, the preparation of land development and land use plans, and the administration of a variety of land related programmes. Land administration according to this definition includes the functions involved in regulating the development and use of land, gathering revenue from the land and resolving conflicts concerning ownership and use of the land."*[25]

For whatever level of government and organ land administration power is conferred in a country, land administration usually involves providing legal frameworks by entrusted organs in a constitution. The overall process in land administration must operate within a legislative framework that shall normally cover, *inter alia*, the following basic elements: basic land laws defining what rights and tenures exist including easements and overriding interests, and how these rights are transferred through sale, gift, inheritance or any other

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[22] Economic Commission for Europe (ECE), Land Administration guidelines, With Special Reference to Countries in Transition, UNITED NATIONS, New York and Geneva, (1996), (hereinafter, ECE land administration guidelines).

[23] *Id.*

[24] Samira Lindner et al, 'Ethiopia: Overview of corruption in land administration', (2014), available at, http://www.transparency.org/whatwedo/answer/ethiopia_overview_of_corruption_in_land_administration last accessed December 2015.

[25] Dale, F. and Mclaughlin, D. *Land Administration, Spatial Information Systems and Geostatics Series*: Oxford University Press, (1999).

manner; land registration; procedures for the initial creation and determination of rights in land; the use of land including controls stemming from physical planning; the status of evidence produced by electronic media and data protection.[26]

Taking the above lists that a legislative framework in land administration has to include, the laws would encompass various issues from establishing the very rights and duties of landholders to data protection and evidencing same through the electronic media. Hence, land administration issues, in addition to the different procedural aspects they need to establish, should be supported by proper legislative framework that shall incorporate the above elements.

In Ethiopian context, land administration [in the perspective of rural land] is defined under the FDRE Rural Land Proclamation No. 456/2005. The definition is made by the Federal Government and it shall be questioned whether this level of government can define land administration issues in a federal country where power is constitutionally shared. The issue here is not whether the Federal Government cannot enact rural land legislations at all as the constitution clearly vested this power to the Federal Government under Article 51. However, nowhere in the constitution the Central Government is entrusted to define the contents of land administration. While the constitution itself has to determine what shall land administration refers and what it has to constitute, it remained silent than simply granting this right to the States. Since apportioning powers and functions of both governments shall be the task of federal constitutions and the FDRE Constitution already made power assignments, one level of government shall not have any legal or practical justification to define the powers and functions of the other level of government. While the constitution gives the power to administer land to States, it failed to determine the elements that shall constitute land administration.

Looking over the provisions in the constitution, what constitutes the matter of land administration is not well addressed. The constitution is not as to what activities States need to undertake while they are administering land. Since the constitution does not specifically empower the Federal Government to enact laws that deal on land administration, this power shall fall in the residual power that is already left to the States. And this author wants to argue from the very beginning that enacting laws relating to land administration shall belong to States by virtue of residual power under the constitution.

[26] ECE Land Administration Guidelines, supra notes, 22.

The Federal Government breaks the silence in the constitution and determined the components of land administration in Ethiopian perspective. However, allowing this level of government to determine the issue through a proclamation might result the diminishing of this power to the extent this level of government requires. In any case, the definition given to land administration is reproduced below since we are now using the definition in understanding the essence of land administration. One shall note that the federal government has restricted the scope that States shall have in relation to the power to administer land. The definition reads that:

> "*land administration is a process whereby rural land holding security is provided, land use planning is implemented, disputes between rural land holders are resolved and the rights and obligations of any rural landholder are enforced, and information on farm plots and grazing landholders are gathered, analyzed and supplied to users*."[27]

Based on this definition, States shall determine on landholding security, implementing land use planning, resolving disputes between rural landholders on the use of land, enforcing the rights and obligations of any rural landholder and gathering, analyzing and supplying information on farm plots in the context of rural land. The lists in the definition are exhaustive and no reason to add other elements. In fact, in the reading of the above provision, it is not clear as to what types of information on plots and farm lands have to be gathered, analyzed and distributed to users.

Similarly, the Benshangul Gumuz Rural Land Proclamation defined rural land administration as: "*rules and procedures on rural land and this proclamation by which agreements between land users and any rights and duties of them, system of land distribution by the proper procedure, protection of land, giving guarantee on possession of land, land use plan implementation and conflict resolution among users is executed*".[28] More or less a similar meaning is given in this particular State to that of the definition held under the federal proclamation to land administration.

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[27] FDRE Rural Land Administration and Land Use Proclamation No. 456/2005, Fed. Neg. Gaz. Year 11, No. 44 (hereinafter FDRE Rural Land Proc No 456/2005), Article 2(2), and a similar definition for rural land administration is adopted by the Amhara National Regional State [See ANRS, The Revised Amhara National Regional State Rural Land Administration and Use Proclamation, Proclamation No. 133/2006, Zikre Hig, 11th Year No. 18, Article 2(23)].

[28] The Benishangul Gummuz National Regional State Rural Land Administration and Use Proclamation, 2010, Proclamation No. 85 /2010, Article 2(2).

According to the definition given by the FAO (which, in this author's opinion, is relatively comprehensive compared with the other definitions above), land administration in a broad manner constitutes land rights, land use regulations and land valuation and taxation and each element has specific and detailed activities on it. More or less, the above definitions in Ethiopia incorporate the elements and attributes of land administration as defined by the FAO less they do not clearly address each element in specific and detailed manner compared to what the latter did. However, the above proclamations in Ethiopia do not tell us whether States are entitled to enact land administration laws.

There is also another definition given by the Federal Government for land administration in the context of 'agricultural investment' to mean "*an act of identification of agricultural investment lands on the basis of study and demarcating, entrusting, transferring, supervising and controlling same*".[29] While this definition simply provides identifying agricultural lands in respect of investment purpose and demarcate, entrust, transfer, supervise and control on the land as aspects of land administration, it failed to incorporate the other major elements in land administration like planning, land valuation as well as taxation issues.

In conclusion, the power to define land administration and the possible elements that should be included in it shall not be left to the Federal Government (this shall be the task of federal constitution). And the later definition for land administration in Ethiopian case highly narrowed the elements that should have been included in land administration. Of course, taking the purpose of the document (it is there to implement the transferred power to allocate land parcels above 5000hrs to the Federal Government from the States), one may not rely on this definition to grasp the elements/essence of land administration in Ethiopia.

3. Assignment of Power on Land Matters in Federal States

3.1. Experiences from Other Federal States

Unlike unitary form of government, in federations, power is shared between the central and constitutional state members. In this part, the article deals on how power, specific to land matters, is shared in some federal countries. Even if the intention here is not to compare the different federal systems to the Ethiopian one on assignment of power land matters, the author believes that

[29] Ethiopian Agriculture Investment Land Administration Agency Establishment Council of Ministers Regulation, Reg. No. 283/2013, 19th year No. 32 Addis Ababa 4th March 2013 (hereinafter, Reg. No. 283/2013).

the experiences in these countries will help to clarify the trend of power sharing in Ethiopia concerning land. The Nigerian, Indian, USA and Russian federations will be considered in the following paragraphs.

The Nigerian federal system, known for its effective governance, depends on an appropriate division of responsibilities and resources between the different level of authorities (federal, regional and local).[30] As a result of major reform of the land regime in the 1970s which sought to consolidate and simplify the previous mixture of customary and statute law, nearly all land is vested in the Governor of each state to be held on trust for the citizens of Nigeria. The State Governors have power to grant rights of occupancy over the land, to consent the alienation of such rights and to override them in the public interest.[31]

In the federation, any alienation or transfer of a statutory right of occupancy requires the consent of the State Governor. Although both alienation and transfer of a customary right of occupancy only requires the consent of the local government, if the transaction is a sale or the property is subject to the order of a court, the state governor's consent must be obtained. Also, the designation of the urban and non-urban areas of a state is the exclusive prerogative of the States.[32] This arrangement shows how much states are authorized to rule on important decisions concerning land in the federation. The Federal Government has authority to exercise exclusive powers, while both the Federal and State Governments are authorized to exercise concurrent powers to the extent prescribed in the constitution. However, States have exclusive legislative authority in residual matters.[33] Among the many powers (both exclusive to the Center and concurrent to both), the powers relating to land have not been mentioned in the constitution. Thus, as residual powers shall belong to Regional States, matters on land shall be the residual power of Regional States.

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[30] Joel D, State and Local Governance in Nigeria, *Public Sector and Capacity Building Program in Africa Region*, the World Bank August 2, 2001.

[31] Land Use Act 1978. See Nwabuzor E, Real Property Security Interests in Nigeria: Constraints of the Land Use Act, *Journal of African Law* Vol. 38, No.1, (1994).

[32] Fajemirokun B., land and resource rights: issues of public participation and access to land in Nigeria, paper presented at the First Workshop of the Pan-African Programme on Land and Resource Rights (PAPLRR) held at Cairo, Egypt, March 25-26, (2002), p.3 (hereinafter, Fajemirokun B., Land and Resource Rights: Issues of Public Participation and Access to Land in Nigeria).

[33] Ignatius A. and Dakas J, Federal Republic of Nigeria, *International Associations of Centers for Federal Studies* available at http://www.thomasfleiner.ch/files/categories/IntensivkursII/nigeriag1.pdf last accessed on 25 January 2017.

The 1978 Nigerian Land Use Act places all lands in the territory of each state under the exclusive authority of the state governor.[34] The Federal Government do not involve itself in administering state lands since this power is already assigned to Regional Governments.[35] However, in relation to federal lands, which are under the ownership of the Federal Government, regional governments can exercise administration power. Federal land comprises landholdings vested to the Central Government prior to the commencement of the land use act and which it retains free of the requirements of the land use act.[36] Here also a duality of land tenure practice exists, since customary authorities also set standards, even if it is true that they intervene more in land management.[37]

In India, power is shared as Union, State and Concurrent where the Central Government shall have a superseding authority in matters of items contained in concurrent lists. The residual powers are given to the Center.[38] States have powers relating to maintaining law and order, police forces, healthcare, transport, *land policies* and others. The State legislature has exclusive power to make laws on these subjects. Consequently, enacting laws relating to land policies shall be the prerogative of constituting state members.[39] But in certain circumstances, the parliament can also make laws on subjects mentioned in the State list. The parliament has to pass a resolution with two-third majority that it is expedient to legislate on State powers in the national interest.[40]

The USA Constitution makes provisions that the Federal Government has certain enumerated powers, which are spelled out in the constitution, including the right to levy taxes, declare war, and regulate interstate and foreign commerce. In addition, the constitution gives the Federal

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[34] This arrangement, however, does not include those lands allocated to the federal government or its agencies as these lands are out of the jurisdiction of regional states.

[35] Africa Union, African Development Bank and Economic Commission for Africa, Land Policy in Africa: West Africa Regional Assessment, 2011, p.51 (hereinafter, AU, ADP and ECA, 2011).

[36] Fajemirokun B, land and resource rights: issues of public participation and access to land in Nigeria, First Workshop of the Pan-African Programme, Cairo, Egypt, (2002), p. 3.

[37] AU, ADP and ECA, 2011, supra notes 35, p.51.

[38] Kumar C, Federalism in India: A Critical Appraisal, *Journal of Business Management & Social Sciences Research (JBM&SSR) ISSN No: 2319-5614* Vol. 3, No.9, (2014), p. 32.

[39] *Ibid.*

[40] *State politics in India*, 1st edition, Radiant publishers, New Delhi, pp. 92–122, https://en.wikipedia.org/wiki/Federalism_in_India, Wikipedia, the free encyclopedia, last accessed on December 2015.

Government the implied power to pass any law "necessary and proper" for the execution of its express powers.[41] State Governments are responsible, *inter alia*, for property law, ***land use laws***, water and mineral resource laws and others.[42] Hence, save for "necessary and proper" clauses in the constitution, States have primary legislative power on land use laws. Also in the constitution, exclusive powers are expressed for the Federal Government and the residual powers are reserved to the States. On this basis, since the power to administer land is not an exclusive power left to the Federal Government, States will exercise this power in their residual powers.

The Russian constitution rules that the Federal Government has exclusive jurisdiction over those powers specified in the constitution. The federal and local governments share jurisdiction over a number of items one of which is *use and disposal of land*, subsoil, water and other natural resources.[43] Thus, unlike the other federal states above, the Russian federation makes use and disposal of land as a power that shall be exercised by the two levels of government jointly.

3.2. Power Sharing on Land Matters in Ethiopia

In Ethiopia, the FDRE constitution rules that *"all powers not given expressly to the Federal Government alone or concurrently to the Federal Government and the States are reserved to the States."*[44]This provision reserves a number of powers, not specifically expressed in the constitution either to the Federal Government or the two levels of government in concurrent, to States. Article 51listed out federal functions though it does not incorporate all of the comprehensively. In effect, what is not listed under Article 51 is not automatically a residual power that falls under the exclusive competences of the States. One has to first deduct all of the functional competences of the Federal Government scattered throughout the other provisions in order to determine the residual powers of the States.

Specific to power sharing concerning land related matters, the constitution empowered the Center with primary legislative power on the utilization and conservation of land and other natural resources.[45] As the phrases "land utilization" and "land conservation" are not defined in the constitution, the

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[41] Bin H, *Distribution of Powers between Central Governments and Sub-National Governments*, supra notes, 12, p.2.

[42] *Ibid*, p.3.

[43] *Id*.

[44] FDRE Constitution, supra notes 8, Art, 52(1).

[45] *Ibid*, Arts. 51(5) and 55(2-a).

extent to which the Federal Government shall have legislative power in this regard is not clear.[46] It is even unclear where the legislative power of the Federal Government ends and the administrative power of the States begin with respect to land and other natural resources. The issue is whether the power of the States to administer federal laws relating to the use of land involves law making power including the issuance of secondary legislative power and, to that effect, whether the federal law should be limited to providing a general framework.[47]

As Brightman argued, the Central Government is constitutionally empowered to define the possible land rights of landholders, how such rights are acquired, what they consist of, how they operate in the holding, transfer and inheritance of land; and how land rights may be extinguished in accordance with the general guidance provided in the Constitution.[48] With the general guidance that is provided under the constitution, the Federal Government is responsible to determine issues on land tenure of landholders across the country. This is in line with the overall economic ambition of the country i.e. establishing a common economic community throughout the country as provided in the preamble of the constitution.[49] Using this power, the Central Government enacted various rural and urban land laws and determined the rights, responsibilities and obligations of landholders.

However, beyond determination of land tenure issues in the country, other land related issues are regional powers since all functions not given expressly to the Federal Government alone or concurrently to both are reserved for the

[46] But, one may look on the provisions of Article 40 of the constitution that define the land rights of landholders to which the federal government, in its legislative power regarding land utilization and conservation, shall respect at all. Hence, in any case, the content of the federal legislations shall not be in contrary to the land policy statements under the constitution though the concern in this piece is the extent to which the federal laws shall go in detail to govern the land rights of the people is not made clear.

[47] Assefa F. and Zemelak A. *'Concurrent Powers in the Ethiopian Federal System' in: Concurrent powers in federal systems meaning, making, and managing*, eds. Palermo, F. and Marko, J, (2017) Koninklijke Brill Nv, Leiden, The Netherlands, pp. 241-260.

[48] Brightman G/Michael, 'The Role of Ethiopian Rural Land policy and Laws in Promoting the Land Tenure Security of Peasants: A Holistic Comparative Legal Analysis' *LLM thesis, Bahir Dar University*, School of Law, (2013) (hereinafter, Brightman G/Michael, 'The Role of Ethiopian Rural Land policy and Laws in Promoting the Land Tenure Security of Peasants: A Holistic Comparative Legal Analysis').

[49] See FDRE Constitution, supra notes, 8, paragraph six of the preamble which states that the NNP are Convinced to live as one economic community is necessary in order to create sustainable and mutually supportive conditions for ensuring respect for our rights and freedoms and for the collective promotion of our interests.

States.[50] On this basis, any land related power that is not expressly given to the Federal Government exclusively or concurrently to both is the issue of enacting land administration laws. Thus, enacting legislations related to land administration (that is not clearly given to the Central Government in the constitution); to administer land in their territory will be the task of States. The argument is, after enacting framework laws concerning the utilization and conservation of land, other legislations that are relevant to administer land shall be left to the States in their constitutionally reserved residual powers.

4. Legislative Interventions of the Federal Government Against Regional States' Power to Administer Land in Ethiopia

Federalism allows the various government levels work on their own spheres. Though the constituting member states are not totally disintegrated in their relations with the Central Government, interventions against the powers and functions of either level of governments is not allowed. Since the powers and functions of both governments are shared by a constitution, any violation of it will amount to a trespass to the constitution and the adhered federal system.[51]

Under the FDRE Constitution, in principle, States are left autonomous in their own spheres and the Federal Government will not intervene on their powers and functions. However, there are legally stipulated possibilities where the Federal Government may intervene on States' internal affairs. One instance is when there is a state of emergency that cannot be controlled by the regular law enforcement agencies and personnel and the emergency is a kind that will endanger the constitutional order.[52] In here, wherever region a situation called a state of emergency occurred; the Federal Government shall intervene to avert the situation before the disorder is get out of control and it results serious damages to human life and property. This intervention cannot be claimed as unjustified so long as the elements under Article 93, which justify the declaration of state of emergency by the Federal Government, are complied with. Interventions of any kind, less declaration of state of emergency and any kind of cooperation (technical as well as financial assistance) means a violation to the constitution and the federal system in general.

Since power has been divided between the State and the Federal governments, interference on one's powers and functions is not possible according to the

[50] *Ibid*, Art. 52(1).

[51] Joseph, Federalism and the Politics of Resource Control in Nigeria: a critical analysis of the Niger Delta crisis

[52] FDRE Constitution, supra notes, 8, Art. 93(1, a).

words and spirits of the constitution since interventions (when not founded constitutionally) might erode the federal setup. In this section, the intention is to explore the legislative interventions that the Federal Government has made in relation to Regional States' power to administer land mainly on two basic areas. Hence, the constitutionality of the transferred power to allocate land parcels above 5000hrs to investors for the Federal Government from States by delegation and the Urban Lands Registration Proclamation No. 818/2014 will be tested in the coming sections.

4.1. The Power to Allocate Rural Lands above 5000 hrs to Investors

Constitutions determine which power belongs to which level of government. As well, recent developments indicate that delegation is also employed when one level of government 'wishes' to transfer its power, albeit temporarily, to the other level of government.[53] Using this arrangement, therefore, one level of government may transfer some of its powers to the other level of government. In Ethiopian case, federal powers can be delegated to States.[54] However, delegating state powers to the federal government is not allowed. The constitution does not clearly provide for the possibility of delegating regional functions to the Center and the drafting material of the constitution explicitly prohibited delegation of regional powers to the Federal Government.

Even if the Federal Government has the right to expropriate land for public purposes,[55] including allocating land to those who may be able to use land more productively such as investors, cooperatives and other entities, it also has effectively centralized the management of large-scale land investments for blocks of land over 5000hrs and appointed the Federal Ministry of Agriculture as lead agency.[56] States' power to administer land, one expression of their economic self-determination, particularly control and regulatory authority over land and other natural resources, is being eroded following this transfer particularly to the Agricultural Investment Support Directorate in the

[53] Assefa Fiseha, Ethiopia's Experiment in Accommodating Diversity: 20 Years' Balance Sheet, supra notes 14, p. 446

[54] FDRE Constitution, supra notes, 8, Art. 50(9).

[55] *Ibid*, Art. 40(8). According to this provision, "*Without prejudice to the right to private property, the government may expropriate private property for public purposes subject to payment in advance of compensation commensurate to the value of the property*".

[56] IS academy, Ethiopia: food security and land governance fact sheets.

Ministry of Agricultural and Rural Development (now changed to Ministry of Agriculture and Natural Resources).[57]

To properly run this business, "land bank" is set up at the federal level which can be accessed by investors through the Ministry of Agriculture. Using this arrangement, by the year 2010, about 3.5 million ha of land was transferred by the States to the federal land bank.[58] Furthermore, the data few years back signify that Regional States save Somalia and Tigray were required and made to transfer a total of around 6 million ha of land to the Federal Land Bank to be administered and transferred to large scale agricultural investors under the authority of the Federal Government.[59] Also the government, by virtue of the First Growth and Transformation Plan (GTPI), 2011-2015, planned to transfer around 7 million ha of land to investors.[60] It was argued that providing investment land to investors will help the country and its people through, *inter alia*, technology transfer, ensuring food security, infrastructural delivery, creating employment opportunities, the inflow of foreign income, technical expertise, capital and many others.[61]

In the year 2010, the Federal Government enacted a directive[62] aimed to administer lands that this level of government took from States through delegation. As can be seen in the preamble of the directive, its overall objective is to provide adjacent and vast lands for agricultural investment and to administer thereof. In here, States are authorized to directly collect the lease price that the land is leased for investors.[63] In all above cases, it is evident that the Federal Government is now administering lands above 5000hrs by taking it from the States. Those lands that exceed 5000hrsand lie concentrated in one area (i.e. one next to the other) will be administered

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[57] Dessalegn Rahmato, 'Land to investors: Large-Scale Land Transfers in Ethiopia' Forum of Social Studies, (2011), p. 10 (hereinafter Dessalegn Rahmato, Land to investors: Large-Scale Land Transfers in Ethiopia').

[58] IS academy, Ethiopia: food security and land governance fact sheets available at, https://www.humanitarianlibrary.org/sites/default/files/2013/07/Ethiopia%20Factsheet%20-%202012.pdf last accessed on 7 March 2016.

[59] Dessalegn Rahmato, Land to investors: Large-Scale Land Transfers in Ethiopia', supra notes, 57, p. 11.

[60] *Ibid*, p.12.

[61] Elias Nur, Between 'Land Grabs' and Agricultural Investment: Land Rent Contracts with Foreign Investors and Ethiopia's Normative Setting in Focus, *Mizan Law Review* Vol. 5, N0.2, (2011), p. 181.

[62] Council of Minster Directive to Administer Agricultural Investment Land, March 2010.

[63] *Ibid*, Art. 6(3).

through the Ministry of Agriculture and Rural Development;[64] whereas pockets of lands that are less than 5000hrsand lie dispersed will be administered by relevant regional offices.[65]

Pursuant to the power to administer land, States have been providing land through lease to investors in their legally defined jurisdictions. Despite this fact, however, as some argue, the Federal Government claimed States have not been efficient in providing land to investors and complained about widespread corrupt practices across States and, therefore, the need for upward delegation.[66] In consequence, inefficiency and corrupt practices of States were taken as prime reasons for the delegation.[67] Interestingly, such widespread corrupt practice is also common at the federal level, as openly presented to the public through government-owned Ethiopian television and other Mediason various occasions.[68] Thus, some doubt the credibility of the federal government's argument in justifying the transfer since this level of government has been accused of corrupt practices in relation to allocating land parcels to investors.[69]

The Federal Government did not take empirical evidences that prove the inefficiency of the Sates as some regions have proved their potential and commitment to administer land in their territory including allocating land parcels to investors.[70] For instance, States including Amhara, Oromia, SNNP and Tigray proved they can administer lands by registering and providing certificates to the landholders in their respective regions and providing lands for investors and controlling the overall procedures thereof. These are among

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[64] Federal Democratic Republic of Ethiopia, 2010. Federal Ministry of Agriculture and Rural Development Agricultural Investment and Land Lease Implementation Directive, Art. 4(1) (hereinafter, FDRE MOARD Directive)

[65] *Ibid*, Art. 4(2).

[66] Assefa Fiseha, 'Ethiopia's Experiment in Accommodating Diversity: 20 Years' Balance Sheet supra notes 14, p. 446.

[67] Fasil Zewdie, 'Right to Self-determination and land right in Ethiopia: Analysis of the Adequacy of the legal Framework to address Dispossession', (2013), (LGD) available at http://www.go.warwick.ac.uk/elj/lgd/2013/zewdie last accessed on 7 March 2016 (hereinafter Fasil Zewde, Right to Self-determination and land right in Ethiopia: Analysis of the Adequacy of the legal Framework to address Dispossession).

[68] https://www.ethiopianreporter.com/content/የጋምቤላ-የአርሻ-ኢንቨስት·መንት·የገጠመ·ት·ፈ·ተናዎች·ምን·ይስተምሩናል last accessed on 1st January, 2017.

[69] Assefa Fiseha, 'Ethiopia's Experiment in Accommodating Diversity: 20 Years' Balance Sheet supra notes 14, p. 446

[70] Fasil Zewde, Right to Self-determination and land right in Ethiopia: Analysis of the Adequacy of the legal Framework to address Dispossession, supra note 67.

the evidences by which one can judge the competency of the States that they can properly handle land administration in their territories. While the real potentials of States in allocating land to investors have to be considered, in reality, the justification seems unfounded empirically. Despite the federal Government took the power to deliver land parcels above 5000ha to investors, it is criticized that this level of government has not been effective and the desired results in agricultural land investment are not achieved. In this regard, in recent study conducted particularly in Gambella National Regional State by the support of the ruling government concerning the status of large scale agricultural investment, it was concluded that the area has been tempted by rent-seeking behaviors and failed to achieve the desired results.[71]

An important point worth consideration at this juncture is on whose initiation shall the delegation be made? Shall it be when States take the initiation by themselves or when the Federal Government takes the chance to initiate the delegation? Here, even if this author will argue in the coming sections that delegating state functions to the federal government, even at their wish, is not possible in the constitution, from the very beginning, the transfer process shall be a point of discussion. Legally speaking, delegation shall be upon the wish of the delegator and what the delegate can do is performing the acts covered in the delegation based on the instruments of delegation. The delegation to transfer lands above 5000hrsto investors is not one initiated by the States; it is the Federal Government who took the initiative to make the delegation effective. And this author holds that the delegation is not in line with the rule of delegation where it is the delegator

[71] As the Reporter Magazine (the Amharic version) reported, the study was conducted under the order of Prime Minister Hailemariam Dessalegn where 14 professionals from the office of the Prime Minister, the office Agricultural and Natural Resource and from the Development and Commercial Banks of Ethiopia were participated. The study reflected that, from the year 2001 E.C onwards, 630,518 hectares of land was transferred to around 623 local and foreign investors. From this figure, 409,706 hectares is transferred from the Gambella region while the remaining 220,812 hectares was transferred by the Federal Agricultural, Investment and Land Administration Agency from the land the federal government took from regional states through delegation. The study further showed that the Developmental Bank of Ethiopia has been providing loan to the investors for different purposes though the bank is not able either to follow up whether the loan is utilized for the purpose intended or the loan is returned on time. Since the overall process in the transfer of land to the investors and the loan provided by the development bank were not effective in the years passed, the study recommended that strict supervision need to be made on the banks and other financial institutions during delivery of loan for the investors and the lands taken by the federal government from regional states through delegation should be returned to the latter as the role of the federal government shall be supporting regional states to capacitate themselves in this regard [for more detail, See https://www.ethiopianreporter.com/content/የጋምቤላ-የእርሻ-ኢንቨስት·መንት·የገጠመ·ት·ፈ·ተ·ና·ዎች·ምን·ይስ·ተ·ም·ሩ·ና·ል]

that shall in any case initiate the question for delegation. Thus, even the manner of delegation of regional powers to administer land has to be questioned as it is contrary to the rules to delegate once powers and functions.

4.1.1. Arguments For and Against the Delegation

The central issue in this sub-section is as to whether the delegation is really constitutional taking what is provided in the FDRE constitution and the nature of the federal system adopted in the country. In this regard, two extreme arguments, for and against this delegation, are considered.

4.1.1.1. Arguments Favoring the Delegation

One line of argument may be that the transfer does not contradict the FDRE Constitution and the Ethiopian federal system. The following scenarios will help to brace the existing transferred power to allocate land parcels above 5000hrs to investors in favour of the federal government: On one hand, despite there are no clear indications on the possibility of delegating States' powers to the Central Government, the constitution does not prohibit the delegation explicitly. In particular to land administration, nothing is expressed in the constitution whether delegating this power to the Federal Government is possible or not. Had the prohibition been inferred from an express stipulation under the constitution, it would have been unconstitutional for States to delegate their land allocation power to the federal government. In the absence of clear provision in the constitution that prohibits States to delegate this power, possible arguments considering the transfer in this respect as unconstitutional will not hold water.

On the other hand, though States already transferred their land allocation power to the Federal Government, this does not mean they have totally lost their power to administer the lands so delegated forever. On this basis:

- Administering land may not only mean the organ that is entrusted to administer it shall do the administration lonely. States can exercise their land allocation power indirectly through the federal Government being the delegatee to exercise the land allocation on their behalf.[72]
- Delegation is not a permanent deal; it is rather revocable.[73] The delegator can take the delegation back when it needs the power again or

[72] Interview with Muradu Abdo (PhD).

[73] For instance, in business transactions that involve the relationships of agent and principal, the agency given to the agent can be revoked on certain incidents authorized by the law. According to article 2226 of the 1960 Ethiopian civil code, the principal may revoke the agency at his discretion and, where appropriate, compel the agent to restore to him the

the time specified in the delegation instrument is over or the delegation is not respected as per its instrument. The effect is States can revoke the delegation when the time for it expires or when the delegatee does not comply with the obligations attached with the transferred power.

- States can precisely determine the amount of land subjected for delegation and will take the benefits derived from the land. Under the Council of Ministers Directive to Administer Agricultural Investment Land, it is provided that States can directly collect the lease price that is allocated for the land while it is transferred to investors[74] even if the contract will directly be concluded by the Federal Government, representing the States and investors.
- The delegation does not totally take away States' power to allocate land in their territory to investors. In other words, they do not totally lose their land allocation power; rather to the extent openly delegated to the Federal Government. As said, the delegation is for lands above 5000hrsfound stretched. But, below this hectare of land, regional sates are still allocating it to investors. That is why the above directive states thatpockets of lands that are less than 5000hrsand lie dispersed will be administered by relevant regional offices.[75]
- During delegation, it is usually the delegator that shall determine the range of rights to be delegated and the manner of exercising the rights thereof. In this regard, it is regional sates that will determine and instruct on how the federal government has to allocate the lands given in delegation. If this is the case, even if States have delegated their land administration powers to the Federal Government, this does not mean they have totally lost their rights over the lands so delegated.

Generally, the arguments in this regard shall be considered in line with a client and principal relationship[76] where all acts done by the client (delegatee) are considered performed by the principal (delegator). Supporting the above arguments, however, need to be evidenced by empirical data on whether the

written instrument evidencing his authority. By this nature of agent-principal relationship, the land administration power that has been transferred to the federal government can be revoked by the regional states following the procedures in revoking agency delegation.

[74] FDRE MOARD Directive, supra notes 64, Art. 6(3).

[75] *Ibid*, Art. 4(2).

[76] As it has been dealt in the 1960 Civil Code of the Empire of Ethiopia, agency is a contract whereby a person, the agent, agrees with another person, the principal, to represent him and to perform on his behalf one or several legally binding acts [see article 2199 of the code]. The conclusion is that, in the nature of delegation that we have at hand, the federal government, the delegatee, will administer lands on behalf of the States, the delegator.

delegation now is being implemented in line with the arguments above. If the benefits obtained from the delegation are utilized for the advantage of the Federal Government; if it is only this level of government that will determine every procedure in allocating the parcels to investors; if the Federal Government is administering the lands without participating the local community and violated the overall delegation given to it, therefore, the delegation is said to be abused. While the federal government took this delegated power, it has promised to distribute the income collected to each respective State.[77]

The arguments above may probably be raised by the Federal Government to justify its action in taking the land administration power of States for the amount of land stated in the above sections. However, this line of argument may not be relied specifically seen from the power sharing scheme in the constitution and the nature of the federal system adopted in Ethiopia and this author further developed arguments that are against this transferred power which are explored in the coming paragraphs below.

4.1.1.2. Arguments Against the Delegation

The second line of argument, which this author takes position on it, is against the existing transferred power to allocate land parcels above 5000hrs to the Federal Government. The constitution provides for upward delegation only. There is no express clause permitting the States to delegate their powers to the Federal Government. An express clause included during the draft stage of the constitution permitting the States to delegate some of their powers was rejected on the basis of protecting the powers and functions of the States.[78] The draft prohibited, at least, the expressed permission of upward delegation.

The issue of delegating State powers to the Federal Government was one of the debatable issues during the draft stages of the constitution. As the constitutional minute clearly provides, the first draft of the constitution allowed for the delegation of regional functions to the Federal Government. The makers of the constitution agreed to leave out the sub-article that allowed the delegation of State powers to the Federal Government. The fact that the Federal Government is allowed to transfer some of its powers to States through delegation was seen as a proper move so long as it can facilitate governmental functions. However, when it comes to delegating State powers, it was argued that the delegation may create a burden against regions in

[77] Interview with Dr Muradu Abdo (PhD).

[78] Assefa Fiseha, 'Ethiopia's Experiment in Accommodating Diversity: 20 Years' Balance Sheet supra notes 14, p. 447.

capacitating themselves to undertake their functions and even it may have psychological impact on their day to day activities. Furthermore, since States got their power from the people, it may not be proper to pass this power to the Federal government even by will; rather the latter, than taking state functions through delegation, should create forums to strength and help States to better undertake their functions.[79]

Furthermore, the prohibition has to do with the historically power imbalance between the central government and member states in the country. In the past, most of the constituting states were not strong enough, as a result, they were suppressed by the Center. Dating the introduction of the FDRE constitution, this imbalance is attempted to be resolved, at least in legislations, when the constitution declared all constituting state members of the federation are equal.[80] In addition, one of the basic reasons to introduce the constitution is due to the Ethiopian people are fully cognizant that their common destiny can best be served through rectifying historically unjust relationships and by further promoting our shared interests.[81] These reasons, coupled with other legal and practical scenarios, can justify the prohibition for upward delegation of power in the country.

Instead of allowing upward delegation, it is better if States are protected and even prohibited from delegating their powers to the federal government as concentration of power to the center may be the ultimate consequence. This aspect of delegation usually raises the central issue of whether it is possible to change by legislation the basic tenet of the federal compact. While the minutes of the constitutional assembly clearly hinted at the fear that the Federal Government may take away State powers and, hence, agreed only on downward delegation, States have now given up this power without any contest in favour of the Center.[82] It is hardly possible to do this in a context of political pluralism and where one or more of the States were under the control of the opposition political parties.[83]

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[79] For detail information, see the Minute of Ethiopian Constitution, Volume IV, 24-30, November, 1995, p. 28-30 on Volume 000109-000112.

[80] FDRE constitution, supra notes, 8, Art. 47(4).

[81] Ibid, Preamble Paragraph four; Even if this statement may be understood that there have been historically unjust relationships between and among the various regional states in the country, it can also reflect the imbalanced power relationships between the central government and the member states so that they were not equal as power has been concentrated to the center.

[82] Assefa Fiseha, 'Ethiopia's Experiment in Accommodating Diversity: 20 Years' Balance Sheet supra notes 14, p. 447.

[83] *Id.*

Furthermore, allowing upward delegation means that powers and functions that are now vested to States may be accumulated to the Center. This, in fact, implies the federal approach will face a danger of centralism.[84] By taking possible justifications, the Federal Government may work aggressively to further snatch state powers and this hinders states to have active participation in the basic decisions on land matters.

The constitutionality of this delegation is a doubt since an open clause authorizing delegation will contradict the federal principle enshrined in the constitution. This is against the rigid procedure of amendment prescribed in Articles 104 and 105 of the constitution. The constitutional guaranteed division of power is likely to be endangered if both governments have the right to change this distribution at will. In such a context, it is normally expected that the regional state-based political party will try to defend its constitutionally guaranteed autonomy. Yet, in Ethiopia, the transfer was achieved without any contest from any of the Regional States as if it was a unitary decentralized system where the center can take away what it gave by law.[85]

In the preceding paragraphs, it is argued that upward delegation is not possible under the constitution. Supporting this argument, principally, all powers of the Federal Government are delegated from States. The Nations Nationalities and Peoples are holders of power[86] and the Federal Government's powers assigned in the constitution are derived from the delegation of the member States as ultimate power belongs to the States. In this regard, Mehari noted that:

> *…the most important characteristic is that, in federalism, power is not delegated to regional states from the center, as in the case of a unitary system. Rather, the central government is delegated by, and obtains its power from, the regions …. the central (federal) government is not the author of its own power, for the ultimate power rests in the constituent units, in the Ethiopian case, the ethno-cultural communities.*[87]

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[84] Interview with Muradu Abdo (PhD).

[85] Assefa Fiseha, 'Ethiopia's Experiment in Accommodating Diversity: 20 Years' Balance Sheet supra notes 14, p. 445.

[86] FDRE constitution, supra notes, 8, Art 8 that rules all sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia and the constitution is the expression of their sovereignty.

[87] Mehari Taddele, Federalism and Conflicts in Ethiopia, (18 June, 2015), available at http://hornaffairs.com/en/2015/06/18/paper-federalism-conflicts-ethiopia/ last accessed on 8 January 2016.

Unlike the unitary system of government, where all powers and functions emanate from the Center thereby power is highly centralized and the Center remains a source of all powers to constituting members, in federalism, the main source of power belongs to States. In Ethiopia, power in its inherent nature belongs to nations, nationalities and peoples. The Central Government got its overall powers from the States since ultimate power belongs to the latter.

In general, once all the powers that the Federal Government now has in the constitution are delegated from the Sates; there shall not be other mechanisms for upward delegation again after the constitution is adopted. Taking the powers vested to States by virtue of delegation appears out of the spirit and tenet of the federal system except trough amending the constitutional power sharing to allow this delegation which, in fact, requires rigorous and cumbersome procedures.[88]

4.2. Evaluating the Constitutionality of Proc. No 818/2014 and its Implication for Land Administration

In urban areas, the most easily and immediately approached source of revenue is the tax on real property (land & house), which can be better assessed and maximized by knowing the particulars of the occupants of land parcels.[89] The particular details include the rights, responsibilities and obligations that a landholder shall have on the parcels, the size and purpose of the land, the location where and the materials from which the houses are built, the encumbrances, if any, on the houses and many others. For this, registering the whole parcels in urban areas and precisely determining the rights, restrictions and responsibilities of landholders on their possessions will become essential. The introduction of the current Urban Lands Registration Proclamation in Ethiopia is there to facilitate the total registration of parcels in urban areas. In this section, an attempt is made to evaluate the Urban Lands Registration

[88] See FDRE Constitution, supra notes, 8, Arts. 104 and 105 that requires cumbersome procedures to amend the provisions (including the provisions dealing on power sharing as between the federal government and regional states) in the constitution. Hence, at least in the face, the federal government cannot amend the constitution in contrary to what is prescribed in the constitution unless the procedures to amend a provision in the constitution are fully complied with.

[89] Daniel Tadesse 'Reflections on the Situation of Urban Cadastre in Ethiopia' (2006), available at http://download.nust.na/pub2/dmm-presentations/Session%202%20-%20Uganda-Ethiopia-Rwanda/DOC_Alemu_AA_Ethiopia_ReflectOnUrbanLandAdmin.doc last accessed 10 January 2016 (hereinafter, Daniel Tadesse 'Reflections on the Situation of Urban Cadastre in Ethiopia).

Proclamation in light of the power sharing scheme under the FDRE constitution and the nature of the Ethiopian federal arrangement.

4.2.1. The Nature and Objectives of the Proclamation

The proclamation aims to realize the real property rights of individuals, provide reliable land information to the public at large, minimize land related disputes and modernize the country's real property registration system.[90] As well, the proclamation's scope of application is to all urban centers all over the country with regard to urban land[91] which renders the proclamation to have a nation-wide application where all States and City Administrations are duty bound to closely follow its implementation.

The proclamation regulates, *inter alia*, the registration of urban lands by federal and regional cities. It in detail defines the urban land registration procedures and the legal effects that emanate from such registration or the consequences flowing from failing to register urban land. It also provides for the creation of urban land 'registering institutions' at regional level and defines the powers and responsibilities of these institutions and makes them directly accountable to a federal agency called the Federal Urban Real Property Registration Information Authority. Since land registration laws of the country are not comprehensive and the country has experienced poor urban land registration system due to lack of capacity and established systems to record urban land use rights, transactions over these rights and possible restrictions;[92] the present proclamation is important as it comprises the fundamental rules on urban land registration.

4.2.2. Evaluating the Proclamation against Regional States' Power to Administer Land

It is doubtful as to whether the federal legislator can enact land administration related laws; just like the above Federal Urban Lands Registration Proclamation, having nation-wide application. Since registering lands is one basic element in land administration that States are expected to perform according to the FAO and other definitions given for the term; the fact that the proclamation is enacted by the Federal Government directly contradicts the States' land administration power.

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[90] FDRE Urban Land Registration Proc No 818/2014, supra notes 16, Preamble.

[91] *Ibid*, Art. 3.

[92] Daniel Tadesse 'Reflections on the Situation of Urban Cadastre in Ethiopia, supra notes, 89.

The Central Government cannot address all details in its land laws and it will be States' task to adopt feasible subsidiary land legislations to implement federal laws considering the prevailing facts in the respective regions. In this regard, it is States that shall determine on how they have to register land; the manner of registration; institutional setups relevant to registration of lands and other similar tasks. If every detail is provided by the Federal Government, the process will leave States to assume only implementation role which, according to the opinion of this author, is not perceived in the constitution. The power of land administration is an exclusive power of the States and we cannot come across with legal or practical reasons to assert otherwise.[93] While federal laws on utilization and conservation of land have to define land use rights, manners of use of land and restrictions on land use rights, land administration laws set rules on enforcement and realization of the laws on land utilization and conservation.[94]

Once the Federal Government enacted various substantive land laws to regulate the creation, transfer, modification, restriction and termination of rights over immovable properties, is it not then up to the States to administer such rights once they are regulated through substantive laws? If the Federal Government can order the regions to administer land in a particular way, where is the significance of the constitutional power of the regions to administer land?[95] In any case, is registering urban land an area that the Federal Government shall perform within its law enactment power to determine the utilization and conservation of land in the country or shall it be a concern for land administration that States shall perform? These and similar issues shall raise a critical investigation on the existing urban lands registration proclamation to test its constitutionality and its relation with the existing federal system in Ethiopia.

In the draft stage of the proclamation, the House of Peoples' Representatives (HPR), receiving the draft, was not sure whether the draft was really consistent with the constitution while deliberating on it. This house transferred the draft to the HoF. This later house was requested to determine whether the draft

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[93] Legesse Tigabu, 'The Ethiopian Urban Land Lease Holding Law: Tenure Security and Property Rights', *Jimma University Journal of Law*, Vol. 6, No.1, (2014), p. 118 (hereinafter, Legesse Tigabu, 'The Ethiopian Urban Land Lease Holding Law: Tenure Security and Property Rights).

[94] Brightman G/Michael, 'The Role of Ethiopian Rural Land policy and Laws in Promoting the Land Tenure Security of Peasants: A Holistic Comparative Legal Analysis', supra notes, 48, p. 131.

[95] Legesse Tigabu, 'The Ethiopian Urban Land Lease Holding Law: Tenure Security and Property Rights, supra notes 93, p.118.

proclamation has violated the States' power to administer land as it was contested that the Federal Government passed its power to enact legislations that have nationwide application. The argument was the federal government shall not put itself into administering land that is originally vested to the States. However, the HPR was confused whether the federal government can enact laws having a nature of land administration. Also, it was claimed that some of the provisions in the draft allow the Federal Government to play administrative role with respect to urban land registration and thereby encroaches into the powers of the States. During the transfer of the draft to the HoF, some members of the parliament objected such transfer arguing that this house is not given any legislative role under the constitution[96] and, therefore, comments shall not be requested from the second chamber as a precondition to pass draft laws.[97]

Despite this objection, the draft was transferred to the HoF, and this house decided that the draft legislation is consistent with the constitution and underlined the importance of the proclamation to build common economic community in the country as desired in the constitution. The argument was the HPR has the power to enact laws on civil matters whenever the upper house deems indispensable to bring about economic union and this proclamation does not violate the constitution in this regard. This is reflected under the constitution which reads "*the House of Peoples Representatives shall enact civil laws which the House of the Federation deems necessary to establish and sustain one economic community*."[98] However, focusing on the decision of this house, the reason was not because the proclamation does not actually compromise the power of the States to administer the use of land. The house

[96] It should be noted that the FDRE Constitution is criticized for it has established a one-cameral legislature to promulgate laws. In the current law-making scheme, it is the HPR that has power to enact laws in the federal level, while the House of Federation's role in this regard is highly minimal (almost scant).

[97] Legesse Tigabu, 'The Ethiopian Urban Land Lease Holding Law: Tenure Security and Property Rights, supra notes 93, p. 119.

[98] See the FDRE Constitution, supra notes, 8, Art. 55(6). As it is shown above, the request for the approval of this proclamation came from the HPR so that the HoF shall consider on the nature of the law. In fact, according to the spirit of the constitution, the HoF will allow the HPR enact civil laws for which the house considers necessary to establish and sustain one economic society in the country not when the claim is presented by the HPR. In this arrangement, the HPR will enact a law having civil nature only after the demand comes from the HoF and it is not after the HPR has already initiated the draft that it seeks the HoF on matters like above. It should be questioned as to whether the HPR can initiate and request the HoF so that the proclamation shall be approved by this later house. Looking on the whole procedures during the enactment of the proclamation, even the procedural issue is another debatable area though the aim of the paper is not to deal with this issue.

admitted some of the provisions in the proclamation actually encroach into the competences of the States to administer land. It, however, reasoned the encroachment into the competences of the States as necessary for sustaining the economic union of the country as envisaged under Article 55 (6) of the Constitution.[99]

Some argue that since the proclamation could help in creating common economic community that the country is pursuing, it shall not be criticized; rather the Federal Government's effort to bring uniformity concerning urban land registration in the country shall be appreciated. For instance, Legesse wrote the following in support of the enactment of the proclamation arguing that the proclamation does not actually contradict the power sharing scheme in the constitution:

> "*...one could uphold the constitutionality of the Ethiopian Urban Landholding Registration Proclamation No. 818/2014 considering this particular provision (Article 55/6) under the constitution. Among the major objectives of the proclamation, one is building one economic community and this goes in line with art 55(6) of the constitution... Given the fact that the country didn't have uniform and well-functioning real property registration law previously, the adoption of the urban landholding registration proclamation should be appreciated and even the same trend could be suggested when it comes to the rural real property registration system*".[100]

Even if the above quoted argument holds water and the Federal Government enacted the proclamation on the basis of the possible outcomes that registering urban lands may bring to the country (this can be inferred from the decision of the HoF that rule in favour of the legality of the proclamation), seen constitutionally (especially, from the principles of self-autonomy and non-interference), the proclamation overrides States' power to administer land. At this point, this author argues that the end result shall not matter; the means and the procedures shall. Hence, though the proclamation may have positive impacts in making registration of urban lands a bit uniform in the country, since from the outset it violated the constitutional power sharing, its constitutionality has to be questioned.[101]

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[99] Federal Democratic Republic of Ethiopia, *House of Federation First Emergency Meeting*, January 2014.

[100] Legesse Tigabu, 'The Ethiopian Urban Land Lease Holding Law: Tenure Security and Property Rights, supra notes 93, pp. 119-120.

[101] According to Article 9(1) of the FDRE Constitution, "the Constitution is the supreme law of the land. Any law, customary practice or a decision of an organ of state or a public official

Furthermore, the Federal Government by virtue of this proclamation defined the powers and responsibilities of States in relation to registration of urban lands. Defining the powers as well as responsibilities of the two levels of government is reserved to the federal constitution. Assignment of power in between the two is completed when the constitution was adopted in 1995. No working scenario is provided in the constitution concerning the possibility of defining State powers and functions in relation to administering land by the Federal Government. It is an uphold principle in federalism that the two level of governments are in equal footing; no one is above the others. On this basis, the Federal Government shall not be empowered by any law except the constitution with the power to give or take away any power to States. Even when the constitution allows for this possibility, the federal system might be in danger of letting States to be subordinate to the Federal Government. Hence, taking the existing framework of the constitution, the proclamation's approach in defining the powers and functions of federating states is unconstitutional; the Federal Government cannot give power to States and vice versa by a proclamation unless it is implicated in the constitution.

5. Concluding Remarks

In a federal structure where division of power between the central, states and local governments is its peculiar feature, adequate authority is given to each level of government to enable them perform assigned responsibilities without, of course, interferences. As this article revealed, despite the Ethiopian federal system does not allow for interventions of one level of government against the powers and functions of the other, it has been practically witnessed that the Central Government is stretching its hands against States' land administration power. In this regard, the paper argued that when the Federal Government enacted the Urban Lands Registration Proclamation No. 818/2014 and took away the power to allocate land parcels above 5000hrs to investors from States; in effect, this level of government is working contrary to the power sharing scheme in the constitution and the federal system in the country.

The above two intervention areas, contradicting the FDRE constitution and the Ethiopian federal system, helped the Federal Government to substantially accumulate much power in its hands. And this trend might lead the country to accustom the tendency of centralism, a threat to the existing federal system. Based on these surrounding facts, the article recommends that since upward

which contravenes this Constitution shall be of no effect". And the validity of this proclamation shall be tested by this provision and in this author's argument; it is directly against the constitution.

delegation of power is not allowed in the federal constitution, the transferred land allocation power for investors has to be returned to the States. Also, since registering urban lands is one area of concern that States shall undertake in their constitutional duty to administer land, enacting the urban land registration proclamation should have been given to them.

The Ethiopian Constitutional Promises to the Nation and Nationalities: The Myth and the Operational Reality

Nigussie Afesha Aytaged[*]

Abstract

Federalism has been formally ushered into the Ethiopian Constitution. Stemming from the multiethnic nature of the Ethiopian state, the Constitution gives focused attention to the rights of the Nations, Nationalities and Peoples (NNP) and recognition to their involvement in all aspects of the country's political life. In doing so, the Constitution has made several promises. These are, inter alia, creating one economic and political community, promoting the NNP culture, exercising full measure of self-governance and having equitable representation in the military. This article examines how these constitutional promises operate in practice and looks into the Ethiopian progress towards fulfilling these constitutional promises. This article also argues that the Ethiopian federal system has come some distance towards building one economic and political community and promoting NNP culture and language. However, there are poor records in realizing NNP who do not have their own regional state and have been subsumed in the nine regional states to establish their own state. There is also an unsatisfactory record with respect to equitable representation of various NNPs in the executive branch and the army. This article puts forward some solutions that would help tackle the aforementioned limitations. Primarily, the government must allow NNPs to exercise the right to unconditional state formation as vividly promised by the constitution. Otherwise, the constitution shall incorporate some conditions like "serous cause", the fulfillment of which is required for the exercise of the right to establish one's own regional state. As far as equitable representation in the federal and state government institution, including the army, is concerned, there should be a mechanism that ensures fair representation and creates functional societies where all NNP have opportunities to participate in the political administration, army and the executive branch.

Keywords: FDRE Constitution, Federalism, One Political and Economic Community, New State Formation, Composition of the Military and Executive and NNP

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Introduction

Ethiopia is a land of a diverse society that can be expressed in terms of religion, ethnicity, culture, language and, perhaps, in terms socio-economic activities as well. Such diversity came as the result of the late 19th century tumultuous expansion of Abyssinia aimed at formation of a modern state.[1] During these times, the policy of state formation did not, however, give rise to nation building apart from incorporating the large diverse groups into a dominant group, using military superiority and armament.[2] The then successful rulers, until the 1990s, believed that assimilating various groups into one dominant community would offer the best guarantee for the stability of the state and maintain unity without affording equal rights to all ethnic groups. Accordingly, as Tsegaye observed, in law, Ethiopia was considered a mono-lingual, mono-confessional state and mono-cultural society while, in reality, the country is a multilingual, multi-confessional state and a multi-cultural society.[3]

However, with the exception of the current ruler, none of the successful rulers in Ethiopia attempted to build a multicultural society. They rather propagated unity, which disregarded the recognition of and the respect for diversity. That situation persisted until 1991 when the current power holder, with the guidance of EPRDF (Ethiopia People's Revolutionary Democratic Front), declared its strategy of state formation based on the recognition of ethnic diversity. The EPRDF leadership provided political justification for ethnic federalism and self-determination.[4] Consequently, the current federal system of Ethiopia was introduced to the belief that the unitary system had failed to accommodate various ethnic and cultural social groups in the decision making process. In this sense, Assefa asserts that the choice of multicultural federalism is the right measure.[5] Solomon further underscores "federalism recognizes the

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[1] Christophe Van der Beken, Ethiopia: Constitutional protection of Ethnic Minorities at the Regional Level, *Afrika Focus*, Vol. 20, No.1-2, (2007), P.105. [hereinafter Van der Beken, Ethiopia].

[2] *Ibid*, p. 106.

[3] Tsegaye Regassa, State Constitutions in Federal Ethiopia: A preliminary Observation, Bellagio Conference, (2004), P.1. [hereinafter Tsegaye, State Constitutions in Federal Ethiopia].

[4] Paulos Chanie, *What One Hand Giveth, the Other Hand Taketh Away: Ethiopia's Post-1991 Decentralization Reform under Neo-Liberalism*, Shaker Publisher (2007), P. 231. [hereinafter Paulos, *What One Hand Giveth the Other Hand Taketh Away*].

[5] Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study*, Wolf Legal Publishers, Oisterwijk, (2006), p. 98. [hereinafter Assefa, *Federalism and the Accommodation of Diversity in Ethiopia*].

political reality of the existence of various groups and interest and also tries to accommodate their diversity through constitutionally established subunits."[6]

The move to establish a political system that represents the interests of the entire community requires a constitutional change. Therefore, the government agreed wholeheartedly with a system change; that is, with the introduction of federalism and regarded it as a vital and fundamental means to maintain unity within a state. Hence, to break down old patterns and prevent further turmoil, the Federal Democratic Republic of Ethiopia Constitution (FDRE Constitution) rule out the keeping of the country together by force and provides the various ethnic groups the right to self-expression.[7]

The federal arrangement in Ethiopia is designed to attain dual purposes. It aims to enable ethnic communities to maintain and promote their distinctive collective identities and their particular life styles. This, in turn, aims to build one political and economic community for the promotion of their common interests collectively.[8] "Ethiopia has hit upon an innovative and potentially workable way of promoting integration and diversity simultaneously."[9] The Ethiopian federal system seeks political justice to the identities of various cultural and linguistic groups. This has been and is regarded as the formula to forge national unity which otherwise affects the national life in many ways.

In this regard, the Ethiopian ethnic federalism, through the constitution, has promised to address the historical grievances of the hitherto marginalized ethnic groups and form one political and economic community. The constitution also contains additional promises. It has also promised all Nations, Nationalities and Peoples should be allowed to establish their own regional state, at any time, in their respective territory, promote their culture;[10] have full measure of self-administration, equitable representation in the state institutions (both at the federal and regional levels). In addition, the

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[6] Solomon Negussie, *Fiscal Federalism in the Ethiopian Ethnic-based Federal System*, Rev. ed., Wolf Legal Publishers, Oisterwijk, (2008) , p. 32. [hereinafter Solomon, *Fiscal Federalism*].

[7] Fasil Nahum, *Constitution for a Nation of Nations: The Ethiopian Prospect*, Red Sea Press, Ewing Township (1997), p. 204. [hereinafter Fasil, Constitution for a Nation of Nations].

[8].Hashim Tewfik, Federalism in Ethiopia, International Conference on Dynamics of Constitution Making in Nepal in Post-conflict Scenario, Nepal, (2010), p. 2. [hereinafter Hashim, Federalism in Ethiopia].

[9] Paul H. Brietzke, Ethiopia's "Leap in the Dark": Federalism and Self-Determination in the New Constitution, *Journal of African Law*, Vol.39, No.1, (1995), p. 33. [hereinafter Brietzke, Ethiopia's Leap in the Dark].

[10] The Constitution of Federal Democratic Republic of Ethiopia, Preoclamtion1/1995, *Federal Negarit Gazetta*, (1995), Article 47(2) [hereinafter called, the FDRE Constitution].

military, in its composition, is also expected to mirror the image of all NNP of Ethiopia. However, as will be argued further below, some of these promises expressed on the paper are neglected in practice. Therefore, a central question of this paper is: How do the FDRE constitutional promises operate in practice?

This article contains diverse issues and is organized as follows. Section I explicates the Ethiopian federalism promises and assesses how the Ethiopian constitutional promise to form one political and economic community is put into practice. In section III, the practical records of the promise to promote one's culture and language are dealt with. Ethiopia's capability and track record with regard to promoting the right to form new regional states is discussed in detail in section IV. The discussion covers issues pertaining to the formation of new federation units by ethnic groups (NNP) that come from different regional states. The achievements and pitfalls of the Ethiopia's federal promises of full measure of self-rule and the ethnic composition of the military are assessed in subsequent sections. Finally, section VII contains concluding remarks.

1. The Promises of Ethiopian Federalism

During the last half a century, Ethiopia has witnessed three regimes that differed from one another in ideology, internal composition, ethnicity and social policies.[11] While a high level of centralization and cultural and structural inequalities characterized the Imperial and Socialist Ethiopia, the EPRDF regime is characterized by a new setting that has opened the door for ethnic and religious equality, decentralization and building one economic and political community without losing cultural distinctiveness.[12] During the 1990s, the initial hopes and anticipations were great since many ethnic based Liberation Fronts (such as Tigray People's Liberation Front and Oromo Liberation Front) exhaustively struggled against the regime of Mengistu. A greater focus on ethnicity was needed to fulfill the hopes of people who fought against the Derge regime.[13] As a result, ethnic federalism was formally ushered into the Constitution, which "constituted the federation

[11] Jan Záhořík, Book Review: Federalism and Ethnic Conflict in Ethiopia: A Comparative Regional Study by Asnake Kefale, *Ethiopian Journal of Social Sciences and Language Studies (EJSSLS)*, Vol. No.1, (2014), p. 98. [Záhořík, Book Review: Federalism and Ethnic Conflict in Ethiopia].

[12] *Ibid*.

[13] *Ibid*.

and continues to be its compact"[14] and manifest the multiethnic personality of the Ethiopian state.[15]

The Constitution recognizes the Ethiopian state as a union of several sovereign collectivities.[16] This gives one the impression that "the foundation of the Ethiopian state requires the ongoing consent of NNP."[17] This in turn may lead one to argue, "The state [the Ethiopia federal polity] is a union formed through the free consent of the nation, nationality and people."[18] This can be justifiably inferred from the Preamble of the constitution which reads "We the Nations, Nationalities and Peoples of Ethiopia" and other provisions of the Constitution. While framing the Constitution, the Constitution makers showed their sensitivity to and awareness of the importance of the rights of NNP.

In this regard, Aalen explicates that compared to other federal systems in the world; the Ethiopian system appears even more idiosyncratic. No other federation has a constitution recognizing a general right to self-determination to 'all nations and nationalities' as the Ethiopian Constitution does.[19] It should be noted here that "the unique feature of the Constitution is not only in the recognition and institutionalization of the right of ethno-linguistic communities of Ethiopia to self-determination (or otherwise, nations, nationalities and peoples of Ethiopia)", [20] but it is also unique for making

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[14] Tsegaye Regassa, Learning to Live with Conflicts: Federalism as a Tool of Conflict Management in Ethiopia-An Overview, *Mizan Law Review*, Vol. 4 No. 1, (2010), p. 87. [hereinafter Tsegaye, Learning to Live with Conflicts].

[15] Alem Habtu, Ethnic Federalism in Ethiopia: Background, Present Conditions and Future Prospects, Second EAC International Symposium on Contemporary Development Issues in Ethiopia, (2003) p. 16 [hereinafter Alem, Ethnic Federalism in Ethiopia].

[16] Kristin Henrard & Stefaan Smis, Recent Experiences in South Africa and Ethiopia to Accommodate Cultural Diversity: A Regained Interest in the Right of Self-determination, *Journal of African Law*, Vol. 44, (2000), p. 44. [hereinafter Henrard & Smis, Recent Experiences in South Africa and Ethiopia].

[17] Assefa Fiseha, Ethiopia's Experiment in Accommodating Diversity: 20 Years' Balance Sheet, *Regional & Federal Studies*, Vol. 22, No. 4, (2012), p. 445. [hereinafter Assefa, Ethiopia's Experiment in Accommodating Diversity].

[18] Andreas Eshete, Ethnic Federalism: New Frontiers in Ethiopian Politics, First National Conference on Federalism, Conflict and Peace Building, (2003), p. 159. [hereinafter Andreas, Ethnic Federalism: New Frontiers in Ethiopian Politics].

[19] Lovise Aalen, Institutionalizing the Politics of Ethnicity: Actors, Power and Mobilization in the Southern Ethiopia under Ethnic federalism, PhD dissertation, university of Oslo, (2008), p. 71. [Aalen, Institutionalizing the Politics of Ethnicity]

[20] Hashim Tewfik, Transition to Federalism: The Ethiopian Experience, *Occasional Paper*, Forum of Federations, (2010), p. 15. [hereinafter Hashim, Transition to Federalism].

such rights non-derogable even during states of emergency.[21] This is properly replicated in the Constitution, which institutes the federation and continues as a pact for the NNP to live together.[22]

The Constitution "aspires to build 'one economic community' based on a 'common destiny', born out of a shared past."[23] The aspiration of the NNP to build one economic community can be realized by allowing them to govern themselves, use their own languages, and promote their own cultural practices. This could be the justification that, while framing the constitution, the Constitution makers revealed their sympathy to the right of nationality and worked to satisfy the ethnic community aspiration for political justice and to further safeguard their interest.

Hence, the Ethiopian has made several promises through the Constitution that assures the equality of the entire ethnic groups irrespective of their size, political influence, economic status and ethnic background. The Constitution, from the outset, has indicated its mission of forming one economic and political community.

2. The Idea of Forming One Economic Community

The regional states of the federation vary from one another in terms of population size, territorial space, developmental pattern and ethnic composition. Following the federal arrangement, the federal Constitution has recognized equality of every social group and all citizens despite the existence of economic disparity and historical marginalization. This can be inferred from the first words of the Constitution which read: 'we the Nations, Nationalities and Peoples of Ethiopia are strongly committed to building a political community founded on the rule of law and capable of ensuring a lasting peace, guaranteeing a democratic order, and advancing our economic and social development."[24] The Constitution equally vests sovereignty in the NNP that constitute Ethiopia.[25] This is an indication for equality of all ethnic groups and recognition of their equal status at the inception of the federal system and throughout the federation making process.

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[21] *Ibid*.

[22] Tsegaye, Learning to Live with Conflicts, supra note 14, p. 87.

[23] *Ibid*, p. 88.

[24] The FDRE Constitution, the Preamble.

[25] The FDRE Constitution, Article 8(1) & (2). The provisions read as follows: 'All sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia. This Constitution is an expression of their sovereignty."

These are the foundational cornerstones of the new federal polity that are meant to ensure sustainable peace. Although there is a strong desire and move to preserve and promote multilingual and multi-cultural rights of the entire NNP; at the same time, there is a strong commitment on the side of NNP to build 'one political and economic community' based on their ''common interests, common outlook and common destiny.''[26] For this reason, the preamble of the Constitution declares that "Nations, Nationalities and Peoples of Ethiopia" using their right to self-determination are strongly committed to build a political community founded on rule of law. These clauses were inserted into the preamble in order to underscore the need for political and economic unity among the constituent ethnic groups and regional states.[27]

In other words, although Ethiopia is a multiethnic state, the Constitution affirms the commitment of the NNP to build one political and economic community in full recognition of their right to exercise self-determination.[28] In so doing, the Constitution attempts to balance the interests of maintaining national unity, on the one hand, and the ethno-linguistic groups' demand for cultural preservation and distinctiveness, on the other hand.[29] This implies that the Constitution promotes self-government and building national unity simultaneously. Building one economic and political community has become one of the most crucial aspects of the federal process and political life.

The clause of the Constitution on building one economic and political community demands that the government in power develop different strategies that could change the political and economic status of the various ethnic groups. These steps should be geared towards creating functional societies where all NNP have equal opportunities to be involved in decision making processes, access to education, jobs and justice. The central issue here is: What has been done over the past couple decades, since the introduction of the federal system, to create one political and economic community as pledged by the Constitution?

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[26] Alem, Ethnic Federalism in Ethiopia, supra note 15, p. 16.

[27] Alem Habtu, Multiethnic Federalism in Ethiopia: A Study of the Secession Clause in the Constitution, Oxford University Press, *Publius*, (2005), P. 326. [hereinafter Alem, Multiethnic Federalism in Ethiopia].

[28] Yonatan Tesfaye, Institutional Recognition and Accommodation of Ethnic Diversity: Federalism in South Africa and Ethiopia, PhD dissertation, University of Western Cape, (2008), p. 391. [hereinafter Yonatan, Institutional Recognition and Accommodation of Ethnic Diversity].

[29] Assefa, Ethiopia's Experiment in Accommodating Diversity, supra note 17, p. 444.

In this regard, there have been positive government efforts towards promoting national unity, although other sideline moves, which cast a shadow over the aim of the Constitution to form one economic and political community, have also been witnessed. Assefa, in this regard, argues that improvement in access to education, health and infrastructure in all the regional states are one among the key factors to achieve this mission.[30] He maintains that there has indeed been some improvement in access to education, health and infrastructure, such as roads, telephone services and electric power. The effort of the government to increase the number and intake capacity of universities (which were only two universities with limited capacity until 1991) is indication of the effort to bring unity.[31] During the last two and half decades, several universities, which are fairly and well distributed throughout the regional, have been built with huge intake capacities.[32] Moreover, in all regional states, access to elementary education and access to basic health services has increased tremendously.[33]. "These developments are important preconditions to build one economic community." [34] Further, Assefa argues that the federation's ability to deliver basic services, like education and health, is promising and the peripheral regional states' high stake is also given due attention with the aim to bring equitable regional development. The networking of economic infrastructure and age-old crosscutting bonds, throughout the regional states, are hoped to maintain unity among NNP.[35]

Moreover, Kristin H. & Stefaan S. argue: the federal system was introduced with the aim to rectify the historical inequalities, marginalization and assimilation moves.[36] The recognition of differences among the population groups present in a certain state could certainly improve internal stability and the peaceful coexistence of the distinctive groups,[37] which in turn can lead to

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[30] *Ibid*, p. 450.

[31] *Ibid*.

[32] Report of Ministry of education higher institution sub-sector, available at http://www.moe.gov.et/higher-education_admission, last accessed on 11, October, 2017. According to the report, currently, the number of public higher education institutions in Ethiopia reaches to 36.

[33] Assefa, Ethiopia's Experiment in Accommodating Diversity, supra note 17, P 450. See also, Ministry of Health, Fact Sheet-Ethiopia 2015, available at http://www.moh.gov.et/cs/web/guest/fact-sheets, last accessed on 11, October, 2017. According to the report, "The overall level of health service coverage reached 100%."

[34] Assefa, Ethiopia's Experiment in Accommodating Diversity, supra note 17, 450.

[35] *Ibid*, p. 463.

[36] Henrard & Smis, Recent Experiences in South Africa and Ethiopia, supra note 1616, p. 18.

[37] *Ibid*.

the creation of one political community. The often-heard expression "unity in diversity" reflects the interrelatedness of promoting ethnic groups with their distinctive ways of life on one the hand, and the goal of nation-building and the need to strengthen national unity, on the other.[38] In this regard, it can be argued that by allowing and ensuring the various groups a certain right to identity, this makes them feel more disposed to integrate and identify with the state in which they live.[39]

The recognition of the right to self-administration, the permission of every ethnic group to develop its culture and participate in the federal law making process may be cited as the best way to maintain one political community. In this regard, since the introduction of the federal system, various ethnic groups who are residing in different regional states have been appealing to gain such privileges. The federal and regional governments are engaging in handling such matters. However, various ethnic groups have been exercising such rights with varying degrees depending on where they reside, their population size, the political determination of the leaders of the ethnic group concerned and so on. For instance, the Amhara regional state recognizes and provides self-government at the zonal level, primarily for three non-Amhara ethnic groups who are residing in the region. These include the Agaw-Awi, the Agaw-Hemra and the Oromos[40] and more recently for Kemant and Argoba. Similarly, in the Gambella regional state, among the existing five nations, the Anywaa, Nuer, and Mezenger have their own national self-administrations.[41] Additionally, the Como and the Opo peoples have local (Wereda) self-administrative government.

The SNNPRS is an exception in this regard. It is composed of various NNP,[42] however, the region, for the purpose of ethnic minority accommodation, is structured with fourteen zones and four special Weredas.[43] The zonal /special Wereda council has legislative power to enact laws on matters that are given neither to the federal government nor for the state by the FDRE and the State

[38] *Ibid*.

[39] *Ibid*.

[40] The Revised Amhara Regional State Constitution, Proclamation n No. 59/2001, *Zikre Hig*, (2001) Article 5 [hereinafter The Revised Amhara Regional State Constitution].

[41] The Revised Gambella Regional State Constitution, Proclamation No. 27/2001, *Gambella Negarit Gazetta*, (2001) Article 75

[42] Tsegaye, Learning to Live with Conflicts, supra note 14, p. 91. This is found at the footnote.

[43] Interview with Lukas Jimma, Nationality Right Affair officer, Southern Nations, Nationalities, Peoples Regional State Council of Nationalities, Hawassa (27 May 2016).

Constitution.[44] Conversely, regular Weredas (which consist of wereda council, wereda administrative council and wereda court) have no legislative mandate. This shows that SNNPR state structure advances zone self-administration for less than two dozen of NNP out of the fifty six NNP reorganized within the region.[45] For this reason, since the introduction of the federal system, various NNP who are residing in the region have been appealing to have their respective Zones or Special wereda.[46]

Lastly, it may be appropriate to discuss the recently established "Nation, Nationality and Peoples" day and its contribution to the creation of one political and economic community. The official and colorful celebration of "Nation, Nationality and Peoples" day creates an opportunity for all ethnic groups to promote their cultural practices. This forum allows them to use their own languages, and promote their own cultural heritages in equal manner with other ethnic groups. This is quite encouraging for the formation of one ethnic and political community born out of multiethnic federalism.

For this reason, Alem Habtu argues that "multiethnic federalism has symbolic meaning for interethnic relations, and its impact is discernible in the willingness of various ethnic groups in peripheral areas to participate in the federal experiment".[47] For instance, "during the recent Ethio-Eritrean war, individuals from all ethnic groups, including those in border regional states such as the Somali, Afar, and Gambella, volunteered in large numbers to join the war. This has demonstrated a high degree of pan-Ethiopian nationalism among members of diverse ethnic backgrounds."[48] The enthusiasm of all the ethnic groups to participate and defend the state against the Eritrean

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[44] The Revised Southern Nations, Nationalities, Peoples Regional State Constitution, Proc., No. 35/2001, *Debub Negarit Gazetta*, Article 80(2) [hereinafter The Revised SNNP regional state Constitution].

[45] There are 56 ethnic communities that are recognized ethnic groups within the region for representation purpose. Each ethnic group has one representative in the Council of Nationality. With this formula, the 56 ethnic groups have at least one representative, which counts to 56 representatives. Due to their population size some ethnic groups such as Sidama, Hadiya, Wolayita and Gurage Nations are represented by one additional representative. Therefore, the council of Nationality has total numbers of 64 seats.

[46] For instance, the Gofa and Konso nations are petitioning for a separate ethnic administration. Gofas started to petition for a separate zonal status as early as 1987 E.C (See the petition by the Gofa to the CoN, (24/8/98 E.C), on file with the registrar of the CoN, Hawassa, and See the latest applications by Konso to the CoN, (Sene 13, 2008 E.C), (13/02/2007 E.C) on file with the registrar of the CoN, Hawassa; Application by Konso to the HoF, (20/01/2008 E.C), on file with the registrar of the HoF, Addis Ababa

[47] Alem, Multiethnic Federalism in Ethiopia, supra note 27, p. 333.

[48] *Ibid*.

aggression is an indication of the successful formation of one political community. This weakens the argument that "Once each ethnic group, regardless of its size, is given significant self-governing autonomy in its own region, it may be difficult to persuade the ethnic groups to cooperate with one another for national unity."[49] This is because unity in diversity is about finding the right balance between developing the idea of the national sentiment while cultivating regional identity.[50]

Despite such success stories and achievements in efforts to maintain national unity, there are incidents that compromise/ repudiate the moves to form one economic and political community, otherwise called "building national unity". In this regard, Yonatan cites the celebration of the martyrs of Chelenko in Harari regional state.[51] This symbolic realm might, in some cases, give rise to internal tensions. In his words:

> *In a region that has a large number of individuals that belong to the Amhara ethnic group, the commemoration of Chelenko, in its present form and spirit, has the effect of projecting the dichotomy of the oppressor and the oppressed, the conqueror and the vanquished. Such divisive symbolism compromises the capacity of the state to build 'one political community' which is not only based on the recognition of diversity but also on the need to hold it together. The commitment of the preamble to continue as a one 'political community' cannot be achieved unless recognition is complemented by the spirit of reconciliation. In this regard, the Ethiopian system, it seems, has to yet explore innovative ways of avoiding 'divisive symbolism' and translating a potentially disruptive symbolism into a symbolic code that promotes reconciliation and recognition.*[52]

It is true that a government is expected to work for non-occurrence of repeated historical wrongs. However, the move to over broadcasting historical prejudices and erecting divisive symbolism would ultimately repudiate our endeavor to form one economic and political community. This would also obviously contradict the goal of nation-building and challenge moves to strengthen social cohesion among NNP.

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[49] Alemante G. Selassie, Ethiopia: Problem and Prospect for Democracy, *William and Mary Bill of Rights Journal*, Vol. 1, No.2, (1992), p. 225. [hereinafter Alemante, Ethiopia: Problem and Prospect for Democracy].

[50] Henrard & Smis, Recent Experiences in South Africa and Ethiopia, supra note 16, pp. 17-18.

[51] Yonatan, Institutional Recognition and Accommodation of Ethnic Diversity, supra note 28, p. 391.

[52] *Ibid*.

3. The Right to Promote One's Culture

Ethiopia houses a plurality of language, religion, nationality and culture.[53] However, such reality was totally disregarded in Ethiopia during the time before 1991. The legacy of assimilation used to be considered the only means of holding Ethiopia together. In this regard, Abera claims that *"...the successive government applied various discriminatory policy aimed at forceful homogenization of the multiethnic society. This homogenization policy was designed to annihilate culture and language of the several ethnic groups."*[54]

In this sense, Assefa explains that the choice of multicultural federalism is a measure in the right direction to the extent that it attempts to integrate historically marginalized groups.[55] The current federal system of Ethiopia has introduced with the belief that the unitary system has failed to accommodate various ethnic and cultural social groups' interests of promoting their own culture and language. In this sense, the federal political system was introduced in Ethiopia to address the ills of the previous regime and the political turmoil that preceded it.

In this regard, one of the major achievements of the new federal arrangement is that it helps the NNP to develop, feel confident in their own language and culture, and obtain their own administration.[56] The Constitution has developed various strategies for how to deal with cultural diversity. First, it gives equal recognition to all "languages and entitles all regional states to determine by law their respective working languages."[57] Accordingly, every regional state determines its working language under its regional constitution. "Looking at the practical records of the regional states, three different approaches seem discernible. First, five states have adopted their own majority's language as the working language of their regional administration.[58] Three other states, which do not have a majority ethnic group, have chosen

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[53] Andreas, Ethnic Federalism: New Frontiers in Ethiopian Politics, supra note 18, p. 144.

[54] Aberra Degefa Principle Guiding the choice of Working Language in Multi-Lingual Society: Some Reflection on the Language Policy of Ethiopia, in Tsegaye Regassa (ed.) *Issues of Federalism in Ethiopia: Towards an Inventory of legal Issues*, AAU Printing Press, (2009), p. 102. [hereinafter Aberra Principle Guiding the choice of Working Language in Multi-Lingual Society].

[55] Assefa, *Federalism and the Accommodation of Diversity*, supra note 5, p. 98.

[56] Lovise Aalen, Ethnic Federalism and Self-Determination for Nationalities in a Semi-Authoritarian State: the Case of Ethiopia, *International Journal on Minority and Group Rights*, Vol. 13, (2006), p. 256. [hereinafter Aalen, Ethnic Federalism and Self-Determination for Nationalities in a Semi-Authoritarian State].

[57] Assefa, Ethiopia's Experiment in Accommodating Diversity, supra note 17, p. 444.

[58] These are the Amhara, Afar, Tigray, Oromia and Somalia Regional states.

Amharic as their working language.[59] The third trend is the one adopted by the state of Harari, where Harari and Oromiffa have been chosen as working languages."[60]

As an extension to this, Asnake argues that ethnic federalism has enabled the diverse peoples of Ethiopia to use their own languages for education and self-administration.[61] In some cases, not only regional states, but also the zonal administrations are allowed to choose their languages for administration and educational purposes.[62] For instance, some zonal administrations in the SNNPR have started using their own languages for administrative matters and primary education.[63]

The education policy, which dictates the use of mother tongue in elementary schools, entitles each regional state to choose its own language of instruction in primary schools.[64] As a result, out of some 80 local languages spoken within the country, 19 are now used for elementary education.[65] Despite this fact, looking at the practical records of the regional states, one may see diverse approaches to the use of language. For instance, ethnically homogenous regions have adopted the languages of their respective dominant groups as the medium of instruction for primary education. Typical examples here are Tigray, Oromyia, Amhara and Somali regional states.[66] When one takes a look at the practices of the Southern regional state, where there are more than a dozen ethnic groups, eleven nationality languages are being used as a medium of instruction in primary education.[67]

Each regional state, municipality, zone and district can choose its own language(s) of instruction.[68] For instance, within the SNNP regional state,

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[59] These are the Benishangul Gumuz, SNNP and Gambella Regional states.

[60] Assefa, Ethiopia's Experiment in Accommodating Diversity, supra note 17, p. 444.

[61] Asnake Kefale, The Politics of Federalism in Ethiopia: Some Reflection, in Gana T, Aaron & Egwu G. Samuel (eds.), *Federalism in Africa*, (2003), p. 261. [hereinafter Asnake, The Politics of Federalism in Ethiopia].

[62] Aalen, Ethnic Federalism and Self-Determination, supra note 56, p. 256.

[63] Asnake, The Politics of Federalism, supra note 61, P. 262. Gurage Zone, Sidama Zone, and Wolaita Zone could be examples in this regard.

[64] Assefa, Ethiopia's Experiment in Accommodating Diversity, supra note 17, p. 444.

[65] Alem, Ethnic Federalism in Ethiopia, supra note 15, p. 18.

[66] In these regions, the languages of the dominant groups (Tigrinya, Oromifa, Amharic, and Somali) are respectively used in the regions as medium of instruction in primary schools.

[67] Yonatan, Institutional Recognition and Accommodation of Ethnic Diversity, supra note 28, p. 406.

[68] Alem, Ethnic Federalism in Ethiopia, supra note 15, p. 18.

Guragigna, Sidamigna, Welaitigna, Hadiyigna, Gamogna, Gedeogna, Keffigna, or Kembatigna, are languages of instruction just as much as Amharic in the respective zones and districts. On the other hand, in the Oromia regional state, as in Adama for example, Amharic is found to be the language of instruction as often as Oromiffa.[69] Within each regional state, municipalities, zones and districts can choose their own language(s) of instruction.[70] In this regard, the assurance of the Constitution, which has promised that every ethnic community may develop its own culture and language, is progressing irrespective of population size and political affiliation. This is an unquestionably big achievement that strengthens the argument that the Constitution is living up to its promise.

4. The Right to Form One's Own State

Ethiopia is made up of many ethno-linguistic groups at different stages of development and with varied life styles. Throughout the 1970s and 80s, various ethnic groups were, to a certain extent, neglected by the central powers and controversies over their future status remained unresolved.[71] Hence, to break down old patterns and prevent further turmoil, the FDRE Constitution ruled out any coercive approach to maintaining unity and provides the various ethnic groups the right to self-expression.[72] The Constitution further promotes the concept of self-determination, which includes secession. With this state of affairs in mind, the federal system is organized with a federal government and nine regional states. The federal system bestowed six ethnic groups their own regions subsuming the rest within them. "This means that the large majority of Ethiopia's ethnic groups does not dominate a particular regional state, but rather constitutes a minority in one of the six single ethnic dominating regional states or in the three remaining multi-ethnic regional states."[73]

The limited number of regions established, on the one hand, and existence of more than 80 ethnic groups, on the other, obviously implies that most ethnic

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[69] *Ibid*.

[70] *Ibid*

[71] One sees the frequent narratives of the ruling parties both in the SNNPR, Benishangul-Gumuz and Gambela regional states.

[72] Fasil, *Constitution for a Nation of Nations*, supra note 7, p. 204

[73] Christophe Van der Beken, Federalism and the Accommodation of Ethnic Diversity: The Case of Ethiopia, Third European Conference on African Studies, (2009), p. 17. [hereinafter Beken, Federalism and the Accommodation of Ethnic Diversity] There is person who argues that all regions are multiethnic; the difference is how this diversity is recognized both legally and politically.

groups do not have their own region.[74] Had it not been for this reason, with the existence of more than 80 ethnic groups, the Ethiopian federation units would not have been limited to nine. By logical extension, it is clear that "regional states are ethnically heterogeneous although, in most of them, there are dominant ethnic groups after whom the states are often named.[75] For instance, in the Amhara regional state, in addition to the Amhara there are the Agaw, the Argoba, the Oromo and other non-Amhara ethnic groups. Similarly, in the Tigray regional state, there are Erob and the Kunama people. In the Oromia regional state, there are Zay and other non-Oromo peoples living all over the state. The Gambella regional state is also composed of the multiethnic groups including Anywaa, the Nuer, the Majang, Komo and Opo nations.[76] Likewise, Benishangul-Gumuz is composed of the Berta, the Gumuz, the Shinasha, the Mao and Como peoples. Notably, the regional state with the highest number of ethnic groups is the SNNPR, which is composed of about 56 NNP.[77]

Taking the multiethnic nature of the Ethiopian regional states into account and capitalizing the equality of all NNP, the Constitution recognizes the right to self-determination to all NNP.[78] For this reason, the preamble of the Constitution declares that "Nations, Nationalities and Peoples of Ethiopia" come to the federation using their right to self-determination. This reading of the Preamble is confirmed by different provisions of the constitution such Article 8, 39and 47. It can thus justifiably be inferred that, NNP are the entities designated as beneficiaries of self-determination.[79]

However, one may argue that the Constitution does distinguish between two categories of beneficiaries: the "normal" and the "privileged". The latter are those ethnic groups who dominate the nine states and collectively form the Federal Democratic Republic. Thus, the dominant ethnic groups enumerated in the nine states are more privileged than those ethnic groups who constitute the regional state but have not yet separated themselves from the states forming the federation.[80] Of course, NNP, if they are not yet constituted as a

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[74] Kinkino Kia, The Right to Form One's Regional State under the Ethiopian Federation: The Case of Sidama People, Unpublished, LLB Thesis, Hawassa University, p. 33. [hereinafter Kinkino, The Right to Form One's Regional State under the Ethiopian Federation].

[75] Tsegaye, Learning to Live with Conflicts, supra note 14, p. 91.

[76] The Revised Gambella Regional state constitution, Article 46(1).

[77] Tsegaye, Learning to Live with Conflicts, supra note 14, p. 91.

[78] The FDRE Constitution, Article 39.

[79] Henrard & Smis, Recent Experiences in South Africa and Ethiopia, supra note 16, p. 43.

[80] *Ibid*, p. 44.

member state of the federation, have the right to establish their own state at any time.[81] The logical extension of this argument is that the federal configuration will vary over time as NNP within the nine states exercise their right to self-determination and eventually and establish themselves as a member states of the federation.[82] This could be the reason why following the constitutional declaration of the right of NNP to self-determination, Article 47(2) of the same constitution states right of the "Nations, Nationalities and Peoples within the States to establish, at any time, their own States."

It is perhaps with this assumption that the NNP of Ethiopia entered into the federation on the basis of a "sovereignty-association" formula. The FDRE Constitution seems to use the self-determination clause as a blandishment to entice the NNP to accept the limitation of their sovereignty for voluntary union of the federation. In this process, internal self-determination may be a crucial tool because the existing NNP rely on to accept the limitation of their sovereignty and remain within the federation units. The NNP accepts this limitation because the Constitution has given the assurance that they will be able to form their own regional states if they follow the producers, as stated under Article 47.

In other words, the NNP can count it as their future option to withdraw from the host region and form their own separate regional state. For that matter, the NNP are required neither to mention some just causes that may be invoked in favor of a right to self-determination nor to prove the violation of their right to internal self-determination by host regional state. It is clear that in order to exercise this right and start the process of establishing their respective regional state, the NNP have to establish their own "Council".[83] This "Council" is the chief negotiator for the process, although it is nowhere specified exactly how the Council should be established, or who should serve on it.

Indeed, precise procedures are put forward under the FDRE Constitution on how to establish new states within the Ethiopian federation.[84] The endorsement of the claim by the NNP and their collective desires to form their own region play a unique role in securing the right. Although the Constitution has promised to all Nations, Nationalities and Peoples, which do not have their own region yet, that they may establish their own region, the

[81] *Ibid*

[82] *Ibid*, p. 47-49.

[83] Tom Pätz, Ethiopia (Federal Democratic Republic of Ethiopia), in Ann L. Griffiths (ed.) *Handbook of Federal Countries*, McGill-Queen's Press-MQUP, (2005), p. 142.

[84] The FDRE Constitution, Article 47(3).

political context is not exactly favorable to exercise this right. This contention can be further substantiated by the claims of the Sidama in SNNPR and Berta in Benishangul Gumuz.

4.1.1 Sidama Nation

During the transitional period, the current SNNPR state was organized into five independent regions, which include Sidama, Wolaita, Omo, Kaffa, and Guraghe-Hadya Kambata regional states, given numbers from 7 to 11 respectively. These five ethnic groups, which enjoyed the right to full internal self-determination during the transition period, were dissolved[85] and formed the Southern Nations, Nationalities and Peoples Regional State (SNNPRS) in 1994.[86] It seems that the assumption is that these ethnic groups will form their own regional states in due course.

These ethnic groups accepted the limitation of their sovereignty relying on Article 47 of the Constitution that gives the assurance that those NNP who do not establish their own regional state will be able to regain it in due time. However, these ethnic groups have been combined and remained under one regional state. There are different views about the merger of the five regions under one region. Some argue that just "before the regional merger took place, several EPRDF affiliated parties in the regions established one common political front, the SEPDF, and became a member of the EPRDF coalition."[87] "When the parties were united across the five southern regions, it was also desirable to have one parallel administrative structure in the south.[88] "Regional officials claim that the merger of the regions came about because regional party members' desired to utilize common resources and manpower. Opposition, however, claims that the merger was an outcome of pressure from the EPRDF, which preferred to control the troublesome southern areas through one rather than several federal units."[89]

Since the regional merger in 1992, the Sidama Liberation Movement has openly pressed the demand to reestablish its own regional state. Individual members of the ruling SPDO (Sidama Peoples Democratic Organization),

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[85] Cumulative reading of National/Regional Self-governments Establishment Proclamation No. 7 of 1992 and the FDRE Constitution.

[86] Lovise Aalen, Ethnic Federalism in a Dominant Party State: The Ethiopian Experience 1991-2000, *Bergen, Chr. Michelson Institute, Development Studies and Human Rights*, No2, (2002), p. 90. [hereinafter Aalen, Ethnic Federalism in a Dominant Party State].

[87] Aalen, Ethnic Federalism in a Dominant Party State , supra note 86, p. 90.

[88] *Ibid*.

[89] *Ibid*.

later SEPDM (this is with an amalgamation of some 20 parties and SPDO, Southern Ethiopia People's Democratic Movement), may have supported the claim, but it has never been on the party's official agenda.[90] In July of 2005, however, it was the SEPDM members of the Sidama council who raised the issue in public. The Sidama zone council justified its decision to ask for regional status by asserting that the Sidama suffered from discrimination in the regional distribution of resources,[91] lack of infrastructure and employment, good governance, and justice.[92]

In addition to these justifications, many associate the claim of the Sidama ruling party for separate regional state with the SEPDM's poor performance in national and regional elections, which took place in 2005. The SEPDM officials promised to work for the realization of the Sidama Nation quest of new regional state formation. The ruling party in Sidama has promoted the Sidama state formation demand to mobilize support for the ousted candidates in the reelections. Consequently, a complete 'victory' over the SLM (Sidama Liberation Movement) was finally secured when all the defeated SEPDM candidates were elected in the rerun of the polls.[93] For this reason, the Sidama zone decided to ask the regional council for separation from the SNNPRS and establishment of an independent region.[94]

It is a true that according to the Constitution, the NNP have a collective right to self-determination and are entitled to internal self-determination on the basis of attributes that they have in common. Any NNP is required neither to mention list of just causes that may be invoked in favor of such right nor to prove the violation of the internal right to self-determination by the central government as a cause for forming their own regional state. What is central to this issue is that it presupposes endorsement of the claim by the NNP and their collective desires to form a new federation unit. The Constitution, in dealing with and providing the right to form one's own state, expresses the right to form one's own state and also details the procedures to be followed in the exercise of the right.[95]

It is true that the making of a new regional state often exerts a profound domino effect on the remaining regional states and is often perceived as a

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[90] Aalen, Institutionalizing the Politics of Ethnicity, supra note 19, p. 163.

[91] For instance, the regional budget allocation was argued to be not proportional to the population size and multifaceted problems of the Sidama people.

[92] Aalen, Institutionalizing the Politics of Ethnicity, supra note 19, p. 163.

[93] *Ibid*.

[94] *Ibid*.

[95] The FDRE Constitution, Article 47.

politically sensitive matter. So the FDRE Constitution attempts to guide the process along a non-threatening path. The Constitution provides for a four-step procedure and maintains that these procedural criteria must be met in order to legitimize self-determination request. The right to form one's own state has to be weighed against Article 47 of the FDRE Constitution, which laid the foundations for the exercise of such right. The NNP, who raise the right to form a new regional state, is charged with four key tasks: initiating the claim, managing and consolidating support for the request, transferring their claim to the federal government and conducting internal diplomacy and overseeing the referendum.

In view of this fact, the request of the Sidama nation to separate itself from the SNNPRS and establish an independent region had the support of a large majority of the Sidama Zonal Council, with the notable exception of the *Hadicho* representatives.[96] The standing committee on legal affairs in the SNNPRS Council, which received the request initially, and the Council of Nationalities of the region replied that the Sidama had a constitutional right to ask for regional status.[97] But before any decision could be made, the EPRDF's central party apparatus intervened and stopped the process through the SEPDM.[98]

Here is the paradox, this goes against the constitutional right that recognizes unconditional self-determination. The Constitution offers no avenue for the ruling party to make such a decision. However, the Sidama request to establish its own regional state was rejected by the EPRDF for fear that accepting this request would cause similar demands from other ethnic groups.[99] The ruling party, through its chairperson, mentioned its justifications for rejecting the claim. "*First, the Sidama council had violated the internal procedures of the EPRDF by raising the issue before it had been discussed by party leaders at the central level. Second, the Sidama would not benefit from a separate regional state because of the Sidama's own lack of development. And third, if the Sidama gained regional status, this would lead the remaining nationalities to ask for the same*"[100] The ruling party also made strategic changes in the regional

[96] Aalen, Institutionalizing the Politics of Ethnicity, supra note 19, p. 163.

[97] *Ibid*.

[98] *Ibid*.

[99] Van der Beken, Federalism and the Accommodation of Ethnic Diversity, supra note 73, p. 18. Citing Asnake Kefale, 'Federalism and Autonomy Conflicts in the Benishangul-Gumuz Region, Ethiopia,' in Eva Brems and Christophe Van der Beken (eds.), *Federalism and the Protection of Human Rights in Ethiopia* , Münster: Lit Verlag, (2008), pp. 192-193

[100] Aalen, Institutionalizing the Politics of Ethnicity, supra note 19, p. 163.

administration, rewarding the leaders Sidama who had changed their stance by appointing them to higher position.[101] Having said this about the Sidama Nation's demand to form its own state, the response from the government, and the way the claim was handled, let us look into a similar claim from of the Berta Nation in Benishangul-Gumuz regional state.

4.1.2 The Berta Nation

In terms of ethnic configuration, the Benishangul-Gumuz regional state is composed of the Berta, Gumuz, Shinasha, Mao and Como and other peoples residing in the region.[102] Geographically, the Benishangul-Gumuz National Regional State (BGNRS) came into being by merging parts of the former Assosa and Metekel administrative regions. The first regional government of the Benishangul-Gumuz region was established in 1993 under the leadership of a newly formed regional party called the Benishangul North West Ethiopia People's Democratic Unity Party (BNWEPDUP) which was under the control of the BPLM (Benishangul People's Liberation Movement).[103] The Berta dominated in the first years after the transition, but were outnumbered when a new political party was established with assistance from the EPRDF in 1998.[104] This party was a result of a merger between different ethnic parties, representing the major ethnic groups in the region.[105]

When the inaugural conference of the BGNRS convened in 1993, there were disagreements between the Gumuz and the Berta over the sharing of political and economic resources; specifically, the naming of the president and the capital of the new region. The major disagreement, however, was that the Berta (who is larger in population than the Gumuz) had a lesser number of representatives in the regional council. After some bickering, "the two groups finally reached a compromise that gave the office of the presidency to the Berta and the capital to the Gumuz. Nevertheless, the interethnic conflict that emerged between the Gumuz and the settlers in and around Pawe necessitated moving the regional capital to Assosa."[106] The regional government faced factional infighting which was a source of instability in the region.

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[101] *Ibid*, p. 164.

[102] See the third Population and Housing Census, which was held in 2007.

[103] Asnake Kefale, Federalism and Ethnic Conflict in Ethiopia: A Comparative Study of the Somali and Benishangul-Gumuz regions, PhD Dissertation, University of Leiden, (2009), p. 160. [hereinafter Asnake, Federalism and Ethnic Conflict in Ethiopia]

[104] Aalen, Ethnic Federalism in a Dominant Party State, supra note 86, p. 69.

[105] Asnake, Federalism and Ethnic Conflict in Ethiopia, supra note 103, p. 162.

[106] *Ibid*, p.160.

The lack of unity within the BPLM challenges the administrative positions the Berta's have in the region and undermines their ability to administrate the region effeciently. In other words, the Berta, who have political ascendancy in the region cannot sustain its political dominance, mainly because of internal divisions during the formative years of the new region.[107] As a result, the "EPRDF decided to restructure the political landscape in the region."[108] All the ethnic parties of the region underwent purging to from the new EPRDF affiliated front. Under the pressure of the EPRDF, they formed one common front and brought it under the Benishangul Gumuz People's Democratic Unity Front (BGPDUF).[109] After the 1995 regional elections, the office of the presidency went to the Gumuz at the instigation of the EPRDF.[110] This, however, displeased many of the Berta who controlled the regional government in the formative years.

Again, in September of 2000, there was conference in Assosa to elect the executive officers of the regional government.[111] There was dispute between the Berta and Gumuz over distribution of executive posts; specifically, the nominee for regional president. As a result, the Berta members of the regional council demanded an informal consultation among the members of the executive committee before the regional council proceeded to elect the new president. In an informal consultation, the Berta demanded the offices of the president and the secretary. They justified their claim by indicating their contribution to the struggle against the Derg and its population size compared to the other titular ethnic groups of the region.[112] The Gumuz and the other executive committee members of the BGPDUF, however, rejected this claim and insisted that both the chair and secretary should be elected by majority vote in the regional parliament.[113] The Berta, who lost political ascendancy in the region, claimed they would establish a new regional state. This is to mean that the impotence of the Berta in the politics and their inability to maintain ascendancy in the regional administrative positions were some of the key reasons that led the Berta to look for other alternatives to remain in the dominant position. As a result, they presented their exit demand of new regional state formation as an opportunity that would provide them a chance

[107] *Ibid*.

[108] *Ibid*, p. 162.

[109] *Ibid*.

[110] *Ibid*.

[111] *Ibid*, p. 163.

[112] *Ibid*.

[113] *Ibid*, p. 163.

to administer themselves in their own geographic area and help them to develop their culture and language pursuant to the Constitution.[114] The Constitution made it clear all NNP may exercise their right to establish, at any time, their own states and administer themselves in their respective territory. There is hardly any standard criterion mentioned in the Constitution to determine the validity of self-determination claims. Although this is what is stated under the Constitution, the claim of the Berta nation was duly entertained neither in the regional council nor in the concerned federal house; that is, the House of Federation (HOF).

The regional council, which was composed of the five ethnic groups, rejected their demand.[115] Equally, federal officials first dismissed the demand arguing that the claim of the Berta nation for new state formation was unpopular and merely reflected the wish of the Berta political elite rather than a genuine demand of the people.[116] After having discredited the demand, federal officials ordered all regional parties to undertake evaluation ('gimegema') and appointed the HoF to mediate the two groups, Berta and the Gumuz.[117] With these decisions, the move to form Berta's regional state administration was unsuccessful. Hence, one can safely conclude that the frequent conflict that emerged with the Berta not only affected their aim to play a prominent role in the politics of the region but also undermined their claim to form the new regional state.

To recap, both ethnic groups have the right to unconditional self-determination. Their claim is legitimate and in conformity with the constitutional provisions. It was the will of the drafters of the Constitution that the right to self-determination would be exercised through constitutionally established procedures.[118] Looking at the legitimate efforts these ethnic groups have made and the steps they have taken, Asnake argued that the federal authorities were not committed to the demand to establish one's own state.[119] Others characterize the response of the federal officials as the hegemonic experience of the ruling regime and its centralized party rule

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[114] *Ibid*, p. 164.

[115] Berhanu Gutema, Restructuring State and Society: Ethnic Federalism in Ethiopia, SPIRIT PhD Series Thesis, No. 8, (2007), p. 119. Actually, it was only the four ethnic groups, which decided against the Berta, but Berta's have already boycotted the council. [hereinafter Berhanu, Restructuring State and Society].

[116] Asnake, Federalism and Ethnic Conflict in Ethiopia, supra note 103, p. 164.

[117] *Ibid*.

[118] Henrard & Smis, Recent Experiences in South Africa and Ethiopia, supra note 16, p. 44.

[119] Asnake, Federalism and Ethnic Conflict in Ethiopia, supra note 103, p. 164.

which tends to disregard the constitutional right to self-determination.[120] One may even have the impression that the right to state formation in Ethiopia has only symbolic value.

In the existing situation, it would be unrealistic for the NNP to exercise their right to establish, at any time, their own states and administer themselves in their respective territories. The ruling party, EPDRF, made substantial effort against both ethnic groups to not exercise their right. As Berhanu Gutema argues, when the Sidama and Berta requested the establishment of their own regional state, it was rejected by the EPRDF. He claims that the resistance and reluctance of the ruling party against the claim to form of a new regional state is an indication of the unwillingness EPRDF to accept the full consequences of the constitution's emphasis on ethnic rights.[121] Others even argue that "the question of self-determination of nations, nationalities and peoples which is prescribed in the Constitution as one of the most significant articles proving the truly democratic character of Ethiopia but...this principle remains an illusory one and serves only as a rhetorical theory."[122]

Federal soldiers and police regularly take measures against ethnic organizations fighting for the establishment of their own constituent unit.[123] For this reason, until now neither the right to form one's state nor the right to secede has been exercised.[124] As Tegaye describes, "the federal option, its bases for carving out the constituent units and the constitutional recognition of the unconditional right to self-determination were among the most contested points as a result of which federalism remains to be a controversial subject in Ethiopia to date".[125]

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[120] Kinkino, The Right to Form One's Regional State under the Ethiopian Federation, supra note 74, p. 12.

[121] Berhanu, Restructuring State and Society, supra note 115, p. 119.

[122] Jan Záhořík, Ethiopia between Constitutional Principles and Reality, in the Scale of Globalization, *Think Globally Act Locally, Change Individually in the 21st Century*, available at, http://conference.osu.eu/globalization/publ2011/374-378_Zahorik.pdf, p. 371, last accessed on 24, March, 2016 [hereinafter Záhořík, Ethiopia between Constitutional Principles and Reality].

[123] Kinkino, The Right to Form One's Regional State under the Ethiopian Federation, supra note 74, p. 12.

[124] Christophe Van Der Beken, Ethiopian Constitutions and the Accommodation of Ethnic Diversity: The Limit of the Territorial Approach, in Tsegaye Regassa, (ed.), *Issues of Federalism in Ethiopia: Towards an inventory of legal Issues*, AAU Printing Press,(2010), p. 269. [hereinafter Beken, Ethiopian Constitutions and the Accommodation of Ethnic Diversity].

[125] Tsegaye, Learning to Live with Conflicts, supra note 14, p. 91.

With this statement of fact in mind, one has to say the following: the recognition of the right to unconditional self-determination would make it more difficult to reach just and peaceful resolutions. Although this is incorporated to express equality of various ethnic groups and promote the right to self-determination, little has been done in terms of ensuring the enjoyment of such rights. While both levels of governments have displayed their will to enforce equality of various ethnic groups in their respective constitutions, they are, at the same time, faced with the challenging task of promoting the right to establish one's own state. As long as the federal policy process is mainly channeled by and through the ruling EPRDF, this seems to be an insignificant development for promotion of the right to establish one's own state.[126]

5. The Right to Full Measure of Self-governance

Another promise of the FDRE Constitution is the right to full measure of self-government within the already established regions. The Constitution vividly states that the nations, nationalities and peoples have the right to self-government. It also lays down what constitutes the full measure of self-government. It reads as follows: "Every Nation, Nationality and People in Ethiopia has the right to a full measure of self-government *which includes the right to establish institutions of government in the territory that it inhabits and to equitable representation in state and Federal governments."* (Emphasis added.)[127]

It is clear from this provision that the right to full measure self-government has two components. The first component is the right to establish government institutions with the three branches: executive, judiciary and legislative, in the territory the NNP inhabit. The second component is the right to equitable representation in government institutions. "These components of the right to self-government are a requirement in federal state for achievement of national unity, which requires genuine regional autonomy, and the political participation of the diverse ethnic groups at the federal level."[128] In this regard, it can be argued "Ethnic federalism in Ethiopia involves not only the structure of the state, but a constitutional mandate to give self-rule to Ethiopia's many nations, nationalities, and peoples."[129] The

[126] Pätz, Ethiopia (Federal Democratic Republic of Ethiopia), supra note 83, p. 144.

[127] The FDRE Constitution, Article 39(3).

[128] Van der Beken, Federalism and the Accommodation of Ethnic Diversity, supra note 73, p. 16.

[129] *Ibid.*

question is: Is this promise of the Constitution fulfilled? The following section assesses the achievements of the Ethiopia federal system and its pitfalls.

5.1 The Right to Self-Governance and Determination of Ethnic Identity

As stated above, the Constitution clearly recognizes the right of all the NNP to a full measure of self-government. Obviously, the essence of self-rule encompasses the right to establish government institutions. While noting this, the Constitution gives the NNP more privileges and authorities that they can exercise independent of the federal government.[130] But the central issue here is: How can the NNP exercise their right to full measure of self-government in reality?

The Ethiopian federal system established nine regional states. This implies that most ethnic groups do not have their own region.[131] The logical extension is how these ethnic groups who are subsumed in the nine regional states exercise their right to self-governance? As a solution to this, the Constitution dictates and empowers the regional government to sketch the state structure in the way that best advances the self-rule right of the NNP who are residing in their respective territories.[132] The logic derived from the principle embodied in the notion of self-determination is that, the Ethiopian federal state has devised the possibility for groups to obtain small administrative district (Wereda) status within the regional state they are residing.[133]

Hence, those ethnic groups who are not able to establish a state within the regional state they inhabit attain self-administration of their own, in conjunction with the regional government administrative hierarchy, and this is applicable especially for small or medium-sized ethnic groups.[134] For example, in the SNNP regional state, in which there are fifty-six ethnic groups, it is highly unlikely that they could all find establishment of their own states a feasible option. For this reason, Aalen argues that since Ethiopia has more than 80 officially recognized ethnic groups, many of them very small, the right to self-determination is most likely to be enforced practically by giving groups

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[130] The FDRE Constitution, Article 39(3).

[131] Van der Beken, Federalism and the Accommodation of Ethnic Diversity, supra note 73, p. 16.

[132] The FDRE Constitution, Article 52(2) (a).

[133] Jon Abbink, The Ethiopian Second Republic and the Fragile "Social Contract", *Africa Spectrum*, Vol. 44, No. 2, (2009), P. 15. [hereinafter Jon, The Ethiopian Second Republic and the Fragile "Social Contract"]

[134] Aalen, Ethnic Federalism and Self-Determination, supra note 56, p. 257.

their own zones or special Woreda (district) administration within the member states of the federation.

Administrations below zonal level have no legislative powers.[135] For this reason, it can be argued that the SNNPR state structure advances self-administration to nearly two dozen of NNP out of the 56 NNP recognized in the region.[136] The remaining 42 NNP who are residing in the region are allowed to have local government institution (Wereda administration) which consists of Wereda council, Wereda administrative council and Wereda court that functions at the local level. However, unlike the Zonal council, the Wereda council has no lawmaking power. Therefore, it may be argued that for the remaining 42 NNP of the region the constitutional promise for full self-determination is yet to be realized. In this regard, Getachew comments the following

> *... 'the rest recognized minorities in the state, numbering more than 35, do not have self-government apparatus, in the sense of a zone or special Wereda, owned by them individually or in few groups. They are either subsumed with in above zones or special Weredas, or are lumped together in two other mosaic zones called south Omo and Segen Peoples'*.[137]

This is perhaps one possible reason for a frequent quest for the formation of one's own Zone or special Wereda, which comes from various NNP of the SNNP region.[138]

Another point, which goes together with self-determination, is the issue of identity determination. It is clear that the entire regional states are characterized by extreme ethnic diversity. The quest for internal self-determination and to have separate identities is quite a frequent question in a region that is comprised of various NNP. The mandate to see identity based claims and self-governance issues are given to the state council in which the

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[135] *Ibid.*

[136] There are 56 ethnic communities that are recognized ethnic groups within the region for representation purpose. Each ethnic group has one representative in the council of Nationalities. With this formula, the 56 ethnic groups will have at least one representative, which counts to 56 representatives. Due to their population size some ethnic groups such as Sidama, Hadiya, Wolayita and Gurage Nations are representative by one additional representative. Therefore, the council of Nationality has total numbers of 64 seats.

[137] Getachew Assefa, Constitutional Protection of Human and Minority Rights in Ethiopia: Myth v. Reality, PhD Dissertation, Melbourne University, (2014), p. 102. [hereinafter Getachew, Constitutional Protection of Human and Minority Rights in Ethiopia].

[138] One can mention the Gofa Nation's claim to get its own Zone.

community concerned inhabits and House of Federation.[139] Moreover, identity based claims and self-governance claims are expected start from state council. As a result, the quest for identity and equality remains one of the biggest concerns among the various ethnic groups since this has already been granted and promised by the Constitution.[140]

Therefore, when regional states establish state administration that best advances self-government within their territory, they are expected to take into account the language, settlement pattern and identities of the community who are entitled to self-determination. It is also crucial for the states to determine the identity of every community in the region before setting the government structure. Thus, the mandate to determine identity of a given community is left to regional states where the community concerned inhabits.[141] Questions of identity determination that are submitted to a State Council shall be decided within one year.[142] However, in practice, a number of identity claims submitted to State Council have not received a decision in due time.[143]

Looking at these trends, Getachew commented, *"[t]he (sic) Southern state is completely against the recognition of both new ethnic groups and new self-government structure in the form of zones or special Weredas."* The recent speech of the Prime

[139] This mandate is given for the state council by HoF which it interprets the constitution following the Identity claim of Silte community decision. See, The House of Federation of Federal Democratic Republic of Ethiopia Decision of House of Federation on Identity claim of Silte community, *Journal of Constitutional Decisions*, vol. 1, No. 1, (2000) p. 41.

[140] The constitution grants and promises any community, which fulfills the requirement, stated in article 39(5). Article 39(5) of the FDRE constitution enumerates different elements the need to be fulfilled by a given community to be considered as Nation, Nationality or People. The entire parts of this sub provision read as follows: "A Nation, Nationality or People" for the purpose of this Constitution, 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 a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory".

[141] Such mandate is given for the regional council following the identity quest of the Silte case by the House of Federation. The House on its decision made it clear that the made to determine identity question is the power of the state council. On its decision, the House indicated that the regional state council to whom the claim is submitted is expected to, in the process of determination of this issue, conduct with direct participation of the community that raises the question, by secret ballot, in a free and fair manner and is attended by impartial observers. However, if community who invokes identity claim dissatisfied with decision of the state council or feel the decision of the state Council contradicts with the Constitution, they can appeal to the House of Federation.

[142] Decision of House of Federation on identity claim of Silte community, supra note 139, p. 41.

[143] Getachew, Constitutional Protection of Human and Minority Rights in Ethiopia, supra note 137, P. 147.

Minister also reinforces the same view. The primer on the statement he made during the meeting with academic staff gathering from various universities underscored that the quests for identity issues are long resolved.[144] In the presence of ample identity-related cases filed before the state council registrar, such a stand of the government tends to cast doubt on political commitment towards maintaining the initial objective of ethnic federalism plans and the promise of the Constitution to protect ethnic identity.

5.2 The Right to Equitable Representation in State Administration

Another component of the right to full measure of self-government is the right to equitable representation of the NNP in the government institutions, be it federal or regional state. Beyond the right, the federalism principle of shared power and federal union are achieved when federation units/ ethnic groups/ can exert sufficient influence in the federal institutions.[145] The Ethiopian federal system presents limited experience on the provision of equitable representation of the various ethnic groups in the executive line. The Constitution is silent regarding how this equitable representation can be achieved. In this regard, Abera observes

> *…the nation nationalities and peoples are entitled to fair representations in proportion to their numerical size in the country. Thus, in their structure, the different institution at the federal level including the executive and the federal civil services should mirror image of the ethnic profile of the country.*[146]

To prove the validity of such an assertion, one may look to the 2010 and 2015 executive cabinet appointments. The practice in those periods have disclosed that the executive is dominated by few nations irrespective their population size. These are Tigray, Amhara, Oromo, Wolayita, Gurage, Silte, Sidama, Hadiya, Somali, Afar nations.[147] The numbers of representative from NNP are presented in the table below.[148]

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[144] A speech made by Prime Minister Haylemariam Desssalgen during his meeting with academic staffs of various universities, on March 15/2016.

[145] Van der Beken, Federalism and the Accommodation of Ethnic Diversity, supra note 73, p. 16.

[146] Aberra Dagafa, The scope of Rights of National Minorities under the constitution of the Federal Democratic Republic of Ethiopia, Ethiopian Constitutional law Series, Vol.1 (2008), p. 132. [hereinafter Aberra, The scope of Rights of National Minorities].

[147] This observation is deduced from the information provided on the EPRDF website, available at, http://www.eprdf.org.et/, last accessed on 24 March 2016.

[148] *Ibid.*

No	Nationality	2010	2015	Change
1	Tigray	3	5	2
2	Amhara	7	8	1
3	Oromo	7	10	3
4	Wolayita	1	1	0
5	Gurage	1	1	0
6	Sidama	1	1	0
7	Silte	2	3	1
8	Hadiya	1	1	0
9	Somali	1	1	0
10	Afar	1	0	-1
Total		23	31	

It is true that of all the more than 80 ethnic groups in Ethiopia, all of them cannot be appointed as ministers. This triggers readers to ask the following question: In what way should power be shared among the different ethnic groups? An incidental question one may raise at this juncture is: Among those nations who are represented in federal executive offices, who outnumber those nations residing in the Benishangul-Gumuz and Gambella regional state, since those NNP who are residing in these regional states are not represented in the ministerial posts? Simple mathematical comparison of population size of Somali nation and Tigray or Silte reveals inverse relation between population size of nations and their representation in federal offices.

According to the 2007 Housing and Census, the total population of the Somalia region was 5.3 million; whereas, the total population size of the Tigray and Silte were about 4.9 million and 877,251 respectively.[149] With such population sizes, the Somali nation has one representative in the executive whereas the Silte nation, that counts one fifth of the Somali nation, has two representatives. This simply shows the allocation of ministerial posts and appointment for executive branch is not carried out based on population size of the NNP. This perhaps goes against one of the pillars of self-government enshrined in the Constitution, which points out that all NNP has the right to equitable representation in the government institutions, which includes the executive branch.

In this regard, Christophe Van der Beken argues that "executive is dominated by the four EPRDF affiliate regional states, i.e. the Tigray, Amhara, Oromia

[149] See the third Population and Housing Census, which was held in 2007.

and SNNR regional states."[150] He further argues that, "more than 19 of the 21 ministers (excluding those posts which have ministerial status) are from these regional states. The remaining two ministers are from Afar and Somali regional states. The other regional states such as Benishangul-Gumuz and Gambella have no representation in the federal ministerial positions."[151] According to Van der Beken, the constitutional guarantee for equitable representation of all NNP is limited to the parliament and the second chamber, HoF.[152] In this regard, the existing political context prevents a full operation of the constitutional provisions.[153] Hence, the constitutional indoctrination that entitles equitable representation the NNP in all branches of government including in the executive branches is less practiced.

Distribution of ministerial posts based on party affiliation and for regional states, rather than for the NNP, is in sharp opposition with the Constitution. The circulation of the executive lines within few ethnic groups goes against the promises of Ethiopian federalism. Emphasizing the same point, Getachew concludes the constitutional claim to have equable representation at the federal institution has not been brought into practical effect.[154] In sum, the above arguments show cabinet membership is allotted based on the party membership, loyalty to the EPDRF and the roles played in the party politics. For that matter, it is a noticeable fact that those personnel who are once in the cabinet post, remain in the executive for more than two terms. This could be among the major factors causing many of the NNP to be denied equitable representation.

The right of NNP to have equitable representation is not only limited to federal institutions, but also equally applies at regional state institutions too.[155] In this regard, the author of the piece presents the experience of the SNNPR state.[156] The council of the SNNPR state consists of two chambers: the State Council and Council of Nationalities.[157] The members of the first

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[150] Van der Beken, Federalism and the Accommodation of Ethnic Diversity, supra note 73, p. 16.

[151] *Ibid*.

[152] *Ibid*.

[153] *Ibid*, pp. 17-18.

[154] Getachew, Constitutional Protection of Human and Minority Rights in Ethiopia, supra note 137, p. 78.

[155] The FDRE and Revised SNNP Regional State constitutions, Article 39(3).

[156] The SNNP regional state which is presented in this section was purposely selected for investigation on the basis of its accessibility of the area to the writer of this piece.

[157] The SNNP Regional state constitution, Article 48.

chamber, the state council, are elected by universal and direct elections by means of the plurality system.[158] Like the HoPR, this electoral system results in the larger (more densely populated) state administrative district having many more representatives in the state council than the smaller ones. On the other hand, because of its specific composition, the Council of Nationality offers relatively equitable representation. Article 58(2) of the SNPPR state constitution stipulates that all the NNP have the right to be represented by at least one person in the state council. Article 58(2) adds that the NNP have the right to one additional seat for every one million of their population. These representatives are elected from the zones and special council. Pursuant to this provision, there are 56 recognized ethnic communities in the region that are entitled to representation. Each of these ethnic groups has at least one representative in the Council of Nationality. Based on this, the 56 ethnic groups have 56 representatives. Due to their population size, some ethnic groups such as Sidama, Hadiya, Wolayita and Gurage Nations are represented by additional representatives. Therefore, the Council of Nationality has a total of 64 seats.

This shows, like the Federal Houses, there is equitable representation of the NNP in the state councils. As far as the ethnic composition of executive council of the SNNP is concerned, two representatives each represent Sidama, Wolayita, Kefa and Gurage nations. The remaining, Silte, Halaba, Bench-Maji, Gamo, Hadiya, Yeme and Gediyo have one representative each.[159] The allocation of executive council posts seems fairly distributed across the NNP. The logical extension of this is that NNP are equally represented in the state administration.

6. Composition of the Military

Given the importance of a federal system in enhancing public participation, its institutional development should mirror the entire community, including minorities, in its legislature, executive and judiciary.[160] Consistent with this argument, Assefa argues that federal institutions should reflect existing diversity in the legislature, judiciary, civil service and the army *(Emphasis added)*.[161] This creates the impression that the more the ethno-nationalist

[158] The Revised SNNP Regional state constitution, Article 50(1).

[159] Interview with Aynekulu Gohtsebah, Information officer at Southern Natations, Natationality, Peoples Regional State, state council, Hawassa, (27 May 2016).

[160] Nigussie Afesha, Dual Constitutions and Concurrence of Constitutional Powers in Ethiopia: Who Has the Mandate to Determine Particulars by Law? *Bahir Dar University Journal of Law*, Vol. 4, No.2, (2014), p. 30.

[161] Assefa, Ethiopia's Experiment in Accommodating Diversity, supra note 17, p. 464.

forces see their image at the federal level, the more they will have the impression that they are part of it, and this makes various ethno-nationalist forces to remain loyal to the system.[162]

It is with this objective that the Constitution dictates the composition of the national armed forces to reflect equitable representation of NNP of Ethiopia.[163] The aim of the Constitution was primarily to establish an army, which would represent ethnic composition of Ethiopia. Very much linked to this point, the federal Constitution recognizes the fact that the military is kept appropriately distant from the politics by laying the ground for how government power is exercised and lost.[164] The assertion of the Constitution regarding how power is held and armed force to be headed, at least for administrative and political purposes, by a civilian minister, are indications for the divorce between the politics and the military in Ethiopia.[165]

The Constitution further indicates the overall responsibility of the armed force. The main responsibility of the armed force is to protect the sovereignty of the country and carry out any tasks, as may be assigned to them under any state of emergency declared in accordance with the Constitution. The Constitution warns the armed forces to carry out their functions free of any partisanship to any political organization(s).[166] Leenco Lata, in this regard, argued that "Making the composition of the officer corps as inclusive as possible is equally necessary in the experience of the states of the Horn of Africa because it could go a long way to dispel the current suspicion that the military favors a particular ethnic, religious or regional group."[167] A similar idea is indicated under the defence establishment proclamation. The proclamation reads "Defence Forces safeguard the country's sovereignty; embody a fair representation of Nations, Nationalities and Peoples and carry out their functions in a manner free from, political loyalties"[168]

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[162] *Ibid*.

[163] The FDRE Constitution, Art 87(1).

[164] Tsegaye Regassa, *Issues of Federalism in Ethiopia: Towards an Inventory of Legal Issues*, in Tsegaye Regassa (ed.) Issues of Federalism in Ethiopia: Towards an inventory of legal issues, Ethiopian Constitutional Series, (2009) p. 7. [hereinafter Tsegaye, *Issues of Federalism in Ethiopia*]

[165] *Ibid*.

[166] See article 87(3) of the FDRE Constitution.

[167] Leenco Lata, Constitutionalism, Self-determination and the African Union, constitutionalism and Human Security in the Horn of Africa conference, (2007), p. 43.

[168] Defense Forces Proclamation, Proclamation No. 27/1996, *Federal, Negarit Gazetta,* preamble of the Proclamation

Moreover, the proclamation consists of the major powers and functions of the minister and General Chief of Staff.[169] Despite laying down the major powers and functions of the minister, the proclamation is mute on the point that the composition of the military shall reflect the images of all the ethnic groups. It is unclear whether the system uses quota mechanism or proportional representation based on population size.

Having such a general remark in mind, if one looks at the practice with respect to composition of the officer corps of the Ethiopia army, two important aspects turn out to be crucial. The first one is the composition of the national defence force in general, and the second relates with the composition high-ranking officers. With regard to the ethnic composition of the entire military, there is an effort made to mirror the ethnic groups in the military. The table below shows the 'rough' configuration of regional states in the military of Ethiopia rather than equitable composition of the NNP.[170]

No	Regions	Year 1996/97	Year 2011
1	Amhara	25,111	30,343
2	Oromiya	21,357	25,205
3	SNNP	9,800	22,842
4	Tigray	39,896	18,580
5	Afar	0,963	0,449
6	Somali	2,361	1,289
7	Gambella	0,002	0,020
8	Harari	0,030	0,013
9	Benshangul-Gumuz	0,480	1,259
		98,525	99,518

Source: HornAffairs.com[171]

In relation to the composition of high ranking military Officers, Neamin argues there has been domination of minority ethnic elite in military,

[169] Defense Forces Proclamation No. 27/1996, Articles 23 and 24.

[170] The writer of this piece wants to bring one point to the attention of the reader that this table does not reflect the ethnic composition of the military at the grassroots level. This implies that one can make an inference how the military is composed of ethnically taking the ethnic composition of the regional states.

[171] HornAffairs.com (last visited on 5/24/16). NB: Here, I would like to bring two things to the attention of the reader. First, the source itself doubts completeness of the data which is presented in the table. Second, the website notes that "The size of active military personnel was estimated 138,000 in year 2008, according to the latest available data on the Stockholm International Peace Research Institute (SIPRI) and the World Development Indicators (WDI) databases."

intelligence and security services.[172] Citing Berhanu, Neamin claims that the single ethnic domination, which has been observed in the military, is contrary to the rule of the Constitution, which claims that the composition of military should reflect all the NNP. He refers to a comprehensive list of the key and commanding positions held by Tigreans in the military as an evidence for his contention. The list shows an ethnic group, which constitutes 6% of the total population controls 95% of the command posts in the military. He further adds

> *It is not possible by any kind of qualitative measurement for promotion – merit, experience, education and other criteria – that a single and minority ethnic group would have what it takes to hold 57 out of the 61 key and mission critical positions within the national military. Nothing can be further from the truth; the only thing that they have is their ethnicity and political loyalty to be able to totally dominate the military in such grossly disproportional ratio. This is the penultimate and most central point that comes out very loud and clear indeed.*[173]

In the same way, Getachew argues that "Due to the absence of rule and principles for ... defense, security, intelligence and economic institutions of the federal government are currently controlled by the powerful TPLF, catering for the Tigre ethnic minority, constituting only about 6% of the national population"[174] (emphasis added)

A potential reason for holding commanding positions in the army by Tigreans could be that the greatest number of the revolutionary fighters belonged to the Tigray during war with the previous regime, and they started struggle against the Derg regime earlier than others. The logical extension of this argument is that they already hold the commanding posts before other fighters joined them and they therefore continue in their dominance.

In informal dialogue with a retired higher military commander, the interviewee mentioned that the government decided those higher military commanders to be lowered by two ranks.[175] This was done to create the

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[172] Neamin Zeleke, Minority Ethnic Domination of the Military in Ethiopia, (2016), available at,

www.nazret.com/blog/index.php/tigres_dominate_the_military_in_ethiopia last accessed on 24 May 2016.

[173] *Ibid.*

[174] Getachew, Constitutional Protection of Human and Minority Rights in Ethiopia, supra note 137, p. 13.

[175] Informal discussion with a retired army personnel (Name, age and position remain confidential).

opportunity for other ethnic groups to appear in the higher military position. Despite this claim, many people still think that one ethnic group dominates the military. This is in sharp contrast with the principle of the Constitution, which promises the military to reflect the image of all the NNP.

Concluding Remark

During the last half of the 20th century, Ethiopia has witnessed three regimes: the Imperial, Derge and post 1991 regime. Each of them have had different policies with regard to ethnic and religious equality, accommodation of diversity, decentralization and building one economic and political community. Their policies and what they promise to the public are reflected in their respective constitutions. For instance, the FDRE Constitution rules out the keeping of the country together by force and provides the various ethnic groups the right to self-expression. The Constitution also promises all NNP may establish their own state, at any time, in their respective territory; promote their culture; have equitable representation in the state institutions (both federal and regional); and the military is also expected to mirror in its composition the image of all NNP of Ethiopia.

Although there are positive efforts that promote national unity, sideline moves, which shadow the aim of the Constitution to form one economic and political community, are also witnessed. On a positive note, *inter alia*, there are improvements in access to education, health and infrastructure in the entire regional states, which may be cited as the best moves to maintain one political community. However, despite such success stories and achievements in maintaining national unity, there are incidents that repudiate the moves to form one economic and political community. In this regard, the celebration of the martyrs of Chelenko in Harari regional state realm might, in some cases, give rise to internal tensions.

The Constitution promised that all the NNP may promote, develop and use their own languages for education and self-administration. As a result, out of some 80 local languages spoken in the country, 19 are now used for such purposes. This is clearly a major achievement that strengthens the argument that the Constitution is living up to its promise. Conversely, although the Constitution has promised that all NNP, which do not yet have their own region, may establish their own regions, the political environment on the ground is not conducive for smooth exercise of this constitutional right. One can see the frequent requests of the Sidama Nation in the SNNP and Berta Nation in Benishangul-Gumuz regional states for the formation of their own regional states.

Another promise of the FDRE Constitution is the right to full measure of self-government of the NNP, which encompasses the right to establish government institutions and receive equitable representation in government institutions. Once the federal system is established, the Constitution dictates and empowers the regional government to sketch the state structure in the way that best advances the rights of the NNP who are residing in their respective territories. In so doing, those ethnic groups who are not able to establish a state within the regional state they inhabit could attain self-administration of their own below the regional government. This particularly applies to small or medium-sized ethnic groups. In this regard, the Ethiopian federal system has some achievements as it establishes self-government at the zonal level for around 30-40 NNP across the nine regional states. The other recognized NNP have no self-government apparatus at the zonal and special Wereda levels.

As far as composition of the Ethiopian army is concerned, there are two ways of looking at the matter. The first aspect is the composition of the entire military at grassroots level, and the second concerns the composition of general officers. In relation to the composition of the higher rank military officers, there has been a domination of minority ethnic elite in military. This is in sharp contrast with the principle of the Constitution, which promises the military to should reflect the image of all the NNP.

To recap, there are constitutional promises which are enforced reasonably and those which remain largely in theory. The promises that fall under the latter (those which remain only as promises) are new regional state formation, equitable representation in the federal and state government institution, composition of national defence. Leaving these constitutional promises unfulfilled will hinder the move to establish a multiethnic community founded on equality and rule of law. The government should tackle the aforementioned limitations in the following ways. With regard to new regional state formation, the government has two options to handle the matter: either it allows the NNP to exercise the right to unconditional state formation as vividly promised by the Constitution, or it shall amend the Constitution that claims to allow unconditional new state formation. Therefore, the Constitution shall incorporate some conditions like "serous cause", the fulfillment of which is required to the exercise of the right to establish one's own regional state. As far as equitable representation in the federal and state government institution is concerned, there should be legislative measures that clearly show how various NNP are well represented in all levels of the government institution, be it through quota system, on base of population size or a sum of the two. Yet another very central issue is the

ethnic composition of the military. Where the composition of army is concerned, there should be quota system to make the composition of the officer corps as inclusive as possible and to bring several NNP in the administration position of the army and hold key and commanding positions. In doing so, we can dispel the current suspicion that the military favors a particular ethnic group.

Enhancing the Representativeness of the Ethiopian Electoral System: A Case for a Mixed Member Proportional (MMP) Electoral System

Temesgen Sisay[§]

Abstract

Electoral systems can be understood as a means by which popular votes can be converted into parliamentary seats on the basis of a scheme designed for this purpose by respective states. As specific contexts obviously vary, states are free to design an electoral system that best fits their particular realities. Designing an appropriate electoral system, however, essentially involves balancing its representativeness and accountability objectives. The purpose of this article is to investigate the salient features of the dominant electoral systems which are being practiced in major democracies of the world and identify a system that appropriately fits the Ethiopian context. Based on critical analysis of the majoritarian and proportional electoral systems and appraisal of the existing Ethiopia's electoral system, it is argued that a Mixed Member Proportion (MMP) electoral system, which is an aspect of a mixed electoral system, best fits the Ethiopian situation as it can ensure representativeness and accountability together.

Keywords: Electoral System, Majoritarian, Proportional, First Past the Post, Mixed Member Proportion, Plurality.

Introduction

The existence of a well designed appropriate electoral system is an important democratic tool that helps translate popular votes into parliamentary seats in an appropriate and effective manner. A well designed and structured electoral system helps address the issues of how people express their views, how electoral districts are organized and how seats are allocated in proportion to popular votes secured by political parties. In addition to translating electoral votes into parliamentary seats, it also has a profound role in shaping the democratization process of countries.[1] The concept electoral systems is used to refer to a very specific set of norms and procedures used in an election to decide how the electorate chooses those who will hold the positions either

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[1] Horowitz, D., A *Democratic South Africa? Constitutional Engineering in a Divided Society*, University of California Press, Berkeley, 1991, p. 20.

through party candidacy line or in individual based candidacy. The electoral system as a means for exercising democratic principles and as democracy means more than holding an election; the processes must be free, fair and competitive in order to give equal opportunity to all participants involved.

There are certain types of electoral systems which are predominantly implemented in different democracies of the world. These electoral systems are designed by considering the specific contexts and realities of countries. Among the major electoral systems, the *majoritarian* and proportional electoral systems are the most common. According to reports, *majoritarian* representations are higher in the number according to population size as the major implementers of this system are highly populous like India and China.[2] However, in a number of countries, the proportional system is dominantly implemented by the majority of countries around the world. The Federal Democratic Republic of Ethiopian Constitution (FDRE) indicates that Ethiopia has introduced a plurality[3] or First Past the Post electoral system which is one component of *majoritarian* system. In this electoral system, a candidate is only required to get the highest number of votes among the candidates to be declared as winner unlike an absolute majority vote.

The purpose of this article is to explore whether the existing electoral system in Ethiopia accommodates the question of accountability and representativeness that an ideal electoral system needs. Moreover, this article forwards an alternative system that could address the limitations of the Ethiopian electoral system that have been witnessed in the past elections.

This article proceeds as follows: first, it revisits and discusses the major electoral systems that are implemented in different countries and shows their strengths and weaknesses. Next, the article explores the electoral history of Ethiopia since the introduction of the first written constitution in 1931 and continues by discussing the nature of electoral system introduced under the current Ethiopian constitution. Finally, it suggests an electoral system that would fit the existing reality of the country.

1. Overview of Electoral Systems

The choice of electoral system and building electoral institutions is the most important decision for any democracy as electoral systems play a significant

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[2] Reynolds, A., Reilly, B. et al, *The International IDEA Handbook of Electoral System Design*, International Institute for Democracy and Electoral Assistance, Sweden, Stockholm, 2005, P.31 (here in after Reynolds).

[3] The Constitution of The Federal Democratic Republic of Ethiopia, 1995, Article 54(2), Federal Negarit Gazeta, Year 1, number 1.

role in influencing the outcome of the election[4] and shaping the nature of the democracy itself. Therefore, any given choice made about a particular electoral system will have an effect on the future political life of the country concerned, and electoral systems, once chosen, often remain fairly constant as political interests solidify around and respond to the incentives presented by them. The nature of electoral law introduced in a certain country will have an impact on the political atmosphere present in that country. As Benoit rightly pointed out, "electoral systems decide how votes are converted in to seats."[5] In this case, the electoral systems implemented in any political environment will shape the number and size of political parties that could win seats both in national[6] as well as local legislatures. An electoral system is a means that converts the votes cast in an election into seats and political positions won by the contestant political parties and individuals in a given political environment.[7] The electoral system may not always shape the nature of politics and political forces in the polity. Rather, it may also be influenced and shaped by political forces running in the country as these forces will strive to introduce an appropriate electoral system that benefits them more.[8]

That is the reason why there has been a wave of constitution-building following the explosion of new democracies in Central and Eastern Europe, Latin America, Asia, and Africa[9]. In these states, the choice of an electoral system generated heated debates, which must necessarily be resolved before

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[4] Lijphart, Arend,. The Political Consequences of Electoral laws, 1945-1985, American Political Science Review, vol. 84, No.2, 1990, p. 485.

[5] Kenneth, Benoit., Electoral Laws As Political Consequences : Explaining the Origins and Change of Electoral Institutions, Annu. Rev. Polit. Sci., 2007, p. 364 online available at http://www.annualreviews.org/journal/polisci last accessed on 12/2/16.

[6] A proportional representation electoral system that is being implemented in Germany, Turkey and Netherlands significantly influences' the size and number of political parties that join the legislature through the introduction of the concept of minimum threshold. As there is no uniform application of the concept, in Turkey, a political party will not join the legislature unless it secures minimum of 10 % of the seats in the legislature. In Germany, minimum threshold of 5 % is required to secure seats in the legislature. However in the Netherlands, a minimum threshold of 0.67 % is required to join the legislature.

[7] Supra note 2, Reynolds p. 31.

[8] Supra note 5, Kenneth, p. 364.

[9] Huntington, S., The Third Wave: Democratization In the Late Twentieth Century, University of Oklahoma Press, Oklahoma,1993, p.32. available at https://www.ou.edu/uschina/gries/articles/IntPol/Huntington.91.Demo.3rd.pdf last accessed on 2/19/2017.

other constitutional issues could be settled. During the 1990s, dialogue about the electoral system moved from the margin to mainstream on the political agenda. This move brought growing attentiveness to the fact that electoral rules are not neutral: the way votes are changed into seats means that some political groups are ruled into the policymaking process while others are ruled out. The core agenda is concerned with whether countries should adopt *majoritarian* systems which prioritize government effectiveness and accountability, or proportional systems, which promote greater fairness to minority parties and more diversity in social representation. Those dissatisfied with the status quo have increasingly turned towards "constitutional engineering"[10] or "institutional design"[11] to achieve their ends. Electoral systems are important institutions of democracy that convert voter preferences into collective choices. Moreover, in the modern sense in which legitimacy is primarily assumed to derive from democracy; it is possible to conclude that representative democracy would have been impossible without having electoral systems as an instrument.

Elections are used to choose heads of state, heads of government, and members of the legislature, as well as a variety of other offices in political democracies. Chief Executives can be elected via *direct*[12] or *indirect*[13] means. In a direct election, voters cast ballots directly for a set of eligible candidates. In an indirect election, a group of electors are selected who then elect the President. In other countries, such as Ethiopia[14] and Italy, the President is elected by parliament though he/she is not a chief executive.

[10] Sartori, G., Comparative Constitutional Engineering. London, Macmillan, 1994, p. 95.

[11] Lijphart, A, and Waisman, C.H., Institutional Design in New Democracies, Boulder, CO, Westview Press, 1996, p. 45.

[12] Political systems that use direct elections of the president include France, Russia, and Argentina among others.

[13] For instance, the United States employs an indirect method for electing the President, where voters (or state legislatures) select presidential electors, who then comprise an *Electoral College.* These electors then select the President. Although generally the Electoral College reflects the popular vote, this has not always been the case in the history of the United States. The most recent example of this being the highly contested 2000 election where the Democratic candidate Al Gore had more popular votes than the Republican George W. Bush, but the latter had more electoral college votes – and was subsequently elected. Even in the recent election, Hilary won popular votes but lost the presidency as well.

[14] In Ethiopia, the scenario is different as the power to elect the nominal president is given to the joint Houses, the House of Peoples Representatives and the House of Federation.

2. Major Electoral Systems

There are different electoral systems that are applicable in different democracies. These electoral systems differ from country to country and are diverse in their nature. The most common mechanism through which to examine electoral systems is by looking into how they translate popular votes won into legislative seats. In other words, we need to look at both the votes-to-seats relationship and the level of wasted votes. Ever since the influential work of Maurice Duverger[15] and Douglas Rae[16], the literature has classified the main types of electoral systems and sought to analyze their consequences. Accordingly, the plurality/majority system, proportion representation system and the mixed system are the major and most commonly applicable electoral systems in different parts of the world; this article focuses on the first two electoral systems.

2.1. *Majoritarian* Electoral Systems

A worldwide survey found that 96 (35.56%) out of 270 countries use *majoritarian*/plurality systems of election.[17] This is the oldest electoral system, dating back at least to the 12th Century; it is also the simplest system of election. In this system, after votes have been cast and totaled, those parties or candidates with the higher votes are declared the winners. Moreover, this electoral system is commonly used in *single-member district.*[18] In the case of First Past the Post (FPTP), sometimes referred as a plurality single member district, the winner is the candidate with the most votes, but not necessarily an absolute majority of the votes. When the FPTP system is implemented in a multi-member district[19], it is referred as a Block Vote.[20] In this system,

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[15] Duverger , Maurice., What is the Best Electoral System? " in Lijphart and Bernard, (eds.) *Choosing an Electoral System: Issues and Alternatives* , New York : Praeger, 1984.

[16] Rae, D., The Political Consequences of Electoral Laws New Haven, Yale University Press, 1971, p. 35.

[17] http://www.ipu.org/parline-e/ElectoralSystem.asp?REGION=All&typesearch=1&LANG=ENG, last accessed on 11/20/16.

[18] Single-member district is an electoral system from which only one member is elected to a legislature or elected body.

[19] Multi-member district is a district from which more than one representative is elected to a legislature or elected body.

[20] Block Vote is a plurality majority system used in multi-member district in which electors have as many voter as there are candidates to be elected and voting is candidate centered.

candidates are declared as winners regardless of the numbers and percentage of votes they received from voters.

A *majoritarian* system, such as the alternative vote and the two-round system, try to ensure that the winning candidate receives an absolute majority. Each system in essence makes use of voters' second preference to produce a winner with an absolute majority if one does not emerge from the first round of voting. This category can be subdivided into those requiring candidates to win a plurality, or an absolute majority (50+ percent) of votes to be elected and these are the most commonly applicable *majoritarian* systems as briefly discussed below.

2.1.1. Plurality Elections/First Past the Post

Among the *majoritarian* electoral systems, a plurality election system (also referred as First Past the Post system), is the simplest form of election system that uses single-member district and candidate-centered voting. The aim of the First Past the Post systems is to create a 'manufactured majority', that is to exaggerate the share of seats for the leading party in order to produce an effective working parliamentary majority for the government, while simultaneously penalizing minor parties, especially those whose support is spatially dispersed. This system focuses on the creation of effective government through dominant and majority party in the parliament and does not pay attention to representation of voters in the legislature. Voters will select only one among the names of the nominated candidates from a list and the winner will simply be the person who receives most votes; in theory she could be elected with two votes, if every other candidate only secured a single vote. As a result, the leading party boosts its legislative base, while the struggling parties gain meager rewards. The focus is effective governance, not representation of all minority views. The basic system of simple plurality voting in parliamentary general elections is widely familiar: countries are divided into territorial single-member constituencies; voters within each constituency cast a single ballot (marked by a X) for one candidate; the candidate with the largest share of the vote in each seat wins the office; and in turn the party with an overall majority of seats forms the government.

In this system, candidates usually do not need to pass a minimum threshold of votes, nor do they require an absolute majority to be elected, instead all they need is a simple plurality i.e. one vote more than their closest rivals. Hence, in seats where the vote splits almost equally five ways, the winning candidate may have only 25% of the vote, while the other contestants get 20%, 20%, 20% and 15% respectively. Although two-thirds of voters supported other candidates, the plurality of votes is decisive. In this system, the party's share of

parliamentary seats, not its share of the popular vote, counts for the formation of government. A government may also be elected without a plurality of votes so long as they have a parliamentary majority. Due to this, research conducted by Lijphart shows that this system is less representative than PR systems.[21] In addition, it will create a constitutional authoritarian government that secures government position without adequate popular representation.

The plurality system is used for election to the lower chamber in different countries including the United Kingdom, Ethiopia, Canada, India, the United States, and many Commonwealth states. In Africa, 15 countries[22], mostly former British colonies, use FPTP systems. David Farrell, in his study of electoral systems, notes that although the trend has moved away from FPTP, it still remains the most commonly used system in population terms.[23] In terms of the number, the countries using plurality systems are fewer, though in terms of population size, these systems represent more people as the most populous countries including China and Russia are using plurality systems.

The plurality election system is praised by its proponents on the following grounds. The primary reason for the preference of this system over other systems is its simplicity. Due to its simplicity nature, the plurality electoral system provides a clear-cut choice for voters between different parties and voters will have the chance to simply elect among the contestants. Moreover, in plurality systems there will be clarity of responsibility and democratic accountability by giving voters in each constituency the chance to hold their representative responsible.[24] In addition, this system is believed to enhance constituency service, in that the electorate can call upon individual representatives to directly address their concerns. This alone will help the system produce winners who are representatives indebted to defined geographic areas.

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[21] Lijphart, A., *Patterns of Democracy: Government Forms and Performance in Thirty six countries*, Yale University, USA, 1999, p. 162.

[22] Among 28 courtiers that are using majority systems in Africa, 15 countries are using First Past the Post system, available at http://www.ipu.org/parlinee/ElectoralSystem.asp?LANG=ENG&REGION_SUB_REGION last accessed on11/20/16.

[23] Farrell, D., Electoral Systems: A Comparative Introduction, London, Macmillan, 1998, p. 13.

[24] Supra note 15, Duverger.

The plurality system, among other *majoritarian* systems, is also preferred for its contribution to establishing a single party government. Due to the formation of single party government, coalition governments will become exceptions rather than the rule. This will help to establish cabinets which are not shackled by the restraints of having to bargain with a minority coalition partner. Moreover, plurality systems are also preferred over the other systems because they create links between constituents and representatives.[25] In this context, candidates to be elected clearly represent defined areas of the cities, towns or regions rather than party labels. The geographical accountability implemented in plurality system is more important and sensible in those developing countries which have predominantly agrarian and nomadic societies who value candidates who belong to their tribe.

On the other hand, plurality election systems are criticized on different grounds. The plurality election system is criticized in that it does not ensure fair representation for smaller political parties as they are generally dominated by the largest ones. This happens when, for example, a political party or an individual candidate that wins a maximum of, say, 15 percent of the votes, should win a maximum 15 percent of the legislative seats in both the national and regional legislatures, at least in principle. However, the plurality election system can totally prevent smaller political parties from having seats in the legislature and deny them from having a fair representation comparative to their votes in the legislative offices.[26] The system gives overall votes to a single winner by rejecting smaller political parties who should deserve fair representation in both the national as well as local legislatures. This system is believed to be intentionally designed to represent only one part of the public, those who vote for the winning candidate in an election. Everyone else, who may make up 20%, 30% or, in some circumstances, even the majority of voters in a district, gets no representation. Based on this

Plurality elections are also criticized for excluding women from representation especially in the male-dominated party structures. This system affects women's ability to be elected to the legislative offices in both the national as well as local legislatures. Recent studies show that the number of women parliamentarians has increased from over time due to the move from

[25] Supra note 7, Reynolds p. 36.

[26] In the 1993 federal election in Canada, the Progressive Conservative won 16% of the votes but only 0.7% of the seats in the Parliament. Moreover, in the 1998 general election in Lesotho, the Basotho national Party won 24% of the votes but only 1% of the seats in the parliament.

majoritarian to proportional representation systems.[27] According to the study, the result from low to high participation of women in the parliament is shaped by the use of an open-list proportional electoral system, a method requiring voters to choose a single candidate on a party list.[28]

Moreover, the plurality system is criticized for its contribution for the proliferation of ethnic or clan based political parties who base their electoral campaigns and policy platforms on conceptions that are attractive to the majority of people in their region but exclude or are hostile to others who do not belong to their ethnic group or clan.[29] This has been an ongoing problem in African countries like Malawi, Kenya and Ethiopia[30] where large communal groups tend to be regionally concentrated. These countries will thus become divided into geographically separate party strongholds, with little incentive for parties to access voters outside their home region and cultural-political base. In this context, other political parties that are established outside the specific ethnic group will have no place whatever their policy and program seems sound. This is strongly noted by Douglas J. Amy in his writing about the American plurality system as an unrepresentative system. He said:

If you are a Republican in a predominantly Democratic district (or vice versa), an African-American in a white district, or a minor party supporter in any district, then you are usually shut out by our current election system. Your candidate is unlikely to win and you will have no one to speak for you in the legislature. The motto of the MTV get-out-the-vote campaign has been "Choose or Lose". But in winner-take-all elections, many voters choose and still lose - it's inevitable.[31]

Vote wastage is also another limitation of plurality systems as it leaves a large number of votes unaccounted for and the wasted votes do not go towards the

[27]Inter Parliamentary Union Study of Women in Parliament: 20 years in review. http://www.ipu.org/english/home.htm last accessed on 11/12/2016.

[28] *Ibid*.

[29] Supra note 25, Reynolds p. 39.

[30] In Ethiopia, there are nearly seventy nine political parties that are registered by the National Electoral Board of Ethiopia and the majority of these political parties are ethnic based. Moreover, in the past 2010 Ethiopian election, all most all these political parties have been registered and involved in the election, available at http://www.electionethiopia.org/en/political-parties/active-political-parties.html last accessed on 11/12/2016.

[31] Douglas, Amy., The Case for a Better Election System, Crescent Street Press, 1997, p. 13.

election of any candidate or political party. It has been proven by researchers that approximately 33% of votes were wasted; cast for candidates that lost in the 2002 elections for the United States House of Representatives and also above 24 million voters came away from the voting booth with no one to represent them in the House.[32] This is even more dangerous when it is coupled with regional fiefdoms as minority parties; supporters in such a region may begin to feel that they have no realistic hope of ever electing a candidate of their choice. This wastage of votes alone may create a distorted representation in politics as some political groups get more representation than they deserve and others get less.

Moreover, plurality election systems may create regional fiefdoms in a certain polity when one party wins all the seats in a province or area. If a party has strong support in a particular part of a country, winning a plurality of votes, it will win all, or nearly all, of the seats in the legislature for that area. This both excludes minorities in that area from representation and reinforces the perception that politics is a battle ground defined by who you are and where you live rather than what you believe in.

2.1.2. Absolute Majority/The Two Round System

This is another form of *majoritarian* representation system implemented by different countries which is also referred as a "run-off" or "double-ballot" system. In this system, the first round is conducted in the same way as a normal First Past the Post (FPTP) election and if there is a candidate that receives an absolute majority of the vote (50 +1 of the total voters), then he/she will be automatically elected without waiting until the next round. However, if there is no candidate that receives the required absolute majority result, all but the leading candidates will be eliminated and a second round of voting will take place.

There is no uniform rule or standard regarding how the second round should be implemented and it differs from country to country. In France, for example, elections to the legislature are conducted using a two-round voting system and the first stage is similar to FPTP in the USA and Ethiopia in that the voter casts one vote for their favored candidate. However, if a candidate receives an overall majority of the votes then they are elected.[33] In due course, if no candidate reaches this threshold then a second round of voting takes place a week later. To participate in the second round election, the candidate should secure at least 12.5 percent of registered voters. What makes the

[32] *Ibid*.

[33] Constitution of the Republic of France, October 4, 1958, Article 7.

second round so unique is that, to be declared a winner, simple plurality is sufficient for a candidate. At the same time, a two round system of election is also applicable to elect the President in France.[34] This electoral system has the advantage of establishing a legitimate government which is acceptable by the majority. This happens when the competition is between two candidates. When the competition occurs between two candidates, there is a possibility of forming a government which is legitimatized and backed by majority of electorates.

Moreover, the absolute majority electoral system helps to exclude extremists and minority parties in the political forum and finally it reduces the risk of vote splitting. Even if it promotes a coalition government, this coalition may not be formed among minority political parties. On the other hand, the absolute majority electoral system is difficult to manage and costly to use. The management of the second round election creates an additional administration burden on the electoral officers as well as the electorates. To handle the administration of the second round run-of, resources are needed and it is doubled compared to the FPTP.

2.2. Proportional Representation System

Proportional representation is an electoral system that decides the composition of a parliament/ legislature by allocating seats on the basis of the number of votes each party receives. Rather than the winner-take all approach of the *majoritarian* systems, proportional representation ensures that votes carry equal weight and in order to do this, multi-member constituencies are used. Therefore, each party gets the same proportion of seats as the proportion of votes it receives in the election. If Party X receives 40% of the popular vote, it would get 40% of the seats. If Party Z acquires 25% of the popular vote, it would get 25% of the seats. If Party Y gets 30% of the popular vote, it would receive 30% of the seats. It is possible to understand from the above point, that proportional representation is a common term for all the systems of election which seek to relate seats to votes cast by the electorate in accordance with party or candidate preference.

In this electoral system, a single electoral province will have the chance to elect more than one representative. The size of this area can vary according to the system, ranging from the size of the whole country to county or local vicinity.

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[34] *Id*, Article 42.

This means proportional representation is a voting system whereby successful parties gain seats in a country's legislature in direct proportion to the number of votes they accrue at an election.[35]

There are different types of proportional representation systems in which the seat distribution system is allocated. In some of the systems, like Israel and Netherlands, seats are determined based on considering the overall votes casted in the nation[36]. On the other hand, in Germany, Finland and Switzerland, seats are allocated within regionally-based multi-member districts.[37] The unique nature of this electoral system is that electors usually (not always) do not choose among individual candidates. Rather, they are more likely to just vote for the party.

The main issue to be considered in proportional representation system is threshold of representation as it is required to secure the minimum level of support to join the legislature. The issue of managing threshold differs from system to system. In some countries, like Germany, New Zealand, and Russia, a minimum threshold of 5% is required for a political party to join the legislature. In Germany alone, the minimum threshold applicable for the national legislature and the European parliament is not the same. The 5% minimum threshold applicable for the national legislature has been reduced to 3% to the European Parliament in 2013.[38] The German Constitutional Court declared the previous 5% electoral threshold unconstitutional justifying that, "the functions of the EP and in particular the fact that it does not need to sustain an EU government by means of stable majorities – do not justify the restriction of the principles of equal suffrage and of equal opportunities for political parties."[39] On the other hand, in Netherlands and Turkey, a minimum threshold of 0.67% and 10% is required to join the winners list respectively. This indicates that parties which gain less than this percentage of the vote are excluded from the count and their vote is distributed to other winning political parties based on the formula provided.

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[35] Supra note 29, Reynolds p. 57.

[36] Report on Proportional Representation by Elections Prince Edward Island, 2002 available at, http://www.gov.pe.ca/electiion last accessed on 11/25/16.

[37] *Ibid*.

[38] European Parliamentary Research Service, Electoral thresholds in European elections Developments in Germany. available at, http://www.eprs.ep.parl.union.eu last accessed on 11/25/16.

[39] *Ibid*.

Though there are many types of proportional representation systems, the most applicable ones are list proportional representation and single transferable vote systems.

2.2.1. List Proportional Representation

List proportional representation systems are the most applicable and the simplest types of proportional representation systems. In this system, each political party presents a list of candidates based on their order to the electors. The electors actually vote for a party rather than an individual candidate. The number of seats each party receives is proportional to the share of the national vote it receives. The winning candidates are taken from the list in the order that their names appear on the list. The list provided in this electoral system could be either an open or closed list. In a closed list system, the order of candidates elected by that list is fixed by the party itself, and voters are not able to express a preference for a particular candidate.[40] Voters do not have a choice among individual candidates and the choice of individual candidates is pre-determined by the political party whom candidates are representing. In the closed list system, parties have the chance to be represented by the minority groups. On the other hand, voters can indicate preferential candidate within that party in an open list proportion representation system. In this system, the vote for a candidate as well as a party is optional. Voters are entitled to mark their ballots for both the parties and candidates.

In this system, the entire country may be considered as one constituency or, if the country has a federal system, different constituencies may be established in the same country. For example, Israel and the Netherlands are two countries which use the present form of list proportional representation as the entire country forms one district or constituency.[41] In these countries, the first name on the party list is usually the leader of the party and will be the first member of that party to be elected. In Germany however, regionally–based, multi-member districts are established rather than considering the whole country as one constituency or electoral district.[42]

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[40] The South African electoral system is a closed-list proportional representation system, and a general election is held every 5 years. At the general election, voters elect the national and provincial legislatures simultaneously. Please see, http://hsf.org.za/resource-centre/hsf-briefs/the-south-african-electoral-system last accessed on 11/25/16.

[41] Supra note 36.

[42] *Ibid*

A list proportional representation (List PR) system has advantages over the other types of proportional representation systems. This system helps to have a diversified legislature that includes minority groups.[43] This is because parties can be encouraged by the system to prepare balanced candidate lists which appeal to a whole spectrum of voters' interests. This system also creates a more friendly environment for women than other electoral systems.[44] In this system, political parties are entitled to provide list of women candidates still basing their choice on other policy matters than gender. According to Inter Parliamentary Union report, in 2016 there were 10502 (22.95%) women and 35256 (77.05%) of men in all parliamentary structures in the world.[45] Among women legislatures, the majority of them are elected through proportional representation system using a List PR. Rwanda is among those emerging democracies with the highest number of women parliamentarians in the world. According to the report of Inter Parliamentary Union, Women are majority in the Rwandan lower Chamber which consists of 51 seats (63.75%) out of overall 80 legislative seats.[46] The number of women has increased in Rwandan parliament as the nature of electoral system is proportional.[47] In Sweden also, the number of women legislatures has been increased due to the change in the nature of the electoral system. Recently, Sweden introduced List PR system and the proportion of women legislatures reached 43.6% of the total legislatures.[48] This shows that, proportional representation system is more accommodative and friendly for women legislatures than any other electoral system.

On the other hand, the List PR system is criticized by its opponents as it may create a weak link between elected legislators and their districts. Moreover, the problem may worsen if the list is closed rather than open. Where the lists are

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[43] Lardeyret, G., The problem with proportional Representation, *Journal of Democracy*, Volume 2, Number 3 (30-35)., The John Hopkins University Press, 1991, p. 90.

[44] Krook,, M. L. , *Quotas for Women in Politics.* New York: Oxford University Press, 2009, p. 100.

[45] Please see http://www.ipu.org/parline-e/WomenInParliament.asp?REGION=All&typesearch=1&LANG=ENG last accessed on 11/26/16.

[46] IPU (2016), available at, http://www.ipu.org/parlinee/WomenInParliament.asp?REGION last accessed on 11/26/16

[47] The Constitution of the Republic of Rwanda, 26 May 2003, Article 77. (...the members of the Chamber of Deputies shall be elected for a five-year (5) term by direct universal suffrage through a secret ballot using a system of proportional representation.)

[48] Women in National Parliaments, situations as of November 2016, available at, http://www.ipu.org/wmn-e/classif.htm last accessed on 11/26/16.

closed, voters have no chance of deciding the identity of persons who will stand for them and no exclusive representative for their electoral constituency, nor can they easily reject an individual candidate if they feel that he or she may not efficiently represent them.

2.2.2. Single Transferable Vote (STV)

This electoral system is used in multi-member districts and the voters are entitled to rank the candidates in order of preference in the same manner as is done in the alternative system. In fact, the single transferable vote is not purely a proportional system but it does produce a more diverse legislature.

In this system, each ballot has a value of one vote and it moves among candidates as determined by the elector's preferences and electors vote for candidates and not the party. Since electors only vote for individual candidates, rather than political parties, it allows for individual candidates to run in the election. To implement a single transferable vote electoral system, voters are given a ballot listing all the candidates for the district in which the elector casts his or her vote. The voter then ranks the listed candidates in order of preference by placing a ranking number (1, 2, 3, 4...etc) beside their favorite candidate. This system therefore allows voters to cast among individual candidates instead of the party list or one party. In most cases, this preference marking is optional, and voters are given discretion to rank all in an order or to mark only one candidate. The choices indicated on the ballot are then counted and the winners are elected by use of a mathematical formula. These days, single transferable vote is only being used in a few territories where there has been British rule and the counting of the votes casted under this system is extremely complicated and the result is determined through a series of counts.[49]

3. Mixed Systems

Mixed electoral systems, as the name indicates, combine both the positive sides of plurality and proportional electoral systems. It combines single member and party list constituencies from the *majoritarian* and proportional electoral systems respectively. This electoral system is the result of a long time debate over the issue whether an electoral system should meet the objective of

[49] Supra note 36. Single Transferable Vote has been used in the Republic of Ireland since 1921 and was established to protect the country's religious denominations. It has also been used in Malta since 1947 and is used in Tasmania for its House of Assembly.

strong and accountable government or inclusion of minority voices to ensure representation.[50] Mixed systems differ in terms of whether they are independent or dependent. An independent mixed system, often referred to as a parallel system, is one in which the *majoritarian* and proportional components of the electoral system are implemented independently of one another. On the other hand, a dependent mixed system, often referred to as a mixed member proportional system, is one in which the application of the proportional formula is dependent on the distribution of seats or votes produced by the *majoritarian* formula.[51] These two types of mixed systems, MMP and Parallel systems are discussed below.

3.1. Mixed Member Proportional (MMP)

As its name indicates, a mixed member proportional (MMP) electoral system combines various elements of plurality or majority systems and proportionality systems. Voters in a single-member electoral district cast two votes: one to directly elect a member to represent their constituency according to the FPTP system, and a second for a party, according to a previously established list of candidates, similar to the List PR system.[52] This system takes the strong sides of both FPTP and proportional systems. In doing this, MMP system keeps the proportionality benefits of proportional representation systems and it keeps the benefits of the FPTP system in that electors have their own members. The MMP system also gives electors more choice as each elector has two votes, one for his or her local member and one for the party. In this system, some of the members of the legislature are elected by the FPTP system, and the remainders of the members are elected by the PR List system. Under this system, both the PR and FPTP election systems have their own objective why they are chosen and the reason is that the PR seats are awarded to compensate for any unproportionality produced by the district seat results.

This can be a simple calculation– a national list divided among the parties according to their second-ballot vote shares – or a complex allocation of local seats. The number of plurality representation seats won is subtracted from its total entitlement of the party. If the party has fewer seats than its rightful

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[50] Pippa ,N., For *Contrasting Political Institutions* special issue of the *International Political Science Review,* Harvard University Vol 18(3) July 1997: pp. 297-312.

[51] Massicotte, L. &, Blais, A., Mixed electoral systems: a conceptual and empirical survey. Electoral Studies 18, Pergamon, 1999, pp. 341–366.

[52] Erin, Virgint. , Electoral Systems and Women's Representation, Publication No. 2016-30-E, 5 July 2016, available at, http://www.lop.parl.gc.ca/Content/LOP/ResearchPublications/2016-30-e.html#a6 last accessed on 11/26/16.

share, it is awarded enough List-PR seats to make up the difference. However, if the political party has more district seats than its mathematical share, which can simply happen, where one party is particularly strong in a given area or across the country, it is allowed to keep them; but it does not receive any list seats.[53]

In this system, the proportion of seats allocated according to the two elements of the system varies from country to country. The system was put in place first in West Germany by the occupied powers in 1949 and was unique to the world till recently, and variations of it have been adopted by many countries since then.[54] It is basically the same system as has been adopted by New Zealand[55], Italy, Scotland and Wales in just the last few years.

In Germany, the parliament (Bundestag) has nearly 598[56] seats and 299 members are directly elected in their districts and the other 299 members enter parliament via party lists through proportional representation.[57] It is possible for the candidate to run in single-member districts as well as simultaneously for the party list. The candidates who achieve a plurality in the FPTP are elected though the second vote determines the number of seats each party will have in the Bundestag.

The system in Germany allows electors to elect with two ballots, one for the local district (or constituency) in which they live and the other for their state

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[53] Heather, MacIvor., Proportional and Semi-Proportional Electoral Systems: Their Potential Effects on Canadian Politics.,A paper Presented to the Advisory Committee of Registered Political Parties Elections, Canada, 1999.

[54] Supra note 49.

[55] Elisabeth, Carter and David, M. Farrell. , Electoral Systems and Election Management , Larry LeDuc, Dick Niemi and Pippa Norris (eds), *Comparing Democracies 3*, London: Sage . New Zealand switched to MMP system by conducting a popular referendum process in the mid-1990s, 2009.

[56] The peculiar nature of Germany lower house is that, the number varies from election to election and its seats are decided after the election. This is because of "overhang" and "compensation" parliamentary seats. Overhang seats are created if a party wins more directly elected seats in one of the 16 federal states than it would get under the proportional share-out from the second ballots cast by voters. Compensation seats are meant to ensure party proportion in the chamber. Right now (the 18th electoral term), the Bundestag has 630 seats, available at https://www.bundestag.de/en/ last accessed on 11/26/16.

[57] Bloomberg, How Germany's Election System Works: What to Watch for Today (2013), available at, http://www.bloomberg.com/news/articles/2013-09-21/how-germany-s-election-system-works-what-to-watch-for-today last accessed on 11/26/16.

or *Land*. Election of the local district is used in a plurality contest to elect a constituency representative; election of their *Land* is a party list ballot. Based on this calculation, half the *Bundestag* seats are occupied by local district representatives, and the other half by representatives selected from the party list.

Germany has designed this method just to correct proportionality imbalances resulting from the List PR result, and to ensure that the larger parties are not unduly rewarded by their ability to win more district seats.[58] Therefore, countries who are using MMP like Germany have exploited the advantages of both FPTP and PR electoral systems. This system allows representation of the various political parties which represent various opinions of the electorate and helps to establish stable coalition government. The system also will help to shape parties' behaviors in softening their ideologies to come up to negotiation to form a coalition government in case where there is no single party that could establish a government. To avoid vote splitting and extremists, the system has designed a minimum threshold concept as a barrier.

The MMP electoral system shares the advantages of both PR and FPTP systems. In translating votes into seats, MMP can be as proportional as pure list PR, and therefore share the advantages and disadvantages of both. The advantages are its proportionality, inclusiveness and geographic representation. On the other hand, it is criticized on the basis of some complications in the processes of its implementation. Moreover, its requirement of boundary delimitation and the possibility of creating two classes of representation could be mentioned as its disadvantages.[59]

3.2. Parallel Systems

Like MMP, plural systems also use both PR and plurality components to identify winners in the election. In this system, the seats are allocated to the same chamber using two systems; the FPTP and also PR system. Unlike the MMP system, under the Parallel System there is no direct correlation or any linkage between the two sects in allocation of the seats. This means both PR and plurality components are used independently as the PR component of the system does not compensate for any proportionality that occurs. That is the reason why parallel systems are referred as independent systems as the combined formulas are used and results are calculated without considering

[58] Benoit, Kenneth., 'Hungary: Holding Back the Tiers', in Michael Gallagher and Paul Mitchell, eds, *The Politics of Electoral Systems*, Oxford: Oxford University Press, Oxford, 2005, p. 34.

[59] Supra note 35, Reynolds, p. 120.

the number of votes that candidates scored both in PR and plurality systems. On the other hand, in MMP, the application of the proportional formula is dependent on the distribution of seats or votes produced by the *majoritarian* formula. In this system, voters may receive either one ballot paper (like in South Korea) or two (as in Japan and Thailand) which is used to cast a vote both for a candidate and for a party.[60]

This electoral system shares some advantages with the MMP like retaining the proportionality benefits of PR systems while, at the same time, ensuring that elected representatives are linked to geographical districts. Moreover, like MMP, the parallel system is preferred for being inclusive of different societies within the country. In addition, the parallel system helps guarantee representation of minorities, especially when there are adequate PR seats and the threshold is low. Like other electoral systems, this system has also limitations such as it may be complicated for average electorate to understand and also may create two classes of representatives as one sect is elected through directly by voters while others are through party lists.

4. Overview of Ethiopian Electoral History

The concept of election is a recent experience for Ethiopia and its roots are traced back to the 20th Century when its first written constitution was introduced in 1931. This first written constitution provided the concept of parliamentary chambers and election for the first time in Ethiopian political history. The nature of the parliament introduced by this constitution was, at least structurally, bicameral which included the Chamber of Deputies and the Senate.[61] The members of the senate were appointed by the Emperor among the dignitaries and the local chiefs who served the empire as princes, ministers, judges and army leaders.[62] However, members of the Chamber of Deputies were indirectly elected by dignitaries and local chefs until the people were capable of electing their representatives by themselves.[63] The people did not have the right to elect their representatives. Though the constitution brought the concept of election, the Ethiopian people were not allowed to participate and elect their representatives directly by themselves.

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[60] *Id*, p. 104.

[61] The Constitution of The Empire of Ethiopia, 1931, Article 30.

[62] *Id*, Article 31.

[63] *Id*, Article 32. In fact this indirect representation system is workable in the US as the president is finally elected by the Electoral Colleges.

In the electoral history of Ethiopia, the 1955 revised constitution brought significant development in the political participation of the Ethiopian people, though the ultimate power rested on the Emperor. One of these changes that had significance to the political development of the country was the election of the members of the Chamber of Deputies by the direct participation of the people. In order to elect the Chamber of Deputies, the entire territory of the empire was divided into electoral districts that contain two hundred thousand inhabitants.[64] On the other hand, towns were allowed to have one Deputy so long as they had thirty thousand inhabitants and one additional Deputy was given for every fifty thousand people in excess of thirty thousand.[65] Moreover, the constitution also guaranteed that:

> All Ethiopian subjects by birth of twenty-one years of age or more who are regularly domiciled or habitually present in any electoral district and who possess the qualifications required by the electoral districts for candidates from the district as members of the Chamber of Deputies May vote. The system of voting shall be secret and direct.....[66]

Of course, members to the Chamber of Deputies were mostly from the highly paid segments of the civil service, feudal lords, and rich merchants as the constitution requires property ownership in the electoral district as a prerequisite to be considered as a candidate for the Chamber of Deputies.[67] There were five elections from 1955 to 1974 and in all these elections it is hardly possible to see adequate democratic principles in the processes. This is due to several factors: the lack of willingness within the ruling elite, the low level of awareness of the public to participate, the traditional seizure of power through kinship, the widespread poverty and illiteracy could be mentioned among others. On the other hand, nothing changed for election of the Senate as the Emperor was responsible to elect members from the princes, other dignitaries, former high government officials, and other persons generally esteemed for his character, judgment and public service.

After the overthrow of the monarchy by the military junta known as *Dergue* (meaning, *Hibret* in Amharic), the 1955 Revised Constitution was suspended and the regime ruled the country without a constitution for almost 13 years. The 1955 constitution was replaced with series of decrees and proclamations.

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[64] The Revised Constitution of The Empire of Ethiopia, 1955, Article 93.

[65] *Ibid*.

[66] *Id*, Article 95.

[67] *Id*, Article 96(b).

After 13 years of rule without a constitution, a constitutional draft commission was organized in 1986 and the commission wrote the 120 article draft constitution. After conducting serious debates and discussions[68] on the draft articles with several associations, like the women's association, youth associations, the public were called to decide over the draft constitution through a direct referendum. In fact, this referendum is the first and the last until now in the constitutional history of Ethiopia, though the people were not free to express what they felt due to the repressive nature of the regime. The referendum was held on February 1, 1987 and the result was announced three weeks after. According to the results, 96% of the 14 million people eligible to participate actually voted. 81% of the voters approved the constitution, while only 18% opposed it. Finally, the Constitution of the Peoples Democratic Republic of Ethiopia was approved on 12 September, 1987.[69] Regarding the electoral rules, the people were entitled to elect members of the unicameral legislature or the National *Shengo* through universal, equal, direct and by a secret ballot.[70] However, candidates to the National *Shengo* were nominated by the organs of the Workers Party of Ethiopia (WPE), mass organizations, military units and other bodies.[71] Though the people were entitled to elect members of the National *Shengo*, election was held without alternatives and rather the role of people was only to bless what the government nominated. Under this regime, people could vote only for candidates of the regime's Marxist-Leninist single party veiled as the Workers Party of Ethiopia (WEP) and activities of democracy were simply labeled as traitors and enemies of the people and the country as the constitution officially endorsed single party system in the country. Moreover, the repressive and undemocratic nature of the government, coupled with absence of freedom made the election more of a game than a real democratic participation of the people. However, due to the short life span of the 1987 Constitution (as it is the shortest-lived constitution in the constitutional

[68] Basically, the regime used this discussion to legitimize the constitution-making process and create a forum for testing the public's reaction on the Constitution. By far, the most controversial draft provision was the one that outlawed polygamy, which caused serious furor anger among Muslims. Few questions were raised about the document's failure to address the outstanding nationalities problem and the right to self-determination.

[69] The Constitution of The Peoples Democratic Republic of Ethiopia, 1987, Negarit Gazetta, Vol.47, No.1, Addis Ababa.

[70] *Id*, Article 65(1).

[71] *Id*, Article 64.

history of Ethiopia) it is difficult to judge from the validity perspective. Yet, it is possible to deduce that the repressive nature of the regime that lasted for about seventeen years with bloodshed would not have brought a different result.

In May of 1991, the PDRE constitution was suspended immediately after the overthrow of the regime by an armed struggle groups led by the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF)[72] and a peace conference was held in Addis Ababa to form a Transitional Government. Following the establishment of the Transitional Government, many political parties flourished in the political field, though many of the political parties were ethnic based and too poorly organized, to seize political power.

5. The Nature of Ethiopian Election

Here, the nature of Ethiopian electoral laws will be discussed in two parts. The first part covers the post 1991 electoral laws and practices of Ethiopia until the enactment of the 1995 constitution. While the second part of the discussion covers the post 1995 electoral experiences and laws that are being used in Ethiopia.

5.1. Electoral Experiences from 1991-1995

After the suspension of the PDRE constitution, a Transitional Government (TG) was established via a Transitional Charter and historical measures have been taken in the political history of Ethiopia including the introduction of multi-party system. The TG allowed the "right to engage in unrestricted political activity and to organize political parties, provided the exercise of such right does not infringe upon the rights of others"[73] The Transitional Government Charter paved the way for the formation of political parties and recognized the right of citizens to establish political parties for the first time; thereby, resulting in the proliferation of political groups with varying orientations and programs. In addition to the formation of political parties,

[72]The EPRDF was established in 1989 by the Tigray Liberation Front (TPLF) in its quest to lend a multinational image emphasizing the former's national role. Initially, the EPDRF was composed of the TPLF and the Ethiopian Peoples' Democratic Movement (EPDM). The latter was later renamed the "Amhara National Democratic Movement" (ANDM). The Oromo People's Democratic Organization (OPDO) and the Southern Ethiopian Peoples' Democratic Front (SEPDF) joined the EPRDF at a later stage.

[73] The Transitional Period Charter of Ethiopia, Charter No.1 of 1991, Negarit Gazetta, 50th Year,. This conference was held immediately two months after the down follow of the regime on the agenda of Peaceful and Democratic Transitional Conference of Ethiopia.

civil society organizations[74] were formed taking advantage of the introduced liberal reforms. Both during the transition period and after, the assumption of public office in the leading bodies of the Ethiopian political system at all levels were legally regulated to be based in the outcomes of periodic competitive elections. Beyond a multi party system and thereby the formation of political parties, the charter took a number of reform measures such as introducing a charter as an interim constitution that guaranteed freedom of speech, assembly and association among others.

The Transitional Government Charter allowed for the enactment of a law which would establish local and regional councils for local administrative purposes delimited on the basis of nationality. Based on that, National/Regional Proclamation No. 7/1992 was enacted "with a view to giving effect to the right of nations, nationalities and peoples to self-determination." [75] Later, the first multi-party elections for regional and local councils in the history of Ethiopia were held in June 1992. The EPRDF's move to use elections as important instruments of representative politics by itself could be considered as a positive development in a country whose history was dominated by the absence of competitive electoral exercises. However, the EPRDF's repression against the opposition and opposition's strategy to boycott elections left the overwhelming majority of Ethiopian voters without a meaningful choice.[76] The major opposition parties, including the Oromo Liberation Front (OLF), threatened to leave the transitional government and finally, on the eve of the polling day for the elections of regional and local councils in 1992, the Oromo Liberation Front (OLF) withdrew from the transitional government.[77] In this election, the EPRDF won and controlled 1,108 of 1,147 regional assembly seats which consist of

[74] During this time, one of the prominent and influential civil society organizations, Human Rights Council (HRCO) Ethiopia was formed in 1991. HRCO is a non-profit, non-governmental organization that works towards building a democratic system, promotes rule of law and due process, and encourages and conducts human rights monitoring, available at, https://ehrco.org/about-hrco/ last accessed on 11/28/16.

[75] Proclamation to Provide for the Establishment of National/ Regional Self-Governments, Proclamation No.7/1992, Negarit Gazeta, 51st Year, Preamble, para. 3.

[76] Terrence, Lyous., Ethiopian Elections: Past and Future, International Journal of Ethiopian Studies, Vol.5. No.1 Spring/Summer 2010, p. 107.

[77] Hashim, Tewfik. , Transition to Federalism: The Ethiopian Experience, Forum of Federations 700- 325 Dalhousie Ottawa, Ontario, Canada, 2010, p. 13.

96.6% of the total seats.[78] Though the country exercised the first multi-party election in 1992 to elect members of regional and local councils, the legitimacy of the electoral process and the result remained highly controversial.

During the transitional period, Ethiopia again conducted the second election in June of 1994. This election was held to elect members of the Constituent Assembly who were responsible for considering, modifying, and ratifying a draft constitution prepared by the Constitutional Commission.[79] As in the June 1992 election, the main opposition parties again left the election, leaving the EPRDF unconstrained except by an assortment of generally weak independent candidates. In this election, EPRDF candidates won 484 seats of 547 Constituent Assembly, a result which was described during that time as 'neither a significant nor an unexpected victory'.[80] This election again ended up with domination of the EPRDF in the constituent Assembly that was empowered to approve the constitution of the Federal Democratic Republic of Ethiopia (FDRE).

5.2. Post 1995 Electoral Laws and Experiences

After four years of transition, the constitution of the Federal Democratic Republic of Ethiopia (hereafter FDRE constitution) was approved by the Constituent Assembly in December of 1994 and it came into full force and effect as of the 21st day of August, 1995. Sovereignty of the Ethiopia Nations, Nationality and representation exercised through democratic participation in the country's socio-economic and political process directly and/or through elected representatives became the cornerstone of the principles outlined in this constitution which heralded the establishment of a federal form of government for the first time in the history of Ethiopia[81].

The FDRE constitution introduced an electoral system based on the principle where a candidate who polls more votes than any other candidate is elected.[82] Then, the constitution has clearly indicated that the *majoritarian* system of representation is preferred. Among the *majoritarian* representation systems, the constitution qualifies plurality/ simple majority system as the Ethiopian

[78] National Democratic Institute, An Evaluation of the June 2I, I992 Elections in Ethiopia (Washington, DC, I992), p. 3

[79] Terrence Lyons, Closing the Transition: The May 1995 Elections in Ethiopia Author(s): Journal of Modern African Studies, Vol. 34, No. 1 (Mar., 1996), pp. 130.

[80] *Ibid*.

[81] Please see Article 1 of the FDRE constitution.

[82] *Id*, Article 54(2)

choice. The framers of the Ethiopian constitution were attracted by the simple majority system, referred to as First Past the Post (FPTP) System. In this system, the party or candidate winning more than 50 percent of the votes in a constituency is awarded the contested seat. In this system, a candidate receiving more votes than any others wins and all other votes count for nothing.

In addition to the FDRE constitution, there are several laws that are enacted to regulate the Ethiopian election. Among the legal regimes, Amended Election Law of Ethiopia No. 532/2007, the Revised Criminal Code Articles 466-476, the Revised Political Parties' Registration Proclamation No. 573/2008, the Electoral Code of Conduct for Political Parties, Proclamation No. 662/2009, Directive No. 1/2009: on the Registration of candidates; Directive No 2/2009: on the registration of voters; Directive No. 6/2010: on Election Reporting Code of conduct of the Media and Journalists could be mentioned among others.

The Ethiopian electoral legal regime set prerequisites for those to participate as electors and candidates in national or local elections. The law sets a standard for a person to qualify for voting, he/she should be an Ethiopian citizen, with sound mental health, minimum of 18 years of age at the day of registration[83]. The Ethiopian electoral law sets requirements that should be met by candidates including attaining 21 years of age, being a resident for two years in the constituency, and versed in the working language of the regional state or the area of his/her intended candidature among other things[84]. In addition to the above standards, a private candidate is required to secure 1000 endorsement signatures for a candidature as well. Concerning limiting the number of candidates in a single electoral district, the number of candidates running for election to the House of Peoples' Representatives shall not exceed twelve.[85] However, if the nominees exceed twelve, priority will be given for political party nominees and private candidates will be removed. Yet, if the numbers of political party nominees exceed twelve, the law gives priority to maximum of six parties that received the highest votes in the previous election and for the remaining six political parties, lots will be drawn.

[83] Please see Article 18 of Directive No 2/2009: on the registration of voters.

[84] Please see Article 12 of Directive No. 1/2009: on the Registration of candidates.

[85] Please see Article 18 of Directive No. 1/2009: on the Registration of candidates.

Since the introduction of the FDRE constitution, the May 1995, the May 2000 and the May 2005, the May 2010 and the May 2015 National, Regional and Local Elections have been held. The May 1995 regional and national election was the first held under the new Constitution. This election was held after a long campaign and promise by the EPRDF to transform the country from a highly centralized, dictatorial state, plagued by civil wars, to a federal republic in which a vast range of powers were devolved to the newly established regional states under the new constitution. Compared to other political parties, the EPRDF was better institutionalized and financially strong enough to handle the election. In this election, the number of candidates and political organizations registered to run for both the national and regional elections were 1881 and 58 respectively.[86] On the other hand, there were also 960 independent candidates whom did not represent any political parties over the 548 electoral constituencies established in the country.[87] This election ended up with a landslide victory of the EPRDF that won 493 seats of 548 national seats to the House of Peoples Representatives (HPR) which is more than 90% of the seats in the Federal Parliament.[88] Whereas, the remaining seats went to independent candidates and other political parties with a share of 8 and 45 respectively.

The National Electoral Board of Ethiopia (NEBE) reported that the election was free and fair and EPRDF won these more than 90% seats of the Federal Parliament in a free competition. However, the NEBE's report and conclusion on the outcome of the election was bluffed and rejected by the opposition and international election observers concluded that the 1995 elections could not be termed as free, fair, and impartial. A report from Norwegian based election observer indicated that, ''Conducting elections as a mere formality and claiming democracy without having any democratic public debate is a futile exercise.''[89]

The second general election was also held in May of 2000 and in this election, 49 political parties contested with the registration of 700 candidates for the federal parliament and 2,052 candidates for the regional councils. In this

[86] Supra note 76, p. 132.

[87] *Ibid*.

[88] http://www.ipu.org/parline-e/reports/arc/2107_95.htm last accessed on 11/29/2016. For this election, voters registered as of 15 April and polling day, which included election of State Councils, was monitored by foreign observers and generally peaceful. Final results gave the EPRDF a landslide victory. Later, on 24 August, Prime Minister Zenawi announced the make-up of the new Council of Ministers.

[89] Merera, Gudina., Elections and democratization in Ethiopia, 1991–2010, Journal of Eastern African Studies, Vol 5, No.4, 2011, pp. 664-680.

election, the opposition political parties won only 13 seats while independent candidates won more seats than the opposing political parties. The overall result shows that the EPRDF with its allies controlled the Federal parliament with 487 seats.[90]

The Third general election which was held in May of 2005 was the most contested election in the Electoral history of Ethiopia and, in fact, it gave meaningful choice to the Ethiopian people.[91]

In this election, the opposition political parties appeared better organized and united compared to the previous elections. Heightened interest in the public to participate in the election coupled with strong and live pre-election debates among political parties made the election more attractive and sensible compared to the preceding elections. In this election, pre-electoral activities including electoral campaigns were carried out peacefully until political parties blamed each other at the end. In this election, the official reports showed that, as usual, the ruling party declared victory in the four regional states. Based on that, the NEBE reported that, 327, 109, 52, 24 and 11 seats were won by the EPRDF, CUD, UEDF, SPDP and OFDM respectively for the national legislature. In the context of nationwide popular vote however, the EPRDF and CUD got 10,260,413 and 4,594,668 respectively out of 20,487,218 valid votes.[92] When popular vote is converted into parliamentary seats, EPRDF and CUD would have 274 and 123 Parliamentary seats respectively had the electoral system been proportional. This shows that the parliamentary seat of the EPRDF would have decreased by 53 votes and the seats of CUD would have increased by 14.

However, the opposing group rejected the blessing of the NEBE over the victory of the EPRDF and claimed a victory in Addis Ababa and other

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[90] National Electoral Board of Ethiopia, Election 2010 Special Edition. Addis Ababa, May 2010.

[91] Terrence Lyous, Ethiopian Elections: Past and Future, International Journal of Ethiopian Studies, Vol.5. No.1 Spring/Summer 2010, p. 107.

[92] Abraha, K,. Alternative Mechanisms of Electoral systems for Vibrant Democracy and All Inclusive Representation in Ethiopia, Master's Thesis, Addis Ababa University. 2008, p. 92, available at https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwi_oPH15YTRAhWp5IMKHTU-DrgQFggdMAA&url=http%3A%2F%2Fetd.aau.edu.et%2Fbitstream%2F123456789%2F5073%2F1%2F8.%2520Abraha%2520Kahsay.pdf&usg=AFQjCNFilKpy-kxwBK-hvV_Cjwmcx_8DGg&bvm=bv.142059868,d.d2s last accessed on 12/21/16

regional states. Reports showed that the NEBE failed to discharge its responsibility specifically in vote counting and realizing electoral results.[93] Unfortunately, this election ended up with bloodshed and was taken as a political curve in which the active participation of the opposing political parties and the public to politics became severely hampered.

After five years of the controversial 2005 election, Ethiopia conducted the fourth general election in May of 2010. Compared to the 2005 election, the 2010 election experienced weaker campaigning and competition among the opposing political parties. As indicated by the EU electoral observer's team, the administration of the election had limitations that they indicated in the following way:

> "While several positive improvements have been introduced, the electoral process fell short of certain international commitments, notably regarding the transparency of the process and the lack of a level playing field for all contesting parties..... The separation between the ruling party and the public administration was blurred at the local level in many constituencies. The EU EOM directly observed some cases of use of state resources for ruling party campaign activities".[94]

In this election, the EPRDF and its affiliates took 99.6% of the seats in the Federal legislature and it is only a single seat that was 'suddenly' taken by the fortunate candidate from the side of the opposing political parties. Moreover, another single seat also won by an independent candidate who did no, in fact, have a different policy agenda from the governing party, but a different implementation strategy.[95] This election is ended up by the EPRDF's vowing to establish a single major and dominant party in the country that would lead the country for the coming few decades. This election also gave the insight that the Ethiopian political atmosphere is devoid of a multi-party system and there will not be diversity of voices and agendas that could be heard in the federal as well as the regional legislatures.

After the death of its long-time leader, Meles Zenawi, Ethiopia conducted the fifth national election in May of 2015. The NEBE reported that there was

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[93] European Union _ Election Observation Mission (EU-EOM), Ethiopia Legislative Elections 2005, Final Report. Brussels: EU-EOM, 2005.

[94] EU-EOM (2010). Ethiopia's 2010 House of Peoples' Representatives and State Council Elections. Preliminary Statement. June 25, 2010. Addis Ababa www.eueom-ethiopia.org last accessed on 11/29/16.

[95] Kjetil, Tronvoll., Briefing the Ethiopian 2010 Federal and Regional Elections: Re Establishing the One Party State African Affairs Advance Access published November 26, 2010. p. 1.

high voter turnout in this election compared to previous elections.[96] However, the process and result of the election was complained about by the opposition as rigged, though the NEBE concluded that elections were credible, free and fair.[97] In this election, the EPRDF and its allies controlled all the 547 parliamentary seats without sharing a single seat to the opposition or private candidates.[98] The results of this election show and confirm that a kind of authoritarian rule will continue in Ethiopia for the next years. The result of the election also indicates that participation in political life will be completely restricted to members of the EPRDF and its allies. Moreover, this election was historical in that there was no political party or independent candidate that could share a single parliamentary seat since the EPRDF came to power in 1991.

The legislature formed next to the 2015 national election lacked an opposition that could play a means of check and balance against the activity of the ruling party at least by serving as the voice of the people. This election, by eliminating both the opposition and private candidates, has created a situation by devaluing the activity of politics which is hostile to parliamentary democracy. Parliament needs a hot debate and discussion to vow the electorate's agenda both in private and public. As Ralph Heintzman pointed out, the nature of the Canadian parliament as follows:

> In addition to its practical value, the daily confrontation of government and opposition in the House of Commons symbolizes the inner dialogue, the continual sequence of question and answer, which distinguishes the truly civilized mind and is reflected in the social and public life of a civil community. Just as a genuinely sound mind does not suppress either of its two fundamental impulses but listens instead to both, and tries unceasingly to achieve a synthesis in which their opposition will be reconciled, so too the good society recognizes that opposing tendencies are not each other's enemies but each other's partners instead, and their indispensable complement.[99]

[96] http://www.bbc.com/news/world-africa-33228207 last accessed on 11/29/16.

[97] http://www.bbc.com/news/world-africa-33228207 last accessed on 11/29/16.

[98] http://www.electionethiopia.org/en/ last accessed on 11/29/16.

[99] Ralph Heintzman, "The Educational Contract," editorial introduction to the *Journal of Canadian Studies*, special issue on "Responsible Government Reconsidered," Vol. 14, No. 2, summer 1979, p. 143.

As indicated above, parliamentary democracy cannot properly work without an active parliament that does not conduct active debate and discussion. This has occurred due to the nature of the electoral system and this has been rightly expressed by Lewis as follows:

The surest way to kill the idea of democracy in a plural society is to adopt the Anglo-American system of FPTP. This is because the one that commands most votes becomes sure to win and the other parts of the homogenous society resign as, whatever they do, they can feel they are likely to lose power or representation through such an electoral system.[100]

Months after of the 100% landslide electoral win of the EPRDF and its allies in the May 2015 election, popular uprising and protests against the government occurred in Oromiya, Amhara and some parts of the Southern regions. In this uprising, several people were killed and property was destroyed. The situation became beyond the control of the regular law enforcement and the government was obliged to declare a state of emergency throughout the country.[101] Amid the ongoing political crises in the country, the government promised to bring reforms in the country including electoral reforms.

A promise to bring electoral reforms was heard for the first time from the country's President. The FDRE President while addressing a joint session of the House of Peoples Representatives and the House of Federation indicated that

> The Government is ready to reform the country's electoral law to place proportional representation and a majority system on an equal and balanced footing after detailed negotiations between political parties with a view to make the voices of the people heard in both chambers of the Parliament.[102]

This inaugural speech of the President was also confirmed by the Prime Minister who is the chief executive of the federal government and he retreated that, "... the government wants to reform the electoral system so the voices of those who are not represented can also be heard in the Parliament."[103]

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[100] Lewis, W.A., *Politics in West Africa.,* George Allen and Unwin, London, 1965, p. 71.

[101] CNN news, Ethiopia declares state of emergency after months of protests, http://www.cnn.com/2016/10/09/africa/ethiopia-oromo-state-emergency/ last accessed on 11/30/16.

[102] Federal Democratic Republic of Ethiopia Ministry of Foreign Affairs, available at, http://www.mfa.gov.et/web/guest/news/-/asset last accessed on 11/30/2016.

[103] IHS Jane's Intelligence Weekly, Ethiopia's proposed electoral reforms and limited amendments to environment, land, and labour laws unlikely to satisfy protesters, available

As reported, the main reason for electoral reform in the country is to have a more representative government than the existing one. In this context, the government has promised to make reform on the *majoritarian* type of First Past the Post electoral system to a more representative system without indicating what type of specific representative electoral system to introduce. When an electoral reform is made in a country like Ethiopia where electoral rules are entrenched in the constitution, constitutional amendment will be the first task of the reformers as they cannot reform electoral rules without amending the constitution. Now the main question is: What type of electoral rules would be more representative to have a representative government and to make the voice of the majority heard in the Ethiopian parliament? The next section evaluates this very question and proposes an electoral system that best addresses the question of representative government. Moreover, leaving the political controversy of whether the existing political turmoil will only be solved by reforming electoral rules or not behind, I will focus on showing which electoral system is better to make the electoral reform successful.

6. Enhancing the Representativeness of the Ethiopian Electoral System

The electoral system design is a serious issue that needs extreme precaution by the constitutional framers. Since the system of election employed in a certain country has the power of determining the fate of political parties, system designers must give acute attention to this task. Most of the time, electoral system designers are faced with the task of balancing representativeness, on the one hand, and accountability, on the other hand. This representativeness and accountability dilemma forces reformers to choose the plurality and proportional representation systems.[104] Plurality representation systems are mostly known by their character of establishing accountable, elected representatives as the system promotes the election of individual candidates in each electoral constituency. In plurality electoral systems, the assignment of an individual candidate in each and every electoral constituency will help to make the elected individual directly accountable to the electorate. On the other hand, proportional representations promote and focus on representativeness than accountability. The system promotes the election of

at, http://www.janes.com/article/64562/ethiopia-s-proposed-electoral-reforms-and-limited-amendments-to-environment-land-and-labour-laws-unlikely-to-satisfy-protesters last accessed on 11/30/2016.

[104] Carey, J.M, and Hix, S., The electoral sweet spot: Low-magnitude proportional electoral systems, *American Journal of Political Science*, Vol.55, No.2, 2011, p. 385.

political parties through providing party lists rather than individual party candidates. In this case, there is no individual who is directly represented for a certain electoral district and this may not create accountability of party representatives for a specific constituency.

In their choice of electoral systems, designers must also balance the issue of representativeness and accountability as there is no a perfect electoral system that best fits the context of all countries in the world. In this case, framers are required to consider what the reality looks like in a certain country that needs an electoral system design.

In the Ethiopian context, the electoral system as plurality/FPTP system has been indicated under the constitution by qualifying that, "members of the House shall be elected from candidates in each electoral district by a plurality of the votes cast". [105] In this context, an individual candidate from the private or political parties will be declared as a winner as long as he/she scores the highest number of votes among the contenders. It seems that the Ethiopian electoral system designers were more in favor of accountability in a single-party government rather than representativeness.

The electoral system design made for Ethiopia seems to have not taken the attention of the framers of the constitution as a serious issue. Addisalem Balema, in his PhD thesis, exposes the fact that, "during the drafting and the ratification process of the constitution, the electoral system was not a contentious issue."[106] However, he did not conceal the fact that there were some political parties like the Council of Alternative Forces for Peace and Democracy in Ethiopia (CAFPDE) that challenged the plurality electoral system as an intentional design of EPRDF as it fits more for the larger political party than the smaller ones.[107]

As speculated by the opposing political parties in the beginning, the electoral system in Ethiopia benefits only the larger political party than the smaller parties. The existing electoral system failed to provide to the Ethiopian people a representative parliament and government. The larger ruling party, the EPRDF, has controlled all parliamentary and government positions with its allies. It has been proven by the government that the electoral system that we have right now is not representative and it has committed to make the system

[105] Supra note 78, Article 54(2) of the FDRE constitution.

[106] Addisalem Balema. *Economic Development and Democracy in Ethiopia*, PhD dissertation, Rotterdam: Erasmus University, 2003, p. 178.

[107] Id, p.1 78.

more representative. Now, it is the time for Ethiopia to design an electoral system that could balance representativeness and accountability.

An electoral system that could address Ethiopia's question of a representative government and that will make the 'unheard voices' to be heard is a Mixed Member Proportional (MMP) system which is one type of mixed systems. The MMP electoral system can unite the positive attributes of both the plurality and the PR electoral systems and will help to establish a stable government in the country. As taking the positive sides of both plurality and PR systems, in this electoral system, half of the members will be elected based on the plurality of the votes casted and the remaining half seats will be filled by the PR electoral system to reimburse for any disproportionality and unfairness produced by the district seat results.

In this electoral system, voters will have two choices: one for the district seat and another for the national seat. By making the electorate to elect district or constituency representatives, it will help to make these elected representatives accountable to their constituency and have an accountable government. This candidate-constituency linkage is very important for a pluralistic country like Ethiopia that has many ethnic groups who would like to be represented by candidates from their ethnic origin. On the other hand, by conducting a PR system, it is possible to have a more representative government as there will not be wastage of votes. This more representative government will be created because of the fact that the vote is counted in aggregate throughout the country than only taking the majority winners. In preferring a MMP electoral system for Ethiopia, there is an important issue to be addressed first. When half of the seats are filled with the proportional system, there has to be an introduction of the concept of minimum threshold to avoid a divided government in the country. As discussed in the earlier part of this article, there are different experiences in addressing the issue of minimum threshold and there is no uniform rule.

In addressing the issue of minimum threshold, the Germany experience of 5% would be suggested as more preferable for the Ethiopian context. In Germany, a political party that scores less than 5% of the national vote may not allowed to join the parliament and it will be automatically knocked out from the system. However, this rule may not work when the political party that scores less than 5% from the proportional vote has scored at least three

seats from the constituencies vote.[108] Such kind of design will help to protect the interest of minority political parties that may not able to constitute 5% vote from the electorate.

7. Conclusion

The central issue in electoral system design is identifying the appropriate electoral system that best fits the existing realities of the country that designs the system. In doing so, designers have the choice of either to prefer a system that ensures representation or accountability or a system that combines both. In this context, proportional representations are known for guarantying and ensuring representation in the system by making every single vote usable. On the other hand, the *majoritarian* representation system focuses more on establishing candidate-constituency linkage and ensuring accountable system in the election. Both electoral systems, when they are used unilaterally, have limitations. A representative government may not have an effect without insuring accountability and creating a linkage between the electorate and the elected. In this context, a Mixed Member Proportion, which is a type of mixed system will solve the problem of representativeness-accountability trade-off by having the strong sides of both *majoritarian* and proportionality electoral systems.

The writer of this article believes that a MMP electoral system will address the existing problems in the Ethiopian electoral law by enhancing the issue of representation which the FPTP system lacks in the government. This system, if chosen, would accommodate the question of candidate-constituency linkage that the Ethiopian situation strictly needs due to the existence of diversity in the country with the appropriate representation question in the parliament.

[108] Chronicle of Parliamentary Elections. 1-January-31 December 2002, Volume 36. Geneva: Inter-Parliamentary Union. pp. 97.

የይቅርታ ሕጎችና አፈጻጸማቸው በባሕር ዳር ማረሚያ ቤት

በላይነህ አድማሱ እጅጉ[§]
ዓለሙ ዳኛው ፈለቀ[a]

አህጽሮት

ይቅርታ ወንጀልን ፈጽመው ጥፋተኛ በተባሉ ወንጀለኞች ላይ የተወሰነው የወንጀል ቅጣት በአስፈጻሚው የመንግስት አካል አማካኝነት የሚቀነስበት ወይም የሚሻሻልበት ሥርዓት ነው። መንግስት ወንጀለኞች የሚያሳዩትን የባህሪ መሻሻልና በጥፋታቸው መጸጸት መነሻ በማድረግ ከተወሰነባቸው ቅጣት ውስጥ ከፊሉ ቀሪ እንዲሆንላቸው በማድረግ የይቅርታ ተጠቃሚ እንዲሆኑ ያደርጋል። ይህም በብዙ አግሮች የተለመደና አሰራሩም በህግ የሚመራ ነው። በዚህ ጥናት ውስጥ የይቅርታ አሰጣጥ ሥርዓትን በህግ እንዲመራ በማድረግ ይቅርታ የሚሰጡ የጥቂት አገሮች ተሞክሮ ተዳስሷል። ኢትዮጵያም ይቅርታን በፌዴራልና በክልል የህግ ማእቀፎች እንዲካተት በማድረግ ለታራሚዎች በየጊዜው ይቅርታን ታደርጋለች።

የዚህ ጥናት አላማ የባሕር ዳር ማረሚያቤት የይቅርታ አሰጣጥ ሥርዓት ከኢፌዴሪና ከአማራ ክልል ሕግጋት አንጻር ምን እንደሚመስል መመርመር ነው። የጥናት ዘዴው አይነታዊ ሲሆን በባሕር ዳር ማረሚያቤት በይቅርታ አሰጣጥ ሂደት የሚስተዋሉትን የሕግና የአፈጻጸም ችግሮች ለይቶ የመፍትሄ ሃሳቦችን በጥናቱ ለማመልከት ጥረት ተደርጓል።

በጥናቱም በአብክመ የይቅርታ አሰጣጥ አዋጅና መመሪያ ውስጥ የሰፈሩ የይቅርታ ቅድመሁኔታዎች ግልጽነት የጎደላቸውና ለአፈጻጸም አስቸጋሪ መሆናቸው ከመረጋገጡም በላይ በነዚህ የክልል ሕግጋትና በፌዴራል ሕጎች መካከል የሚስተዋሉት መጣረስና ልዩነት ተለይተው የመፍትሄ ሃሳቦች ተጠቁመዋል።

ቁልፍ ቃላት- ይቅርታ፤ የይቅርታ ተጠቃሚ፤ የይቅርታ አሰጣጥ ሥርዓት፤ የወንጀል ቅጣት

መግቢያ

ይቅርታ በፍርድ ጥፋተኛ ተብለው በማረሚያቤት የተወሰነ ቅጣታቸውን ተግባራዊ እያደረጉ እያለ፤ ታራሚዎች በጥፋታቸው ተጸጽተው የይቅርታ ማመልከቻ ለሚመለከተው አካል ሲያቀርቡ ወይም በሌላ በሚመለከተው የመንግሥት አካል የይቅርታ ጥያቄ ሲቀርብ ታራሚዎች የሚገኙበትን ሁኔታ፤ ማረሚያቤት አስፈላጊውን ጥናት በማድረግና የታራሚዎችን ባሕርይ በመገምገም ቅጣቱ ከመጠናቀቁ በፊት በሁኔታ ወይም ያለሁኔታ እንዲለቀቁ የሚደረጉበት ሥርዓት

[§] በሕግ የመጀመሪያ ድግሪ (አዲስ አበባ ዩኒቨርሲቲ)፤ ሁለተኛ ዲግሪ በወንጀል ሕግ (አምስተርዳም ዩኒቨርሲቲ)፤ በሕግ ረዳት ፕሮፌሰር፤
ባሕር ዳር ዩኒቨርሲቲ ሕግ ትምህርት ቤት፡ badmaasu7@gmail.com ወይም belaynehv@yahoo.com

[a] በሕግ የመጀመሪያ ድግሪ (ጅማ ዩኒቨርሲቲ)፤ ሁለተኛ ዲግሪ በወንጀል ሕግ እና ሰብአዊ መብት (ባሕር ዳር ዩኒቨርሲቲ)፤ ሌክቸረር፤
ባሕር ዳር ዩኒቨርሲቲ ሕግ ትምህርት ቤት፡ alemudag@gmail.com

ነው።[1] ይህ ሥርዓት እንደሌሎች አገሮች ሁሉ በኢትዮጵያም የወንጀል ፍትህ አስተዳደሩ አካል ሆኖ በሕግ እውቅናን ከማግኘቱም በላይ በፌዴራልና በክልል መንግስታት ስር በተዋቀሩ ማረሚያቤቶችና የይቅርታ ቦርዶች አማካኝነት ተግባራዊ በመሆን ላይ ይገኛል። ሆኖም በይቅርታ አሰጣጥ ሂደቱ የሚከናወኑ ተግባራት ከሕግና ከአፈጻጸም ችግሮች የጸዱ አይደሉም። በተለይ በአማራ ብሄራዊ ክልል ውስጥ ከሚገኙ ማረሚያቤቶች አንዱ በሆነው ባሕር ዳር ማረሚያቤት በይቅርታ አሰጣጥ ረገድ ከሚስተዋሉ የሕግና የአተገባበር ችግሮች መካከል የይቅርታ ጥያቄ አቀራረቡ ግልጽነት የጎደለው መሆኑ፣ የይቅርታ ተጠቃሚዎችን በተመለከተ የባሕርይ መመዘኛ መስፈርት አለመኖሩ፣ የእርቅ አፈጻጸሙ ሂደት የረዘመና ባለቤት የሌለው መሆኑና ሌሎችም ይገኙበታል። እነዚህን ችግሮች ሳይንሳዊ በሆነ መንገድ በማጥናት ዘላቂ የሆነ መፍትሄ በማፈላለግ ለሕግና ለፖሊሲ አውጭዎች እንዲሁም ጉዳዩ ለሚመለከታቸው አስፈጻሚ አካላት ለመጠቆም በማሰብ ይህ ጥናት ተከናውኗል።

የጥናቱም መሰረታዊ ጥያቄዎች የሚከተሉት ናቸው፤

1. የይቅርታ ቅድመሁኔታዎች ግልጽና የተሟሉ ናቸውን?
2. እነዚህ ቅድመሁኔታዎች ላፈጻጸም ምቹ ናቸውን?
3. የይቅርታ ተጠቃሚ ታራሚዎች እነማን ናቸዉ?
4. ታራሚዎች ከወንጀል ሰለባዎች ወይም ከቤተሰቦቻቸው ጋር እንዲፈጽሙ የሚጠበቀው እርቅ ለይቅርታ መስጠት አስገዳጅ ነውን? ታራሚዎች እርቁን እንደት ሊፈጽሙ ይችላሉ? እርቁ ለመፈጸሙ ማቅረብ ያለባቸው ማስረጃ ምንድን ነው?

የነዚህ ጥያቄዎች ሳይንሳዊ በሆነ መንገድ መመለስ ታራሚዎች የይቅርታ ተጠቃሚ ለመሆን የሚያጋጥሟቸውን የሕግና የአፈጻጸም ችግሮች በጥናት በመለየት የመፍትሄ ሃሳቦችን አመንጭቶ ለሚመለከታቸው አስፈጻሚ አካላት እንዲሁም ለፖሊሲና ለሕግ አውጭዎች ለመጠቆም ያስችላል። የጥናቱ ዘዴ አይነታዊ ሲሆን፣ መረጃዎችም በቃለመጠይቅ፣ በቡድንተኮር ውይይት (Focus group discussion)፣ በምልከታና አግባብነት ባላቸው ሰነዶች ተሰብስበዋል።

በዚህ መሠረት በፌዴራል መንግስቱና በአማራ ብሄራዊ ክልል መንግሥት የይቅርታ ሕጎች እንዲሁም በአማራ ክልል ከሚገኙ ማረሚያቤቶች አንዱ በሆነው ባሕር ዳር ማረሚያቤት በይቅርታ አሰጣጥ ላይ የሚስተዋሉ ችግሮችን በሳይንሳዊ ዘዴ በማጥናት የመፍትሄ ሃሳቦችን በጥናቱ ለማመልከት ተሞክሯል።

1. የይቅርታ ምንነትና ጽንሰ-ሃሳብ

ይቅርታ በእለት ተእለት የሰው ልጆች መስተጋብር ውስጥ ይስተዋላል። የሰው ልጅ በደል ወይም ስህተት ሲፈጸምበት በድርጊቱ ተበሳጭቶ ለበቀል ወይም ለወቀሳ የሚነሳሳውን ያህል ለይቅርታም ያንኑ ያህል ቦታ ይሰጣል።[2] ከባህል ባህል ወይም

[1] የኢፌዴሪ የወንጀል ሕግ ፣አዋጅ ቁጥር 414/1997፣ ነጋሪት ጋዜጣ፣1997፣ አንቀፅ 229 (ከዚህ በኋላ የኢፌዴሪ የወንጀልህግ)።

[2] Nicola Lacey and Hanna Pickard, 'To Blame or to Forgive? Reconciling Punishment and Forgiveness in Criminal Justice', *Oxford Journal of Legal Studies*, (2015) pp. 1-32, p. 1, available at http://eprints.lse.ac.uk/60379 last accessed on May 20, 2017.

ከአገር አገር ደረጃውና ይቅር የሚባባሉበት መንገድ ይለያይ እንጂ በደል ወይም ስህተት ሲፈጸም በድርጊቱ ተጸጽቶ 'ይቅርታ አድርግልኝ ወይም ማረኝ' መባባሉ የሰው ልጆች የዘወትር ትዕይንት ነው።[3] ይህም ሀይማኖታዊ መነሻ ያለው ሲሆን ሰዎች ሀጢያት ወይም በደል በመፈጸማቸው ተጸጽተው ፈጣሪያቸው ይቅርታ ወይም ምህረት እንዲያደርግላቸው የሚማጸኑበት ወይም ንስሀ የሚገቡበት መንገድ እንደሆነ ይታመናል። ይህም ከበደላቸው ወይም ከመጥፎ ተግባራቸው በመነሳት ተጸጽተው ያለፈ በደላቸው ይደመሰስላቸው ዘንድ ከፈጣሪያቸው ጋር የሚገናኙበት እድል ከመሆኑም በላይ በደል ወይም ሀጢያት ድጋሜ ላይሰሩ ንስሃ የሚገቡበት ሥርዓት ሆኖ ያገለግላል።[4] ከላይ የተነሳውን የሰው ልጆች በእለት ተእለት መስተጋብራቸው በሚፈጥሩት በደል ወይም ስህተት የሚያቀርቡትን ይቅርታ ለአንባቢያን በመተው በዚህ ጥናት በወንጀል ድርጊት ጥፋተኛ ተብለው ቅጣት ለተጣለባቸው ሰዎች በመንግሥት በኩል የሚደረገው ይቅርታ እንደሚከተለው ቀርቧል።

እንዲህ አይነቱ የይቅርታ አሰጣጥ እንዴት እንደሚፈጸም ከማየት በፊት የቃሉን ፍቺ ማብራራት በጽንሰሃሳቡ ላይ ያለውን ግንዛቤ ለማስረዳት ስለሚጠቅም ይቅርታ ምን ማለት እንደሆነ የተለያዩ ጻሕፍት ስራዎች ተቃኝተዋል። ይቅርታ የሚለው የአማርኛ ቃል (pardon) ከሚለው እንግሊዝኛ ቃል ጋር አቻ መሆኑን በመገንዘብ በተለያዩ ጻሕፍቶች የተጻፉ የእንግሊዝኛ ድርሳናትን በማንበብ የይቅርታን ጽንሰሃሳብ ይበልጥ ለመረዳት ይቻላል። ይቅርታ በጥንታዊ የፈረንሳይ ሕግ ውስጥ ተካትቶ የሚገኝ ሲሆን ቃሉም ከላቲን ቃል *(perdonare)* [5]የተወሰደና ወደአማርኛ ሲመለስ መስጠት (መፍቀድ) ማለት ሲሆን፣ የወንጀል ጥፋት ላጠፉ ሰዎች በመንግስት የሚፈቀድ ስጦታ ተብሎ ሊተረጎም ይችላል።[6] በወንጀል ፍትህ አስተዳደር አዘውትሮ ተግባራዊ የሚደረገው ይቅርታ ከሁለት የእንግሊዝኛ ቃላት 'par´ እና ´don' ከሚሉት የተወሰደና ሁለት ጽንሰሃሳቦችን የያዘ እንደሆነ መዛግብት ያስረዳሉ። ይኸውም par ማለት መተው፣ መርሳት ወይም ነገሩን እንዳልተፈጠረ አድርጎ መገንዘብን ሲያመላክት don ደግሞ ስጦታን፣ ችሮታን፣ ልገሳን ይወክላል። ስለዚህ የሁለቱ ቃላት ጥምር ፍቺ ይቅርታ ለተፈጸመ አንድ በደል ወይም ጥፋት ምህረት ወይም ይቅርታ ማድረግን ያመለክታል።[7]

ይቅርታ ማለት በወንጀል ፍትህ አስተዳደር ውስጥ ወንጀል የሰራን ግለሰብ ቅጣቱ ሙሉ በሙሉ ወይም በከፊል እንዳይፈጸምበት የሚሰጥ ይቅር ማለት ወይም መተውን[8] የሚመለከት ጽንሰሃሳብ እንደሆነ ብላክስ ሎው (የሕግ መዝገበቃላት) ይገልጻል። የይቅርታ ትርጉም በሌሎች መዝገበቃላትም ተመሳሳይ በሆነ መንገድ ተገልጾ ይገኛል። ለምሳሌ የዌብስተር መዝገበቃላት ይቅርታ ለሚለው ቃል የሰጠው

[3] ዝኒ ከማሁ።

[4] Julian H. Wright, Jr, 'Pardon in the Hebrew Bible and Modern Law', *Regent University Law Review*, vol. 3, No. 1, (1993) p. 6

[5] Amnesty and pardon, Encyclopedia of crime and Justice, 2002, retrieved from http://www.encyclopedia.com last accessed on 15 Agust 2017.

[6] ዝኒ ከማሁ።

[7] Pardon and Amnesty, the criminal Magazine, No 2, 1985.

[8] Black's Law Dictionary, 9th ed., s.v. "pardon".

ፍቺ አንድ ሰው በፈጸመው የወንጀል ድርጊት ተከሶ በፍርድቤት የጥፋተኝነትና የቅጣት ውሳኔ ከተላለፈበት በኋላ ቅጣቱ በከፊል ወይም ሙሉ በሙሉ እንዳይፈጸምበት የሚደረግበት አሰራር ወይም አግባብ እንደሆነ ያሳያል።[9] ስታንሌይ ግሩፕ የተባለ ጸሃፊም እንዲሁ ይቅርታ ማንኛውንም የወንጀል ውጤት ሙሉ በሙሉ ቀሪ የሚያደርግ ጽንሰሃሳብ ተደርጎ እንደሚወሰድ ይገልጻል።[10]

ይህንኑ ቃል በጽንሰሃሳብ ደረጃ ተመሳሳይ በሆነ መልኩ የመስኩ ባለሙያዎች ይተነትኑታል። ሱዛን ማርቲን የተባለች የዘርፉ ሊቅ ይቅርታ የሚለው ቃል ጠቅለል ያለና አስፈጻሚው የመንግሥት አካል በፍርድ ጥፋተኛ የተባሉ ወንጀለኞችን ከእስር ለመልቀቅ ወይም የተወሰነባቸውን የእስራት ቅጣት ለማቅለል የሚያልፍባቸውን ልዩ ልዩ የሕግ ስነሥርዓቶች አካትቶ የያዘ የቅጣት መቀነሻ ወይም ማቅለያ መንገድ እንደሆነ በመግለጽ ጽንሰሃሳቡን ታብራራለች።[11] ማርሻልና ሆልምስ የተባሉ አሜሪካዊ ዳኞችም እንደዚሁ በ1833 [12] እና 1927 [13] እንደቅደምተከተላቸው ይቅርታን ከፍ ብሎ ከተሰጠው ማብራሪያ ጋር ተመሳሳይ በሆነ መንገድ ገልጸውታል።

ከላይ በባለሙያዎች የተገለጸው የይቅርታ ጽንሰሃሳብ ከወንጀል ፍትህ አስተዳደር ጋር ተያያዥነት ያለውና በፍርድ ጥፋተኛ የተባለ ወንጀለኛ በመንግሥት ይቅር የሚባልበትን ሥርዓት ያሳየ እንደሆነ በግልጽ መገንዘብ ይቻላል። ጽንሰሃሳቡን ይበልጥ ለመገንዘብም ከይቅርታ ጋር ቁርኝት ያላቸውን መሰረታዊ ነጥቦች መመልከቱ ጠቀሜታው የጎላ ነው። በወንጀል ፍትህ አስተዳደር ውስጥ የሚታወቀው ይቅርታ በማህበራዊ ወይም በኃይማኖታዊ ኑሮ በማንኛውም ግለሰብ ከሚሰጥ ይቅርታ የተለየ የሚያደርገው የወንጀል ፍትህ አስተዳደር ሥርዓት ባለቤት በሆነው መንግሥት ከፍተኛ ባለስልጣን የሚሰጥ መሆኑ ነው።[14] በዚህ ጽንሰሃሳብ መነሻነት በብዙ አገሮች ይቅርታ በአስፈጻሚው የመንግሥት አካል ይታወጃል።[15] ይህም ወንጀል ፈጽመው በፍርድ ጥፋተኛ ለተባሉት ወንጀለኞች ህዝብና መንግሥት ይቅርታን የሚሰጡበት ሥርዓት በወንጀል ፍትህ አስተዳደር ውስጥ የሚታወቀው ይቅርታ የሚይዘው አንዱ ባሕርይ ነው።

የይቅርታ ይዘት የሚያካትተው ሌላ ነጥብ ይቅርታ የሚሰጠው በፍርድ ወንጀለኛ መሆናቸው ለተወሰነባቸው ሰዎች መሆኑ ነው። ይቅርታ ለማንኛውም ሰው

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[9] www.merriam-webster.com/dictionary/pardon last accessed on 15 Agust 2017.

[10] Stanley Grupp, Some Historical Aspects of the Pardon in England,, the American Journal of Legal History, Vol. 7, No. 1(Jan. , 1963), p. 51.

[11] Susan E. Martin, 1983, 'Commutation of Prison Sentences: Practice, Promise, and Limitation', 29 CRimE & DELINQ. 593, 593

[12] United States v. Wilson 32 U.S. 150 (1833).

[13] *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

[14] Ekta Bharati & Niharika Sala, President's Power to Pardon, *Journal On Contemporary Issues of Law (JCIL)* Vol. 2 Issue 2, p. 1.

[15] Nada Simjanoska, Meaning of the Terms Amnesty and Pardon in the Macedonian Criminal Law, *(JPMNT) Journal of Process Management – New Technologies, International,* Vol. 5, No 1, (2017), p. 17; Henry Weihofen, Consolidation of Pardon and Parole: A Wrong Approach, *Journal of Criminal Law and Criminology* (1931-1951),Vol. 30, No. 4 , (1939), p. 537.

የሚሰጥ ሳይሆን በፍርድቤት ጥፋተኛ መሆናቸው ተወስኖ በማረሚያቤት ቆይታቸው በጥፋታቸው መጸጸታቸውንና በባሕርይ መሻሻል ላሳዩ ሰዎች ነው።[16] የይቅርታ ተጠቃሚ የሆነው ሰው ከወንጀል ክስ ወይም ቅጣት ነጻ እንዲሆን መደረጉ የይቅርታ ውጤትና መገለጫ እንደሆነ ይታመናል።[17] በዚህ መሠረት ይቅርታ የተደረገለት ወንጀለኛ ከእስር ተለቅቆ፣ በፍርድ የተደረገበት የመብት ክልከላ ተነስቶለት ነጻ ሆኖ የመንቀሳቀስ እድል ያገኛል። በመጨረሻም ይቅርታ የተደረገለት ሰው ቅጣቱ እንደሚሰረዝለትና ቀደም ሲል የተላለፈበት የጥፋተኝነት ውሳኔ ተነስቶለት ከዚህ በፊት ወንጀል እንዳልፈጸመ ንጹህ ሰው ተቆጥሮ በማንኛውም እንቅስቃሴ ሊሳተፍ እንደሚችል ጸሕፍት ይሟገታሉ።[18] ይህንን ሐሳብ የሚያጠናክሩ ፍርዶችም በአንዳንድ የአሜሪካ ዳኞች ተሰጥተዋል። እነዚህ ፍርዶችም በፍትህ ስርአቱ ውስጥ የይቅርታ ውጤትን አስመልክቶ የክርክር መነሻ ሐሳብ ሆነው ሲያገለግሉ ይስተዋላል።[19]

ከላይ የተበራራው የይቅርታ ጽንሰሃሳብ በኢትዮጵያ የሕግ ማዕቀፍም የራሱን ሥፍራ ይዞ ይገኛል። በተለያዩ ጊዜያት በወጡ ህገመንግስታትና[20] የወንጀል ሕጎች[21] ይቅርታን አስመልክቶ የየራሳቸውን ድንጋጌ የያዙ ቢሆኑም የይቅርታን ምንነት ወይም ትርጓሜ ትኩረት አልሰጡትም። በኢፌዴሪ ህገመንግስትና የወንጀል

[16] ዝኒ ከማሁ, ገፅ 17::

[17] ዝኒ ከማሁ።

[18] Henry Weihofen, The Effect of a Pardon, *University of Pennsylvania Law Review and American Law Register*, Vol. 88, No. 2 (Dec., 1939), p. 177.

[19] 7I U. S. 333, 380 (i866), Illinois Central Ry. v. Bosworth, I33 U. S. 92, I03 (I889) ; Ex parte Hunt, IO Ark. 284, 288 (I850); People v. Hale, 64 Cal. App. 523, 533, 222 Pac. I48, I52 (I923); In re Emmons, 29 Cal. App. I2I, I23, I54 Pac. 6I9, 620 (19I5); In the Matter of Executive Communication, I4 Fla. 3I8, 319 (I872) ; Dade Coal Co. v. Haslett, 83 Ga. 549, 55I, io S. E. 435 (I889); United States v. Athens Armory, 35 Ga. 344, 363 (i868); Kelley v. State, 204 Ind. 6i2, 625, i85 N. E. 453, 458 (i933); Cowan v. Prowse, 93 Ky. I56, I72, I9 S. W. 407, 4II (i892); State v. Baptiste and Martini, 26 La. Ann. i34, I37 (i874); Penobscot Bar v. Kimball, 64 Me. I40, I46 (I875); Jones v. Board of Registrars, 56 Miss. 766, 768 (I879); People v. Court of Sessions, 14I N. Y. 288, 294, 36 N. E. 386, 388 (i894); State v. Keith, 63 N. C. I40, I43 (i868); Knapp v. Thomas, 39 Ohio St. 377, 381 (i883); Wood v. Fitzgerald, 3 Ore. 568, 577 (I870); Diehl v. Rodgers, I69 Pa. 3I6, 322, 32 Atl. 424, 426 (I895) ; Carr v. State, i9 Tex. App. 635, 66i (i885); In re Conditional Discharge of Convicts, 73 Vt. 414, 428, 5I Atl. io, 14 (I90I); Edwards v. Commonwealth, 78 Va. 39, 43 (1883). As cited in Henry Weihofen, ' The Effect of a Pardon', *University of Pennsylvania Law Review and American Law Register*, Vol. 88, No. 2 (Dec., 1939), p. 177.

[20] Ethiopian Constitution of 1931, Established in the reign of His Majesty Hail`e Sellassi´e I, 16th July 1931, Article 16, Proclamation Promulgating the Revised Constitution of the Empire of Ethiopia Conquering Lion of the Tribe of Judah Haile Selassie I Elect of God, Emperor of Ethiopia, (1955), Article 35, The constitution of the Peoples of Democratic Republic of Ethiopia, proclamation No. 1of 1987, *Negarit Gazetta*, , No.1, Addis Ababa, Article 86(2)(d), The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No 1 /1995 , *Federal Negarit* Gazeta, (1995)1, Article 71 (7).

[21] የኢትዮጵያ የወንጀለኛ መቅጫ ሕግ፣ ነጋሪት ጋዜጣ፣(1949)፣ አንቀጽ 239 (ከዚህ በኋላ የኢትዮጵያ የወንጀለኛ መቅጫ ሕግ)፣ የኢ.ፌ.ዴ.ሪ የወንጀል ሕግ የግርጌ ማስታወሻ ቁጥር 1፣አንቀጽ 229።

ሕግ የተደነገገውን ይቅርታ ለማስፈጸም ያግዝ ዘንድ የኢፌዴሪ መንግሥትና የክልል መንግስታት የየራሳቸውን የማስፈጸሚያ አዋጆችና መመሪያዎች አውጥተው በስራ ላይ ያዋሉ ሲሆን እነዚህ ሕግጋት ይቅርታን የተመለከቱ ዝርዝር አሰራሮችን ከመደንገጋቸው በተጨማሪ ቃሉን ከፍ ብሎ በተገለጸው መንገድ ተርጉመውታል። የየክልሎች አዋጆችና [22] መመሪያዎች ሲመረመሩ ይቅርታን ከመተርጎም አንጻር ተመሳሳይ ይዘት ያላቸው በመሆናቸው ለዚህ ጥናት አላማ የኢፌዴሪንና የአማራ ብሄራዊ ክልላዊ መንግሥትን የይቅርታ አዋጆችንና መመሪያዎችን ብቻ መመልከቱ በተመራማሪዎቹ እምነት በቂ ሆኖ ተግኝቷል። በመሆኑም ሕግጋቱ ይቅርታን የተረጎሙበት አግባብ እንደሚከተለው ቀርቧል።

የኢፌዴሪ የይቅርታ አዋጅ ቁጥረ 840/2006 ይቅርታን እንደሚከተለው ተርጉሞታል። "ይቅርታ ማለት የቅጣት ፍርድ በሙሉ ወይም በከፊል ቀሪ እንዲሆን ወይም የቅጣት ፍርዱ አፈፃፀምና ዓይነት ቀለል ተደርጎ እንዲፈፀም ማድረግ ነው"። [23] የአማራ ብሄራዊ ክልላዊ መንግሥት የይቅርታ አዋጅ ለቃሉ ቀጥተኛ ትርጉም ባይሰጥም የይቅርታ ጥያቄን ትርጉም በኢ.ፌ.ዴ.ሪ የይቅርታ አዋጅ ለይቅርታ ከተሰጠው ትርጉም ጋር ተቀራራቢ በሆነ መልኩ ተርጉሞታል።[24] ይሁን እንጂ በአዋጁ የተመለከተውን ክፍተት ለማሟላት በሚመስል መልኩ የአ.ብ.ክ.መ የተሻሻለው የይቅርታ አሰጣጥ መስፈርት መወሰኛ መመሪያ ለይቅርታ በኢ.ፌ.ዴ.ሪ የይቅርታ አዋጅ ለይቅርታ ከሰጠው ትርጉም ጋር አንድ ዓይነት ፍቺ አስፍሮ ይገኛል። ምክንያቱም ይህ መመሪያ የቅርታን፤ "ይቅርታ ማለት የቅጣት ፍርድ በሙሉ ወይም በከፊል ቀሪ እንዲሆን ወይም የቅጣት ፍርዱ አፈፃፀምና ዓይነት ቀለል ተደርጎ እንዲፈፀም ማድረግ ነው"።[25]

በኢትዮጵያ ህግጋት ለይቅርታ የተሰጠው ትርጓሜ ሲታይ የተለያዩ ጸሕፍት የይቅርታን ጽንሰሃሳብ ሲያብራሩ ከሰጧቸው ገለጻዎች ጋር በይዘት ተመሳሳይ ነው። ይህም የየኢትዮድያና የአብክመ የሕግ ማእቀፍ፣ ይቅርታ በወንጀል ፍትህ አስተዳደር ሥርዓት ያለውን ሚና በአግባቡ የሚያመላክት ነው። ሕግጋቱ ለይቅርታ ከሰጡት ትርጓሜ ታራሚዎች የተጣለባቸውን ቅጣት በከፊል ወይም ሙሉ በሙሉ ሳይፈጽሙ ከእስር እንዲለቀቁና የበደሉትን ማህበረሰብ እንዲክሱ የሚደረግበት ሥርዓት እንደሆነ መገንዘብ ይቻላል።

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[22] የኦሮሚያ ብሔራዊ ክልላዊ መንግሥት፣ የይቅርታን አፈጻጸም ስነሥርዓት ለመወሰን የወጣ አዋጅ፣ አዋጅ ቁጥር 11/1998፣ መገስተ ኦሮሚያ፣ (ሐምሌ 5 1998)፣ የተሻሻ የደቡብ ብሔሮች፣ ብሔረሰቦች እና ሕዝቦች ክልል መንግሥት የይቅርታ አሰጣጥ ሥነሥርዓት አዋጅ፣ አዋጅ ቁጥር 157/2007፣ ደቡብ ነጋሪት ጋዜጣ፣ (የካቲት 2007 ዓ.ም) እና የትግራይ ብሄራዊ ክልላዊ መንግሥት የይቅርታ አሰጣጥ ስነ ስርዓት ለመደንገግ የወጣ አዋጅ፣ አዋጅ ቁጥር 112/1998 ዓ/ም፣ የትግራይ ነጋሪት ጋዜጣ፣ (ሐምሌ 4 1998)።

[23] የኢፌዴሪ የይቅርታ አሰጣጥና አፈፃፀም ሥነሥርዓትን ለመደንገግ የወጣ አዋጅ፣ አዋጅ ቁጥር 840/2006፣ ፌዴራል ነጋሪት ጋዜጣ፣ (2006)፣አንቀጽ 2(1) (ከዚህ በኋላ የፌዴራል የይቅርታ አሰጣጥ አዋጅ ተብሎ ይነበባል።)

[24] በአማራ ብሔራዊ ክልላዊ መንግሥት የይቅርታ አሰጣጥ ሥርዓት መወሰኛ አዋጅ ቁጥር 136/1998፣ገዝክረሕግ፣ (1998)፣ቁጥር 21 (ከዚህ በኋላ የአብክመ የይቅርታ አሰጣጥ አዋጅ)። አንቀጽ 2(1) "*የይቅርታ ጥያቄ ማለት አንድ ፍርድ በሙሉ ወይም በከፊል ቀሪ እንዲሆን ወይም የቅጣት አፈጻጸሙ ዓይነት በቀላል ሁኔታ እንዲፈጸም የሚቀርብ ጥያቄ ነው።*"

[25] የተሻሻለው የአማራ ብሔራዊ ክልላዊ መንግሥት የይቅርታ አሰጣጥ መስፈርት መወሰኛ መመሪያ፣ መመሪያ ቁጥር 23/2007፣ የአማራ ብሄራዊ ክልል መስተዳደር ም/ቤት፣(ነሐሴ 29 ቀን 2009 ዓ.ም) ፣አንቀጽ 2(6) (ከዚህ በኋላ የአብክመ የይቅርታ አሰጣጥ መመሪያ)፣ አንቀጽ 2(6).

2. የይቅርታና የምህረት ተመሳስሎና ልዩነት

ይቅርታና ምህረት በጽንሰሃሳብ ደረጃ የተለያዩ ቢሆኑም በዘርፉ ባሉ ባለሙያዎችና ጉዳዩ በሚመለከታቸው ሌሎች ሰዎች መካከል ሁለቱን ጽንሰሃሳቦች አስመልክቶ የግንዛቤ ልዩነት አለ። በሌላ አገላለጽ በይቅርታና በምህረት መካከል ያለውን የጽንሰሃሳብ ልዩነት ባለመረዳት ሁለቱ አንድ እንደሆኑ በማሰብ አንዱ ሌላውን የተካ በሚመስል መልኩ ስራ ላይ ሲውሉ ይታያል።[26] የዚህ ክፍል ዋና ዓላማም 'ይቅርታ' ከ'ምህረት' የሚለይባቸው ባሕርያት ምን እንደሆኑ በማሳየት በመካከላቸው ያለውን ብዥታ ለማጥራት ነው። ለዚህ ዓላማ መሳካትም የይቅርታ ትርጓሜና ጽንሰሃሳብ በቀደመው ክፍል እንደተብራራ ሁሉ ለንጽጽር ይመች ዘንድ 'ምህረት' የሚለውን ቃል ፍቺ ወይም ትርጉም መስጠቱ አስፈላጊ እንደሆነ በመረዳት እንደሚከተለው በአጭሩ ለማብራራት ጥረት ተደርጓል።

ምህረት 'Amnesty' ለሚለው የእንግሊዝኛ ቃል አቻ ሲሆን የእንግሊዝኛው ቃል መነሻ 'አምነስቲያ' የሚለው የግሪክ ቃል እንደሆነ ይታወቃል።[27] ትርጓሜውም በመንግሥት ላይ የተፈጸመ ወንጀልን ወይም ጥፋትን በመርሳት ወይም በማስተስረይ ወንጀሉ ወይም ጥፋቱ እንዳልነበረ በመቁጠር መንግሥት ወንጀለኞችን እንደንጹህ ሰው በመቁጠር ከማህበረሰቡ ጋር ተቀላቅለው በሰላማዊ መንገድ እንዲኖሩ የሚያደርግበት ሥርዓት ነው።[28] በዚህ አግባብ ለወንጀለኞች በመንግሥት የሚታወጀው ምህረት ከክስ ወይም ከፍርድ በፊት አሊያም ከፍርድ በኋላ ሊሆን ይችላል። ምህረት ለወንጀለኞች በመንግሥት የሚሰጥ ከመሆኑ ጋር ተያይዞ ከይቅርታ ጋር የሚመሳሰልባቸው ባሕርያት አሉ። ይቅርታን ከምህረት ጋር የሚያመሳስለው አንዱና ዋናው ሁለቱም በመንግሰት የሚሰጡ መሆናቸውና ቅጣትን ቀሪ ማድረግ መቻላቸው ነው። በምህረትም ይሁን በይቅርታ እንዲለቀቅ የሚደረግ ወንጀለኛ በፍርድ የተወሰነበት ቅጣት ሊቀርለትና ነጻ ሆኖ ሊንቀሳቀስ ይችላል። ይህም ይቅርታንና ምህረትን ሊያመሳስል የሚችል የሁለቱም ውጤት ተደርጎ ይወሰዳል።

ይቅርታና ምህረት በዚህ መልኩ ይመሳሰሉ እንጂ በመካከላቸው ልዩነት የለም ማለት አይደለም። ሁለቱም በመንግሥት የሚሰጡና የወንጀለኛውን ቅጣት ቀሪ የሚያደርጉ ቢሆኑም የሚከተሉት ነጥቦች ይቅርታን ከምህረት ልዩ ያደርጉታል። ይቅርታ በአስፈጻሚው አካል የሚሰጥ ሲሆን ምህረት ብዙውን ጊዜ በሕግ አውጭው አካል ይታወጃል።[29] ይህም ሁለቱን ጽንሰሃሳቦች ከተለያየ የመንግሥት አካል የሚመነጩና ተግባራዊ የሚደረጉ እንደሆኑ ያስገነዝባል። ይቅርታ ከምህረት የሚለይበት ሌላው ነጥብ ከወንጀሉ ዓይነት ጋር የተያያዘ ነው። ምህረት በምንግስት ላይ በተፈጸሙ ፖለቲካነክ ወንጀሎች ለተጠረጠሩ፣ ለተከሰሱ ወይም ለተፈረደባቸው

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[26] James F. Childress, The Amnesty Argument, *CrossCurrents*, Vol. 23, No. 3 , (1973), p. 311, available at http://www.jstor.org/stable/24457861 last accessed on 7 July 2017.

[27] Bouvier, "Definition of Amnesty", available at < http://dictionary.babylon.com/Amnesty last accessed July 25, 2017.

[28] *Black's Law Dictionary*, 9th ed., s.v. "Amnesty".

[29] Rene´Le´vy, Pardons and Amnesties as Policy Instruments in Contemporary France, *Crime and Justice*,Vol. 36, No. 1, (2007), p. 554, available at http://www.jstor.org last accessed on5 August 2017.

ወንጀለኞች የሚደረግ ሲሆን ይቅርታ ግን በማንኛውም ወንጀል ጥፋተኛ ተብለው ለተፈረደባቸው ሰዎች ብቻ የሚሰጥ ነው።[30] በመካከላቸው ያለውን ልዩነት ለማብራራት ሌላው ግምት ውስጥ መግባት ያለበት ነገር ይቅርታና ምህረት ሊያስገኙ የሚችሉት ውጤት ነው። ምህረት በፖለቲካ ነክ ወንጀሎች ለተጠረጠሩ፣ ለተከሰሱ ወይም ለተፈረደባቸው ሰዎች በሕግ አውጭው በኩል ሲታወጅ ምህረት የተደረገላቸው ወንጀለኞች ወንጀላቸው ሙሉ በሙሉ ተሰርዞ እንደንጹህ ዜጋ የመቆጠር መብትን ያጎናጽፋቸዋል። ምህረት የተደረገለት ሰው ምንም ዓይነት የቀደመ የወንጀል ጥፋተኝነት እንደሌለበት ተደርጎ በነጻነት በማንኛውም ፖለቲካዊ፣ ማህበራዊና ኢኮኖሚያዊ ጉዳዮች ላይ የመሳተፍ እድል ይኖረዋል።[31] በተቃራኒው በይቅርታ የተለቀቀ ሰው የወንጀል ሪከርድ የሚኖርበትና ነጻነቱ በገደብ የተወሰነ ሊሆን ይችላል።[32] ገደቡን ተላልፎ የተገኘም እንደሆነ የተሰጠው ይቅርታ ተሰርዞ ወደነበረበት ማረሚያቤት ተመልሶ ቅጣቱን እንዲፈጽም ይደረጋል። ይህም በይቅርታ ከተለቀቀው ይልቅ በምህረት የተለቀቀው ሰው ሙሉ ነጻነት ያለው መሆኑን ያሳያል።

3. የይቅርታ አስፈላጊነት

ይቅርታ በማህበረሰባችን ውስጥ እንደመልካም እሴት ተደርጎ እንደሚወሰድና ይህም ከግለሰብ ግንኙነት አልፎ ወንጀል ፈጽመው በፍርድ ቅጣት ላረፈባቸው ግለሰቦችም እንደሚሰጥ በቀደሙት ርእሶቻችን ተመልክተናል። ይቅርታ በወንጀል ፍትህ አስተዳደሩ ውስጥም የሚኖረው ሚና ከላይ ከተመለከትነው የተለየ አይደለም። ይቅርታ የህዝብና የመንግሥትን ጥቅም በመጻረር የወንጀል ሕግን ተላልፎ ወንጀልን ፈጽሞ የተገኘ ግለሰብ ከረጅም ጊዜ ምርመራና ማጣራት በኋላ ጥፋተኛ ለመሆኑ በማስረጃ ተረጋግጦ ቅጣት ካረፈበት በኋላ ቅጣቱ በከፊል ወይም ሙሉ በሙሉ ተሰርዞለት ከማህበረሰቡ ጋር ተቀላቅሎ የበደለውን ግለሰብና ማህበረሰብ እንዲክስ የሚደረግበት ሥርዓት ነው። ይህ አሰራር በተለያዩ አገራት የወንጀል ፍትህ ሥርዓት ውስጥ ሕግን መሠረት አድርጎ ሲፈጸም ቆይቷል፤ እየተፈጸመም ነው።

ወንጀለኛው የእንዲህ አይነቱ የይቅርታ ሥርዓት ተጠቃሚ የሚሆንባቸው ምክንያቶች በርካታ ናቸው። ዋና ዋናዎቹም ወንጀለኛው የባሕርይ መሻሻል አምጥቷል ተብሎ መታመኑ፣ በፍርድ የተላለፈበት ቅጣት የተጋነነ ነው ተብሎ መታሰቡ፣ በተፈጠረው የሕግ እና የፍሬ ነገር ስህተት ምክንያት ንጹሃን የቅጣት ሰለባ የመሆናቸው አጋጣሚና ጥፋተኞች በነገሥታት ወይም በርእሰ-ብሄሮች አማካኝነት ይቅርታ ሊደረግላቸው ይገባል ተብሎ መታመኑ ናቸው።[33] እነዚህ ምክንያቶች የይቅርታን አስፈላጊነት የሚያመላክቱ ስለሆኑ ከዚህ በታች ተራ በተራ ለመመልከት ይሞክራል።

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[30] ዝኒ ከማሁ።

[31] Dejene Girma Janka, *A handbook on the criminal code of Ethiopia*, (2013), Addis Ababa, p. 200.

[32] ፀሐይ ወዳ፣ *የወንጀል ሕግ መሠረታዊ መርሆዎች*፣ (ጥር 19 ቀን 1994)፣ ገፅ 233።

[33] Kathleen Dean Moore, *Pardons Justice, Mercy and the public Interest*, oxford University press, (1989), pp. 60-63::

በወንጀል ጥፋተኛ የተባለው ሰው በማረሚያቤት የተወሰነ ጊዜ ቆይታው የሚያሳየው የባሕርይ መሻሻል ለይቅርታ እንደዓቢይ ምክንያት ተደርጎ ይወሰዳል፡፡ የፍርድ ቅጣቱ ላልተወሰነ ጊዜ (indeterminate sentencing) እንዲፈጸም የሚፈቅድ ሕግ ባላቸው አገሮች ለምሳሌ በአሜሪካ፣ እንግሊዝ፣ አውስትራሊያና ሌሎችም [34] ታራሚው በፍርድቤት ከተላለፈው ቅጣት ከፊሉን በማረሚያቤት እንደቆየ የባሕርይ ማሻሻል ሊያሳይ ይችላል፡፡ ይህ የባሕርይ መሻሻል ከታየ በኂላ ታራሚውን በማረሚያቤት እንዲቆይ ማድረጉ ከጥቅሙ ይልቅ ጉዳቱ ስለሚያመዝን ታራሚው በአመክሮ ቦርድ አስተያየት ሰጭነት ከእስር እንዲለቀቅ ይደረጋል፡፡[35] የተወሰነ ጊዜ ቅጣት መርህን (determinate sentencing) በሚከተሉ አገሮች ደግሞ በፍርድቤት የተወሰነው የቅጣት ጊዜ ካላለቀ በቀር የታራሚውን ባሕርይ መሻሻል ግምት ውስጥ አስገብቶ ታራሚውን ከእስር ለመልቀቅ የሚያስችል አሰራር ባለመኖሩ ይቅርታን እንደአንድ አማራጭ አድርጎ የመገልገል ልምድ አለ፡፡ [36] በሌላ አነጋገር ይቅርታ የባሕርይ መሻሻል ላሳዩ ታራሚዎች ሙሉ በሙሉ የእስራት ቅጣቱን ከመፈጸማቸው በፊት ከእስር እንዲለቀቁ ይደረጋል፡፡ይህም ታራሚዎች የባሕርይ መሻሻል ማሳየታቸው በማረሚያቤት የመቆየታቸውን ፋይዳ ዋጋ ያሳጣዋል፡፡[37]

ይቅርታን አስፈላጊ የሚያደርገው ሌላ ነጥብ የቅጣት መጋነን ነው፡፡ [38] በመሠረቱ ቅጣት የሚጣልባቸው ምክንያቶች ወንጀለኛውን በመቅጣት እሱንና አጠቃላይ ማህበረሰቡን ማስተማር፣ ማስጠንቀቅና ወንጀለኛው ላጠፋው ጥፋት እንዲቀጣ ማድረግ ናቸው፡፡ [39] ወንጀለኛውን ላጠፋው ጥፋት እንዲቀጣ የማድረጉ ነገር ወደበቀል እንዳያዘነብል አስፈላጊው ጥንቃቄ መወሰድ ያለበት ቢሆንም አንዳንድ ጊዜ ቅጣቱ ከጥፋቱ ያመዝንና ወይም ሳይመጣጠን ቀርቶ ወንጀለኛው ኢፍትሃዊ የሆነ ፍርድ ሊያጋጥመው ይችላል፡፡[40] እንዲህ አይነቱ የቅጣት መጋነንና የፍትህ መጓደል ሊያጋጥም አንዱ የማስተካከያ መንገድ የሚሆነው ፍርድ ቤቶች በሕግ የተሰጣቸውና የተለመደው ማስተካከያ መንገድ እንደይግባኝ፣ ሰበርና ፍርድን እንደገና ማየት የመሳሰሉ የውስጥ አሰራራቸው (self corrective devices) እንደሆነ ይታወቃል፡፡ [41] በተፈጠረው የፍሬነገር፣ የስነሥርዓትና የመሰረታዊ ሕግ ስህተት ምክንያት በተጓደለው ፍትህ ቅር የተሰኘ ወገን በይግባኝ ወይም በአቤቱታ

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[34] Fionadoherty, Indeterminate Sentencing Returns: The Invention of Supervised Release, *New York University Law Review*, Vol. 88:958, (June 2003), pp. 964-967.

[35] ዝኒ ከማሁ፡፡

[36] ዝኒ ከማሁ፡፡

[37] በላይነህና ሙሉነህ፣ የይቅርታ አፈጻጸም እና ውጤት በአማራ ክልል፣ *የአብክመ ፍትህ ቢሮ የሀግ መጽሄት ሕግጋት*፣ ቅጽ 1፣ ቁጥር 3፣ (2004) ፣ ገጽ 102፡፡

[38] N. Trendle, Reviewing Miscarriages of Justice: The Pardon ational Society for the Reform of the Criminal Law, avai Papers/2004/Trendle Justice. pdf

[39] Mirko Bagaric, *Punishment and Sentencing: A Rational Approach*, Cavendish Publishing Limited, London, (2001), pp 33-50

[40] Kathleen Dean Moore, supra note 31, p. 131.

[41] Chad Flanders, Pardons and the Theory of the "Second Best", *Saint Louis University school of law, legal Studies* Research papers Serious No. 2013-11, pp. 1-4. ፍርድቤቶች የተሳሳተ ፍርድን ለማረም የሚጠቀሙባቸውን የውስጥ አሰራሮች በተመለከተ የኢትዮጵያ የወንጀለኛ መቅጫ ስነሥርአት ሕግ ከአንቀጽ 180-189፣ የፌዴራል ፍርድቤቶች አዋጅ፣ አዋጅ ቁጥር 25/1988፣ ፌዴራል ነጋሪት ጋዜጣ፣ (1988)፣ አንቀጽ 10 እና የኢፌዴሪ የወንጀል ስነሥርአት ረቂቅ ህግ አንቀጽ 354 እንደቅደምተከተላቸው ይመልከቱ፡፡

እንዲስተካከልለት ጠይቆ ውጤት ሳያገኝ ቢቀርና በፍርድቤት የተጣለበትን የቅጣት ውሳኔ ለመፈጸም ወደ ማረሚያቤት ቢገባ ከፍ ብሎ ከተጠቀሱት ማስተካከያ መንገዶች በተጨማሪ ለተፈጠረው የፍትህ መጓደል መፍትሄ ሆኖ የሚያገለግለው ይቅርታ መሆኑን ብዙ ጸሕፍት ያስረዳሉ።[42] ፍርድ ቤቶች ጥፋተኛ በተባለ ግለሰብ ላይ ቅጣት ሲጥሉ ልዩ ልዩ የማቅለያና የማክበጃ ምክንያቶችን[43] ግምት ውስጥ በማስገባት ለጥፋቱ ተመጣጣኝ የሆነ ቅጣት እንደሚወስኑ የወንጀል ሕግ ፍልስፍና መርህ ቢሆንም በተግባር አልፎ አልፎም ቢሆን ከጥፋቱ ጋር የማይመጣጠን ቅጣት ሲወሰን ይስተዋላል። እንዲህ አይነቱ ቅጣት በወንጀል ሕግ የታለመውን ፍትህ ከማስፈን ይልቅ በጥፋተኛው ላይ የፍትህ መጓደልን ስለሚያስከትል በሕግ አግባብ ሊታረም ወይም ሊስተካከል እንደሚገባው ግልጽ ነው። ስለሆነም የፍትህ መጓደሉ ውሳኔውን በሰጠው ፍርድቤት ካልተስተካከለ በአስፈጻሚው አካል በሚሰጥ ይቅርታ የፍትህ መጓደሉ ሰለባ የሆነው ግለሰብ መፍትሄ ሊያገኝ እንደሚገባው የዘርፉ ጠበብት ይሞግታሉ።[44]

ንጹሃን በተሳሳተ ፍርድ አማካኝነት ላልተገባ ቅጣት የመዳረጋቸው ጉዳይ ይቅርታን አስፈላጊ የሚያደርግ ሌላው ነጥብ እንደሆነ ባለሙያዎች ይስማማሉ።[45] ሙር የተባለችው የዘርፉ ሊቅ የንጹሃንን ለተሳሳተ ፍርድ መጋለጥ ስታብራራ፣ ስህተት በየትኛውም ዘርፍ ወይም ሙያ ሊፈጠር እንደሚችልና ንጹሃን ተጎጅዎች ሊሆኑ እንደሚችሉ የኒኩለር ቦንብንና የአውሮፕላን አደጋን በንጽጽር ትጠቅሳለች። በእነዚህ ዘርፎች የሚፈጠሩ ስህተቶች በሰው ልጆች ሕይወት ላይ ከፍተኛ አደጋን ሊያስከትሉ እንደሚችሉ ሁሉ በፍርድ ሂደት የሚፈጠሩ ስህተቶችም በንጹሃን ላይ ከፍተኛ ፍትህ መጓደልና ልዩ ልዩ ማህበራዊና ኢኮኖሚያዊ ጉዳቶች መጋለጥን ያስከትላሉ። ይህን ግምት ውስጥ በማስገባት ከፍ ብሎ ለአብነት በተጠቀሱት የስራ ዘርፎች ለሚፈጠሩት አደጋዎች ፍቱን መፍትሄ (safety valves) የመኖራቸውን ያህል በፍትህ ዘርፉም በንጹሃን ላይ በተሳሳተ ፍርድ ምክንያት ለሚደርስባቸው ጉዳት መፍትሄ እንደሚያስፈልግ በማስረዳት ይቅርታ እንደመፍትሄ ሆኖ ሊያገለግል እንደሚችል ሙር በመጽሐፏ ታብራራለች።[46] ይህ ፍልስፍና በምእራባውያን ሀገሮች እውቅናን አግኝቶ በሕግ ማእቀፎቻቸው ተካትቶ እየተተገበረ እንደሚገኝ የታሪክ ድርሳናት ያሳያሉ። ለአብነትም ባረቦር የተባለው የሚሲሲፒ አገረገኘር ቁጥራቸው 200 የሚደርሱ ታራሚዎችን እ.አ.አ. በ2012 በይቅርታ የለቀቀበትና[47] አርባ ሁለተኛው የአሜሪካው ፕሬዝዳንት ቢል ክሊንተን ባለቀ

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[42] Margaret Colgate, Reinventing the President's Pardon Power, *American constitution Society for law and policy*, (October 2007), p. 10, retrieved from https://www.acslaw.org last accessed on 1 May 2017.

[43] Andrew Ashworth, *Mitigation and Aggravation at Sentencing*, Cambridge University Press (2011), P.21.

[44] James D. Barnett, 'The Grounds of Pardon, *Oregon Law Review*,, No. 6,(1927), pp 218 - 219 available at http://heinonline.org last accessed on 27 July 2017.

[45] Henry Weihofen, Pardon: An Extraordinary Remedy, *Rocky Mountain Law Review*, (1939-1940),, p.118 available at http://heinonline.org last accessed on 20 July 2017.

[46] Kathleen Dean Moore, supra note 33, p 131.

[47] P.S. Ruckman Jr , Barbour's last-minute rush to pardon, available at http://edition.cnn.com/2012/01/12/opinion/ruckman-haley-barbour-pardons/index.html last accessed 2 August 2017.

የስልጣን ዘመናቸው እ.አ.አ. በጥር 2001 ቁጥራቸው 140 ለሚደርሱ የአሜሪካ ፌደራል መንግሥት ታራሚዎች የሰጡት ይቅርታ ተጠቃሽ ነው።[48] በጠቅላላው ይቅርታ በፍትህ ሥርዓት ውስጥ በሚፈጠሩ ስህተቶች ምክንያት ለፍትህ መጓደል ለተጋለጡ ንጹሃን ነጻ መውጣት ፍቱን መፍትሄ በመሆን ያገለግላል።

በመጨረሻም ይቅርታ የሚሰጥበት ምክንያት የመንግሥት ወይም የንጉሣን ምህረትና ቸርነት እንደሆነ በዚህ ርዕስ መግቢያ ላይ ተመልክቷል። የብዙ ሀገራት መሪዎች ወይም ነገስታት በስልጣን ዘመናቸው ወንጀል ፈጽመው የተለያየ ቅጣት ተወስኖባቸው ፍርድ በመፈጸም ላይ ላሉ ታራሚዎች ይቅርታ ሲሰጡ መቆየታቸውን ጻሕፍት ያመላክታሉ።[49] የሀገራት ነገሥታት በቀድሞው ጊዜ ለወንጀለኞች ይቅርታን ሲያደርጉ ወይም ምህረትን ሲያውጁ የታራሚውን ንጽህና ወይም የባሕርይ መሻሻል መሠረት ከማድረግ ይልቅ ያላቸውን የፖለቲካ፣ የሀብትና ማህበራዊ ደረጃ ልእልና መገለጫ አድርገው ነበር።[50] በተለያዩ የአውሮፓ አገሮች በተለይም በእንግሊዝ ይህንን የሚያመላክቱ ይቅርታ ከሰባተኛው ክፍለዘመን ጀምሮ በስፋት ሲሰጥ ቆይቷል። ይሁን እንጂ ይህ አይነቱ የልዕልና መገለጫ ያለምንም ተቃዎሞና ውጣውረድ ሲከናወን ቆይቷል ለማለት አያስደፍርም። ከነገሥታቱ በተጨማሪ ሌሎች ስልጣን ያላቸው አካላት ለተከታዮቻቸው ይቅርታ በማድረግ ያላቸውን ስልጣን የነገሥታትን ያህል ማሳየት ይፈልጉ ስለነበር በዚህ ረገድ ሽኩቻዎች ታይተዋል። ለዚህ አይነተኛ ምሳሌ የሚሆነው በእንግሊዝ ካህናቱና ፓርላማው በየራሳቸው ልክ እንደንጉሱ ሁሉ ይቅርታ የማድረግን ስልጣን ተግባራዊ በማድረግ የንጉሡን ይቅርታ የመስጠት ስልጣን ለመቃወም ሞክረዋል።[51] በአጭሩ ይቅርታ በነገሥታት ወይም በሀገር መሪዎች በግዛታቸው ወንጀል ፈጽመው ለተቀጡ ወንጀሎች በሕግ የተሰጣቸውን ስልጣን ወይም የገኘኮነታቸውን ችሮታ በመጠቀም ከእስራት እንዲለቀቁ የሚያደርጉበት አሰራር ነው።

4. ይቅርታ በሌሎች አገሮች የወንጀል ፍትህ ሥርዓት

በዚህ ክፍል ይቅርታ በሌሎች አገሮች ምን ዓይነት የሕግ ይዘትና አፈጻጸም እንዳለው በአጭሩ መመልከቱ ወደፊት በኢትዮጵያ በተለይም በአማራ ብሄራዊ ክልል የፍትህ ሥርዓት ውስጥ ምን አይነት ቦታና አፈጻጸም እንዳለው ለመተንተን አቅም ሆኖ እንደሚያገለግል ይታመናል። በመሆኑም ይቅርታን አዘውትረው ከሚጠቀሙ አገሮች ውስጥ የቤልጅየም፣ የጀርመንና የስዊዘርላንድን የሕግ ማእቀፍና አፈጻጸም በናሙናነት ተመርጠው ተቃኝተዋል ።

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[48] H. Rept. Justice Undone: Clemency Decisions in the Clinton White House, Volume 1 - 107th Congress (2001-2002), available at https://www.congress.gov/congressional-report/107th-congress/house-report/454/3 last accessed on 10 August 2017.

[49] Kathleen Dean Moore, supra note 33, pp 16-18.

[50] ዝኒ ከማሁ።

[51] ዝኒ ከማሁ።

4.1 ቤልጅየም

ቤልጅየም ይቅርታን በሕግ ማእቀፏ ውስጥ በማካተት ተግባራዊ ከሚያደርጉ የአውሮፓ አገሮች መካከል አንዷ ናት። አገሪቷ ይቅርታን የተመለከተ ድንጋጌ በ1994 ባወጣችው ሕገመንግሥት አስፍራለች።[52] በዚህ ሕገመንግሥት መሠረት ይቅርታ የማድረግ ስልጣን ለንጉሱ የተሰጠ ሲሆን፣ ንጉሱ በፍርድ ቤቶች የተወሰነውን ቅጣት ሙሉ በሙሉ በመሰረዝ ወይም በከፊል በመቀነስ ለታራሚዎች ይቅርታ ሊያደርግ ይችላል።[53] ይሁን እንጂ ይቅርታን በማድረግ ረገድ ስልጣኑን ያለአግባብ እንዳይጠቀም በዚሁ ሕገመንግሥት ገደብ ተጥሎበታል። የሚጣለውም ገደብ ፖለቲካዊና አስተዳደራዊ ባሕርይ ያለው ይመስላል። የሀገሪቱ ሚኒስተሮችና ሌሎች ከፍተኛ ሹማምንት ወንጀል ፈጽመው በሀገሪቱ ጠቅላይ ፍርድቤት ጥፋተኛ ተብለው ቅጣት በሚተላለፍባቸው ጊዜ የይቅርታ ተጠቃሚ ለመሆን ጥያቄው በሀገሪቱ ህዝብ ተወካዮች ምክርቤት ወይም በሕግ አውጭው አካል በኩል መቅረብ ይኖርበታል። በዚህ መንገድ የይቅርታው ጥያቄ ሲቀርብ ንጉሱ ይቅርታ ሊያደርግ ይችላል።[54] ይህም ንጉሱ በራሱ ተነሳሽነትና ስልጣኑን ያለአግባብ በመገልገል በዘፈቀደ ወይም እንዳሻው ለሹማምንቱ ይቅርታን ከመስጠት ይገድበዋል።

ሌላው ገደብ አስተዳደራዊ ሥነ-ሥርዓት የሚከተለው የይቅርታ አሰጣጥ ነው። ይህ አይነቱ የይቅርታ አሰጣጥ በረጅም ሥነ-ሥርዓት በብዙ የመንግሥት አካላት ካለፈ በኋላ የመጨረሻው ውሳኔ በንጉሱ አማካኝነት የሚጸድቅበት ወይም የሚሻርበት ሥርዓት ነው። የይቅርታ ጥያቄው ለንጉሱ፣ ለፍትህ ሚኒስቴር ወይም በቀጥታ የይቅርታ አሰጣጥን ለሚያስተዳደረው '*the Service des Grâces*' እየተባለ ለሚጠራው የፍትህ ሚኒስቴሩ አካል ለሆነው መምሪያ (ዲፓርትሜንት) ሊቀርብ ይችላል። ከነዚህ የይቅርታ ጥያቄ አቀራረብ ሥርዓቶች በአንዱ የቀረበ ጥያቄ የይቅርታ አሰጣጥን በቀጥታ በሚከታተለው ዲፓርትሜንት በኩል አስፈላጊው ምርመራና ጥናት ከተደረገበት በኋላ መሰረታዊ መብቶችንና ነጻነቶችን ለሚከታተለው የፍትህ ሚኒስቴር ዲፓርትሜንት (the Directorate General of Legislative and Fundamental Rights and Liberties) ለአስተያየት ቀርቦ ከታየ በኋላ ከተገቢ አስተያየት ጋር ለአገሪቱ ጠቅላይ ዓቃቤ ሕግ እንዲላክ ይደረጋል። ይህ የደረሰው ጠቅላይ ዓቃቤ ሕግም ጉዳዩን አጥንቶ ተገቢ ነው ከሚለው አስተያየት ጋር ወደፍትህ ሚኒስቴር ይመልሰዋል። ሚኒስቴር መስሪያቤቱም ከፍ ብሎ የተጠቀሱትን የሶስቱን አካላት አጠቃላይ የጥናት ውጤት ቀምሮና የራሱን አስተያት ጨምሮ ይቅርታን ለማወጅ በሕገመንግስቱ ስልጣን ለተሰጠው የሀገሪቱ ንጉስ ያቀርባል። ንጉሱም ይቅርታውን ለማወጅ የታራሚውን ጉዳይ መመርመር ይጠበቅበታል። በዚህ ወቅት በፍርድ ሂደት ያልታዩ አዳዲስ እውነታዎች ካሉ፣ ታራሚው ከጥፋተኝነት ውሳኔ በኋላ ባሕርይውን ለማሻሻል ያደረገው ጥረት ካለ፣ ከጥፋተኝነት ውሳኔ በኋላ ቅጣቱ ለመፈጸም የተፈጠረ የጊዜ መንተትና ከፍርድ በፊት ታራሚው በሕገወጥ መንገድ ታስሮ ከሆነ ከግምት ውስጥ በማስገባት ተገቢ

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[52] The Belgian Constitution, *Belgian State Gazette*, Belgian House of Representatives, (October 2012), Article 110, http://www.dekamer.be/kvvcr/pdf_sections/publications/constitution/grondwetEN.pdf last accessed on 1 May 2017.

[53] ዝኒ ከማሁ።

[54] ዝኒ ከማሁ፣ አንቀጽ 103።

ነው የሚለውን ውሳኔ በቀረበለት የይቅርታ ውሳኔ ሐሳብ ላይ ያሳርፋል።[55] እንዲህ ያለው አሰራር በንጉሱ ይቅርታ የመስጠት ስልጣን ላይ ሌሎች ጉዳዩ የሚመለከታቸው የአስተዳደር አካላት እንደሚሳተፉበትና በስልጣን ያለአግባብ መገልገልን ሊቀንስ እንደሚችል የሚያሳይ አሰራር ነው።

በቤልጅየም የሕግ ማእቀፍ ከፍ ብሎ በተመለከተው መልኩ ይቅርታ የሚሰጥ ሲሆን በዚህ አግባብ በርካታ ይቅርታዎች በንጉሱ አማካኝነት ተሰጥተዋል። የይቅርታ አፈጻጸሙ ሲታይ ቀደም ባሉት ዘመናት ለወንጀለኞቹ በጅምላ ህዝባዊ በዓልን በተለይም የንጉሱ ልደትና በአለሲመት ሲከበር ይቅርታ ሲሰጥ እንደነበር መገንዘብ ይቻላል። [56] ሆኖም የጅምላ የይቅርታ አሰጠጥ የታራሚዎችን ጉዳይ በተናጠል ለማየት የማያስችል መሆኑን በመገምገም ይቅርታው በተናጠል የሚሰጥበት አሰራር ተዘርግቷል። በዚህ መሠረት እያንዳንዱ ይቅርታ ጠያቂ ጉዳዩ በተናጠል እየታየ የይቅርታ ሥርዓቱ ተጠቃሚ የሚሆንበት አሰራር ተግባራዊ ሆኗል።[57] በዚህ አሰራር መሠረት የይቅርታ ሥርዓት ተጠቃሚ የሆኑ ታራሚዎች ቅጣታቸው ሙሉ በሙሉ ወይም በከፊል ሊሰረዝላቸው ወይም በአመክሮ ሊለቀቁ ይችላሉ። እነዚህ ታራሚዎች ለተበዳዩ ካሳ እንዲከፍሉ፣ የማህበረሰብ አገልግሎት እንዲሰጡ፣ ስልጠና እንዲከታተሉና ባሕርይያቸውን የማሻሻልና ከጥፋታቸው የመማር ግዴታ እንዲጣልባቸውም ይደረጋል።[58]

4.2 ጀርመን

ሌላዋ አውሮፓዊት አገር ጀርመን እንደሌሎች ሀገራት ይቅርታን በወንጀል ፍትህ አስተዳደር ሥርዓቷ በመተግበር ላይ ትገኛለች። ጀርመን የኮንቲኔንታል ሕግ ሥርዓት ከሚከተሉ የአለም ሀገራት መካከል አንዷ መሆኗና የፌዴራል መንግሥት አወቃቀር ሥርዓት መከተሏ ከኢትዮጵያ ጋር ያመሳስላታል። በይቅርታ ረገድም ሁለቱ ሃገሮች ተቀራራቢነት ያለው የሕግ ማእቀፍ ያላቸው በመሆኑ የኢትዮጵያን የይቅርታ አሰጣጥ ሕግና አፈጻጸሙን ከመመልከት በፊት የጀርመንን ሕግና ልምድ መመልከቱ አስተማሪነቱ የጎላ ሊሆን እንደሚችል ታምኖበታል። በመሆኑም የጀርመንን የይቅርታ ሕግና አፈጻጸም እንደሚከተለው ለማቅረብ ተሞክሯል።

ጀርመን ወንጀልን በግል ወይም በቡድን ፈጽመው በፍርድቤት ጥፋተኛ ለተባሉ ግለሰቦች ይቅርታ ለመስጠት የሚያስችል የሕግ ማእቀፍ አላት። በዚህ መሠረት የሀገሪቱ ፕሬዚዳንትና [59] የየክልሎቹ አስተዳዳሪዎች ይቅርታን የመስጠት ስልጣን ተሰጥቷቸዋል። [60] ይህ ይቅርታ በብዛት ወንጀልን በተናጠል በፈጸሙና በፍርድቤት ቅጣት ለተወሰነባቸው ግለሰቦች የሚደረግ የይቅርታ አይነት ነው።

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[55] Pardons: European State Practices, Legal Memorandum March 2014, pp. 3-4.

[56] ዝኒ ከማሁ።

[57] ዝኒ ከማሁ።

[58] ዝኒ ከማሁ ገጽ 5።

[59] Basic Law for the Federal Republic of Germany, Article 60 (2), last amended on 23 December 2014, as translated by Professor Christian Tomuschat and Professor David P. Currie, available at https://www.btg-bestellservice.de/pdf/80201000.pdf last accessed on 16 August 2017.

[60] Pardons: European State Practices, supra note 55, p. 5.

በሀገራቱ ሕግ መሠረት በየደረጃው የሚገኙ መንግስታት ይቅርታን በሚሰጡበት ጊዜ ስልጣናቸውን ያለአግባብ እንዳይገለገሉ በሕግ ገደብ ተጥሎባቸዋል።[61] ገደቦቹም ከቤልጅየሙ የይቅርታ ሕግና አሰራር በተለየ መልኩ የጀርመኑ ፕሬዚዳንት ወንጀልን በህብረት ለሰሩ ታራሚዎች ይቅርታ ማድረግ አለመቻሉ፣ ይቅርታ የመስጠት ስልጣኑ ለክልል መንግስታት ተከፍሎ መሰጠቱና በምርጫ ወቅት ፕሬዚዳንቱ ይቅርታን አስመልክቶ ያከናወናቸው ተግባራት ለህዝብ ትችት መቅረባቸው ዋና ዋናዎቹ ናቸው።[62] ይህንን የስልጣን ገደብ መሠረት በማድረግ ቅጣቱ ከፍርድ አላማው ጋር የማይጣጣም ከሆነና ከርትዐዊ ጋር የሚቃረን ሆኖ ሲገኝ ታራሚውን በይቅርታ እንዲለቀቅ በማድረግ የወንጀል ቅጣቱ ፍትሃዊና ርትዐዊ እንዲሆን የማድረግ ስራ ይከናወናል።[63] ይህም ከይቅርታ መሰረታዊ አስተሳሰብ ጋር የሚጣጣምና በወንጀል ፍትህ ሥርዓቱ ውስጥ ሊፈጸሙ ለሚችሉ ስህተቶች እንደመፍትሄ ሆኖ ያገለግላል።

በጀርመን ይቅርታ እነዚህን መሰረታዊ ሃሳቦች መርህ በማድረግ የሚሰጥ ቢሆንም አሰራሩ አዘውትሮ ለህዝብ ይፋ አይደረግም። ይህንን አሰራር ሊያሻሽል በሚችል መልኩ ይቅርታ የተደረገላቸውን ታራሚዎች ይፋ በማድረግ ረገድ ተጠቃሽ የሚሆነው እ.አ.አ በ2003 ክላር የተባለ ለ20 አመታት በእስራት ከቆየ በኋላ ያቀረበው የይቅርታ ጥያቄንና ምክንያቱን ይፋ በማድረግ ይቅርታ ሊሰጥ ሞክሮ የነበረውና በህዝብና በመሪ የፖለቲካ ድርጅቶች ከፍተኛ ተቃውሞ የደረሰበት የሀገሪቱ ፕሬዚዳንት ሆረስት ኮሆልረ ነው።[64]

4.3 ስዊዘርላንድ

ስዊዘርላንድ ቀደምሲል ከተቃኙት አገሮችም ይሁን ከኢትዮጵያ ለየት ያለ የይቅርታ አሰጣጥ ሥርዓትን ዘርግታ ተግባር ላይ አውላለች። ይቅርታ የመስጠት ጽንሰሃሳብን እንደሌሎች አገሮች ሁሉ በሕገመንግስቷና በወንጀል ሕጎቿ ውስጥ አካትታ በወንጀል ጥፋተኛ ተብለው ቅጣት እየፈጸሙ ላሉ ታራሚዎች ይቅርታን የምታደርግ ቢሆንም ይህንን ተግባራዊ የሚያደርጉ ተቋሞቿ አወቃቀራቸው ለየት ያለ ይዘት ያለው ነው። በዚች ሀገር ይቅርታን የመስጠት ስልጣን የተሰጠው በፌደራሉ መንግሥት ደረጃ የፌደራል አሴምብሊ ሲሆን በክልል ደረጃ ደግሞ ካንቶን በሚባለው አካል ነው። ሁለቱም አካላት እንደቅደምተከተላቸው በፌዴራልና በክልል ደረጃ ከሚገኙ ፓርላሜነት አባላት ተውጣጥተው ይቅርታን ለመስጠት የተቋቋሙ አደረጃጀቶች ናቸው።[65] እነዚህ አካላት ይቅርታን ለመስጠት የቀረበውን የይቅርታ ጥያቄ በማጥናትና በማጣራት የሚያቀርብላቸው ተቋም ወይም ኮሚሽን የሚያዋቅሩ ሲሆን ይህ አሰራርም የሚሰጠውን የይቅርታ አይነት፣ ይቅርታ

[61] ዝኒ ከማሁ ገጽ 11-12።

[62] ዝኒ ከማሁ።

[63] ዝኒ ከማሁ።

[64] Deutsche Welle, Statement by Convicted Terrorist Casts Doubt on Pardon (Feb. 26, 2007), available at http://www.dw.de/statement-by-convicted-terrorist-casts-doubt-on-pardon/a-2366065 last accessed on 16 August 2017

[65] Switzerland's Constitution of 1999 with Amendments through 2002, Article 173 (1) (k) (1999), available at http://www.admin.ch/ch/e/rs/1/101.en.pdf last accessed on August 16, 2017.

የሚሰጥበትን ምክንያትና ሁኔታ በመለየት ከፍተኛ አስተዋጽኦ ያደርጋል። የይቅርታ አሰጣጡ በኮሚሽኑ ከተጠና በኋላ ውጤቱ ለፌደራሉ ምክርቤት ቀርቦ በምክርቤቱ ፕሬዚዳንት አቅራቢነት በሸንጎው የድምጽ ብልጫ የይቅርታው ሁኔታ ይወሰናል።[66]

5. ይቅርታ በኢትዮጵያ

የይቅርታ ሕጎችንና በባሕር ዳር ማረሚያቤት ያላቸውን አፈጻጸም ከማየት በፊት ይቅርታ በኢትዮጵያ ያለውን ጠቅላላ ገጽታ በአጭሩ መቃኘቱ ጠቃሚ ይሆናል። ይቅርታ በኢትዮጵያ ታሪክ ያለው ቦታ የቅርብ ጊዜ የሚባል አይደለም። በጥንታዊት ኢትዮጵያ ታሪክ ነገሥታት በጦር ያንበረከኳቸውንና የማረኳቸውን ተዋጊዎች ለተወሰነ ጊዜ ይዘው ካቆዩ በኋላ የተለያዩ በዓላት በሚከበሩበት ጊዜ በይቅርታና በምህረት ይለቁ እንደነበር የታሪክ ድርሳናት ያስረዳሉ።[67] በዚህ ረገድ የመጀሪያውን የይቅርታ አዋጅ ያወጁት ንጉስ ኢዛና [68] ፣ አለማየሁ የሚባል ልጃቸውን የልደት በዓል ምክንያት በማድረግ በርካታ ምርኮኞችን በይቅርታና ምህርት የለቀቁት አጼ ቴዎድሮስና[69] በተመሳሳይ ምርኮኞችን በይቅርታና ምህረት ሲለቁ የነበሩት አጼ ምኒሊክ ግንባርቀደም ተጠቃሽ ናቸው።[70]

በዘመናዊ የኢትዮድያ አስተዳደር ይቅርታ የሕግ እውቅና እንዲኖረው ተደርጎ ስራ ላይ ውሏል። በቀዳማዊ ኃይለስላሴ ዘመነመንግሥት ወጥተው ስራ ላይ የዋሉ ሕገጋት ይቅርታ የማድረግ ስልጣንን ለንጉሱ የሰጡ ናቸው። በ1931 እና በ1955 ዓ.ም የንጉሱን ፍጹማዊ ስልጣን ይዘው እንዲወጡ የተደረጉት ሕገመንግሥታት እንደቅደምተከተላቸው በአንቀጽ 16 እና 35 ስር በኢትዮድያ ሕገመንግሥት ታሪክ ውስጥ ይቅርታና ምህረት ቦታ እንዲኖራቸውና ሁለቱም በጽንሠሀሳብ ደረጃ ተለያይተው እንዲታወቁ ለማድረግ ተሞክሯል። [71] በ1949 ዓ.ም. የወጣው የኢትዮጵያ የወንጀለኛ መቅጫ ሕግ ይቅርታ ለታራሚዎች ሊደረግ እንደሚችል በመደንገግ ጽንሰሃሳቡ በኢትዮድያ ሕግ ይበልጥ ደምቆ እንዲነበብ አስችሏል። [72] በ1980 ዓ.ም የወጣው የኢትዮጵያ ህዝባዊት ዴሞክራሲያዊት ሪፐብሊክ ሕገመንግሥት በተመሳሳይ ይቅርታን እንዲያካትት ተደርጓል። ሕገመንግሥቱ ይቅርታ የማድረግን ስልጣን ለሕዝባዊ ዴሞክራሲያዊ ሪፐብሊክ ኢትዮጵያ ፕሬዚዳንት ሰጥቷል። [73] በኢፌዴሪ ሕገመንግሥትና የወንጀል ሕግም እንደቅደምተከተላቸው በአንቀጽ 71 እና 229 ይቅርታ ለታራሚዎች ሊደረግ እንደሚችል ተመልክቷል። ይህንን ተግባራዊ ለማድረግም የይቅርታ አሰጣጥን የሚደነግጉ ወይም የሚወስኑ አዋጆችና መመሪያዎች በፌደራልና በክልል መንግስታት ወጥተው በስራ ላይ ውለዋል።

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[66] Pardons: European State Practices, Supra note 55, p. 9.

[67] Pankrust, Richard, *the economic history of Ethiopia from earlier time to 1800*, England,(1962), p. 28.

[68] ዝኒ ከማሁ።

[69] ዝኒ ከማሁ።

[70] ገብረ ሕይወት ባይከዳኝ፤ ፃጼ ሚኒሊክ እና ኢትዮድያ፥(1903)፤ ያልታተመ፤ገጽ 8።

[71] ግርጌ ማስታወሻ ቁጥር 19ን ይመልከቱ።

[72] የኢትዮድያ የወንጀለኛ መቅጫ ሕግ፣ በግርጌ ማስታወሻ ቁጥር 21እንደተገለጸው፣ አንቀጽ 239።

[73] የኢህዴሪ ህገመንግሥት፣አዋጅ ቁጥር 1/1980፣ ነጋሪት ጋዜጣ፣(1980)፣ አንቀጽ 86(3)(መ)።

5.1. የይቅርታ ሕጎችና አፈጻጸማቸው በባሕር ዳር ማረሚያቤት

የይቅርታ ሕግን አውጥተው ተፈጻሚ እያደረጉ ካሉ ክልሎች መካከል አንዱ የአማራ ብሄራዊ ክልላዊ መንግሥት በመሆኑ የፌዴራሉና የዚህኑ ክልል ሕግጋት አጠቃላይ ይዘትና አፈጻጸም በባሕር ዳር ማረሚያቤት ምን እንደሚመስል ከዚህ በታች በዝርዝር ቀርቧል፡፡

ከላይ ይቅርታ በኢትዮድያ አጠቃላይ የሕግ ማእቀፍ ያለውን ቦታና ይዘት በአጭሩ ተቃኝቷል፡፡ ቀጥሎ ደግሞ የዚሁ የሕግ ማእቀፍ አካል የሆኑት የፌዴራሉና የአማራ ብሄራዊ ክልል የይቅርታ ሕጎች ይቅርታን ያዩበትን አግባብና ይዘት፣ ለአፈጻጸም እንቅፋት ሊሆኑ የሚችሉ ክፍተቶችን እንዲሁም በባሕር ዳር ማረሚያቤት የሚስተዋሉ የአፈጻጸም ችግሮችን ለመዳሰስ ጥረት ተደርጓል፡፡

የኢፌዴሪ ሕገመንግሥት ይቅርታ የማድረግ ስልጣንን ለሀገሪቱ ርዕሰብሄር [74] የመስጠቱን ፈለግ ተከትሎ የተሻሻለው የክልሉ ሕገመንግሥት ይቅርታ የማድረግ ስልጣንን ለክልሉ መስተዳደር ምክርቤት ሰጥቷል፡፡ [75] በእነዚህ ሕገመንግሥታት መሠረት በፌዴራል መንግሥቱ የወንጀል ጉዳዮች ላይ ርዕሰብሄሩ በአማራ ብሄራዊ ክልል መንግሥት የወንጀል ጉዳዮች ላይ ደግሞ የክልሉ መስተዳደር ምክርቤት ይቅርታ ያደርጋሉ፡፡ መንግሥታቱ በየሕገመንግሥታቸው የተሰጣቸውን ስልጣን ተግባራዊ ለማድረግ የይቅርታ አሰጣጥ ሥነሥርዓትን የሚደነግጉ አዋጆችና መመሪያዎችን አውጥተዋል፡፡ የፌዴራል መንግስቱ የተሻሻለውን የይቅርታ አዋጅ ቁጥር 840/2006 [76] እና የአማራ ብሄራዊ ክልላዊ መንግሥት ደግሞ በ1998 ዓ.ም በክልሉ የይቅርታ አሰጣጥን ለመወሰን የሚያስችል አዋጅ [77] አውጥተው ስራ ላይ አውለዋል፡፡ አዋጆቹ በዋናነት ይቅርታ ስለሚሰጡ አካላትና የይቅርታ አሰጣጥና አፈጻጸሙን የሚመለከቱ ድንጋጌዎችን የያዙ ናቸው፡፡ በእነዚህ ድንጋጌዎች ስር የተገለጹትን የይቅርታ ቅድመሁኔታዎችና ሥነሥርዓቶች መመልከቱ በይቅርታ አፈጻጸም ወቅት ሊከሰቱ የሚችሉትን የሕግና የአተገባበር ችግሮች ለመለየት የጎላ ፋይዳ ይኖረዋል፡፡ በመሆኑም የይቅርታ አሰጣጥና አፈጻጸም ድንጋጌዎቹ ያላቸውን ቅድመሁኔታና ሥነሥርዓት ከተግባራዊ አፈጻጸሙ ጋር በማያያዝ እንደሚከተለው ለማቅረብ ተሞክሯል፡፡

5.2 የይቅርታ ጥያቄ አቀራረብ

የይቅርታ ጥያቄ እንዴት ይቀርባል? የሚለውን ጥያቄ ለመመለስ ይቅርታ ለማንና ለምን እንደሚሰጥ በቅድሚያ መመልከቱ ጠቃሚ ነው፡፡ በአማራ ክልል ይቅርታ የሚሰጥበትን ምክንያት ለመገንዘብ በፌዴራልና በክልሉ ደረጃ የወጡ አዋጆችን መመልከት ያስፈልጋል፡፡ ሁለቱም አዋጆች በጋራ የሚያሰምሩበት ዐብይ የይቅርታ ዓላማ፤ "የይቅርታ አሰጣጥ ዋና ዓላማ የሕዝብን፣ የመንግሥትንና የታራሚዎችን ጥቅም ለማስጠበቅ ሲባል መንግሥት የወንጀል ጥፋተኞች በጥፋታቸው የተጸጸቱና

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[74] የኢፌዴሪ ሕገመንግሥት፣አዋጅ ቁጥር 1/1987፣ ፌዴራል ነጋሪት ጋዜጣ፣ (1987)፣ አንቀጽ 71(7) (ከዚህ በኋላ የኢፌዴሪ ሕገመንግሥት)፡፡

[75] የአማራ ብሄራዊ ክልል የተሻሻለው ሕገመንግሥት ማጽደቂ አዋጅ፣ አዋጅ ቁጥር 59/1994፣ዝክረ-ሕግ(1994)፣፣ አንቀጽ 58(6) (ከዚህ በኋላ የአብክመ ሕገመንግሥት)፡፡

[76] የፌዴራል የይቅርታ አሰጣጥ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 23 እንደተገለጸው፡፡

[77] የአብክመ የይቅርታ አሰጣጥ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 24 እንደተገለጸው፡፡

የታረመ መሆኑን በማረጋገጥ ወደ ህብረተሰቡ ተቀላቅለው አምራች ዜጋ እንዲሆኑ ማድረግ ነው።"[78]; በሚል ቀርቧል።

ከዚህ መገንዘብ የሚቻለው ይቅርታ የሚሰጠው ታራሚዎች በፈጸሙት ወንጀል ተጸጽተው የባሕርይ ለውጥ በማድረግ የበደሉትን ማህበረሰብ እንዲክሱ ለማድረግ፣ ታራሚዎችን በማረሚያቤት በማቆየት በመንግሥትና በህዝብ ላይ ሊደርስ የሚችለውን የኢኮኖሚ ጫና ለመቀነስና በአጠቃላይ የሕዝብና የመንግሥትን ጥቅምና ደህንነት ለመጠበቅ እንደሆነ ነው። አዋጆቹ ይቅርታ የሕዝብን፣ የመንግሥትንና የታራሚዎችን ጥቅምና ደህንነት ግምት ውስጥ ያስገባ እንደሆነ በዓላማው ላይ ሲያመላክቱ የወንጀሉ ሰለባ የሆኑ የግል ተበዳዮችን ጥቅምና ደህንነት ከትኩረት አላስገቡም። የግል ተበዳዮችን ፍላጎትና ደህንነት በግልጽ ባለአመላከተ መልኩ የይቅርታ አላማ በአዋጆቹ መቀረጹ የወንጀል ፍትህ አስተዳደሩ ለግል ተበዳዮች ተገቢውን ትኩረትና ቦታ አለመስጠቱን ያመላክታል። ሌላው ከይቅርታ አላማ ጋር ሊነሳ የሚገባው ነጥብ የአማራ ክልል የይቅርታ አሰጣጥ አዋጅ ከፌዴራል መንግስቱ አዋጅ ጋር ሲነጻጸር በይዘት ጠበብ ያለ መሆኑ ነው። የፌዴራል መንግሥቱ አዋጅ ይቅርታ የሚደረገው ለታራሚዎች፣ ለሕዝብና ለመንግሥት ጥቅም እንደሆነ ሲያመላክት የክልሉ ተነጻጻሪ ሕግ የሆነው አዋጅ ቁጥር 136/98 በአንቀጽ 3 ስር ያመላከተው የይቅርታ ዓላማ የታራሚዎችን ጥቅም የዘነጋ ይመስላል። ድንጋጌው የይቅርታን ዓላማ በሕዝብና በመንግሥት ጥቅም ላይ ብቻ ያነጻጸረ አድርጎ አቅርቦታል። ከዚህ በመነሳት የክልሉ የይቅርታ አሰጣጥ አዋጅ በይዘት የሳሳና የጠበበ ሆኖ ይታያል።

በፌዴራል መንግስቱ የይቅርታ አሰጣጥ አዋጅ አንቀጽ 3 ሥር የተመለከተው አላማ የታራሚዎችን፣ የሕዝብንና የመንግሥትን ጥቅምና ደህንነት መሠረት ያደረገ እንደመሆኑ መጠን ታራሚዎች በፍርድቤት ከተጣለባቸው ቅጣት በሕጉ የተመለከተውን ጊዜ በማረሚያቤት ካሳለፉ በኋላ የባሕርይ ለውጥ እንዳሳዩ ሲታመን የይቅርታ ጥያቄው በራሳቸው ወይም በሚመለከተው የመንግሥት አካል ለይቅርታ ቦርዱ ሊቀርብ ይችላል።[79] ይቅርታው በታራሚው በራሱ ወይም በባለቤቱ፣ በቅርብ ዘመዱ፣ በወኪሉ ወይም በጠበቃው አማካኝነት ሊቀርብ ይችላል።[80] ከዚህ ድንጋጌ የይቅርታ ጥያቄ አቅራቢዎች በቁጥር ብዙ መሆናቸውን መገንዘብ ይቻላል። ይሁን እንጂ የይቅርታ ጥያቄው በራሱ በታራሚው ወይም የእሱ ሥልጣንና ፈቃድ በተሰጣቸው ወኪሎች ወይም ጠበቃዎች በኩል ካልቀረበ በባለቤቱ፣ በቅርብ ዘመዱ ወይም በሌላ ሰው አማካኝነት የሚቀርብ የይቅርታ ጥያቄ ይቅርታ የሚደረግለት ግለሰብ የሚስማማበት መሆኑን በፊርማው ማረጋገጥ እንዳለበት ይኸው ድንጋጌ ያዝዛል። ይህም የይቅርታ ጥያቄው ከታራሚው ከራሱ መመንጨት እንዳለበት ያስገነዝበናል። ሌላው የይቅርታ ጥያቄ የሚቀርብበት መንገድ ጉዳዩ የሚመለከታቸው የመንግሥት አካላት ለህዝብና ለመንግሥት ደህንነት ሲባል የይቅርታ ጥያቄ የሚያቀርቡበት አግባብ ነው። በቀድሞው የአገሪቱ ፍትህ ሚኒስቴር፣ በአሁኑ ጠቅላይ ዓቃቤ ሕግ ወይም የማረሚያቤቶች አስተዳደር ታራሚዎችን በመከታተል የባሕርይ ለውጥ ወይም መሻሻል አሳይተዋል

[78] የፌዴራል የይቅርታ አሰጣጥ አዋጅ፣ የግርጌ ማስታወሻ ቁጥር 23፣ አንቀጽ 3 እና የአብክመ የይቅርታ አሰጣጥ አዋጅ፣ ግርጌ ማስታወሻ ቁጥር 24፣ አንቀጽ 3።

[79] የፌዴራል የይቅርታ አሰጣጥ አዋጅ፣ የግርጌ ማስታወሻ ቁጥር 23፣ አንቀጽ 15።

[80] ዝኒ ከማሁ፣ አንቀጽ 15(2)።

የሚሏቸውን በመምረጥ በይቅርታ እንዲለቀቁ ለይቅርታ ቦርድ ጥያቄውን ሊያቀርብ ይችላል። እንዲህ በሚሆንበት ጊዜ የይቅርታ ጥያቄው ማመልከቻ ግልባጭ ለታራሚው ደርሶት ፈቃደኛነቱን በፊርማው ማረጋገጥ ይኖርበታል። ታራሚው ማመልከቻው ከደረሰበት ቀን አንስቶ ባሉት 15 የስራ ቀናት ውስጥ ይቅርታውን እንደማይፈልግ ለቦርዱ በጽሑፍ ካልገለጸ እንደተቀበለው ተቆጥሮ የይቅርታው ተጠቃሚ ይሆናል።[81]

ይህ የይቅርታ አቀራረብ መንገድ በአብክመ የይቅርታ አሰጣጥ አዋጅ በአንቀጽ 11 ስር የተካተተ ቢሆንም፣ ከፌዴራሉ አዋጅ ጋር ሲነጻጸር መጠነኛ ልዩነቶች አሉት። ልዩነቶቹም የይቅርታ ጥያቄው በታራሚው ባለቤት፣ የቅርብ ዘመድ ወይም በሌላ ሰው አማካኝነት በሚቀርብበት ጊዜ ታራሚው ፈቃደኛነቱን በፊርማው እንዲያረጋግጥ የክልሉ አዋጅ አለመደንገጉና የይቅርታ ጥያቄው በክልሉ ፍትህ ቢሮና በማረሚያቤቶች አስተዳደር በኩል ሲቀርብ ሃሳቡ መቅረብ ያለበት ለክልሉ መንግሥት አስተዳደር ምክርቤት መሆኑ ነው።[82] እነዚህ ልዩነቶች በአዋጁ ውስጥ የተፈጠሩት ለአሠራር አመችነት ታስቦ ነውን? የሚለው ጥያቄ መልስ የሚሻ ነጥብ እንደሆነ ልብ ሊባል ይገባል።

ከእዚሁ ጋር ተያይዞ ጥያቄ የሚያጭረው ጉዳይ ይቅርታን ስለታራሚው ሆነው እንዲጠይቁ በአዋጁ የተፈቀደላቸው 'የቅርብ ዘመዶቹ'[83] እነማን ናቸው? የሚለው ነው። 'የቅርብ ዘመዶች' የሚለው አገላለጽ በኢትዮጵያ በተለይም በአማራ ባህልና ወግ ረዘም ያለ የገዘመንድና ሐረግን የሚያሳይ በመሆኑ በዚህ አዋጅ መሠረት የይቅርታን ጥያቄ ማቅረብ የሚችለው ዘመድ ማን እንደሆነ በግልጽ አልተመለከተም። ይህም ያለታራሚው እውቅናና ፈቃድ ይቅርታ ሊጠየቅ የሚችልበትን ሰፊ እድል የሚፈጥር ከመሆኑም በላይ ለአፈጻጸምም አስቸጋሪ ነው። በተለይም የአብክመ የይቅርታ አሰጣጥ አዋጅ የይቅርታ ጥያቄ በቅርብ ዘመድ በሚቀርብበት ጊዜ የይቅርታ ተጠቃሚው እንዲያውቀውና ፈቃደኛ መሆኑን የሚያረጋግጥበት አሰራር አለመዘርጋቱ አፈጻጸሙን ይበልጥ አስቸጋሪ ያደርገዋል። ያለይቅርታ ተጠቃሚው ፈቃድ የሚሰጥ ይቅርታ ምን ችግር ሊያስከትል ይችላል? የሚለው ጥያቄ እዚህ ላይ መነሳቱ አገባብነት ይኖረዋል። ከፍ ብሎ ባሉት የዚህ ጥናት ክፍሎች ለመግለጽ እንደተሞከረው ይቅርታ በበዳይና በተበዳይ መካከል ያለውን ግንኙነት ሰላማዊ የሚያደርግ እንደመሆኑ መጠን ይቅርታ የሚደረግለት ሰው በድርጊቱ ተጸጽቶና ጥፋቱን ተቀብሎ ተበዳዩን የሚክስበት መንገድ ነው። ይህ ከሆነ ደግሞ የይቅርታ ተጠቃሚው ሙሉና ነጻ ፈቃድ ለይቅርታው ስኬታማነት ወሳኝ ሚና ይኖረዋል። ይቅርታ የሚደረግለት ሰው ሳያውቅና ሳይፈቅድ የሚደረግ ይቅርታ ባለቤት የለሽና የታለመውን ውጤት ሊያስገኝ የማይችል የይስሙላ ይቅርታ ይሆናል። ይቅርታው የታቀደውን ሰላም በማስገኘት ፋንታ ይቅርታውን

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[81] ዝኒ ከማሁ፣ አንቀጽ 15(4፣ 5ና 6)።

[82] የአብክመ የይቅርታ አሰጣጥ አዋጅ፣ ግርጌ ማስታወሻ ቁጥር 24፣አንቀጽ 11(1 እና 2)፣ *"[ታ]በክልሉ ስልጣን ስር በሚወድቅ ማናቸውም የወን[ጅን] ጉዳይ በፍርድቤት ተከሶ የመጨረሻ ፍርድ የተወሰነበት ማንኛውም ሰው የተወሰነ ፍርድ በሕግ በሕግ ይቅርታን የሚያስከለክል ካልሆነ በቀር የይቅርታ ጥያቄውን በራሱ፣ በባለቤቱ፣ በቅርብ ዘመዶቹ፣ በወኪሉ ወይም በጠበቃው አማካኝነት ማቅረብ ይችላል"። "[ከዚህ በላይ በንዑስ አንቀፅ 1 ስር የተደነገገው እንደተጠበቀ ሆኖ፣ የክልሉ ፍትህ ቢሮ ወይም የማረሚያቤቶች አስ/ጽ/ ቤት ይቅርታ ሊደረግላቸው 2. የሚገባውን ሰዎች በመምረጥ ይቅርታ እንዲደረግላቸው ለክልሉ መስተዳደር ምክርቤት ሃሳብ ሊያቀርቡ ይችላል። መሥሪያቤቶች የይቅርታ ጥያቄ ለማቅረብ የወሰኑ እንደሆነ የይቅርታ መጠየቂያውን ደብዳቤ ቅጂ በስሙ ይቅርታ ለተጠየቀለት ሰው እንዲደርሰው ማድረግ ይኖርበታል"*

[83] ዝኒ ከማሁ፣ አንቀጽ 11 (1)።

በሰጠውና በይቅርታው ተጠቃሚ መካከል አለመግባባትንና ንትርክን ከመፍጠሩም በተጨማሪ የህዝብ አመኔታን ይሸረሽራል።[84]

5.3 የይቅርታ አሰጣጥ ሂደት

የይቅርታ ጥያቄ ከላይ ከተመለከትናቸው የይቅርታ ጥያቄ ማቅረቢያ መንገዶች በአንዱ በጽሑፍ ለይቅርታ ቦርዱ የቀረበ እንደሆነ ቦርዱ ማመልከቻውን በአግባቡ መርምሮ ውሳኔ መስጠት ይጠበቅበታል። የይቅርታ ጥያቄ ማመልከቻው ይቅርታ ስለሚደረግለት ሰው ሊይዝ የሚገባቸው መረጃዎች በአብክመ የይቅርታ አሰጣጥ አዋጅና መመሪያ ተዘርዝረዋል። [85] በአዋጁና በመመሪያው የተመለከቱትን መስፈርቶች አሟልቶ የቀረበ የይቅርታ መጠየቂያ ማመልከቻ ፍርዱ ከተሰጠ በኋላ በማንኛውም ጊዜ ሊታይ ይችላል።[86] አስፈላጊውን መረጃ ይዞ የቀረበ ማመልከቻ ሁሉ አወንታዊ መልስ እንደሚያገኝ ይታመናል።[87] በሌላ አነጋገር ከፍርድ በኋላ አስፈላጊውን መረጃ የያዘ ማመልከቻ ያቀረበ ታራሚ በመመሪያው ላይ የተመለከቱትን ዝርዝር ቅድመሁኔታዎች እስካላሟላ ድረስ የይቅርታ ተጠቃሚ አይሆንም። ለመሆኑ መሟላት ያለባቸው ቅድመሁኔታዎች ምንድን ናቸው? ይህንን ጥያቄ በአግባቡ ለመመለስ የአብክመን የይቅርታ አሰጣጥ ሥነሥርዓት መወሰኛ አዋጅ ለማስፈጸም የወጣውን መመሪያ መመልከቱ ተገቢ ነው። በመመሪያው መሠረት ለአንድ ታራሚ የይቅርታ ተጠቃሚ መሆን መሟላት ያለባቸው ቅድመሁኔታዎች የባሕርይ መሻሻል[88]፣ እድሜ[89]፣ የጤና ሁኔታ[90]፣ ጸታ[91]፣ የእስራት መጠንና የእስር ቆይታ ጊዜን መሠረት ያደረጉ ናቸው። እነዚህን ቅድመሁኔታዎች አንድ በአንድ ከዚህ በታች ለማሳየት ተሞክሯል።

የባሕርይ መሻሻል ወይም ለውጥ በመመሪያው የይቅርታ ተጠቃሚ ለመሆን ከቅድመሁኔታዎቹ አንዱ ሆኖ ተመልክቷል።[92] ይሁን እንጂ ዝርዝር አፈጻጸሙ እንደሌሎቹ መስፈርቶች በመመሪያው በግልጽ አልተመለከተም። አንድ ታራሚ የይቅርታ ተጠቃሚ ለመሆን የባሕርይ መሻሻል ወይም ለውጥ አሳይቷል ለማለት የሚያስችል ዝርዝር መመዘኛ በሌለበት ቅድመሁኔታውን አሟልቷል ወይም አላሟላም ለማለት ያስቸግራል። ይህም በመሆኑ የዚህ ጥናት ትኩረት በሆነው በባሕር ዳር ማረሚያቤት ከማረሚያቤቱ ባለሙያዎች ጋር በተደረጉ የቡድን

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[84] Ethiopia Frees opposition leader Birtukan Mideksa, available at https://www.theguardian.com/world/2010/oct/06/ethiopia-frees-opposition-leader-birtukan-mideksa last accessed 13 December 2017

[85] የአብክመ የይቅርታ አሰጣጥ አዋጅ፣ ግርጌ ማስታወሻ ቁጥር 24፣ አንቀጽ 12፤ የአብክመ የይቅርታ አሰጣጥ መመሪያ፣ በግርጌ ማስታወሻ ቁጥር 25 እንደተገለጸው።

[86] የአብክመ የይቅርታ አሰጣጥ አዋጅ፣ ግርጌ ማስታወሻ ቁጥር 24፣ አንቀጽ 15 እና የአብክመ የይቅርታ አሰጣጥ መመሪያ ፣ ግርጌ ማስታወሻ ቁጥር 25፣ አንቀጽ 13 ይመልከቱ።

[87] ከአብክመ ማረሚያቤቶች አስተዳደር ኮሚሽን የተገኘ የ 2009 ዓ.ም ሪፖርት እንደሚያሳየው በአመቱ በአዲስ አመት መገቢያና በግንቦት 20 በዓል 157 ሴት ታራሚዎችና 5421 ወንድ ታራሚዎች በይቅርታ ከእስር ተለቀዋል።

[88] የአብክመ የይቅርታ አሰጣጥ አዋጅ፣ ግርጌ ማስታወሻ ቁጥር 24፣ አንቀጽ 20 እና የአብክመ የይቅርታ አሰጣጥ መመሪያ፣ በግርጌ ማስታወሻ ቁጥር 25፣አንቀጽ 5።

[89] የፌዴራል የይቅርታ አሰጣጥ አዋጅ፣ የግርጌ ማስታወሻ ቁጥር 23፣ አንቀጽ 20።

[90] ዝኒ ከማሁ።

[91] የአብክመ የይቅርታ አሰጣጥ መመሪያ፣ በግርጌ ማስታወሻ ቁጥር 25፣ ቁጥር 6።

[92] ዝኒ ከማሁ፣ ቁጥር 5።

ውይይቶች ባለሙያዎቹ በክልሉ አመክሮ አሰጣጥ መመሪያ የተመለከተውን ዝርዝር የባሕርይ ለውጥ መለኪያ ለመጠቀም እንደተገደዱ ገልጸዋል።[93]

ከባሕርይ መሻሻል ወይም ለውጥ በተጨማሪ ከእድሜ፣ ከጾታ፣ ከጤናና ከሌሎችም የታራሚው የግል ሁኔታ አንጻር እየታየ ፍርድ ቤቱ ካስተላለፈበት የእስራት መጠን ምን ያህሉን ሲፈጽም የይቅርታ ተጠቃሚ እንደሚሆን ተመልክቷል።[94] መመሪያው በወንጀል ሕጉ ከተመለከተው ከፍተኛ የእስራት መጠን ወይም ጣሪያ ማለትም ከእድሜ ልክ እስራት ጀምሮ እስከዝቅተኛው ቀላል እስራት ጊዜ ድረስ ጾታን መሠረት ያደረገ የአቀናነስ ሥርዓት አለው።[95] በዚህ አሰራር መሠረት ሴት ታራሚዎች በይቅርታ አሰጣጡ የልዩ መብት ተጠቃሚዎች ሆነዋል። አንዲት ሴት ታራሚና አንድ ወንድ ታራሚ ከአንድ አመት በላይ የሆነ እኩል የእስራት ቅጣት ቢወሰንባቸው የይቅርታ ተጠቃሚ ለመሆን ሴቷ በማረሚያቤት የሚኖራት ቆይታ ወይም የቅጣት ፍርድ አፈጻጸም ከወንድ ታራሚው አንጻር ሲታይ ያነሰ መሆን እንዳለበት መመሪያው ያመላክታል።[96] ለሴት ታራሚዎች የይቅርታ ተጠቃሚ እንዲሆኑ በፍርድቤት ከተላለፈባቸው የእስራት መጠን በአማካይ ከአንድ እስከሁለት አመት በተመሳሳይ ወንጀልና እስራት ከተፈረደባቸው ወንድ ታራሚዎች እንዲቀነስላቸው በመመሪያው ተመልክቷል። ለምሳሌ፣ አንድ ወንድና አንዲት ሴት እኩል የእድሜ ልክ እስራት ቢፈረድባቸው ከእዚህ ውስጥ ወንዱ 14 አመት ሴቷ 12 አመት በማረሚያቤት ከቆዩና የባሕርይ ለውጥ ካመጡ ሌሎች መስፈርቶች እንደተጠበቁ ሆነው የይቅርታ ተጠቃሚ ሊሆኑ ይችላሉ።[97] በሌላ በኩል መሰል ታራሚዎች ከአንድ አመት በታች እስራት ቢፈረድባቸው ሴቷ 1/3ኛውን ወንዱ ደግሞ ግማሹን የእስራት ጊዜ ካጠናቀቁ ሌሎች መስፈርቶች ከተሟሉ የይቅርታ ተጠቃሚዎች ይሆናሉ።[98] ሆኖም ሴቷ ታራሚ ነፍሰጡር ከሆነች በልዩ ሁኔታ የይቅርታው ተጠቃሚ እንድትሆን መመሪያው ይፈቅዳል።[99] ከፍ ብሎ እንደአብነት በተመለከትናቸው ከፍተኛና ዝቅተኛ የእስራት ፍርዶች ላይ የተመለከተው ስሌት በሌሎቹ የእስራት መጠኖችም ላይ ሲተገበር በጠቅላላው ለሴት ታራሚዎች ከአንድ እስከሁለት አመት ሊደርስ የሚችል የእስራት መጠን ቅናሽ ይደረግላቸዋል።

ከእድሜ አንጻርም መመሪያው በወጣት አጥፊዎችና በእድሜ የገፉ ታራሚዎች በይቅርታ እንዲወጡ ለማድረግ የተለየ መስፈርት አለው። እድሜያቸው ከ9 -15 አመት የሆኑ ወጣት አጥፊዎች ሦስት ዓመትና ከዚያ በለይ የሆነ እስራት ከተፈረደባቸው ከዚህ ውስጥ 1/3ኛውን፣ ከ3 ዓመት በታች ከተፈረደባቸው ደግሞ 1/4ኛውን ከፈጸሙና ሌሎችን መስፈርቶች አሟልተው ከተገኙ የይቅርታ ተጠቃሚዎች ይሆናሉ።[100] በእድሜ የገፉ ታራሚዎች እንደሴት ታራሚዎችና እንደወጣቹ ሁሉ በመመሪያው በልዩ ሁኔታ በይቅርታ ወቅት እንዲስተናገዱ

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[93] በባሕር ዳር ማረሚያቤት ከሚገኙ ባለሙያዎች ጋር ስለ ይቅርታ አሰጣጥ ከተደረገ ቡድን ወይይት የተገኘ፣ ግንቦት 2008 ዓ.ም፣ ለበለጠ ግንዛቤ በአብክመ አስተዳደርና ጸጥታ ቢሮ የአመክሮ አሰጣጥ ስርዓትንና አፈጻጸምን ለመወሰን የወጣ ጊዚያዊ መመሪያ ቁጥር 1/2003 ዓ.ም ይመልከቱ።

[94] የአብክመ የይቅርታ አሰጣጥ መመሪያ፣ በግርጌ ማስታወሻ ቁጥር 25፣ ቁጥር 5።

[95] ዝኒ ከማሁ፣ ቁጥር 5 ይመልከቱ።

[96] ዝኒ ከማሁ።

[97] ዝኒ ከማሁ፣ ቁጥር 5(1)።

[98] ዝኒ ከማሁ፣ቁጥር 5(8)።

[99] ዝኒ ከማሁ፣ቁጥር 6(6ና 7)።

[100] ዝኒ ከማሁ፣ቁጥር 6(1ና 2)።

ተደንግጓል፡፡ በዚህ መሠረት እድሜው ከ55 ዓመት በላይ የሆነ ወንድ ታራሚና እድሜዋ 50 ዓመትና ከዚያ በላይ የሆነ ሴት ታራሚ ከተጣለባቸው የእድሜ ልክ እስራት 12 እና 11 ዓመት እንደቅደምተከተላቸው ፈጽመው ከተገኙ የይቅርታ ተጠቃሚዎች ይሆናሉ፡፡[101] እነዚሁ ታራሚዎች ሦስት ዓመት በላይ በሆነ እስራት ከተቀጡ 1/3ኛውን፤ ቅጣቱ ከእዚህ በታች የሆነ እንደሆነ 1/4ኛውን በተመሳሳይ መፈጸም ይጠበቅባቸዋል፡፡[102]

ከላይ ከተቃኙት የይቅርታ መስፈርቶች በተጨማሪ በመመሪያው የተመለከተው መስፈርት የታራሚው የጤና ሁኔታ ነው፡፡ ታራሚው የአእምሮ ህመምተኛ፣ የማይድኑ በሽታዎች ለምሳሌ፣ ስኳር፣ ኤች አይቪ ኤድስ፣ ካንሰርና ሌሎችም በሽታዎች ተጠቂ የሆነ እንደሆነና የእለት ተዕለት ተግባሩን ለማከናወን የሚቸገር የአካልጉዳተኛ የሆነ ሰው የእስራት መጠኑ ከግምት ውስጥ ሳይገባ የይቅርታ ተጠቃሚ ሊሆን ይችላል፡፡[103] ይሁን እንጂ የይቅርታ ተጠቃሚው የጤና ሁኔታ ህጋዊነት ካለው የጤና ተቋም ማስረጃ ማቅረብን እንደቅድመሁኔታ ይጠይቃል፡፡ የአዕምሮ ህመምን በተመለከተ በሀገሪቱ ካለው የአእምሮ ህክምና ተቋም ከሆነው አማኑኤል ሆስፒታል ወይም ከሌላ ተነጻጻሪ ተቋም ማስረጃ መቅረብ እንዳለበት መመሪያው ያዝዛል፡፡[104] ከዚህ ላይ የዘርፉ ባለሙያዎች መልስ የሚሹ ሁለት መሰረታዊ ጥያቄዎችን ያነሳሉ፡፡ እነሱም ተነጻጻሪ ሆስፒታል ምን ማለት ነው? ማስረጃውን የሚያቀርበው ማን ነው? የሚሉ ናቸው፡፡ ስለታራሚው የአእምሮ ህምም ማስረጃ ሊሰጥ በሚገባው የህክምና ተቋም ወይም ሆስፒታል የአፈጻጸም ችግር የሚስተዋል ሲሆን ይኸውም በክልሉ የሚገኙ ከፍተኛ ሆስፒታሎች ከአማኑኤል የአዕምሮ ህክምና ሆስፒታል ጋር ተነጻጻሪ ተደርገው የሚሰጡት ማስረጃ በይቅርታ ቦርዱ በኩል አንዳንድ ጊዜ ተቀባይነት ሲያገኝ ሌላ ጊዜ ውድቅ እየተደረገ በአሰራሩ ላይ የወጥነት ችግር በመፍጠር ላይ ይገኛል፡፡ በእዚህ ምክንያትም የአእምሮ ህመም ችግር ያለባቸው ታራሚዎች የይቅርታ ተጠቃሚ እንዳይሆኑ በመደረጉ በማረሚያቤቱ ላይ ከፍተኛ ተጽእኖ ሲያሳርፉ ይስተዋላል፡፡[105] በአጠቃላይ የታራሚው ጤንነት ሁኔታ ለይቅርታ ተጠቃሚነት ወሳኝ መስፈርት ቢሆንም በአፈጻጸም ረገድ ከላይ የተወሱት ጥያቄዎችና ሌሎችም ችግሮች[106] የሚስተዋሉበት ነው፡፡

በመጨረሻም ከግምት ውስጥ መግባት ያለበት ሁኔታ በይቅርታ ጠያቂውና በግል ተበዳይ ወይም በቅርብ ቤተሰቦቹ መካከል ሊፈጸም የሚገባው የእርቅ ጉዳይ ነው፡፡ ምንም እንኳ መመሪያው እርቅን በሁሉም የወንጀል ጉዳዮች ላይ እንደቅድመመስፈርት ባያመላክትም በሰው መግደልና በመግደል ሙከራ ወንጀልን በተመለከተ በማህበረሰቡና በወንጀሉ ሰለባ በሆኑ ግለሰቦች ላይ ጥሎ የሚያልፈውን ቁርሾ በመሻር ረገድ የሚኖረውን ፋይዳ በመገንዘብ ይቅርታ ጠያቂው እርቅን

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[101] ዝኒ ከማሁ፣ቁጥር 6(3)፡፡

[102] ዝኒ ከማሁ፣ቁጥር 6(4ና 5)፡፡

[103] ዝኒ ከማሁ፣ቁጥር 7፡፡

[104] ዝኒ ከማሁ፡፡

[105] ኮማንደር አማረ ወርቁ አይናለም፣ በአብክመ ማረሚያቤቶች አስተዳደር ኮሚሽን ታራሚዎች አያያዝ አስተዳደር ዋና የስራ ሂደት፣ ስለይቅርታ አሰጣጥ የተደረገ ቃለመጠይቅ፣ ሐምሌ 2009፡፡

[106] ከዚህ ጋር ተያይዘው የሚስተዋሉ ችግሮች አስተዳደራዊ ሲሆኑ እነዚህም የመጓጓዣ፣ የበጀት፣ ታራሚውን አጅቦ ወደህክምና ተቋም የሚወስድ የሰው ኃይል፣ የውሎ አበል አከፋፈል መሆናቸውን በጥናቲ ከተመረጡ የመረጃ ምንጮች መገንዘብ ተችሏል፡፡

አስቀድሞ መፈጸም እንዳለበት በግልጽ ደንግጓል።[107] እርቁ መፈጸም ያለበት በይቅርታ ጠያቂውና በሚች የቅርብ ዘመዶች ወይም በግል ተበዳይ መካከል እንደሆነ መመሪያው ያመላክታል።[108] እርቅ መፈጸሙ ብቻ ሳይሆን እንደጉዳቱ መጠን በካሳ መልክ እንደእየአካባቢው ባህልና ልምድ ገንዘብ ሊከፈል እንደሚገባም በመመሪያው ተገልጿል። የገንዘቡ መጠንም የተጋነነ መሆን እንደሌለበት ይኸው መመሪያ ደንግጓል።[109] ሆኖም እርቅ እንዲፈጽም የተጠየቀው ወገን ከአካባቢው ባህል ውጭ በሆነ መንገድ የተጋነነ የገንዘብ መጠን ከጠየቀ ወይም እርቅ ሊፈጽሙ የሚገባቸው ሰዎች በአካባቢው አለመኖራቸው ወንጀሉ በተፈጸመበት ወረዳ አስተዳደርና ጸጥታ ጉዳይ ጽ/ቤት ከተረጋገጠ ይህ ቅድመሁኔታ ሳይሟላ ይቅርታ የጠየቀው ታራሚ የይቅርታው ተጠቃሚ ሊሆን ይችላል።[110] ታራሚዎች በማረሚያቤት ሆነው ከማረሚያቤት ውጭ ካሉ ተበዳዮች ጋር እርቅ እንዲፈጽሙና ካሳ እንዲከፍሉ እንደቅድመሁኔታ የመቅረቡ ጉዳይ እርቁን በተሟላ ሁኔታ ለማስፈጸም በርካታ ችግሮች እንዲከሰቱ ምክንያት ሆኗል። ዋና ዋና ችግሮችም እርቅን ለመፈጸም ተገቢው የተበዳይ ዘመድ ማን እንደሆነ በመመሪያው በግልጽ ካለመመልከቱና ለእርቁ ከሚጠየቀው የገንዘብ መጠን ጋር የተያያዙ ናቸው።

የተጎጅ ቤተሰቦች እነማን ናቸው? የሚለው በዘር ሐረጋቸው ቅደምተከተል በመመሪያው የትርጉም ክፍል ይገለጽ እንጂ እርቅን በመፈጸም ረገድ ማን የቀዳሚነት መብት አለው? የሚለው በግልጽ አልተመለከተም። ይህ በመሆኑ በተለያዩ ደረጃዎች ያሉ የስራ ኃላፊዎችም ይሁን ባለሙያዎች አንድ አይነት ሐሳብ ወይም አተረጓጎም የላቸውም። አንዳንዶቹ በመመሪያው ላይ ከተመለከቱት የተጎጅ ቤተሰቦች መካከል አንዱ እርቅ መፈጸሙ ታራሚውን የይቅርታ ተጠቃሚ ማድረግ ይችላል[111] ሲሉ ሌሎቹ ደግሞ ሁሉም የቤተሰብ አባላት መታረቅና በመካከላቸው ስምምነት መፍጠር ካልተቻለ ታራሚውን የይቅርታ ተጠቃሚ ማድረግ አይቻልም[112] በማለት ይሟገታሉ። ሌሎች የዘርፉ ባለሙያዎችም የተጎጂ ባለቤት ወይም በእድሜ ትልቁ ልጅ መታረቁ ሌሎቹን ማሳመን ስለሚችሉ በቂ ነው ይላሉ።[113] እነዚህ ሁሉ ሃሳቦች በትግበራ ወቅት ስለሚነሱ የይቅርታ አፈጻጸሙን ወጥ እንዳይሆን እንዳደረጉት መገንዘብ ይቻላል።

ከእርቅ አፈጻጸም ጋር በተያያዘ የሚስተዋሉ ሌሎች ችግሮች፣ የእርቅ ሂደቱ ከማረሚያቤት ተጀምሮ ተበዳዮች ካሉበት ቀበሌ ስለሚፈጸም ሂደቱ ረጅም መሆኑ፣ አስታራቂ ኮሚቴዎች በአግባቡ አለመፈጸማቸው፣ ተበዳዮችንና ቤተሰቦቻቸውን ለማግኘት (በተለይም ሂደቱን የሚከታተል የይቅርታ ጠያቂው ቤተሰብ በሌለበት

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[107] የአብክመ የይቅርታ አሰጣጥ መመሪያ፣ በግርጌ ማስታወሻ ቁጥር 25፣ ቁጥር 11።

[108] ዝኒ ከማሁ፣ ቁጥር 11(1)።

[109] ዝኒ ከማሁ፣ ቁጥር 11(1) እና (2) ይመልከቱ።

[110] ዝኒ ከማሁ፣ቁጥር 11።

[111] ኮማንደር እውነቱ፣ በአብክመ ማረሚያቤቶች አስተዳደር ኮሚሽን የታራሚዎች አያያዝ አስተዳደር ባለሙያ፣ ስለይቅርታ አሰጣጥ የተደረገ ቃለመጠይቅ፣ ግንቦት 2008 ዓ.ም.።

[112] አቶ ሐይሉ አስምር፣ በአብክመ የይቅርታ ቦርድ ጽ/ቤት ባለሙያ፣ ስለይቅርታ አሰጣጥ የተደረገ ቃለመጠይቅ፣ መጋቢት 2009።

[113] አቶ ገብረ-መስቀል ደምሌ፣ በአብክመ ይቅርታ ቦርድ ጽ/ቤት ባለሙያ፣ ስለይቅርታ አሰጣጥ የተደረገ ቃለመጠይቅ፣ መጋቢት 2009 እና በባሕር ዳር ማረሚያቤት ከሚገኙ ባለሙያዎችና የስራ ኃላፊዎች ጋር ስለይቅርታ አሰጣጥ የተደረገ የቡድን ውይይት፣ ሚያዝያ 2008 ዓ.ም.።

ጊዜ) አለመቻላቸውና ይቅርታ ጠያቂዎቹ ለአስታራቂ ኮሚቴው አበልና የሥራ ማስኬጃ እንዲከፍሉ መገደዳቸው ናቸው።[114]

በመመሪያው እርቅ በሚያስፈልጋቸው የወንጀል ጉዳዮች ጥፋተኛ ተብለው የታሰሩ ታራሚዎች የይቅርታ ተጠቃሚ ለመሆን እርቅን በሚፈጽሙበት ጊዜ አንደአካባቢው ባህልና ልምድ የሚጠየቀውን ገንዘብ መክፈል እንዳለባቸው መመልከቱ ቀደምሲል ተወስቷል። በዚህም መሠረት የግል ተበዳዮች ወይም የሚች የቅርብ ዘመዶች ለደረሰባቸው በደል መካሻ የሚጠይቁት የገንዘብ መጠን መጋን እንደሌለበት መመሪያው ቢገልጽም በተግባር ግን ከፍተኛ የገንዘብ መጠን ክፍያን በመጠየቅ እርቁን ሲያስተጓጉሉና ታራሚዎች የይቅርታ ተጠቃሚ እንዳይሆኑ ሲያደርጉ ይስተዋላል። [115] እንዲህ አይነት ችግር ሲያጋጥምና የግል ተበዳዮች ለእርቅ ፍቃደኛ አለመሆናቸውን የሚገልጽ ደብዳቤ ወንጀሉ በተፈጸመበት ወረዳ አስተዳደርና ፀጥታ ጽ/ቤት በኩል ሲቀርብ የይቅርታ ቦርዱ ታራሚዎቹን የይቅርታ ተጠቃሚ እንዲሆኑ ማድረግ እንዳለበት መመሪያው በግለጽ ቢያመላክትም በተግባር ይህ ባለመፈጸሙ በርካታ ታራሚዎች በዚሁ ምክንያት ብቻ የይቅርታ ተጠቃሚ መሆን እንዳልቻሉ ተስተውሏል። [116] ለአብነትም በ2009 ዓ.ም በአማራ ክልል በሚገኙ ማረሚያቤቶች ካሉ ታራሚዎች 2400 የሚሆኑት እርቅ የጠየቁ ሲሆን፣ 829 ታራሚዎች ብቻ እርቅን መፈጸም ችለዋል። ቀሪዎቹ በአፈጻጸም ችግር እርቅን ሳይፈጽሙ ቀርተዋል። እርቅ ካልፈጸሙ ታራሚዎች መካከል 155 የሚሆኑት ያቀረቡት የይቅርታ ጥያቄና ማስረጃ በቦርዱ ተቀባይነትን ባለማግኘቱ የይቅርታ ተጠቃሚ ሳይሆኑ ቀርተዋል። [117] በአጠቃላይ ከእርቅ አፈጻጸም ጋር በተያያዘ የሚስተዋሉ ችግሮች በባሕር ዳር ማረሚያቤት የይቅርታ አሰጣጥ ሂደት ላይ ከፍተኛ ተጽእኖ በማድረስ ላይ እንደሆኑ መገንዘብ ይቻላል።

ከላይ የተቃኙት የእድሜ፣ የጾታ፣ የጤናና ሌሎች ቅድመሁኔታዎች በጠቅላላው ሲታዩ የእስራት ቅጣትን ለማስቀነስ እንደምክንያት የተወሰዱ በመሆናቸው የይቅርታ ተጠቃሚ የሚሆኑት በእስራት የተቀጡ ታራሚዎች ብቻ እንደሆኑ ያመላክታል ። ይህ ሁኔታ በወንጀል ሕጉም ሆነ በፌዴራሉና በአብክመ የይቅርታ አሰጣጥ አዋጆች በይቅርታ ሊቀነስ ወይም ሊሻሻል የሚችለው ማንኛውም የቅጣት አይነት እንደሆነ የገለጹ ቢሆንም መመሪያው የእስራት ቅጣት ላይ ብቻ ያነጣጠረና ሌሎች የቅጣት አይነቶች በይቅርታ ሊቀነሱ ወይም ሊሻሻሉ እንደማይችሉ በማመላከቱ በአዋጆቹና በመመሪያው መካከል ልዩነትን የፈጠረ ይመስላል። [118]

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[114] በባሕር ዳር ማረሚያቤት ከሚገኙ ታራሚዎች ጋር ስለይቅርታ አሰጣጥ የተደረገ የቡድን ውይይት፣ ግንቦት 2008 ዓ.ም.።

[115] ዝኒ ከማሁ።

[116] ዝኒ ከማሁ።

[117] ኮማንደር አማረ፣ በግርጌ ማስታወሻ 104 እንደተገለጸው።

[118] የኢፌዴሪ የወንጀል ሕግ በግርጌ ማስታወሻ ቁጥር 1፣ አንቀጽ 229፣
የኢፌዴሪ የይቅርታ አሰጣጥ አዋጅ፣ ግርጌ ማስታወሻ ቁጥር 23

አንቀጽ 2

(1) "ይቅርታ" ማለት የቅጣት ፍርድ በሙሉ ወይም በከፊል ቀሪ እንዲሆን ወይም የቅጣት ፍርዱ አፈፃፀምና ዓይነት ቀሰል ተደርጎ እንዲፈፀም ማድረግ ነው፤

(2) "የቅጣት ፍርድ" ማለት በወንጀል ጉዳይ ዋና ቅጣትን፣ተጨማሪ ቅጣትን ወይም የክልከላና የጥበቃ ጥንቃቄ እርምጃን በተመለከተ በፍርድቤት የተሰጠ የመጨረሻ ውሳኔ ነው፤

የአብክመ የይቅርታ አሰጣጥ አዋጅ፣ ግርጌ ማስታወሻ ቁጥር 24

አንቀጽ 2

በተግባር የሚታየውም በይቅርታ አማካኝነት ታራሚዎች ከእስር ሲለቀቁ እንጂ ሌሎች የቅጣት አይነቶች ሲሻሻሉላቸው ወይም ሲቀነሱላቸው አይደለም። በመሆኑም ይቅርታ በወንጀል ሕጉና በይቅርታ አዋጆቹ በተመለከተው መሠረት በእስራት ቅጣት ላይ ብቻ ሳይሆን በሌሎቹ የቅጣት አይነቶችም ላይ ተፈጻሚ እንዲሆን መደረግ ይኖርበታል።

5.4 ይቅርታን የሚያስከለክሉ ሁኔታዎች

የይቅርታ ተጠቃሚ ለመሆን የሚያስፈልጉ ቅድመሁኔታዎች ከፍ ብሎ የተገለጹ ሲሆን ከዚሁ ጋር በንጽጽር መታየት የሚገባው ነጥብ ይቅርታን ሊያስከለክሉ የሚችሉ ምክንያቶች ምንድን ናቸው? የሚለው ነው። ቅድመሁኔታዎችን ማሟላት የይቅርታ ተጠቃሚ ለመሆን እንደመስፈርት በመመሪያው ቢመለከትም እነዚህን ማሟላት ብቻውን በቂ አለመሆኑን የሚያሳይ ልዩ ሁኔታ በመመሪያው ተደንግጓል። በሀገሪቱ ይቅርታ ሊደረግላቸው አይገባም ተብለው የታመኑ የወንጀል አይነቶችና ወንጀል ፈጻሚዎች ተለይተው በሕገመንግሥቱና በመመሪያው ተገልጸዋል። በሰው ልጆች ላይ የሚፈጸሙ ወንጀሎች፣ የሰው ዘር ማጥፋት፣ ያለፍርድ የሞት ቅጣት እርምጃ መውሰድ፣ በአስገዳጅ ሰውን መሰወርና ኢሰብአዊ የሆነ የድብደባ ድርጊት መፈጸም በኢፌዴሪ ሕገመንግሥት አንቀጽ 28 መሠረት ይቅርታ አይደረግላቸውም። [119] በይቅርታ አሰጣጥ መመሪያው መሠረት ደግሞ በርካታ የወንጀል አይነቶች ይቅርታ እንደሚያስከለክሉ የተደነገገ ሲሆን ዋና ዋናዎቹም፣ የሙስና ወንጀል፣ ሽብርተኝነት ፣ ውንብድና፣ አስገድዶ መድፈር፣ ግብረሰዶም፣ የሐሰት ገንዘብ መስራት ወይም ማዘዋወር፣ በጦር መሳሪያ መነገድ ና ሌሎችም ናቸው።[120]

ይቅርታ ለሚያስከለክሉ ወንጀሎች እንደምክንያት የሚቀርቡት፤ ወንጀሎቹ በህዝብና በመንግሥት ጥቅም ላይ የሚያደርሱት ጉዳት እጅግ በጣም ከፍተኛ መሆኑ፣ በመሰል ወንጀሎች ላይ የሚሳተፉ ወንጀለኞች ባሕርይ አደገኝነትና የወንጀለኞቹን ባሕርይ ለመለወጥ ወይም ለማሻሻል የማረሚያቤቶችን የረዥም ጊዜ ክትትልና ጥረት የሚሻ መሆኑ ናቸው። [121] ይሁን እንጂ ይቅርታ የሚያስከለክሉ ወንጀሎች ከፍ ብሎ የተገለጹትን ምክንያቶች ግምት ውስጥ ያስገቡ ከሆነ አስገድዶ መድፈርና ግብረሰዶም የመሳሰሉ በግለሰቦች ላይ የሚፈጸሙ ወንጀሎች ይቅርታን ሲያስከለክሉ በግፍ ሰው መግደልን ያህል ከባድ ወንጀል ይቅርታን ለማስከልከል እንደምክንያት ተቆጥሮ በመመሪያው ውስጥ አለመካተቱ ጥያቄን ያጭራል። ሌላው በጥያቄ መልክ መነሳት ያለበት የሽብርተኝነት ወንጀል [122] ፣ ሐሰተኛ ገንዘብ መስራት ወይም ማዘዋወር [123] ፣ አደገኛ እፅ ማምረት፣ ማዘዋወር፣ ይዞ መገኘት ወይም

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1. "የይቅርታ ጥያቄ" ማለት አንድ ፍርድ በሙሉ ወይም በከፊል ቀሪ እንዲሆን ወይም የቅጣት አፈጻጸሙ ዓይነት በቀላል ሁኔታ እንዲፈጸም የሚቀርብ ጥያቄ ነው፤

2. "ፍርድ" ማለት በወንጀል ጉዳይ በፍርድቤት የመጨረሻ ውሣኔ የተወሰነ ዋና ቅጣት፣ በተጨማሪ ቅጣት ወይም የጥንቃቄና የጥበቃ ውሣኔ ነው

[119] የኢፌዴሪ ሕገመንግሥት፣ ግርጌ ማስታወሻ ቁጥር 74፣ አንቀጽ 28።

[120] የአብክመ የይቅርታ አሰጣጥ መመሪያ፣ በግርጌ ማስታወሻ ቁጥር 25 ፣ አንቀጽ 9።

[121] አቶ ንብረ መስቀል ደምለው፣ የአብክመ ይቅርታ ቦርድ ጽ/ቤት ባለሙያ፣ ስለይቅርታ አሰጣጥ የተደረገ ቃለመጠይቅ፣ መጋቢት 2009 ዓ.ም.።

[122] ስለፀረሽብርተኝነት የወጣ አዋጅ፣ አዋጅ ቁጥር 652/2001፣ *የፌዴራል ነጋሪት ጋዜጣ*፣ (2001)፣ አንቀጽ 31።

[123] የፌዴራል ፍርድቤቶች አዋጅ፣ አዋጅ ቁጥር 25/1988፣ *ፌዴራል ነጋሪት ጋዜጣ*። (1988)። አንቀጽ 4(5)።

መጠቀም[124] ፣ ሕገወጥ የሰዎች ዝውውርና[125] ሌሎችም በፌዴራል ፍርድ ቤቶች ስልጣን ስር የሚዳኙ የወንጀል አይነቶችን የሚመለከት ነው፡፡ ይኸውም እነዚህ ወንጀሎች በክልል ፍርድ ቤቶች የሚታዩት በውክልና ስልጣንና ይቅርታውም የሚሰጠው በፌዴራሉ መንግሥት ሆኖ ሳለ በአብክመ የይቅርታ አሰጣጥ መመሪያ ላይ ይቅርታን የሚያስከለክሉ ወንጀሎች ተብለው መደንገጋቸው በሕግ ፊት ያለው ተቀባይነትና የመመሪያው ተፈጻሚነት ጉዳይ ነው፡፡

ከወንጀሉ ባሕርይ ባሻገር የወንጀል ፈጻሚው ባሕርይ ለይቅርታ መስጠት ወይም መከልከላ እንደምክንያት ይወሰዳል፡፡ ወንጀል ፈጻሚው አደገኛ ባሕርይ ያለው ከሆነ ወንጀሎችን ደጋግሞ የመፈጸም ልምድ ያዳበራል ተብሎ ይገመታል፡፡ ደጋጋሚ ወንጀለኛ የሚለው ሐረግ ትርጉሙ ላይ መስማማት ባይደረስም በኢፌዴሪ የወንጀል ሕግ አንቀጽ 67 ስር የተመለከተውን ጽንሰሀሳብ ግምት ውስጥ በማስገባት ደጋግመው በወንጀል ጥፋተኛ የተባሉ ሰዎች ደጋጋሚነታቸው ለይቅርታ መከልከል እንደምክንያት ተደርጎ በመመሪያው ተመልክቷል፡፡[126] በዚህ ድንጋጌ መሠረት ደጋጋሚ የሆነ ማንኛውም ወንጀለኛ የይቅርታ ተጠቃሚ መሆን አይችልም፡፡ሆኖም በመመሪያው አንቀጽ 10፡-

> *ከዚህ በፊት በሰው መግደል ወንጀል ተፈርዶባቸው ከወጡ በኋላ ዳግመኛ የሰው መግደል ወንጀል ፈጽመው የተፈረደባቸውን ሳይመለከት በማንኛውም ሕጋዊ የአፈታት ሥርዓት ከእስር ተፈተው አምስት አመትና ከዚያ በላይ በማህበረሰቡ ውስጥ ተቀላቅለው የነበሩ የሕግ ታራሚዎች ዳግም ወንጀል ፈጽመው ቢመጡም የባሕርይ ለውጥ ማምጣታቸው በልዩ ክትትልና ግምገማ ከተረጋገጠና የይቅርታ አሰጣጥ መስፈርቱን ካሟላተው ከተገኙ የይቅርታ ጥያቄ ማቅረብ ይችላሉ፡፡*

የሚል ድንጋጌ አለ፡፡

ይህ ድንጋጌ ደጋጋሚ ወንጀለኞችን የይቅርታ ተጠቃሚ የሚሆኑና የማይሆኑ ብሎ ለመለየት ያሰበ ይመስላል፡፡ በድንጋጌው ውስጥ "ከዚህ በፊት በሰው መግደል ወንጀል ተፈርዶባቸው ከወጡ በኋላ ዳግመኛ የሰው መግደል ወንጀል ፈጽመው የተፈረደባቸውን ሳይመለከት" የሚለው ሐረግ ማንኛውንም አይነት የሰው መግደል ወንጀል በተደጋጋሚ ፈጽመው የተፈረደባቸው ታራሚዎች ምንም እንኳን በኢፌዴሪ የወንጀል ሕግ አንቀጽ 67 የተመለከተው አምስት አመት ካለፈ በኋላ የሰው መግደል ወንጀል የፈጸሙ ቢሆንም ደጋጋሚነታቸው ሳይሰረዝ እንዳለ ተቆጥሮ በዚሁ ምክንያት የይቅርታ ተጠቃሚ መሆን አይችሉም፤ የሚል መልዕክት ይሰጣል፡፡ ይህ የበለጠ ግልጽ የሚሆነው የድንጋጌው ሌላ ዘንግ በወንጀል ሕጉ የተመለከተው አምስት አመት ካለፈ በኋላ ከማህበረሰቡ ጋር ተቀላቅለው በሰላም ሲኖሩ ሌላ ወንጀል ፈጽመው ወደማረሚያቤት ከመጡ ደጋጋሚነታቸው ሳይዘከር የይቅርታ ተጠቃሚ እንደሚሆኑ መደንገጉን በሌላ መንገድ ሲታይ ነው፡፡ ምንም እንኳ ከፍ ብሎ የተመለከተው ብዥታ ወይም የሀሳብ ልዩነት በደጋጋሚነት ጽንሰሃሳብና ውጤቱ ላይ በጉልህ የሚንጸባረቅ ቢሆንም በደምሳሳው መረዳት የሚቻለው ደጋጋሚነት የወንጀለኞች አንዱ አደገኛ ባሕርይ በመሆኑ ይቅርታን

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[124] ዝኒ ከማሁ፣ አንቀጽ 4(10)፡፡

[125] ሕገወጥ የሰዎች ዝውውርና ስደተኞችን በሕገወጥ መንገድ ድንበር መሻገር ወንጀልን ለመከላከልና ለመቆጣጠር የወጣ አዋጅ፣ አዋጅ ቁጥር 909/ 2007፣ *ፌዴራል ነጋሪት ጋዜጣ*፣ (2007)፣ አንቀጽ 24 (1)፡፡

[126] የአብክመ የይቅርታ አሰጣጥ መመሪያ፣ በግርጌ ማስታወሻ ቁጥር 25፣ ቁጥር 10 እና የኢ.ፌ.ዴ.ሪ የወንጀል ሕግ ግርጌ ማስታወሻ ቁጥር 1፣ አንቀጽ 67፡፡

ለማስከልከል በይቅርታ አሰጣጥ መመሪያው ላይ እንደምክንያት ሰፍሮ እየተተገበረ መሆኑን ነው።

በመመሪያው ባይመለከትም ይቅርታን በተግባር እያስከለከለ ያለው የገንዘብ መቀጮ ነው። የይቅርታ ተጠቃሚ የሆነ አንድ ታራሚ በይቅርታ አሰጣጥ አዋጁና በመመሪያው የተመለከቱትን ቅድመሁኔታዎች ሙሉ በሙሉ ቢያሟላም ከእስራት ቅጣቱ በተጨማሪ ወይም በሌላ ወንጀል ጥፋተኛ ተብሎ የገንዘብ ቅጣት ተወስኖበት ከሆነ ይህንን መቀጮ እስካልከፈለ ድረስ የይቅርታው ተጠቃሚ ሊሆን እንደማይችል ጥናቱ የተደረገበት ማረሚያቤት አሰራር ያሳያል።[127] በአጠቃላይ ይቅርታ በመርህ ደረጃ በኢፌዴሪ ሕገመንግሥትና በወንጀል ሕጉ የተመለከተውን ለማስፈጸም በወጡ የአብክመ የይቅርታ አሰጣጥ አዋጅና መመሪያ የተመለከተቱትን መስፈርቶች አሟልቶ ለተገኘ ማንኛውም ታራሚ ሊደረግ የሚችል ቢሆንም ከላይ በቀረቡት ምክንያቶች የተነሳ ይቅርታው ሊነፈግ እንደሚችል ልብ ማለት ያሻል።

5.5 ይቅርታ የሚሻርበት ሁኔታ

በቀደመው ርእስ እንደተገለጸው ይቅርታ በሕጉ የተመለከቱ ቅድመሁኔታዎች ተሟልተው ሲገኙ የሚሰጥና ታራሚዎች የፍርድ ጊዜያቸውን ከመጨረሳቸው በፊት ከእስር የሚለቀቁበት መንገድ ነው። ይሁን እንጂ በዚህ መልኩ የተሰጠ ይቅርታ ሊሰረዝ የሚችልባቸው ሁኔታዎች እንዳሉ ልብ ሊባል ይገባል። ይቅርታ የተደረገለት ሰው ይቅርታውን ያገኘው በሕገወጥ መንገድ ከሆነና ለሁኔታዎች ተገዥ ካልሆነ የተሰጠው ይቅርታ ሊሰረዝ ይችላል። ይቅርታው የሚሰረዝባቸው ሁኔታዎች በኢፌዴሪና በአማራ ክልል የይቅርታ አሰጣጥ አዋጆች እንደቅደምተከተላቸው በአንቀጽ 23 እና 15 እንዲሁም በአብክመ የይቅርታ አሰጣጥ መስፈርት መወሰኛ መመሪያ አንቀጽ 13 ስር ተመልክተዋል። በዚህ መሠረት ይቅርታው በተጭበረበረ መንገድ የተገኘ ከሆነ፣ በቅድመሁኔታ ላይ የተመሰረተ ይቅርታ ከሆነ ቅድመሁኔታው ካልተከበረና ይቅርታ የተደረገለት ሰው ይቅርታ ከተሰጠበት ጊዜ ጀምሮ ባሉት ሦስት አመታት ውስጥ ሌላ አዲስ ወንጀል ፈጽሞ ጥፋተኛ ከተባለ የተሰጠው ይቅርታ ይሰረዛል።[128]

ይቅርታው ይቅርታ ለተደረገለት ሰው ቢደርስም ባይደርስም በማጭበርበር ወይም በማታለል የተሰጠ ከሆነ ሊሰረዝ ይችላል። የይቅርታው መሰረዝ ውሳኔ የሚሰጠው በፌዴራል መንግሥት ደረጃ በሀገራቱ ርዕሰብሄር ሲሆን በአማራ ብሄራዊ ክልል ደግሞ በክልሉ መስተዳደር ምክርቤት እንደሆነ በአዋጆቹ ተደንግጓል።[129] ከዚህ ላይ ይቅርታን የመስጠትና የመሻሩ ስልጣን በክልል ደረጃ ከርዕሰመስተዳደሩ ይልቅ ለምን ለመስተዳደሩ ምክርቤት እንደተሰጠ በሕጉ አልተገለጸም። ይሁን እንጂ በዚህ ጥናት አቅራቢዎች እምነት የርዕሰመስተዳድሩ ሕገመንግስታዊ ስልጣን ከሀገሪቱ ርዕሰሄር ይልቅ ከጠቅላይ ሚኒስትሩ ስልጣን ጋር የሚነጻጸር በመሆኑና ይቅርታ ደግሞ የአገሪቱ ሉአላዊነትና ህዝባዊነት መገለጫ (symbol of the nation) በመሆኑ

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[127] ከባሕር ዳር ማረሚያቤት ባለሙያዎች፣ የስራ ኃላፊዎችና ታራሚዎች ጋር ስለይቅርታ አሰጣጥ የተደረገ የቡድን ውይይት፣ ግንቦት 2008 ዓ.ም.።

[128] የፌዴራል የይቅርታ አሰጣጥ አዋጅ፣ ግርጌ ማስታወሻ ቁጥር 23 አንቀጽ 23 እንዲሁም የአብክመ የይቅርታ አሰጣጥ መመሪያ፣ ግርጌ ማስታወሻ ቁጥር 25፣ ቁጥር 13(4)።

[129] የፌዴራል የይቅርታ አሰጣጥ አዋጅ፣ ግርጌ ማስታወሻ ቁጥር 23፣ አንቀጽ 23 (3 እና 4) እና የ አብክመ የይቅርታ አሰጣጥ አዋጅ ፣ ግርጌ ማስታወሻ ቁጥር 24፣ አንቀጽ 15(4)።

እንደሆነ ያምናሉ፡፡ በአጠቃላይ ይቅርታ በብዙ መስፈርቶች ተመዝኖ እንደሚሰጥ ሁሉ ይቅርታው ከተሰጠ በኋላ ይቅርታ የተደረገለት ሰው ሊያከብራቸው የሚገቡ ቅድመሁኔታዎች ተላልፎ ከተገኘ በሕጉ በተመለከተው ስነሥርዓት መሠረት ሊሻርና ይቅርታ የተደረገለት ወንጀል ፈጻሚ ይቅርታውን ከማገኘቱ በፊት ወደነበረበት ሁኔታ እንዲመለስ ይደረጋል፡፡

6. ማጠቃለያና የመፍትሄ ሃሳብ

6.1 ማጠቃለያ

በዚህ ጥናት የይቅርታ ጽንሰሃሳብ፣ አስፈላጊነትና ሌሎች ተያያዥ ጉዳዮች ከመዳሰሳቸውም በላይ በባሕር ዳር ማረሚያቤት የይቅርታ አፈጻጸም ምን እንደሚመስል ከኢፌዴሪ የወንጀል ሕግና ይቅርታ አሰጣጥ አዋጅ እንዲሁም ከአብክመ ይቅርታ አሰጣጥ አዋጅና መመሪያ አንጻር ተቃኝቷል፡፡ በእነዚህ ሕግጋትና በይቅርታ አፈጻጸም ላይ የሚስተዋሉ ችግሮችም ተለይተዋል፡፡ በዚህም መሠረት የይቅርታ አሰጣጥን አስመልክቶ የሚስተዋሉ የሕግና የአፈጻጸም ችግሮችንና መፍትሄዎቻቸውን በጥናቱ ውስጥ ለማካተት ተሞክሯል፡፡ የጥናቱ አንኳር ግኝቶችም እንደሚከተለው በአጭሩ ቀርበዋል፡፡

የክልሉ የይቅርታ አዋጅ የይቅርታን ዋና አላማ ሲያመላክት የታራሚዎችን ጥቅምና ፍላጎት ወደጎን በመተው በህዝብና በመንግሥት ጥቅም ላይ ብቻ ያተኮረ ሲመስል ይህም ከፌዴራሉ ተነጻጻሪ ሕግ ጋር ሲተያይ በይዘቱ የጠበበ ይመስላል፡፡ በተመሳሳይ የፌዴራሉም ሆነ የክልሉ የይቅርታ አሰጣጥ አዋጆች የወንጀሉ ሰለባ የሆኑትን ግለሰቦች ፍላጎትና ጥቅም ግምት ውስጥ ባለማስገባታቸው የይቅርታ አላማ የህዝቡን፣ የመንግሥትንና የታራሚዎችን ኢኮኖሚያዊና ማህበራዊ ጥቅሞች ማሳካት ላይ ያነጣጠረ ነው፡፡

የይቅርታ ጥያቄ በታራሚው ባለቤት፣ በቅርብ ዘመድ ወይም በሌላ ሰው አማካኝነት ሲቀርብ ታራሚው ፈቃደኛ ስለመሆኑ በፊርማው እንዲያረጋግጥ የክልሉ አዋጅ በግልጽ አለመደንገጉ የታራሚው ፈቃድ ከግምት ውስጥ እንዳይገባ ያደርጋል፡፡ ይህም የይቅርታ ጥያቄው ከታራሚው እውቅና ውጭ ለይቅርታ አድራጊው አካል ቀርቦ ያለታራሚው ፈቃድና ዝግጅት ይቅርታው ሊሰጥ የሚችልበትን አጋጣሚ ሊፈጠር ይችላል፡፡

የይቅርታ ጥያቄ በመንግሥት አካላት በኩል ሲቀርብ ይኸው ጥያቄ በፌዴራል ለይቅርታ ቦርዱ ሲሆን በክልሉ ደግሞ ለክልሉ መስተዳደር ምክርቤት መቅረቡ ሂደቱን ከማርዘሙም በላይ የፖሊሲ ምክንያቱ ግልጽ አይደለም፡፡

ከመመሪያው በይቅርታ ሊቀነስ ወይም ሊሻሻል የሚችለው የቅጣት አይነት እስራት ብቻ እንደሆነ የሚያመላክቱ መስፈርቶችን ይዞ መውጣቱንና የይቅርታ ተጠቃሚ የሚሆኑትም የዚሁ ቅጣት ፍርደኞች ብቻ መሆናቸውን መገንዘብ ተችሏል፡፡ ይሁን እንጂ ይቅርታ በሁሉም የቅጣት አይነቶች ላይ ተግባራዊ ሊሆን እንደሚችል በወንጀል ሕጉ ከተመለከተው ድንጋጌ አንጻር ሲታይ መመሪያው የይቅርታን ጽንሰሃሳብና አፈጻጸም ውስን እንዲሆን አድርጎታል፡፡

የክልሉ የይቅርታ አሰጣጥ መመሪያ እርቅ ለይቅርታ እንደቅድመሁኔታ በተመለከተባቸው የወንጀል አይነቶች ላይ በእርቁ ሊሳተፉ የሚገባቸውን የተጎጂ

የቅርብ ቤተሰቦችን በቅደምተከተል ሲያመላክት ይህ ቅደምተከተል እርቅን ለመፈጸም በልጆች መካከል ወይም በወላጆች መካከልና በሌሎቹም ቤተዘመዶች መካከል እንዴት ተግባራዊ ሊሆን እንደሚችል በግልጽ ባለመመልከቱ የእርቅን አፈጻጸም ወጥ እንዳይሆን አድርጎታል። እርቅ ለሰው መግደልና የመግደል ሙከራ ወንጀሎች ላይ ብቻ የይቅርታ መስፈርት ሆኖ መመልከቱ፣ ነገርግን በሌሎች መሰል ከባድ ወንጀሎች ላይ አለመጠየቁ እርቅ ለይቅርታ ያለውን ፋይዳ አጠያያቂ እንዲሆን አድርጎታል።

በመመሪያው ከ አስራ ሦስት አመት በታች ፍርደኛ ለሆኑ ነብሰጡር ሴቶች የይቅርታ ተጠቃሚ እንዲሆኑ ልዩ ስሌትን ሲያመላክት ከዚያ በላይ ለተፈረደባቸው ነብሰጡር ሴቶች ትኩረት አለመስጠቱ በመሰል ሴቶች መካከል ልዩነትን የሚፈጥር ይሆናል።

የይቅርታ አሰጣጥ መመሪያው የባሕርይ መሻሻልን እንደቅድመሁኔታ ቢያመላክትም የባሕርይ መሻሻሉ ዝርዝር መለኪያ አለመዘጋጀቱ ለአፈጻጸም አስቸጋሪ ሆኗል።

ይቅርታን የሚያስከለክሉ የወንጀል አይነቶች በመመሪያው የተለዩ ቢሆንም የፖሊሲ ምክንያታቸው ግልጽ አለመሆኑ ሌላው በመመሪያው የተስተዋለ ክፍተት ነው።

በአፈጻጸም ረገድ ከይቅርታ አሰጣጥ ጋር ተያይዞ በባሕር ዳር ማረሚያቤት የሚስተዋሉ ችግሮች ደግሞ በይቅርታና የእርቅ አፈጻጸም ሂደት ውስጥ የሚሳተፉ አካላት መብዛትና ሂደቱም ረጅምና የተንዛዛ መሆኑ፣ አስታራቂ ሽማግሌዎች እርቁን በአግባቡ አለመፈጸማቸው፣ የይቅርታ ተጠቃሚዎች እርቅን ለመፈጸም ተበዳዮችንና ቤተሰቦቻቸውን በቅርበት በቀላሉ ማግኘት አለመቻላቸው፣ ለእርቅ የሚጠየቀው የገንዘብ ካሳ መጋነንና በአካባቢው ባህል ያልተለመደ መሆን፣ የይቅርታ ተጠቃሚዎቹ ለአስታራቂ ሽማግሌዎች አበልና የስራ ማስካሄጃ እንዲከፍሉ መገደዳቸውና የይቅርታ ተጠቃሚዎቹ ሌሎችን የይቅርታ መስፈርቶች ቢያሟሉም በፍርድቤት የተጣለባቸው የገንዘብ መቀጮ ካለ ይህንኑ እስካልፈጸሙ ድረስ የይቅርታ ተጠቃሚ አለመሆናቸው ዋና ዋናዎቹ ናቸው።

6.2 የመፍትሄ ሐሳብ

ከፍ ብሎ የተመለከቱትን የሕግ ክፍተቶችና የአፈጻጸም ችግሮች መሠረት በማድረግ የመፍትሄ ሃሳቦች ከዚህ በታች ቀርበዋል፤

- በአብክመ የይቅርታ አሰጣጥ አዋጅ ውስጥ የሰፈረው የይቅርታ አላማ በይዘት ጠበብ ያለ ስለሚመስል ከፊዴራሉ የይቅርታ አዋጅ ጋር እንዲጣጣም ማድረግ አስፈላጊ ነው።
- በፌዴራሉም ይሁን በክልሉ የይቅርታ አሰጣጥ አዋጅ ውስጥ የተለመከተው አጠቃላይ የይቅርታ አላማ የወንጀል ሰለባዎችን ፍላጎትና ጥቅም የማያስተናግድ በመሆኑ የክልሉ የይቅርታ አሰጣጥ አዋጅ ይህንን በሚያካትት መልኩ እንዲሻሻል ማድረግ አስፈላጊ ነው።
- የይቅርታ ጥያቄ በታራሚው ባለቤት ወይም የቅርብ ዘመድ ሲቀርብ ታራሚው እንዲፈርምበት በማድረግና ጥያቄው በፍትህ ቢሮ ወይም በማረሚቤት ጽ/ቤት በኩል ሲቀርብ ጥያቄው ወደመስተዳደር ም/ቤት ከሚቀርብ ይልቅ ለቦርዱ እንዲቀርብ ለማድረግ ሕጉ ቢሻሻል፤

- በእርቅ ሂደት ውስጥ ባለቤት ሆነው መሳተፍ የሚገባቸው የተጎጅ ቤተሰቦች በግልጽና በማያሻማ መልኩ ከትርጓሜ ባለፈ ተለይተው በሕግ ቢመለከቱ፤
- የይቅርታ አሰጣጥ መመሪያው አስራ ሦስት አመት በታች እስራት የተቀጡ ነብሰጡር ሴቶች የእስራት ቅጣቱ በልዩ ስሌት ተሰልቶ የይቅርታ ተጠቃሚ እንዲሆኑ ሲያመለክት ከ13 አመት በላይ የእስራት ቅጣት የተጣለባቸው ነብሰጡር ሴቶች ግን የዚህ ተጠቃሚ እንዳይሆኑ መደረጉ አድሎን ስለሚፈጥር ቢስተካከል፤
- የባሕርይ መሻሻልን መለካት የሚያስችል ዝርዝር መለኪያ በይቅርታ አሰጣጥ መመሪያው እንዲካተት ቢደረግ፤
- ይቅርታ ከእስራት ባሻገር በወንጀል ሕጉ መንፈስ መሠረት ለሌሎች ቅጣት አይነቶችም ተግባራዊ የሚሆንበት አሰራር በመመሪያው እንዲካተት ቢደረግ፤
- እርቅ በግድያና በመግደል ሙከራው ወንጀል ላይ ለይቅርታ እንደሚያስፈልግ መመሪያው ስለሚጠይቅ መፈጸሙ ግድ ቢሆንም አፈጻጸሙ ለታራሚዎች አዳጋች ሆኗል። ይህም የሆነው በባለቤትነት እየተከታተለ የሚያስፈጽም አካል ባለመኖሩ ስለሆነ ይህን ተከታትሎ የሚያስፈጽም ባለሙያ በየወረዳው በሚገኙ በአስተዳደርና ጸጥታ ጽ/ቤቶች ቢመደብ፤
- እርቅን ለሚያስፈጽሙ ሽማግሌዎች ስልጠና ቢሰጥ፤ ክትትልና ድጋፍ ቢደረግ፤
- የግል ተበዳዮች ለመታረቅ ፈቃደኛ ሳይሆኑ ከቀሩ እንዲሁም የተጋነነ ካሳ ሲጠይቁም ፈቃደኛ እንዳልሆኑ ተቆጥሮ በመመሪያው መሠረት ማስረጃ ሲቀርብ የይቅርታ ተጠቃሚ እንዲሆኑ ቢደረግና ለበቀል እንዳይጋለጡ ተገቢ የክትትል ሥርዓት ቢኖር፤
- ከእስራት በተጨማሪ በገንዘብ መቀጮ የተቀጡ ታራሚዎች ገንዘቡን መክፈል ስለመቻላቸው የይቅርታ ተጠቃሚ እንዳይሆኑ ከሚደረግ ይልቅ በሕጉ መሠረት የሚከፍሉበት ሁኔታ ቢመቻች ወይም ፍርድቤቱ ተለዋጭ ቅጣት የሚያመቻችበት ሥርዓት ቢዘረጋ።

የዓለም አቀፍ የሰብአዊነት ሕግጋትና መርኖች በዳግማዊ አጼ ቴዎድሮስ የጦር ሜዳ ውሎዎችና ውሳኔዎች ውስጥ የነበራቸው ቦታ

ነጋ እውነቱ መኮንን[§]

መግቢያ

በኢትዮጵያ የተደረጉ ጦርነቶችን፣ የነገሥታት የጦር ሜዳ ውሎዎችንና ውሳኔዎችን አስመልክቶ አንዳንድ ኢትዮጵያዊያንን ጨምሮ የውጭ አገር ጸሕፍት በአብዛኛው በአንድ ነገር ይስማማሉ፡፡ ይህም የነገሥታት ፍርዶች በተለይም የጦር ሜዳ ውሎዎች በጭካኔ የተሞሉና ኢሰብአዊ እንደሆኑ አድርገው ሲያቀርቡ ይስተዋላል፡፡[1] በታሪክ ወደኋላ መለስ ብለን የአውሮፓዊያንን የጦር ሜዳ ታሪክ ብንፈትሽ እጅግ በጣም አስቀያሚና ዘግናኝ ሆነው እናገኛቸዋለን፡፡ የሩቁን ትተን በአንጻሩ የቅርቡን እ.አ.አ. በ1859 ዓ.ም በፈረንሳይ፣ ሰርዲኒያና አስትሪያ መካከል የተደረገውን የሶልፈሪኖ ጦርነት አንኳ ብንወስድ አሰቃቂነቱንና ኢሰብአዊነቱን ከሄነሪ ዱና ማስታወሻ በሚገባ አንረዳለን፡፡ *A Memory of Solferino* *ይሚለውን መጽሐፍ ያነበበ ጦርነት ይረግማል* እስኪባል ድረስ የሶልፈሪኖ ጦርነትን አሰቃቂነት ሄነሪ ዱና ጽፏል::[2] የዓለም አቀፍ ቀይ መስቀል ማኅበር እንዲቋቋም የታሪክ አጋጣሚ እንዲፈጠር በዋናነት አስተዋጾ ያደረገውም ይህ ጦርነት ነው፡፡[3] በኢትዮጵያ ርስበርስም ይሁን ከውጭ ወራሪ ጋር የተደረጉ ጦርነቶች ዘግናኝ የሆኑና የሰው ልጅን ለከፋ መከራ የዳረጉ እንደነበር ግልጽ ነው፡፡ በአንጻሩ ግን ርህራሄን መሠረት ያደረጉ፣ አስተዋይነት የተሞላባቸው፣ ለሰው ልጅ ክብር የሰጡ የነገሥታት የጦር ሜዳ ውሎዎችንና ውሳኔዎችን እናገኛለን፡፡

ጦርነትን ጨምሮ ትላንት የተፈጸመ አንድ ነገር መመዘንና መለካት ያለበት በዛሬ አስተሳሰብ፣ አስተምህሮ፣ መስታውትና ሕግ መሆን የለበትም፡፡ ሁሉም ትላንት የሆነ ነገር መታየት ያለበት በራሱ በትላንት ዐይንና አስተሳሰብ ነው፡፡ ቢሆንም ግን አውሮፓዊ መሠረት ያላቸው ዘመናዊዎቹ የሰብአዊነት ሕግጋትና የጦርነት መርኖች ሥራ ላይ ከመዋላቸው በፊት ኢትዮጵያዊያን ነገሥታት የሰጧቸው

[§] በባሕር ዳር ዩኒቨርሲቲ ሕግ ት/ቤት የሕግ ረዳት ፕሮፌሰር፡፡ ከፍተኛ ዲፕሎማ በማስተማር ስነዘዴ (ባሕር ዳር ዩኒቨርሲቲ፣ 2007 ዓ.ም)፣ ኤል ኤል ኤም(ዩኒቨርሲቲ ኦፍ ግሮኒንገን፣ ዘኔዘርላንድስ፣ 2000 ዓ.ም)፣ ኤል ኤል ቢ(አዲስ አበባ ዩኒቨርሲቲ 1996 ዓ.ም)፡፡ ተመራማሪውን በኢ-ሜይል አድራሻው beleteeng@yahoo.com ማግኘት ይቻላል፡፡

የዚህን ጥናት የመጀመሪያ ረቂቅ አንብበው ገንቢ አስተያየት የሰጡኝን የሕግና የታሪክ ምሁራን ክልብ አመሰግናለሁ፡፡ እንዲሁም የባሕር ዳር ዩኒቨርሲቲ የሕግ መጽሄት ዋና አርታኢ የሆኑት አቶ ኃይሌ ጉዕሽ የጥናቱ የመጀመሪያ ረቂቅ ከሕግ ምሁራን በተጨማሪ የታሪክ ምሁር አስተያየት እንዲታከልበት በማድረጋቸውና በጥናቱ ላይ የራሳቸውን ገንቢ አስታያት ስለሰጡኝ ይህም ለጥናቱ መዳበር ከፍተኛ አስተዋጾ በማደረጉ በጣም ላመሰግናቸው እወዳለሁ፡፡

[1] ለምሳሌ ከኢትዮጵያ የታሪክ ምሁራን መካከል ፕሮፌሰር ባሕሩ ዘውዴ *የኢትዮጵያ ታሪክ፣ ክ1847-1983፣* በሚል በአዲስ አበባ ዩኒቨርሲቲ ፕሬስ በ1999 ዓ.ም የታተመውን መጽሐፍ ይመልከቱ፡፡ (ከዚህ በኋላ ባሕሩ ዘውዴ)፡፡ ፕሮፌሰር ባሕሩ አጼ ቴዎድሮስ ምኞትና ብልጭልጭ ነገር አለመውደዳቸውን፣ የወታደሮቻቸውን ኑሮ የሚጋሩ መሪ እንደነበሩ፣ እንደገበሬ ያርሱ እንደወታደር ይዋጉ እንደነበር እንዲሁም ለፍትሕና ለእኩልነት ተቆርቋሪ እንደነበሩ በዚሁ መጽሐፋቸው አትተዋል፡፡

[2] Henry Dunanat, A *Memory of Solferino,* American Red Cross, Reprinted by the ICRC, Geneva, 1986.

[3] የዓለም አቀፍ ቀይ መስቀል ማኅበር የሶልፈሪኖ ጦርነት ከተካሄደ ከአራት አመታት በኋላ እ.አ.አ. በ1863 ዓ.ም ተመሥርቷል፡፡ ለበለጠ መረጃ Clara Barton, *The Red Cross a History of this International Movement in the Interest of Humanity*, Wshington D.C., American Red Cross, 1898 ይመልከቱ፡፡

ፍርዶችና በጦርነት ጊዜ የወሰኗቸው ውሳኔዎች ከእነዚህ ዘመናዊ ሕግጋትና መርኖች ጋር ተመሳሳይና ሰብአዊነትን አጉልተው የሚያሳዩ ነበሩ።

ስለዳግማዊ አጼ ቴዎድሮስ ብዙ ነገሮች በብዙ ጻሕፍት ተጽፈዋል። ኢትዮጵያ ዘመነመሣፍንት ሰፍኖባት[4] ከሰባ አመታት በላይ ማዕከላዊ መንግሥት አልባ ሆና ከቆየች በኋላ ማዕከላዊ መንግሥት እንዲኖራት ያደረጉ፣ በቀን ከሌት ህልማቸው አውሮፓዊ ስልጣኔ በአገራቸው አውን ሆኖ ማየትን የተመኙ፣ የሰለጠነና በደመወዝ የሚተዳደር ዘመናዊ ወታደር ለማደራጀት የጣሩ፣ መንገድ የሰሩ፣ የባሪያ ንግድን ለማስቀረት የሞከሩና ሌሎች ከእሳቸው በፊት ያልተሞከሩና ያልታሰቡ ተግባራትን የሞከሩ ንጉሠነገሥት እንደነበሩ በሰፊው ተጽፏል።[5] በዚህ ፋና ወጊነታቸውም ከዘመናቸው ቀድመው የተፈጠሩ በማለት ብዙዎች አሞካሽተዋቸዋል።

ምንም እንኳ ይህንና ሌሎች ተመሳሳይ አድናቆትና ሙገሳዎች ቢቸሯቸውም በአጼ ቴዎድሮስ ታሪክ ላይ የጻፉ ጻሕፍት አንድ አቢይ ጉዳይ ያመሳስላቸዋል። ይህም ንጉሠነገሥቱ ጨካኝ፣ አረመኔ፣ ካለፍርድ ሰዎችን የገደሉ፣ የሰቀሉ፣ ወደገደል የወረወሩ፣ ቤት ዘግተው ያቃጠሉና ሌሎች ሰቆቃዎችን በሕዝባቸው ላይ የፈጸሙ በማለት ይወቅሷቸዋል። በተቃራኒው ንጉሠነገሥቱ የሰሯቸውን በጎ ተግባራት ማለትም ደግነታቸውን፣ ሩህሩህነታቸውን፣ ለጋስነታቸውን፣ በሕግና በፍርድ መሠረት መቅጣታቸውን አጉልቶ የጻፈ የሕግም ይሁን የታሪክ ምሁር አልተገኘም። እነዚህ ጉዳዮች ጊዜ የሚወስድ ጥልቅ የታሪክና የሕግ ምርምር የሚጠይቁ ቢሆኑም በንጉሠነገሥቱ ዙሪያ ከተጻፉ የታሪክ መጻሕፍትና መድብሎች የዚህ ጥናት አቅራቢ የተረዳው ነገር ቢኖር አጼ ቴዎድሮስ ጨካኝና ካለፍርድ ሰዎችን የገደሉ ብቻ ሳይሆኑ አንዳንድ የጦር ሜዳ ውሎዎቻቸውና ውሳኔዎቻቸው ከዛሬዎቹ ዘመናዊ የዓለም አቀፍ የሰብአዊነት ሕግ (International Humanitarian Law) መርኖች ጋር ተቀረራቢ፣ ተመሳሳይና አቻ መሆናቸውን ነው።

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[4] በኢትዮጵያ ታሪክ የዘመነመሣፍንት መጀመሪያና የማዕከላዊ መንግሥት መጨረሻ ተደርገው የሚቆጠሩት በየጁዉ መሥፍን በትልቁ ራስ ዓሊ ከዙፋናቸው የተባረሩት አጼ ተክሉ-ጊዮርጊስ (ከ1773-1777 ዓ.ም) በስመመንግሥታቸው ፍቁር ሠገድ ናቸው። አጼ ተክሉ-ጊዮርጊስ በግዕዙ ተፍጻሚተ- መንግሥት በሚል ቅጽል ይጠራሉ። በአማርኛ ትርጉሙ የመንግሥት ፍጻሜ ማለት ነው። የዘመነ-መሣፍንት መጀመሪያ ተደርጎ መወሰድ ያለበት ራስ ስዑል ሚካኤል አጼ እዮአስን ማርከው በሞት እንዲቀጡ ካደረጉበት ከ1761 ዓ.ም ጀምሮ ነው የሚል ክርክር መኖሩን ልብ ይሰሉ።[n] ነገርግን የራስ ስዑል ሚካኤል የበላይነት ለተወሰነ ጊዜ የቆየ በመሆኑና ከሞቱ በኋላ የነገሡት ነገሥታት እንደቀድሞው ነገሥታት እውነተኛ ሥልጣን የነበራቸው በመሆኑ ይህ ሁለተኛው ክርክር ብዙም ሚዛን አይደፋም። ከትልቁ ራስ ዓሊ (1777-1782 ዓ.ም) እስከትንሹ ራስ ዓሊ (1823-1845 ዓ.ም) ድረስ ባሉት 68 አመታት ውስጥ 14 ሠለሞናዊ ነገሥታት ቢነግሡም ምንም ሥልጣን ያልነበራቸውና ለስሙ ንጉሠነገሥት ተብለው ዙፋን ላይ የተቀመጡ፣ ኑሯቸው በጎንደር ቤተመንግሥት ግንብ የታጠረና የተገደበ ነበር። በአንጻሩ ግን እውነተኛ ጉልበትና ሥልጣን የነበራቸው ስምንት የየጁ መሣፍንት በእነዚህ ጊዜያት ተፈራርቀዋል። ከጎንደር ነገሥታት ጋር በጋብቻ የተሳሰሩ የየጁ መሳፍንትም ነበሩ። ለምሳሌ፣ የትንሹ ራስ ዓሊ እናት አቴጌ መነን የመጨረሻዎቹ የይስሙላ ንጉሠነገሥታት አንዱ የሆኑት የአጼ ዮሃንስ 3ኛ ባለቤት ነበሩ። ትንሹ ራስ ዓሊ በደጃዝማች ካሣ ከተሸነፉ በኋላ ከ1845-1847 ዓ.ም ድረስ ባሉት ሁለት አመታት እንደዚህ ቀደሙ የይስሙላ ንጉሠነገሥት በጎንደር ቤተመንግሥት አስቀምጦ የገዛ መሥፍን አልነበረም። በእነዚህ አመታት ውስጥ ደጃዝማች ካሣ ዘውድ ደፍቶ ለመንገሥ ላይ ታች ሲሉ የነበሩበትና የመጨረሻ ተቀናቃኞቻቸውን ለማጥፋት የተንቀሳቀሱበት ጊዜ ሲሆን በመጨረሻም የስሜኑን ገዥ ደጃዝማች ውቤን በደረስጌ ጦርነት ድል በማድረግ ሕልማቸውን እውን አድርገዋል።

[5] ለምሳሌ ፕሮፌሰር ሪቻርድ ፓንክረስት ዘመናዊ የመንገድ ግንባታ በአጼ ቴዎድሮስ እንደተጀመረ ጽፈዋል። ለበለጠ መረጃ Richard Pankhurst, *Economic History of Ethiopia 1800-1935,* Addis Ababa, Haile Sellassie I University Press, 1968 ይመልከቱ። እንዲሁም Philip Marsden, *The Barefoot Emperor an Ethiopian Tragedy*, London, Harper Collins Publishers, 2007 ይመልከቱ።

በዚህ ጥናት የዛሬዎቹ ዓለም አቀፍ የሰብአዊነት ሕግጋትና መርኖች በዳግማዊ አጼ ቴዎድሮስ ታሪክ[6] ውስጥ የነበራቸውን ቦታ እንመለከታለን። የታሰሩ ሰዎች አያያዝ፣ በምርኮ የተያዙ ሰዎች በባርነት እንዳይሸጡ መከልከላቸው፣ ከዘረፋ ይልቅ በደመወዝ የሚተዳደር ወታደር ለማደራጀት ያደረጉት ጥረት፣ በጦርነት በተያዙ ቦታዎች የሚኖሩ ሰዎች መብት (the Law of Occupation)፣ ወታደሮች ለሚፈጽሙት ወንጀል ኃላፊነትን መውሰድ (Command Responsiblity)፣ በሕግና ፍርድ ላይ የተመሠረተ ቅጣትና ምሕረት የሚሉ ጉዳዮችን የምንመለከት ሲሆን እነዚህ ነጥቦች የዓለም አቀፍ የሰብአዊነት ሕግ ትኩረት ከሰጠባቸው ጉዳዮች ውስጥ ተጠቃሾች ናቸው። እነዚህ ጉዳዮች በአጼ ቴዎድሮስ የጦር ሜዳ ውሎዎችና ውሳኔዎች ምን ቦታ ነበራቸው የሚለውን ነጥብ በታሪክ መጻሕፍትና መድብሎች ተከትበው ከሚገኙ ታሪኮች (stories) ጋር በማጣቀስ እንዳስሳለን። ከዚያ በፊት ግን አንባቢው ታሪኮቹ በዓለም አቀፍ የሰብአዊነት ሕግ ውስጥ ያላቸውን ቦታ በሚገባ ለመረዳት እንዲችል ስለዓለም አቀፍ የሰብአዊነት ሕግ አይነት፣ ይዘት፣ ዓላማና መርኖች አጭር ዳሰሳ ይደረጋል።

በጥናቱ በዋቢነት ጥቅም ላይ የዋሉት አብዛኞቹ ታሪኮች ወደተመራማሪው ቃላት ሳይለወጡ (paraphrase ሳይደረጉ) ሥርዓተነጥብ በማሻሻል ብቻ ከመጻሕፍት በቀጥታ የተወሰዱ ናቸው። ተመራማሪው ይህንን ያደረገበት ምክንያት በጊዜው የነበረው የአነጋገር ዘዬ በራሱ ታሪክ በመሆኑና ታሪኮቹ በቀጥታ ቢወሰዱ የተለየ ለዛ፣ ውበትና ጉልበት ስለሚኖራቸው የሚፈለገውን መልእክት በደንብ ያስተላልፋሉ ብሎ ስላመነ ነው። ቢሆንም አሁን ባለንበት ዘመን ለመግባቢያነት የማያገለግሉ፣ የተለየ ትርጉም የሚሰጡ ወይም አንባቢውን ግር ያሰኛሉ ብሎ ያሰባቸውን ቃላት በግርጌ ማስታወሻና እንዳመችነቱ በትምህርተ ጥቅስ ውስጥ የአራት ማዕዘን ቅንፍ በመጠቀም ተመራማሪው ትርጉማቸውን አስፍሯል። ከውሳኔዎች ውስጥ ሁለቱ አጼ ቴዎድሮስ ከመንገሳቸው በፊት የወሰኗቸው ቢሆንም ሰብእናቸውን የሚገልጹ በመሆናቸው በጥናቱ ተካትተዋል። በመጨረሻም ጥናቱ መሠረት ያደረገው የጉዳዩን (የጭብጡን) ይዘት አንጂ የታሪኮቹን የጊዜ ቅደምተከተል (chronological order) አለመሆኑን ተመራማሪው ለአንባቢ መግለጽ ይፈልጋል።

1. የዓለም አቀፍ የሰብአዊነት ሕግ ይዘት፣ ዓላማና አይነት በአጭሩ

የዓለም አቀፍ የሰብአዊነት ሕግ ዓላማ ምንድ ነው? ሕጉ ከሌሎች የዓለም አቀፍ ሕግጋት በምን ይለያል? የዓለም አቀፍ የሰብአዊነት ሕግ አይነቶች ምን ይመስላሉ? የሚሉትንና ሌሎች ተያያዥ ነጥቦችን በዚህ ክፍል እንመለከታለን።

1.1 የዓለም አቀፍ የሰብአዊነት ሕግ ይዘትና ዓላማ

የዓለም አቀፉ የሰብአዊነት ሕግ የዓለም አቀፍ ሕግ ቅርንጫፍ ሲሆን ዓላማውም ጦርነት የሚያደርሰውን ጉዳት ማስቆም ባይቻልም ለመቀነስና የሰው ልጅ የሚደርስበትን ሰቆቃ ጋብ እንዲል ማድረግ ነው። በመሆኑም የሕጉ ዓላማ ጦርነት እንዳይካሄድ መከልከል ወይም ማስቆም ሳይሆን ጦርነት ክቡር በሆነው የሰው ልጅ

[6] የኢትዮጵያ ዘመናዊ ታሪክ መነሻ ተደርጎ የሚቆጠረው የዘመነመሣፍንት መጨረሻና የዳግማዊ አጼ ቴዎድሮስ ዘመነሥልጣን መጀመሪያ የሆነው 1847 ዓ.ም ነው።

ሕይዎት፣ አካልና ንብረት ላይ የሚያደርሰውን ጉዳት በተቻለ መጠን ለመቀነስ ነው። ከዚህ ላይ የዓለም አቀፉ የሰብአዊነት ሕግ ጋር ተመሳሳይ ስለሚመስለው ግን ፈጽሞ አንድ ስላልሆነው አንድ አገር በሌላ አገር ላይ የጦር ኃይሉን በመጠቀም ጥቃት እንዳይፈጽም የሚከለክለውንና ሌሎች ተመሳሳይ ጉዳዮችን ከሚደነግገው የዓለም አቀፍ ሕግ ቅርንጫፍ ከሆነው ሕግ ጋር ያለውን ግንኙነት መረዳት ጠቃሚ ነው።

ዓለም አቀፍ የሰብአዊነት ሕግ በእንግሊዝኛው *jus in bello* በመባል የሚጠራ ሲሆን ይህ ሁለተኛው የዓለም አቀፍ ሕግ ቅርንጫፍ ደግሞ *jus ad bellum* በመባል ይታወቃል። የሁለተኛው ሕግ ትኩረት ከአገራት ሉዐላዊነትና ከጦር ኃይል አጠቃቀም ጋር የተገናኘ ሲሆን አላማውም አንድ አገር የሌላ ሉዐላዊ አገር ላይ የጦር ኃይሉን በመጠቀም ጥቃት አንዳይፈጽም መከላከል ነው። ቀደም ባሉት ጊዜያት በተለይም ከ20ኛው መቶ ክፍለዘመን በፊት ጉልበት ያለውና የጦር ኃይሉ ጠንካራ የሆነ አገር በሌላ አገር ላይ ጥቃትና ወረራ መፈጸም የሚችል ሲሆን ይህንን ድርጊት የሚከለክል ግልጽና የተጠናከረ ዓለም አቀፍ ሕግ አልነበረም።

አንድ አገር የሌላ ሉዐላዊ አገር ላይ የጦር ኃይሉን በመጠቀም ጥቃት እንዳይፈጽም የሚከለክለው የመጀመሪያው በስምምነት ላይ የተመሠረተ ዓለም አቀፍ ሕግ ተደርጎ ሊቆጠር የሚችለው የሊግ ኦፍ ኔሽንስ ኮቭናንት ወይም ቃልኪዳን ነው። የሊጉ አባል አገራት የአባላቱን ሉዐላዊነትና ነጻነት ማክበርና እንዲሁም የሌላውን አባል አገር በኃይል መድፈር እንደሌለባቸው ኮቭናንቱ ይደነግጋል።[7] ነገርግን እ.አ.አ. በኦክቶበር 1935 ዓ.ም ፋሽስት ኢጣሊያ ኢትዮጵያን በኃይል ስትወር እንዲሁም እ.አ.አ. በሴፕቴምበር 1931 ዓ.ም ጃፓን ማንቹሪያ በተባለችው የቻይና ግዛት ላይ ተመሳሳይ ድርጊት ስትፈጽም የሊግ ኦፍ ኔሽንስ ዝምታን ሲመርጥ ኮቭናንቱ ከወረቀት ነብርነት እንዳልዘለለ አመላካች ነበር።

ከሊግ ኦፍ ኔሽንስ ኮቭናንት ጋር ተመሳሳይ የሆነው ሌላው ስምምነት እ.አ.አ. በ1928 ዓ.ም የተፈረመው የፓሪሱ ስምምነት (The Pact of Paris)[8] ሲሆን የስምምነቱ ዓላማም አባል አገራት በብሄራዊ ፖሊሲ ደረጃ ጦርነትንና የኃይል እርምጃን እንዲያወግዙ ማድረግ ነበር። የስምምነቱ አባል አገራት ማንኛውንም አለመግባባት ለመፍታት ኃይልን እንደአማራጭ መጠቀም እንደሌለባቸውና ጉዳዩን በሰላማዊ መንገድ መጨረስ እንዳለባቸው ይደነግጋል።[9] ምንም እንኳ የፓሪሱ

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[7] Articles 9 and 10, League of Nations, *Covenant of the League of Nations*, 28 April 1919, available at, http://www.refworld.org/docid/3dd8b9854.html last accessed on 3 July 2017. አንድ አገር የሌላን አገር ሉዐላዊነትና ነጻነት ማክበርና እንዲሁም በኃይል መድፈር አንደሌለበት የሚደነግገው ዓለም አቀፍ ሕግ በዋናነት ቢያንስ በሕግ ደረጃ የታወቀው ከአንደኛው የዓለም ጦርነት በኋላ ሲሆን ከዚያ ቀደም በነበሩት ጊዜያት ይህን የመሰለ ክልከላ አልነበረም። በመሆኑም አገራት ጥቅማቸውን ለማስጠበቅ ጦርነትን እንደዋነኛ መሳሪያ ይጠቀሙበት ነበር። ለበለጠ መረጃ Edward B. Davis, The Legitimate Use of Force, *Mililary Law & L. War Rev*. Vol. 40, 2001 እና Christopher R. Rossi, *Jus Ad Bellum* in the Shadow of the 20th Century, *N.Y.L. Sch. J. Int'l & Comp. L*, Vol. 15, 1994-1995 ይመልከቱ።

[8] የዚህ ስምምነት ሙሉ መጠሪያ Treaty between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy ወይም The Kellog-Briand Peace Pact በመባል ይታወቃል። ይህ ስምምነት ያካተተው አሜሪካ፣ ጃፓንና ሌሎች የአውሮፓ አገራትን ሲሆን በጥቅሉ 15 አባል አገራት ነበሩት።

[9] ዝኒ ከማሁ፣ አንቀጽ 1 እና 2።

ስምምነት ጦርነትን እንደመፍትሄ መጠቀምን ቢያወግዝም የሁለተኛው የዓለም ጦርነትን ከመፈንዳት አላገደውም።

የዓለም አቀፉ ማኅበረሰብ የሁለተኛው የዓለም ጦርነት ካደረሰው እልቂትና ውድመት ትምህርት በመውሰድና በወቅቱ የነበረው የሊግ ኦፍ ኔሽንስን አቅመቢስነት በመረዳት እ.አ.አ በ1945 ዓ.ም የተባበሩት መንግሥታት ድርጅትን ሲያቋቁም የመመሥረቻ ቻርተሩንም አብሮ አጽድቋል። የተባበሩት መንግሥታት ድርጅት ቻርተር በመሠረተሃላብ ደረጃ አገራት የሌሎች አገራትን የፖለቲካ ነጻነትና የግዛት ሉዐላዊነት በኃይል መድፈር እንደሌለባቸው ሲደነግግ [10] በልዩነት ግን በተናጠል ወይም በጋራ ራስን መከላከል መሠረት ባደረገ መልኩ የጦር ኃይል መጠቀም እንደሚቻል ይፈቅዳል።[11]

በዓለም አቀፍ የሰብአዊነት ሕግና የአገራትን የጦር ኃይል አጠቃቀምን በሚወስነው ሕግ መካከል ያለው ግንኙነት ምን እንደሆነ መመልከት በሁለቱ ሕግጋት መካከል ያለውን ትስስርና ልዩነት ስለሚያጎላው ወደዚያው እንለፍ። ቀደምሲል እንደተመለከትነው የዓለም አቀፍ የሰብአዊነት ሕግ አላማ ጦርነት በሰው ልጅ ሕይዎት፣ አካልና ንብረት ላይ የሚደርሰውን ሰቆቃ፣ ጉዳትና እልቂት መቀነስና ማስታገስ ነው። የጦርነቱ ሕጋዊነት፣ ፍትሐዊነትና ትክክለኛነት የዓለም አቀፍ የሰብአዊነት ሕግ ጥያቄና ትኩረት አይደለም፤ ጦርነቱ ሕጋዊ፣ ፍትሐዊና ትክክለኛ ቢሆንም ባይሆንም ዓለም አቀፍ የሰብአዊነት ሕግ ተፈጻሚ ይሆናል። በመሆኑም ጦርነቱ ዓለም አቀፍ የጦር ኃይል አጠቃቀም ሕግን የጣሰ በመሆኑ የዓለም አቀፍ የሰብአዊነት ሕግን አልተገብርም የሚል መከራከሪያ አንድ አገር ማቅረብ አይችልም። የጦር ኃይል አጠቃቀም ሕግን የጣሰው አገር ዓለም አቀፍ ተጠያቂነት (International State Responsiblity) እንዳለ ሆኖ ሁለቱም ማለትም ጥቃት ፈጻሚውና ተጠቂው አገራት ዓለም አቀፍ የሰብአዊነት ሕግን የማክበር፣ የመተግበርና የማስፈጸም ግዴታ አለባቸው።

1.2 የዓለም አቀፍ የሰብአዊነት ሕግ አይነቶች

ወደዓለም አቀፍ የሰብአዊነት ሕግ አይነቶች ስንመጣ ሕጉን እንደማእቀፍ ልንወስደው የምንችል ሲሆን በሁለት ዋና ዋና ክፍሎች ይከፈላል። በጦርነት ጊዜ ጥቅም ላይ መዋል ያለባቸው የጦር መሳሪያዎች ላይ ገደብና ክልከላ የሚጥለው፣ የውጊያ ታክቲክ፣ ስልትና ስትራቴጂ ምን መምሰል እንዳለበት የሚደነግገውና እነዚህን በመሳሰሉ ሌሎች ጉዳዮች ላይ ትኩረት የሚያደርገው የመጀመሪያው ክፍል ሲሆን በጦርነት ቀጥተኛ ተሳትፎ ያላቸው ሰዎች መብትና ጥበቃ እንዲሁም በጦርነት የማይሳተፉና እንዲሳተፉ የማይፈቀድላቸው ሰዎች መብትና ጥበቃን የሚመለከተው ደግሞ ሁለተኛው ክፍል ነው። የመጀመሪያው የሄግ ሕግ በመባል የሚታወቅ ሲሆን መሠረቱን የጣለውም እ.አ.አ. በ1899ና በ1907 ዓ.ም በወጡት

[10] Article 2(4), United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at, http://www.refworld.org/docid/3ae6b3930.html last accessed on 3 July 2017.

[11] *Ibid*., Article 51.

የሄግ ኮንቬንሽኖች ላይ ነው። ሁለተኛው ሕግ የጀኔቫ ሕግ ሲባል በውስጡም እ.አ.አ በ1949 ዓ.ም የወጡትን አራቱን የጀኔቫ ኮንቬንሽኖችንና በ1977 የእነዚህ አራት ኮንቬንሽኖች ተጨማሪ ሆነው የወጡትን ሁለት ፕሮቶኮሎች ይሏል።[12]

የመጀመሪያው የጀኔቫ ኮንቬንሽን ተፈጻሚ የሚሆነው በመሬት ላይ ለሚደረግ ውጊያ ሲሆን የሁለተኛው ኮንቬንሽን ተፈጻሚነት ደግሞ በባሕር ላይ ለሚደረግ ውጊያ ነው። በመሆኑም በነዚህ ሁለት ኮንቬንሽኖች መካከል ያለው መሠረታዊ ልዩነት ጦርነቱ ወይም ውጊያው የሚደረገበት ቦታ እንጂ ጥበቃ የተደረገላቸው ሰዎችና ተቋማት በአብዛኛው ተመሳሳይ ናቸው። የታመሙና የቆሰሉ ወታደሮች፣ የኃይማኖት አባቶች፣ የሕክምና ባለሙያዎችና ተቋማት፣ ከሕክምና አገልግሎት ጋር ተያያዥነት ያላቸው መጓጓዣዎች እንዲሁም የጦር ኃይሎች ለሕክምና አገልግሎት የሚጠቀሙባቸውን አርማዎችና ምልክቶችን በተመለከተ ዝርዝር ድንጋጌዎችን ይዘዋል።[13]

ሦስተኛው የጀኔቫ ኮንቬንሽን ለጦር እስረኞች ጥበቃ ይሰጣል። በዚህ ኮንቬንሽን መሠረት የጦር እስረኛነት (Prisoner of War Status) እንደመብት የሚቆጠር ሲሆን የዚህ መብት ተጠቃሚዎችም በአገራት መካከል በሚደረግ ጦርነት ወይም በዓለም አቀፍ ጦርነት የተማረኩ ወታደሮች (combatants) እና ሌሎች በዚህ ኮንቬንሽን የተጠቀሱ ሰዎች ናቸው። በአንድ አገር ውስጥ በመንግሥትና በአማጺያን ወይም በአማጺያን መካከል በሚደረግ ውጊያ ላይ የተያዙ ሰዎች ይህ መብት የላቸውም። እነዚህ ከዓለም አቀፍ ጦርነት ውጪ የተያዙ ሰዎች የሚኖራቸው መብት የአራቱ የጀኔቫ ኮንቬንሽኖች የጋራ አንቀጽ በሆነው በአንቀጽ 3 እና በሁለተኛው ተጨማሪ ፕሮቶኮል ላይ ተደንግጎ ይገኛል።

አራተኛው የጀኔቫ ኮንቬንሽን በጦርነት ውስጥ ቀጥተኛ ተሳትፎ ለሌላቸው ሰላማዊ ሰዎችና ተቋማት ጥበቃ የሚሰጥ ነው። ጥበቃ የሚደረግላቸው ሰዎችን ትርጉም በሚያስቀምጠቀው አንቀጽ 4 መሠረት ኮንቬንሽኑ ተፈጻሚ የሚሆነው በግጭት ወይም በወረራ ምክንያት በጠላት ስር ለወደቁ ሰዎች ነው። ይህም ማለት በመሠረቱ ዓለም አቀፍ የሰብአዊነት ሕግ በአጠቃላይ ይህ ኮንቬንሽን ደግሞ በተለይ ተፈጻሚነቱ በሰዎችና በሌላ አገር መካከል ባለው ግንኙነት ላይ ነው። በሌላ አገላለጽ ሕጉ በዜጎችና በአገራቸው መንግሥት መካከል የሚኖረው ግንኙነት አይመለከተውም። ከዚህ ላይ ልብ ልንለው የሚገባን ነጥብ ይህ ትርጉም የሚያገለግለው በአገራት መካከል በሚደረግ ጦርነት ወይም በዓለም አቀፍ ውጊያ ጊዜ ስለሚኖረው ጥበቃ ብቻ መሆኑን ነው። ከዚህ በታች እንደምንመለከተው አራቱ የጀኔቫ ኮንቬንሽኖች ከጋራ አንቀጽ 3 በስተቀር እንዲሁም የመጀመሪያው ተጨማሪ ፕሮቶኮል ተፈጻሚነታቸው በአገራት መካከል ለሚደረግ ጦርነት ወይም ለዓለም አቀፍ ጦርነት ብቻ መሆኑን ነው። ስለዚህ ከዓለም አቀፍ ጦርነት ውጪ በሆነውና በመንግሥትና በአማጺያን ወይም በአማጺያን መካከል የሚደረግ ውጊያን

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[12] እነዚህ ሁለት ሕግጋት ስያሜያቸውን የወሰዱት ኮንቬንሽኖቹ ከተፈረሙበት ከተሞች ስም መሆኑን ልብ ይበሉ። አራቱ የጀኔቫ ኮንቬንሽኖችና የእነሱ ተጨማሪ ሆኖ እ.አ.አ. በ1977 ዓ.ም የወጣው አንደኛው ተጨማሪ ፕሮቶኮል ተፈጻሚነታቸው በአገራት መካከል ለሚደረግ ጦርነት ወይም ለዓለም አቀፍ ጦርነት ሲሆን የአራቱ የጀኔቫ ኮንቬንሽኖች የጋራ አንቀጽ 3 እና በተመሳሳይ አመት እ.አ.አ. በ1977 ዓ.ም የወጣው ሁለተኛው ተጨማሪ ፕሮቶኮል በአንድ አገር ውስጥ በመንግስትና በአማጺያን ወይም በአማጺያን መካከል በሚደረግ ጦርነት ላይ ተፈጻሚ ናቸው።

[13] እ.አ.አ. በ2005 ዓ.ም የወጣው ሦስተኛው የጀኔቫ ኮንቬንሽኖች ተጨማሪ ፕሮቶኮል ቀደምሲል እውቅና ከተሰጣቸው የቀይ መስቀልና የቀይ ጨረቃ አርማዎች በተጨማሪ የቀይ ክርስታል አርማ ለሰብአዊ ግልጋሎት እንዲውል ጥበቃና እውቅና ሰጥቷል።

በተመለከተ የዓለም አቀፍ የሰብአዊነት ሕግ ተፈጻሚነት በዜጎችና በአገራቸው መንግሥት መካከል ወይም በራሳቸው በአማጺያን መካከል መሆኑን እንረዳለን፡፡

የጀኔቫ ኮንቬንሽኖችን በተመለከተ በመጨረሻ የምንመለከተው የሁለቱን ተጨማሪ ፕሮቶኮሎች ይዘትና የተፈጻሚነት ወሰንን ይሆናል፡፡ ለተለያዩ ጥበቃ ለሚያሰፈልጋቸው ሰዎችና ተቋማት ተፈጻሚ የሚሆኑ ከዚህ በፊት ታይቶ በማይታወቅ መልኩ በአንድ ጊዜ አራት ኮንቬንሽኖችን ማውጣት ቢቻልም በጊዜ ሂደት የጀኔቫ ኮንቬንሽኖች የማይሸፍኗቸው ጉዳዮች እየተከሰቱ መጡ፡፡ የጦር መሳሪያ ቴክኖሎጂ እየተራቀቀ በመምጣቱ ለሰላማዊ ሰዎች የተደረገው ጥበቃ በቂ ባለመሆኑ፣ የደፈጣ ውጊያ በከፍተኛ ሁኔታ እየተስፋፋ መምጣትና ለደፈጣ ተዋጊዎች የጦር እስረኛነት መብት ይሰጥ ወይ? የሚለው ጉዳይ አጀንዳ መሆኑ እንዲሁም በአራቱ የጀኔቫ ኮንቬንሽኖች የጋራ አንቀጽ 3 የተሰጠው ጥበቃ በቂ አለመሆኑ በዓለም አቀፍ ቀይ መስቀል ማኅበር አስተባባሪነት ለጀኔቫ ኮንቬንሽኖች ተጨማሪ የሚሆኑ ሁለት ፕሮቶኮሎች እንዲወጡ ተደረገ፡፡[14]

የመጀመሪው ተጨማሪ ፕሮቶኮል ጥበቃ የሚሰጠው በአራቱም የጀኔቫ ኮንቬንሽኖች ከለላና ጥበቃ ለተደረገላቸው ሰዎችና ተቋማት ሲሆን ተፈጻሚነቱም በአገራት መካከል ለሚደረግ ጦርነት ወይም ለዓለም አቀፍ ጦርነት ነው፡፡ [15] የሁለተኛው ተጨማሪ ፕሮቶኮል ተፈጻሚነት በመንግሥትና በአማጺያን ወይም በአማጺያን መካከል ርስበርስ ለሚደረግ ውጊያ ሲሆን አላማውም በዋናነት የአራቱ የጀኔቫ ኮንቬንሽኖች የጋራ አንቀጽ 3 በቂ ባለመሆኑ ተጨማሪ፣ ዝርዝርና በቂ የሆነ ጥበቃ ለመስጠት ነው፡፡[16]

የጀኔቫ ኮንቬንሽኖችንና ተጨማሪ ፕሮቶኮሎችን በተመለከተ ዳሰሳችን እንደቀጠለ ሲሆን ቀጥለን አንድ መሠረታዊ ነጥብ እንመልከት፡፡ የዓለም አቀፍ የሰብአዊነት ሕግ ጥበቃ የሚያደርግላቸውን ሰዎችንና ተቋማትን በሁለት ዓበይት ክፍሎች መክፈል እንችላለን፡፡ እነሱም ሰላማዊ ሰዎችና ተቋማት (civilians and civilian objects) እና ወታደሮችና ወታደራዊ ኢላማዎች (combatants and military objectives) ናቸው፡፡[17] የዓለም አቀፍ የሰብአዊነት ሕግ የሚሰጠው ጥበቃ ወይም የመብት አይነት በዋናነት መሠረት ያደረገው ጥበቃ የሚደረግላቸውን ሰዎችና ተቋማት ምንነት ላይ ነው፡፡ በመሆኑም አንድ ሰው ወይም ተቋም ምን ዓይነት ጥበቃ ይደረግለታል? ምን መብትስ ይኖረዋል? የሚሉትን ጥያቄዎች ለመመለስ

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[14] Manooher Mofidit and Amy E. Eckert, "Unlawful Combatants" or "Prisoners of War": The Law and Politics of Labels, *Cornell International Law Journal*, Vol. 36, No. 1, 2003-2004, p. 65

[15] የዓለም አቀፍ ጦርነትን ወይም ውጊያን ትርጉም ይበልጥ ለመረዳት የአራቱ የጀኔቫ ኮንቬንሽኖች የጋራ አንቀጽ 2ን ይመልከቱ፡፡ በመጀመሪው ተጨማሪ ፕሮቶኮል አንቀጽ 1(4) መሠረት ዓለም አቀፍ ጦርነት ማለት በአገራት መካከል የሚደረግ ጦርነት ማለት ብቻ ሳይሆን የራስን እድል በራስ ለመወሰን ከቅኝ ገዥዎች፣ ከውጪ ወራሪዎች እና ከዘረኛ አገዛዞች ጋር ሕዝቦች የሚያደርጉትን ጦርነት ይጨምራል፡፡

[16] ዓለም አቀፋዊ ያልሆነ ጦርነትን ወይም ውጊያን ትርጉም ለመረዳት የአራቱ የጀኔቫ ኮንቬንሽኖች የጋራ አንቀጽ 3 እና የሁለተኛው ተጨማሪ ፕሮቶኮል አንቀጽ 1ን ይመልከቱ፡፡

[17] *Civilian objects* የሚለውን የእንግሊዝኛ ሐረግ *ሰላማዊ ተቋም* በማለት የዚህ ጥናት አቅራቢ የተረጎመው ለሰላማዊ ሰዎች ግልጋሎት የሚሰጡ ቁሳቁሶችና ተቋማት በሚል አግባብ (context) መሆኑን አንባቢ እንዲረዳለት ይፈልጋል፡፡ ለዚህ ሐረግ የዓለም አቀፍ የሰብአዊነት ሕግ የሰጠውን ትርጉም ለመረዳት በዚህ ክፍል ከዚህ በታች ያለውን ትርጓሜ ይመልከቱ፡፡

በመጀመሪያ አንድ ሰው ወታደር ነው ወይስ ሰላማዊ ሰው? ተቋሙ ለሰላማዊ ሰዎች ግልጋሎት የሚሰጥ ተቋም ነው ወይስ ወታደራዊ ኢላማ? የሚሉትን ጥያቄዎች በሚገባ መመርመር በጣም አስፈላጊ ነው። እነዚህን ጥቂዎች መመለስ አስፈላጊ ከሆነ ቀጥለን ወታደር ማን ነው? ሰላማዊ ሰው ማን ነው? ለሰላማዊ ሰዎች ግልጋሎት የሚሰጥ ተቋም ማለት ምን ማለት ነው? እንዲሁም ወታደራዊ ኢላማስ ምንድን ነው? የሚሉትን ነጥቦች እንቃኛለን።

እነዚህን ጥያቄዎች ለመመለስ የምንመለከታቸው ሕግጋት ሦስተኛውን የጀኔቫ ኮንቬንሽን፣ የመጀመሪያውን ተጨማሪ ፕሮቶኮልና የሄግ ደንቦችን ነው። በሦስተኛው የጀኔቫ ኮንቬንሽን አንቀጽ 4 መሠረት የጦር እስረኛነት መብት የሚያገኙት በዓለም አቀፍ ጦርነት ውስጥ ሲዋጉ እጃቸውን የሰጡ ወይም የተማረኩ ወታደሮች ሲሆኑ በዚህ አንቀጽ አገላለጽ የሚከተሉትን ያጠቃልላል፤ መደበኛና ሚሊሺያ የጦር ኃይል አባላት፣ እንዲሁም መደበኛ የጦር ኃይሉ አባላት ሳይሆኑ የተለያዩ አገልግሎት ለመስጠት ለምሳሌ፣ የጦር አውሮፕላን የበረራ ክፍል አባላት እንዲሁም ለጦር ኃይሉ የተለያዩ ቁሳቁሶች ለማቅረብ ውል የተዋዋሉ አቅራቢዎች የጦር ኃይሉን ይሁንታና ፈቃድ ካገኙ እንደወታደር ይቆጠራሉ። ወደመጀመሪያው ተጨማሪ ፕሮቶኮል ስንመጣ ከሕክምና ባለሙዎችና ከኃይማኖት አባቶች ውጪ ያሉ የጦር ኃይሉ አባላት በሙሉ ወታደሮች እንደሆኑና በውጊያ በቀጥታ መሳተፍ እንደሚችሉ አንቀጽ 43 ይደነግጋል። ከዚህ ላይ አንድ መሠረታዊ ነጥብ መገንዘብ ይኖርብናል። ይኸውም የጦር እስረኛነት መብት የሚያገኙት በዓለም አቀፍ ጦርነት ውስጥ የሚዋጉ ወታደሮች እንጂ ዓለም አቀፍ ባልሆነ ጦርነት ውስጥ ይህ መብት እንደሌለ ልብ ልንል ይገባል።[18]

እ.አ.አ በ1899 እና በ1907 የወጡት የሄግ ደንቦች አንድ አገር በውጭ ወራሪ በኃል በመወረር ላይ እያለ በደንብ ለመደራጀት ጊዜ ያላገኙና ወረራውን ለመመከት በግብታዊነት የተነሱ ሰላማዊ ሰዎች የጦር መሳሪያቸውን በግልጽ ከያዙና ልማዳዊ የጦርነት ሕግጋትን ካከበሩ እንደተዋጊ ወታደር እንደሚቆጠሩ ወይም *levée en masse* እንደሆኑ ይደነግጋሉ።[19] አንድ አገር በውጭ ወራሪ ከተወረረ በመሠረቱ ወረራውን በቀጥታ መመከት ያለበት መደበኛ ወታደሩ ወይም የጦር ኃይሉ ነው። ነገርግን መደበኛ ወታደሩ ወረራውን መመከት ከአቅሙ በላይ ሊሆንበት ወይም ሊሸነፍ ይችላል። በዚህ ጊዜ ሰላማዊ ሰዎች "ሆ" ብለው በመነሳት የአገራቸውን ዳር ድንበር ለማስከበር መሞከራቸው ተፈጥሯዊና አይቀሬ የዜግነት የውዴታ ግዴታ እንዲሁም መብት ነው። በኢትዮጵያም እ.አ.አ. በ1936 ዓ.ም ንጉሠነገሥት ቀዳማዊ አጼ ኃይለ

[18] የተዋጊ ወታደሮችን ትርጉም የሚያመላክተውና የጦር እስረኞችን መብት የሚደነግገው በዓለም አቀፍ ጦርነት ላይ ተፈጻሚ የሆነው የመጀመሪያው ተጨማሪ ፕሮቶኮል መሆኑን ልብ ይሏል። የሁለተኛው ተጨማሪ ፕሮቶኮልም ይሁን የጀኔቫ ኮንቬንሽኖች የጋራ አንቀጽ 3 ስለተዋጊ ወታደርና የጦር እስረኞችን በተመለከተ ምንም የሚሉት ነገር የለም።

[19] Article 2, Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (1907 Hague Regulation IV):

The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war. ***Levée en masse*** ቃሉ ፈረንሳይኛ ሲሆን ትርጉሙም "በጅምላ ወይም በብዛት መነሳት" ማለት ነው። በእንግሊዝኛ "Mass Uprising" ወይም "Mass Mobilization" የሚል አቻ ትርጉም ይሰጠዋል።

ሥላሴ በማይጨው ጦርነት ተሸንፈው ወደእንግሊዝ አገር ከተሰደዱ በኋላ ፋሺስት ጣሊያን በተቆጣጠራቸውና ገና ባልተቆጣጠራቸው የኢትዮጵያ ክፍሎች አርበኞች ወረራውን ለመመከት ከፍተኛ ተጋድሎ ማድረጋቸው በታሪክ ተከትቦ ይገኛል። ሁለቱ የሄግ ደንቦች እውቅና የሰጡት ከዚህ ታሪክ ጋር ተመሳሳይነት ያላቸው ክስተቶችን ነው።

ከዚህ ላይ አንድ ነጥብ ልብ ልንል ይገባል። በዚህ ሁኔታ ሰላማዊ ሰዎች እንደተዋጊ ወታደር የሚቆጠሩት ገና ወረራው በመካሄድ ላይ እያለና ተወራሪው አገር በወራሪው ኃይል ቁጥጥር ስር እስካልዋለ ድረስ ብቻ ነው። አገሩ በወራሪው ኃይል ቁጥጥር ስር ከዋለና ሰላማዊ ሰዎች ራሳቸውን በሚገባ ለማደራጀትና ለማስታጠቅ ጊዜ ካገኙ እንደተዋጊ ወታደር ወይም *levée en masse* አይቆጠሩም። ሰላማዊ ሰዎች ራሳቸውን በሚገባ ለማደራጀትና ለማስታጠቅ ጊዜ ካገኙ እንደተዋጊ ወታደር የሚቆጠሩት በሦስተኛው የጀኔቫ ኮንቬንሽን አንቀጽ 4(2) ስር የተዘረዘሩትን ቅድመሁኔታዎች ካሟሉ ብቻ ነው።[20] እነዚህ ቅድመሁኔታዎች ከተሟሉ ሰላማዊ ሰዎች የነበሩት ወደተደራጀ የተከላካይ እንቅስቃሴ (organized resistance movements) ይቀየራሉ ማለት ነው። የተደራጀ የተከላካይ እንቅስቃሴ አባላት እንደተዋጊ ወታደር የሚቆጠሩ ሲሆን በጠላት ከተማረኩ ወይም እጃቸውን ለጠላት ከሰጡ በሦስተኛው የጀኔቫ ኮንቬንሽን መሠረት የጦር እስረኛነት መብት ያገኛሉ።

ወታደር ማን ነው? የሚለውን ጥያቄ ከመለስን ቀጥለን የምንመለከተው የሰላማዊ ሰዎችን ትርጓሜ ይሆናል። በመጀመሪያው ተጨማሪ ፕሮቶኮል አንቀጽ 50(1) ላይ እንደተመለከተው ሰላማዊ ሰው ማለት በሦስተኛው የጀኔቫ ኮንቬንሽን አንቀጽ 4(ሀ)(1)፣ (2)፣ (3)ና (6) እንዲሁም በዚሁ ተጨማሪ ፕሮቶኮል አንቀጽ 43 ውጪ ያሉትን ሰዎች የሚያጠቃልል ሲሆን አንድ ሰው ሰላማዊ ሰው መሆን አለመሆኑ ጥርጣሬ በሚፈጥር ጊዜ እንደሰላማዊ ሰው እንደሚቆጠር ይኸው አንቀጽ ይደነግጋል።[21] ከዚህ ትርጓሜ የምንረዳው ሰላማዊ ሰው ማን ነው? የሚለውን ጥያቄ ለመመለስ በመጀመሪያ ወታደር ማን ነው? የሚለው ጥያቄ ምላሽ ማግኘት

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[20] Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in oroutside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

a) that of being commanded by a person responsible for his subordinates;

b) that of having a fixed distinctive sign recognizable at a distance;

c) that of carrying arms openly;

d) that of conducting their operations in accordance with the laws and customs of war

በማለት አንቀጽ 4(2) ቅድመሁኔታዎችን ያስቀምጣል።

[21] Article 50, Convention (III) Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949 (Geneva Convention III): *A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.*

ይኖርበታል፡፡ ምንም እንኳ በስነአመክንዮ አንድን ቃል *እንዲህ ያልሆነ* በማለት በተቃራኒው መተርጎም ባይደገፍም፣ በአጭሩ ሰላማዊ ሰው ማለት ወታደር ያልሆነ በማለት በተቃራኒው (negatively) መተርጎም እንችላለን ማለት ነው፡፡

ከዚህ በላይ እንደተመለከትነው የዓለም አቀፍ የሰብአዊነት ሕግ ጥበቃ የሚያደርገው ለሰዎች ብቻ ሳይሆን ለተቋማትም ጭምር ነው፡፡ ወታደር ማን ነው? ሰላማዊ ሰውስ ማን ነው? የሚሉትን ጥያቄዎች ከመለስን፣ ቀጥለን የምንመለከተው ወታደራዊ ዒላማ ምንድን ነው? ከሰላማዊ ተቋምስ በምን ይለያል? የሚሉትን ጥያቄዎች ይሆናል፡፡ እንደሰላማዊ ሰው ትርጓሜ በተመሳሳይ ሰላማዊ ተቋም ማለት ወታደራዊ ዒላማ ያልሆነ በማለት የመጀመሪያው ተጨማሪ ፕሮቶኮል አንቀጽ 52(1) በተቃራኒው ትርጉሙን አመልክቷል፡፡ ስለዚህ የሰላማዊ ተቋምን ምንነት ለማወቅ የወታደራዊ ዒላማን ትርጉም መረዳት ይኖርብናል ማለት ነው፡፡ በዚሁ ተጨማሪ ፕሮቶኮል አንቀጽ 52(2) መሠረት በተፈጥሯቸው፣ በተቀመጡበት ቦታ፣ በአገልግሎታቸውና በሚሰጡት ጥቅም ለወታደራዊ እንቅስቃሴው ውጤታማ አስተዋጾ የሚያደርጉ እቃዎች፣ የእነዚህ እቃዎች በከፊል ወይም ሙሉ በሙሉ መውደም፣ መማረክ ወይም ጥቅም እንዳይሰጡ መደረግ ባለው ተጨባጭ ሁኔታ የታወቀ ወታደራዊ ጥቅም የሚሰጥ ከሆነ ወታደራዊ ዒላማዎች ናቸው፡፡[22] ከዚህ የምንረዳው እንደሁኔታዎች ተለዋዋጭነት ሰላማዊ ተቋም የነበረ ወደወታደራዊ ዒላማነት፣ እንዲሁም ወታደራዊ ዒላማ የነበረ ወደሰላማዊ ተቋምነት ሊቀየር እንደሚችል ነው፡፡

በሰላማዊ ተቋምና ወታደራዊ ዒላማ መካከል ስላለው ልዩነት የምናደርገውን ትንተና ከመቋጨታችን በፊት አንድ መሠረታዊ ነጥብ እንመልከት፡፡ ቀደም ሲል እንደተመለከትነው ዓለም አቀፉ የሰብአዊነት ሕግ የሰላማዊ ተቋምንና የወታደራዊ ዒላማን ትርጉም ቢያመላክትም በተግባር ግን አንድ ተቋም ወይም እቃ በአንድ ጊዜ ወታደራዊና ሰላማዊ ጣምራ ግልጋሎት ሊሰጥ ወይም በእንግሊዝኛው Dual Use Object ሊሆን ይችላል፡፡ ይህንን ነጥብ ይበልጥ ለማብራራት ለወታደራዊና ለሰላማዊ ሰዎች የበረራ አገልግሎት የሚሰጡ የአውሮፕላን ማረፊያዎችን፣ የኃይል ማመንጫ ግድቦችን ወይም የኒዩክሌር ጣቢያዎችን፣ የነዳጅ ዘይት ማጣሪያዎችን፣ የሬዲዮና ቴሌቪዥን ማሰራጫ ጣቢያዎችን፣ ወደቦችን፣ አውራ ጎዳናዎችን፣ ድልድዮችን፣ እንዲሁም የባቡር ጣቢያዎችንና ሀዲዶችን በምሳሌነት መጥቀስ ይቻላል፡፡[23] ከዚህ ላይ የሚነሳው ዋናው ጥያቄ እነዚህ ጣምራ ግልጋሎት የሚሰጡ ተቋማት ሰላማዊ ተቋማት ናቸው ወይስ ወታደራዊ ዒላማዎች? የሚለው ነው፡፡

ወደዓለም አቀፉ የሰብአዊነት ሕግ ስንመጣ አራቱ የጀኔቫ ኮንቬንሽኖችም ሆነ ሁለቱ ተጨማሪ ፕሮቶኮሎች ጣምራ ግልጋሎት የሚሰጡ ተቋማትን ትርጓሜ በተመለከት በግልጽ ያመላከቱት ነገር የለም፡፡ በሕግ በግልጽ የተመለከተ ትርጉም ባለመኖሩ

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[22] Article 52 (2), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I): *In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military of advantage.*

[23] Gary D. Solis, *The Law of Armed Conflict, International Humanitarian Law in War*, Cambridge University Press, Cambridge, 2010, p. 534 (ከዚህ በኋላ ሶሊስ)

ምክንያት ጉዳዩ በዘርፉ ምሁራን የመከራከሪያ ነጥብ ከሆነ ውሎ አድሯል። በጉዳዩ ላይ በጻፉ ምሁራን እንደመፍትሄ ከሚሰነዘሩት ሃሳቦች መካከል አንዱ በመጀመሪያው ተጨማሪ ፕሮቶኮል አንቀጽ 52(2) ስር የተመለከተውን የወታደራዊ ዒላማን ትርጓሜ መሠረት ያደረገ ነው። ምንም እንኳ ተቋማቱ ሰላማዊ ግልጋሎት ቢሰጡም በአንቀጽ 52(2) መሠረት በተፈጥሯቸው፣ በተቀመጡበት ቦታ፣ በአገልግሎታቸውና በሚሰጡት ጥቅም ለወታደራዊ እንቅስቃሴው ውጤታማ አስተዋጾ የሚያደርጉ እቃዎች፣ የእነዚህ እቃዎች በከፊል ወይም ሙሉ በሙሉ መውደም፣ መማረክ ወይም ጥቅም እንዳይሰጡ መደረግ ባለው ተጨባጭ ሁኔታ የታወቀ ወታደራዊ ጥቅም የሚሰጥ ከሆነ ተቋማቱ ወታደራዊ ዒላማዎች ናቸው። የሚለው አንዱ የመከራከሪያ ሃሳብ ነው።[24] በዚህ የመከራከሪያ ሃሳብ መሠረት የተቋሙ ሰላማዊ ግልጋሎት ግምት ውስጥ የሚገባው የተመጣጣኝነትን መርኅ እንዳይጣረስ ብቻ ነው።[25] በመሆኑም በዚህ የክርክር መስመር መሠረት በመጀመሪያው ተጨማሪ ፕሮቶኮል አንቀጽ 52(2) ስር የተመለከተው መስፈርት ከተሟላ ሁሉም ጣምራ ግልጋሎት የሚሰጡ ተቋማት ወታደራዊ ተቋማት ይሆናሉ ማለት ነው።[26]

ሰላማዊ ሰው፣ ወታደር፣ ሰላማዊ ተቋምና ወታደራዊ ዒላማ ምን እንደሆኑ ተመልክተናል። ከዚህ ላይ አንባቢ አንድ ጥያቄ መጠየቁ አይቀርም። ይህንን ትርጉም መስጠትና መስመር ማስመር ያስፈለገበት ምክንያት ምንድን ነው? የሚለው መሠረታዊ ጥያቄ ነው። በዓለም አቀፍ የሰብአዊነት ሕግ ሰላማዊ ሰዎች ያላቸው መብት፣ ግዴታና ጥበቃ ከወታደሮች መብት፣ ግዴታና ጥበቃ የተለየ ነው። እንዲሁም ሰላማዊ ተቋማት ከወታደራዊ ዒላማዎች በተለይ የወታደራዊ ጥቃት ሰለባ እንዳይሆኑ ሕጉ ጥበቃና ከለላ ይሰጣቸዋል። ይህንን ነጥብ ከዚህ በታች በዝርዝር እንመለከታለን።

በዓለም አቀፍ የሰብአዊነት ሕግ መሠረት በውጊያ በቀጥታ የመሳተፍ መብት ያላቸው ወታደሮች ብቻ ናቸው።[27] ይህም ማለት ወታደሮች የጠላት ወታደሮችን የመግደል፣ የማቁሰልና የመማረክ መብት አላቸው። ይህ መብት ግዴታ ማስከተሉ ስለማይቀር በእነሱም ላይ ተመሳሳይ መብት የጠላት ወታደሮች ይኖራቸዋል ማለት ነው። ወደሰላማዊ ሰዎች ስንመጣ ግን ይህ መብትና ግዴታ የላቸውም። ማለትም በውጊያ በቀጥታ መሳተፍ አይችሉም፤ የጠላት ወታደሮች ጥቃት የቀጥታ ሰለባም አይደሉም።[28]

ይህ ከቀጥታ ጥቃት ሰለባ ነጻ የመሆን መብት የሚያገለግለው ግን ሰላማዊ ሰዎች በውጊያው በቀጥታ እስካልተሳተፉ ድረስ ብቻ ነው። ሰላማዊ ሰዎች በውጊያው

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[24] Henry Shuet and David Wippman, Limiting Attacks on Dual-Use Facilities Performing Indispensable Civilian Functions, Cornell International Law Journal, Vol. 35, 2001-2002, p. 562.

[25] ዝኒ ከማሁ፣ ገጽ 562-563። የተመጣጣኝነት መርኅን በተመለከተ ከዚህ በታች "የዓለም አቀፍ የሰብአዊነት ሕግ መርኖች" በሚለው ክፍል ስር ያለውን ዝርዝር ሀተታ ይመልከቱ።

[26] ሶሊስ በጉዳዩ ላይ አስተያየት የሰጡ የጦር ጀኔራሎችንና የዘርፉን ምሁራን በመጥቀስ ተመሳሳይ ክርክር ያቀርባሉ። ለበለጠ መረጃ ሶሊስ፣ ከገጽ 534-536 ይመልከቱ።

[27] Article 43(2), Additional Protocol I.

[28] ዝኒ ከማሁ፣ አንቀጽ 51(3)።

በቀጥታ ከተሳተፉ ይህንን መብታቸውን ያጣሉ፤ የጠላት ወታደሮችም እነዚህን ሰዎች መግደል፣ ማቁሰልና መጉዳት ይችላሉ፡፡ በመሆኑም በውጊያ የቀጥታ ተሳትፎ (Direct Participation in Hostilities) ጽንሰሃሳብ ሰላማዊ ሰዎችን ብቻ የሚመለከት ነው፡፡ በውጊያ የቀጥታ ተሳትፎ ማለት ምን ማለት ነው? ሰለማዊ ሰዎች ጦርነቱን አስከምን ድረስ ማገዝ ይችላሉ? የሚሉትና ሌሎች ተመሳሳይ ጥያቄዎች የዘርፉ ምሁራን፣ ተመራማሪዎችና ባለሙያዎች መከራከሪያ ከሆኑ ውሎ አድሯል፡፡[29] በሌላ አነጋገር ክርክሩ ሰላማዊ ሰዎች በውጊያው በሚኖራቸው ቀጥተኛና ቀጥተኛና ያልሆነ ተሳተፎ መካከል ያለውን መስመር እንዴት ማስመር ይቻላል? የሚል ነው፡፡ ይህ ጽንሰሃሳብ አሻሚ፣ እልባት ያላገኘና በጀኔቫም ይሁን በሌሎች ስምነቶች ትርጉም ያልተሰጠው በመሆኑ የዓለም አቀፍ ቀይ መስቀል ማኅበርን ትኩረት መሳብ የቻለ ሲሆን ማኅበሩም ጽንሰሃሳቡን ለመተርጎም የሚያስችል መመሪያ (Interpretative Guidance) አዘጋጅቷል፡፡[30]

ወደዓለም አቀፉ የቀይ መስቀል ማኅበር የትርጉም መመሪያ ከማምራታችን በፊት አንድ ነጥብ ላይ ትኩረት ማድረግ ያስፈልጋል፡፡ በውጊያ በቀጥታ የመሳተፍ መብት ያላቸው ወታደሮች ቢሆኑም ሰላማዊ ሰዎች የማይሳተፉበት ጦርነት ወይም ውጊያ ሊኖር አይችልም፡፡ በሰላማዊ ሰዎች ያልተደገፈ የጦር ኃይል በምንም መልኩ ጦርነቱን በድል ማጠናቀቅ አይችልም፡፡ [31] ከዚህ የምንረዳው ሁሉም አይነት የሰላማዊ ሰዎች ተሳትፎ በዓለም አቀፍ የሰብአዊነት ሕግ ያልተከለከለ መሆኑን ነው፡፡ ለዚህም ነው በሰላማዊ ሰዎች ላይ የተጣለው ገደብ ቀጥተኛ ተሳትፎ ብቻ የሆነው፡፡ በመሆኑም ቀጥተኛ ያልሆነ የሰላማዊ ሰዎች ተሳትፎ በሕግ የተፈቀደና ተፈጥሯዊ መሆኑን ልብ ልንል ይገባል፡፡ [32] ይህንን ቀጥተኛ ያልሆነ የሰላማዊ ሰዎች ተሳትፎ እንዴት ቀጥተኛ ከሆነው ተሳትፎ መለየት እንችላለን? የሚለውን መሠረታዊ ነጥብ ቀጥለን እንመለከታለን፡፡

በዓለም አቀፉ የቀይ መስቀል ማኅበር የትርጉም መመሪያ መሠረት አንድ ድርጊት ቀጥተኛ ተሳትፎ መሆኑን ለማወቅ ሦስት የማይነጣጠሉ ቅድመሁኔታዎች (Constitutive Elements) መሟላት አለባቸው፡፡ እነሱም፤

1. ድርጊቱ የጠላት ወታደራዊ ዘመቻ ወይም አቅም ላይ ተጽእኖ ማሳደር ያለበት ሲሆን ሞትና ጉዳት የቀጥታ ጥቃት ሰለባ እንዳይሆኑ ሕግ ከለላ በሰጣቸው ሰዎችና ቁሳቁስ ላይ ማድረስ፣
2. በድርጊቱና በጉዳቱ መካከል ቀጥተኛ የሆነ የምክንያትና የውጤት ትስስር መኖር፣ እንዲሁም

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[29] ሶሊስ፣ ገጽ 202፡፡

[30] Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009 (ICRC Interpretive Guidance).

[31] ሰላማዊ ሰዎች ለጦር ኃይሉ ስንቅ ሊያቀርቡ፣ የገንዘብና የሞራል ድጋፍ ሊሰጡና በሌሎች መስል ተግባራት ሊሳተፉ ይችላሉ፡፡

[32] ለበለጠ መረጃ Michael N. Schmitt, Deconstructing Direct Participation in Hostilities: The Constitutive Elements, *New York University Journal of International Law and Politics*, Vol. 42, 2009-2010 ይመልከቱ፡፡

3. ድርጊቱ የተፈጸመው በውጊያው ውስጥ የሚሳተፈውን አንዱን ወገን በመደገፍና ሌላኛውን ለመጉዳት በማሰብ መሆን ይኖርበታል።[33]

እነዚህ ሦስት ቅድመሁኔታዎች ከተሟሉ ተሳትፎው ቀጥተኛ ተሳትፎ ስለሚሆን በድርጊቱ የተሳተፉ ሰላማዊ ሰዎች በሕግ የተሰጣቸውን ከቀጥታ ጥቃት የመጠበቅ መብታቸውን ያጣሉ ማለት ነው።

2 የዓለም አቀፍ የሰብአዊነት ሕግ መርኖች

ከላይ የተመለከትናቸው ነጥቦች ማለትም የዓለም አቀፍ የሰብአዊነት ሕግና ሕጉ የሚሰጠው ከለላና ጥበቃ እንደሁኔታው በተለያዩ ዓለም አቀፍ ስምምነቶችና የልማድ ሕግጋት ውስጥ ተገቢውን ቦታ ያገኙ ቢሆንም ሕግጋቱ የተነሱበት የራሳቸው ተፈጥሯዊ መሠረት አላቸው። እነዚህ ሕግጋቱ የተገነቡባቸው መሠረቶች የዓለም አቀፍ የሰብአዊነት ሕግ መርኖች በመባል ይታወቃሉ። መርኖቹን ዓለም አቀፍ የሰብአዊነት ሕግ የተሸመነባቸው ቱባ ድርና ማግ አድርገን ልንወስዳቸው እንችላለን። ዓለም አቀፍ የሰብአዊነት ሕግ የሚሰጠውን ከለላና ጥበቃ በደንብ ለመረዳት የእነዚህን መርኖች ምንነትና ይዘት በሚገባ መገንዘብ በጣም ጠቃሚ በመሆኑ በዚህ ክፍል በመርኖቹ ላይ አጭር ቅኝት ይደረጋል።

የወታደራዊ ጥቅም አስፈላጊነት መርኅ፣ ከመጠን ያለፈ ጉዳትንና አላስፈላጊ ስቃይን የመከላከል መርኅ፣ የተመጣጣኝነት መርኅና የመለየት መርኅ የሚሉት መሠረታዊ የዓለም አቀፍ የሰብአዊነት ሕግ መርኖች ናቸው። እነዚህን መርኖች በጦርነት ላይ ያሉ ኃይሎች ጥቃት ከመሰንዘራቸው በፊት ሊመረምሯቸው የሚገባ ሲሆን የአንድን ጥቃት ሕጋዊነት ወይም ትክክለኛነት ለመለካትም በመስፈርትነት ያገለግላሉ። መርኖቹ በተለያዩ ዓለም አቀፍ ስምምነቶች ውስጥ ቦታ የተሰጣቸው ከመሆኑም በላይ የዓለም አቀፍ የልማድ ሕግ እየሆኑም መጥተዋል። መርኖቹን ከዚህ ቀጥለን በዝርዝር እንመለከታልን።

2.1. የወታደራዊ ጥቅም አስፈላጊነት መርኅ (The Principle of Military Necessity)

በወታደራዊ ጥቅም አስፈላጊነት መርኅ መሠረት አንድ ጥቃት ከመፈጸሙ በፊት ከጥቃቱ የሚገኝ ወታደራዊ ጥቅም መኖር አለመኖሩን ማረጋገጥ ያስፈልጋል።[34] ከታለመው ወታደራዊ ጥቃት የሚገኝ ምንም አይነት ወታደራዊ ጥቅም ከሌለ ጥቃቱን መፈጸም እንደማይገባ ይህ መርኅ ይደነግጋል።[35] በመሆኑም በጠላት ጦር ላይ የሚፈጸመው እያንዳንዱ ጥቃት ተዋጊውን ኃይል ለድል በማብቃት ረገድ የራሱ አስተዋጾ ሊኖረው ይገባል ማለት ነው።

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[33] ICRC Interpretive Guidance.

[34] Nobuo Hayash, Contextualizing Military Necessity, *Emory International Law Review*, Vol. 27, No. 189, 2003, p. 193.

[35] Nobou Hayashi, Military Necessity as Normative Indifference, *Georgetown Journal of International Law*, Vol. 44, 2013, pp. 695-696.

ይህን መርኅ ለመጀመሪያ ጊዜ በሕግ ደረጃ ደንግጎ ያወጣው በኒውዮርክ የሚገኘው የኮሎምቢያ ኮሌጅ ፕሮፌሰር የነበረው ፈራንሲስ ሊበር ነው።[36] የሊበር ሕግ በዋናነት ተፈጻሚ እንዲሆን የተፈለገው በወቅቱ ሲካሄድ በነበረው የአሜሪካ የርስበርስ ጦርነት ላይ ቢሆንም ሕጉ እንደሕግ በአጠቃላይ ይህ መርኅ ደግሞ በተለይ ለዓለም አቀፍ የሰብአዊነት ሕግ መነሻ በመሆን አገልግሏል።[37] በዚህ መርኅ መሠረት በውጊያ ጉዳት ማድረስ የሚቻለው ማለትም መግደል ወይም ማቁሰል እንዲሁም በወታደራዊ ዒላማ ላይ ጥቃት ማድረስ የሚቻለው ጉዳት ለማድረስ ወይም ለመግደልና ለማቁሰል ስለተፈለገ ብቻ አይደለም፤ የሚደርሰው ጉዳት ጦርነቱን በአሸናፊነት ለመወጣት የራሱን አስተዋጾ የሚያበረክት ሊሆን ይገባል።[38]

ይህ መርኅ በአራቱም የጀኔቫ ኮንቬንሽኖችና በሁለቱ ተጨማሪ ፕሮቶኮሎች ውስጥ ቢጠቀስም እነዚህ ሕግጋት ምንም አይነት ትርጉም ሳይሰጡት አልፈዋል።[39] ምንም እንኳ ጽንሰሃሳቡ በእነዚህ ሕግጋት ውስጥ ዝርዝር ትርጉም ተሰጥቶት ባናገኘውም የዓለም አቀፍ የልማድ ሕግ ደረጃን በማግኘቱ ተፈጻሚነቱ ውስን አይደለም።[40]

2.2 ከመጠን ያለፈ ጉዳትንና አላስፈላጊ ስቃይን የመከላከል መርኅ (The Principle of Prevention of Superflous Injury and Unnecessary Suffering)

ይህ መርኅ በውጊያ ጥቅም ላይ መዋል የሌለባቸው የጦር መሳሪያዎች ላይ ገደብ የሚጥል ነው።[41] በዚህ መርኅ መሠረት ከመጠን ያለፈ ጉዳት የሚያደርሱ ወይም አላስፈላጊ ስቃይንና ሰቆቃን የሚያስከትሉ የጦር መሳሪያዎችንና ስልቶችን መጠቀም የተከለከለ ነው።[42]

መርኑ ለመጀመሪያ ጊዜ በሕግ የተደነገገው እ.አ.አ በ1868 ዓ.ም በወጣው የሴይንት ፒተርስበርግ መግለጫ ላይ ነው።[43] በዚህ መግለጫ መሠረት ከመጠን ያለፈ ጉዳትንና አላስፈላጊ ሰቆቃን የሚያስከትሉ ወይም ስቃይን የሚያባብሱ ሰውነት ውስጥ ከገቡ በኋላ ሊፈነዱ የሚችሉ ጥይቶችን መጠቀም የተከለከለ ነው።[44] ይህ

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[36] Burrus M. Carnahan, Lincoln,Liber and the Laws of War: The Origins and Limits of the Principle of Military Necessity, *The American Journal of International Law*, Vol. 92, 1998, pp. 213-214.

[37] የሊበር ሕግ የወጣው እ.አ.አ በ1863 ዓ.ም ሲሆን የአሜሪካ የርስበርስ ጦርነት እ.አ.አ ከ1861 እስከ1865 ዓ.ም ድረስ መካሄዱን ልብ ይበሉ። ሶሊስ፣ ገጽ 40።

[38] *Military necessity does not admit of cruelty - that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult* በማለት የሊበር ሕግ አንቀጽ 16 ይደነግጋል።

[39] ሶሊስ፣ ገጽ 259።

[40] ዝኒ ከማሁ።

[41] Article 35(5), Additional Protocol I.

[42] *Ibid*.

[43] መግለጫ ወይም በእንግሊዝኛው *Declaration* በቀጣይ ለሚፈረሙ ዓለም አቀፍ ስምምነቶች እንደመሠረት የሚያገለግል እንጂ በሂደት የዓለም አቀፍ የልማድ ሕግ ደረጃን ካላገኘ በስተቀር በራሱ አስገዳጅ ሕግ አለመሆኑን ልብ ይበሉ።

[44] ሶሊስ፣ ገጽ 579።

መርኅ በቀጣይ እ.አ.አ በ1899 እና 1907 ዓ.ም በወጡት የሄግ ደንቦች እንዲሁም እ.አ.አ በ1977 ዓ.ም በወጣው የመጀመሪያው ተጨማሪ ፕሮቶኮል ላይም ትኩረት ተሰጥቶታል። ለምሳሌ በመጀመሪያው ተጨማሪ ፕሮቶኮል መሠረት ከመጠን በላይ ጉዳት የሚያደርሱና ያልተፈለገ ሰቆቃን የሚያስከትሉ የጦር መሳሪያዎችንና ስልቶችን መጠቀም የተከለከለ ነው።[45] ከነዚህ ሕግጋት በተጨማሪ ልዩ ልዩ የጦር መሳሪያዎች ጥቅም ላይ እንዳይውሉ የሚከለክሉ ወይም ገደብ የሚጥሉ የተለያዩ ዓለም አቀፍ ስምምነቶች ተፈርመዋል። [46] የእነዚህ ዓለም አቀፍ ስምምነቶች ዓላማም በዋናነት ይገኛል ተብሎ ከታሰበው ወታደራዊ ጥቅም አኳያ ከመጠን ያለፈ ጉዳትን መከላከንና አላስፈላጊ ስቃይን መቀነስ ነው።[47]

ይህን ንዑስ ክፍል ከማጠቃለላችን በፊት አንድ ነጥብ እንመልከት። ከመጠን ያለፈ ጉዳትና ያልተፈለገ ስቃይና ሰቆቃ ማለት ምን ማለት ነው? አንድን ጉዳት ከመጠን ያለፈ ነው፣ አላስፈላጊ ስቃይን አስከትሏል እንዲሁም ሰቆቃን አባብሷል የምንለው መቼ ነው? መስፈርትና መለኪያችንስ ምንድን ነው? የሚሉና ሌሎች ተያያዥ ጥያቄዎች መነሳታቸው አይቀሬ ነው። ቀደምሲል የጠቀስናቸው ሕግጋት እነዚህን ጥያቄዎች አይመልሱልንም። በመጠኑም ቢሆን ለእነዚህ ጥያቄዎች መልስ ለመስጠት የሞከረው የዓለም አቀፉ ፍርድቤት ነው። ፍርድቤቱ አላስፈላጊ ስቃይ ማለት አንድን የታለመ ወታደራዊ ግብ ለማሳካት አስፈላጊ ከሆነውና ከሚደርሰው ጉዳት በላይ የሚደርሰው ጉዳት ነው፤ (a harm greater than that unavoidable to achieve legitimate military objectives) በማለት ተርጉሞታል።[48] በመሆኑም አንድ የጦር አዛዥ ጥቃት እንዲሰነዘር ትዕዛዝ ከመስጠቱ በፊት የታለመውን ወታደራዊ ግብ ለማሳካት በጠላት ወታደሮች ላይ የሚደርሰው ጉዳት ከልክ ያለፈ ወይም ያላስፈ እንዲሁም ተመጣጣኝ መሆን አለመሆኑን አስቀድሞ በሚገባ መመርመር ይኖርበታል ማለት ነው። በተግባር ይህንን መወሰን ወይም መገመት ለአንድ የጦር አዛዥ በጣም አስቸጋሪ ሊሆን እንደሚችል ግን አንባቢ ሊገነዘበው ይገባል።

2.3 የተመጣጣኝነት መርኅ (The Principle of Proportionality)

ከዚህ በላይ ባሉት ሁለት ንዑስ ክፍሎች የተመለከትናቸው መርኖች ጥበቃ የሚሰጡት ለወታደሮች ሲሆን ይህ መርኅ ግን ለሰላማዊ ሰዎች ከለላ ለመስጠት የቆመ ነው።[49] ቀደምሲል እንደተመለከትነው ሰላማዊ ሰዎች በውጊያ ውስጥ በቀጥታ እስካልተሳተፉ ድረስ የቀጥታ ጥቃት ሰለባ አይደረጉም። በሌላ አገላለጽ ወታደሮችን ዒላማ በማድረግ የተሰነዘረ ጥቃት በሰላማዊ ሰዎች ላይ ቢያርፍና

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[45] Article 35(2), Additional Protocol I.

[46] Conventions on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or Have Indiscriminate Effects, 1980 እንደምሳሌ መጥቀስ ይቻላል።

[47] ሶሊስ፣ ገጽ 272።

[48] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I. C.J. Reports 1996, p. 226,* para. 78. ይህ የፍርድቤቱ ምክረሃሳብ በራሱ አስገዳጅ አለመሆኑን ልብ ይበሉ። ነገርግን ቀደምሲል እንደተመለከትነው ይህንን መርኅ ጨምሮ ሌሎች መርኖች የዓለም አቀፍ የልማድ ሕግ ደረጃን በማግኘታቸው ትርጉሙ በሕግ ደረጃ ተቀባይነት እንደሚኖረው አያጠራጥርም።

[49] ሶሊስ፣ ገጽ 269-270።

ጉዳት ቢያደርስ ነው (collateral damage) ጉዳቱ ሕገወጥ ላይሆን ይችላል። ይህ ሁለተኛው ቀጥተኛ ያልሆነ ጥቃት በመሠረቱ የተከለከለ አይደለም። ምክንያቱም ሕጉ የሚከለክለው ሰላማዊ ሰዎች የቀጥታ ጥቃት ሰለባ እንዳይሆኑ ብቻ ነው።[50] ምንም እንኳ በመሠረቱ ቀጥተኛ ያልሆነ ጥቃት ባይከለከልም ለተዋጊ ኃይሎች የተሰጠ ልዓም የሌለው ልቅ መብት ግን አይደልም። ሰላማዊ ሰዎች ላይ የሚደርሰው ቀጥተኛ ያልሆነ ጥቃት የሚፈቀደው ይገኛል ተብሎ ከታለመው ወታደራዊ ጥቅም አኳያ ሲመዘን መጠኑን ያላለፈ ወይም ተመጣጣኝ እስከሆነ ድረስ ብቻ ነው።[51]

ይህ መርኅ ለመጀመሪያ ጊዜ ተገቢው ቦታ በሕግ የተሰጠው እ.አ.አ. በ1907 ዓ.ም በወጣው የሄግ ደንብ ነው። በዚህ ደንብ መሠረት ወታደሮች የሚፈጽሙት ጥቃት ገደብ የሌለው ሳይሆን ሰላማዊ ሰዎችና ተቋማትን ግምት ውስጥ ያስገባ መሆን ይሆርበታል።[52] ከሄግ ደንብ በተጨማሪ የመጀመሪያው ተጨማሪ ፕሮቶኮል ለዚህ መርኅ ተገቢውን ቦታ ሰጥቷል። በሰላማዊ ሰዎች ላይ የሚደርሰው ቀጥተኛ ያልሆነ ሞትና ጉዳት እንዲሁም በሰላማዊ ተቋማት ላይ የሚደርሰው ውድመት ይገኛል ተብሎ ከታለመው ወታደራዊ ጥቅም ከበለጠ ሊፈጸም የታቀደው ጥቃት ሊሰረዝ ወይም ለሌላ ጊዜ ሊተላፍ ይገባል።[53]

ከመጀመሪያው ተጨማሪ ፕሮቶኮል በተለየ ይህ መርኅ በሁለተኛው ተጨማሪ ፕሮቶኮል ተጠቅሶ አናገኘውም። ምንም እንኳ ይህ መርኅ በሁለተኛው ተጨማሪ ፕሮቶኮል ባይጠቀስም መርሁ በዚሁ ፕሮቶኮል ውስጥ ተገቢውን ቦታ ካገኘው የሰብአዊነት ጽንሰሃሳብ ጋር ቁርኝት ስላለው ዓለም አቀፍ ባልሆነ ውጊያም የተመጣጣኝነት መርኅ ትኩረት ሊነፈገው አይገባም በማለት ዓለም አቀፍ ቀይ መስቀል ማኅበር ይከራከራል።[54] በዓለም አቀፍና ዓለም አቀፍ ባልሆነ ውጊያ ውስጥ ዓለም አቀፍ የሰብአዊነት ሕግ የጥበቃ ልዩነት የሚያደርገው በውጊያ ውስጥ የቀጥታ ተሳትፎ በሚያደርጉ ሰዎች ላይ እንጂ ሰላማዊ ሰዎችን በተመለከተ መሠረታዊ ልዩነት ስለሌለ መርኑን በሁለቱም ውጊያዎች ላይ እኩል መተርጎምና ማስፈጸም ተገቢ ነው ብሎ የዚህ ጥናት አቅራቢ ያምናል።

2.4 የመለየት መርኅ (The Principle of Distinction)

ከተመጣጣኝነት መርኅ በተጨማሪ ሌላው ለሰላማዊ ሰዎች ጥበቃ የሚሰጠው መርኅ የመለየት መርኅ ነው። ከዚህ በላይ የተመለከትናቸው መርኖች ርስበርሳቸው የተሳሰሩ ሲሆን ከመርኖቹ ውስጥ ደግሞ በተለይ የወታደራዊ ጥቅም አስፈላጊነት መርኅ ከመለየት መርኅ ጋር በጥብቅ የተቆራኘ ነው። በዚህ መርኅ መሠረት በውጊያ የሚሳተፉ ኃይሎች ጥቃት ሲሰነዝሩ ሰላማዊ ሰዎችን ከወታደሮች እንዲሁም ሰላማዊ ተቋማትን ከወታደራዊ ዒላማዎች በመለየት ጥቃታቸውን

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[50] Alfered Al H. Novotne, Random Bombing of Public Places: Extradititon and Punishemnt of Indiscriminate Violence Against Innocent Parties, Boston *Univesity International Law Journal*, Vol. 6, 1988, p. 229.

[51] Article 51 (5)(b), Additional Protocol I.

[52] Article 22, 1907 Hague Regulation IV.

[53] Artilces Article 51.5(b) and Article 57.2(b), Additional Protocol I.

[54] ሶሊስ፣ ገጽ 275።

በጠላት ወታደሮችና ወታደራዊ ዒላማዎች ላይ ብቻ ማነጣጠር ይኖርባቸዋል።[55] ይህ መርኅ ለመጀመሪያ ጊዜ የሕግ እውቅና የተሰጠው በሊበር ሕግ ክዚያም በተወሰነ መልኩ በሴይንት ፒተርስበርግ መግለጫ ላይ ነው።[56] በኋላ የወጡት ሁለቱ የሄግ ደንቦችም ለመርኑ ቦታ ሰጥተዋል።[57]

መርኑ ጠንከር ያለና ዝርዝር የሕግ ሽፋን የተሰጠው ግን በአራተኛው የጀኔቫ ኮንቬንሽንና በሁለቱ ተጨማሪ ፕሮቶኮሎች ነው።[58] ዓለም አቀፉ ማኅበረሰብ አንደኛውና ሁለተኛው የዓለም ጦርነቶች በሰላማዊ ሰዎችንና ሰላማዊ ተቋማት ላይ ካደረሱት እልቂትና ውድመት ትምህርት በመውሰድ መርኑ ተገቢው የሕግ እውቅና እንዲሰጠው አድርጓል።[59]

ከዚህ ላይ የመለየት መርኅ በልዩነት የማይተገበርባቸውን ሁኔታዎች ቀደምሲል ካደረግነው ውይይት በመነሳት መረዳት ጠቃሚ ነው። ሰላማዊ ሰዎች በውጊው በቀጥታ ከተሳተፉ፣ ሰላማዊ ተቋማት ወደወታደራዊ ዒላማነት ከተቀየሩ እንዲሁም በተመጣጣኝነት መርኅ መሠረት ይገኛል ተብሎ የታለመው ወታደራዊ ጥቅም በሰላማዊ ሰዎች ላይ ይደርሳል ተብሎ ከሚገመተው ጉዳት ከበለጠ ይህ የመለየት መርኅ እንደማይተገበር ከዚህ በላይ ባሉት ንዑስ ክፍሎች ካደረገነው ወይይት መረዳት ይቻላል። ከእነዚህ ምክንያቶች በአንዱ በሰላማዊ ሰዎችና በተቋማት ላይ እንዲሁም እንደሁኔታው በውጊያ በቀጥታ በሚሳተፉ ሰዎች ላይ ቀጥተኛ ያልሆነና ቀጥተኛ የሆነ ጥቃት መፈጸም ሕገወጥ ድርጊት አይደለም።

3 የአጼ ቴዎድሮስ የጦር ሜዳ ፍርዶችና ውሳኔዎች

በመግቢያው ላይ እንደተጠቀሰው በዚህ ክፍል የአጼ ቴዎድሮስ የጦር ሜዳ ውሎዎችና ውሳኔዎች ለዓለም አቀፍ የሰብአዊነት ሕግ የሰጡትን ቦታ እንመለከታለን። የታሰሩ ሰዎች አያያዝ፣ በምርኮ የተያዙ ሰዎች በባርነት እንዳይሸጡ መከልከላቸው፣ ከዘረፋ ይልቅ በደመወዝ የሚተዳደር ወታደር ለማደራጀት ያደረጉት ጥረት፣ በጦርነት በተያዙ ቦታዎች የሚኖሩ ሰዎች መብት (the Law of Ocuupation)፣ ወታደሮች ለሚፈጽሙት ወንጀል ኃላፊነትን መውሰድ (Command Responsiblity)፣ በሕግና ፍርድ ላይ የተመሠረተ ቅጣትና ምሕረት፣ የሚሉ ጉዳዮችን እንመለከታለን።

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[55] Article 48, Additional Protocol I.

[56] Mark David "Max" Maxwell and Richard V. Meyer, The Principle of Distinction: Probing the Limits of its Customariness, *Army Law1*, 2007, pp.2-3.

[57] Article 25, 1907 Hageue Regulation IV.

[58] የመጀመሪያው ተጨማሪ ፕሮቶኮል አንቀጽ 48 እና የሁለተኛው ተጨማሪ ፕሮቶኮል አንቀጽ 31(1) ይመለከቱ።

[59] በጉዳዩ ላይ የተለያየ ሰታትስቲክስ ቢቀርብም በሁለተኛው የዓለም ጦርነት በሚሊዮን የሚቆጠሩ ሰላማዊ ሰዎች መሞታቸው በታሪክ ተመዝግቦ ይገኛል። ለምሳሌ http://www.historylearningsite.co.uk/world-war-two/civilian-casualties-of-world-war-two/ የተባለውን ድረገጽ ብንጎበኝ ከሁለቱም ጎራ በጦርነቱ የሞቱ ሰላማዊ ሰዎችን ቁጥር ከ30 ሚሊዮን በላይ ይደርሳል። ይህ አሀዝ በጦርነት ከሞቱ ወታደሮች የበለጠ ነው። ይህም ሰላማዊ ሰዎች በጦርነቱ ቀጥታ የጥቃት ሰለባ በመደረጋቸው የተፈጠረ ነው። ዝርዝሩን ለመረዳት ድረገጹን ይጎብኙ።

3.1. የታሰሩ ሰዎች አያያዝ

በአገር ውስጥ በሚደረጉ የርስበርስም ይሁን በዓለም አቀፍ ጦርነቶች በተደረገ ውጊያ የተያዙ ሰዎች አያያዝ ምን መምሰል እንዳለበት የጀኔቫ ኮንቬንሽኖችና ተጨማሪ ፕሮቶኮሎች ዝርዝር ድንጋጌዎችን አስፍረዋል። በአገር ውስጥ በተደረገ ውጊያ የተያዙ ሰዎች አያያዝን በተመለከተ የአራቱ የጀኔቫ ኮንቬንሽኖች የጋራ አንቀጽ 3(C) ሙሉ ክብራቸው ተጠብቆ መያዝ እንዳለባቸውና ክብራቸውን የሚነካ ማንኛውም አያያዝ የተከለከለ መሆኑን ይደነግጋል።[60] እነዚህ ሰዎች ካለምንም መድሎ በሰብአዊነት ክብራቸው ተጠብቆ ሊያዙ እንደሚገባ የጀኔቫ ኮንቬንሽኖች ተጨማሪ ሆኖ የወጣው የሁለተኛው ፕሮቶኮል አንቀጽ 4 በግልጽ ያመላክታል።[61] የእነዚህ ሁለት ሕግጋት የዓለም አቀፍ የሰብአዊነት ሕግ መርኖች ከሆኑት ውስጥ አንዱና ዋናው በሆነው በሰብአዊነት (humanity) መርኅ ላይ የተመሠረቱ ናቸው። በዓለም አቀፍ ውጊያ የተያዙ ሰዎችን አያያዝ በተመለከተ ይህ የሰብአዊነት መርኅ በአራቱም የጀኔቫ ኮንቬንሽኖች የጋራ አንቀጾች በሆኑት 12፣ 13 እና 27 ላይ በግልጽ ሰፍሮ እናገኘዋለን።

አጼ ቴዎድሮስ ወደሥልጣን ከመምጣታቸው በፊት ድል ካደረጓቸው መሣፍንት መካከል የጎጃሙ ደጃዝማች ብሩ ጎሹ ይገኙበታል። የደጃዝማቹ ጦር ብዙ የተንከራተተና ውጊያ የሰለቸው ስለነበር ደጃዝማች ብሩ በቀላሉ ለደጃዝማች ካሣ እጃቸውን ሰጡ። [62] ደጃዝማች ካሣ ደጃዝማች ብሩን ሸማ አስነጥፈው ካስቀመጧቸው በኋላ "አሁን እኔን ይዘውኝ በሆነ ምን ባደረጉኝ?" [63] ሲሉ ጠየቋቸው። ደጃዝማች ብሩም "እርስዎን ብይዘው ለማየት አላስደርስዎም ነበር። አስገድልዎት ነበር እንጂ"[64] አሏቸው። ከዚህ የምንረዳው ደጃዝማች ካሣ ደጃዝማች ብሩን የያዙበት ሁኔታ ጊዜ ጥሎት በጦርነት እንደተማረከ [65] ሰው ሳይሆን ቀደምሲል የነበራቸውን ክብርና ዝና መሠረት ባደረገ መልኩ በሰብአዊነት መሆኑን ነው። ደጃዝማች ብሩ ሳይደብቁ እንደተናገሩት ምርኮኛው ደጃዝማች ካሣ ቢሆኑ ኖሮ ይገድሏቸው ነበር። ይህ ሃሳብ ግን የደጃዝማች ካሣን ውሳኔ አላስለወጠም፤ በቤተመንግሥት ለግብር [66] የተጠሩ ይመስል ሸማ አስነጥፈው በክብር አስረዋቸዋል።

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[60] The 1949 Four Geneva Conventions of 12 August 1949, Common Article 3(C) (Geneva Conventions).

[61] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977 (Additional Protocol II).

[62] ደብተራ ዘነብ ዘኢትዮያ፣ *ዮሐንስድሮስ ታሪክ*፣ በተስፋዬ አካሉ አበበ፣ ኣጼ ቴዎድሮስ በሦስቱ ቀደምት ጻሕፍት ውስጥ፣ 2004 ዓ.ም፣ ገጽ 52 (ከዚህ በኋላ ተስፋዬ አካሉ)። ቴዎድሮስ የሚለው ስም የንግሥና ስማቸው መሆኑንና አጼ ቴዎድሮስ ከመንገሳቸው በፊት ካሣ ይባሉ እንደነበር ልብ ይበሉ።

[63] ተስፋዬ አካሉ፣ ገጽ 52።

[64] ዝኒ ከማሁ።

[65] በዚህ ጥናት *ምርኮ* የሚለውን ቃል ተመራማሪው የተጠቀመው በዘመኑ ጥቅም ላይ ይውል የነበረ ቃል በመሆኑ እንጂ በሦስተኛው የጀኔቫ ኮንቬንሽን አግባብ (context) አለመሆኑን ለአንባቢ መግለጽ ይፈልጋል።

[66] *ግብር* በቀድሞ ጊዜ ነገሥታቱና መሣፍንቱ በቤተመንግሥታቸው ደግሰው እንግዶቻቸውንና ወታደሮቻቸውን የሚጋብዙበት ግብዣ ነው። "ግብሩ በቤተመንግሥት ወይም በታላላቅ ባለሥልጣናት ቤት ይደረግ የነበረ ግብዣ።" አማርኛ መዝገበ ቃላት፣ የኢትዮጵያ ቋንቋዎች ጥናትና ምርምር ማዕከል (አማርኛ መዝገበ ቃላት)፣ ገጽ 499።

ከታሰሩ ሰዎች አያያዝ ጋር በተያያዘ ቀጥለን የምንመለከተው ለአጼ ቴዎድሮስ ሥልጣንና ሕይወት መቋጫ ከሆነው ከመቅደላ ጦርነት ጋር የተያያዘ ነው። ጠንካራው የአጼ ቴዎድሮስ የመቅደላ ምሽግ በጀኔራል ናፒር በሚመራው የእንግሊዝ ጦር ከመሰበሩ በፊት ከባዱ ውጊያ የተካሄደው በእሮጌ ነው።[67] ከእሮጌ ውጊያ በኋላ በአጼ ቴዎድሮስና በጀኔራል ናፒር መካከል የመልእክት ልውውጥ የተደረገ ሲሆን አጼ ቴዎድሮስ በመልእክታቸው ከጠቀሷቸው ጉዳዮች ውስጥ አንዱ ለጦርነቱ መነሻ ስለሆኑት የእንግሊዝን ጨምሮ የሌሎች አገራት እስረኞችን በተመለከተ ነው። በመጨረሻም አጼ ቴዎድሮስ እስረኞችን ፈትተው ሲያሰናብቷቸው እንዲህ አሏቸው፤ "በጦርነቱ ጊዜ [የእሮጌው ጦርነት] አደጋ እንዳያገኛችሁ እሁነኛ ስፍራ እንድትቀመጡ አድርጌያለሁ።" [68] የጦርነቱ መነሻ እነዚህ እስረኞች ሆነው እንዲሁም በጦርነቱ ተስፋ ቆርጠው እያለ እስረኞቹ አደጋ እንዳይደርስባቸው ወደተሻለ ስፍራ ወስደው ማስቀመጣቸውን ስናይ አጼ ቴዎድሮስ ምን ያህል አርቆ አስተዋይ እንደነበሩ እንገነዘባለን። ከዚህ በተቃራኒው እስረኞቹ እንዲገደሉ ሃሳብ ያቀረቡ አማካሪዎችን ምክር ወደጎን ትተው እንዲፈቱ መወሰናቸውም በጣም የሚገርም ነው።[69]

ምንም እንኳ ለመቅደላው ጦርነት ምክንያት የሆኑት በአጼ ቴዎድሮስ የታሰሩት አውሮፓውያን አሁን ሥራ ላይ ባለው ዓለም አቀፍ የሰብአዊነት ሕግ መሠረት የጦር እስረኞች ናቸው ማለት ባይቻልም[70] ሰዎቹ የነበሩበት ሁኔታ ከጦር እስረኞች ጋር ተመሳሳይ በመሆኑ የአጼ ቴዎድሮስ ተግባር ለጦር እስረኞች ጥበቃ በሚሰጠው በሦስተኛው የጀኔቫ ኮንቬንሽን አንቀጽ 19 ላይ ከሰፈረው የጦር እስረኞችን ደህንነታቸው ወደሚጠበቅበት ቦታ የመውሰድ ግዴታ ጋር ተመሳሳይ ሆኖ እናገኘዋለን።[71] ቀደምሲል እንደተመለከትነው እስረኞቹ እንዲገደሉ ቀርቦ የነበረውን ሃሳብ ወደጎን በመተው ሕይወታቸውን መጠበቃቸው ከዚሁ ጋር አብሮ መነሳት ያለበት ነጥብ ነው። በዚሁ በሦስተኛው የጀኔቫ ኮንቬንሽን አንቀጽ 130 ላይ እንደተገለጸው የጦር እስረኞችን መግደል ፈጽሞ የተከለከለ ነው።

3.2 በጦርነት የሞቱ ሰዎችን ክብር መጠበቅ

ከዚህ በላይ እንደተመለከትነው አጼ ቴዎድሮስ ከመንገሳቸው በፊት ድል ካደረጓቸው መሣፍንት መካከል የጎጃሙ ደጃዝማች ብሩ ጎሹ ይጠቀሳሉ። በዚህ ክፍል የምንመለከተው ደግሞ ስለአባታቸው ደጃዝማች ጎሹ ይሆናል። እንደልጃቸው ሁሉ ደጃዝማች ጎሹ የተሸነፉት አጼ ቴዎድሮስ ከመንገሳቸው በፊት ነበር።[72] ደጃዝማች

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[67] ተስፋዬ አካሉ፣ ገጽ 28-29።

[68] ተክለ ጻድቅ መኩሪያ፣ *አጼ ቴዎደሮስና የኢትዮጵያ አንድነት*፣ ኩራዝ አሳታሚ ድርጅት፣1981ዓ.ም፣ ገጽ 402 (ከዚህ በኋላ ተክለ ጻድቅ መኩሪያ)።

[69] እስረኞቹን ገድለን እንዋጋ፤ የሚል ሃሳብ የሰነዘሩ አማካሪዎችን ምክር አጼ ቴዎደሮስ እንዳልተቀበሉትና ምክንያቱን ለመረዳት ተስፋዬ አካሉ፣ ገጽ 30ን ይመለከቱ።

[70] የጦር እስረኛን ትርጉም ለመረዳት የሦስተኛውን የ1949 (እ.አ.አ.) ጄኔቫ ኮንቬንሽን አንቀጽ 4ን ይመልከቱ።

[71] Article 19, Geneva Convention III: *Prisoners of war shall be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger* ሲል ይደነግጋል።

[72] ደጃዝማች ጎሹ በደጃዝማች ካሣ የተሸነፉት በጉርአምባው ጦርነት በ1947 ዓ.ም. ነው። ተክለ ጻድቅ መኩሪያ፣ ገጽ 126።

ጎሹ ብዛት ያለው የጦር ሠራዊት ቢኖራቸውም እጣ ፋንታቸው እንደልጃቸው መሸነፍ ነበር። "ደጃዝማች ጎሹ ምንም እንኳን በጦርነት ተጋጥመው ቢቆስሉና በኋላም ቢሞቱ ደጃዝማች ካሣ ብዙ ጊዜ ከደጃዝማች ጎሹ ቤት ተቀምጠው ስለነበር ስለደጃዝማች ጎሹ መሞትና መቁሰል ደስ ሳይላቸው ሥርዓተቀብራቸውን በክብር አስፈጽመውላቸዋል።"[73]

ይህ በደጃዝማች ካሣ የተፈጸመው ተግባር በሁለተኛው ተጨማሪ ፕሮቶኮል አንቀጽ 8 ላይ ከሰፈረው ግዴታ ጋር አንድ ሆኖ እናገኘዋለን። በዚህ አንቀጽ መሠረት ሁኔታዎቹ ሲፈቅዱ በጦርነቱ የቆሰሉና የታመሙ ሰዎችን መፈለግና አስፈላጊውን እንክብካቤ ማድረግ እንዲሁም የሞቱ ሰዎች ካሉ መፈለግና በክብር መቀበር እንዳለባቸው ይደነግጋል።[74] ለመንገሥ እየተንደረደሩ የነበሩት ደጃዝማች ካሣ የተደረገላቸውን ውለታ ሳይረሱ ሲወጓቸው የነበሩትን ከተሳካም ሊገድሏቸው ይችሉ የነበሩትን ሰው የሚገባቸውን ክብር ሰጥተው ሥርዓተቀብራቸውን ማስፈጸማቸው ከዘመናዊ ሕግ የቀደም አርቆ አስተዋይነት እንደነበራቸው ያሳያል።

ከዚህ ላይ የሚገርመው ነገር ደጃዝማች ጎሹ ደጃዝማች ካሣን ለመውጋት በዝግጅት ላይ እያሉ የእርሳቸውን ጀግንነትና የጦር ኃይላቸውን የበላይነት በተቃራኒው የደጃዝማች ካሣን የበታችነትና የጦር ኃይላቸውን አነስተኛነት አዝማሪያቸው ሲያቀነቅን የነበረ ቢሆንም ደጃዝማች ካሣ በዚህ ቂም አለመያዛቸው ነው። ይህንን አስመልክቶ የደጃዝማች ጎሹ አዝማሪ እንዲህ ሲል አቀንቅኖ ነበር፤

አያችሁት ብያ የእኛን ፅብድ፣
አምስት ጋሞች ይዞ ጉር አምባ ሲወርድ።[75]
ያንንብባል እንጂ መች ይዋጋል ካሣ፣
ወርደህ ጥመድበት በሸምብራው ማሳ።
ወደ ወደ በሴቶቹ በነጉንጭት ለምደ።
ሐሩ ቋዱ ለወዙ ገወዙ አለ ቋራ፣
መንገዱ ቢጠፋ እኔ ልምራ።[76]

በዚህ ግጥም ደጃዝማች ካሣ የጉዳዩ ባለቤት በሆኑት በደጃዝማች ጎሹ የተከፉ ባይመስልም በአዝማሪው ግን ቅር ተሰኝተው ኖሮ "ምን ብለህ ሰደብከኝ?" ብለው ሲጠይቁት አዝማሪው የመጀመሪውን ግጥም በደጃዝማች ካሣ አነጋገር ስድብ በመናገር ፋንታ እንዲህ በማለት በግጥም በራሱ ላይ ፈረደ፤

አዎይ ያምላክ ቁጣ፣ አዎይ የግዜር ቁጣ፣
አፍ ወዳጁን ያማል ሥራ ሲያጣ፣
ሸመል ይገባዋል ያዝማሪ ቀልባጣ።[77]

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[73] ዝኒ ከማሁ።

[74] Article 8, Protocol II: *Whenever circumstances permit, and particularly after an engagement, all possible measures shall be taken, without delay, to search for and collect the wounded, sick and shipwrecked, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead, prevent their being despoiled, and decently dispose of them.*

[75] የዚህ ስንኝ ትርጉም በደንብ ያልሰለጠኑና ልምድ የሌላቸው ጥቂት ወታደሮችን ይዞ ወደጉር አምባ ዘመተ ማለት ነው። *ጋሞች* የሚለው ቃል *ጋሜ* ከሚለው ስርወቃል የተወሰደ ሲሆን በዚህ ዘመን አነጋገር ጎረምሳ የሚል አቻ ትርጉም ያለው ነው። "ጋሜ፤ ለአካላ መጠን ያልደረሰች ወይም ያልደረሰ ልጅ።" አማርኛ መዝገበ ቃላት፣ የኢትዮጵያ ቋንቋዎች ጥናትና ምርምር ማዕከል፣ ገጽ 516።

[76] ተክለ ጻድቅ መኩሪያ፣ ገጽ 126።

[77] ተክለ ጻድቅ መኩሪያ፣ ገጽ 127።

አዝማሪው ከመፍራቱ የተነሳ ለጥፋቱ በግርፋት ወይም በድብደባ ልቀጣ ይገባል ቢልም "በራሱ ላይ ፈርዷል" በሚል ሰበብ ከመጠን በላይ ተደብድቦ እንዲገደል ተደርጓል።[78] ምንም እንኳ በሞት መቀጣቱ ከጥፋቱ ጋር ተመጣጣኝ ነው ባይባልም ከዚህ በታች "በሕግና በፍርድ ላይ የተመሠረተ ቅጣት" በሚለው ክፍል ስር በዝርዝር እንድምንመለተው ቅጣቱ በፍርድ ላይ የተመሠረተ ነው ማለት ይቻላል።

3.3 በምርኮ የተያዙ ሰዎች በባርነት እንዳይሸጡ መከልከላቸው

በኢትዮጵያ ሰዎች ወደባርነት ከሚቀየሩባቸው መንገዶች ውስጥ ዋነኛው ጦርነት ነበር።[79] በጦርነት የተዘረፈ ንብረት በተዋረድ የጦር አዝማቹና ወታደሮቹ እንደሚከፋፈሉት ሁሉ የተማረከ ሰው እጣ ፋንታም ተመሳሳይ ነበር።[80] አጼ ቴዎድሮስ የባሪያ ንግድን በጠቅላላው በጦርነት የተማረከ ሰው ደግሞ በተለይ በባርነት እንዳይሸጥ ለመከላከል ጥረት አድርገዋል።[81] ለምሳሌ፣ በቃሉ (ወሎ) ወታደሮች በምርኮ ያገኟቸውን ባሪያዎች እንዳይሸጡ አግደዋቸዋል።[82] ይህ ተግባር የጀኔቫ ኮንቬንሽኖች ተጨማሪ ሆኖ ከወጣው የሁለተኛው ተጨማሪ ፕሮቶኮል አንቀጽ 4(2)(f) ጋር ተመሳሳይ ነው።[83] ከያዝነው ጭብጥ ጋር በቀጥታ ባይገናኝም ከባሪያ ንግድ ጋር የተያያዘ አንድ ሌላ ምሳሌ እንመልከት። አጼ ቴዎድሮስ ከሸዋ ዘመቻ መልስ በጎጃም ሲያልፉ ባሶ ገበያ ላይ ለሽያጭ የተኮለኮሉትን ባሮች አይተው ሁሉንም ነጻ ካወጡ በኋላ ርስበርስ አጋብተዋቸዋል።[84] እነዚህ ንጉሠነገሥቱ የወሰዷቸው እርምጃዎች ምንም እንኳ ዘለቄታ ኖሯቸው ፍሬያማ ባይሆኑም ሰብአዊና ስርነቀል እንደነበሩ ግን እንገነዘባለን።[85]

3.4 ከዘረፋ ይልቅ በደመወዝ የሚተዳደር ወታደር ለማደራጀት ያደረጉት ጥረት

በኢትዮጵያ በጦርነት ጊዜ በሕዝቡ ላይ ከሚጸፈሙ በደሎች ውስጥ ዋነኛው የዘማቹ ወታደር ምሕረትየለሽ የዝርፊያ ሰለባ መሆን ነበር። ዘማቹ ወታደር ያገኘውን ሁሉ

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[78] ዝኒ ከማሁ። ይህ በአዝማሪው ላይ የተላለፈው ውሳኔ የደኞዝማች ካሣን (የአጼ ቴዎድሮስን) ተለዋዋጭ ባህርይና ያልተጠበቁ ውሳኔዎችን እንደሚያሳልፉ አመላካች ነው።

[79] David Eltis and Stanley L. Engerman (eds.), *The Cambridge World History of Slavery*, Vol. 3, Cmbridge, Cambridge University Press, 2011, p. 73.

[80] Teshale Tibebu, *The Making of Modern Ethiopia 1996-1974*, The Red Sea Press Inc., Lawrenceville, 1995, p. 57; Tsegaye Beru, Breief Hitory of the Ethiopian Legal System- Past and Present, *International Journal of Legal Information* , 2013, Vol. 41, p. 349 (Tsegaye Beru).

[81] Tsegaye Beru, p. 349.

[82] ባሕሩ ዘውዴ፣ ገጽ 35።

[83] የሁለተኛው ተጨማሪ ፕሮቶኮል አንቀጽ 4(2)(f) ሰዎችን ባሪያ ማድረግና በባርነት መሸጥን ይከለክላል።

[84] ባሕሩ ዘውዴ፣ ገጽ 35።

[85] ምንም እንኳ አጼ ምኒሊክን ጨምሮ የባሪያ ንግድን ለማስቀረት ጥረት ቢደረግም ኢትዮጵያ የሊግ ኦፍ ኔሽንስ አባል እስከሆነችበት እ.አ.አ. እስከ1923 ዓ.ም ድረስ ስርነቀል ለውጥ ሳይመጣ ቆይቷል። ኢትዮጵያ የሊግ ኦፍ ኔሽንስን በአባልነት ለመቀላቀል ባደረገችው ጥረት ውስጥ የባሪያ ንግድን የመከልከል ጉዳይ አንዱ አጀንዳ ነበር። የበለጠ መረጃ ለማግኘት Jean Allain, Slavery and the League of Nations: Ethiopia as a Civilized Nation, *Journal of the History of Inernational Law*, Vol. 8, 2006 እና Solomon Addis and Wudu Tafete , *Culture and Customs in Ethiopia, in* Culture and Custom of Africa, Toyin Falola (ed.), ABC-CLIO,LLC, Santa Babara, California, 2014 ይመልከቱ።

ማለትም እህሉና ከብቱን ይዘርፋል፣ ከዚያም አልፎ ያቃጥላል፤ ያወድማል። ዘረፋን ጨምሮ ሥርዓት አልበኝነት እንዲሰፍን በማድረግ እንደምክንያት የሚጠቀሰው ወታደሩ የሚተዳደርበት ቋሚ ደመወዝ አለመኖሩ ነው። ወታደር በዘረፋ ሳይሆን ደመወዝ ተቆርጦለት በደመወዝ መተዳደር አለበት፤ የሚለውን ሃሳብ በኢትዮጵያ ለመጀመሪያ ጊዜ ያፈለቁት አጼ ቴዎድሮስ ናቸው።[86] መተዳደሪያ ደመወዝ ያለው ብቻ ሳይሆን በወታደራዊ ሥርዓት ማለትም በተዋረድ የተደራጀ ሠራዊት ለማደራጀትም ጥረዋል።[87]

በዲሲፒሊን የታነጸ፣ በተዋረድ የተደራጀና ለሚወስዳቸው እርምጃዎች ኃላፊነት የሚወስድ አዛዥ ያለው ሠራዊት የሰብአዊነትና ሌሎች የጦር ሕግጋትን ለማስከበርና ለማሰፈጸም አመች ከመሆኑም በላይ የጦር አዛዡ በስሩ ያለውን ወታደር መርቶ ለድል ለማብቃት የሚኖረው አስተዋጾም ቀላል አይደለም። ለዚህም ይመስላል ከእሮጌው ውጊያ በኋላ አጼ ቴዎድሮስ ለጀኔራል ናፒር በምሬትና በተስፋ መቁረጥ ስሜት እንዲህ ሲሉ መልእክት የላኩት፡- 'ያገሬ ሰው ገብር፣ ስራት ግባ [ሥርዓት ይኑርህ፣ ሰልጥን] ብየ ብለው እምቢ ብሎ ተጣላኝ። እናንተ ግን በስራት [በሥርዓት] በተገዛ ሰው አቸነፋችሁኝ።'[88]

አጼ ቴዎድሮስን ከቤተክህነት ጋር ያጣላቸውም ይህ የወታደር ደመወዝ ጉዳይ ነው።[89] ቀደም ሲል ቤተክርስቲያን ይዛው የነበረችውን መሬት በመቀነስ ለወታደሮቻቸው ደመወዝ እንደሚያውሉትና የአገልጋይ ዲያቆናትንና ቀሳውስትን ቁጥር በከፍተኛ ደረጃ እንደሚቀንሱ ሲያስታውቁ ሊቋቋሙት ያልቻሉት ተቃውሞ ከቤተክህነት ገጠማቸው።[90] እስቲ በንጉሠነገሥቱና በካህናቱ መካከል የተደረገውን እሰጣገባ እንመልከት። ካህናቱ፤ "እያባትህ[91] ብለው አዋጅ ተናገሩ፤ እኛም እንደ ጥንት እንደ ነገሥታቱ ያኑሩን።"[92] ሲሏቸው "አጼ ቴዎድሮስም እኔ ምን ልብላ? ሠራዊቴንስ ምን ላብላቸው? እኩሌታውን የመስቀል መሬት፣ እኩሌታውን አረም ገዳም እያላችሁ ወሰዳችሁት።"[93] በማለት ቢመልሱላቸውም ካህናቱ የዋዛ አልነበሩምና የሚከተለውን መልስ ሰጧቸው፤ "አራት ወር በጎንደር ተቀምጠው አርማጨሆን፣ ጸገዴን፣ ወልቃይትን፣ ስሜንን፣ ትግሬን ይብሉ[94]። አራት ወር በዓሪንጎ ተቀምጠው ቤጌ ምድርን፣ ላስታን፣ የጁን ይብሉ። አራት ወር ይባባ ላይ

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[86] ይህ የንጉሠነገሥቱ ሃሳብ ዘረፋን ከሚከለክለው የሁለተኛው ተጨማሪ ፕሮቶኮል አንቀጽ 4(2)(g) ጋር ተመሳሳይ ነው።

[87] ባሕሩ ዘውዴ፣ ገጽ 33-34።

[88] ዝኒ ከማሁ።

[89] ዝኒ ከማሁ፣ ገጽ 28።

[90] ዝኒ ከማሁ።

[91] *እያባትህ ብለው አዋጅ ተናገሩ* የሚለው አገላለጽ *እንደሙያችሁ* ኑሩ ብለው *በሕግ ፈቀዱ* ለማለት የተጠቀሙበት ነው። በድሮ ጊዜ ንጉሠነገሥቱ በጦርነትም ይሁን በህመም ከሞቱና ልጁ፣ ወንድሙ ወይም ሌላ ዘመዱ ዙፋኑን ከተረከበ በኋላ አዲሱ ንጉሠነገሥት ነጋሪት በማስነስም *የሞትንም እኛ፣ ያለንም እኛ፣ ገበሬም እረስ፣ ነጋዴም ነግድ፣ ሁሉም ባለበት ይርጋ።* የሚል አዋጅ ማወጅ የተለመደ ነበር። መልእክቱም ለውጡ የንጉሠነገሥት ብቻ ነው፤ ስልጣኑ ከዘራችን አልወጣም፤ ለሚቹ እንዳደረጋችሁት ሁሉ ለአዲሱ ንጉሠነገሥትም ተገዙ፤ ንብሩ፤ ሁሉም ነገር ሕግንና ሥርዓትን ጨምሮ እንደድሮው ባለበት ይቀጥላል፤ አዲስ ነገር የለም፤ የመተዳደሪያ ሙያችሁን ይዛችሁ ቀጥሉ ማለት ነው።

[92] ተስፋዬ አካሉ፣ ገጽ 62።

[93] ዝኒ ከማሁ።

[94] *ይብሉ* የሚለውን ቃል በአሁኑ ዘመን አገላለጽ *ግብርና ታክስ ይሰብስቡ* ማለት ነው።

ተቀምጠው ሜጫን፣ አገውን፣ ዳሞትን፣ ጎጃምን [95] ይብሉ፡፡'' [96] ይህ ንትርክ ውሎ አድሮ ለስልጣናቸው እድሜ ማጠር የራሱን አስተዋጾ አድርጓል፡፡

ንጉሠነገሥቱ ዝርፊያን ለማስቀረት ከወሰዷቸው እርምጃዎች ውስጥ ሁለቱን እንመልከት፤ ለአጼ ቴዎድሮስ እንገዛም በማለት ካፈነገጡት መካከል የወሎ የየጁ መሣፍንት ይጠቀሳሉ፡፡ [97] በመሆኑም በተደጋጋሚ ለዘመቻ ከተመላለሱባቸው አካባቢዎችም ውስጥ አንዱ ወሎ ነበር፡፡ አጼ ቴዎድሮስ በወሎ ደላንታ ተጉዘው በሽሎ ወንዝ እንደደረሱ ወታደሩ ወደባላገሩ ቤት ገብቶ መግደልና መዝረፍ ሲጀምር ኗሪው ሕዝብ እየተከላከለ ብዙ ወታደር ገድሎ የተረፈው እየሸሸ መምጣቱን ሲያዩ 'ድሮውንስ ማን ውረሩ አላችሁ? ከወረራችሁስ ማን ሸሹ አላችሁ?' በማለት የሸሹትን ወታደሮች እጅና አግራቸውን በመቁረጥ ቀጧቸው፡፡ [98] አንድ ጊዜ ደግሞ ወታደሩ የባላገሩን ከብት በመዝረፍ አርዶ መብላቱን ሲያውቁ 'ወታደር የደሀውን ገንዘብ

እንዳረድኸው ባንተም እግዚአብሄር አለ፡፡ በማለት ተቆጡ፡፡' [99] እነዚህ እርምጃዎች የጀኔቫ ኮንቬንሽኖች ተጨማሪ ሆኖ ከወጣው የሁለተኛው ፕሮቶኮል አንቀጽ 14 ስር ከሰፈሩት ክልከላዎች ጋር ተመሳሳይ ናቸው፡፡ [100] በአንቀጽ 14 እንደተመለከተው ለሰላማዊ ሰዎች ኑሮ አስፈላጊ የሆኑት ሰብሎችን፣ የእርሻ ቦታዎችን፣ የቁም እንስሳትንና ለምግብና ለሰብል ምርት አስፈላጊ የሆኑ ግብአቶችን ማውደም ፈጽሞ የተከለከለ ነው፡፡ አጼ ቴዎድሮስ እነዚህንና ሌሎች ተመሳሳይ እርምጃዎችን ወስደው ጥረታቸው ፍሬ ባያፈራም የንጉሠነገሥቱ ሃሳብም ምን ያክል ዘመን ተሻጋሪና አርቆ አስተዋይነት የተሞላበት እንደነበር ግን እንረዳለን፡፡

3.5 በጦርነት በተያዙ ቦታዎች የሚኖሩ ሰዎች መብት (The Law of Occupation)

የሰላማዊ ሰዎችን መብትና አያያዝን በተመለከተ የተደነገገው አራተኛው የጀኔቫ ኮንቬንሽን ትኩረት ከሰጣቸው ጉዳዮች ውስጥ አንዱ አንድ አገር ወይም ቦታ በጠላት ጦር ተሸንፎ ከተያዘ በኋላ ቦታውን የያዘው ኃይል ሰላማዊ ሰዎችን እንዴት ይጠብቃል፣ ምን ምን ግዴታወችስ ይኖሩበታል የሚሉና ሌሎች ተያያዥ ነጥቦች ይገኙበታል፡፡

አጼ ቴዎድሮስ ምናልባት ድሉ የእንግሊዞች ከሆነ ከድል በኋላ ሕዝባቸውን በተለይም አቅመደካሞችንና ለጥቃት ተጋላጮችን ጀኔራል ናፒር እንዳይበድል በማሰብ በአደራ እንዲህ የሚል መልእክት ለጀኔራሉ ልከውለት ነበር፤ "ጠባቂ ያላቸውና የሌላቸው ልጃገረዶች፣ ትላንት ባል አልባ የሆኑ ሴቶች፣ ጧሪ የሌላቸው አዛውንቶች፣ በእኔ ከተማ እምመግባቸው ብዙዎች አሉ፡፡ እግዚአብሄር ኃይል

[95] እነዚህ የቦታ ስሞች በወቅቱ የነበረውን የአካባቢ አስተዳደር አወቃቀር የሚያመላክቱ ናቸው፡፡

[96] ተስፋዬ አካሉ፣ ገጽ 62፡፡

[97] ዝኒ ከማሁ፣ ገጽ 78፡፡

[98] ተክለ ጻድቅ መኩሪያ፣ ገጽ 159፡፡

[99] ዝኒ ከማሁ፡፡

[100] ተመራማሪው "እነዚህ እርምጃዎች" ሲል የወታደሮችን እጅና አግር መቁረጥን ሳይጨምር መሆኑን ሊገልጽ ይወዳል፡፡

ስለሰጠህ እነዚህን ሰዎች እንዳትበድላቸው፤ ሃገሩ አረመኔ ነው።"[101] ይህ መልእክት ንጉሠነገሥቱ የግል ጥቅምንና ፍላጎታቸውን ለማስፈጸም የላኩት ሳይሆን የሕዝባቸው በተለይም የአቅመደካሞችና ለጥቃት ተጋላጮች ደህንነት አሳስቧቸው የላኩት ነው። ምንም እንኳ በጦርነት በተያዙ ቦታዎች የሚኖሩ ሰዎች መብት ሕግን (the Law of Occupation) እንዲያስፈጽም የሚገደደው በጦርነት አሸንፎ ቦታውን ወይም አገሩን የያዘው ኃይል ቢሆንም ንጉሠነገሥቱ ለዚህ መሠረታዊ ሕግ በዚያ ዘመን የነበራቸው ግንዛቤ የሚደነቅ ነው። አጼ ቴዎድሮስ በመልእክታቸው ያነሷቸው ጉዳዮች በአራተኛው የጀኔቫ ኮንቬንሽን አንቀጽ 27፣ 47 እና 50 ጥበቃ የተደረገላቸውን መብቶች ነው።[102]

3.6 ወታደሮች ለሚፈጸሙት ወንጀል ኃላፊነትን መውሰድ (Command Responsibility)

የበታች ወታደሮች ለሚፈጽሙት ጥፋት ወይም የጦር ወንጀል የጦር አዛገሮች ኃላፊነቱን መውሰድ እዳለባቸው ዓለም አቀፍ የሰብአዊነት የልማድ ሕግ ከሆነ ውሎ አድሯል። የዓለም አቀፍ የቀይ መስቀል ማኅበር ዓለም አቀፍ የሰብአዊነት የልማድ ሕግጋትን ለማጥናት ጥረት አድርጎ ሕግጋቱን በመድብል መልክ በተለያዩ ጥራዞች አሳትሟል።[103] ከእነዚህ ሕግጋት ውስጥ ሕግ 153 ወታደሮች ለሚፈጽሙት ጥፋት ወይም የጦር ወንጀል የጦር አዛገሮችና የበላይ ኃላፊዎች ኃላፊነቱን መውሰድ እዳለባቸው ይደነግጋል።[104]

ንጉሥ አይከሰስ ሠማይ አይታረስ፤ በሚባልበት ዘመን አጼ ቴዎድሮስ የወሰኑት ውሳኔ ግን ከዚህ በላይ ከጠቀስነው ሕግ ጋር ተመሳሳይ ነበር። ይህንን አስመልክቶ ለንጉሠነገሥቱ የቀረበውን ጉዳይ በመጀመሪያ እንመልከት፤

> *በየካቲት ኪጋይንት ተሰረ[105] ገብተው ሳለ ወታደር ባላገሩን ገደለው። የሞተበት ሰው ክንጉሡ መጥቶ ጮሽ። ንጉሥ ቴዎድሮስም ወታደሩን ሁሉ አፈርሳታ[106] አውጣ አሉት። ወታደርም አልገደልንም፤ አላየንም ብሎ በተገዙተ ጊዜ ለንጉሥ ቴዎድሮስ ይህ ነገር ጭንቅ ሆነ። አስበው ሁዋላ እንዲህ አሉ፦ 'ወታደር ብላ ባላገር አብላ ያልሁ እኔ*

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[101] ተስፋዬ አካሉ፣ ገጽ 29።

[102] በጦርነት በተያዙ ቦታዎች የሚኖሩ ሰዎች ጤንነታቸውን፣ እድሜያቸውንና ጾታቸውን ግምት ውስጥ ያስገባ ጥበቃ ሊደረግላቸው እንደሚገባ የአራተኛው የጀኔቫ ኮንቬንሽን አንቀጽ 27 ይደነግጋል። እንዲሁም የዚሁ ኮንቬንሽን አንቀጽ 50 ለሕጻናት፣ ለሙት ልጆች፣ ከወላጆቻቸው ለተነጠሉ ሕጻናትና ለነፍሰጡር ሴቶች ልዩ ጥበቃና እንክብካቤ ማድረግ እንደሚገባ ይገልጻል። ከዚህ በተጨማሪም ጥበቃ የተደረገላቸው ሰላማዊ ሰዎች የሚኖበሩት ቦታ በጠላት ኃይል በመያዙ በሚኖረው የአስተዳደር ለውጥ ምክንያት በኮንቬንሽኑ የተሰጣቸውን ጥበቃ ሊነጠቁ እንደማይገባ አንቀጽ 47 በግልጽ አስፍሯል።

[103] The study on the customary international humanitarian law conducted by the International Committee of the Red Cross (ICRC) and originally published by Cambridge University Press, Cambridge, 2005. ለበለጠ መረጃ የሚከተለውን ድረ ገጽ ይጎብኙ፣ https://www.icrc.org/ihl

[104] Rule153: *Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible*. ሲል ሕጉ ይደነግጋል።

[105] ተሰረ የሚለው ቃል ወታደሮች የምግብና የመኝታ አገልግሎት እንዲያገኙ ወደባላገሩ የመኖሪያቤት ተደለደሉ ለማለት የገባ ቃል ነው።

[106] አፈርሳታ በቀድሞው ጊዜ ወንጀል ሲፈጸም ወንጀል የተፈጸመበት አካባቢ ማኅበረሰብ ተጠቂጣሪውን ለመለየት የሚጠቀምበት ባሕላዊ የወንጀል ምርመራ ዘዴ ነው (አማርኛ መዝገበ ቃላት፣ ገጽ 345)።

ነኝና ደመኛህ እኔን ግደል'[107] ባሉት ጊዜ ባለደሙም 'እኔ ንጉሥ መግደል አይቻለኝም" አለ። ንጉሡም ብዙ ብር ሰጥተው ሰደዱት።[108]

እንደሚታወቀው በዘመኑ በነበረው ልማድ ንጉሠነገሥቱ የአገር መሪ ብቻ ሳይሆን የወታደሩ አዝማች ጭምርም ነበር። የአጼ ቴዎድሮስን የንግሥና ሕይወት ስንመለከት ግን ከእሳቸው በፊትና በኋላ ከነገሡ ነገሥታት ለየት ይላል። አጼ ቴዎድሮስ ከሌሎች ነገሥታት በተለየ በቤተመንግሥት በድሎትና በምቾት ግብር እያበሉ በአዝማሪ ሽለላ ዘና እያሉ ያልተቀመጡ፣ ሽፍታ ተነሳ በተባለበት ቦታ የተንከራተቱና[109] ኑሯቸውን በድንኳን ያደረጉ ነበሩ።[110] በዚህም ምክንት ለወታደሩ ቅርብና የእለት ተእለት ሕይወቱንም የሚጋሩ ነበሩ።

ለዚህም ነው ከላይ እንደተጠቀሰው ማንም ላይ ኃላፊነቱን ሳይጥሉ ጥፋተኛው ወታደር ባይታወቅም እንኳ ባላገሩ ለወታደሩ ምግብና መኝታ እንዲያቀርብ የወሰንኩ እኔ በመሆኔ ኃላፊነቱን ልወስድ ይገባል፤ በገደለው ወታደር እግር ገብቼ በሞት መቀጣትም ይኖርብኛል ሲሉ በራሳቸው ላይ የፈረዱት። በንጉሠነገሥቱ ላይ በሚፈጸመው የሞት ቅጣት የሚቹ ዘመድ ስላልተስማማ አጼ ቴዎድሮስ የገንዘብ ካሣ ከፍለው አሰናብተውታል። ይህ ውሳኔ ለሕግ ልዕልና ቦታ የሰጠ፣ በዘመኻ ጊዜ በወታደሮች ለሚፈጸመው ጥፋት ነገሠነገሥቱ በኃላፊነት ሕይወታቸውን እስከመስጠት ድረስ በሕግ ሊጠየቁ እንደሚችሉ ያመላከተና በዘመኑ ሰፍኖ ከነበረው አስተሳሰብ ወጣ ያለ ነው።

3.7 በሕግና ፍርድ ላይ የተመሠረተ ቅጣት

ኢትዮጵያዊያን ነገሥታትን ከሚያመሳስሏቸው ነገሮች ውስጥ አንዱ በሽፍቶች፣ በሥልጣን ተቀናቃኞቻቸውና በሌሎች ሰዎች መካከል በሚፈጠር የርስበርስ ገጭት የተነሳ የሚወሰኑ ቅጣቶች በተቻለ መጠን ሕግን መሠረት ያደረጉ እንዲሆኑ መጣራቸው ነው። ፍርዱ የሚሰጠውም በራሳቸው ብቻ ሳይሆን በመጀመሪያ የሌሎችን ማለትም የፈራጆችን ሃሳብ ካዳመጡ በኋላ ነበር። ይህ አሰራር በተለይ ፍትሐነገሥት በ15ኛው መቶ ክ/ዘመን ወደኢትዮጵያ ከገባ በኋላ ይበልጥ ተጠናክሮ ቀጥሏል።[111]

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[107] በዘመኑ ዘመድ የተገደለበት ሰው ቢቻል ገዳዩን ካልሆነም የገዳዩን ዘመድ እንዲገድል በማድረግ ፍትሕ ይሰጥ ነበር።

[108] ተስፋዬ አካሉ፣ ገጽ 66

[109] ከዚህ ላይ አንድ የሚያሳዝን ጉዳይ መጥቀስ ይገባል። አጼ ቴዎድሮስ የመጀመሪያ ባለቤታቸው እቴጌ ተዋበች ዘመኻ ላይ እያሉ በማረፋቸውና የቀብር ሥነሥርዓታቸውን በሚገባ መፈጸም ስላልቻሉ ለሁለት ወራት አስከሬናቸውን በአልጋ አድርገው ለዘመኻ በሚከራተቱበት ቦታ ይዘው ከዞሩ በኋላ በመጨረሻ ቀብራቸው በግሸን ማሪያም ተፈጽሟል (ተክለ ጻድቅ መኩሪያ፣ ገጽ 185)።

[110] አጼ ቴዎድሮስ ከክተማ ሕይወትና ከቤተመንግሥት ምኞት ይልቅ የድንኳን ኑሮ መምረጣቸውን Henry Blanc, *A Narrative of Capitivity in Abyssinia: With Some Account of the Late Emperor Theodore, His Country and People*; Smith, Elder and Co., London, 1868, pp. 11-12 ጽፏል።

[111] ፍትሐነገሥት መንፈሳዊና ዓለማዊ ሕግጋትን አጣምሮ የያዘ ሲሆን ከአረብኛ ወደግዕዝ ተተርጉሞ በኢትዮጵያ ሥራ ላይ የዋለው በአጼ ዘረ-ያዕቆብ ዘመነመንግስት (እ.አ.አ. ከ1434-1468 ዓ.ም) ነው። ስለፍትሐነገሥት የበለጠ መረጃ ለማግኘት Dibekulu Zewde, *Fetha Nagast, Monocanon: The Title, the Canon, the Sources*, 1993 ለፍልስፍና ዶክትሬት ዲግሪ ማሟያ የጻፉትንና ወደአማርኛ ቋንቋ የተረጎሙትን መጽሐፍ እና Abba Pauos Tzadua, *The Fetha Nagast the Law of the Kings*, Haile Sellassie I University Press, 1968 ይመልከቱ።

ወደዓለም አቀፉ የሰብአዊነት ሕግ ስንመጣ በመንግሥትና በአማጺያን ወይም በአማጺያን መካከል በሚደረግ ጦርነት ላይ ተፈጻሚ የሆነው የሁለተኛው ተጨማሪ ፕሮቶኮል አንቀጽ 6 ገለልተኛ በሆነ ፍርድቤት ጥፋተኝነታቸው ካልተወሰነ በቀር በተከሰሱ ሰዎች ላይ ቅጣት መጣል እንደማይቻል ይደነግጋል። አጼ ቴዎድሮስም በተለያዩ ጊዜ ተይዘው የቀረቡላቸውን የሥልጣን ተቀናቃኞቻቸውን በሕግ መሠረት ቅጣት ለመቅጣት ሞክረዋል። እስኪ ለምሳሌ የሚከተሉትን እንመልከት፤ የመጀመሪያው ጉዳይ ይህንን ይመስል ነበር፤

> *በወሎ መሬት 7 ጊዜ ተመላለሱ። አዋጅም ግባ[112] እያሉ ነገሩ። እባክህን ተወን ክሽፍታም አትሁን እያሉ። እምቢ ባሉ ጊዜም መቁረጥ ጀመሩ። ያንግዜም የግራአዝማች ዓለሜ ሎሌ መክሮ የወሰዳቸው በንጉሥ እጅ ትሞታለህ ተብሎ ተመቅደላ ተይዞ መጣ። ንጉሡም 'እስቲ ፍረዱ ሰው ተከዳበት ስፍራ ቢገኝ እንዴት ይሆናል?' አሉ። ፈራጆችም እንዲህ አሉ 'ሰው ከክዳበት ስፍራ ተተገኘ ይቀጣ በቃ' አሉ። ፍትሐ ነገሥትም እንዲሁ ፈረደ።*[113]

ይህ ታሪክ የሚነግረን የንጉሠነገሥቱን ተደጋጋሚ አትሸፍቱ፤ ገብራችሁ በሰላም ኑሩ፤ የሚለውን ማስጠንቀቂያ ወደጎን የተወ በመጨረሻም እጣ ፋንታው ተይዞ ከአጼ ቴዎድሮስ ዙፋንና ከፈራጆች ፊት ተከሶ ስለቀረበ ሰው ነው።

አጼ ቴዎድሮስ ለፈራጆች ያቀረቡት ሁለተኛው ጉዳይ ይህን ይመስል ነበር፤

> *መርዕድ አዝማች ኃይሌንም ሥራሁብዙ የሚባል ሰው የአመዴ በሸርን መልእክተኛ አልብሰህ ሚስጢር ተጫውተህ ሰደሃል ብሎ ክሰሰው። መርዕድ አዝማችም መምጣትስ መጥቶብኝ ነበር አይሆንልኝም ብየ መልሼ ሰደድሁት ባለ ጊዜ ንጉሡም እንዲህ ያደረገን ሰው ምን ያደርጉታል ፍረዱ ባሉ ጊዜ ፈራጆችም ክጠላት ከተላላከ ይቀጣ በቃ ብለው ፈረዱ። ንጉሡም ቅጣቱን ምረው አሰረው አሉ።*[114]

ከእነዚህ ሁለት ፍርዶች የምንረዳው ምንም እንኳ የመጨረሻው ውሳኔ የንጉሠነገሥቱ ቢሆንም ጉዳዩ ሳይመረመር በተለይም ለፈራጆች ሳይቀርብ ቅጣት አንደማይጣል ነው። በዘመኑ በነበረው አሰራር ንጉሠነገሥቱ ሕግ አውጪ፣ ዳኛና ሕግ አስፈጻሚ በመሆናቸው ገለልተኛ ፍርድቤት የሚባል ተቋም መኖር ቀርቶ ባይታሰብም ጉዳዩ ለፈራጆች ቀርቦ ሃሳባቸውን መስጠታቸውና ንጉሠነገሥቱም ይህን ሃሳብ ግምት ውስጥ አስገብተው ፍርድ መስጠታቸው ውሳኔያቸው ከላይ ከጠቀስነውን ከሁለተኛው ተጨማሪ ፕሮቶኮል አንቀጽ 6 ጋር በተወሰነ መልኩ የተጣጣመ መሆኑን እንገነዘባለን።

3.8 ምሕረት

ቀደምሲል እንደተመለከትነው አጼ ቴዎድሮስ በፍትሐነገሥት እያስፈረዱ ይቀጡ ነበር። አልፎ አልፎ ግን ቁጣቸው ወደትእግስት፣ ቂማቸው ወደይቅርባይነት እየተለወጠ ይሰቀላሉ፤ ይገደላሉ፤ ይታሰራሉ፤ ተብለው የተጠረጠሩ ሰዎችን በምሕረት የሚለቁበት ጊዜ ነበር። ከዚህ በላይ እንዳደረግነው በመጀመሪያ ለመንደርደሪያ የሚሆነንን ታሪክ እንመልከት፤

> በወርኃ መጋቢት ንጉሥ ቴዎድሮስ በዘፈን እንዲህ ያለ ትንቢት ተናገሩ፤

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[112] *ግባ* የሚለው ቃል አመጽ፣ ሽፍታነታችሁንና አልገዛም ባይነታችሁን በመተው ለንጉሠነገሥቱ አውቅና በመስጠት በስሩ ገብራችሁ ኑሩ የሚል ትርጉም ለመስጠት የገባ ቃል ነው።

[113] ተስፋዬ አካሉ፣ ገጽ 78።

[114] ዝኒ ከማሁ፣ ገጽ 71።

ጎጃምን ብንቆጣው በእሳቱ ተቀጣ፣
ወሎን ብንቆጣው በነፍጡ[115] ተቀጣ፣
ይብላኝ ለወራኔ ይብላኝ ለሰቆጣ።

ይህንን ዘፈን ተናግረው ወደ ሰቆጣ ከዋግሹም ገብረ መድኅን ገሰገሱ። የንጉሥን መምጣት በሰማ ጊዜ አገው ተዋግቶ ዋግሹም ገብረ መድኅንን፣ ቢትወደድ ብሩንና አባ ጫጉን ከነባሪያው ያዙዋቸው። ንጉሡ ገና ሳይደርሱ ብዙም ሰው ተያዘ። ንጉሥ ቴዎድሮስም ሦስቱን መኳንንት አስረው የቀረውን ሰው ስለመድኃኒዓለም ብለው ማሩት።[116]

ከግጥሙ እንደምንረዳው ንጉሠነገሥቱ ወደሰቆጣና ወራኔ ዘመቻ ከማምራታቸው በፊት ምን ያህል ተናደውና ለጦርነቱ ከፍተኛ ዝግጅት አድርገው እንደነበር ነው። ወደፊት በሰቆጣና በወራኔ የሚወስዱትን እርምጃ በጎጃምና በወሎ ከወሰዱት እርምጃ ጋር እያነጻጸሩ እርምጃቸው ከቀደሙት ቢበልጥ እንጂ እንደማያንስ ወሮላችሁ! መጣሁባችሁ! በማለት ማስጠንቀቃቸውን እንረዳለን። ይህንን ዝግጅታቸውንና ንዴታቸውን የተመለከተ ንጉሠነገሥቱ መሪዎችን በእስራት ቢቀጡም ሌሎች የአመጹ ተሳታፊዎችን በምሕረት ይለቃሉ ብሎ በፍጹም ሊያስብ አይችልም።

ወደዓለም አቀፉ የሰብአዊነት ሕግ ስንመጣ በሁለተኛው ተጨማሪ ፕሮቶኮል አንቀጽ 6(5) ላይ እንደተመለከተው ጦርነቱ እንደተጠናቀቀ በጦርነቱ የተሳተፉና የታሰሩ ሰዎች በተቻለ መጠን በምሕረት እንዲለቁ የያዟቸው ኃይሎች የሚችሉትን እንዲያደርጉ ሕጉ ይጠይቃል።[117] አጼ ቴዎድሮስ ያደረጉትም በዚህ አንቀጽ ላይ ከተመለከተው ጋር ተመሳሳይ ሆኖ እናገኘዋለን።

የማጠቃለያ ነጥቦች

በዚህ ጥናት እንደተመለከትነው የአጼ ቴዎድሮስ የጦር ሜዳ ውሳኔዎችና ፍርዶች ከዚህ ዘመን ዓለም አቀፉ የሰብአዊነት ሕግጋትና መርኖች ጋር ተቀራራቢ፣ ተመሳሳይና አቻ ነበሩ። ጨካኝነታቸውና በሕዝቡ ላይ የተፈጸመው በደል እንደተጠበቀ ሆኖ ንጉሠነገሥቱ የታሰሩ ሰዎችን በእንክብካቤና በርህራሄ የያዙ፣ በጦርነት ቆስለው የሞቱትን በሥርዓት ቀብራቸው እንዲፈጸም ያደረጉ፣ በምርኮ የተያዙ ሰዎች በባርነት እንዳይሸጡ የከለከሉ፣ ከዘረፋ ይልቅ በደመወዝ የሚተዳደር ወታደር ለማደራጀት ጥረት ያደረጉ፣ በጦርነት በተያዙ ቦታዎች የሚኖሩ ሰዎች መብትን (the Law of Ocuupation) በተመለከተ ግንዛቤ የነበራቸው፣ ወታደሮች ለሚፈጽሙት ጥፋትና ወንጀል በግል ኃላፊነትን የወሰዱ (Command Responsiblity)፣ በሕግና በፍርድ ላይ የተመሠረተ ቅጣት ለመጣል የሞከሩና በምርኮ የተያዙ ሰዎችን በምሕረት የለቀቁ ነበሩ። እነዚህ ተግባራት፣ ውሳኔዎችና

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[115] ነፍጥ የጦር መሳሪያ ወይም ጠበንጃ ማለት ነው (አማርኛ መዝገበ ቃላት፣ ገጽ 292)።

[116] ተስፋዬ አካሉ፣ ገጽ 67-68።

[117] Article 6(5), Additional Protocol II: *At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.*

ፍርዶች በዘመናዊው የዓለም አቀፉ የሰብአዊነት ሕግ ውስጥ ቦታ ያላቸውና ልዩ ትኩረት የተሰጣቸው ናቸው።

የዓለም አቀፉ የሰብአዊነት ሕግጋትና መርኖች በዓለም አቀፍ ደረጃ ገና በሚገባ ባልዳበሩበትና ኢትዮጵያም ከሌላው ዓለም ተገልላ ብቻዋን በነበረችበት ዘመን አጼ ቴዎድሮስ ከላይ በዝርዝር የተመለከትናቸውን ተግባራት ማከናወናቸው፣ ውሳኔዎችንና ፍርዶችን መስጠታቸው ለሰብአዊነት የነበራቸውን ግንዛቤና ለሕግ የሰጡትን ቦታ በደንብ ያመላክታል።

አጼ ቴዎድሮስ እነዚህን ተግባራት ቢያከናውኑም ስለእርሳቸው የተጻፉት፣ የተገጠሙትና የተነገሩት ግን እነዚህን ጉዳዮች የሚያደበዝዙ እንጂ አጉልተው የሚያሳዩ አልነበሩም፤ አይደሉም።[118] ይህ ተመራማሪ ይህን ጥናት ለማካሄድ ያነሳሳው ምክንያትና ሊያሰምርበት የፈለገው ነጥብ በግሉ ዳግማዊ አጼ ቴዎድሮስን ማወደስ፣ ሰብዕናቸውን ማጉላትና በእርሳቸው ላይ በተቃራኒው የጻፉ ሰዎችን ሃሳብ መሞገትና መተቸት አይደለም። ይህን ማድረግ በምርምር ዓለም የተለመደ በመሆኑ በራሱ ክፋት ባይኖረውም የሕግ ምርምርን ፈርና መሠረታዊ መርኅ ሊያስለቅቅ እንደሚችል ግን እሙን ነው። በመሆኑም ተመራማሪው እንደማጠቃለያ ሊያስገነዝብ የሚፈልገው ዋናው ነጥብ ኢትዮጵያ ለተቀበለቻቸው የዓለም አቀፍ የሰብአዊነት ሕግጋት መሠረት ዓለም አቀፍ ስምምነቶችና የልማድ ሕግጋት ብቻ ሳይሆኑ የኢትዮጵያ ነገሥታት አሻራ በጠቅላላው እንዲሁም የዳግማዊ አጼ ቴዎድሮስ ውሳኔና ፍርድ አስተዋጾ ደግሞ በተለይ እንዳለበት ነው።

እንደሚታወቀውና በሌሎች አገሮችም ተቀባይነት እንዳገኘው የነገሥታት ታሪክ የሕግ ታሪክን ጨምሮ ጥሩም ይሁን መጥፎ የሕዝብ ከዚያም አልፎ የአገር ታሪክና ሕግ ነው። ወደኢትዮጵያ ሕግ ታሪክ ስንመጣ የኢትዮጵያ ነገሥታት ፍርዶችና ውሳኔዎችን በታሪክነታቸው ማውሳትና መዘከር ተገቢ ቢሆንም በቂ ግን አይደለም። በተለይም ሁሉንም ዓለም አቀፍ የሰብአዊነት ሕግና ሌሎች ተመሳሳይ ሕግጋት በዓለም አቀፍ ስምምነት ወይም በዓለም አቀፍ የልማድ ሕግ አማካኝነት ከምዕራቡ ዓለም ብቻ የተኮረጁ እንደሆኑ አድርጎ መቀበል ትክክል አይደለም። በዘመኑ በነበረው የምዕራባዊያን የኢኮኖሚና የፖለቲካ የበላይነት ሳቢያ ዓለም አቀፍ የሰብአዊነት ሕግጋትን ለማርቀቅና መግለጫዎችን ለማውጣት በተካሄዱት ጉባዔዎች ላይ ኢትዮጵያ ከሌሎች አገራት ጋር ባለመሳተፏ አሻራዋን በቀጥታ ማሳረፍ ባትችልም እንኳ በዓለም አቀፍ ስምምነት ወይም በዓለም አቀፍ የልማድ ሕግ አማካኝነት ከተቀበለቻቸው ሕግጋት ውስጥ ኢትዮጵያዊ አስተምህሮ እንዳለበት ልንገነዘብ ግን ይገባል።

በመጨረሻም በዓለም አቀፍ የሰብአዊነት ሕግ ብቻ ሳይሆን በሌሎች የምዕራብና ምዕራብ ቀመስ ሕግጋት ውስጥ የኢትዮጵያ ድርሻ ወይም አስተምህሮ መኖር አለመኖሩን መመርመር፣ ካለም ድርሻውና አስተምህሮው ምን እንደሆነ ሳይንሳዊ በሆነ መንገድ በሚገባ አጥንቶ ማቅረብ፣ እንዲሁም በጉዳዩ ላይ የሃሳብ ፍጭትና ክርክር ማድረግ የሕግ፣ የታሪክና የሌሎች ጉዳዩ የሚመለከታቸው ምሁራን ኃላፊነት መሆኑን የጥናቱ አቅራቢ መጠቆም ይወዳል።

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[118] በጉዳዩ ላይ ከጻፉት ውስጥ ሄንር ብላኒክ ይጠቀሳል (ከዚህ በላይ ማስታዎሻ ቁጥር 110)።

Legalizing the Illegal: Ethiopian Arbitration Law towards a New Jurisprudence (A Case Comment on Zem Zem PLC V. *Illubabor* Zone Education Department)

Yehualashet Tamiru Tegegn[§]

Abstract

Even with its faults, arbitration is one of the most popular methods of dispute resolution. The laws for various policy justifications provide exclusionary clauses for some selected issues from the ambit of arbitration. One such area is the administrative contract. Oddly enough, the Cassation Bench renders a decision although it actually contradicts with the clear provision and spirit of the law. The author argues that the decision of the Cassation Bench is logically unsound and legally baseless; therefore, calls for revision of this position.

1. The Case[1]

This case began in the High Court of *Illubabo*r Zone. The current respondent was a plaintiff before the High Court of *Illubabo*r Zone suing both the current applicant and Nile Insurance Company to pay compensation of ETB 184,559.26 (one hundred eighty four thousand five hundred fifty nine birr twenty six cents) in consequence of non-performance of the contract. The current applicant, however, raised an objection on the grounds that the court has no jurisdiction to entertain this case for the reason that, as per Article 24 of the agreement, if any dispute arises in relation to the contract, it will be entertained by an arbitrator. Furthermore, the current applicant informed the High Court that with a view to getting arbitrators appointed, it had filed an application before the First Instance Court of *Illubabor Zone*.[2] The High Court, however, rejected the objection and ruled in favor of the current respondent. As a result, it awarded ETB 31,111.40 (Thirty one thousand one hundred eleven birr forty cents) and three hundred birr for the cost of litigation.

[§] LL.B., Addis Ababa University. My special thanks go to two anonymous reviewers for helpful comments in the earlier draft of the paper and Mr. Haile Guesh for his relentless follow up. I am also very grateful to Zekarias Kenea, Tewodros Mehret, Haregewein Ashenafi and Yohannis Takele for their part of contributions. The usual caveat applies here. The author can be reached through email at yehuala5779@gmail.com.

[1] *Zem Zem vs. Illubabor Zone Education Department*, Federal Supreme Court Cassation Bench File No. 16896(1998 E.C.)

[2] As provided under Article 3334(1) of the Civil Code, if the parties failed to appoint an arbitrator as they agree, the court will appoint.

The current applicant appealed to the Regional State Supreme Court which then confirmed the decision of the lower court.

1.1. Holding of the Cassation Bench

The Cassation Bench framed the issue of whether assumption of jurisdiction by court disregarding the term of the contract to submit a dispute in relation to contract to arbitration is appropriate or not?

The Cassation, reversing the decision of the lower court reasoned that the parties to the contract can agree on any matter as far as it is not prohibited by law. This is clearly stipulated under Article 1731 of the Civil Code. Any valid contract will have a binding effect on the contractual parties. Sub-art.1 of the same Article provides that a contract is a law between contractual parties and they should abide by the terms and conditions of the contract. One of the terms stipulated under Article 24 of the contract states that if there is any disagreement arising out of the contract, it will be entertained by an arbitrator. Accordingly, since the jurisdiction of the court is ousted by this agreement, the case must be brought before an arbitrator.

2. Comment

As defined under Article 1675 of the Civil Code, a contract is an agreement whereby two or more persons between themselves create, vary or extinguish obligation of a proprietary nature. From this definition, it is possible to infer four core elements.

1. In principle, there must be two or more parties.[3]
2. The presence of two parties or more must be supplemented by agreement. Therefore, there must be an agreement with a serious intention to be legally bound.
3. The agreement must be either to create, vary or extinguish an existing obligation or future; and,
4. The agreement must be of proprietary nature.

For a contract to be valid and enforceable before the court, it should meet the four requirements put in place under Article 1678 of the Civil Code. These are consent, capacity, lawfulness or possible and form if any. The absence of one or more of these requirements may lead the contract to be void or

[3] The exception is an agent acting on the name and behalf of the principal may conclude a contract with himself for the obvious reason that he has the capacity to represent the principal on one hand and himself on the other. See infra note 7.

voidable. Therefore, not all contracts may be valid due to defects or vices which might render the contract susceptible to invalidation.[4]

A void contract is an act in which the law reckons to have no existence or to be no contract at all; i.e. a nullity from the very beginning. Conclusion of void contract does not change the position of "contractants".[5] Moreover, a void contract is jurisprudentially understood as unborn to the parties' agreement.

A voidable contract, on the other hand, is binding until it is invalidated by the option of the party whom the law protects. It is a "sick contract" that may be "cured" or "killed" depending upon the option that may be exercised by the victim of the defective agreement.[6] Therefore, a voidable contract has defect; but it is possible to rectify that problem and perpetuate its legal effect until it is invalidated.

As it is easily noted from the reading of Article 1808 (1) of the Civil Code, a defect in consent and capacity will lead to invalidation of a contract. Therefore, if the defect is related to capacity or consent, that will be a voidable contract.

On the other hand, a defect in the object of the contract[7]; be it unlawful[8], impossible or immoral makes it void *ab initio.*[9] The same holds true for non-compliance with legal form.

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[4] Lantera Nadew, Void agreements and voidable contracts the need to Elucidate Ambiguities of their effects, Mizan Law Review, Vol. 2, No. 1 (2008), p. 1.

[5] Guest, A. G (ed.) *Anson's Law of Contract,* 26th ed, Oxford. University Press, (1981), p. 17 as quoted by Lantera Nadew cited above.

[6] Supra note 4, p. 2.

[7] The object of a contract must be differentiated from its subject. The subject of a contract is the thing over which the parties are contracting. The object of the contract is, however, the respective obligation of the parties. See Mulugeta M. Ayalew "Ethiopia" in international Encyclopedia of laws contracts Kluwer Law International (2010), p. 92.

[8] As stated under Article 2 of Proclamation. No. 454/05 decision of Cassation will have binding effect. In its well reason decision cassation stated that there is difference between unlawful and illegal contract. Unlawful contract means contract which is prohibited by law for example slavery which is prohibited by both national and international instrument to which the country is a party. These leads the contract void *ab initio* or null and void and there is no period of limitation for this. However, illegal contracts are those not fulfill the criteria stipulated under the general provision of contracts or other laws. By this well-funded analysis it is possible to say that arbitration clause in Administrative contract is illegal but not unlawful. Please see Federal Supreme Court Cassation Bench, File No 43226 Mohammed Abedela Vs. Dire Dawa Ethio- Djibouti Railway(2000 E.C).

[9] It is important to note that the code preferred to use "no effect", which has a similar legal effect with "void *ab initio.*

The Civil Code of Ethiopia has dealt with the issue of special contract under Book V. Title XIV; Article 3136-3306 is devoted to administrative contracts. As to why the administrative contract is dealt with separately from general law of contract, Rene David had the following to say:

Because of the peculiarity of administrative Contracts and the importance of providing a clear and coherent system of rules for them, it was apparent that like contracts relating to immovable, they should be dealt with in especial title.[10]

What is meant by administrative contract is defined under Article 3132. Pursuant to this provision, there are three separate conditions, which make a contract administrative. These conditions are:

1. When it is expressly qualified as such by the law or by the parties or
2. It is connected with an activity of the public service and implies a permanent participation of the party contracting with the administrative authorities in the execution of such service or
3. It contains one or more provision which could only have been inspired by urgent consideration of general interest extraneous to relations between individuals.

As we can see from the first condition above, if either the law or the parties expressly qualify their agreement as administrative contract, then it will be governed by the special provision of administrative contract, *ipso jure*. The law designates some contracts as administrative contracts. These are public concession contracts,[11] public construction contracts[12] and public supplies contracts.[13]

It is necessary to look at Article 3244(1) of the Civil Code to have a good understanding of what is meant by public construction. As per this provision, "a contract of public works is a contract whereby a person, the contractor, binds himself in favor of an administrative authority to construct, maintain or repair public work in consideration of a price." Article 2 (c) of the federal public procurement has clearly defined what "work" means.[14]

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[10] Rene David, Ethiopian Administrative Contracts, *Ethiopian Journal of Law*, Vol. 4, No. 1 (1967) p. 145.

[11] Article 3207-3243 of the Civil Code.

[12] Article 3244-3296 of the Civil Code.

[13] Article 3297-3306 of the Civil Code.

[14] Works means all works associated with the construction, reconstruction, demolition, repair or renovation of a building road or structure, such as site preparation, excavation, installation, of equipment and materials, decoration, as well as series incidental to works if the value of those services does not exceed that of the works themselves and includes

The contract concluded between *Zem Zem PLC* and *Ilubabo*r Zone Educational Department was to build a primary school in *Alegesayi Wereda.*[15]It clearly falls under the ambit of administrative contract; more particularly, a contract of public work. The contract was to construct a primary school in *Illubabor*, which is in line with the definition set forth above.

As mentioned under Article 3131(1) of the Civil Code, an administrative contract will be governed by general and special laws of contract. However, the general law of contract is limited to playing a gap filling role for special provisions of administrative contract. If there are any special provisions which handle the matter, the primacy shall be given for such provision. However, if there is a lacuna, we shall resort to general provisions of contract.

There is no specific provision in the law of administrative contract to deal with the issue of validity requirement of an administrative contract. It necessarily follows that Article 1678 of the general provision of contract will have a gap filling role. Therefore, any administrative contract must comply with the validity requirement put in place under general law of contract. As stated above, the defect in some requirements will lead the contract to be voidable while some others will lead the same to be void *ab initio*. Unlawful object turns out to be good instance for making the contract void *ab initio*.

As it is clearly stipulated under Article 315 (2) of the Civil Procedure Code "*No arbitration may take place in relation to administrative contract as defined in Article 3132 of the Civil Code or in any other case where it is prohibited by law*". By virtue of this provision, an administrative contract is not within the ambit of arbitration. Moreover, the issue of administrative contract is non-arbitrable for the following reasons:

Firstly, by arbitrability, we mean that the agreement must relate to subject matter capable of being resolved by arbitration. This is known as objective arbitrability or arbitrability *ratione materiae*. Secondly, by arbitrability, we mean that the agreement must be concluded by parties entitled to submit their disputes to arbitration. This is known as subjective arbitrability or *arbitrability ratione personae*.[16]

building, own, operate and transfer contract see, Federal public procurement proclamation, Proclamation No. 430/2005, *Federal Negarit Gazetta*, 2005.

[15] It is stipulated under Article 1 of the contract.

[16] Ching- Lang Lin, Arbitration in Administrative Contract: comparative law perspective, University of Paris, PhD dissertation. 2014. p. 19.

No matter how carefully we frame a contract, it is impossible to avoid conflict because words are susceptible to different interpretation. When there is dispute, one way of resolving it is through arbitration. There are two types of arbitration submission. These are *act de compromise* and *clause compromissuive.* In the latter, submission is considered to be a separate contract within the broader contract. So, it is a contract within a contract. This is the reason why many accept that an arbitration clause is severable from the main contract of which it forms a part.[17]

As per Article 315(2) of the Civil Procedure Code, an administrative contract is beyond the ambit of arbitration. The type of contract excluded turns out to be the administrative contract. Thus the law takes administrative contract away from the ambit of arbitration based on subject matter but not based upon the capacity of contractants. The government as a contractant can submit its dispute with another party to arbitration. However, the government will be prohibited from submitting its dispute to arbitration in case the subject matter is an administrative contract. The government, given Ethiopia's situation, has a huge role in the market; hence, it may engage in various contracts other than administrative contracts. Therefore, in that case it is possible for government to submit its dispute to arbitration. All in all, the type of arbitrability envisaged under Article 315 (2) is that of subjective arbitrability or *arbitrability ratione personae.*[18]

There is a strong and unsettled academic debate regarding arbitrability of administrative contract[19] prior to this Cassation decision. I submit that the Cassation Division's decision on this matter should be criticized for the following major reasons:

1. It is one of the cardinal rules of interpretation that if the law is clear, there is no need for interpretation unless it has absurd

[17] Infra note 48 p. 120.

[18] It is clear that in practice administrative contracts are submitted to arbitration. It is impossible to bring the practice as a justification to legalize the arbitrability of administrative contracts.

[19] See Zekarias kenena, Arbitrability in Ethiopia: posing the problems, *Journal of Ethiopia*, Vol. 17, No.17, (1994), Tecle Hagos Adjudication and Arbitrability of Government Construction Disputes, *Mizan Law Review*, Vol.3, No. 1, (2009) Bezzawork Shimelash, The Formation, Content and Effect of an Arbitral submission under Ethiopia Law, *Journal of Ethiopia law*, Vol. 17, No.17, (1994), Tilahun Teshome, The legal Regime governing Arbitration in Ethiopia: A synopsis, *Ethiopia Bar Review*, Vol. 1, No. 2, (2000) and Ibrahim Idris, Administrative Contracts and the Law of Arbitration in Ethiopia, senior essay paper, Addis Ababa University , 1979.

consequence.[20] The courts' function is not to say what the legislature meant but to ascertain what the legislature has said it meant. The court cannot proceed on the assumption that the legislature has made a mistake. Even if there is a defect, it is not for the court to add to or amend the words of a statute or to supply a *casus omissus*. That is for the legislature. When the language is clear, it is the duty of the court to give effect to it without calling in aid and outside consideration to ascertain the intentions of the legislature. Statutory provision cannot be whittled down by general principle of equity, justice and good conscience; nor can they be avoided on the ground of hardships or inconvenience when the meaning of parliament is enacting the statute or its wisdom.[21] Therefore, we need interpretation only when the law is vague and ambiguous. In the absence of ambiguity or vagueness of the law, courts are supposed to apply the law as it is. The amendment proclamation to proclamation No. 25/96 i.e. Proclamation. No. 454/2005, which empowers the decisions of Cassation Division to be of precedential value for lower court states under Article 2(1) that "Interpretation of a law by the Federal Supreme Court..." Here the law is talking about interpretation. As mentioned above, interpretation presupposes the existence of vague or ambiguous provision.

Article 315 (2) of the Civil Procedure Code is too clear to invite any interpretation disregarding this; however, the Cassation Division has misinterpreted the clear provision of the law. By doing so, it has violated one of the cardinal rules of interpretation thereby going beyond its power.

2. The second reason is highly interlinked with the first one. There is no apparent contradiction as some authors claim.[22] There is clear provision as to prohibition of arbitrability of administrative contract in the Civil Procedure Code[23]. However, there is no clear provision

[20] For better understanding on rule of interpretation please see George Krzecucurrenticz, Statutory Interpretation in Ethiopian, *Journal of Ethiopia Law*, Vo.l 1, No. 2(1964).

[21] Mulla, The Code of Civil Procedure: Act V of 1908, 16th ed., Butterworth Publisher, (2001), Volume 1, p. 4.

[22] See the above works specially Bezzawork Shimelesh.

[23] Article 315 (2).

that allows arbitrability of administrative contract in the Civil Code.[24]

True in civil matters, where the law is silent on a certain subject matter and where there is no clear stipulation to the contrary, the silence of the law would amount to an implied incorporation of the matter in issue. In our case, however, in order to invoke the above principle of interpretation one should at least be able to indicate a provision that deals implicitly with the issue of arbitrability. But we do not find such matter under provisions of Article 3325-3346 of the Civil Code.[25]

As stated under Article 722 of the Civil Code, "Only the court is competent to decide whether a betrothal has been celebrated or not and whether such betrothal is valid." Therefore, the court has exclusive jurisdiction in this matter. Zekarias, in confirming this, states that it is only the court, in exclusion of all other alternative dispute settlement mechanisms and tribunals including arbitration, which can make decisions over the issues of which squarely fall within the spirit of those provisions. In other words, matters falling within the limits and bounds of those provisions are not arbitrable.[26] If the law, under the same code, prohibits arbitrability of a valid marriage, it is possible to argue, for a stronger reason, that it also prohibits arbitrability of administrative contract, where the public interest is at stake.

Furthermore, the legislation is presumed to be prudent enough in selecting and using words in legal provision. It is, therefore, necessary to interpret words of a provision in any legislation to give effect instead of nullifying its meaning.[27]In interpreting the provision of a statute that construction should be adopted, would give effect to all parts thereof, and would not render any of them meaningless or inoperative. It is not a sound principle of construction to brush aside words in a statute as being inapposite, surplus sage if they can have appropriate application in circumstance conceivably within the statute.[28] If we follow this principle, it is possible to conclude that the administrative contract is non-arbitrable under Ethiopian law.

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[24] Article 3325-3348.

[25] Yodit Gurji, Arbitability of Administrative Contract, Senior Essay Paper, Addis Ababa University, 1997. p. 20

[26] Zekarias kennea, Arbitrability in Ethiopia: Posing the problem, *Journal of Ethiopia Law*, Vol. 17, No.17, (1994) p. 117-118.

[27] Positive rule of interpretation.

[28] Supra note 20.

3. One of the core principles in arbitration is equality of parties. However, the special nature of the administrative contract in effect creates a special right and obligation towards the parties. The basic reason that gives rise to the peculiarity of administrative contract is that of inequality of interest.[29] This ultimately leads to inequality of parties. Thus the very nature of the administrative contract is incompatible with the core principle of arbitration. For instance, if the government is the litigant party, it may be difficult to access evidence by virtue of Article 145 of the Civil Procedure Code. This is because submission of such crucial and important evidence will determine the output which the government might not want. As a result, such sort of instances will no doubt affect the equality of party and ultimately will have great repercussions in the outcome of the case.
4. It should be a matter of common knowledge that Ethiopian Civil Procedure Code was transplanted from French and Indian legal system. Looking into the same laws of those countries, therefore, plays a significant role in interpreting the actual intention of the drafter. Under French law, as per Article 2060, disputes involving pubic organizations and public institutions are secluded from the ambit of arbitration.[30] And in Indian law, the administrative contract is non-arbitrable.[31] It necessarily follows that the Ethiopian civil procedure, which is transplanted from French and Indian law, does not allow the arbitrability of the administrative contract.
5. One of the cardinal principles of interpretation, in a case where there is contradiction, is to see the maturity date of the law. The legal maxim *lex posterior derogat priori* or posterior law prevails over (derogates from) prior law when the two laws have the same status

[29] George Langrod, Administrative Contract, *America Journal of Comparative Law*, Vol, 4, No.3, (1995) p. 325.

[30] Generally in French it is prohibited for territorial public collectives (including the country, region, provinces, and communes) and public establishment to become parties in arbitration procedure. See supra note 16 p. 58.

[31] Any Commercial matters can be referred for arbitration but public policy prohibited submission of issues like insolvency and anti-competition to be referred to arbitration. Thus, if the law prohibited arbitrability of insolvency, for stronger reason we may argue that it also prohibited arbitrability of administrative contracts. Sumeet Kachwaha and Dharmendra Rautray, Arbitration in India; an overview, p. 4 available at https://www.scribd.com/document/348016476/Arbitration-in-India, last accessed on 10 June, 2016.

or hierarchy. This is because the legislator who made a new law, that contradicts an old law of the same hierarchical position, is presumed to intend to repeal the old law by implication. In other words, the new or more recent law must be applicable, thereby giving the old law no effect.[32] Both the Civil Code and Civil Procedure Code are placed on the same rung of the ladder. Therefore, the two laws have equal hierarchy.[33] The Civil Code came into force in 1960, while the Civil Procedure Code came into force in 1965. Therefore, if there is any contradiction between these two laws, the Civil Procedure Code should be applicable instead of the Civil Code due to the cardinal principle, "The later prevails over the former."

The Civil Code is silent as far as arbitrability of administrative contract is concerned. Even though that silence of the Civil Code is said to amount to acceptance, it is repealed by subsequent law; i.e. Article 315(2) of the Civil Procedure Code. The law makers of Civil Procedure Code, well aware of the existence of Civil Code, put clear stipulation as to non arbitrability of the administrative contract.[34]

6. Some argue procedural law is a means to an end; it is there to deal with the issue of how rights, privilege and duties are enforced. The argument goes if this is what is meant by Civil Procedure, then, it should not defeat the right guaranteed under substantive law; in our case, the right of arbitrabality of the administrative contract in Civil Code.[35] However, this argument is not tenable since the procedural

[32] Tesfaye Abate, Material on Introduction to Law and Ethiopian Legal System, Justice and Legal System Research Institute, (2008) p.160.

[33] Some argue that Civil Procedure Code has the status of decree which is less than proclamation. However it is wrong and Tesfay has the following to say legislation by Emperor Cum parliament under Articles 88-90 or by imperial decree under Article 92 constitutes the ordinary law between the constitution above and non-sovereign Administrative enactment below. There is hardly a difference in effect, between legislation proclaimed pursuant to Arts 88-90 and legislative, decreed based on Article 92. Ibid p. 114 He also goes to state that the only difference between decree and proclamation at the time were decree promulgated by emperor when the parliament is not recession but proclamation promulgated by parliament and approved by emperor. p. 82.

[34] Supra note 30 p. 102.

[35] Bezzawork argues that Procedural law should neither limit nor extend substantive rights that are definitively dealt with in the substantive laws in this case, the civil code. Bezzawork Shimelash, The Formation, Content and Effect of an Arbitral Submission under Ethiopia Law, Journal of Ethiopia Law, Vol 17, (1994) p. 8. This is based on the assumption that there is clear demarcation between procedural law and substantive law. However procedural law may determine the right per se. like *res juridicata*. Whereas, the substantive law may provide

law is as important as substantive law. Moreover, arbitration is a mere procedure and procedural law is appropriate to deal the issue.

It is quite a mistaken assumption that civil procedure deals only procedural matters. Sometimes even civil procedure can provide substantive rights; a case in point is the appointment of trustees and dissolution of partnerships.

Article 308(1) of the Civil Procedure Code stated that if the court is satisfied that there is good cause, it may appoint a provisional director, trustee or liquidator. This is substantive right which also duplicated in substantive parts of the law. Under bankruptcy provision, for instance, under Article 994 the issue of appointment of trustees is handled.

The same holds true for dissolution of partnerships. Under Article 311(1) of the Civil Procedure Code, the court may order the dissolution of a partnership or body corporate or even for termination of an endowment. It is quite clear that such matters are substantive rights (for instance the same issue is dealt under Article 258 of the Commercial Code) all the same it is dealt with under procedural law. As a result, it is emphatically correct and sound for the law to deal with the issue of arbitrablity in Civil Procedure Code.

Above all, the court, by ruling that administrative contracts are subject to arbitration, violates the very policy justification behind non arbitrability of the administrative contract. Redfern and Hunter emphasize that being arbitrable or non-arbitrable of a subject-matter is the matter of public policy.

> *The concept of non-arbitrability is in effect public policy limitation upon the scope of arbitration as a method of settling disputes. Each state may decide, in accordance with its own public policy considerations as to which matters are incapable of being settled by arbitration under the law of the place of agreement or of arbitration. Moreover, recognition and enforcement of an award may be refused if the subject-matter and if the difference is not arbitrable under the law of the country where enforcement is sought.*[36]

There is no conclusive evidence which shows the policy justification for taking the administrative contract out of the ambit of arbitrability. Even a reference to administrative contract provisions in Civil Code and its legislative

procedural matters like period of limitation. Thus there is no clear cut difference between these two parts of laws.

[36] Infra note 33.

background doesn't have any help.[37] In the absence of this, it is for everyone to presume the possible public policy justifications. The following public policy justifications can be thought of behind the prohibition of arbitrability of the administrative contract:

1. The first justification lays in the very nature of the administrative contract. Unlike other contract in which there are only two private parties or government at individual capacity, in the administrative contract, the two parties are an individual party and a sovereign body i.e. the government or between two government or sovereign bodies. The government, as a body which stands for the benefit and on behalf of the people, has the obligation to do things in transparent and accountable manner. Furthermore, the public at large has the right to know what the government does. Apart from a few exceptions, court proceedings in principle take place in public. Any person interested in a given case has the right to attend the trial. However, the opposite works for arbitration. In arbitration, proceedings, in principle, take place in a closed session; that is, they are confidential.[38]The tribunal, the parties and their representatives are the only persons allowed to participate in the proceeding unless the parties and the tribunal agree otherwise. A witness may be required to give evidence to the tribunal but that testimony is only heard by those persons allowed to be present. The public has no right to attend a hearing before an arbitral tribunal.[39]In other words, in arbitration, the public at large is not allowed to attend the proceeding. Thus, the government's acts are not transparent and accountable which will be in contradiction with government's obligation to be transparent.[40] It also deprives the public at large of the right to know the deeds and misdeeds of the government.

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[37] Allan Redfen and Martin Hunters, Law and Practice of International Commercial Arbitration, Sweet and Maxwell, (1936) p.47.

[38] For instance Article 25 of the then Ethiopian Arbitration and Conciliation Center (EACC) stated that unless the parties agree otherwise or the law provides to the contrary, the hearing and ruling of the tribunal shall remain confidential. No one other than the arbitrators, the parties or their lawful representative and the required personnel of the center may be allowed to be present during the proceeding. In reality not only the proceeding but also the output is confidential. Please see Report of Arbitral Award, Vol .1(2008) introduction part.

[39] John Sutton, John Kendall and Judith Gill, *Russell on Arbitration*, 21thed, Sweet and Maxwell Limited, (1997), p. 5.

[40] Infra note 43 Article 12.

2. If the administrative contract is allowed to arbitration, then both substantive and procedural provisions of Civil Code and Civil Procedure Code will be applied. One of the provisions is Article 317(2) of the Civil Procedure Code, which states that unless the parties agree to have the dispute resolved on equity, awards are to be made on the basis of the law. Moreover, the parties may relieve the arbitrators from deciding according to the law. According to Zekarias Kenna, it is possible to agree to solve dispute through extra legal means; that is, justice and equity.[41] These, in turn, have two drastic effects. First, the prerogative power of administrative organs will be sold out by way of agreement. The agreement will exclude the application of relevant law, which in turn will compromise the public interest. Second, there will not be resort to Federal Supreme Court Cassation Bench since the power of Cassation is to rectify basic and fundamental error of law only. If, however, the parties exclude the application of relevant law and replace it with justice and equity, the Cassation will be excluded. That will in no doubt compromise public interest.[42]

3. If we allow government authorities to solve disputes of administrative contracts through arbitration, they will select an arbitrator. Unlike judges[43], for a person to be appointed as an arbitrator, there are no qualifications to be met.[44] Furthermore, unlike judges who are governed by various laws of the country, arbitrators, once they accept

[41] Rene David expresses his regret for codification commissioner not discussion with him on administrative contract provisions. The task of the commission was often facilitated by an *expusedesmotif* that I submitted the text of the preliminary draft. This procedure was not followed, however, for the title dealing with administrative contracts. The title Administrative Contracts was one of the last that I drafted for submission to the codification commission and was not accompanied by an *expuse des motif*. Rene David, Administrative contract in the Ethiopian civil code, *Journal of Ethiopian Law*, Vol 4, No. 1 (1967) p. 46.

[42] Interview with Associate professor Zekarias Kenna, Lecture, Department of Law, Addis Ababa University (18 October, 2016).

[43] Judges are expected to be honest, impartial, independent, and diligent in their work, for instance The Constitution of Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, *Federal Negarit Gazetta*, (1995), Article 79.

[44] Article 316(2) of Civil Procedure Code only prohibited judge from being an arbitrator. Other than this there is no restriction. Theoretically an illiterate person can be an arbitrator. However from partial point of view it is possible to uphold that arbitrators are very much qualified and man of integrity. From overview reading of report of arbitrational awards we find people like Professor Tilahun Teshome, Asso. Professor Zekarias Kenna, Tamiru Wendemagegn, Mekebe Tsegaw and others.

the appointment, they will conclude a contract called "*receptum arbitri"* with the disputing parties and they will be governed by this contract. This, in turn, greatly affects the public interest since the supervision in case of a privately appointed arbitrator may turn out to be less strict than that of a judge.

4. If there is a possibility of appeal,[45] from the decision of arbitrator, then there is no purpose other than adding one layer to the existing court structure. In the current judicial hierarchy, we have three tiers of court. Now, with the addition of arbitration, there will be fourth rung of court. That is time consuming which may hinder the speedy disposition of cases. Since public interest is involved, administrative contract disputes must be resolved as speedily as possible. Thus, an appeal from the decision of arbitration award will compromise public interest for the reason that it is a time consuming procedure.
5. It seems that there is a general consensus that proceedings of arbitration are less costly than normal court proceeding. However, the reality is that arbitration proceeding is more costly when seen in comparison with that of courts.[46]

An arbitrator's fee in general is expensive. This is for two reasons. First, they are generally experts in a certain area and consequently demand high amount of fees. Second, they are very few in number.[47] Nowadays, it is an open secret that an arbitrator's fee is much higher than an attorney's fee.

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[45] Article 350- 354 of the Civil Code. According to Robert Allen Sedler on the following three grounds it is possible to apple:

a. The award is inconsistence, uncertain or ambiguous on its face, wrong in law or fact
b. The arbitrator omitted to decide matter referred to him
c. Certain irregularities or improper conduct on the party of the arbitrator have occurred. Please see Allen Sadler Ethiopia Civil Procedure, Oxford University Press, (1968), p. 389.

[46] For instance for the case involves 200,000 Birr the arbitration fee according to the Addis Ababa Chamber of Commerce and Sectoral Association arbitration institution the revised arbitration rule it will be 20,000 Birr (15,000 Birr+15% of the amount above 100,000) for the same case the court fee according to Legal Notice No. 177/52, it will be 4,315 ((200,000-100,000)*1.5/100+3,315 Birr).

[47] For instance the numbers of arbitrators registered in Addis Ababa Chamber of Commerce and Sectoral Association is only 45 interviews with Ms. Mister Mohammed, Chief Registrar at Addis Ababa Chamber of Commerce and Sectoral Association(December 15,2017). However the number of attorney registered in Federal Attorney General is 4385 as of December 25, 2017 Interview with Mr. Birehanu Tadesse, Deputy General Attorney (December 25, 2017).

In addition to the above mention reasons, the Cassation was in default in citing and applying Article 1731 of the Civil Code. Article 1731 of the Civil Code stated that a valid contract is a law between and among contractual parties; that is, the principle of *pacta sunt servanda.* Let me directly cite Article 24 and Article 25 of the agreement with it equivalent translation to show the fallacious reasoning of Cassation:

አንቀጽ 24፦ አለመግባባቶች አፈታት፦

በአስሪና በስራ ተቋራጭ እንዲሁም አሰሪውን ወክሎ ባለው አማካሪ መካከል ስለሚነሱ አለመግባባቶች በተቻለ መጠን አርስ በአርስ በሚደረግ ውይይት ለመፍታት ሙከራ ይደረጋል። ነገር ግን በ30 ቀናት ውስጥ መፍትሄ ካልተገኘ አንደኛው ወገን ለሌላኛው ወገን እንዲመራለት ወይም በኢትዮጵያ ህግ መሰረት ለግልግል እንዲመራ ሊጠይቅ ይችላል።

Article 24- Dispute Resolutions:

Disputes between the contractor and the employer, including the consultant acting under the employer's authority, shall be resolved amicably by informal negotiations.

If no amiable solution can be found after 30 days from the commencement of negotiations, either party may require that the dispute be referred to a 3rd party for adjudication or arbitration in accordance with Ethiopian law.

አንቀጽ 25፦ **የሚዳኝበት ሕግ፦ ይህ ውል በኢትዮጵያ ሕገ መሠረት የሚታይ ይሆናል።**

Article 25- Arbitrable law: The contract shall be interpreted in accordance with Ethiopian law.

Therefore, as per Article 24 of the agreement, in case there is dispute, the party must negotiate to solve the dispute. Negotiation is the precondition for the case to be brought before arbitration. If and only if the negotiation fails, the parties will resort to arbitration. However, the *Zem Zem PLC* failed to solve the dispute by negotiation. Therefore, the Cassation should not allow arbitration even if as per the agreement the parties failed to resolve their dispute through negotiation.

As per Article 25 of the agreement, the applicable law to the contract in resolving the dispute is Ethiopian law. Therefore, pursuant to this provision, the parties bring the law into the terms and conditions of their contract. By doing so, the contractual parties are abided by the term and condition of the contract and provision of the law stipulated under various laws, one of which is Article 315(2) of the Civil Procedure Code. Thus, it is possible to say that the parties have agreed to apply Article 315(2) and make their contract, which is administrative, non-arbitrable.

From this, it should be clear that administrative contracts are not within the ambit of arbitration. Cassation has, however, ruled in contradiction to this, thereby subjecting administrative contracts to arbitration. In the words of

Tecle Hagos, "the Federal Supreme Court, through the Cassation decision, has stripped Article 315 (2) of the Civil Procedure Code of 1965 of its luster and hammered the last nail in its coffin and that hence forth any arbitral clause or submission in an administrative contract is enforceable."[48]

Concluding Remarks

The issue of arbitrablity of the administrative contract is one thorny legal issue. Despite its clear meaning and purpose of the law, the Cassation has been misinterpreted and opens Pandora's box which can be rectified by it only. In *Illubabor Zone Educational Department v. Zem Zem PLC*, Article 24 was not in line with what Ethiopian law provides; that is, Article 315 (2) of the Civil Procedure Code. If a contract does not observe the lawfulness requirement, it will be null and void. By virtue of theory of separability, what the Cassation should have done was to nullify Article 24 of the agreement and enforce the contract. However, the Cassation Division of the Federal Supreme Court approved the unlawful contract and legalized it and hence clearly deviated from the law and public policy behind it.

[48] A tribunal may derogate from strict application of the law if it is of the opinion that such a way of decision of the dispute would lead to just outcome. See Tilahun Teshome, The legal Regime Governing Arbitration in Ethiopia, A synopsis, *Ethiopian Bar Review*, Vol. 1, No. 2 (1999) p. 138.

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ቀን፡- 26/1/2010

ዳኞች፡- ብርሃኑ አመነው
በዕውቀት በላይ
እንደሻው አዳነ
ሃይሉ ነጋሽ
እትመት አሰፋ

አመልካቾች፡- 1. ሳራ ቻላቸው ቀርቧል
2. አለም አምባሉ
3. አባይነህ መለሰ
4. ዘውዱ ምርኳዝ
5. አብይ ደመላሽ

ተጠሪዎች፡- 1. ባህር ዳር ዩኒቨርሲቲ ነ.ፈ በላይነህ አዳነ
2. ትምህርት ሚኒስቴር ወኪል አበበ ወንድሙ

መዝገቡ የተቀጠረው ምርምሮ ፍርድ ለመስጠት ነው፡፡ በመሆኑም ምርምረን የሚከተለውን ፍርድ ሰጥተናል፡፡

ፍርድ

ይህ የሰበር አቤቱታ ሊቀርብ የቻለው አመልካቾች የባህር ዳርና አከባቢዋ ከፍተኛ ፍርድ ቤት በመ/ቁ 01268 ታህሳስ 4 ቀን 2008 ዓ.ም የሰጠውን ፍርድ የአ.ብ.ክ.መ ጠቅላይ ፍርድ ቤት በመ/ቁ 42384 በ19/07/2008 ዓ.ም በማጽናቱ መሰረታዊ የህግ ስህተት የተፈፀመ በመሆኑ በሰበር ታይቶ ይታረምልን በማለታቸው ነው፡፡

ጉዳዩ የትምህርት ማስረጃ የመስጠት ግዴታን የሚመለከት ነው፡፡ በስር ፍርድ ቤት አመልካቾች ከሳሽ ሲሆኑ 1ኛ ተጠሪ ተከሳሽ እና 2ኛ ተጠሪ ጣልቃ ገብ በመሆን ተከራክረዋል፡፡

የክሱ ይዘት በ1ኛ ተጠሪ የህግ ትምህርት ቤት ከ2000-2006 ዓ.ም ለ6 ዓመት በዲግሪ ደረጃ ትምህርታችንን ስንከታተል ቆይተን ካጠናቀቅን በኋላ ከደንብና መመሪያ ውጭ በግለሰብ መመሪያ የተማርንበትን ማስረጃ የከለከለን በመሆኑ እንዲሰጠን ይወሰንልን የሚል ነው፡፡ 1ኛ ተጠሪም ጉዳዩ በፍርድ ቤት ሊታይ አይገባም፣ አመልካቾች በዩኒቨርሲቲ ትምህርታቸውን የተከታተሉ ቢሆንም የመውጫ ፈተና አማካይ ውጤታቸው የትምህርት ሚኒስቴር ካወጣው በታች ስለሆነ ሚኒስቴሩ ካስተላለፈው መመሪያ መሰረት በመከልከሉ ነው ያልተሰጣቸው፡፡ ይህ መመሪያ በሀገር አቀፍ ደረጃ እየተተገበረ በመሆኑ ተጠያቂነት የለብንም ትምህርት ሚኒስቴር ጣልቃ ገብቶ ይከራከርልን ብለዋል፡፡ 2ኛ ተጠሪም የዩኒቨርሲቲው ቦርድ የመጨረሻ ውሳኔ አልሰጠም፣ ለፍ/ቤት የሚቀርብ አይደለም፡ ዩኒቨርሲቲዎች ለትምህርት ሚኒስቴር ተጠሪ በመሆናቸው መመሪያ መስተላለፋችን

ተገቢ ነው፡ የመውጫ ፈተና የሥርዓት ትምህርቱ አንዱ አካል በመሆኑ ይህን ሳያሟሉ ትምህርታቸውን እንዳጠናቀቁ ስለማይቆጠር አቤቱታቸው ተቀባይነት የለውም ተከሳሽ ራሱን የቻለ ተቋም በመሆኑ ጣልቃ ገብ አይመለከተንም ብለዋል፡፡

ፍርድ ቤቱ የቀረበውን የመጀመሪያ ደረጃ መቃወሚያ ውድቅ አድርጎ ክሱን ሰምቶ ማስረጃዎችን ከመረመረ በኋላ 2ኛ ተጠሪ የአስፈፃሚ አካላትን ስልጣንና ተግባር ለመወሰን በወጣው አዋጅ ቁጥር 691/2003 አንቀጽ 28/2 /ሀ/ /ለ/ እና አምስት ሀገራዊ የብቃት ማዕቀፍ አጣቃላይ የሥርዓተ ትምህርቱን መሰረት ያደረገ ፈተና የማዘጋጀት ኃላፊነት ያለበትና አዋጅ ቁ 650/02 አንቀጽ 97 ደንብና መመሪያ የመውጣት ሥልጣን ያለው በመሆኑ በዚሁ መሠረት የህግ ተማሪዎች ከሚወስዱት የትምህርት ዓይነት በተጨማሪ የመውጫ ፈተና መፈተንና በቂ ውጤት ማምጣት ያለባቸው ስለመሆኑ መመሪያ ማስተላለፉ ተገቢ ነው፡፡ አመልካቾች እየተማርን የወጣ ነው ያሉትም ተቀባይነት የለውም፡፡ በቂ ውጤት ባያመጡም ማስረጃ ማግኘትን አይከለክለንም ያሉትም የመውጫ ፈተና በሥርዓተ ትምህርት ውስጥ የተካተተ በመሆኑ ግዴታቸው ሳይወጡ ማስረጃ መጠየቅ ህጋዊ መሰረት የለውም መመሪያው በረቂቅ ደረጃ ያለና በሚ/ር ዴኤታ የተፈረመ ህጋዊ ነው ያሉትን በተመለከተ በመላው ሀገሪቱ ተግባራዊ የሆነ በመሆኑና ሚ/ር ዴኤታ መፈረሙ ህጋዊ ነው ረቂቅ ሊባል አይችልም በማለት 2ኛ ተጠሪ በሰጠው መመሪያ መሠረት አመልካቾች በቂ የማለፊያ ነጥብ እስካላሟሉ ድረስ 1ኛ ተጠሪ ማስረጃ አልሰጥም ማለቱ ተገቢ ነው በማለት የአመለካቾችን አቤቱታ ውድቅ አድርጎታል፡፡

አመልካቾች በዚህ ውሳኔ ቅር በመሰኘት ያቀረቡትን ይግባኝ የአ.ብ.ክ.መ ጠቅላይ ፍርድ ቤት በአብላጫ ድምጽ ሳይቀበለው ቀርቷል፡፡ የአመልካች የሰበር አቤቱታ የቀረበውን ይህን ለማስለወጥ ሲሆን ይዘቱም የትምህርት ሚኒስቴር የፃፈው ደብዳቤ በህግ ያልተደገፈ ሥልጣን ባለው አካል ያልተፃፈ የስብሰባ ቃለ-ጉባኤ፣ ተራ ደብዳቤ እንደመመሪያ በመውሰድ የተሰጠው ውሳኔ የህግ መሠረት የለውም፣ 2ኛ ተጠሪ የተለያየ መልስ መስጠቱ በዝምታ ታልፏል፡፡ ማስረጃ እንዳይሰጥ የሚከላከል ግልጽ ህግ ሳይኖር ትምህርት ማስረጃ መከልከሉ ተገቢ አይደለም፡፡ የመማርና ማስረጃ ማግኘት መብታችንን የጣሰ በመሆኑ መሠረታዊ የህግ ስህተት የተፈፀመበት በመሆኑ ይታረምልኝ የሚል ነው፡፡

የአመልካቾች አቤቱታ ተመርምሮ አመልካቾች የዩኒቨርሲቲ ትምህርታቸውን አጠናቅቀው የመውጫ ፈተና ባለማለፋቸው ምክንያት ትምህርት ማስረጃቸው እንዳይሠጣቸው ግልፅ መመሪያ/አዋጅ በሌለበት የተፃፈ ደብዳቤ አለ በማለት ብቻ መከልከሉን ለመመርመር ተጠሪዎች መልስ እንዲሰጡ ታዞ 1ኛ ተጠሪ በሰጠው መልስ በአዋጅ ቁጥር 650/2001 አንቀጽ 19/2/ በተሰጠው የተቋሙን የአካዳሚክ ፕሮግራሞች ሥርዓተ ትምህርት የመወሰን ሥልጣን መሠረት የመውጫ ፈተና 8 ክሬዲት ሀወር እንዲይዝ ተደርጓል፣ በትምህርት ውስጥም ተካቷል ስለዚህ ይህንን ያላሟላ ተማሪ ዝቅተኛውን መመዘኛ ያላሟላ በመሆኑ ዲግሪ አይሰጠውም፣ አመልካቾች የመውጫ ፈተና ወስደው የሚጠበቅባቸውን ዝቅተኛ ውጤት አላመጡም ስለዚህ ሊሠጣቸው አይችልም፣ ሚኒስቴር ዴኤታ ደብዳቤ መፃፉ ሚኒስተሩን ተክቶ የሚሰራ በመሆኑ መመሪያ አድረጎ መውሰዱ ስህተት የለውም፤ በመመሪያው መሠረት ተጠሪ የትምህርት ካሪኩለም ቀርፆ በሴኔት ሌጀስትሌሽን ፀድቆ በ8 ክሬዲት ሀወር እየተሰጠ ነው አመልካቾች ይህንን አላሟሉም፡፡ ስለሆነም የስር ፍ/ቤት ውሳኔ ይፀናልን ብሏል፡፡ 2ኛ ተጠሪም በሰጠው መልሱ 2ኛ ተጠሪ

በአዋጅ ቁጥር 916/2008 አንቀጽ 32 መሠረት የትምህርት ስራን በበላይነት እንዲመራ ሲቋቋም ሀገራዊ የብቃት ማዕቀፍ እና የትምህርት ጥራት የሚጠበቅበትን ስታንዳርድ በማዘጋጀት በሥራ ላይ እነዲውሉ አድርጓል፡፡ ስለሆነም የተፃፈው ደብዳቤ ህገ-ወጥ ሊባል አይችልም፡፡ የመውጫ ፈተና የስርዓተ-ትምህርት አካል ሆኖ ስምምነት ላይ ተድሷል በዚሁ በአዋጅ 650/2007 አንቀጽ 49/2/ በዩኒቨርሲቲዎች በህግ በተሰጠው ስልጣን 8 ክሬዲት ሀወር እንዲኖረው ተደርጓል፡፡ ይኸው በሀገር አቀፍ ደረጃ እንዲሰራ በህግ በተሰጠው ስልጣን ሚ/ር ዴኤታው ደብዳቤ ተፃፈ፡፡ ይህም ለተጠሪ በተሰጠው ስልጣን መሠረት የትምህርት ጥራትን ለማረጋገጥ የተፈፀመ ነው፡፡ አመልካቾች የዲግሪ ሠርተፊኬት ያልተሰጣቸው ተጠሪ ከልክሎ ሳይሆን እንደማነኛውም የሕግ ተማሪ የተሰጠውን ፈተና ባለማለፋቸው ነው ስለሆነም የስር ፍ/ቤት ውሳኔ ይፅናልኝ ብሏል፡፡ አመልካቾች የመልስ መለስ አቅርበዋል፡፡

የጉዳዩ አመጣጥ በሰበር የቀረበው የጹሁፍ ክርክር ከላይ የተገለፀው ሲሆን እኛም ጉዳዩን ለሰበር አቤቱታ መነሻ ከሆነው ውሳኔ እና አግባብነት ካላቸው ድንጋጌዎች ጋር ጉዳዩ ለሰበር ሲቀርብ ከተያዘው ጭብጥ አንፃር በሚከተለው መልኩ መርምረነዋል፡፡

ከክርክሩ ሂደት መገንዘብ የሚቻለው አመልካቾች በባሕር ዳር ዩኒቨርሲቲ የህግ ትምህርት ክፍል ከ2000-2006 ዓ.ም የሚሰጠውን ትምህርት የተከታተሉና የመውጫ ፈተና ወስደው ከ35% በታች ያመጡ መሆኑ አላከራከረም፡፡ አመልካቾች ትምህርታቸውን ያጠናቀቁ በመሆኑ ከደንብና መመሪያ ውጭ ማስረጃዎችን ተከልክለናል ይሰጠን 2ኛ ተጠሪ ለ1ኛ ተጠሪ አስተላለፈ የተባለው መመሪያ ቢሆንም በህግ ተቀባይነት ያለው አይደለም የሚል ነው፡፡

በእርግጥ በወቅቱ ሥራ ላይ የነበረው የፌደራል አስፈፃሚ አካላትን ሥልጣንና ተግባር ለመወሰን የወጣው አዋጅ ቁጥር 691/2003 አንቀጽ 28 መሠረት 2ኛ ተጠሪ የትምህርት ሥራን በበላይነት የሚመራና ሀገራዊ የትምህርት ስታንዳርድ፣ ሀገራዊ የብቃት ማዕቀፍ አጠቃላይ የሥርዓተ ትምህርት ሥልጣንና ፖሊሲ እና ሥርዓተ ትምህርትን መሠረት ያደረጉ ሀገር አቀፍ ፈተናዎችን አሠራሮችን የማዘጋጀት በየደረጃው የትምህርት ሥራን እንዲሠሩ በህግ ለተቋቋሙ ተቋማት የማስተላለፍና በሥራ ላይ መዋሉን የማረጋገጥ ኃላፊነት አለበት፡፡ በከፍተኛ ትምህርት አዋጅ ቁጥር 650/2001 አንቀጽ 97 መሰረት ደግሞ 2ኛ ተጠሪን ያቋቋመው የሚኒስትሮች ምክር ቤት ደንብ ቁጥር 234/203 አንቀጽ 2/2/ 1ኛ ተጠሪነቱ 2ኛ ተጠሪ መሆኑ ያስገነዝባል፡፡ በዚህ መሠረት 2ኛ ተጠሪ በሚ/ር ዴኤታ አማካኝነት የከፍተኛ ትምህርት ተቋማትን የመውጫ ፈተና መቁረጫ ነጥብ አስመልክቶ በሀገር አቀፍ ደረጃ ወጥ በሆነ መልኩ እንዲሠራበት የማድረግ ኃላፊነት ያለበት በመሆኑ ለሁሉም ዩኒቨርሲቲዎች በደብዳቤ እንዲያውቁ እንዲፈፅሙት ተላልፏል፡፡ ዩኒቨርሲቲውም በከፍተኛ ትምህርት አዋጅ 650/2001 አንቀጽ 49/2/ በተሠጠው ኃላፊነት 35% በኋላ 8 ክሬዲት ሀወር እንዲኖረው ተደርጎ በሥርዓተ ትምህርት ውስጥ እንዲካተት አድርገዋል፡፡

በያዝነው ጉዳይ አመልካቾች በዩኒቨርሲቲው በነበሩበት ጊዜ በህግ ትምህርት ክፍል የተሠጡትን የትምህርት ዓይነቶች መውሰዳቸው ማጠናቀቃቸው እንጂ ይህንን በዩኒቨርሲቲው የሚሰጠውንና የወሰዱትን የመውጫ ፈተና ተገቢውን ውጤት

በማምጣት ማለፋቸው አልተከራከረም፡፡ ይህ ከሆነም ደግሞ በዩኒቨርሲቲም የሚሰጠውን ትምህርት አጠናቀዋል ሊያስብል የሚያስችል አይደለም፡፡

በሌላ በኩልም ከትምህርት ሚኒስቴር ለሁሉም ዩኒቨርሲቲዎች የተላለፈውን ደብዳቤ ከላይ እንደተመለከተው 2ኛ ተጠሪ ባለው ስልጣን መሠረት የተፃፈና ዩኒቨርሲቲውም ተቀብሎ ተግባራዊ ያደረገው በመሆኑ ምንም የሚከላከል ህግ በሌለበት የሚባል ሆኖ አልተገኘም፡፡

በአጠቃላይ የስር ፍርድ ቤቶች የሠጡት ውሳኔ መሠረታዊ የሕግ ስህተት የጠፈፀመበት ባለመሆኑ ተከታዩን ውሳኔ ሠጥተናል፡፡

1/ የባህርዳርና አከባቢዋ ከፍተኛ ፍ/ቤት በ/ቁ 01268 ታህሳስ 04 ቀን 2008 እና የአ.ብ.ክ.መ ጠቅላይ ፍርድ ቤት በመ/ቁ 42384 በቀን 19/07/2008 ዓ.ም የሰጡት ፍርድ በፍ/ሥ/ሥ/ሕ/ቁ 348/1/ መሠረት ፀንቷል፡፡

2/ አመልካችና ተጠሪ በዚህ ችሎት ያወጡትን ወጪና ኪሳራ ይቻቻሉ፡፡

መዝገቡ ተዘግቷል፡፡

የማይነበብ የአምስት ዳኞች ፊርማ አለበት

የሰ.መ.ቁ. 40215
ታህሣሥ 14 ቀን 2007 ዓ.ም.

ዳኞች፦ ፀጋዬ ወርቅአየሁ
ኃ/ማርያም ሞገሥ
አብዬ ካሣሁን
ተስፋዬ ዓለማየሁ
በሪሁን አዱኛ

አመልካች ..... በረከት እንደሻው ህንፃ ሥራ ተቋራጭ ኃላ/የተ/የግ/ማኅ

ተጠሪ ..... አሁን ደሳለኝ
ይበልጣል ቢሻው
ጌታቸው ተረፈ
ማስተዋል ብርሃኑ
ሀይማኖት ደምሴ
ሀይማኖት ደጀኔ
ሶስና ብርሃኑ
ትግስት አየነው
አንዳች ሲሳይ
ትግስት አየነው
ትግስት ጌትነት
ሁሉአገርሽ ታከለ
በላይነሽ ስንቴ
ይርበብ ውበቴ
መሠረት ሙሉየ
ፈንታየ ማሩ
ስንቴ ፍቃዱ
መሠረት ባዜ
ሰላም አድማሱ
ሁሉአገርሽ ቸኮል

መዝገቡ የተቀጠረው ለምርመራ ነበር፤ በዚሁ መሠረት መዝገቡን መርምረን የሚከተለውን ፍርድ ሰጥተናል፡፡

ፍርድ

ለሰበር አቤቱታው መነሻ የሆነው ጉዳይ የተነሳው በባህር-ዳር ከተማ ወረዳ ፍርድ ቤት ሲሆን ተጠሪዎች መጋቢት 04 ቀን 2006 ዓ.ም በተሃፈ አቤቱታ በአመልካች ድርጅት ውስጥ በተለያየ ሙያ እና የደመወዝ መጠን ተቀጥረን በለሳኝነት፣ በአናጺነት፣ በጠራቢነት ሙያ ተቀጥረን በመሥራት ላይ እንገኛለን፡፡ ይሁንና የአመልካች ድርጅት ለህዝብ በዓላት እና ለሳምንት የዕረፍት ቀናት ክፍያ ፈጽሞልን

የማያውቅ በመሆኑ ይህ ክስ ከመቅረቡ ከስድስት ወራት በፊት ያለውን የዕረፍት ቀናት እና የበዓል ቀናት ክፍያ ታስቦ እንዲከፍል ይወሰንልን በማለት ጠይቀዋል፡፡

ተጠሪ ለቀረበበት ክስ በሰጠው መልስ አቤቱታቸው የወል የሥራ ክርክር በመሆኑ ጉዳዩን ለማየት ፍርድ ቤቱ ሥልጣን የለውም፤ የሣምንት እና የበዓላት ቀን ክፍያ ሊከፈል የሚገባውም የወር ተከፋይ ለሆነ እንጂ በየአሥራ አምስት ቀኑ ክፍያ ለሚፈጸምለት ሠራተኛ አይደለም፡፡ ስለሆነም ለበዓላት እና ለሣምንት ዕረፍት ክፍያ የምንፈጽምበት ምክንያት የለም በማለት ተከራክሯል፡፡

ፍርድ ቤቱም የግራ ቀኙን ክርክር እና ማስረጃ ከመረመረ በኋላ የሳምንት ዕረፍት ቀናት እና የበዓላት ቀናት ክፍያ ሊፈጸምባቸው የሚገቡ ስለመሆኑ በህገ-መንግሥቱም ሆነ በአሠሪና ሠራተኛ ህጉ የተደነገገ በመሆኑ አመልካች ያቀረበው ክርክር ተቀባይነት የለውም በማለት በክስ የተጠየቀውን ክፍያ ሊፈጽም ይገባል በማለት ወስኗል፡፡

አመልች በውሳኔው ቅር ተሰኝቶ ለምዕራብ ጎጃም መስተዳድር ዞን ከፍተኛ ፍርድ ቤት ቅሬታውን ያቀረበ ቢሆንም ፍርድ ቤቱ አቤቱታው ሳይቀበለው ቀርቷል፡፡

ይህ ሰበር አቤቱታ የቀረበው ይህን ውሳኔ በመቃወም ሲሆን አመልካች ተጠሪዎች የወር ተከፋይ ሳይሆኑ ለሣምንት የዕረፍት ቀናት እና ለህዝብ የበዓል ቀናት ክፍያ እንድንፈጽምላቸው መወሰኑ ስህተት ስለሆነ ሥር ፍርዱ ይሻርልን በማለት ጠይቀዋል፡፡

ተጠሪዎች በበኩላቸው የሥር ፍርዱ መሠረታዊ የህግ ሥህተት ያልተፈጸመበት ስለሆነ ቅሬታው ተቀባይነት ሊኖረው አይገባም በማለት ተከራክረዋል፡፡ ክርክሩም በዚሁ ተጠናቋል፡፡

እኛም መዝገቡን መርምረናል፡፡ እንደመረመርነውም በጉዳዩ ላይ ውሳ የሚሻው ነጥብ ለሣምንት እነወ ለቀን ተከፋይ ሠራተኞች የሣምንት የዕረፍት ቀናት ክፍያ እና የበዓል ቀናት ክፍያ ሊከፈላቸው ይገባል ወይስ አይገባም የሚለው በመሆኑ እንደሚከተለው በየተራ እንመለከታቸዋልን፡፡

በቅድሚያ ተጠሪዎች የሣምንት የዕረፍት ቀናት ክፍያ መመልከት ያስፈልጋል፡፡ በህገ-መንግሥቱ አንቀጽ 40 (2) ላይ እንደተገለጸው ሠራተኞች ከክፍያ ጋር የዕረፍት ቀን እንደሚያስፈልጋቸው ተገልጿል፡፡ ይህን ዕውን ለማድረግም ማንኛውም ሠራተኛ በአሠሪና ሠራተኛ ህጉ በአንቀጽ 61 ላይ ከቀን 8 ሰዓት፣ በሣምንት ከ48 ሰዓት ሣይበልጥ መሥራት እንዳለበት ሲደነግግ በአንቀጽ 69 ላይ ማንኛውም ሠራተኛ በሰባት ቀናት ውስጥ ያልተቋረጠ ከ24 ሰዓት የማያንስ ዕረፍት ጊዜ እንደሚያስፈልገው ተገልጿል፡፡ በልዩ ሁኔታ ካልተወሰነ በቀር የሣምንቱ የመጨረሻው ዕሁድ ቀን የሣምንቱ የዕረፍት ቀን እንደሚሆን አንቀጽ 69 (2) ላይ ተገልጿል፡፡ በህገ-መንግሥቱም ሆነ በአሠሪና ሠራተኛ ህጉ ላይ እንዲህ ያለ ድንጋጌ የተቀመጠው ሠራተኛው ህይወቱን ተገቢ በሆነ መንገድ እንዲመራ (decent life እንዲመራ ለማድረግ) ለማስቻል ነው፡፡ ለሠራተኛው ጥበቃ በማድረግ ዓላማ ላይ የተመሠረተ ስለሆነ ነው ማለት ነው፡፡ ከዚህ ስንነሳ ሠራተኛው የሣምንት የዕረፍት ቀናትን ያለክፍያ እንዲያሳልፍ ማድረግ ህጉ ሠራተኞች ህይወታቸውን ተገቢ በሆነ መንገድ እንዲመሩ ለማስቻል ህጉ የቆመለትን

መሠረታዊ ዓላማ የሚያስት ይሆናል፡፡ ጥበቃው ተደርጓል ማለት የሚቻለው የሣምንት የዕረፍት ቀኑ ከክፍያ ጋር ሲሆን ብቻ ነው፡፡

ስለሆነም የሣምንት የዕረፍት ቀናት ከክፍያ ጋር መሆን እንዳለበት መታሰብ አለበት፡፡ ከሁሉም በላይ ደግሞ በሶሺዮ ኢኮኖሚክ ኮቬናንት በአንቀጽ 7 ላይ የዕረፍት ቀናት ከክፍያ ጋር መሆን እንዳለባቸው የተደነገገ እና ኢትዮጵያም የዚህ ኮቬናንት ፈራሚ አገር በመሆኗ በስምምነቱ ተገዳጅ ነች፡፡ ስለሆነም የሣምንት ቀናት ከክፍያ ጋር የመሆኑ ነገር አከራካሪ ባለመሆኑ አመልካቾች ለሣምንት የዕረፍት ቀናት ያልተከፈላቸውን ደመወዝ ተጠሪ ሊከፍላቸው የሚገባ ሆኖ አግኝተነዋል፡፡ በዚህ ረገድ የሥር ፍርድ ቤት ሥህተት ፈጽሟል ማለት አይቻልም፡፡

ወደበዓል ቀናት ክፍያዎች ስናልፍ በአዋጁ አንቀጽ 74 የወር ደመወዝ ተከፋይ የሆነ ሰው በበዓል ቀን ባለመሥራቱ የሚያገኘው ደመወዝ የማይቀነስበት መሆኑ ሲገልጽ ከዚህ ውጪ (ከወር ተከፋዮች ውጪ) ክፍያ የሚፈጸምላቸው ሠራተኞች በተመለከተ ግን ክፍያው በህብረት ስምምነት እንደሚወሰን ይገልጻል፡፡ ምን ማለት ነው? በህብረት ስምምነት ካልተወሰነ በቀር አይከፈላቸውም ማለት ነው ወይስ ሌላ ትርጉም አለው የሚለውን በጥሞና ማየት ይጠይቃል፡፡ ከህገ-መንግስቱ ድንጋጌዎች ስንነሳ በአንቀጽ 42 (2) ላይ "... **ከክፍያ ጋር የሚሰጡ** የዕረፍት ቀኖች፣ **ደመመዝ የሚከፈልባቸው** የህዝብ በዓላት...." የሚሉት ቃሎች የሚሳዩት የዕረፍት ቀኖችም ሆነ የበዓል ቀኖች **ክፍያ/ደመወዝ** የሚፈጸምባቸው መሆኑን ያመለክታል፡፡ ይህን መሠረታዊ ነገር በመያዝም የኢ.ሠ.ህ.አ.ቁ. 377/96 አንቀጽ 73 የህዝብ በዓላት ቀኖች ክፍያ የሚፈጸምባቸው መሆኑን ያጸናል፡፡ በአንቀጽ 74 ደግሞ የወር ተከፋይ የሆኑ ሠራተኞች የቀን ደመወዛቸው ምን ያህል እንደሚሆን የሚታወቅ/የሚያከራክር ባለመሆኑ ሠራተኛው በዚህ የህዝብ በዓል ቀን ባይሠራም ደመወዙ (በቀን ሊያገኝ የሚችለው) አይቀነስበትም በማለት ይደነግጋል፡፡ በአንቀጽ 74 (2) ላይ ከወር ተከፋዮች ውጪ የቀን ተከፋዮችን በተመለከተ ግን የቀን ደመወዛቸው እንደሥራው ጠባይ በሚሰሩበት የሥራ ሰዓት የሚወሰን በመሆኑ መጠኑ ሊለያይ የሚችል በመሆኑ ሠራተኞች በበዓል ቀን ምን ያህል ክፍያ ሊፈጸምላቸው እንደሚገባ ለማወቅ ያስቸግራል፡፡ በዚህ የተነሳም አሠሪውና ሠራተኛው በህብረት ስምምነት **የክፍያውን መጠን** እንዲወስኑ ክፍት አድርጎታል፡፡ ይህ ማለት ለሥራ ውል እና ለህብረት ስምምነት የተተወው የክፍያውን መጠን ብቻ ነው፡፡ እንጂ በህብረት ስምምነት ወይም በሥራ ውል ካልተወሰነ በቀር ከወር ተከፋዮች ውጪ ያሉ ሠራተኞች የበዓል ቀን ክፍያ አይፈጸምላቸውም ማለት አይደለም፡፡ በድንጋጌው ላይ በህብረት ስምምነት ይወሰናል ከሚለው ሃረግ ተነስቶ ሠራተኛው በሥራ ውል ወይም በኅብረት ስምምነት እንዲወሰን ለማድረግ ከአሠሪው ጋር እንዲደራደርበት የሚደረገው ከመነሻው የሌለውን፣ ያልተጠበቀለትን የክፍያ መብት እንዲያገኝ ለማስቻል ነው ብሎ ከተባፊው ነገር ተነስቶ ያልተባፊውን በማንበብ የሚገኘውን የአተረጓጎም ስልት (acontrario reading) በመቀበል ልንገኝ የምንችለውን ትርጉም በከፍተኛ ጥንቃቄ ልናየው የሚገባ ነው፡፡ አመክኗዊ (logical) የሚመስሉ ነገሮች ሁሉ ትክክለኛ መደምደሚያ ላይ ያደርሳሉ ብሎ ለመደምደም አይቻልም፡፡ በዚህ የተነሳ እንደህ ያለውን አተረጓጎም በከፍተኛ ጥንቃቄ ልንፈጽመው የሚገባ እንጂ እንደዘወትር የአተረጓጎም ስልት የምንጠቀምበት ነው ማለት አይቻልም፡፡ ያልተፈለገ/ምክንያታዊ የሆነ ውጤት ላይ ሊያደርሱን ስለሚችሉ ማለት ነው፡፡ በተያዘው ጉዳይ እንዲህ ያለውን አተረጓጎም መቀበል

በመጀመሪያ ደረጃ የክፍያውን አፈፃፀም መሠረት በማድረግ ብቻ የወር ተከፋይ በሆኑን እና የወር ተከፋይ ባልሆኑት መካከል ምክንያታዊ ያልሆነ ልዩነት በመፍጠር የወር ተከፋይ ያልሆኑት ለበዓል ቀን ክፍያ እንደማይፈ*ም*ላቸው በማድረግ ከወር ተከፋዮች ጋር በዕኩልነት የመታየት ህገ-መንግሥታዊ መብታቸውን የሚጥስ ይሆናል። በሁለተኛ ደረጃ በሣምንት የዕረፍት ቀናት እና በህዝብ የበዓል ቀናት ክፍያ እንዲፈጸምላቸው በህጉ ላይ የተቀመጠበት ዋና ምክንያት ሠራተኛው ህይወቱን ተገቢ በሆነው መንገድ (decent life) እንዲመራ ለማስቻል ነው። መሠረታዊ ዓላማው ይህ ከሆነ ምክንያቱ ለወር ተከፋዩ ብቻ ሳይሆን በተመሳሳይ ሁኔታ ለቀን ተከፋዩም ተፈፃሚ የማይሆንበት ምክንያት የለም። ይህ ብቻም አይደለም። በሶሺዮ ኢኮኖሚክ ኮቬናንት በአንቀጽ 7 ላይ ሠራተኞች በበዓል ቀናትን ክፍያ የማግኘት መብት እንዳላቸው የተደነገገ እና ኢትዮጵያም የዚህ ኮቬናንት ፈራሚ አገር በመሆኗ በስምምነቱ ተገዳጅ ነች። ስለሆነም ህገ-መንግሥቱን፣ የአሠሪና ሠራተኛ ህጉን እና ኮቬናንቱን በማገናዘብ አስተሳስረን ስንመለከተው ህግ አውጪው ከዚህ ስሜት በመራቅ የወር ተከፋይ ያልሆኑ ሠራተኞች በስራ ውላቸው ወይም በህብረት ስምምነት ክፍያ እንዲፈጸምላቸው የሚፈቅድ ድንጋጌ ከሌለ በቀር ለበዓል ቀን ክፍያ አይፈጸምላቸውም ብሎ አቀዋም እንደወሰደ ማሰብ አይቻልም። እንዲያውም ድንጋጌው ብዙ ጊዜ ከሠራተኞቻቸው ጋር በድርድር የጎበረት ስምምነት ለመፈጸም የማይፈልጉ አሠሪዎችን የህብረት ስምምነት እንዲኖራቸው የሚያተጋ መሣሪያ ተድርጎ የሚወሰድ ነው። ከዚህ ያለፈ ትርጉም ሊሰጠው አይችልም። ስለሆነም የወር ተከፋይ ያልሆኑ ሠራተኞች ከአሠሪያቸው ጋር በሥራ ውል ወይም በህብረት ስምምነት የሚወስኑት ከፍ ሲል በተጠቀሱት ምክንያቶች የክፍያውን መጠን ብቻ ነው። በህብረት ስምምነት ወይም በሥራ ውል የተወሰነ የክፍያ መጠን ከሌለ ግን ማንኛውንም ሠራተኛ በቀን ስምንት ሰዓት እንደሚሰራ ታስቦ በመርህ ደረጃ የተጠበቀለትን ክፍያ የማግኘት መብት ተግባራዊ ሊሆንለት ይገባል። ስለሆነም የሥር ፍርድ ቤት ተጠሪዎች ለበዓል ቀናት ክፍያ ይገባቸዋል በማለት የሰጠው ፍርድ የሚነቀፍበት ምክንያት አላገኘንም። ስለሆነም የሚከተለውን ውሳኔ ሰጥተናል።

ውሳኔ

አመልካቾች ለሳምንት የዕረፍት እና ለበዓል ቀናትን ክፍያ ሊፈጸምላው ይገባል በማለት የሰጠው ፍርድ መሠረታዊ የሆነ ህግ ስህተት ያልተፈጸመበት ስለሆነ አጽንተነዋል።

ኪሣራና ወጪ ይቻቻሉ።

ትዕዛዝ

የባህር-ዳር ከተማ ወረዳ ፍርድ ቤት ውሳኔው የጸና መሆኑን አውቆ በጸናው ውሳኔ መሠረት እንዲያስፈጽም ታዟል። ግልባጩ ይተላለፍለት። ይጸፍ።

የተሰጠ ዕግድ ካለ ተነስቷል። ይፃፍ።

መዝገቡ ተዘግቷል። ወደመዝገብ ቤት ይመለስ።