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MESSAGE FROM THE EDITORIAL COMMITTEE

The Editorial Committee is delighted to bring Volume 7, No. 1 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 of Land Expropriation in the Federation of Ethiopia: The Approach, Manner, Source and Implications

*Brightman Gebremichael Ganta**

Abstract

Although the power of land expropriation is arguably an inherent power (I claim it is a constitutional power) of a state in any jurisdiction, the approach, the manner and the source of it varies among nations and is also a point of academic and policy debate. Particularly, in federations, as is the case in Ethiopia, apart from its implication for land tenure security of landholders, it can be also a source of power conflict/competition between the central and state governments. However, the implication of the approach, the manner, and the source of land expropriation power adopted in the Ethiopian land law regime over the land tenure security and central-state governments power conflict/competition have not been examined critically. Therefore, this study aims at setting the agenda for academic discourse and legal reform about the approach, the manner and the source of defining the power of land expropriation with the view to enhancing land tenure security and avoiding the potential power conflict/competition between the central and regional governments in the country.

Keywords: Power of land expropriation, Land tenure security, Power conflict/competition, Federation

Introduction

In developing countries like Ethiopia which incorporate the realization of sustainable development as a policy and legal agenda,[1] the government's need of land is critical to make available public facilities and infrastructure that ensure safety and security, health and welfare, social and economic enhancement, and the protection and restoration of the natural environment.

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[1] Constitution of Federal Democratic Republic of Ethiopia, *Proclamation No.1/1995*, Fed. Neg. Gaz. 1st year No.1, (hereinafter FDRE Constitution), Art.43 and 89.

To discharge this duty, the required land may not be in the hands of the government or on the market. Thus, in order to obtain land where and when it is needed, the government resorts to the power of expropriation. The power of expropriation is the right of a nation or state, or a body to whom the power has been lawfully delegated, to condemn private property for public use and to appropriate the ownership and possession of that property without the owner's or occupant's consent upon paying the owner due compensation to be ascertained according to the law.[2] It is arguably the inherent right or power of the state which can be exercised by the state itself or its delegates.

The land expropriation aspect of land tenure system is marred by two contradictions or competing interests. On the one hand, it is aimed at the betterment of the society at large through enhancing social and economic development and protecting the natural environment.[3] On the other hand, for those individuals or groups whose land is expropriated, it means displacement of families from their homes, peasants from their fields, pastoralists from their grazing lands and businesses from their neighbourhoods.[4] In addition, peculiar to federations, it can be a potential source of power conflict/competition between the central and federating state governments, and the development of double-standard[5] unless quick and clear apportionment of the power of land expropriation is done. Consequently, the tensions inherent in land expropriation require a balance

[2] See Henry Campbell Black, 1999, *Black's Law Dictionary*, 7th ed. West Publishing Co., St. Paul, MN *s.v.* 'expropriation' and 'eminent domain', and C. Francis, and et al, *Eminent Domain,* Corpus Juris Secundum, 29 A CJS EMINENT DOMAIN NO.2 as cited in Daniel Woldegebriel, *Compensation During Expropriation*, in Muradu Abdo (ed.), 2009, Land Law and Policy in Ethiopia since 1991: Continuities and Changes, Ethiopian Business Law Series Vol. III, AAU printing press, Addis Ababa, (hereinafter Daniel Woldegebriel, Compensation During Expropriation) p. 194. The definition of the notion of expropriation may slightly vary depending on which its theoretical foundation we base. The three theoretical justifications – reserved rights theory, consent theory and inherent power theory – influence our understanding of the concept. See Daniel W. Ambaye, 2015, *Land Rights and Expropriation in Ethiopia,* Doctoral Thesis, Springer (hereinafter Daniel W. Ambaye, Land Rights and Expropriation in Ethiopia), pp. 100-103; Matthew P. Harrington, 2002. "Public Use" and the Original Understanding of the So-Called "Taking" Clause. Hastings Law Review, Vol.53 (hereinafter Matthew P. Harrington, "Public Use" and the Original Understanding).

[3] Food and Agricultural Organization, 2008, *Compulsory acquisition of land and compensation*, Land Tenure Studies 10, Rome, Italy, (hereinafter FAO, Compulsory acquisition of land and compensation) p 1.

[4] Ibid.

[5] In my context it refers to the adoption of two different standards to treat the same subjects by different organs.

between the public need for land and private or group expectations of security of land tenure and property rights, and also putting a clear distinction and demarcation on the power and role of the central and state governments in relation to land expropriation.

One of the underlying elements and means to maintain the balance among the above competing interests is to clearly identify the state organ authorized to make decisions on land expropriation and avoidance of multiplication of institutions.[6] The clear authorization of the central or regional or both levels of government, the adoption of centralized or decentralized or middle-path approach in assigning the power of expropriation within a particular government level, and the identification of a specific authority within one level of government with the power of making the decision of expropriation have their own implication for land tenure security and the potential power conflict/competition at the different levels of government. Because the absence of clear demarcation about which level of government assumes the power of land expropriation and under what conditions tends to lead to power claim and conflict among the different levels of government. Moreover, the approach adopted in assigning the power within a particular level of government has its own implication for the land tenure security of landholders. Theoretically, it is argued that giving power of land expropriation to local levels with no oversight may result in losing land rights to discretionary bureaucratic behaviour[7] and in abusing and perpetuating tenure insecurity of landholders.[8] The same result may also be expected in the case of multiplication of authorities with the same power.

Therefore, in the Ethiopian federation, the search for an equilibrium between the above competing interests demands critically looking into whether the Ethiopian land law regime has adopted the approach, the manner and the source of land expropriation power that fits into the prevailing theoretical frameworks and the best experiences of other nations explained in Section 1.The author did this not with the view to producing and recommending a

[6] It does not refer to the aspect of implementation of the decision of expropriation.

[7] Klaus Deininger, 2003, *Land Policies for Growth and Poverty Reduction*: A World Bank Policy Research report, the World Bank and Oxford University Press, (hereafter Klaus Deininger, Land Policies) p. 8.

[8] FAO, Compulsory acquisition of land and compensation, supra notes 3, p. 13.

particular model in this regard. Rather, it was to situate the issue at hand within policy and academic framework to debate and propose pragmatic and feasible alternative ways forward.

To do this, the manuscript is composed of four sections apart from the introduction. The first section provides an overview about how the notion of the power of land expropriation is dealt with in the literature and other jurisdictions. Specifically, it highlights the different approaches, manners and sources of state power of land expropriation. This is followed by a section that examines the approach, manner and source of the power in the Ethiopian legal regime. Doing this helps to identify whether the Ethiopian approach to manner and source of defining land expropriation power is prescribed in a way not to open a loophole for perpetuating land tenure security, and power conflict/competition between the central and state governments. In the third section, an attempt is made to discuss where the Ethiopian case fits in all this and its implications for the land tenure security and power conflict/competition between the two levels of government. Finally, conclusions are drawn.

1. General Overview of the Power of Land Expropriation

The power of expropriation also known as 'compulsory acquisition', 'eminent domain', 'compulsory purchase', 'taking', 'condemnation', 'land acquisition and resumption' depending on the legal tradition followed and the nature of land ownership adopted is a common legal realm to all nations.[9] As a forceful deprivation of property right, it is recognized as a limit to any property right even in countries that have adopted individualistic and strongest property rights protection.[10] However, unlike the universal recognition, necessity and presence of the notion in everywhere, it is the most debatable and contentious aspect of land tenure system among academics and policy makers. Basically, the debate centres on the issues of its theoretical foundations and justifications, the requirements to be satisfied to make the taking legitimate, which branch of government – judiciary and executive –to have the power to make the expropriation decision, and about

[9] Id at p. 1; Daniel W. Ambaye, Land Rights and Expropriation in Ethiopia, supra notes 2, p. 95.

[10] Klaus Deininger, Land Policies for Growth and Poverty Reduction, supra notes 7, at p. 28.

the availability of redress in time of grievance in the expropriation proceedings.

The issue of how – approach and manner, and from where – the legal source of the power of expropriation assigned to the state emanates, becomes a point of discontent especially when it is assigned to the administrative/executive organ. Because it is a development agent, the impartiality and independence of the organ is questionable. To minimize abuse of power in such cases different mechanisms may be designed like securing of the consent of the community or giving power to a higher authority or to a local authority with the oversight of the higher authority.[11] Nonetheless, when the power of expropriation is assigned to the judiciary by declaratory judgment, it may not be a point of argument. It is because of the assumption that the judiciary is an independent and impartial institution in its decision making and the power of expropriation may not be exposed to abuse.

In a federal system, the very nature of the government adds additional flavour to the issue at hand. As a result, a dual level of government regulation of the power of land expropriation becomes an aspect of the apportionment of power between the central and state governments.[12] Then, where and how to assign the power of land expropriation needs special treatment in federations. Hence, the subsequent three sub-sections separately address the issue of the source, approach, and manner of power of land expropriation with the aim of developing an ideal general framework that keeps the balance among the competing interests and against which the Ethiopian situation is appraised in Section 2.

[11] FAO, Compulsory acquisition of land and compensation, supra notes 3, p 13; Paul De Wit *et al.*, 2009, *Land Policy Development in an African Context: Lessons Learned from Selected Experiences*, FAO Land Tenure Working Paper 14 (hereafter Paul De Wit et al. Land Policy Development) p 72. The abuse of power furthered when a mechanism is not devised about appeal to an independent organ when the affected party aggrieved with the decision of expropriation.

[12] Ilya Somin, 2011, *Federalism and Property Rights*, U. Chi. Legal F. Vol. 53: 88; Stewart E. Sterk, 2004, *The Federalist Dimension of Regulatory Takings Jurisprudence*, The Yale Law Journal Vol. 114: 203.

1.1. The Legal Source: Constitutional Matter or Statutory or Presumed Power?

In the quest for the legal source of the state power of land expropriation three different perspectives may be identified. It may be regulated under the written constitutional law as a constitutional matter like in most constitutions of nations. This is with the assumption that since it is a matter of establishing and maintaining a system for the allocation (and reallocation) of power over wealth among individuals, group and state, constitutional law should be devoted to governing it.[13] Alternatively, as a limit to the constitutional right to property it is supposed to emanate from the constitutional rules.[14] In contrast, in states like Canada and New Zealand the power of land expropriation is not regarded as a constitutional matter since the constitution of such states do not incorporate the right to property. Here, the power of land expropriation is statutory but not constitutional. In extreme cases we may theoretically think that the power of land expropriation neither be statutory nor constitutional. It may rather be regarded as a presumed power of a state without any constitutional or statutory sanction or recognition. This line of thought was prevalent, for instance, in pre-1968 Canada.

In fact, all the three thoughts about the source of the state power of expropriation are not random views. They are the outcomes of different theoretical/conceptual justifications which influence state power of expropriation. Mathew Harrington's formulation of three theories of the origin of the power of expropriation – the reserved right, inherent power and consent theories – clearly resulted in the development of the three views about the source of the power of expropriation. The thought of the power of expropriation that emanates from constitutional rules is influenced by the inherent power theory though in reverse.[15] According to this theory the

[13] John Henry Merryman, *Ownership and Estate (Variations on a Theme by Lawson*), 48 Tul. L. Rev. 917-945, 1973-1974, p. 916.

[14] Gregory S. Alexander, 2009, Property Rights in Vikram David Amar and Mark V. Tushnet (ed.) *Global Perspectives on Constitutional Law*, Oxford University Press, p. 59.

[15] I said it inverted way because this theory also does not expressly recognize that the power of expropriation of state emanates from the constitution. It rather considers constitutional regulation as a way to put limitation on the already existing power of state. This line of thought also does not fit into the current constitutional democratic state conception. Because in constitutional democracy the power of the state emanates from a constitutional rule by which the society empowers the state as an agent to maintain the peace, order and welfare of the people.

power of land expropriation is "regarded as a power which inheres in the right of state to govern its polis – which is to say, inherent in its 'police power'."[16] Governments, subject to limitations imposed on their respective constitutions and without depending on the pre-existing property rights, have the power to expropriate land. Here, the power of the state to expropriate land is not defined in the constitution as power granting but as limit to the power.

The assumption of state power of expropriation as statutory is, on the other hand, derived from the consent theory of the origin of the power of expropriation. According to the consent theory the state has assumed/secured the power of expropriation of property only upon the consent of the owner (society). The provision of the consent can be exercised through its representatives – parliament while legislating laws.[17] Therefore, the state has got the power of expropriation only because the legislation enacted by the parliament entitled it to do so.

Finally, the presumed power thought is derived from the reserved right theory about the origin of state power of land expropriation. In this theory it is assumed that initially the state has an original and absolute ownership of all property held by its inhabitants, and citizens' possession and enjoyment of the same is derived from grant by the state with implied reservation of the right to take it back.[18] The tacit reservation, in this juncture and context refers to the power of expropriation. Hence, as per this theory the state power of expropriation does not depend upon the constitutional empowerment or statutory declaration. Even in the absence of both, the state still has the power to expropriate land as it is the presumed power of state.

However, all the three theories as they stand entail the government to have strong power position and exercise unlimited power of expropriation. Particularly, the reserved right theory and inherent power theory make property rights insecure by making expropriation as a right/rule and the right

[16] Comments 1948–1949. *The Public Use Limitation on Eminent Domain: An Advance Requiem*. Yale L. J., Vol. 58: 599–614; Matthew P. Harrington, "Public Use" and the Original Understanding, supra notes 2, p. 1251.

[17] Matthew P. Harrington, "Public Use" and the Original Understanding, supra notes 2, pp. 1257ff.

[18] Id pp. 1249ff.

to property as an exception.[19] Moreover, in the era of constitutional democracy and human rights, the consideration of constitutional law as an instrument to prescribe limitation on state power of expropriation only as inherent power theory, does not go hand in hand with the current thoughts on constitutional law in general and the function of constitutional recognition of property rights in particular. As it is noted by Edwin Baker, the constitutional recognition of property rights aimed at guaranteeing the protective function, *inter alia*, to the right-holder.[20] Moreover, it is also with the view to protecting property rights from state encroachment through enactment of law.[21] Consequently, the defects of the theories of origin of the power of expropriation and the Bakerian thought of constitutional property rights' functions warrant the constitutional definition of state power of expropriation necessary.

1.2. Manner of Designation

In the above sub-section, I have noted and argued that the state power of land expropriation should derive from the constitution and it has to be treated as a constitutional matter. It is with the view to making the source of state power to be in line with the concept of constitutional democracy and to limit state encroachment on individuals' or communities' property rights in the making of law. The question that still remains, however, is how this power is supposed to be prescribed in the constitution, whether there is uniformity among the constitution of nations in this regard, and the factors which influence and force a given constitutional maker to adopt a particular perspective.

Apart from non-inclusion, the critical and comparative analysis of constitutions of nations reveals that there are four different ways of constitutional style in prescribing state power of expropriation. The difference among the constitutions in this regard lies in the amount of

[19] Id pp. 1252ff.

[20] Edwin Baker, 1986, *Property and its Relation to Constitutionally Protected Liberty*, Pal. L. Rev., vol.134, No.4, 741 (hereafter Edwin Baker Property). He argues in contrast to inherent power theory that constitutional recognition of property rights is made not with the view to put restriction on state power mainly. He, rather, perceives it as provision of constitutional guarantee to the property rights of individuals and defining of the exceptional scenarios for state encroachment.

[21] Id p. 766.

regulating and providing details on power of expropriation. Accordingly, in the first method, which I call the *inexactalist modality*, the state power of expropriation is provided in the constitution simply as the only limit to property rights. The constitutions which have adopted the *inexactalist modality* assert that the power to compulsorily acquire private property for greater societal interest is the single exception to fully protected private property rights. In this modality no further information and rules about the conditions and circumstances are provided in the constitution. It leaves determination of the details to the legislature or/and constitutional interpreter through constitutional deferral. The revised constitution of Rwanda best illustrates this modality. It states:

> Private property, whether individual or collective, shall be inviolable. The right to property shall not be encroached upon except in public interest and in accordance with the provisions of the law.[22]

The second modality is *requirementalist modality* as I call it. In *requirementalist modality,* besides recognising expropriation of property as a single exception to property rights, the constitutions mention general requirements to be undertaken in compulsory acquisition. The constitution enunciates the conditions and standards required to be observed and satisfied in expropriating such as due process of law, public use and just compensation. For instance, the Fifth Amendment of the Constitution of the United States of America has stipulated the state power of expropriation in the *requirementalist modality*. It states:

> No person [...] shall be deprived of [...] property, without due process of law; nor shall private property be taken for public use without just compensation.[23]

However, the problem with this modality, particularly as it stands in the USA Constitution, is that there is neither a clear definition of the requirements nor an indication about who should provide details of them – the legislature or court interpretation.

[22] The Constitution of the Republic of Rwanda of 2003, Revised In 2015, Chapter IV, Art.34 and Art.35.

[23] United States of American Constitution Amendment V.

The *limitationalist modality*, on the other hand, goes further to define the purposes for which the state can legitimately exercise its power of expropriation. Apart from referring to expropriation as the only restriction to property rights and listing down the requirements of due process of law, public use, and just compensation, the constitutions that adopted the *limitationalist modality* provide the specific projects for which state can use its power of expropriation to deprive property rights. The listing of the purposes in the constitutions has aimed to restrict further the state power of expropriation. The state does not have the power to expropriate property rights for purposes other than the ones listed in the constitutions or differing in nature. A good illustration for this approach is the constitution of Ghana. Ghana's constitution includes provisions detailing exactly what kinds of projects allow the government to use its power of compulsory acquisition and specifies that displaced inhabitants should be resettled on suitable alternative land.[24] In an illustrative manner it lists out the purposes as follows:

> the taking of possession or acquisition if necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property in such a manner as to promote the public benefit.[25]

Finally, the state power of expropriation is also defined in some state constitutions in the *detailist modality*. In the *detailist modality* the constitution goes further to define each and every requirement needed to be satisfied in decision of expropriation. This modality leaves silly and slight things to the legislature and courts interpretation. The constitution itself provides all the details on the requirements of public use, due process of law, and just compensation. Chile's constitution, for instance, identifies the purposes for which land may be compulsorily acquired (public use), the right of property holders to contest the action in court (due process of law), a framework for the calculation of compensation, the mechanisms by which

[24] The Constitution of the Republic of Ghana of 1992, Chapter Five, Article 20.

[25] Ibid.

the state must pay people who are deprived of their property, and the timing and sequence of possession (just compensation).[26]

It is quite interesting to discuss why the above-mentioned wide-ranging differences in the regulation of the state power of expropriation are manifested among the constitutions of nations. As Rosalind Dixon explains it is the result of the constitutional makers' perception about the constitutional interpreter. The adoption of codified/detailed or framework-style approach in drafting of constitutional provisions depends upon the trust or distrust the makers have in the constitutional interpreter.[27] Moreover, she notes that the approach adopted can be determined by the existence or nonexistence of constitutional deferral through 'by law clause' or adoption of abstract or vague concepts in the constitution.[28] In her view, constitutional drafters adopt a detailed or codified approach, with less or no by law clause or abstract concepts, in constitutional norms drafting because they to some degree distrust the constitutional interpreters as they may not share the aims and understandings of constitutional drafters. In yet another approach, the constitutional drafters resort to framework-style constitutional, more bylaw clauses and abstract concepts, norm drafting when they highly trust and have faith in the constitutional interpreters as partners in the process of a constitutional design.[29]

Nevertheless, her binary divide – trust-distrust dichotomy – does not exactly tell us why the above four modalities of designation of state power of expropriation developed because her view warrants only the development of two styles of defining it. Consequently, unless we take the trust-distrust metaphor in the form of degrees, there are other additional factors that may influence the adoption of a particular modality. Moreover, the factors are also unique and peculiar to a given nation's constitutional making and may not be generalized to all constitutions. It requires separate research on the issue, and I will not delve into it in detail as it is not the concern of this article.

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[26] See Chile's Constitution of 1980 with Amendments through 2012, Chapter III, Art.19(24).

[27] Rosalind Dixon, 2011, *Constitutional Amendment Rules: A Comparative Perspective* in Rosalind Dixon & Tom Ginsburg (eds.) *Comparative Constitutional Law*, Edward Elgar.

[28] Rosalind Dixon, 2015, *Constitutional Drafting and Distrust*, I•CON 13: 819–846 p. 820.

[29] Ibid.

From land tenure security perspective, the modality that best serves is the one that governs, as far as possible, every element of the state power of land expropriation. Therefore, it minimizes, if not avoids, the possibility of encroachment of property rights on the making of laws or court interpretations. However, adoption of such modalities, on the other hand, contradicts another policy issue, that is the flexibility of land policy.[30] The amendment of a constitution is assumed to be not easy as there are stringent requirements attached to it unlike other policy instruments and decisions. However, land policy is required to be flexible and go hand in hand with the changes in the socio-economic and political conditions of a given country. Then, detailed and exhaustive regulations of the issue of state power of expropriation affect the timely change of a policy, which in effect make a land policy incompatible with socio-economic and political changes.[31] Therefore, an *optimal modality* that prescribes the general requirements and conditions for expropriation and leaves details to the legislature and court interpretation ensures both policy objectives – to secure land tenure and have flexible land policy.

1.3. Approaches to Designation

As seen in the above section, all constitutions mention the existence of the state power of expropriation. The constitutions as such do not specify a state agent or agents authorized to make the decision of expropriation. In a unitary form of state this might not be necessary. It can be done by the legislature in a subordinate legislation. A problem in the unitary state occurs if the approach adopted in designating the state authority with the power of expropriation exposes property right holders to abuse of power, variations of standard of treatments, and all in all threatens their land tenure security.

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[30] Klaus Deininger, Land Policies, supra notes 7, p. 51.

[31] With regard to the Ethiopian land policy, there is a claim that the constitutional regulation has effectively eliminated the possibility of flexible application of policy. (See for instance, Samuel Gebreselassie, 2006, *Land, Land Policy and Smallholder Agriculture in Ethiopia: Options and Scenarios*, Paper prepared for the Future Agricultures Consortium meeting at the Institute of Development Studies 20-22 March 2006, p 4). However, the claim is not supported with the critical analysis of the constitutional stipulations. The conclusion reached was just by taking the constitutional incorporation of land issue. Unless we analyse the specific land policy issue incorporated in the constitution and what is left to the subordinate legislation and policy decision, it is not a valid argument to regard the constitutional incorporation has made the land policy inflexible.

In federations like Ethiopia the problem goes beyond this and might have implications on constitutional division of power between the federation and the constituent units. As there is at least dual self-ruling level of government in federations, the assignment of state power of expropriation becomes an issue of division of power. One of the fundamental constitutional law contents unique to federations is the apportionment of power between the central and state governments.[32] Accordingly, it becomes reasonable to expect constitutions of federations to assign the power of expropriation either to central or state governments or to both. However, as is the case in Ethiopia, discussed in a later section, an express constitutional stipulation may not be provided for it. Through the canon of interpretations of the constitution one is able to identify which level of government is authorized with the power of expropriation. In the next section, I will discuss this issue in analysing the constitution of Ethiopia.

With respect to assigning the power to specific state authority, nations may adopt three different approaches. The approaches are designed only with the consideration and assumption of unitary state including the *centralization approach, decentralization/localization approach* and *a combined approach.*[33] Apart from the nature of the approach adopted, a clear identification of the authorized government bodies enhances land tenure security as it reduces opportunities for abuse of power.[34] In *the centralization approach*, as the name indicates, the power is highly centralized and assigned only to national level government. Here, any organ of the state submits the demands – initiation of expropriation – to an organ at a national level. Accordingly, it is only the national level authority that can decide on whether a given property right can or should be expropriated. This approach is adopted in the South African legal system where the power of expropriation of land is assigned to a ministerial level of the national

[32] See Ronald L Watts, 1998, *Federalism, Federal Political Systems and Federations*, Annual Review of Political Science Vol. 1: 117, p 121; William H. Riker, 1975, *Federalism* in Fred Greenstein and Nelson Polsby (eds.) *Handbook of Political Sciences,* Wesley Publishing Company, Volume 5, p. 101; Kenneth C. Wheare, 1964, *Federal Government*. Oxford: Oxford University Press, pp. 32-33. In their definition of federalism the issue of distribution of power between the central government and federating states is the basic characteristics that defines federalism from other forms of government.

[33] FAO, Compulsory acquisition of land and compensation, supra notes 3, p. 13.

[34] Ibid.

government.[35] As the Food and Agriculture Organization (FAO) notes the adoption of *centralization approach* enhances uniformity of standards, achievement of a coherent national land policy and the establishment of a body of core expertise.[36] In contrast, it can lead to delays in the acquisition of land and does not guarantee that processes will be implemented fairly.[37]

The decentralization/localization approach, on the other hand, demands the power of expropriation to be devolved to the regional and local level governments, and parastatal organizations. As an anti-thesis of *the centralization approach*, the *decentralization/localization approach* guarantees a timely acquisition of land. However, it opens the door to variation of standards among localities and creates difficulties to achieve national land policy coherently and the inability to establish a body of expertise in each locality.[38] Furthermore, it exposes landholders to abuse of power and threatens their land tenure security as the decisions at the local level can be influenced by elites who have the power to easily manipulate the rhetoric and use this power for their own advantage.

In the *combined approach* both national and local governments are entitled with the power of land expropriation. The local authorities are, however, not at liberty to make the decision of expropriation on their own. Rather, they are subject to the supervision and approval of higher authorities or/and to conducting public hearing and getting consent of the local community.[39] Addressing the defects of the other two approaches and avoiding or reducing opportunities for abuse of power by local governments in making the decision of land expropriation that land tenure security of private landholdings is maintained. Accordingly, it is recommended that *the combined approach* be adopted while designating the power of expropriation.

However, even with the adoption of *the combined approach* the problem of variations in standards, the difficulty to achieve coherent national land policy

[35] Republic of South Africa, Expropriation Bill, published in Government Gazette No. 38418 of 26 January 2015 (hereafter South African Expropriation Bill) Art.3(1)(a) and Art.4(2).

[36] FAO, Compulsory acquisition of land and compensation, supra notes 3, p. 13.

[37] Ibid.

[38] Ibid

[39] Ibid; Paul De Wit et al Land Policy Development, supra notes 11, p. 72.

and the inability to establish a body of expertise might occur. The problem is exacerbated when there are several local authorities and higher approving authorities. There are many different administrative authorities at the local, higher and national levels. If all administrative authorities at each level are entitled to expropriate land, then there is a high probability for the persistence of these problems. With the assumption that these problems might occur, the South Africa constitution, for instance, assigned power of expropriation to a single state authority and made it a non-delegable power.[40]

2. The Case in the Ethiopian Legal Regime

In the entire political history of modern Ethiopia, the state power and control over land rights are often a cause for protest and rebellion against it. The call for reduced/minimal state interference in the land rights of individuals or communities, *inter alia*, has caused the military overthrow of past political regimes – the monarchy and the *Derg* regime.[41] The same question is still on the table against the current regime.[42] However, this article confines itself to examining the contribution of legal reforms taken by the current regime in defining the state power of land expropriation to addressing the deep-rooted and persistent problem in the country's history. It analyses the reform against the ideal system to show where and how the state power of expropriation is defined as established in Section 1 above.

2.1. The Constitutional Base and Manner

Unlike the constitutions of other nations,[43] establishing the constitutional basis for state power of *land expropriation* from the Constitution of the

[40] See South African Expropriation Bill, supra notes 35.

[41] See for instance, Teshale Tibebu, 1995, *The Making of Modern Ethiopia: 1896-1974.* The Red Sea Press; Dessalegn Rahmato, 1993, *Agrarian Change and Agrarian Crisis: State and Peasantry in Post Revolution Ethiopia*, *Journal of the International African Institute, Vol. 63, No. 1:* 36; Gebru Tareke, 1991, *Ethiopia: Power and Protest: Peasant Revolts in the Twentieth Century,.* Cambridge University Press.

[42] Wibke Crewett and Bendikt Korf, 2008, *Ethiopia: Reforming Land Tenure*, Review of African Political Economy,No. 116: 203.

[43] In jurisdictions private ownership of land is prevalent, the constitutional basis about the state power to expropriate land can be deduced from the general rule about the expropriation of private property as land is one there. Whilst, in countries where private ownership of land is outlawed like in Ethiopia, the constitution specifically and expressly refers to land expropriation. The case in China best illustrates such constitutional approach. (See Constitution of the People's Republic of China, adopted in December 1982 Art. 10).

Federal Democratic Republic of Ethiopia (FDRE) is not an easy task. Because of the manner of the provisions of the state power of expropriation, the definition of 'private property', access to land and immunity against eviction are drafted, in conjunction with the prohibition of private ownership of land, we cannot find an express stipulation in the constitution about the state power of land expropriation.

Article 40(8) of the Constitution of FDRE expressly authorizes the government to expropriate 'private property'. In Sub-Article 2 of the same article 'private property' is defined in terms of the Lockean proviso of Labour Theory justifying the original acquisition of property rights. It defines 'private property':

> … *any tangible or intangible product* which has value and is *produced by the labour, creativity, enterprise or capital* of an individual citizen, associations which enjoy juridical personality under the law, or in appropriate circumstances, by communities specifically empowered by law to own property in common.[44]

From the perspective of state power of expropriation, the two elements in the definition get our attention and play a key role in delineating the scope of the power. The first one is the broader understanding of private property as any tangible or intangible product. As per this conception the state power of expropriation is not limited to tangible products as is the case in most situations. In Ethiopia, it can apply to both tangible and intangible products. In contrast, the phrase *produced by the labour, creativity, enterprise or capital* in the definition, on the other hand, apparently narrows the concept of 'private property' which in effect arguably confines the state to exercising its power of expropriation only on the property rights that are produced in this way. Because as the means of producing private property are exhaustively listed, property rights created through other ways are not regarded as 'private property' for *the purpose of Article 40 of the FDRE Constitution*.

Given that any Ethiopian can have ownership rights only over 'private property',[45] and the ownership of land is exclusively vested in the state and

[44] FDRE Constitution, supra notes 1, Art. 40(2).

[45] Id Art. 40(1).

peoples of Ethiopia,[46] it becomes absurd to consider the provisions that deal with state power of expropriation of 'private property' as applied to *land expropriation*. It is because the cumulative reading of Article 40(1-3) and (8) creates an impression that the state power of expropriation applies only to ownership property rights of individuals or communities. Accordingly, it may be argued that in order to deprive property rights over land, the state may not be required to go through and observe the requirements of expropriation. At the other extreme a counter-argument that claims that the Ethiopian state does not have a constitutional power to expropriate land rights of individuals and communities may also be forwarded.

These two extreme positions are the result of defects in the drafting of the provisions in Article 40 and the exclusive dependence on the same article to base and substantiate one's argument. Moreover, both thoughts have their own drawbacks. The first thought, for instance, exposes the landholders to arbitrary eviction and perpetuation of land tenure insecurity since the state is not required to follow and satisfy the requirements of expropriation. The second thought, on the other hand, undermines the social and economic wellbeing of the people by limiting the ability of the state to get required land for ensuring sustainable development and protection of environment.

Therefore, a search for a constitutional base for the state power of land expropriation requires one to adopt a contextual interpretation of the provisions in the same article and to consult other articles of the constitution itself.[47] First, common to all landholdings – urban and rural land – is being based on the *argumentum a fortiori*. That is if the constitution entitles the state with the power to expropriate 'private property' to which the owners have a better and complete property rights, the state will have the power to expropriate land to which the holders have a lesser and incomplete property rights.[48] Moreover, understanding the context of the constitution, particularly the section dealing with the national policy objective, one can clearly deduce that the constitutional makers have presupposed the state power of land

[46] Id Art. 40(3).

[47] For details see Brightman Gebremichael, 2016, *Public Purpose as a Justification for Expropriation of Rural Land Rights in Ethiopia*. Journal of African Law, Vol. 60:190 (hereafter Brightman Gebremichael, Public Purpose) pp. 201-203.

[48] Id p. 203.

expropriation. The economic and social policy objectives impose a duty on the state to promote and protect the health, welfare and the living standards of the Ethiopian people through ensuring access to public health and education, clean water, food, housing and social security.[49] The realization of these developmental goals requires acquisition of land for the development of infrastructure. It can be assumed that the makers of the constitution have presumed the state power of land expropriation since acquisition of land is the initial step to fulfil these policy objectives.[50]

Furthermore, based on the constitutional provision that defines property rights over immovables and permanent improvements made on land, it is still possible to establish the constitutional base of the state power of land expropriation. Particularly, when one critically reads the Amharic version of Article 40(7) of the FDRE Constitution it provides the possibility of termination (*sikuaret*, the English version says "expires," which limits the grounds of termination to lapse of duration) of land rights in general.[51] One possible and main reason for terminating land rights is the state power of expropriation.

In addition to the above common arguments, special constitutional provisions can be cited in support of the constitutional base of the state power of land expropriation taking the nature of the landholder and manner of accessing land into account. This line of argument works for expropriation of livelihood land and residential land, on the one hand, and investment land and again residential land, on the other hand.[52] The residential land in urban centres can be seen in both categories. With respect to livelihood land, as is the case with peasants and pastoralists who acquire land for free and who are protected against eviction,[53] we can deduce that the constitutional base of the state power comes from a different constitutional

[49] FDRE Constitution, supra notes 1, Art. 89(2) and 90.

[50] Brightman Gebremichael, Public Purpose, supra notes 47, p. 202.

[51] FDRE Constitution, supra notes 1, Art. 40(7).

[52] Viewing land expropriation from the perspective of such categorization is suggested by some scholars. A good example is Azuela and Herrera's, and Muradu's prediction. (see Antonio Azuela and Carols Herrera, 2007, *Taking land around the world: International trends in the expropriation for urban and infrastructure projects*, Lincoln Institute of Land Policy; Muradu Abdo Srur, 2015, State *Policy and Law in Relation to Land Alienation in Ethiopia*, (unpublished PhD Thesis), University of Warwick, School of Law, p. 153).

[53] FDRE Constitution, supra notes 1, Art. 40(4 and 5).

stipulation enshrined in Article 44(2) of the FDRE Constitution. The sub-article states:

> [a]ll persons who have been *displaced or whose livelihoods* have been adversely affected as a result of *State programmes* have the right to commensurate monetary or alternative means of *compensation*, including *relocation* with adequate State assistance.[54]

The provision talks about the rights of persons whose livelihood, like land rights of peasants and pastoralists, is affected by the state programmes. However, it tacitly empowers the state to displace or adversely affect the livelihoods of persons legitimately. One way is the expropriation of land. This constitutional provision can also be adopted and applied to establish the state power of expropriation of residential land in urban centres as well, because the phrase "…*who have been displaced*…" is accommodative enough to refer to them.

With respect to investment land and also urban residential land acquired under lease arrangement, the constitutional base of the state power of expropriation can be established by way of *assimilation*. Assimilation considers persons' property rights to land as an intangible private property in the context of the constitution because the nature of their land right and the way they acquire land can satisfy the two requirements of establishing 'private property' seen above. Here I am not claiming that they have an ownership right to land, as it is constitutionally outlawed.[55] Rather, they do have an ownership right over their property rights to land. Besides, they acquire their property rights to land on the basis of payment arrangements.[56] Then, their property rights to land are created by their capital, which is recognised as one of the alternative grounds to establish 'private property' in the constitution. Therefore, I argue that the land rights of investors and urban land lease holders do have an ownership right over their property rights to land, which is intangible, and as it is the product of their capital, we can regard it as 'private property'. The assimilation then leads to the application

[54] Id Art. 44(2).

[55] Id Art. 40(3).

[56] Id Art. 40(6); Federal Democratic Republic of Ethiopia, *Urban Lands Lease Proclamation No.721/2011* Fed. Neg. Gaz. Year 18, No.4 (hereafter Urban Land Proc. No. 721/2011).

of the constitutional state power to expropriate 'private property' and to give land rights to investors and urban residents.

These special provisions are not only aimed at the establishment of the constitutional base of the state power of land expropriation. They have also implications for the need to adopt different standards and differential treatment in the course of expropriation. Specially, with respect to expropriation of livelihood land, that of peasants and pastoralists, the constitutional recognition of the right to immunity against eviction and displacement, which is not given to other landholders, is an indication to provide them with a better protection than other landholders. The special treatment and standards may take the form of narrower conception of public use and a unique and better compensation, among others. Whether such special treatments are extended to peasants and pastoralists in subordinate legislation requires a further study.

All in all, from the above analysis it can be concluded that the constitutional base of the state power of land expropriation in Ethiopia is established through canon of interpretation. It is with the anticipation of two other counter-arguments and line of thoughts discussed above. The manner of designation also resembles the *requirementalist modality*. It simply states the requirements of expropriation – public purpose/state programmes and commensurate compensation – without making any indication about who should provide the details. Furthermore, the constitution has not also incorporated the other requirement of expropriation – due process of law. This in effect may lead the state to perpetuate land tenure insecurity by taking legislative measures which limit the landholders' ability to enforce land rights.

2.2. Ethiopian Approach to Designating the Land Expropriation Power

As noted in Section 1.3, the approach adopted in designating the state power of expropriation to specified authorities in federations like Ethiopia can follow one of two courses that should be given attention. First, the approach must make sure that it does not invite a power conflict/competition between the central and state governments. Second, it should not open a loophole for

abuse of power – threaten land tenure security, variance in the standards, difficulty to achieve coherent national land policy and inability to establish a body of expertise. Thus, the below analysis of the Ethiopian legal regime is made against these backdrops.

2.2.1. FDRE Constitution

Being one aspect of division of power between the federal and state governments in federations, first one must see and examine whether the constitution has provided and assigned the power to expropriate to either or both levels of government. In the FDRE constitution we can find an indication about which level of government has been constitutionally empowered with the power to expropriate land though not explicitly. It is rather inferred from the way the constitution has made a power division concerning land and other natural resources.

However, before directly looking at the power division on matters related to land, it would be paramount to synthesize the general approach of apportionment of power adopted in the FDRE Constitution. The FDRE Constitution has identified the levels of government with the power of land expropriation in the country. The FDRE Constitution has adopted *a modified exclusive listing and residual power approach* in apportioning government power between the federal and regional states. It has exhaustively listed out the exclusive power of the federal government and the concurrent power of both.[57] It reserves the residual power to the state governments.[58] The Constitution has also made further stipulations to modify this general approach, and that is why I call it *a modified* one. The modification has basically taken three features. These are the assignment of legislative powers on civil laws to the federal government upon the decision of House of Federations[59], the delegation of the federal government powers to the states (only downward delegation)[60], and designating the undesignated power of taxation by the joint decision of the House of Federations and the House of

[57] FDRE Constitution, supra notes 1, Art. 51 and 98.

[58] Id Art. 52(1).

[59] Id Art. 55(6).

[60] Id Art. 50(9) and 78(2).

Peoples' Representatives.[61] The modifications can be considered as protection to state governments' power from encroachment by the federal government.

Coming to the power of land expropriation, the analysis of the following two provisions of the FDRE Constitution in conjunction with the general approach and modifications about the power division discussed above give us an indication of which level of government is endowed with the power expropriate land. Articles 51(5) and 52(2(d)) of the FDRE Constitution respectively state:

> [the federal government] shall enact laws for the utilization and conservation of land…";and"[States have the power] [t]o administer land… in accordance with Federal laws.[62]

The cumulative reading of these two constitutional provisions indicates that the central government has been entrusted with the power of enacting laws on the *utilization and conservation of land, w*hilst the states are designated to *administer* it in accordance with the federal law. The provisions do not speak directly and expressly about the power of land expropriation in a strict sense. Rather, the essence of the phrases *enactment of law on land utilization and conservation* and *land administration* may indicate where the power exists.

The FDRE constitution does not have a definitional clause, and it has not given a definition, except 'private property', for abstract terms like the two phrases mentioned above. Therefore, we are forced to take literal understanding of the concepts as indicated in the literature. Particularly, since the federal government's power is limited to enactment of laws on land utilization and conservation, searching a meaning for *land administration*s suffices to resolve the issue at hand. Based on the general approach and modifications about division of power adopted in the constitution and discussed above, it is possible to deduce that the federal government does not possess the power of administering land in any way. However, whether the power of land expropriation is a component of land administration or not still requires determining what the notion of land administration refers to.

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[61] Id Art. 99.

[62] Id Art 51(5) and 52(2(d)).

The idea of land administration may not have universally accepted single definition. Since it reflects the socio-cultural context where it operates, 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.[63] To illustrate this fact comparing the definition of the concept given by FAO and the federal rural land law of Ethiopia is enough. FAO defines land administration 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. It comprises an extensive range of systems and processes to administer:
>
> 1. land rights: 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;
> 2. land use regulation: land use planning and enforcement, and the adjudication of land use conflicts;
> 3. 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.[64]

Setting aside the legality of doing so, in the federal rural land law of Ethiopia land administration is defined as:

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[63] Mulatu, Abebe, 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, p. 5.

[64] Food and Agriculture Organization, 2005, *Access to rural land and land administration after violent conflicts*, Land Tenure Studies 8, Rome, pp. 23-24; see also Tony Burns, and Dalrymple, 2006, *Land Administration: Indicators of Success, Future Challenges*, Land Equity International Kate Pty Ltd, October 2006, pp.13-14, that has indicated that land administration system consists of the following major things:

a) the management of public land;
b) the recording and registration of private rights in land;
c) the recording, registration and publicizing of the grants or transfers of those rights in land through, for example, sale, gift, encumbrance, subdivision, consolidation, etc.;
d) the management of the fiscal aspects related to rights in land, including land tax, historical sales data, valuation for a range of purposes including the assessment of fees and taxes, and compensation for State acquisition of private rights in land, etc.; and
e) the control of the use of land, including land use zoning and support for the development application/approval process.

> 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 land [holders] are gathered, analysed and supplied to users.[65]

The comparison of the above two concepts of land administration reveals that the definition in the Ethiopian rural land law is narrower than FAO's because it has failed to incorporate the issue of land valuation, taxation and limited implementation of the aspect of land use planning excluding the development of land use planning itself. However, the regional state laws, as is the case in the Amhara state rural land law, the concept of land administration is defined in broader terms than in the federal rural land law incorporating these two aspects as well.[66] Such differences, on the other hand, will lead to federal-state governments power conflict as the federal law seems to limit the regional states' constitutional power and gives some aspect to the federal government.

Again, from both definitions a direct indication about the incorporation of the idea of the power to make land expropriation decision is not mentioned as a component of land administration explicitly. However, since the idea of land use planning is considered as one component of land administration, we can say that the land expropriation decision-making is under the ambit of land administration. Land expropriation is one of the instruments to ensure the implementation of land use planning. The land use planning as a means of selecting and adopting the best land-use option presupposes the change of land-use from a previous user and purpose to a better land-use option.[67] This can happen if the planner, in our case the state government, is empowered to forcefully convert the purpose and transfer to the other in case the initial user fails to negotiate. That forceful taking happens in the exercise of the power of land expropriation.

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[65] Federal Democratic Republic of Ethiopia, *Rural Land Administration and Land Use Proclamation No. 456/2005*, Fed. Neg. Gaz. Year 11, No. 44, (hereafter cited as Rural land Proc. No. 456/2005) Art.2(2).

[66] Amhara National Regional State, *Revised Rural Land Administration and Use Proclamation No. 252/2017* (hereafter Amhara State Rural Land Proc. No. 252/2017) Art. 2(2).

[67] See Gregory K. Wilkinson, 1985, *The Role of Legislation in Land Use Planning for Developing Countries*, FAO, Rome; GIZ, 2012, *Land Use Planning: Concept, Tools and Applications*; *Graciela Metternicht, Land Use Planning, UN Global Land Outlook Working Paper*, September 2017.

Therefore, in the federation of Ethiopia, the power to make the decision of land expropriation is constitutionally assigned to the state governments. This is inferred from two basic arguments. The first one is from the general approach adopted in the constitution about the allotment of power between the federal and state governments. The constitution after making the exhaustive listing of the exclusive federal and concurrent powers of both, it has assigned the residual power to the state governments. In fact, it is also without disregarding the modifications made as seen above. However, the modifications seen above are not related to the issue of executive power or else they are intended to provide state governments with more power. Second, in the absence of contextual definition for the notion of the state governments' power of land administration in the FDRE constitution, the restoration of literal meaning of the concept reveals that the power of land expropriation is an aspect of land administration. Accordingly, the constitution's assignment of the power of land administration to state governments in effect implies that the power of land expropriation belongs to state governments.

The question that still remains is how the power is assigned to specific authorities within the regional states' administrative structure, and whether the subordinate legislation of the federal government is enacted in conformity with the above constitutional rule of the state governments' power of land expropriation. The next sub-section reviews the state land administration laws and the federal land utilization and conservation law to answer these questions.

2.2.2. The Land Laws

The relevant subordinate legislations related with the issue at hand and which can help to answer the aforementioned two questions include:

- The Federal Rural Land Administration and Use Proclamation No. 456/2005;
- The Federal Landholdings Expropriation Proclamation No.455/2005;
- The Federal Urban Lands Lease Holding Proclamation No. 721/2011; and
- The State Rural Land Laws.

For the sake of convenience, let us begin with how the federal laws have dealt with the state power of land expropriation. Examination of the federal laws has revealed two different implications in relation to the observation of the regional states' constitutional power of land administration in general and land expropriation in particular. The differences are the result of urban-rural land dichotomy. Regarding *the power to expropriate urban land,* the urban land law has apparently upheld the constitutional rule. The reading of Article 31(1) in conjunction with Article 2(6) of the Federal Urban Lands Lease Holding Proclamation No. 721/2011 establishes that the expropriation of urban land can be done only by the decision of the appropriate state authority.[68] Furthermore, it also avoids the possibility of multiplications of state authorities with the power to expropriate urban land. This is through requiring the power of expropriation to be carried out only by the specific state authority vested with the power to administer and develop urban land.[69] However, it indicates neither state higher authorities nor local authorities are entrusted with the power in which case reference has to be made to the special law that deals with the issue of land expropriation – the Federal Landholdings Expropriation Proclamation No.455/2005.

With respect to the power of expropriation of rural land, the federal legislation has provided stipulations which go against the constitutional rule. By entrusting the federal government with the power to make decisions about the expropriation of rural land, the federal rural land laws allow the federal government to share the state power. It is inferred from some provisions in the two other federal legislations mentioned above. Particularly, the Federal Landholdings Expropriation Proclamation No. 455/2005 Article 3(1) states:

> *[a] woreda [district] or an urban administration* shall … have the power to expropriate rural or urban landholdings for public purpose … or where such expropriation has *been decided by the appropriate higher regional or federal government organ* for the same purpose.[70]

[68] Urban Land Proc. No. 721/2011, supra notes 56, Art. 2(6) and 31(1).

[69] Ibid.

[70] Federal Democratic Republic of Ethiopia, *Expropriation of Landholding for Public Purposes and Payment of Compensation Proclamation No.455/2005,* Fed. Neg. Gaz. No.43, year 11 (hereafter Proc.No.455/2005) Art. 3(1).

The provision indicates the federal government's encroachment upon the state power of expropriation in two forms. First, it has specified and determined the approach of the power of expropriation to be adopted. By empowering the higher regional organ and the local government (district/urban administration) without the need of an approval from a higher authority, it demands states to adopt the *combined approach*. However, as part of their land administration power, it is up to the regional states to determine the adoption of a particular approach in designation of the power of land expropriation in their administrative structures.

Second, it has entitled the federal government with the power to make the decision of land expropriation. In contradiction to the constitutional principle discussed in the above sub-section the federal land expropriation law has made the federal government share the state power of land expropriation.[71] The Federal Rural Land Administration and Use Proclamation No. 456/2005 under Article 7(3) also reaffirmed the federal government's sharing of the state power of expropriation. The article states:

> [h]older of rural land who is evicted for purpose of public use shall be given compensation …[w]here the rural landholder is evicted by federal government the rate of compensation would be determined based on the federal land administration law. Where the rural land holder is evicted by regional governments, the rate of compensation would be determined based on the rural land administration laws of regions.[72]

My claim that the federal government's sharing of the state power of expropriation is against the constitutional rule does not deny the federal government's power to initiate land expropriation. As the federal government is responsible for projects of national importance or/and cross-regional states and major investments, it should assume the power of

[71] Since this aspect of the provision is different from the one mentioned in the urban land law, its applicability to the urban land expropriation is ambiguous. Even two competing canons of interpretation of law can equally be formulated. Taking the time of enactment of the legislation one may argue that the stipulation in the land expropriation law does not apply to the urban land expropriation since the recent urban land law prevails. Contrary, one may claim that the subject matters of the two legislations are different. The urban land law deals with the general matters of urban land tenure system, whereas, the land expropriation law deals with the special issue of land tenure, i.e. land expropriation. Therefore, on the basis of the special prevails over the general interpretation maxim, the Land expropriation law is special about land expropriation and prevails over the urban land law.

[72] Rural land Proc. No. 456/2005, supra notes 65, Art. 7(3).

initiating land expropriation and submit its demand to the concerned regional state authority. Apart from this, making the decision of land expropriation by its own motion amounts to the federal government's intervention in the regional states' constitutional power.

Moreover, to make thing worse, the specific authority of the federal government to expropriate land (though against the constitution) is not specified. Then, the failure to clearly identify the authorized government bodies will open opportunities for abuse of power.[73] Moreover, it will make all the federal government authorities assume power to make land expropriation decision. For instance, Daniel Woldegebriel, mentioned that at federal level, the Ministry of Agriculture, Ministry of Trade, Investment Agency, Ministry of Construction and Urban Development and Ministry of Mining are the most notable higher organs that give land expropriation decisions.[74] Such multiplication of authorities results in variation of standards, difficulty to achieve national land policy coherently and inability to establish a body of expertise in all the authorities. The South African approach best addresses such problems. In the South African expropriation bill, this power is expressly given to the minister of public works and is not even subjected to delegation.[75] However, the only problem with this approach is that it may slow down the land acquisition process.

The appraisal of the regional states' rural land law, on the other hand, reveals the adoption of three different approaches to the designation of the power of land expropriation in their respective administrative structure. For instance, when one goes through the Amhara State rural land law, it is possible to infer the adoption of the *decentralized approach* because the power to decide land expropriation is totally left to the *woreda* administration.[76] There is neither any indication of expropriation by higher state authority nor its oversight and approval of the decision by a *woreda* administration. This, in effect, opens the door to the demerits of the decentralization approach discussed in Section 1.3 to happen. However, in order to limit the

[73] FAO, Compulsory acquisition of land and compensation, supra notes 3, p.13.

[74] Daniel Weldegebriel, 2013, *Land Rights and Expropriation in Ethiopia*, Doctoral Thesis, Royal Institute of Technology (KTH) Stockholm, p.170.

[75] South African Expropriation Bill, supra notes 35.

[76] Amhara State Rural Land Proc. No. 252/2017, supra notes 66, Art. 26.

opportunity of abuse of power, in an exceptional case, the law required the *woreda* administration to get the consent and approval of the community where the demanded land is located. That is when the proposed project for which the expropriation of land is required is directly related to the development of the community.[77]

The Benishangul Gummuz State rural land law, on the other hand, indicates the possibility of the adoption of the *combined approach*. It states that both the *woreda* administration and the higher authority, the region's Environment Protection, Land Administration and Use Authority (EPLAUA) have the power to expropriate rural land.[78] However, it is not clear whether the decision of the *woreda* administration is subject to the approval and supervision of EPLAUA. What is clear is that the *woreda* administration is required to base its decisions to expropriate rural land on the information provided by EPLAUA. Therefore, the approach adopted in the Benishangul Gummuz State Law still opens the possibility of abuse of power.

Finally, in the other State Rural Land Laws, like in the Tigray State, no reference is made to a particular regional state authority that assumes the power to expropriate rural land. Such situations may force states to follow what has been adopted in the federal law. Thus, as discussed above such states seem to adopt the *combined approach* in which case the higher authority, for instance, Agricultural and Rural Development Bureau (in Oromia State),[79] and Environmental Protection, and Land Administration

[77] Id Art. 26(2). In Benishangul Gummuz State law also the same stipulation is made. (Benishangul Gummuz State Rural Land Proc. No. 85/2010, infra notes 78, Art. 33(2)).In the Southern Nations, Nationalities and Peoples, Afar and Somali State Rural Land Laws the participation of the concerned community is not limited to a certain expropriation decision as the case in Amhara State counter-part. All the expropriation decisions are required to be made with the consultation of the community. Nevertheless, the three State Laws are not clear with respect to the effect of the public participation on the expropriation decision. Whether the state authority is required to get the consent of the majority, as the case in Amhara State in the exceptional scenario, to approve the expropriation decision is not clearly delineated.

[78] Benishangul Gummuz National Regional State, *Rural Land Administration and Use Proclamation No. 85/2010* (hereafter Benishangul Gummuz State Rural Land Proc. No. 85/2010) Art. 2(19) and 33.

[79] Oromia National Regional State, *Proclamation to amend the Proclamation Number 56/2002, 70/2003, 103/2005 of Oromia Rural Land Use and Administration, Proclamation Number 130/2007*, Megelata Oromia, No. 12 Year 15 Art 26.

and Use Agency (in Tigray State),[80] and local governments, the *woreda* administration, are entrusted with the power. As it stands in the federal law then, the oversight and approval of the higher authority of the decision of expropriation made by the *woreda* administration is not required.

In sum, the approach to land expropriation power designation adopted in the land laws of Ethiopia is neither in the observation of the constitutional rule on division of power between the federal and state governments nor in a way that ensure check and balance, uniformity of standards, coherent land policy and ability to form a body of expertise. In violation of the FDRE Constitution the federal government has empowered itself with the power of land expropriation by its legislation. Arguably, the violation occurs in relation to the expropriation of rural land only. About urban land the federal law has reserved the power of expropriation of urban land to the regional states and city administrations. Moreover, some possibilities are provided particularly in the Amhara, Somali and Afar state laws in the form of conducting public hearing to minimize the abuse of power in the decision of land expropriation.

3. Where the Ethiopian Case Fits and its Implications

In the above two sections an attempt is made to analyse and discuss how and where the power of land expropriation is governed and designated to the state authorities and their respective implications for land tenure security (in terms of abuse of power, uniformity of standards, achievement of coherent national land policy, establishment of body of expertise) and federal-state government power conflict/competition in federations. In Section 1 a general analysis of comparative perspective has been undertaken in order to map the different sources, manner and approaches in defining the designation of state power of land expropriation. Then, I have made a proposal that the source of power of land expropriation should be the constitution of a nation and should be defined in the *optimal* modality manner, whereby the requirements of expropriation are incorporated and the power assigned to either or both levels of government in federations in a non-overlapping way, and deferral to further details is made in a clear manner. Furthermore, the adoption of the

[80] Tigray National Regional State, *Revised Tigray National Regional State Rural Land Administration and Use Proclamation No.239/2014*, Tigray Neg. Gaz. year 21 No.1 Art. 2(2).

combined approach, which assigns power to expropriate land to both the national/regional and local governments, should be subject to the approval of a higher authority and/or members of a community, strikes a balance between prompt acquisition of land and land tenure security of landholders. Still, multiplication of authorities with the power to expropriate land in the same administrative structure must be avoided. Moreover, I have argued that the implication of perpetuation of land tenure insecurity may persist even in the adoption of the combined approach as defined here.

Against the analytical frameworks elaborated in Section 1 and summarised above, Section 2 has tried to illustrate in detail how and where the state power of land expropriation is regulated in the federation of Ethiopia. The section at hand, on the other hand, aimed at providing brief explanations and findings of where the Ethiopian case fits into and the implications thereof on the land tenure security and federal-state government power conflict/competition.

To begin with, the source of state power of land expropriation in the FDRE Constitution neither adopted the entire non-regulation of property rights like the case in Canada (which is not advisable) nor explicitly incorporated as the case is in most written constitutions. It rather demands constitutional interpretation to establish its constitutional base opening three equally competing different line of thoughts and arguments. It can be validly and alternatively argued that the state in Ethiopia does not possess constitutional power to expropriate land, or it can do it without the need to go through the process and satisfying the requirement of expropriation; or as is the case in 'private property' it can have the constitutional power to expropriate land in observance and accordance with the requirements and processes of expropriation. It, then, provides the state with the benefit of the doubt and may choose the line of interpretation that favours its interest, which is taking land without following and satisfying the process and requirement of land expropriation. This line of thought, on the other hand, has the implication of perpetuating the land tenure insecurity of landholders.

The origin of the problem goes back to the way the provisions of the constitutional rights to property were drafted. Predominantly, as discussed in Section 2.2.1, the way the notion of expropriation was incorporated and

'private property' was defined in the Constitution, without the consideration of the nature of land ownership adopted, has caused the absurdity and vagueness of the constitution.[81] Nevertheless, the *assimilation approach* proposed for the investment and urban residential land, and the livelihood land conception of the peasants' and pastoralists' landholdings, provides a valid and best line of thought about the constitutional base to establish the state power of land expropriation in observance of the substantive and procedural requirements. That makes the manner of designation of power in the FDRE Constitution similar to the *requirementalists modality* with the defects attached thereto.

With respect to avoiding the possibility of federal-state power conflict/competition over the power of land expropriation (arguably established), the FDRE Constitution as a constitution of federation has made a clear delineation. Assigning the power to enact laws on land utilization and conservation to the federal government, it reserved the prerogative of land administration that consists of the power to expropriate land, among other things, to the regional states.[82] This inference is made from the general approach and modification of the division of power and function between the federal and state governments, and the ordinary connotation of land administration.

Disregarding the spirit of the FDRE Constitution, in its subordinate legislation the federal government intruded into the regional state power by empowering itself with the power to make the decision of land expropriation in relation to rural land in particular.[83] At the worst, it has created the impression that any national level development agents and authorities can assume power. In turn, the multiplication of responsible authorities creates the probability of variation of standards, undermine the achievement of coherent national land policy and establishment of body of expertise in all authorities.[84] Moreover, the federal government has also determined the approach to designation of power to be adopted in the regions. By entrusting the power to regional higher authorities and local administrations without

[81] FDRE Constitution, supra notes 1, Art. 40.

[82] Id Art. 50(9), 51, 52, 55(6), 78(2) and 99.

[83] Rural land Proc. No. 456/2005, supra notes 65, Art. 7(3); Proc.No.455/2005, supra notes 70, Art. 3(1).

[84] FAO, Compulsory acquisition of land and compensation, supra notes 3, p. 13.

approval and supervision of higher authorities, it recognised the *combined approach*.[85] Generally, the multiplication of authorities with the power to expropriate land in the absence of clearly defined, specific and unique situations and coordination among them, conflicting decisions about expropriation of a single land for different purposes may be made by different authorities. In such cases, it creates conflict among the authorities and difficulty to determine the prevailing one.

The approach adopted in the regional state rural land laws is also susceptible to the same problems as most of them have taken the stand of the federal law, that is either by cross-referring to the federal legislation or silencing (or providing the same stipulation in) the regional law about the issue. Leaving aside the approach followed by federal legislation, the Amhara state rural land law, for instance, adopted the decentralized approach totally designating the power to expropriate land to the *woreda* administration. With the exception of the development projects for which land expropriation requires getting the approval of the majority of the community, the approach opens a door to abuse of power *inter alia,* as the approval of the higher authority is not required.[86] In the same fashion but in a broader context, to minimize the possibility of the abuse of power the Southern Nations, Nationalities and Peoples, Afar and Somali States rural land laws have required the decision to expropriate land to be made in consultation with the community.[87] However, what the three regional states laws failed to indicate is what the effect of public hearing is. Whether the expropriating organ is required to get the consent of the community or conduct mere consultation is not clear.

Conclusion

The centrality of immunity against expropriation in the property regime is well recognized which Honore equated it with the right to security in his

[85] Proc.No.455/2005, supra notes 70, Art. 3(1).

[86] Amhara State Rural Land Proc. No. 252/2017, supra notes 66, Art. 26.

[87] See Southern Nations, Nationalities and Peoples Regional State, *Rural Land Administration and Utilization Proclamation, Proclamation No. 110/2007*, Debub Neg. Gaz.No. 10Year13 Art. 13(11); Afar National Regional State, *Rural Land Administration and Use Proclamation No. 49/2009* Art. 19(1); Ethiopian Somali Regional State, *Rural Land Administration and Use Proclamation No. 128/2013*, Dhool Gaz. Art. 18(1), respectively.

seminal work that lists out the bundle of rights.[88] Nevertheless, it has never been an absolute right in any jurisdiction because there may be a public demand for property and land in my cases. If a state, representing the public, required to get land through negotiation, the landholder may not be willing to hand over to the state for various reasons or may demand an inflated price. Hence, the idea of land expropriation prioritizing public interest over the private has emerged. However, care has to be taken not to abuse the property rights of individuals and communities under the guise of the power of expropriation for public interest.

One of the means to minimize, and possibly eliminate, the abuse of power and the threat to land tenure security of landholders is concerned with how and where the state power to expropriate land should be governed and established. Since it is an aspect of state power and a limit to citizen rights, constitutional establishment of it is recognised in most written constitutions of nations. In the recent trend of constitutional democracy, the state assumption of this power as an assumed or statutory power like in Canada creates, as Baker argued, the opportunity for encroachment on property rights through law making.[89]

The comparative analysis of the constitutions of different nations reveals that manner of the constitutional establishment of the state power of expropriation has not been the same. It takes one of the following four modalities depending on the extent of level of constitutional makers' trust on the constitutional interpreter among other things. These are *inextractalist* (refers to expropriation as the sole limit to property rights), *requirmentalist* (provides the requirements of expropriation, like public use, compensation and due process of law clauses), *limitationalist* (which goes further to specify the constituting elements of public use) and *detailist* (that gives every detail of each requirement).

The optimal suggested manner is to adopt the *requirmentalist modality* with a clear deferral about the details to be determined by legislature or/and court interpretation. It is with the view to making it serve both the protection

[88] Anthony M. Honore, 1961, *Ownership*inA.G. Guest (ed.), *OXFORD ESSAYS IN JURISPRUDENCE* 107 as cited in Stephen R. Munzer, 1990, *A Theory of Property*, Cambridge University Press, p. 22.

[89] Edwin Baker Property, supra notes 20, p. 766.

against interference to property rights through enactment of law and achieving of flexible land policy that can be easily changed to be compatible with the socio-economic and political changes in the country since constitutional amendments cannot get through easily for stringent requirements are attached to them.

Specific to federations, apart from the manner, to which level of government the power to expropriate land has been assigned requires constitutional determination. Given that there is at least dual level of government in federations and the main feature of their constitution is making apportionment of power and functions between the central and state governments, it is necessary to indicate to which level of government the power of land expropriation is assigned. Otherwise, it may cause power conflict/competition between the two.

Furthermore, the approach adopted in the assignment of the power to specific government agents/authorities has its own implication for the acquisition of land and land tenure security of the landholder. The adoption of the decentralization approach (assigning power of expropriation to local authorities) or the centralization approach (assigning power of expropriation to a higher and national authority) has their respective merits and demerits. The adoption of a combined approach, by which both the national/higher authority and local authorities entrusted with the power of expropriation, ensures the timely acquisition of land without undermining the land tenure security of landholders. In fact, this would be realized when the decision of local authorities is subjected to the approval and supervision of a higher authority or/and in public hearing. Moreover, attention must also be given not to create the multiplication of authorities to make land expropriation decision in the same situation because multiplication may cause conflicting decisions, variations in standards, incoherence in the national land policy, and inability to establish a body of expertise for all.

The case in Ethiopia is not free from problems related to the assignment of power to expropriate land. It begins from the absurdity in the FDRE Constitution. In Ethiopia the state power of land expropriation is neither expressly recognized nor excluded from the constitution. With the admission of the presence of the other two equally competing counter-arguments, the

state's constitutional power to expropriate land is established through the canon of construction by using the assimilation and livelihood protections approach, among others. The constitution has also assigned the power exclusively to regional states entrusting the federal government with the power to enact laws only on land utilization and conservation.

The manner of FDRE constitution's designation of the power of expropriation of land approximates the *requirementalist modality*. Without mentioning any deferral, it only specifies the requirements for public purpose and compensation. It has not made any references to the other requirements, like due process of law.

Furthermore, through its subordinate legislation the federal government has violated the constitutional rule in two ways. First, encroaching on regional state powers it entrusted itself with the power to make decisions of land expropriation. Second, it has also specified the approach to be adopted in designation of the power – *combined approach*. Furthermore, it has not specified the federal authority that can decide expropriation of land and subjected the local government (*woreda* administration) decision to the approval of a higher authority or/and public hearing. This has caused the multiplication of the federal development agents with the power of land expropriation. Then, it may result in variation in standards, and undermines the achievement of coherent national land policy and the establishment of a body of expertise.

Moreover, failure to subject the decision of local authorities to a higher authority's or/and community's approval opens a door to abuse of power since elites who have the power to easily manipulate the rhetoric use this power for their own advantage, among others. However, an attempt to mitigate the problem has been tried in some state rural land laws subjecting the decision to community approval (some exceptions are Amhara and Benishangul Gummuz State laws) or consultation (in Southern Nation, Nationalities and Peoples, Somali and Afar State laws).

Expropriation of Urban Lands and its Implications for Tenure Security of Old Possessors

Melaku Gezahegn[*]

Abstract

One of the major issues that have come along with the re-enactment of the Ethiopian Urban Land Lease Proclamation Number 721/2011and that have triggered immense fear and worry among the public has been the clear determination of the government to convert all old possessions into a leasehold system. When an inquiry is made into the property right to land that old possessors acquired before and after the introduction of the leasehold system, and the implication of this proclamation is scrutinized in light of tenure security, there are issues that in fact are of great concern for old possessors. The most important issue that is underscored in this article is the dilemma that old possessors confront with regard to expropriation of old possession for 'public purpose'. Accordingly, old possessions could easily be expropriated by land administrative organs under the guise of 'public purpose' which is stated broadly, and old possessors could also be given a substitute plot of land which is far smaller than its former size. They could also be given a substitute plot of land which is lower than its former grade and which is located in the outskirts of urban centers that may have the effects of disrupting social ties and the already established business activities of old possessors. Except for claims for compensation, old possessors are also prohibited from lodging an appeal to regular courts against any decisions of land administrative organs connected with issues of the law and claims for a substitute of a plot of land. The outcome of all these problems is nothing but to exacerbate the situation and to make old possessors live under acute conditions of tenure insecurity until the overall conversion of old possession into leasehold system is completed. This article will try to analyze those legislations dealing with expropriation of old possessors in light of tenure security issues.

Keywords: *Land expropriation, old possessions, leasehold lands, tenure security*

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Introduction

Everywhere in the world, the issue of land holds an immense and significant position in the economic, political and social lives of human beings. This is particularly true as land is fundamental to the life of every society since it is the basic source of food, shelter and income that even goes to the extent of determining the status and the living standard of individuals.

When one looks at the issue of land in the Ethiopian context, land also holds a significant position in the day to day lives of citizens that even goes to the extent of denoting that to be 'landless is to be sub-human.'[1] More specifically, the special attachment of Ethiopians to their land was clearly enunciated under Proclamation No. 31/1975 that declared 'a person's right, honor, status and standard of living is determined by his relation to land.'[2] The reaction witnessed from the society after the issuance of the new Urban Land Lease Proclamation No. 721/2011 could also be taken as a good manifestation as to how land still holds the central position in the lives of Ethiopians.

This, in fact, is understandable as landholders are curious about the security of their tenure and the protection that they have over the land they hold. Land holders tenure security is defined as the degree of reasonable confidence against arbitrary deprivation of the land rights enjoyed or of the economic benefit deriving from them.[3] It includes both the objective elements (clarity, duration, robustness and enforceability of the rights) and subjective elements (land owner's perception of the security of the rights).[4] As is well articulated by Rahmato, the objective elements of tenure security are fulfilled when:

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[1] Paul, Brietzke, Land Reform in Revolutionary Ethiopia, *The Journal of Modern African Studies,* Vol. 14, No. 4, Dec. 1976, p.638

[2] Public Ownership of Rural Lands Proclamation, Proclamation No.31/1975, Negarit Gazetta, (1975), see the preamble. (Herein after Cited as Proc. No. 31/1975).

[3] Gudeta Seifu, Rural Land Tenure Security in the Oromia National Regional State, in Muradu Abdo (ed.), *Ethiopian Business Law Series, Land Law and Policy in Ethiopia Since 1991: Continuities and Changes*, Faculty of law, Addis Ababa University, Addis Ababa, Vol. III, (2009), p. 112. In fact this article only focuses on the analysis of legislations and emphasis will be given to the assessment of objective element of tenure security. And as such, the subjective elements of tenure security which requires an assessment of the subjective feeling of landholders will not be examined.

[4] Ibid, p. 112.

> The duration of the rights (the landholder has a right to the land on a continuous basis for good or for long enough to have an incentive to improve or invest on it), the assurance of the right (the feeling of assurance that the land rights are not overridden by the others) and robustness of the rights (that the landholder has the freedom to use, dispose of or transfer the land free from interference by others including the state). [5]

Moreover, effective legal protection against eviction or arbitrary curtailment of land rights, along with enforceable guarantees and legal/and social remedies against the loss of this rights are also important components that significantly affects tenure security of land holders.[6]

Thus, as expropriation is one essential component that has the effect of curtailing property right of landholders, the manner of its enunciation as well as its implication on landholder should be thoroughly scrutinized. To begin with, expropriation is generally understood to be the right of the state or of those to whom the power has been lawfully delegated to take private property for public use without the owner's consent and with payment of due compensation to be ascertained according to law.[7] Article 40(8) of the Federal Democratic Republic of Ethiopia`s Constitution clearly acknowledges the power of the state to expropriate private property for

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[5] Dessalegn Rahimato, Searching for Tenure Security? *The Land System and New Policy Initiative in Ethiopia*, FSS Discussion Paper No. 12 Forum for Social Studies, Addis Ababa, (2004). P. 35.

[6] United Nations Human Settlements Program (UN-HABITAT), Secure Land Right for All, (2008), P. 7. So as to say that landholders do have secured land right, they should have a land right which is long enough to enable them to invest on the land they hold. The land right should not also be easily overridden by others including the state and there should exist effective legal protection against eviction or arbitrary curtailment of land rights. In cases where these rights are curtailed, land holders should be provided with enforceable guarantees and legal/and social remedies against the loss of this rights.

[7] Daniel Woldegebriel, Compensation during Expropriation, in Muradu Abdo (ed.), Ethiopian Business Law Series, *Land Law and Policy in Ethiopia Since 1991: Continuities and Changes*, Faculty of law, Addis Ababa University, Addis Ababa, Vol. III ,(2009), from page 191-234. In this article a detail accounts of all those basic elements of expropriation are singled out by the writer. Accordingly, first expropriation is a right to be exercised by the state itself or its sub branches such as municipalities or other public companies or private companies legally authorized by the state. Secondly, the state or other organs authorized to take such lands must follow some procedure which warrant that the state must initiate an expropriation procedure before a court or other organs in order to observe due process of law. Thirdly, expropriation of private properties must be taken for public purposes. Fourthly, expropriation differ from the police power of the state in that it involves the loss of the core constituent right of disposal while in the later what the owner loses is some part of his use right over his property. Finally expropriation is a sovereign power of the state to take private land without the consent of the owner.

public purposes by paying commensurate compensation for the value of the property to be taken. Therefore, to implement the basic principles enshrined under the constitution, the country has enacted Expropriation of Land Holdings for Public Purposes and Payment of Compensation Proclamation Number 455/2005 and its implementing Council of Ministers Payment of Compensation Regulation No. 135/2007. These are the basic laws that dictate how private property of individuals is to be expropriated by the state for public purposes.

Even if both the proclamation and the regulation mentioned above do not define what expropriation is, it can be understood from the reading of Article 3 of Proclamation Number 455/2005 that a *woreda* or an urban administration can only expropriate rural or urban landholdings for public purposes upon payment in advance of commensurate compensation for a better development project to be carried out by public entities, private investors, cooperative societies or other organs.

Likewise, with regard to urban land, the Lease Holding Proclamation no 721/2011 also enunciates that a body of a regional or city administration vested with the power to administer and develop urban land has the power where it is in the public interest to clear and take over urban land upon payment of commensurate compensation.[8] Ever since leasehold system has been introduced in Ethiopia in the year 1993, the country's urban land has begun being administered by the leasehold system. Leasehold tenure system, however, is not fully implemented and there still exist urban lands which are acquired and being administered without the lease system. The lease proclamation designates these lands as 'permit holdings' or 'old possessions', which are defined as plots of urban land which are legally acquired before the urban center entered into a leasehold system or a land provided as compensation in kind to persons evicted from old possessions.[9]

This article will thus mainly analyze the tenure security of old possessors during expropriation proceedings of urban lands. This, in fact, is done by

[8] Lease Holdings of Urban Lands Proclamation, Proclamation No. 721/2011, *Federal Negarit, Gazetta.*, (2011), article 26(1) cumulative with Article 2 (Here in after cited as Proc.No.721/2011).

[9] Proc. No.721/2011, Article 2(18). It has to be also noted here that old possession is a synonym for permit holding.

comparing the implication of expropriation proceedings on old possessor's vis-à-vis leaseholders and sometimes its implication on both landholdings. Accordingly, the first section of this paper will try to address the historical account of old possessions and the manner of their treatment under different lease proclamation enacted so far. The second section will try to examine the basic elements of expropriation and its implication on old possessions. As such, issues related with public purpose, substitute plot of land, compensation and access to ordinary court will be thoroughly examined in this part. Finally, the paper will wrap up by providing a concluding remark.

1. Historical account of old possessions and their treatment under the leasehold system

In Ethiopia, before the introduction of leasehold system in 1993, urban land had gone through different tenure systems. It ranges from freehold urban land tenure system that among other things allowed urban dwellers to freely own, sale and transfer their plot of land before the year 1975, to government ownership of urban land and extra houses which came along with the enactment of Proclamation Number 47/1975.

Leasehold tenure system was introduced in Ethiopia through the enactment of the First Urban Lands Lease Holding Proclamation Number 80/1993.The question that followed after the issuance of this proclamation was how this new tenure system would treat those urban dwellers who acquired land before the introduction of the leasehold system. In fact, the approach adopted in this proclamation excluded all urban lands acquired before the introduction of the lease system from the ambit of the proclamation.[10] Permit holders (those who acquired land before the introduction of the lease proclamation), were left to be governed pursuant to the past arrangements that only oblige them to pay annual land rent and house tax.[11]

[10] Urban Lands Lease Holding Proclamation, Proclamation No. 80/1993, *Negarit Gazetta*,(1993), Article 3, (Here in after cited as Proc. No. 80/1993).

[11] Government ownership of Urban Lands and Extra Houses Proclamation, Proclamation no. 47/1975, *Negarit Gazetta*, Article 9 cumulative with Article 11(4), (Herein after cited as Proc. No. 47/1975). In fact, any transfer of dwelling houses in cases other than inheritance; and lands to be allotted for any other purpose than dwelling houses after the issuance of the proclamation were made to be governed by the Land Lease Proclamation No. 80/1993. See Article 3 cumulative with Article 4, 5 and 15 of the Proclamation.

The arrangements adopted under the first lease proclamation were totally changed with the enactment of the Second Re-enacted Urban Lands Lease Proclamation Number 272/2002 that repeal and replace the first lease proclamation. Accordingly, this proclamation was meant to administer both permit holders and lease holders under a single leasehold system. However, the application of the proclamation on permit holders was suspended until the then regional states and city administrations came up with their own specific regulations.[12]

Nevertheless, before the conversion of old possessions into leasehold system was carried out, Proclamation Number 272/2002 itself was repealed and replaced by Urban Land Lease Proclamation Number 721/ 2011. Like its predecessor, the new proclamation also declared leasehold as the only means of acquiring urban lands and states the mandatory conversion of all permit holdings (old possessions) into a leasehold system.[13] The application of this proclamation is also suspended until the Council of Ministers decided the manner of conversion of old possessions into leasehold system based on a detailed study to be submitted to it by the Ministry of Urban Development and Construction.[14] However, till now such a study is not submitted to the Council of Ministers and conversion of all old possessions into leasehold system is not carried out. In fact, such exception will remain intact for only cases of transfer through inheritance and any case of transfer of old possessions to third parties through any other modality other than inheritance could only be carried out through leasehold system.[15]

Such arrangements adopted in the second and third lease proclamations clearly left the fate of old possessors to be under the mercy of the concerned government organs given the mandate to decide on the manner of conversion of old possession into leasehold system. The new amendments also cast their own negative implication on old possessors who had indefinite land rights

[12] The Re-enactment of Lease Holding of Urban Lands Proclamation, Proclamation No. 272/2002, *Federal Negarit Gazetta*, Art. 3, (Here in after cited as Proc. No. 272/2002).

[13] According to Article 2(18) of Proc. no 721/2011, old possessions are plots of urban lands which are legally acquired before the urban center entered in to leasehold system or a land provided as compensation in kind to persons evicted from old possessions. It has to be also noted here that old possession is a synonym for permit holding.

[14] Proc.No.721/2011,Article 5 cumulative with Article 6.

[15] Proc. No. 721/2011, Art. 6(3),

only through payment of annual land rent and house tax under the previous land tenure system.[16] However, as the focus of this article is on the expropriation of old possessions and its implication on tenure security of old possessors, the next part of this paper will give much emphasis on the nature and extent of expropriation and its implication on tenure security of old possessors.

2. Expropriation of old possessions and its implication on tenure security of old possessors

As have been discussed before, expropriation is an inherent power of a state that can be enforced without the need to secure landholders/owners consent. However, there are preconditions that a given state is under obligation to honor. As is stated under the FDRE Constitution, expropriation can be carried out when doing so is in the public interest and with payment of commensurate compensation.[17] In this regard, the implementing proclamation, Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation no. 455/2005, also re-affirms that rural or urban landholding could only be expropriated for public purposes and with payment of compensation. The proclamation also states that the reason for the expropriation should be for a better development project to be carried out by public entities, private investors, cooperative societies or other organs, or where such expropriation has been decided by the appropriate higher regional or federal government organ for the same purpose.[18]

Likewise, it is also stated under Urban Land Lease Proclamation no. 721/2011 that the appropriate body shall have the power, wherein it is in the public interest, to clear and take over urban land up on payment of

[16] See. Proc. No. 721/2011, Article 16(1) and (2). Any person intending to acquire urban land shall conclude a lease contract which is for definite period of time and which among other things include the lease price. It is thus clear that as any arrangement of conversion of old possessors in to leasehold system could bring about changes in duration of holdings and payment of lease price, it is a matter of huge concern for old possessors.

[17] The Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, Federal Negarit Gazetta, (1995), Article 40(8)

[18] Expropriation of landholdings for public purpose and payment of compensation Proclamation, Proclamation Number 455/2005, (2005), Article, 3 (1) (Herein after cited as Proc. No. 455/2005).

commensurate compensation, in advance, for the properties to be removed from the land.[19]

What one can discern from the FDRE Constitution and the proclamations stated above is that government organs can expropriate private landholding for the purpose of public interest and with payment of commensurate compensation. The expropriation must also be for a better development project to be carried out by public entities, private investors, cooperative societies or other organs.

Moreover, landholders are given the right to get substitute plot of land in cases of expropriation of land and can only appeal to the court on grievances related with the amount of compensation paid.[20] Thus, it is of a paramount importance to specifically deal with issues related with 'public purpose,' substitute plot of land, compensation and the manner of grievance handling mechanisms related to expropriation proceedings of old possessors in light of tenure security.[21]

2.1 What is meant by public purpose and its implication on tenure security of old possessors

2.1.1 What is meant by 'public purpose'?

As has been discussed before, for any government to expropriate private land of individuals, the expropriation must be carried out for public purposes. A proper investigation of legislation of different countries reveals

[19] Proc. No.721/2011, Article, 26(1). Here one can easily note that the expropriation and the lease proclamations employ different terminologies of 'power to expropriate land holding' and 'power to clear urban land' respectively. However, from the reading of the Amharic version what one can see is that both proclamations enunciate "**መሬት የማስለቀቅ ስልጣን**" and "**የከተማ ቦታ የማስለቀቅ ስልጣን**" respectively. It is thus clear from the reading of the Amharic version that both proclamations discuss about the power to appropriate private landholdings of individuals and those government organs entrusted with the power to expropriate land. Hence, the writer might use those terminologies referred above interchangeably but with common connotation of taking of private holdings of individuals for public purposes.

[20] Proc. 721/2011, see Article 26(2) and Article 29 (3).

[21] In the following sub-topic, much emphasis is exerted on the negative implication of expropriation that uniquely affects old possessors than that of leaseholders. Here, even if discussions related with compensation and access to regular courts are of common concerns for both old possessors and lease holders, the writer is of opinion that the very nature and the manner of how 'public purpose' is envisaged in the expropriation legislation make old possessors to be more vulnerable than that of leaseholders. Hence, the writer will insist on the discussion of old possessors in fact with noting the common nature of the problem but with acknowledging the fact that old possessors are more vulnerable and affected by the expropriation proceeding than leaseholders.

the fact that the concept of public purpose is given different names. While in Europe it is known as 'public interest,' in the USA and Ethiopia it is known as 'public use' and 'public purpose' respectively.[22] Although the scope of application of the concept might differ from country to country, all the above terminologies have the same objective – acquisition of privately owned land by public entity.[23] When a reference is made to the definition of public purpose, defining the concept is not an easy task. This is mainly because, in every case, it is a question of public policy, the determination of which is dependent upon the facts and circumstances and on what the legislature seeks to accomplish.[24]

Based on what the legislator seeks to accomplish, public purpose might be stated to be broadly or narrowly construed. The broader view of public purpose gives discretion for governments to widely interpret public purpose and expropriate private property rights of individuals. At the heart of the broader view of public purpose lies the fact that it is not necessary that there be actual physical use by the public or the government. Anything which tends to enhance utilization of resources, increase industrial energy supplies, and promote the productive power of any considerable number of the inhabitants of a section of the state manifestly contributing to the general welfare and the prosperity of the whole community constitutes public use.[25]

On the other hand, the narrower view of public purpose limits government power to expropriate private property rights of individuals to activities that directly benefits the public. Here, public purpose is narrowly construed to be 'use by the public'.[26] At the heart of the narrower view lies the fact that the society should get benefit from the property appropriated as a matter of right

[22] Daniel Woldegebriel Ambaye , Land Rights and Expropriation in Ethiopia, Academic Dissertation for the Degree of Doctor of Philosophy, Royal Institute of Technology (KTH), Sweden, (2013), P. 188

[23] Ibid, p. 189.

[24] Ibid.

[25] Ibid, p 194. The writer adds that public uses are not limited to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, safety, recreation, and enjoyment; besides, it includes the field of public welfare or public necessity or the prosperity of the community. The taking of property for aesthetic purposes may be also considered as taking for public use for different reasons like; public health, safety, utility, morals, general welfare, security, prosperity.

[26] Ibid, p. 193. It has to be noted here that with more public engagement and economic development, especially after the American Revolution, it is said, the "broader view dominated the courts ," and today it has become the most held view in the US Supreme Court.

and not as a matter of favor. If any benefits accrued from expropriation proceedings are solely to the benefit of a single individual, then such proceedings are just for private use and do not qualify as public purpose. This signifies that the transfer must assume some form of benefit accrue to society as a whole or partly.

Whether a state follows the broader or narrower view of public purpose, what matters most in light of tenure security of property rights of individuals is striking a balance between societal and individual interests. It is stated that ‘‘though states interpret ‘public interest’ differently, it generally signifies that the property, once intended for public purpose use, will benefit the community or country in general rather than a particular individual or group.’’[27] Similarly, private property of individuals must not be expropriated for personal use only and that governments should expropriate private properties for clearly identified public purposes.[28]

The meaning of public purpose is ultimately based on the widely accepted understanding that the general interest of the community or a section thereof, overrides the particular interest of the individual.[29] In South Africa, too, the term ‘public purposes’ is usually defined in contrast to ‘private purposes’.[30] As such, expropriating land by the state for the purposes of carrying out its administrative obligations such as building a road, a bridge or a hospital can be considered as projects done for the general interest of the public. On the other hand, an expropriation specifically carried out for the benefit of a private individual or for the benefit of the state’s commercial ventures would be private purpose, and would therefore not be permissible.[31] It is thus against this backdrop that we will try to see how public interest is envisaged under the pertinent expropriation provisions of the country and as to how it is applied with regard to old possessors and leaseholders.

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[27] Legal memorandum, Land Expropriation in Europe, January 2013, p. 2.

[28] Klaus Deininger, Land Policies for Growth and Poverty Reduction, a co-publication of the World Bank and Oxford university press, (2003), p. 173

[29] Brightman Gebremichael, Public Purpose as a Justification for expropriation of Rural Land Right in Ethiopia, *Journal of African Law*, Available on CJO, (2016) , p. 5

[30] Dr. Christina Treeger, Legal analysis of farmland expropriation in Namibia, Konrad Adenauer Stiftung publication, (2004), p.3.

[31] Ibid.

Urban Land Lease Proclamation no. 721/2011 defines 'public interest' as:

> The use of land defined as such by the decision of the appropriate body in conformity with urban plan in order to ensure the interest of the people to acquire direct or indirect benefits from the use of the land to consolidate sustainable socio-economic development.[32]

One can also see that a similar definition of what is meant by 'public purpose' is stated under Proclamation no. 455/2005.[33] It could be inferred from both proclamations mentioned above that public interest is left to be defined by the appropriate body (regional or city administrators vested with the power to administer and develop urban land)[34] in conformity with urban plan (structural plan, local development plan or basic plan of an urban center)[35] that has to directly or indirectly benefit the public in a manner that consolidate sustainable socio-economic development.

In fact, under the previous Proclamation no. 401/2004 which was repealed and replaced by the current Expropriation Proclamation no. 455/2005, those works which could fall under the category of public interest were sorted out. Accordingly, works related with highway, power generating plant, building, airport, dam, railway, fuel depot, water and sewerage, telephone and electrical works and other related works were sorted out to fall under the category of public use.[36] Under this proclamation, public interest is construed narrowly in light of those works that would directly benefit the general public. However, nothing of such kind of works that could fall under public interest is sorted out under the Expropriation Proclamation Number 455/2005. In this regard, the pertinent provision states that;

> A *woreda* or an urban administration shall, upon payment in advance of compensation in accordance with this Proclamation, have the power to expropriate rural or urban landholdings for public purpose where *it believes that* it should be used for *a better development project to be carried out by public entities, private investors, cooperative societies or other organs*, or

[32] Proc. No. 721/2011, Article, 2(7).

[33] See Proc. No. 455/2005, Article 2(5).

[34] Proc. No.721/2011, Article 2(6).

[35] Proc. No. 721/2011, Article 2(8).

[36] Appropriation of Land for Government Works and Payment of Compensation Proclamation, Proclamation Number 401/2004, (2004). Article, 2(2).

> where such expropriation has been decided by *the appropriate higher regional or federal government organ for the same purpose*.[37] (Emphasis added)

Thus, the determination of what sort of activities could justify 'public interest' is left to be broadly construed at the discretion of appropriate organs. What is given priority is a better development project that will be carried out by public entities, private investors, corporate societies or other organs. It is not even clear whether those development projects should directly or indirectly benefit the public.

One can thus hardly trace all those project proponents and those development projects which could justify expropriation of old possessions for public purpose, making it an amorphous term which could include anything that the appropriate body decides to fall under the wider basket of public interest. Such kind of a broader interpretation of 'public purpose' would give land administrative authorities a wider right to expropriate private landholding of individuals solely for the benefit of the state's commercial interest or for a private person. This in its turn would make landholders to live under acute conditions of tenure insecurity by depriving them of security of property rights and assurance against unabated government's encroachment on their property rights to land. The next sub-topic will try to shed light on how such an approach make old possessors live under acute conditions of tenure insecurity.

2.1.1.1 The implications of 'public purpose' on tenure security of old possessors

As it is discussed above, in cases of expropriation of old possessions, public interest is left to be broadly construed by land administration authorities. Nevertheless, a different approach is followed in cases of expropriation of leasehold lands than that of old possessions. For example, lease holders unlike those of old possessors are given a guarantee against the wider application of public interest as a means to take over leasehold lands prior to the expiration of the lease period. Accordingly, *leasehold lands cannot be taken over unless the lessee has breached the contract of lease, and the use*

[37] Proc. No. 455/2005, Art. 3(1).

of land is not compatible with the urban plan or the land is required for a development activity to be undertaken by the government.[38] The same protection is also accorded to leaseholders under the expropriation proclamation that no land lease holding may be expropriated unless the lessee has failed to honor the obligations he assumed under the Lease Proclamation and Regulations or the land is required for development works to be undertaken by the government.[39] Here, if the lessee is unable to use the land for the prescribed purpose within the period of time stated in the contract, it is stated that the leasehold land would be taken from him actually by returning the amount of lease price paid after reasonable deductions are made.[40]

On the other hand, as far as urban land is to be offered for lease holding after assessment is made about its compatibility with the urban plan, it is clear that the lessee is expected to make the use of the land compatible with the urban plan.

Actually, what is worrisome to leaseholders is that their land could be taken for those projects that will be undertaken by the government. On the other hand, landholding of old possessors could be taken for those projects not only to be undertaken by the government but also by public entities, private investors, corporative societies and other organs that are not even specifically enumerated under Proclamation no. 455/2005. It could reasonably be said that old possessors are more vulnerable to expropriation under the guise of 'public interest', which in fact is made to be broadly interpreted by city or regional land administrators. As to the writer, the wider interpretation and lack of clearly identified public purpose make old possessors lack a guarantee that their landholding would not be expropriated for the sake of personal or individual interests. This in fact is against landholders' tenure security which demands clear interpretation of public purpose and which prohibit expropriation of land for private purposes.[41]

[38] Proc. No.721/2011, Article, 26(3).

[39] Proc. No. 455/2005, Art. 3(2).

[40] Proc. No.721/2011, Article, 21(1) and 25(3).

[41] Deininger, supra note 28, p. 179.

This, on the other hand, render old possessors to live under acute conditions of tenure insecurity, which would come into the picture when landholders lack the degree of reasonable confidence against arbitrary deprivation of the land rights enjoyed and when they lack a guarantee to use their land on a continuous basis for good or for long enough to have an incentive to improve or invest on it.[42]

Hence, if at all maintaining tenure security of old possessors is sought, the broad discretionary power of the appropriate organs to determine public purpose should have been limited at least by the requirement of establishing an equitable balance between the social interests on one hand, and that of old possessors on the other hand. As the definition of public purpose lacks clarity, old possessors could hardly know their property rights clearly, which in fact is against the objective tenure security of old possessors. Thus, as old possessions are legally acquired lands as the proclamation itself enunciates,[43] some limitation on the interpretation of public interest should have been provided as their counterpart leaseholders.

2.2 The right to get substitute plot of land and issues related to tenure insecurity of old possessors

Persons displaced due to an action taken by regional and city administrations are given a right to get substitute plot of land.[44] Here, the most important issue with regard to substitute plot of land is related with the size of the land that a landholder is going to be provided with. As is stated under Article 26(2) of Proclamation no. 721/2011, the size of a substitute plot of land to be given to those urban dwellers whose land is taken over due to public interest is left to be determined by regional or the city administrations. In this regard, it is of a paramount importance to ask what the implication of this provision would be on tenure security of old possessors.

At this spot, the writer is of opinion that such discretionary power is given to regional or city administrations so that they could give a substitute plot of land which is disproportionate to the previous holding of old possessors

[42] Gudeta, supra note, 3 p.112 and see also Dessalegn Rahimato, supra note, 5, p.35.

[43] Proc. No. 721/2011, Article 2(18).

[44] Proc. No. 721/2011, Article, 26(2).

when it is compared with those of their counterpart leaseholders.[45] This can easily be inferred from a simple logic that had the legislator intended to provide a plot of land which is equal to the original size of old possessors, it could have been clearly provided in the provision at hand.

In line with this, under the Addis Ababa City Government Land Lease Regulation no. 49/ 2011 and the Model Draft Regulation No-/ 2011, those leaseholders who are to be displaced due to urban renewal programs are guaranteed not to be forced to leave their land before the termination of the lease term unless the lease land is needed for public purpose.[46] Even in such cases, too, they are guaranteed to be given a substitute plot of land which is the same as the size and the remaining lease term. Nevertheless, one can hardly find such similar guarantees with regard to the size of the land that old possessors are going to be given in similar cases of expropriation of urban land.

Hence, while lease holders are going to be given an equal size of a substitute plot of land, old possessors, on the other hand, are never guaranteed the same and the size of land that they are going to be given is left to be determined by the appropriate bodies. Moreover, even if the Model Regulation No-/2011 enunciated a precondition that dictates the substitute plot of land to be given to old possessors should take cognizance of grade, distribution standard, and infrastructural accessibility, the approach it followed in this regard is of no help to avoid tenure insecurity as it is a non-

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[45] *የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ 4ኛው የህዝብ ተወካዮች ምክር ቤት 2ኛ አመት የስራ ዘመን 1ኛ መደበኛ ስብሰባ ቃል ቧቃል ቃለ-ጉባዔ*, September, 30, 2004(E.C), See, p.30 (herein after cited as the minute of the parliament) (Unpublished, available at the library of House of Peoples Representative, Addis Ababa). See the minute of the parliament. During the ratification of Urban Lands Leasehold Proclamation No. 721/2011, Ato Girma Seifu, who at that time was a member of the parliament, had pointed out that 'giving the right to the appropriate body to determine the size of plot of land to those persons displaced due to public interest is not justifiable'. According to him, such discretionary power given to appropriate bodies should be restricted. He further asked that what if for example those whose 500 square meters of land is taken over are given 250 square meter of land? He further pointed out that persons displaced from their holding should be guaranteed to be given equal plot of land and the infrastructural accessibilities of the substitute land that they are to be given should also be taken in to consideration with what they held before and the law should be amended in such a manner.(Translation by the author)

[46] Model Draft Land Lease Regulation No.-/2011, Article, 23(1) and (2) and Addis Ababa City Government Regulation No. 49/2011, Article 22(1) and (2).

binding draft regulation and as the same is not enunciated under the lease proclamation.[47]

For example, regarding determining the size of substitute land, the Addis Ababa City Municipality Urban Renewal Directive no. 3/2002 after stating various rigorous procedures of ascertaining the size of plot of old possessors, it determines the substitute plot of land to be given to legally acquired old possessions. Accordingly, those old possessors whose landholding ranges between 201 and 250 square meters will be given 105 square meters of land, and those legal old possessors whose original holding is between 251 and 300 square meters are going to be given 150 square meters.[48]

On the other hand, while old possessors who hold between 301 and 350 square meters urban land will be given 175 square meters of substitute plot of land, those who hold between 351 and 400 square meters are allowed to be given 200 square meters.[49] Moreover, those old possessors whose landholding ranges from 401 to 450 and from 451 to 500 square meters are going to be given 225 and 250 square meters respectively.[50] Finally, those old possessors whose urban landholding is beyond 500 square meters, will only be given 350 square meters of substitute land.[51]

This actually means that whether an old possessor acquires 1500 square meters of land through legally spending much sum of money or not, actually what he can get as a substitute plot of land will definitely be only 350 square meters of land in fact without being paid nothing for the loss of the rest 1150 square meters of land.

This in its turn will definitely exacerbate tenure insecurity of old possessors who lack a sufficient guarantee for the continuous use of their holding. In this regard, unlike leaseholders who are guaranteed to be given an equal plot

[47] Model Draft Lease Regulation No.-/2011, Article, 23(1). One can witness that the same kind of approach is not followed under Article 24 of the lease proclamation and under the Addis Ababa City Lease Regulation.

[48] *በአዲስ አበባ ከተማ አስተዳደር ማዘጋጃ ቤት የነሳ ግምት የምትክ ቦታ አና ቤት አሰጣጥ መመሪያ ቁጥር 3/2002 (አንደ ተሻሻለው)* January 4/2003, (herein after cited as Urban Renewal Directive 3/ 2002), see part six, paragraph 21.1, p. 48 and part three of the appendix.

[49] Ibid

[50] Ibid

[51] Ibid

of land for what is taken from them, the landholdings of old possessions are made to be reduced in a substantial degree from what they hold before. The final upshot of all such uncertainties is nothing but to make old possessors live under acute condition of tenure insecurity.

Thus, as the Model Land Lease Regulation has no binding effect, the approach it follows regarding the manner of how a substitute plot of land is to be given to old possessors should be included under Article 26(2) of the current Land Lease Proclamation no. 721/2011. Such approach would have the effect of narrowing down the discretionary power given to regional and city urban land administration organs as it provides preconditions that should be taken into consideration in cases of giving substitute plot of land. Accordingly, the substitute plot of land to be given to old possessors should at least take into account the comparability of the size, grade and infrastructural accessibility of the substitute plot of land, which in fact is of a paramount importance to maintain tenure security of old possessors.

2.3 The right to get commensurate compensation and issues related to tenure insecurity of old possessors

The other important point that deserves proper scrutiny in light of tenure security is whether the amount of compensation to be paid for the loss of properties attached to old possession is commensurate enough to substitute the same house old possessors had before or not. As is stated under Regulation no. 135/2007, the compensation that is to be paid for the loss of a building is enunciated to be determined on the current cost per square meter or unit for constructing a comparable building.[52] Likewise, the amount of compensation for property situated on the expropriated land shall be determined on the basis of replacement cost of the property.[53] In calculating cost of construction and improvements, valuators are required to consider two basic components, i.e. current cost of construction materials and labor.

[52] Payment of Compensation for Properties Situated on Landholdings Expropriated for Public Purposes, Regulation no. 135/2007, (2007), Article 3(1). (Herein after cited as Regulation no. 135/2007). At this juncture, it has to be noted here that problems related with payment of compensation are not peculiar only to old possessions.

[53] Regulation No. 135/2007, Art. 7(2)

To illustrate what happens on the ground, a field study conducted by Walta Information Center is of an immense importance. According to this field study, from those old possessors and those who live in *kebele* houses and whose houses are demolished to clear the land for public interest projects, around 40% responded that the amount of compensation paid for the loss of their houses is in adequate.[54] As to the respondents, the compensation given so as to enable them to replace the same house is inadequate and that they incurred additional cost to build the same house.[55]

This clearly shows that in addition to the big loss that old possessors might incur with regard to the size, grade and location of a substitute plot of land, the amount of compensation that they are paid is claimed to be inadequate to replace what they had lost when their houses are demolished.[56] From this field study, one can see how the amount of compensation paid for properties attached to old possession is a matter of huge concern for old possessors.

More importantly, a study conducted by Daniel Woldegbriel on valuation and payment of compensation traces those major causes that deter landholders from getting commensurate compensation for their properties demolished during expropriation. According to the study, in practice, in order to calculate the cost of construction and improvements a central price index is prepared by the city administration (in Addis Ababa) or Urban Works and Development Bureau (in regional states). This price index that shows the current price of construction materials and labor cost is then distributed to each sub-city (in Addis Ababa) and town (in regions).[57]

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[54] በመልሶ ማልማት ሂደት ሰራ አሰፈጸሚው የሚያቀረበው አገለግሎት ፍጥነትና ተነሺዎች የሚያሳዩት ትብብር: የህዝብ አሰተያየት ጥናት: ዋልታ ኢኒፎረሜሽን ማዕከል , አዲስ አበባ: (2004) p. 39-40 (Unpublished, available at the office of Addis Ababa Land Administration Urban Renewal Department)

[55] Ibid. See also Haymanot Merawi, *የዙሪያ ባለቤትነት ሲሄፈግ ህገመንግስታዊ ጥያቄ ያስነሳል, Reporter Gazeta, Amharic edition*, issue 17, No. 7/1200, Tahisas, 2004, p. 29. This writer also stated that the compensation paid during demolishing of old houses around Sheraton Addis for urban renewal purpose is said to trigger an immense controversy in that the amount of compensation paid was said to be very small let alone to enable them to build the same kind of house they lost. (Translation by the author).

[56] See the Minute of the Parliament; supra note, 45, p. 29. During the ratification of the lease proclamation, Ato Girma Seifu had asked as to what is meant by commensurate compensation? He had also spoke about what he stated is a practical problem that was being witnessed. Accordingly, he stated that the government in practice gives 500,000 to the property that may worth 5,000,000. As to him, any urban development that makes the location value of the land to be expensive is not solely done by the government. Rather, it is by the people who were there while the area was devoid of any infrastructure.

[57] Daniel Weldegebriel, Supra note, 22, p. 240.

However, the crux of the problem identified with such system is that due to the fact that cost of labor and building materials are not periodically updated, urban dwellers whose house is demolished due to urban land clearance order are unable to get commensurate compensation as the law dictates.[58] The price index is not updated frequently in spite of increases in material prices and workmen's wages.[59] Such practice, in fact, is against one of the well accepted requirements of expropriation, i.e. that it must be accompanied by adequate, effective and prompt compensation.

The practice clearly inhibits landholders (both leaseholders and old possessors) from getting commensurate compensation in the case of urban land clearance order. It is thus plain that valuation and payment of compensation are among those major problems that exacerbate tenure insecurity of landholders.

2.4 Access to regular courts and its implications for tenure security of old possessors

The other sensitive issue related with tenure security of landholders is the manner of access to ordinary courts during clearance of urban land. It has to be noted here that the issue of access to ordinary courts is common to both leaseholders and old possessors. As such, any discussion related to old possessors is equally applicable to leaseholders. As is clearly stated in the proclamation, landholders are prohibited from taking an appeal to the regular courts against any decisions of administrative organs related to issues of law and claims for a substitute plot of land.[60] Accordingly, any person served

[58] Ibid, p. 245. The writer also sorted out that a person may not get a land comparable in size and location and that location is not given value (city administration gets disproportional profit), damages to property/business caused as a result of another project are not compensable. In his article, the writer recommended that so as to at least minimize those causes for tenure insecurity during valuation of properties, municipalities at least must update current price of building materials and valuation must also be done with professional valuators.

[59] Ibid

[60] Proc. 721/2011, Article 29(3). This in fact is not a new approach which was followed by Proc. no. 721/2011. Rather, the same kind of approach had been followed by the previous proc. No. 272/2002. As it was stated in the preamble of this proclamation, among the main reasons that necessitated the re-enactment of the second Lease Proclamation No. 272/2002 was the need to set up an order wherein legal claims arising from the lease proclamation could be handled. Accordingly, this proclamation envisaged provision that had never been enunciated under the first Lease Proclamation No. 80/1993 by specifically stating those organs authorized to clear urban lands for public purposes and the manner of instituting pleading on the organ that carried out the clearance and on issues of appeal against the

with a clearing order pursuant to a public interest or any other person alleging infringements of his rights or interests as the result of the order may submit his grievance within fifteen working days to the body of regional or city administration that has the power to clear and take over urban land upon payment of commensurate compensation.[61]

Likewise, any applicant who is dissatisfied with the decision of the above organs may appeal to appellate tribunal which shall be established by regions and city administrations themselves.[62] Here, it is interesting to note that save for claims related with compensation, the decision given by the tribunal after 30 days of application shall be final both on issues of law and facts including claims for substitute land, which is not appealable to the municipal or regular courts.[63] The pertinent question that has to be raised in this regard is why is an appeal to municipal or regional courts is prohibited both in issues of law and fact except only on the amount of compensation paid? And what is its implication on tenure security of land holders? Indeed, landholders' access to ordinary courts of law is of an important ingredient to bring about tenure security, and it is for this reason that one writer noted:

> [I]n order to maintain tenure security, the loss of landholders rights should occur only in exceptional circumstances and should be a result of *due process, the decision of a court of law*, or according to the provisions of a contract, in which case, the holder will be compensated in full for the land and/or the investments on it.[64] (Emphasis added)

Moreover, writers like Desalegn Rahimato strongly contend that for the existence of genuine tenure security "no decision on land should be binding

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decision of such organ. Accordingly, any decision rendered by the then regional or city administration vested to clear urban land was appealable to appeal commission that was set by the decision of the highest organ of regional or city government. Likewise, except for the amount of compensation paid, any decision that the appeal commission rendered was specifically made to be final both on issues of facts and laws. See Articles, 16-18 Proc. No.272/2002.

[61] Proc. No.721/2011, Article, 27(1) cumulative with Article 28(1).

[62] Proc. No.721/2011, Article, 29(1), and Article 30. Moreover, pursuant to sub Article, (2), (3) and (4) of Article 30 of this Proclamation, the appellate tribunal, which at least consists of five members drawn from different bodies is made to be accountable to the council of regional or city administration as the case may be, is given a power to confirm, vary or reverse a decision given by the regional or city administration regarding clearance of urban land.

[63] Proc.No.721/2011, Article, 28(3) and (4).

[64] Deininger, supra note 28, p. 12.

on right holders *unless it is made through the legal process and is the decision of legitimate courts*."[65] (Emphasis added). Here, it could be said that great emphasis given to courts of law for the maintenance of genuine tenure security seems is traceable from the fact that courts are neutral organs that would only render decisions being solely guided by what the law dictates and nothing else.

Moreover, prohibiting courts of law from adjudicating issues of law that is perceived as their inherent power and the constitutionality of such approach adopted under the lease proclamation is also arguable.[66]

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[65] Dessalegn, supra note, 5, P. 36. This writer also add that giving the courts the sole authority on land matters, including land disputes, dispossessions, land transactions, etc. is of a paramount importance to maintain tenure security.

[66] Even if under this paper, access to ordinary court is scrutinized in light of urban tenure security, the writer wants to shed some light as to the constitutionality of precluding the issue of claims for substitute plot of land from the reach of court of laws. For this writer, as from the deep reading of the pertinent provision of the FDRE Constitution, what one can gather regarding adjudicating matters is that both courts and any other competent bodies (like those established by regional or city land administrations organs) have a legitimate judicial power to render their decisions. This being the case, the problem lies with regard to precluding error of laws from the reach of ordinary courts trough appeal. For this writer, such kind of clear prohibition has its own negative repercussion in narrowing down the inherent constitutional power of ordinary courts to adjudicate judicial matter. This is mainly because;

firstly, as it is stated under Article 79(1) the FDRE Constitution, judicial power at both Federal and State levels is an inherent power of courts and it is vested in them. Thus, with the existence of different and multiple administrative tribunals, if the executive body is allowed to deal with issues of law wholly by itself, where is then the independent establishment of the legislative, executive and the judiciary and allocation of judicial power to courts that the constitution asserts and guarantees citizens to take justiciable matters to court of laws? Here, if the approach adopted under the current Land Lease Proclamation No. 721/2011 regarding the exclusion of error of laws from the jurisdiction of court of law is adopted by a number of administrative tribunals that are established and that are to be established, there would be no doubt that the inherent power of courts to exercise judicial power and the right of citizens to bring their case to court of laws and to appeal against the decisions of administrative organs on those matters containing basic error of law would clearly be curtailed.

Secondly, prohibition of appeal on issues of laws ignores the division that most of the time exists between issue of fact and law. In this case, it is a matter of common knowledge that while administrative bodies are more experts on issues of fact that they are usually exercising in their day to day activities, judges on the other hand, are experts on issues of laws in which they are specially trained. In this regard, one could witness a good division of issues of fact and issues of law in Article 112 of the Income Tax Proclamation No 286/2002 that among other things allowed appeal to court of laws against any erroneous decisions related with matter of laws. Such approach duly acknowledges the inherent power of courts on issues of laws than the approach adopted under the Land Lease Proclamation No. 721/2011.

It is thus this writer's strong belief that prohibiting error of laws committed by administrative tribunals from the reach of courts has its own negative bearing in narrowing down the inherent power of courts that the FDRE Constitution asserts with regard to adjudication of disputes.

Even if one can hardly deny the immense significance that administrative tribunals would contribute in adjudicating deputes, the manner in which they discharge their function should not be by curtailing the inherent power of courts to at least adjudicate error of laws like what the current lease proclamation did.

With regard to issues of landholder's tenure security, the approach adopted under the current Land Lease Proclamation no. 721/2011 casts its own negative repercussion for exacerbating tenure insecurity of landholders. This in fact is traceable from the fact that while courts do have constitutional back up to freely adjudicate matters brought before them being free from the influence of the executive body and being solely guided by the law and nothing else, the same is not true with regard to administrative tribunals which are part of the executive organ. [67]

This in fact leads to the lack of a neutral organ that would check the legality of decisions rendered by administrative tribunals. For example, what if urban clearance authorities expropriate old possessions and hand them over for others under the guise of better development, but actually for nothing? What if they give a substitute plot of land the size of which is far below what the law dictates[68] and the same is confirmed by appellate tribunals?

It can thus be said that the approach followed by the lease proclamation provides no guarantee to old possessors against any abuse of power that might be committed by both land administration authorities and appellate tribunals. Here, whatever the case might be, one can hardly deny the severe insecurity that pervades old possessors with regard to lack of neutral organs to check unjustifiable allotment of substitute plots of land.

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[67] The FDRE Constitution, see Article, 78(1), cumulative with Article 79(1) and (3).

[68] For example, under the Addis Ababa City Municipality Urban Renewal Directive No. 3/ 2002, see part six, paragraph 21.1, p. 48 and part three of the appendix. In this directive, an old possessor whose 500 square meter of land is cleared for public purpose is guaranteed to be given 250 square meter of land as a substitute. If such is the case, what if for example, administrative bodies give an old possessor 150 square meters of land as a substitute and the same is upheld by appellate tribunals while the law clearly guaranteed 250 square meter of land? Would giving compensation in this regard redress the injustice committed by the land administration organs? Here it is vivid that one could hardly respond in the affirmative.

Hence, if at all resolving issues of tenure insecurity that pervades landholders/old possessors and respecting the inherent judicial power of courts in adjudicating disputes is sought, appeal should not be limited only to matters related to compensation. Rather, as issues of land are interlocked with social and economic lives of the society, landholders should at least be given the right to appeal against erroneous decisions of land administrative organs related with error of law to independent courts of law that would positively contribute to enhancing tenure security of landholders.

Conclusion

Proper scrutiny of expropriation rules in light of the objective elements of tenure security warrants the assertion that currently old possessors are living under acute condition of tenure insecurity. Accordingly, the wider interpretation of public purpose, the possibility of giving a substitute plot of land which is less than in its grade, size and which might be located in the outskirts of urban centers could have the effect of exacerbating tenure insecurity of old possessors. Moreover, the inadequate scheme of compensation and limiting access to independent courts of law even with regard to the very sensitive issues of substitute plots of land are also major bottlenecks that negatively affects tenure security of old possessors. All such limitations casts their own negative repercussion on the objective elements of tenure security that require landholders to have clear, durable, robust and enforceable land rights.

Legal Practice Experience for an Engaged Scholarship: A call for access to advocate's license for Ethiopian law schools' instructors

Temesgen Sisay[*]

Abstract

Theoretical and practical experience of law instructors is very essential to handle practice- oriented and clinical courses in law schools. Unless theory is integrated with practical experience, quality education may be compromised. This article explores the relationship between legal practical experience of law instructors and quality legal education in law schools. In doing so, the writer examined the legal regime in Ethiopia that regulates the licensing and registration of advocates to practice law in Ethiopian courts vis-à-vis the curriculum of law schools and proves that there is no law that permits law instructors to access advocates' licenses. Moreover, it examined the experiences of selected countries. The findings of this article revealed that, the delivery of clinical and practice-oriented courses in Ethiopian law schools were managed by instructors with no practical legal experience, and quality of instruction is compromised. To ensure quality education through an engaged scholarship, access to advocate's license for law instructors needs an immediate response and the law should be revised to pave the way for law instructors to deliver an engaged scholarship in their career.

Keywords: Clinical courses, advocate's license, practical experience, engaged scholarship

Introduction

As part of higher education institution, one of the main missions of law schools in Ethiopia is to provide quality education to their students.[1] This quality education rendering objectives of the law schools would only be successful if law schools could employ qualified instructors that could teach

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[1] Higher Education Proclamation, Proclamation No. 650/2009, *Federal Negarit Gazette*, 15th Year No.64. The customers of law schools are their students and students deserve to get quality legal education.

both theoretical and practice-oriented courses. It has been observed that research done by law professors[2] have a significant contribution to judges, lawyers and other legal professionals.[3] The contribution of law professors to the legal profession based on engaged scholarship[4] is not only a matter of responsibility rather it is a necessity for the profession.[5]

To make law professors focus on an engaged scholarship that could solve the practical problems of the community, their involvement in the legal practice and understanding the contemporary theoretical knowledge of law are very important. Understanding the place of both theoretical and practical knowledge of the law professor in the teaching activity, writers are advocating for the introduction of mandatory legal practice requirement for the professors.[6]

Following the introduction of the national harmonized curriculum for legal education in Ethiopia, clinical and practice-oriented courses have been introduced in the curriculum with the intent that these courses would be delivered and supervised by practice-oriented law instructors working either as a full-time or part-time staff of the law schools. However, the law schools

[2] In this article, the words professors and instructors are interchangeably used.

[3] David Hricik & Victoria S. Salzmann, Why There Should Be Fewer Articles Like This One: Law Professors Should Write More for Legal Decision-Makers and Less for Themselves, 38 Suffolk U. L. Rev. 761 2004-2005

[4] The concept of engaged scholarship is defined by Judge Edwards and he explained that, "*Engaged scholarship addresses problems related to the law, legal system, or legal profession that affect a significant portion of society or the legal community. It identifies current legal issues, offers possible solutions to legal problems, or meaningfully informs decision-makers on the issues before them".* See Edward L. Rubin, *The Practice and Discourse of Legal Scholarship.* 86 MICH. L. REV. 1835, 1850 (1988). Engaged scholarship is also a concept that promotes the combination of theory with practice to deliver a fruitful academic responsibility in law schools context.

[5] David Hricik & Victoria S. Salzmann, Why There Should Be Fewer Articles Like This One: Law Professors Should Write More for Legal Decision-Makers and Less for Themselves, 38 Suffolk U. L. Rev. 761 2004-2005.

[6] Emily Zimmerman, Should Law Professors have a Continuing Practice Experience (CPE) Requirement? North Eastern University Law Journal, Vol. 6 No.1, (2013-2014), p.131, (hereinafter Emily, Should Law Professors have a Continuing Practice Experience (CPE) Requirement?; Paul Horwitz, *What Ails the Law Schools?*, 111 Mich. L. Rev. 955 (2013). Available at: http://repository.law.umich.edu/mlr/vol111/iss6/; Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession, 91 Mich. L. Rev. 34 (1992).

are managing these courses even by a fresh graduate due to lack of instructors who combine both theoretical and practical experience.[7]

To address the problem of practice-oriented staff, creating opportunities for the instructors to get advocacy license and practice in law was an ideal solution. However, the Ethiopian law does not allow law instructors to represent their clients privately and learn from their practice.[8]

This article aims to challenges in the delivery of clinical and practice-oriented courses in the law schools and demonstrate the need for practice-oriented legal education.

It proceeds as follows. First, it discusses the experiences in admission to legal practice in different countries. Next, the article explores the relationship between practical legal experience and an engaged scholarship in law schools and evaluates the Ethiopian legal regime in how it admits legal professionals into the world of practice. Finally, the article suggests solutions that will help to bring an engaged scholarship in Ethiopian law schools.

1. Admission Requirements to Legal Practice

Practicing law normally needs a license from the concerned authorities. However, the modalities of the licensing process differ from country to country. When a lawyer receives a license to practice law, it is presumed that an admission to law practice and representing clients is acquired. Becoming a practicing lawyer or an advocate requires a widely different process around the world. However, there are requirements which are common to all jurisdictions and these include age and competence. On the other hand, among others, obtaining a law degree, passing an entrance exam, or serving

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[7] Mizanie Abate ,Clinical Legal Education in Ethiopia: Challenges and Their Possible Way Out, Ethiopian Journal of Legal Education, V. 2, No. 2, (2009), p. 2*,(hereinafter Mizane,* Clinical Legal Education in Ethiopia: Challenges and Their Possible Way Out).

[8] As per to the knowledge of the writer, exceptionally Southern Nation, Nationalities and Peoples Regional (SNNPR) State is still licensing law instructors to practice law. However, the law even in this region requires from the applicants to provide release paper from their ex-employers. It means that, there is no legal ground to say that the law in this region allows law instructors to get license. See Article 6(2)(g) of Proclamation No 164/2016, A proclamation to Provide for Licensing and Administration of Advocates and Paralegals Practicing at SNNPR State Courts, *Debub Negarit Gazette*, 22th Year No.4.

in an apprenticeship are the common requirements from jurisdiction to jurisdiction.

Within the same jurisdiction, the licensing processes and requirements might be different when that jurisdiction has federal and state arrangements. In this context, the experiences of Ethiopia[9] and the United States of America[10] could be mentioned as an example where the licensing requirement has disparity between the federal and state governments. However, countries with unitary state structure have uniform legislation that authorizes advocates to practice law within their jurisdiction.[11]

The experience of countries in how advocate's license is administered to practice law is discussed below. These countries' experiences are preferred to show the different experiences from countries with federal and unitary state structures. Based on that, *Kiswahili* Speaking East African Countries and the USA could be good representatives of countries that have unitary and federal structure of government respectively.

1.1 Admission to Legal Practice in *Kiswahili* Speaking East African Countries

In Kenya, as a *Kiswahili* speaking country, the issue of legal practice is regulated by the Advocates Act, Chapter 16 of the Laws of Kenya.

[9] In Ethiopia, Federal courts Advocate Licensing and Registration Proclamation No.199/2000 is applicable for the Federal jurisdiction and all the nine regional states also have their own Advocates' Licensing and Registration Proclamations.

[10] In the USA as well, the admission to the Federal Bar is different from state Bar as the admission requirement for the former is on a court-by-court basis, and each Court has slightly different local rules that establish the requirements of admission and general for the latter. For example, to practice in US District court for the Northern District of California requires that, *"that the Bar of this court consists of attorneys of good moral character who are active members in good standing of the State Bar of California. Attorneys must also certify that they have knowledge of the Federal Rules of Civil and Criminal Procedure and Evidence, the Rules of the United States Court of Appeals for the Ninth Circuit and the local rules of this court. Furthermore, attorneys must possess familiarity with the Alternative Dispute Resolution programs of the court and an understanding and commitment to abide by the Standards of Professional Conduct of this court set forth in Civil Local*." http://www.cand.uscourts.gov/attorneys/admission (last accessed on 6/9/2017)

[11] For example as a unitary system of government in Italy, after graduating with law degree, those wishing to qualify as Italian attorneys are required to complete a period of internship of 4 semesters (2 years) in an established Italian law firm, under the supervision of a Senior Lawyer: during this period, the candidate will develop basic skills such as drafting pleadings, researching case law and appearing in Court in conjunction with a qualified lawyer to gain a better understanding of the judicial legal procedure in Italy and this is uniformly applicable throughout the country. https://www.hg.org/article.asp?id=26125 (last accessed on 2/20/18).

According to this law, there are different requirements for admission of a lawyer to having the right of audience before Kenyan courts. Among these, completion of law degree from recognized university in the Commonwealth[12], attending Kenyan School of Law for Postgraduate Diploma in legal practicing[13], completion of a mandatory one year article of pupilage under the supervision of a lawyer who has a minimum of five years of standing[14] and application for admission to the Chief Justice could be mentioned.[15] Applicants who have completed both academic and practical training are expected to petition the Chief Justice by accompanying an affidavit that shows the trustworthiness of the documents they attached as evidence of academic and practical training qualification. Once the petition is submitted to the Chief Justice, it will be sent to the High Court upon the approval of the Law Society of Kenya[16], which is in fact an association of Lawyers and has a similar status to the American Bar Association (ABA). The admission program takes place in an open court with the presence of the Chief Justice, who finally pronounces the admission of the advocate to practicing law in Kenyan courts.

As indicated in the Advocates Act of Kenya, there is no formal bar admission examination administered either by the bar association or the authority that licenses the admission certificate. Rather, the exam administration is done by educational institutions that award the degree and postgraduate diploma.

In addition to academic and legal training requirements, the applicant who wishes to be licensed as an advocate should be a Citizen of Kenya, Uganda and Tanzania.[17] Citizens of Uganda and Tanzania might be allowed to practice law in Kenya for different reasons. Primarily, these countries are in the commonwealth and English is a working language in these countries.

[12] Laws of Kenya, the Advocates Act, Chapter 16, Revised Edition 2009 (1992) Published by the National Council for Law Reporting with the Authority of the Attorney General, available at www.kenyalaw.org (last accessed 6/10/17).

[13] Ibid

[14] Ibid

[15] Ibid

[16] Ibid

[17] Ibid

Moreover, these countries are among *Kiswahili* speaking East African nations and there might not be any language barrier to practice the profession before these courts. In addition, there is also the same permission in the Advocates Act of Uganda and Tanzania that allows Kenyan citizens to practice law before their courts.[18]

According to Advocates Code of Conduct of Kenya, advocacy service is not considered as an employment opportunity and graduates who wish to be advocates are not required to show that they are unemployed or should show letter of release from their former employer. Because of this reason, university professors are entitled to practice law so long as they fulfill the requirements provided by the law. So long as individuals have completed both educational and practical training requirements, they will be awarded a certificate to practice law before Kenyan courts.

1.2. Admission to Legal Practice in the USA

In the USA, there is no uniform law that regulates a practicing lawyer or an attorney. Rather, all the member states of the USA are allowed to enact their own criteria and legislation concerning legal practitioners as the power is among those residual powers[19] given to the states. Based on that, lawyers are not admitted to practicing law throughout the United States, rather they are admitted to practicing law in a particular state. Separate rules govern admission to the various federal courts. In most states, admission to practicing law is gained by graduating from law school, passing the state's bar examination, and demonstration and possession of good moral character.

Though each state has the power to enact its own legislation, the examination for admission of an attorney is administered centrally by the American Bar Association (ABA). Since ABA is administering the exam, it usually makes recommendations to the authorities in the states concerning admission to the bar, and to lawyers and law schools in general. The ABA is making the recommendation in association with the National Conference of

[18] The Advocates Act of Tanzania, January 1995, Article 8(b)(ii).

[19] In the federal constitution, a power which is not clearly indicated in the constitution is referred as a residual power. In the USA constitution, the power of the federal government is clearly mentioned as it is referred as enumerated powers. However, powers that are not mentioned as enumerated powers of the federal government are referred as residual powers and these powers belong to the states.

Bar Examiners, and the Association of American Law Schools[20] who are responsible for the legal profession. The standard and guideline is prepared with intent that it will bring uniformity throughout the nation on practices in bar admission.

Since each federal court maintains its own separate bar, an attorney who wants to practice in federal courts must be separately admitted to the bar of that court. In this case, admission is given upon "motion by an attorney who is already a member of that court's bar' and who can affirm that the applicant is a person of good moral character."[21] The applicant is required to be admitted in the state in which the federal court sits to get an admission to a federal district court. In order to be admitted to the Supreme Court of the USA, the applicant is required to practice law before the court of any state at least for three years.[22]

In the USA, moreover, this profession is not considered as a means of job opportunity and candidates are not required to show that they are unemployed for admission and certification. Rather, so long as candidates fulfill the educational and other requirements, they are allowed to take the examination administered by the ABA. Due to this, even professors who teach in universities are allowed to practice law so long as they successfully pass the bar examination.

University professors who teach in law schools are not only allowed to practice law there is also a move towards introducing a mandatory Continuing Practice Experience (CPE) for law professors who teach in the universities as legal practitioners do have an obligation to take a Continuing Legal Education (CLE).[23] Professor Zimmerman argues that, both ABA and Association of American Law Schools (AALS) should revise their admission and recruitment of staff requirements respectively to value practical

[20] The Code of Recommended Standards for Bar Examiners has been adopted by the policy-making bodies of the ABA, NCBE, and AALS. An initial Code was adopted in 1959. This standard has been amended in 1980, 1987 and 2011 to cope up with the changing circumstances.

[21] Schwartz, M.D. et. al., Problems in Legal Ethics, (American Casebook Series), 11TH edition, St.Paul, Minn: West Group, (2015), p. 38.

[22] Ibid

[23] Emily, Should Law Professors have a Continuing Practice Experience (CPE) Requirement?

experience.[24] With regard to the ABA's responsibility, she advised the Association to extend its accreditation requirement of law schools by introducing CPE as an obligation of law professors.[25] On the other hand, she recommends to AALS to employ professors who have practical experiences and committed enough to continue even after their employment.[26]

2. Debates on the Need to Legal Practice Experience for Teaching Position

In the USA, there has been a heated debate among academicians and legal practitioners on the issue of whether law professors should have a legal practice experience[27] or not to produce qualified lawyers that could serve the justice system. The source of this debate is from the point of view of interest of the professors themselves and not from the government's policy perspective. The idea behind this debate is to make legal education more practice oriented and to prepare students for the practical aspects of law

2.1. Debates against Legal Practice Experience for Teaching Position

The idea against legal practice experience requirement of law professors for a teaching position emanates from some professors' themselves as they are more inclined to teaching and research work than to participate in the legal practice.[28] Law professors' justification to distance themselves from legal practice could be different. Among others, some claim that they did not have extensive practice experience before they became law professors, law professors who did spend a small amount of time in practice may not have

[24] Id, P.187.

[25] Ibid

[26] Ibid

[27] Jeremy Paul wrote a short article in New York Law Journal title "Theory Makes Successful Layering Possible." Paul argues that, University professors could produce successful lawyers and he rejected the practice experience of the professors in the legal profession as a judge, a public prosecutor and an advocate. WWW.NYLJ.COM Monday, April 21, 2014. On the other hand, B. Cohen, on his article titled as "*The Dangers of the Ivory Tower: The Obligation of Law Professors to Engage in the Practice of Law*, 50 LOY. L. REV. 623, 631 (2004) argues that, law professors should have practical skills to produce all rounded and skill full lawyers.

[28] Emily, Should Law Professors have a Continuing Practice Experience **(**CPE**)** Requirement?

actually enjoyed practicing law and some law professors resist the idea that law schools should be training grounds for law practice.[29]

In addition, law schools themselves have a tendency to resist the idea of continuous legal practice experience of their professors. AALS has argued that there are some serious risks involved in encouraging law professors to engage in the practice of law. Professors who devote too much time to the outside practice may be depriving their students and their schools of important services.[30] The association also added that, devoting time to the outside world other than teaching and researching task would affect the professors' task of class preparation, scholarship, committee work and student advising.[31] Though it seems that they support the responsibility of law professors to the outside world, their position towards legal practice seems negative:

> *Law professors are frequently in demand to participate in activities outside the law school. Such involvement may help bring fresh insights to the professor's classes and writing. Excessive involvement in outside activities, however, tends to reduce the time that the professor has to meet obligations to students, colleagues, and the law school. A professor thus has a responsibility both to adhere to a university's specific limitations on outside activity and to assure that outside activities do not significantly diminish the professor's availability to meet institutional obligations.*[32]

2.1. Debates for legal practice Experience for Teaching Position

Even though there is resistance by the law professors and the AALS on professors' participation in the world of legal practice and law schools leniency to employ those who have legal practice experience, there are strong critiques by scholars against the American law schools on their failure to make their students engaged and all rounded graduates. They also added that failure of law professors to identify themselves as practicing lawyers resulted in inadequate preparation of law students for the practice of law.

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[29] Ibid

[30] ASSOCIATION OF AMERICAN LAW SCHOOLS, *Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities, in* HANDBOOK 95 (2003), *available at* httpJ/www.aals.org/ethic.html (last visited Oct. 4, 2004)

[31] Ibid.

[32] Ibid

According to reports, the elite law schools in the USA prepare their top five students to become law professors but fail to prepare the rest of their students to become practicing lawyers.[33] These top and elite law schools not only do they fail to educate their students in legal doctrine and rigorous analytical thinking beyond the first year, but they also fail to impart the proper state of mind for legal practice.[34]

The role of legal practice in teaching position is very significant. In a civil procedure course, for example, a professor who has practice experience could discuss how the plaintiff's case was structured and what considerations went into negotiating an acceptable settlement to his students. However, a professor who has no practice experience could not do that unless he/she invites to class another practitioner who has been engaged in the practice. In a bankruptcy and criminal procedure course, a non-practicing professor should do the same to discuss how the practice looks like. It means that non-practitioners are always dependent on other practicing professionals to handle practice oriented courses.

3. The Relationship between Legal Practice and Engaged Scholarship

A lot has been said and written by scholars[35] about the distance between law professors and legal education, and the gap between legal theory and legal practice. Judge Harry T. Edwards wrote that law schools and legal scholars are on a vastly different path than the rest of the legal profession, emphasizing abstract theory at the expense of practical scholarship.[36] In addition to treatise by scholars, concerned centers and research institutions said a lot about the gap between legal theory and practice and recommend

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[33] Alex M. Johnson, Jr., Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice, 64 S. CAL. L. REV. 1231, 1233 (1991), Content downloaded/printed from Hein Online (http://heinonline.org) Wed Sep 8 12:10:38 2010

[34] Id, p.1225.

[35] Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession,* 91 MICH. L. REV. 34 (1992); *Emily Zimmerman,* Should Law Professors have a Continuing Practice Experience **(**CPE**)** Requirement? NORTHEASTERN UNIVERSITY LAW JOURNAL VOL. 6 No.1 I**,** N.E. U. L.J. 131 2013-2014. Please see also R. Michael Cassidy, *Beyond Practical Skills: Nine Steps for Improving Legal Educations Now*, 53 B.C.L. Rev. 1515 (2012), http://lawdigitalcommons.bc.edu/bclr/vol53/iss4/7

[36] Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession, 91* MICH. L. REv. 34, 35 (1993).

the combination of the two related issues of legal scholarship.[37] The *Maccrete* report[38] argued for more skills training and clinical opportunities in legal education to make future lawyers practice oriented and to contribute their part to the legal profession.[39]

Teaching legal theories and legal practice has a direct correlation to the legal profession and it is not logical to separate them. Law professors' position in the elite law schools in the USA to distance themselves from practicing lawyers in order to gain the status and respect of their colleagues is not an accepted position. If a law professor continues to distance himself from practice, he cannot teach students to be better and ethical lawyers as he himself is uninformed about the world of practice. Tangible law practice expands a professor's knowledge and experience in the legal profession. It usually forces the professor to deal with new issues and new legal procedures, examine issues that have current relevance, and test ideas in the 'real world'.[40] By doing this, the professor will become a better scholar, teacher, and advisor to his students.

These days, Ethiopian law schools' curricula have included clinical and practice oriented courses. To administer these clinical and practice oriented courses[41], it needs a professor who has a practice experience in the legal profession. If law schools deliver these courses by a non-practicing professor, it would be equivalent of teaching a medical student by a medical doctor who has never done an actual surgical operation and treated patients. Moreover, if law professors do not have a legal practice experience, law

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[37] *Legal Education and Professional Development - An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap,* 1992 A.B.A. SEC. Legal Educ. And Admissions to the bar [referred as MACCRATE REPORT]

[38] Robert MacCrate was an American lawyer who served as Counsel to New York Governor Nelson D. Rockefeller and as Special Counsel to the Department of the Army for its investigation of the My Lai Massacre

[39] Gary A. Munneke, Legal *Skills for a Transforming Profession,* 22 PACE L. REV. 105, 130-35 (2001).

[40] Rory K. Little, *Law Professors as Lawyers: Consultants, Of Counsel, and the Ethics of Self-Flagellation,* 42 **S.** TEX. L. REV. 369, (2001).

[41] In the Ethiopian law schools' harmonized curriculum as well, clinical programs such as Clinical Program on Child Rights; Clinical Program on Domestic Violence; Clinical Program on Family Law; Clinical Program on HIV/AIDS; clinical Program on Restorative Justice; and Clinical Program on Rights of prisoners are included. Moreover, there are also skill oriented courses such as Legal Research Methods, Legal Writing, Legislative Drafting, Pre-Trial Skills and Trial Advocacy, Appellate Advocacy and Moot Court and Judgment writing courses are included.

students may not directly observe the real subject matter they're supposed to study and their dream as an enlightened interpreters of the law could be affected.[42] It is also difficult for law professors to prepare their students for law practice and connect theory to practice when they are unfamiliar with what their students will be doing as practicing lawyers.

Without current practice experience, a professor may lack the knowledge of what her students will face in law practice. She may also lack the confidence to put together practice-related information and activities into her courses. As long as students are coming to the law schools to make themselves as future lawyers, their professors should be familiar with the practice to acquaint their students with the practice.

Moreover, if law professors do not join the world practice, they will only be motivated to write texts that do not contribute to the legal profession and that are out of touch with the work that practicing lawyers and judges do.[43] If law professors join the legal practice, they will produce articles that could help judges and legal practitioners in addressing real cases. If law professors focus on theoretical aspects and ignore the practical scholarship, their articles may not be referred by judges. Studies in the USA showed that law reviews are seldom cited by the federal courts of appeals.[44] In addition to that, absence of an ongoing exposure to the practice of law by law professors would develop despicable attitudes about practicing attorneys and it will affect the profession badly. The damage that these attitudes can potentially inflict upon law students, who will become practicing lawyers, would be enormous.[45]

It is also possible to say that the distance between law professors and legal practice would affect an engaged scholarship that professors could contribute. Engaged scholarship is a way of addressing legal problems which are "related to the law, legal system, legal profession that affect a significant

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[42] J. Jerome Frank, *Both Ends Against the Middle,* 100 U. PA. L. REv. 20, 28-29 (1951).

[43] Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

[44] Louis J. Sirico, Jr. & Beth A. Drew, *The Citing of Law Reviews by the United States Courts of Appeals" An Empirical Analysis,* 45 U. Miami L. REv. 1051, (1991).

[45] Cohen, page 634.

portion of society or the legal community."[46] Engaged scholarship, if applicable, helps to identify existing legal issues, offers possible solutions to them or significantly informs decision makers on the issues before them. Participating and devoting time in the practice world would help professors identify topics for their research. Professors who advise students about law practice would be better-informed advisors if they actually had some exposure to law practice.[47]

4. Admission Requirements to Legal Practice in Ethiopia

As government in Ethiopia has a federal form, regulating the admission requirements to the legal profession in Ethiopia is given for both the federal and regional governments. It is the power of the regional governments to determine the requirements to practice before state courts. Regional states in Ethiopia are allowed to enact their own admission requirements to practice law within their jurisdiction. On the other hand, practicing before the federal courts is regulated by the federal government.

To practice law before federal courts, any Ethiopian has a choice among three types of licenses that are issued by the Attorney General and these are federal first instance court advocacy license, federal courts advocacy license and federal court special advocacy license .[48] To be certified and practice in the federal courts, there are some common requirements provided by the legislature for the three types of licenses. Legal education requirement, ethical behavior suitable for the legal profession, no criminal record that shows an improper conduct for the profession, passing an entrance examination and having professional Indemnity Insurance Policy are the main requirements.[49] According to Federal Courts Advocates Licensing and Registration Proclamation, everyone is not allowed to be admitted to practicing law before the federal courts. Rather, the profession is only

[46] Edward L. Rubin, *The Practice and Discourse of Legal Scholarship.* 86 MICH. L. REV. 1835, 1850, (1988)

[47] Paul Horwitz, What Ails the Law Schools*?*, 111 Mich. L. Rev. 955, (2013). Available at: http://repository.law.umich.edu/mlr/vol111/iss6/7.

[48] Federal Courts Advocates Licensing and Registration Proclamation No. 199/2000), Article 3 and 7.

[49] Id, Article 4. As far as professional Indemnity Insurance concerns, it is not yet practiced. Advocates are not expected to buy insurance policy for the sake of securing their license.

limited to Ethiopians, and foreigners are not allowed to practice law before the federal courts.[50]

Even though foreigners are educated in the Ethiopian law schools and speak one of the languages which are spoken in Ethiopia, they are not allowed to practice law. Moreover, the profession is only opened for unemployed Ethiopians who could present evidence that shows their good moral character from their former employers.[51] Unless an Ethiopian is able to produce evidence from his/her former employer, she/he is not allowed to apply for license. The proclamation indirectly indicates that employed Ethiopians even from the law schools are not allowed to have an advocate's license to practice law before the federal courts. Considering the position of the proclamation that bans foreigners even who speak the federal working language and attended their education in Ethiopia and Ethiopians who are employed in whatever sector, it is possible to assume that, advocate's licensing and admission before the federal courts is considered as job opportunity.

The position of the Federal Courts Advocates Licensing and Registration Proclamation that considers the legal profession as a means of job creation by the federal government is strengthened by the Amhara region Advocates' Licensing and Registration Proclamation. Similar to the federal proclamation, this proclamation recognizes three types of licensing which are administered by the regional Justice Bureau. These licenses are second class advocacy license, first class advocacy license and special advocacy license.[52]

In this proclamation, the admission requirements were almost similar to the federal proclamation. The requirements are educational training, good moral character, passing entrance examination and providing evidence from the ex-employer that shows the good moral character of the applicant. However, the regional government recently revised the law and paved the way for fresh

[50] Id, Arti.3(1)

[51] Id, Arti.4(2)(b)

[52] Amhara Region Licensing, registration and controlling code of conduct of advocates proclamation No of 75/2000 Article 7 as amended by The Licensing, Registration of advocates and Controlling Code of conduct proclamation, revised proclamation No.211/20014. Please see also Tigray Regional Court Advocates" Licensing and Registration Proclamation No. 156/2000.

graduates from the law schools to apply for the second class advocates' license without any work experience.[53] This is the first law in the country that allows fresh graduates to practice law before the courts without having any practical experience[54] as a judge, public prosecutor, an attorney or legal educator.

Both the federal and regional proclamations do not allow university instructors to be admitted and practice law before the Ethiopian courts as they are not able to submit evidence of release letter. In fact, both the federal and regional laws allow university instructors to have an advocate's license without entrance examination so long as they leave law schools after serving for five years (four years for the regions) or after serving as an assistant professor and leave their teaching position.[55]

In the past, there was a practice of licensing university instructors both by the federal and regional governments. Nowadays, university instructors are banned from having license to practice law unless they terminate their employment relationship with academic institutions. Advocacy license used to be given for university instructors in the Amhara region through a reform introduced by the regional Justice Bureau following its business rocess reengineering (BPR).[56] The BPR document developed by the regional Justice Bureau allowed university instructors to practice[57] law so long as they fulfill the character, education and service requirements. However, the regional Justice Bureau has suspended the BPR document and the document was replaced by the pervious licensing, registration of advocates and

[53] Id, Article 8(1) of Amhara Region Licensing, registration and controlling code of conduct of advocates proclamation

[54] According to my interview with Ato Dessie Seyoum, Amhar Region Justice Bureau Legal Research and Drafting Main Process owner, the law is designed to create job opportunity for fresh graduates from the Ethiopian law schools. Since law graduates were almost unemployed and the position was saturated, the regional government has designed this mechanism and revised the former law for this specific purpose.

[55] Please see Article 11(2) of Federal Advocates' Licensing

[56] በአብክመ ፍትህ ቢሮ የሰነዶች፣ ማህበራት እና የጠበቆች ምዝገባ ዋና የስራ ሂደት አፈጻጸም ላይ ስልጠና ለመስጠት የተዘጋጀ ማንዋል፣ 2000 ዓ/ም፣ ገጽ 27 *"...ከዚህ ቀደም ዳኛ፣አቃቤ-ህግ፣ነገረ-ፈጅ፣የህግ አማካሪ ወይንም መምህር፣ የመዝገብ ቤት ሹም እና ከዝህ ጋር ተዛማጅነት ባላቸው የስራ መስኮች ላይ ተሰማርተው አገልግሎት ሲሰጡ ከመቆየታቸው በላይ በህግ ከታወቁ ከፍተኛ ትምህርት ተቋማት ዲፕሎማ ወይንም ዲግሪ የያዙትን ባለሞያዎች የጥብቅና ስራ ፈቃድ ለማግኘት ፈተና እንዲወስዱ መደረጉ ደንበኞችን ከማጉላላት በስተቀር የሚጨምረው ፋይዳ የለም። ስለሆነም በዚህ ማንዋል ላይ ለአንደኛ ወይንም ለሁለተኛ ደረጃ ጥብቅና ስራ ፈቃድ ለመስጠት የተጠየቁትን መስፈርቶች አሟልቶ የተገኘ ባለሞያ ያለ ፈተና የጠየቀውን ፈቃድ እንዲያገኝ ይደረጋል።"*

[57] Interview with Ato Yitayew Tensaye, Amhara Region Justice Bureau Advocates and Documentation Licensing Process owner, May, 20, 2017.

controlling code of conduct proclamation No. 75/2000 and later by Proclamation No.211/2014.[58]

The writer asked the concerned officials in the Amhara region[59] as to why the revised proclamation failed to include the BPR document that used to allow university instructors to practice law in the regional courts and they replied that;

> *There has been continuous complaint from the officials of the law schools situated in the region. Law schools complained that instructors are abusing their teaching jobs as they become full-time advocates. Specifically, the officials of the Law School at Wollo University directly complained to the bureau to revoke the license of university instructors. Moreover, the BPR document was intended to work for six months and at the end of six months time, it has no effect.*

In the opinion of the writer of this article, prohibiting law instructors from practicing law is equivalent to prohibiting a medical doctor who teaches in a university from practicing her medical profession. If the concern of law schools was the misconduct of instructors, they could have used their own controlling mechanisms. It is clear that the practical experience of law instructors has a direct effect on the quality of education. Law schools have practical courses that need an instructor who has a practical knowledge and experience. It is very difficult for a law school instructor to teach criminal procedure, clinical program on family law, civil procedure, evidence law and other similar practical courses without having a practical experience.

According to research, the majority of Ethiopian law school instructors do not possess practical skills themselves.[60] It goes without saying that they cannot deliver skill-oriented courses. In practice, these instructors are delivering skill-oriented courses. It was commented that such instructors were wasting time.[61] This research shows that the quality of teaching in law

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[58] The Licensing, Registration and Controlling Code of Conduct of Advocates Proclamation No 75/2000was introduced mainly to recognize exit exam, special advocacy license for institutions and permission of second class advocacy license for new graduates without any experience.

[59] Interview with Ato Dessie and Ato Yitayew

[60] *Mizane,* Clinical Legal Education in Ethiopia: Challenges and Their Possible Way Out

[61] Abdi Jibril, The Need to Harmonize Ethiopian Legal Education and Training Curricula, *Ethiopian Journal of Legal Education,* Vol. 4, No, 1 (2011), (hereinafter Abdi, The Need to Harmonize Ethiopian Legal Education and Training Curricula, *Ethiopian Journal of Legal Education)*

schools has been compromised due to lack of practical skills of instructors. To fill the practical skill gap of university instructors, law schools are inviting practitioners such as judges, prosecutors and advocates to teach practical and skill-oriented courses.[62] However, employing practitioners to teach practical and skill oriented courses might have a disadvantage as judges and practitioners could be remote for theories.

5. Challenges of Law Schools in Handling Clinical and Practice-Oriented Courses

Since 2006, Ethiopian law schools have introduced a national harmonized curriculum due to legal education reform program introduced in the country. The legal education reform and curriculum harmonization agenda was set to address the identified pre-2006 law school curricula in the country.[63] The pre-2006 curriculum was criticized and the harmonized curriculum was introduced due to the incompatibility of the legal education and legal system that the law schools had before 2006.[64] Though Ethiopia is dominantly a civil law legal system, the concept of its legal education was related more with the common law legal system.

In addition to legal system and legal education incompatibility, the former curriculum was also criticized for lack of skill-oriented courses in its course content.[65] To address those shortcomings, the new harmonized curriculum came up with skill-oriented courses such as Legal Research Method, Legal Writing, Pre-Trial Skills and Trial Advocacy, Appellate Advocacy and Appellate Moot Court, Judgment Writing, Externship and clinical programs. In addition to practice-oriented courses, the new curriculum has introduced clinical program courses which include clinical programs on Child Rights, Domestic Violence, Family Law, HIV/AIDS, Restorative Justice, and Rights of Prisoners

[62] Bahir Dar University School of Law employs judges and prosecutors as part-timers to cover skill oriented courses.

[63] Abdi, The Need to Harmonize Ethiopian Legal Education and Training Curricula, *Ethiopian Journal of Legal Education.*

[64] Ibid

[65] Ibid

Though the national harmonized curriculum introduced skill-oriented and clinical program courses to address the shortcomings of the previous curriculum, law schools lack experienced staff who could deliver these skill-oriented courses. As research shows, law schools in Ethiopia lack instructors who possess practical experiences to deliver skill-oriented courses and these courses are delivered by instructors even who have never experienced practical cases.[66]

The new harmonized curriculum was designed to deliver clinical and practice-oriented courses by instructors who posses both practical and theoretical expertise. The curriculum was designed with intent that if an instructor lacks either of these qualifications, he/she is not appropriate for the courses.[67] It also added that if the law schools lack an experienced supervisor and teacher to deliver these courses, committed practitioners outside the law schools shall supervise students at legal clinics.[68]

However, clinical and practice-oriented courses are not delivered as expected in the curriculum. Rather, the courses are even delivered by fresh graduates who have no practice experience as a judge, an advocate or as a public prosecutor. In this context, Mizane Abate in his research shows the magnitude of the problem in delivering clinical courses saying that,

> *…it may not be possible to find individuals who combine both types of experience. In Ethiopia, only a small minority of university law teachers were practicing law (be it as a judge, prosecutor, private practitioner or legal advocate of government or private institutions). Another problem is that experienced specialists who could share their practical experiences to students may not be interested in teaching at law faculty-they are too busy or teaching is not profitable for them to do it. Even where practitioners are willing for teaching, the experienced lawyers usually lack experience of interactive teaching methods*[69].

[66] Mizanie, Clinical Legal Education in Ethiopia: Challenges and Their Possible Way Out.

[67] Dr. Mizane Abate in his research told us that, the issue was raised in a workshop held at Mekelle and participants agreed that, in as much as possible, individuals in charge of supervising the clinical programs have to be instructors who are or used to be in the practice.

[68] Mizanie, Clinical Legal Education in Ethiopia: Challenges and Their Possible Way Out.

[69] Ibid.

It is possible to understand from the above assertion that law schools are not properly handling practice-oriented course due to lack of practitioners who could deliver courses and supervise students. Some law schools try to resolve these problems by employing part-time instructors from the courts.[70] However, part-time instructors from the courts should not be considered as a long lasting solution since they themselves are remote to the updated theoretical understanding to deliver the courses.

6. Call for Advocates' License for Ethiopian Law School Instructors

One of the objectives of Ethiopian higher education institutions is to "prepare knowledgeable, skilled, and attitudinally mature graduates in numbers with demand-based proportional balance of fields and disciplines…"[71] This objective stated in the proclamation will be achieved only when students are trained with a good curriculum and in accordance with the curriculum. In addition to the curriculum, the quality of admitted students and professors employed to teach the students are very essential to produce graduates who could be domestically as well as internationally competitive.

The objective of Ethiopian law schools' curriculum is not different from the objective of the higher education proclamation. The basic aspiration of the curriculum is to provide basic legal training to the students. To achieve this objective the program aspires to:[72]

- *equip students with basic knowledge of major national legislations and procedures along with the skills of legal interpretation required to solve legal problems;*
- *train professionals who will be able to undertake the technical aspects of drafting and revising laws;*
- *enhance the critical thinking abilities of students so that they can understand and implement laws as judges, practicing lawyers, prosecutors, public defenders or academicians;*

[70] For example, Bahir Dar University Law School employs judges and public prosecutors to manage civil procedure, criminal procedure and other practice oriented courses.

[71] Higher Education Proclamation No. 650/2009, Federal Negarit Gazetta, 15th Year, No.64, Article 4(1).

[72] Bahir Dar University School of Law, National Modularized Curriculum of the LL.B Program in Laws, June 2013, pp. 4-5.

- *train professionals who can deliver legal advice in public and business laws either by working for particular firms or individuals seeking such advice;*
- *educate individuals who will be able to defend and advise clients with professionalism, understanding and responsibility;*
- *prepare dedicated professionals who can research and publish, and hence reinforce Ethiopian legal jurisprudence; and*
- *produce legal professionals who serve the society with high integrity and who strive to defend rights and liberties and uphold the fundamentals of rule of law.*

To achieve the objectives of the law schools' curriculum, courses should be given by qualified and experienced instructors both in theory and practice. However, this objective of the curriculum may not be realized as practice-oriented and clinical courses are taught by non-practitioners and even sometimes by fresh graduates who have never seen the door of courts. If instructors are detached from the practice, they may not be effectively preparing students for the skills they would need in the practice of law.[73] Law and medical teaching strongly need skills and attitudes on the part of the teachers who could be good role models for the student to emulate as he or she moves into the practice.[74] If an instructor teaches and practices copyright law at the same time, he/she will know about the practical aspects of copyright law and trademark law that he/she had probably never encountered in a law school. He/she will learn how actual trademark searches are done and what issues are frequently raised by trademark examiners who evaluate trademark applications. He/she will also learn how to search for a design mark and where to look for descriptions of goods and services that are acceptable to the trademark office. If the instructor only teaches the theory and has no information on the practice, he/she may not suggest a solution to the practical problems in the practical world.

To address the problem and achieve the objectives of the curriculum and the higher education proclamation, law schools need to have staff that could manage both theoretical and practice-oriented courses. This would be only

[73] Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession,* 91 MICH. L. REV. 34 (1992)

[74] Norman Redlich, *Professional Responsibility of Law Teachers,* 29 CLEV. ST. L. REV. 623, 624, (1980)

possible by allowing law instructors to get advocacy license and to practice law. Except for the decisions of the federal Supreme Court cassation decision, court decisions are unreported. Due to this, there may not be room either for law research or for practical law teaching within the law schools without creating an opportunity for the instructors to practice law.[75]

In fact in other jurisdictions, there is a move towards a mandatory legal practice requirement for a professor who teaches law in law schools. Even researchers who have experience both in academics and practicing law advise that;

Every law professor should at sometime during his or her teaching career be forced to confront that reality, not only because it will make that professor a better teacher and a better scholar, but also a better, less cynical, more humble and appreciative representative of our profession - the one we share with the lawyers we have all educated and sent out to the world of practice.[76]

However, in Ethiopia university instructors are not allowed to get advocacy license unless they leave their academic career. If law schools want qualified instructors that could teach theories and practices of law in an integrated manner, they should create a forum with the concerned authorities to pave the way for their instructors to be involved in the practice of law.[77] The involvement of instructors in real legal practice would help them to familiarize themselves with real life understanding of the impact of the law on society and contribute their part in the development and refinement of the laws when needed. According to Article 5(3) of the Federal Courts Advocates Licensing and Registration Proclamation, "… license may not be issued to a person who has another permanent job."[78]

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[75] G. Krzeczunowicz, ETHIOPIAN LEGAL EDUCATION: Retrospection and Prospects, Journal of Ethiopian Studies, Vol. 1, No. 1 (January 1963), pp. 68-74. Accessed: 16-02-2018 11:18 UTC via JSTOR

[76] B. Cohen, *Then Dangers of the Ivory Tower: The Obligation of Law Professors to Engage in the Practice of Law*, 50 LOY. L. REV. 623, 631, (2004).

[77] According to the information tipped from Ato Mihret Alemayehu, Bahir Dar University School of Law Vice Dean, recently, Law Schools' Consortium has raised the agenda and it established a task force to facilitate a forum between law schools and the concerned authorities.

[78] Federal Courts Advocates' Licensing and Registration Proclamation No. 199/2000, Fed. Neg. Gazetta., year 61, No. 27.

Though it is arguable whether academic position is a permanent job or not, from the very outset, it is not logical to expect qualified judges and advocates from an instructor who does not know what the practice world looks like. So long as students join law schools to be practice lawyers, among others, it would be useful for those teaching law students (law instructors) to have some familiarity with current legal practice. This familiarity will only be established if they are allowed to get the license and practice of it.

Familiarity with the current realities of law practice could inform individual instructors of pedagogical as well as curricular understandings more broadly. Moreover, spending time in the world of law practice could help law instructors identify issues for their research, both legal issues that arise in a practice setting and issues about the context in which law is practiced. This move will help to insure quality education in law schools. Instructors' involvement in the practice world may help bring fresh insights to their classes and writing. However, their involvement in the practice world does not mean an excessive involvement in outside activities that tends to reduce the time that the instructor should give to his or her students, colleagues, and law school.

Licensing and practical engagement of law instructors may not only assure quality education in law schools, it will also help to retain the academic staff in their academic career. If instructors are licensed, they will get additional income by representing clients and will be more motivated to stay in the academic career. Working for paying clients may affect the objectivity with which a law professor approaches teaching and scholarship. However, the risk could be minimized through appropriate controlling mechanisms by the law schools themselves.

Moreover, the licensing of law instructors will help and advance legal aid activities of law schools. An instructor who practices a commitment to helping the indigent will serve as a more effective enlightened interpreter for his students. He will have earned the direct experience critical to his role of conveying the sense of importance in such service. The time spent by the instructor in performing free legal aid service meets many needs. This service addresses the cutbacks in legal services appropriations, thereby

affirming his/her commitment to providing access to the justice system. It furnishes a model for his students, who will more likely endeavor to emulate their teacher by displaying their own commitments to the needy in their future practices.

Ethiopian law schools should aim to create a truly integrated model of legal education that fully combines theoretical and doctrinal scholarship, clinical education, and practicing advocates to support the profession. Hiring should also focus on diversity of perspectives, with no ideological or academic group having a favored status. Based on that, practical, theory-oriented, and critical legal scholars, along with their clinician counterparts could flourish in the school.

Concluding Remarks

In every profession, the experience of the professional plays a pivotal role in contributing a lot to his/her career. This logic will apply at the same time for those professionals teaching legal education. If the teacher teaching law has an experience in theory and practice, he will be able to meet the objectives of the curriculum without any difficulty.

Understanding the place of practice experience in the legal profession, researchers are advocating for the introduction of continuous practice experience for law teachers. The experience of teachers will enhance their teaching and scholarship and strengthen their connection to the legal profession. This experience gives an opportunity for teachers to create strong relationship with other practicing lawyers and enhance their interaction with students. This interaction with the students will help to integrate theory and practice better in the classroom and in the minds of their students.

Licensing of law teachers is one mechanism to link the theory with practice. However, Ethiopian law schools' instructors lack this opportunity to integrate the theory with practice as they do not have access to get advocate's license. The law that licenses advocates requires law teachers to resign from their teaching position if they want to get the license.

Lack of access to get the license would affect teaching, researching and community service mission of law teachers. Unless the teacher knows the

practice, he/she may not be able to integrate the theory with practice in those practice-oriented and clinical courses. The teacher's practical experience will enhance the quality of her/his teaching, thus assisting one's professional development and growth as a teacher and scholar; law teachers may not also be able to conduct practitioner research that could suggest significant solutions to practical problems. Moreover, law teachers may not be able to deliver pro bono services in the form of representations as they do not have a license to do that.

The best approach in legal education scholarship is to balance between theory and practice. To achieve a balanced and engaged scholarship, opening access for law teachers to get an advocacy license is a timely issue. If we do that, the legal academy will assume the responsibility to write more useful and problem-oriented articles. What I am proposing, however, is that we all should be sensitive to the value of experiences in training future lawyers, judges and advocates.

የአመክሮ ሕጎችና አተገባበራቸው በባሕር ዳር ማረሚያ ቤት

በላይነህ አድማሱ እጅጉ♣
ዓለሙ ዳኘው ፈለቀ♣

አህጽሮተ-ፅሁፍ

በኢትዮጵያ አመክሮ ታራሚዎች በማረሚያ ቤት ቆይታቸው መልካም የሚባል የባሕርይ መሻሻል በማሳየታቸው 2/3ኛውን የእሥራት ጊዜ ካጠናቀቁ በኋላ ቀሪውን የፍርዱን 1/3ኛ ወይም በፍርድ ቤት የሚወሰነውን የሙከራ ጊዜ በአመክሮ ከእስር ተለቅቀው በሙከራ እንዲያሳልፉ የሚደረግበት አሰራር ነው።[1] *ጥናቱ በተደረገበት በአማራ ብሄራዊ ክልል አንዱ በሆነው የባሕር ዳር ማረሚያ ቤትም ይኸው ተግባራዊ ይደረጋል። ይሁን እንጂ በአመክሮ አተገባበርና ሕጉ ላይ ችግሮች ይስተዋላሉ። የዚህ ጥናት ዋና ዓላማም በክልሉ አመክሮ አሰጣጥ ላይ የሚስተዋሉ የሕግ ክፍተቶችንና በማረሚያ ቤቱ አሉ የሚባሉ የአፈጻጸም ችግሮችን በመለየት የመፍትሄ ሐሳቦችን ለመጠቆም ነው። በማረሚያ ቤቱ የአመክሮ ሕጎችና አፈጻጸማቸው ምን እንደሚመስል በአይነታዊ የጥናት ዘዴ ለመመርምር ተሞክሯል። የጥናቱ መረጃዎችም በሳይንሳዊ መንገድ ተተንትነዋል። በዚህም መሰረት በወንጀል ሕጉና በአብክመ አመክሮ አሰጣጥ መመሪያ መካከል አለመጣጣምና የሕግና የአፈጻጸም ክፍተቶች መኖራቸውን የጥናቱ ግኝት አሳይቷል።*

ቁልፍ ቃላት፦ *አመክሮ፣ ማረሚያ ቤት፣ የእስራት ቅጣት፣ ታራሚ፣ መልካም ጸባይ*

መግቢያ

የወንጀል ፍትህ አስተዳደር ወንጀልን የመከላከልና ወንጀለኞችን በፍርድ ሂደት ለይቶ እንዲታረሙና መልካም ዜጋ እንዲሆኑ የማድረግ ዓላማን ለማሳካት የሚደራጅ ሥርዓት ነው።[2] እነዚህን ዓበይት ዓላማዎች ለማሳካት በፍትህ ሥርዓቱ ውስጥ ጉልህ ሚናና ኃላፊነት ያላቸው አካላት ማለትም ፖሊስ፣ ዐቃቤ ሕግ፣ ፍርድ ቤትና ማረሚያ ቤቶች ይዋቀራሉ።[3]

እነዚህ የፍትህ አካላት ለአንድ ዓላማ የተቋቋሙ ሲሆን የተለያዩ ነገርግን ተያያዥነት ያላቸው ተልእኮዎች ወይም ተግባራት ታሳሚ አድርገው ይሰራሉ። ሁሉም የፍትህ አካላት ወንጀልን በመከላከልና ወንጀል ፈጻሚዎችን በፍትህ ሥርዓቱ እንዲታረሙ በማድረግ የሕግ

♣ በሕግ የመጀመሪያ ዲግሪ (አዲስ አበባ ዩኒቭርሲቲ)፣ ሁለተኛ ዲግሪ በወንጀል ሕግ (አምስተርዳም ዩኒቨርሲቲ)፣ ረዳት ፕሮፌሰር፣ ባሕር ዳር ዩኒቨርሲቲ ሕግ ትምህርት ቤት፡ badmaasu7@gmail.com ወይም belaynehv@yahoo.com

♣ በሕግ የመጀመሪያ ዲግሪ (ጅማ ዩኒቨርሲቲ)፣ ሁለተኛ ዲግሪ በወንጀል ፍትህ አስተዳደር እና ሰብአዊ መብት ሕግ (ባሕር ዳር ዩኒቨርሲቲ)፣ ሌክቸረር፣ ባሕር ዳር ዩኒቨርሲቲ ሕግ ትምህርት ቤት፡ alemudag@gmail.com

[1] የኢፌዴሪ የወንጀል ሕግ፣ አዋጅ ቁጥር 414/1997፣ ነጋሪት ጋዜጣ፣1997 ፣ አንቀፅ 202 እና 204 (ከዚህ በኋላ የኢፌዴሪ የወንጀል ሕግ)

[2] Alfred Blumstein, 'Systems analysis and criminal justice system', *the annals of the American Academy of political and social science*, Vol. 374 (1997), pp. 93-94, available at http://www.jstor.org/stable/1037196 last accessed on 17-06-2017)

[3] Thomas J. Bernard and Robin Shepard, 'Conceptualizing criminal justice theory', *Justice Quarterly,* Vol. 18 No 1, (March 2001), p.2 , http:// www.UC.edu/content/dam/uc/.../articles/. Last accessed on 17 June 2017)

የበላይነትን ለማረጋገጥና ፍትህን ለማስፈን የተቋቋሙ ናቸው።[4] ለዚህ ዓላማ እውን መሆን ፖሊስ ወንጀልን የመከላለከልና ወንጀል ተፈጽሞ ሲገኝ ተጠርጣሪዎችን በመያዝ ሳይንሳዊ የምርመራ ዘዴዎችን በመጠቀም በማስረጃ የተደገፉ እውነታዎችን ፈልጎ[5] የምርመራ ውጤቱን ለዐቃቤ ሕግ ያቀርባል።[6] የወንጀል የምርመራ መዝገብ የሚደርሰው ዐቃቤ ሕግ በበኩሉ ጉዳዩን አግባብነት ካላቸው ሕጎች ጋር በማገናዘብ መርምሮ ወንጀል መፈጸሙን፣ እንዴትና በማን እንደተፈጸመ የሚያሳይ ማስረጃ እንዳለ ባመነ ጊዜ ሥልጣን ላለው ፍርድ ቤት ክስ በማቅረብ[7] ተከራክሮ አጥፊው ጥፋተኛ እንዲባል[8] እና ሊያርመው የሚችል ቅጣት እንዲወሰንበት በማድረግ የማረም ሂደቱም በአግባቡ እንዲከናወን አስፈላጊውን ክትትል የማደረግ ኃላፊነት አለበት።[9] ፍርድ ቤቶችም በዐቃቤ ሕግ በኩል የቀረበውን ክስ መነሻ በማድረግ የማራቀኙን ማስረጃ በመቀበልና በአግባቡ በመመዘን ተከሳሽ ጥፋተኛ ሆኖ ሲገኝ ተመጣጣኝ የሆነውንና የወንጀል ሕጉን የቅጣት ዓላማ ሊያሳካ የሚችል ቅጣት በጥፋተኛው ላይ ይወስናሉ።[10] ማረሚያ ቤቶችም በፍርድ ቤቱ የተወሰነውን ቅጣት በሕጉ መሠረት በማስፈጸም ጥፋተኛው መልካም ዜጋ እንዲሆን የማረም ሥራቸውን በሀላፊነት ይፈጽማሉ።[11] በአጠቃላይ የወንጀል ፍትህ አስተዳደር አካላቱ ከላይ የተመለከቱትን አበይት ተግባራት እጅና ጓንት ሆነው በመሥራት የወንጀል ፍትህ አስተዳደሩን ዓላማ ከግብ ለማድረስ ያላሰለሰ ጥረት ያደርጋሉ።

አሁን ባለው የኢትዮጵያ የሕግ ሥርዓትም ከላይ የተመለከቱትን ተግባራት የሚያከናውኑ የፍትህ አካላት በፌዴራልና በክልል ደረጃ ተዋቅረው የእለት ተእለት ተግባራቸውን በማከናወን ላይ ይገኛሉ። በዚህ መሠረት በአማራ ብሄራዊ ክልላዊ መንግሥት እነዚህ የፍትህ አካላት በየአስተዳደር እርከኑ ተዋቅረው በሕግ የተሰጣቸውን መሰል ተግባራት በማከናወን ላይ ናቸው። ተግባራቱ ሲከናወኑ የሕግና የአፈጻጸም ችግሮች እንደሚከሰቱ ጥናቶች ያመለክታሉ።[12] በተጨማሪም በማረሚያ ቤቱ በኩል በሚከናወኑ ተግባራት በተለይም በአመክሮ አሰጣጥ ሥርዓት ላይ ታራሚዎች ቅሬታ እንደሚያሰሙ በመስክ ምልከታ ወቅት ለመገንዘብ ተችሏል። በታራሚዎች በኩል ከሚነሱ ችግሮች መካከል ዋና ዋናዎቹ፤ በወንጀል ሕጉና በአማራ ብሄራዊ ክልላዊ መንግሥት የአመክሮ አሰጣጥ

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[4] Nicola Lacey, Criminal Justice and Democratic Systems: Inclusionary and Exclusionary Dynamics in the Institutional Structure of Late Modern Societies, Center for European Studies Working Paper Series #148 (2007)

[5] Melissa-A.-settle,M.Ed, Police-officers-Then and now, Teacher Created Materials, publishing Inc., 2007, pp 6-11

[6] የኢትዮጵያ ንጉሠ ነገስት መንግስት የወንጀለኛ መቅጫ ሥነ-ሥርዓት ሕግ፣ አዋጅ ቁጥር 185/1954፣ ነጋሪት ጋዜጣ፣1954፣ ብርሃንና ሰላም ማተሚያ ቤት፣ አዲስ አበባ ኢትዮጵያ፣ አንቀጽ 37(2)

[7] ዝኒ ከማሁ፣አንቀጽ 40፣ 109-120፣ የፌዴራል ጠቅላይ ዓቃቤ ሕግ ማቋቋሚያ አዋጅ፣ አዋጅ ቁጥር 943/2007፣ፌዴራል ነጋሪት ጋዜጣ፣2007፣ አንቀጽ 6 (ከዚህ በኋላ 'የጠቅላይ ዐቃቤ ሕግ መቋቋሚያ አዋጅ')

[8] የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ የወንጀል ፍትሕ ፖሊሲ፣ የሚኒስትሮች ምክርቤት፣ የካቲት 25/2003 ዓ.ም፣ ቁጥር 3.10 (ከዚህ በኋላ የወንጀል ፍትህ ፖሊሲ)፣ የጠቅላይ ዐቃቤ ሕግ መቋቋሚያ አዋጅ በግርጌ ማስታወሻ ቁጥር 7 እንደተገለጸው

[9] የወንጀል ፍትሕ ፖሊሲ፣ዝኒከማሁ፣ ቁጥር 5.3 (መ)፣ የጠቅላይ ዐቃቤ ሕግ መቋቋሚያ አዋጅ በግርጌ ማስታወሻ ቁጥር 7 እንደተገለጸው

[10] የኢትዮጵያ የወንጀለኛ መቅጫ ሥነሥርዓት ሕግ፣ በግርጌ ማስታወሻ ቁጥር 6 እንደተገለጸው፣ አንቀጽ 149

[11] የፌዴራል ማረሚያ ቤቶች ኮሚሽን ማቋቋሚያ አዋጅ፣ አዋጅ ቁጥር 365/1995፣ ፌዴራል ነጋሪት ጋዜጣ፣ 1995፣ አንቀጽ 6፣ የወንጀል ፍትሕ ፖሊሲ፣ በግርጌ ማስታወሻ ቁጥር 8 ላይ እንደተገለጸው፣ ቁጥር 5.3

[12] Federal Democratic Republic of Ethiopia, comprehensive justice system reform program baseline study report, Ministry of Capacity Building Justice system reform program office February, 2005, pp. 14-17

ሥርዓትንና አፈጻጸምን ለመወሰን የወጣ ጊዜያዊ መመሪያ (ከዚህ በኋላ የአብክመ የአመክሮ አሰጣጥ መመሪያ እየተባለ የሚጠራ) ላይ የሚታዩ ክፍተቶችን፣ የአመክሮ ጊዜ ስሌትና የማስረጃ አቀራረብ፣ እንዲሁም ከማረሚያ ቤት ከወጡ በኋላ ከማህበረሰቡ ጋር የሚኖራቸውን መስተጋብርና ሌሎችንም የሚመለከቱ ናቸው። ችግሮቹን በጥናት በመለየት የመፍትሄ ሐሳብ በማፈላለግ ለሕግና ለፖሊሲ አውጭዎች እንዲሁም ጉዳዩ ለሚመለከታቸው አስፈጻሚ አካላት መጠቆሙ አስፈላጊ ነው። በመሆኑም በባሕር ዳር ማረሚያ ቤት አመክሮን የሚመለከት ምርምር በማድረግ የተገኘው ውጤት በጽሑፉ ቀርቧል።

በጥናቱ የተዳሰሱ መሠረታዊ ነጥቦችም፤ የአመክሮ ቅድመሁኔታዎች ግልጽ መሆን አለመሆን፣ ቅድመ ሁኔታዎቹ ለአፈጻጸም ቀላልና ምቹ መሆን አለመሆናቸው፣ ለአመክሮ ተጠቃሚነት ብቁ የሚሆኑ ታራሚዎች የሚለዩበት ማንነት፣ ታራሚዎች ለወንጀል ሰለባዎች ካሳ ለመክፈል ያላቸው ግዴታ በአመክሮ አሰጣጥ ላይ የሚኖረው ሚናና ተፈጻሚነት፤ የሚሉት ናቸው።

እነዚህን ነጥቦች ለመቃኘት በየደረጃው ከሚገኙ የማረሚያ ቤት ኃላፊዎችና ባለሙያዎች፣ የአመክሮ ተጠቃሚ ለመሆን በዝግጅት ላይ ያሉትን ታራሚዎችና ጉዳዩ የሚመለከታቸውን ሌሎች አካላት በማነጋገር መረጃ መሰብሰብ የጥናቱ ዋና ተግባር በመሆኑ አይነታዊ የመረጃ አሰባሰብ ስልት ሥራ ላይ ውሏል። በዚህ መሠረት በጥናቱ አግባብነት ያላቸውን ልዩ ልዩ የጽሑፍ ሰነዶች በመፈተሽ፤ ቃለመጠይቅ፣ የቡድን ውይይት (Focus group discussion) እና ምልከታ በማድረግ አስፈላጊ መረጃዎች ተሰብስበው ተተንትነዋል።

1. የአመክሮ ትርጉምና ጽንሰ-ሐሳብ

በመግቢያው ላይ እንደተገለጸው በማረሚያ ቤት አስተዳደር ከሚከናወኑ በርካታ ተግባራት መካከል አመክሮ አንዱ ነው። ማረሚያ ቤት ታራሚዎችን ከመጠበቅ ባሻገር ለጠቅላላ ሰብዕናቸው ግንባታ የሚያስፈልጋቸውን ትምህርት፣ ልዩልዩ የሙያ ሥልጠናና ሌሎችንም የገቢ ምንጭ ሆነው የሚያገለግሉ ሥራዎችን እንዲሰሩና ራሳቸውን እንዲያግዙ ሁኔታዎችን ያመቻቻል።[13] ይህንን አቢይ ኃላፊነት ለመወጣት በሚያከናውናቸው ተግባራት የታራሚዎችን ባሕርይ በማሻሻል መልካም ዜጋ ማድረግ የሚጠበቅ ውጤት[14] ሲሆን፣ ይህንን የባሕርይ ለውጥ ማሳየት የቻሉ ታራሚዎችን ሙሉ የእሥራት ጊዜያቸውን መፈጸም ሳይጠበቅባቸው ከማህበረሰቡ ጋር ተቀላቅለው እንዲኖሩ ለማድረግ አመክሮን የመስጠት ሥልጣን አለው።[15] በዚህ መሠረት የብዙ ሀገር ማረሚያ ቤቶች በአይነትና በይዘቱ የተለያየ ይሁን እንጂ ታራሚዎችን እያነጹ መልካም ዜጋ በማድረግ ለታራሚዎቹና ለማህበረሰቡ ጥቅም ሲባል የእሥራት ጊዜያቸው ከማለቁ በፊት አመክሮን ይሰጣሉ።[16] በኢትዮጵያ ባሉ

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[13] የፌዴራል ማረሚያ ቤቶች ኮሚሽን ማቋቋሚያ አዋጅ፣ በግርጌ ማስታወሻ ቁጥር 11 እንደተገለጸው፣ አንቀጽ 6፣ የወንጀል ፍትሕ ፖሊሲ፣ በግርጌ ማስታወሻ ቁጥር 8 ላይ እንደተገለጸው፣ ቁጥር 5.3 እና የኢፌዴሪ የወንጀል ሕግ፣ በግርጌ ማስታወሻ ቁጥር 1 እንደተገለጸው፣ መግቢያውና አንቀጽ 1

[14] የወንጀል ፍትሕ ፖሊሲ፣ በግርጌ ማስታወሻ ቁጥር 8 ላይ እንደተገለጸው፣ ቁጥር 5.3

[15] የኢፌዴሪ የወንጀል ሕግ፣ በግርጌ ማስታወሻ ቁጥር 1 ላይ እንደተገለጸው፣ አንቀጽ 202፣ የኢፌዴሪ ሚኒስትሮች ም/ቤት፣ የፌዴራል ታራሚዎችን አያያዝ ለመወሰን የወጣ ደንብ ቁጥር 138/1997፣ ነጋሪት ጋዜጣ፣ አንቀጽ 46 (ከዚህ በኋላ የፌዴራል ታራሚዎችን አያያዝ ለመወሰን የወጣ ደንብ እየተባለ የሚጠራ) እና በአብክመ አስተዳደርና ጸጥታ ቢሮ የአመክሮ አሰጣጥ ሥርዓትንና አፈጻጸምን ለመወሰን የወጣ ጊዜያዊ መመሪያ ቁጥር 1/2003 ዓ.ም (ከዚህ በኋላ የአመክሮ አሰጣጥ መመሪያ) መግቢያ

[16] Correctional Services of Canada, National Parole Board. 2007 from confinement to community. Available at http://www.npb-cnlc.gc.ca /infocntr/confinement_community_e.htm last accessed on 2 July 2007.

ቁጥራቸው 119[17] በሚደርሱ ማረሚያ ቤቶችም በኢፌዴሪ የወንጀል ሕግንና አመክሮን ለማሳለጥ በወጡ ልዩ ልዩ የሥራ መመሪያዎች አማካይነት አመክሮ ይሰጣል፡፡

ለመሆኑ አመክሮ ምንድን ነው? ስለአመክሮ የሕግ ጽንሰ ሐሳብና አፈጻጸሙ ከማውሳት አስቀድሞ ጥያቄውን ለመመለስ ሥለጠቅላላ ትርጉሙና በጥቂቱ ማውሳቱ የጥናቱን ዓላማ ለመረዳት የሚኖረው ፋይዳ ቀላል አይሆንም፡፡ በመሆኑም አመክሮን የዘርፉ ባለሙያዎች እንዴት እንደሚረዱትና እንደሚገልጹት እንደሚከተለው ለማሳየት ጥረት ተደርጓል፡፡

አመክሮ አንድ ታራሚ የእሥራት ጊዜውን ሙሉ በሙሉ ከመፈጸሙ በፊት በገደብ ወይም በሁኔታ ላይ ተመስርቶ ከእስር የሚለቀቅበትና ገደቡን ተላልፎ ሲገኝ እንደ አስፈላጊነቱ ወደነበረበት ማረሚያ ቤት እንዲመለስ የሚደረግበት አሠራር ነው፡፡[18] በፕሪቶሪያ አመክሮ ቦርድ ማኑዋል ላይም ለቃሉ የሚከተለው ትርጉም ተሰጥቶታል፤

> አመክሮ አንድ ታራሚ በፍርድ ቤት ከተጣለበት የእሥራት ቅጣት በሕግ እንዲፈጽም የሚገደደውን ዝቅተኛ የእሥራት ጊዜ ከፈጸመ በኋላ ያሳየው የባሕርይ መሻሻል ታይቶ ቀሪውን የእሥራት ጊዜ ከማረሚያ ቤት ውጭ በመሆን ከማህበረሰቡ ጋር ተቀላቅሎ እንዲፈጽም በሁኔታ ወይም ያለሁኔታ ከእስር ተለቅቆ በሕግ ሥልጣን በተሰጠው ተቆጣጣሪ ክትትል እንዲቆይ የሚደረግበት የቅጣት አፈጻጸም ሥርዓት ነው፡፡[19]

ኒል ልዊስ ማነዬልኮ የተባለ ተመራማሪም እንዲሁ ለአመክሮ ከዚህ በላይ ከተመለከተው ትርጓሜ ጋር ተመሳሳይነት ያለው ሀሳብ አለው፡፡[20]

ከላይ ከቀረቡ ትርጉሞች መረዳት እንደሚቻለው፣ አመክሮ በጽንሰ-ሃሳብ ደረጃ የሚከተሉትን ዋና ዋና ነጥቦች መያዝ ወይም ማሟላት እንዳለበት መገንዘብ ይቻላል፡፡ ለአመክሮ ጽንሰ ሐሳብ ማእዘን ሆኖ የሚያገለግለው በፍርድ ቤት በታራሚው ላይ የሚወሰነው የእሥራት ቅጣት ነው፡፡ አንድን ወንጀል የፈጸመ ሰው በፈጸመው ወንጀል ተከስሶ በፍርድ ቤት የእሥራት ቅጣት ተወስኖበት ወደ ማረሚያ ቤት እንዲላክ ካልተደረገ የአመክሮ ጽንሰሐሳብ ሊጠነሰስ አይችልም፡፡

ይህ የእሥራት ውሳኔ ከተወሰነበትና ወደ ማረሚያ ቤት ከተላከ በኋላ በማረሚያ ቤቱ የሚኖረው በሕግ የተወሰነ ቆይታ ሌላው አመክሮን ለመገንዘብ ግምት ውስጥ መግባት ያለበት ነጥብ ነው፡፡ በፍርድ ቤቱ የተሰጠው የእሥራት ውሳኔ የተወሰነ ወይም ያልተወሰነ (Determinate or indeterminate sentence)[21] ሲሆን፣ ታራሚው በፍርድ ቤት ውሳኔ

Tobius Mwanza, Parole as a Way to Reduce Overcrowding in Zambian Prisons: A Communicative and Participatory approach, the University of Zambia, 2012, p. 39 available at dspace.unza.zm:8080/xmlui/bitstream/handle/123456789/1800/Tobias, last accessed on July 13 2018)

[17] comprehensive justice system reform program baseline study report, supra note 12, p. 114 እና የኢትዮጵያ ሰብአዊ መብት ኮሚሽን፣ የታራሚዎች የሰብዓዊ መብት አጠባበቅ በኢትዮጵያ ማረሚያ ቤቶች መነሻ ክተትል ሪፖርት፣ ሰኔ 2004፣ አዲስ አበባ፣ ገጽ 21 (ከዚህ በኋላ የኢትዮጵያ ሰብዓዊ መብት ኮሚሽን ሪፖርት)

[18] Webster's Unabridged International Dictionary, 2nd ed, as cited by Carter H. White, Some Legal Aspects of Parole, 32 J . Crim. L. & Criminology 600 (1941-1942)

[19] Department of Correctional Services. Correctional supervision and parole board manual. Pretoria: Commissioner of Correctional Services, 2004

[20] Mandelko, Neal Louis, "*Parole in theory and practice an evaluation of factors affecting the parole concept,"* thesis, Dissertations, Professional Papers. Paper 9079, 1998፣ p. 6.

[21] ዝኒ ከማሁ፣ ገጽ 20-21

ከተጣለበት የእሥራት ቅጣት ውስጥ እንደ ቅደምተከተላቸው በሕግና በአመክሮ ቦርድ ወይም በሕግ ሥልጣን በተሰጠው ሌላ አካል የተቀመጠውን ዝቅተኛ የእሥራት መጠን በማረሚያ ቤቱ ውስጥ በመሆን መፈጸም አለበት፡፡ ለምሳሌ፣ በኢትዮጵያ፣[22] በፈረንሳይና በእስፔን የወንጀል ሕግ መሠረት ማንኛውም ታራሚ በአመክሮ ከእስር ለመለቀቅ ፍርድ ቤቱ ከወሰነው የእሥራት መጠን 2/3ኛ የሚሆነውን በማረሚያ ቤት ሊያሳልፍ ይገደዳል፡፡[23] በዚህ አገላለጽ በፍርድ ቤት ከተወሰነው ቅጣት ውስጥ ታራሚው የአመክሮ ተጠቃሚ ለመሆን በማረሚያ ቤት በመቆየት መፈጸም ያለበት ዝቅተኛ የእሥራት መጠን በፍርድ ከተላለፈው የእሥራት ዘመን ከሦስቱ ሁለት እጁን ነው፡፡

ሆኖም ይህን ያህል የእሥራት ጊዜ በማረሚያ ቤት ማሳለፉ ብቻ የአመክሮ ተጠቃሚ ያደርገዋል ማለት አይቻልም፡፡ ይልቁንም በዚህ የቆይታ ጊዜ ያሳየው የባሕርይ መሻሻል ወይም ለውጥ ለአመክሮ መሰጠት እንደ አንድ ተጨማሪና ወሳኝ መስፈርት ሆኖ ያገለግላል፡፡ የባሕርይ መሻሻሉ ወይም ለውጡ በሁኔታ ወይም ያለሁኔታ ከማረሚያ ቤት ለመውጣት የራሱ የሆነ አስተዋጽኦ እንዳለው ከፍ ብሎ ለቃሉ ከተሰጡ ፍቺዎች መረዳት ይቻላል፡፡ የባሕርይ ለውጡ ተገምግሞ በሁኔታ ወይም ያለ ሁኔታ ከማረሚያ ቤት እንዲወጣና ከማህበረሰቡ ጋር ተቀላቅሎ ቀሪውን የእሥራት ዘመን እንዲፈጽም ሥልጣን ባለው አካል የተወሰነ እንደሆነ ከማህበረሰቡ ጋር ተቀላቅሎ ሲኖር የሚያሳየውን ባሕርይ ለመከታተልና ለመገምገም ኃላፊነት ያለበት አንድ ባለሙያ ወይም አካል ሊመደብ እንደሚገባም ትርጓሜዎቹ ያሳያሉ፡፡

ከፍ ብሎ ከተመለከቱት ለቃሉ ከተሰጡ ፍቺዎች መገንዘብ እንደሚቻለው የአመክሮ ጽንሰ-ሐሳብ ይህ ይሁን እንጂ በዚህ ላይ ምርምር ያደረጉ ተመራማሪዎች የሚያነሷቸው ልዩ ልዩ አስተሳሰቦችም አሉ፡፡ እነዚህን አስተሳሰቦች መመልከቱ ጽንሰ ሐሳቡን ይበልጥ ለመረዳት ይረዳል፡፡ በመሆኑም አመክሮን ከውል፣ ከችሮታ፣ ከእሥራት ወይም ከጥበቃ፣ ታራሚው መብቱን አሟጦ ከመጠቀሙና በማረሚያ ቤት ቆይታው ካሳየው የባሕርይ መሻሻል (Parens Patriae)[24] አንጻር በመመልከት ባለሙያዎች ጽንሰ ሐሳቡን ያብራራሉ፡፡ እነዚህን የፍልስፍና አስተሳሰቦች በአጭር በአጭሩ ማውሳቱ በአመክሮ ጽንሰ ሃሳብ ላይ ያለውን የአስተሳሰብ አድማስ ይበልጥ ግልጽ ለማድረግ ያግዛል፡፡

የመስኩ ባለሙያዎች አመክሮን ከውል ወይም ከስምምነት አንጻር ሲተነትኑት አመክሮ በአመክሮ ተጠቃሚውና ሰጭው መንግሥት መካከል በሚደረግ ስምምነት መሠረት ታራሚው ከእስር የሚለቀቅበት አሠራር ነው፤ በማለት ይገልጻሉ፡፡[25] የአመክሮ ተጠቃሚው ከእስር ሲለቀቅ ይህን ስምምነት በመቀበል በስምምነቱ ላይ የተመለከቱትን ግዴታዎች ለመፈጸም ተስማምቷል ለማለት ይቻላል፡፡ በዚህ መሠረት ግዴታን የተቀበለ የአመክሮ ተጠቃሚ ሁኔታዎችን አክብሮ በማይገኝበት ጊዜ አመክሮው ቢሰረዝ የስምምነቱ ውጤት ተደርጎ ሊወሰድ ይችላል፡፡ ምክንያቱም በአመክሮ የተለቀቀ ሰው የአመክሮ ቅድመሁኔታዎችን በጣሰ ወይም ባላከበረ ጊዜ ስምምነቱን እንዳፈረሰ ሊቆጠር ስለሚችል ነው፡፡[26]

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[22] የኢፌዴሪ የወንጀል ሕግ፣ በግርጌ ማስታወሻ ቁጥር 1 ላይ እንደተገለጸው፣ አንቀጽ 202

[23] Champion, D.J..*Probation, parole and community corrections,* 4th edition, Upper Saddle River, NJ: Prentice Hall, 2002, P. 5,

[24] 'The parole system', *University of Pennsylvania law review*, 1971, vol.120, No 282-377, p. 286

[25] Nxumalo, T.E., *Parole supervision: A penological perspective*, MA dissertation, Pretoria University of South Africa, 1997, [unpublished] p 18

[26] ዝኒ ከማሁ

አመክሮን አስመልክቶ የሚቀርበው ሁለተኛው አስተሳሰብ አመክሮ በመንግሥት በጎ ፈቃድ ወይም ችሮታ ላይ ተመስርቶ ታራሚው ከእስር የሚለቀቅበት እንጂ እንደ መብት የሚጠየቅ ጉዳይ አለመሆኑን የሚያንጸባርቅ ነው።[27] በዚህ እይታ መሠረት አመክሮ መንግሥት ተገቢ ሆኖ ሲያገኘው አስፈላጊ ነው ብሎ የሚያምነውን ቅድመ ሁኔታ በማስቀመጥ ታራሚውን ከእስር የሚለቅበትና የአመክሮ ተጠቃሚው ቅድመ ሁኔታዎችን ጥሶ በሚገኝበት ጊዜ ያለምንም ሥነ ሥርዓት ወደ እስር የሚመልስበት የመንግሥትን በጎ ፈቃድ ብቻ መሠረት ያደረገ አሰራር ነው።[28] በመሆኑም የአመክሮ ተጠቃሚው እንደመብት የሚጠይቀው ሳይሆን የመንግሥትን መሀሪነት ወይም ይቅር ባይነት መሠረት በማድረግ እንዲለቀቅ የሚማጸንበት አሠራር ነው ብለው የመስኩ ባለሙያዎች ይሞግታሉ።[29]

የባለሙያዎች ሦሥተኛው አስተሳሰብ አመክሮ ተጠቃሚውን በጥበቃ ወይም በእስር ላይ ካለ ታራሚ ጋር የሚያመሳስል ነው።[30] በዚህ የአስተሳሰብ ጎራ የሚነሳው በአመክሮ የተለቀቀ ታራሚ በቁጥጥር ወይም በክትትል ሥር ያለና ሁኔታውም የእሥራቱ አካል እንደሆነ የሚያሳይ ነው።[31] የአመክሮ ቦርድ ወይም ሌላ ሥልጣን የተሰጠው አካል በአመክሮ የተለቀቁ ታራሚዎች ላይ በእስር እንዳሉት ፍርደኞች ሁሉ ክትትልና ቁጥጥር የማድረግና የባሕርያቸውን መልካምነት የማረጋገጥ ኃላፊነት አለበት።[32] በክትትሉ በአመክሮ የተለቀቁ ሰዎች የተጣለባቸውን ገደብ ተላልፈው ወይም ሌላ ወንጀል ፈጽመው የተገኙ እንደሆነ ከእስር እንዳመለጡ ታራሚዎች ተቆጥረው ያለምንም የፍርድ ሂደት ወደነበሩበት ማረሚያ ቤት እንዲመለሱ ይደረጋል።[33] ይህም አመክሮ የቀድሞው እሥራት ቅጥያ መሆኑን በግልፅ ያመላክታል።

ከአመክሮ ጽንሰ ሐሳብ ጋር የሚነሳው ሌላው አስተሳሰብ የስነ ሥርዓት መብትን የሚመለከት ነው። ከላይ አመክሮን ከእሥራት ጋር በማስተሳሰር ለማብራራት የተሞከረበት አስተሳሰብ አመክሮ ተጠቃሚው የተጣለበትን ገደብ ተላልፎ ወይም አዲስ ወንጀል ፈጽሞ የተገኘ የአመክሮ ተጠቃሚ ያለምንም ተጨማሪ ስነሥርዓት ወደ ማረሚያ ቤት እንደሚመለስ በአንክሮ ይገልጻል።[34] ይህ አስተሳሰብ በፍርድ ቤት የክርክር ሂደት አልፎ ወደ ማረሚያ ቤት እንዲገባ የተደረገ ታራሚ በማረሚያ ቤትም ይሁን በአመክሮ ጊዜ ሊያነሳ የሚችለው የስነ ሥርዓት (due process right) መብት እንደሌለ ያስገነዝባል።[35] ምክንያቱም ታራሚው የዚህ አይነቱን መብት የቅጣት ውሳኔ እስከ ተሰጠበት ባለው የክርክር ሂደት ሙሉ በሙሉ ስለተጠቀመበት ነው።[36] ሥለሆነም የአመክሮ ገደብን በመተላለፉ ቀሪውን የእሥራት ጊዜ

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[27] The parole system, supra note 24.

[28] ዝኒ ከማሁ፣ ገጽ 287.

[29] ዝኒከማሁ

[30] Clear, T.R. & Dammer, H.R, *The offender in the community,* Second edition. Belmont: Wadsworth. 2003, p.347

[31] Francois Christiaan, *The Parole Process from a South African Perspective*, masters thesis, University Of South Africa , November 2008, p. 36 available http://uir.unisa.ac.za/bitstream/handle/10500/1320/dissertation.pdf?sequence=1, last accessed on 10 August 2017)

[32] Clear, T.R. & Dammer, H.R, supra note 30

[33] ዝኒ ከማሁ

[34] The parole system, supra note 23, p. 288

[35] ዝኒ ከማሁ

[36] ዝኒ ከማሁ

ታራሚው ወደማረሚያ ቤት ተመልሶ እንዲፈጽም በአመክሮ ቦርድ ወይም ሌላ ሥልጣን ባለው አካል ሲወሰን ሊነሳ የሚችል የስነሥርዓት መብት ሊኖር አይችልም።

በመጨረሻ የሚነሳው ነጥብ አመክሮ ታራሚው በማረሚያ ቤት ቆይታው የሚያሳየው የባሕርይ ማሻሻል (Parens Patriae) ሲሆን፣ ይህ አስተሳሰብ አመክሮ ለማንኛውም ታራሚ የሚሰጥ ሳይሆን በማረሚያ ቤት ቆይታቸው የባሕርይ መሻሻል እንዳሳዩ በአመክሮ ቦርዱ ለታመነባቸው ታራሚዎች ብቻ የሚሰጥ ነው። የአመክሮ ቦርድ ይህን መሠረት አድርጎ አመክሮ እንዲሰጥ በሚያስተላልፈው የአስተዳደር ውሳኔ በፍርድ ቤት ሊከለስ አይገባውም[37]፤ የሚል አስተሳሰብን የሚያስተጋባ ነው።

ከላይ የተቃኙት የተለያዩ ባለሙያዎች አተያዮች የአመክሮን ባሕርያት መሠረት በማድረግ ጽንሰሐሳቡን ለማብራራት የሚያግዙ ይሁኑ እንጂ በየራሳቸው ሲታዩ ህፀፅ አልባ ባለመሆናቸው እያንዳንዳቸው ለትችት የተጋለጡ ናቸው። አስተሳሰቦቹን በተመለከተም ጸሕፍት በነዚሁ አስተሳሰቦች መካከል የሐሳብ ተቃርኖ እንዳለ ያሳያሉ።[38] ሌላው ቀርቶ በእያንዳንዱ አስተሳሰብ ውስጥ የሐሳብ አለመጣጣም እንደሚስተዋል[39] በማንሳት የአስተሳሰቦቹን ተቀባይነት ጥያቄ ውስጥ ይጥሉታል።

በአጠቃላይ የአመክሮ ጽንሰሃሳብ በዚህ ጥናት ውስጥ ከተብራሩት መሠረተ ሐሳቦች የተዋቀረና በወንጀል ፍትህ አስተዳደሩ አልፈው የባሕርይ መሻሻል ያሳዩ ታራሚዎችን ወደ ማህበረሰቡ እንዲቀላቀሉ በማድረግ የታራሚዎችን፣ የህዝብንና የመንግሥትን ጥቅም ለማስከበር የሚያገለግል ሥርዓት ነው።

2. የአመክሮ ታሪካዊ ዳራ

የአመክሮ ታሪካዊ ዳራ ሲቃኝ ወደ ጥንቱ የሙሴና የሀሞራቢ የሕግ ሥርዓት ያመራናል። በሙሴ ዘመን በወቅቱ የነበረውን ሕግ በመተላለፍ ወንጀል ወይም ኀጢአት የፈጸመ ሰው ከሚኖርበት ግዛት ወይም አካባቢ በመሸሽ ተሰድዶ በሌላ አካባቢ እንደ ንጹህ ሰው ተቆጥሮ በነጻነት እንዲኖር ይደረግ ነበር።[40] በተሰደደበት ግዛት ብቻ እንዲንቀሳቀስና በነጻነት እንዲኖር ሲፈቀድለት፣ ከዚያ ግዛት ክልል ውጭ ሲንቀሳቀስ ከተገኘ ውሳኔውን እንደተላለፈ ተቆጥሮ ባላጋራዎቹ በተገኘበት እርምጃ እንዲወስዱበት ለምሳሌም በሰው መግደል ወንጀል ተበይኖበት ከሆነ ግድያ እንዲፈጸምበት ይደረግ ነበረ።[41]

በ16ኛው ክፍለ ዘመን በወቅቱ እጅግ በጣም ገናና የነበረችው እንግሊዝ በግዛቷ ወንጀል የፈጸሙ ግለሰቦችን በወቅቱ ቅኝ ግዛቶቿ ወደነበሩት አሜሪካ፣ በኋላም ወደ አውስትራሊያና የአፍሪካ ሀገሮች እንዲጓዙ ታደርግ ነበረ።[42] በሌላ አነጋገር በእንግሊዝ ሕግ ወንጀለኛ ተብለው የተፈረደባቸው ታራሚዎች ከላይ ወደ ተጠቀሱት ሀገሮች ተወስደው በልዩልዩ ሥራዎች ላይ በአገልጋይነት እንዲሰማሩ ይደረግ ነበር። በተለይ በ18ኛው ክፍለዘመን

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[37] ዝኒ ከማሁ፣ ገጽ 289

[38] ዝኒ ከማሁ፣ ገጽ 289-291

[39] ዝኒ ከማሁ፣ ገጽ 291-296፤ ሆኖም የዚህ ጥናት አላማ እነዚህን ፍልስፍናዎች ወይም አስተሳሰቦች መመርመር ባለመሆኑ ዝርዝሩን አንባቢያን በዚሁ በግርጌ ማስታዎሻ ላይ የተመለከተውን ጽሑፍና ሌሎችንም ፈልጎ በማንበብ ይበልጥ እንዲገነዘቡት የጥናቱ አቅራቢዎች ይመክራሉ።

[40] Mandelko, Neal Louis, supra note 20

[41] ዝኒ ከማሁ

[42] Frederick a. Moran, (Chairman, New York State Board of Parole), the Origins of Parole, http://heinonline.org, last accessed on 8 July 20-17), pp. 71-73

አሜሪካ የራሷን ነጻ መንግሥት ከመሰረተች በኋላ እንግሊዝ አውስትራሊያን እንደ አማራጭ የእስረኞች መጠበቂያ አድርጋ መገልገል ብትጀምርም የአውስትራሊያ ቀደምት ሰፋሪ የነበሩ እስረኞች በእንግሊዝ ላይ የመሬት አጠቃቀምን ምክንያት በማድረግ ተቃውሞ በማንሳታቸው አመክሮ እንደ ችግር መፍቻ ሆኖ እንዲታሰብ ሁኔታው አስገድዷል።[43] በዚህ መሠረት በአውስትራሊያ እንዲሰፍሩ ሲደረጉ የነበሩ ታራሚዎች ለተወሰነ ጊዜ ለቀደሙት ታራሚዎች ሲያገለግሉ ከቆዩ በኋላ ያሳዩት የባሕርይ ለውጥ ግምት ውስጥ ገብቶ መሬት ተሰጥታቸው ለራሳቸው እየሰሩ እንዲተዳደሩ መደረግ ጀመረ።[44] ይህም አመክሮ በሁኔታ ወይም ያለሁኔታ ለመስጠት ታሪካዊ መነሻ ሆኖ በዘመናዊ ማረሚያ ቤቶች አስተዳደር ጽንሰ ሐሳቡ በ19ኛው ክፍለዘመን ዳብሮ መተግበር እንደጀመረ ይነገራል።[45]

ይህንን ተከትሎ ወደ አውስትራሊያና ሌሎች ግዛቶች ለሚላኩ እስረኞች በፍርድ ቤት የተወሰነባቸው ቅጣት በይቅርታ መልክ እንዲቀንስላቸው ለማድረግ እ.አ.አ በ1790ዎቹ ሕግ ወጥቶ ተግባራዊ ሆኗል። በዚህ መሠረት እ.አ.አ ከ1811 ጀምሮ የባሕርይ መሻሻል፣ በቆይታቸው መልካም ሥራን ሠርተው እውቅናን ያገኙና ጋብቻን ፈጽመው ለትዳር ብቁና ዝግጁ ሆነው የተገኙ እስረኞች ፍርዳቸውን ሳይጨርሱ ሙሉ በሙሉ ከገደብ ነጻ ሆነው ከእሥራት እንዲለቀቁ መደረጉ አመክሮ በዘመናዊ መንገድ መሠጠት መጀመሩን አመላክቷል።[46] በተለይም እ.አ.አ በ1830 እና 1835 በፈረንሳይና በእስፔን እንደቅደምተከተላቸው አመክሮ በወንጀል ፍትህ አስተዳደር ውስጥ ገሃድ ሆኗል።[47] በእነዚህ ሀገሮች በፍርድ ቤት ከተወሰነው ቅጣት 2/3ኛውን በማረሚያ ቤት ሲቆይ፣ በዚህ ወቅትም ትምህርትና የሙያ ሥልጠና ከተከታተለ እንዲሁም የባሕርይ መሻሻል በማሳየት ለተሻለ ሥራ ከተነሳሳ 1/3ኛውን የእሥራት ጊዜ ከማረሚያ ቤት ውጭ ሆኖ እንዲፈጽም መደረግ ተጀምሯል።[48]

ለአመክሮ አሰጣጥ እንደ ቅድመሁኔታ ሆነው ከሚያገለግሉት መስፈርቶች አንዱ የሆነውን የባሕርይ መሻሻል ለመለካት በወቅቱ አስችግሮ ስለነበረ እ.አ.አ በ1840 የኖርቪክ ደሴት ገዥ የነበረው አሌክሳንደር ማኮኖቺ ታራሚዎች በአመክሮ ለመለቀቅ በእስር መቆየት ያለባቸው ጊዜ በሚሰሩት ሥራና በሚያሳዩት የባሕርይ ለውጥ መመዘን እንዳለበት ሐሳብ አቅርቧል። ምዘናውም ታራሚው በየቀኑ ለሚሰራው ሥራ ነጥብ በመስጠት መደረግ እንዳለበት ግለሰቡ ተጨማሪ ሐሳብ ሰንዝሯል።[49] ይህም በዘመናዊ አመክሮ አሰጣጥ ተቀባይነትን አግኝቶ ኢትዮጵያን ጨምሮ በብዙ ሀገሮች እየተሰራበት ይገኛል።

3. የአመክሮ አስፈላጊነት

የአመክሮ አስፈላጊነት የወንጀል ፍትህ አስተዳደሩ ዓላማ ከሆነው የማህበረሰብ ወይም የህዝብ ደህንነት የሚመነጭ ነው።[50] ታራሚዎች ይህንን ደህንነት የሚያደፈርስ ወንጀል

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[43] ዝኒ ከማሁ፣ገጽ 76

[44] Mandelko, Neal Louis, supra note 20, p. 5

[45] ዝኒ ከማሁ

[46] ዝኒ ከማሁ፣ገጽ 13

[47] Champion, D.J, *Probation, parole and community corrections*, 4th edition, upper Saddle River, NJ: Prentice Hall, 2002, p. 260

[48] ዝኒ ከማሁ

[49] ዝኒ ከማሁ

[50] Cromwell, P.F. & Del Carmen, R.V, Community-*based corrections*, 4th edition, Belmont: Wadsworth, 1999, P. 2.

በመፈጸማቸው ተፈርዶባቸው በእስር ከቆዩ በ ኋላ ሲለቀቁ ከመሰል የወንጀል ባሕርያቸው ስለ መታረማቸው ማስረጃ ያሻል።[51] በሌላ አነጋገር ታራሚዎች በአመክሮ ከወጡ በኃላ ተመሳሳይ የወንጀል ድርጊት እንዳይፈጽሙ አስፈላጊው ቅድመጥንቃቄ ሊወሰድ ይገባል። ለዚህም ሲባል ታራሚው ከማረሚያ ቤት ሲለቀቅ የሚያሟላቸው መስፈርቶች አብዛኛዎቹ ከባሕርይ መለወጥ ወይም መስተካከል ጋር የተያያዙ ናቸው።[52] ታራሚው እነዚህን መስፈርቶች አሟልቶ ከእስር እንዲለቀቅና ከማህበረሰቡ ጋር አብሮ እንዲኖር ሲደረግ ኃላፊነት የሚሰማውና ለሕግ ተገዥ የሆነ መልካም ዜጋ እንዲሆነ ታምኖበት ነው።[53] ይሁን እንጂ ታራሚው በአመክሮ ከተለቀቀ በኋላ ለዚህ ባሕርይው ዋስትና ይሆን ዘንድ የክትትል ሥርዓት ይዘረጋል።[54] የክትትል ሥርዓቶቹም ተቆጣጣሪ መመደብ፣ ገደብ መጣልና ልዩልዩ የቁጥጥር ዘዴዎችን በመጠቀም ግለሰቡ ተጨማሪ ወንጀል እንዳይፈጽም ማገዝ ሲሆኑ፣ እነዚህን ተላልፎ ከተገኘ አመክሮውን በማንሳት ወደ ነበረበት ማረሚያ ቤት እንዲገባ ማድረግ ነው።[55] በዚህ መንገድ አመክሮን በመፈጸም የማህበረሰቡን ደህንነት መጠበቅና ታራሚውንም አመክሮን በመጠቀም መልካም ዜጋ እንዲሆን ያስችላል።[56]

ሌላው አመክሮ ሲሰጥ ግምት ውስጥ የሚገባው ከአመክሮ ተጠቃሚው ጋር ተያያዥነት ያለው ጉዳይ ነው። እዚህ ላይ የሚታየው የአመክሮ አስፈላጊነት ታራሚው ባሕርይውን እንዲያሻሽል፣ ከማህበረሰቡ ጋር አብሮ እንዲኖርና የግል ተበዳዮችንና ማህበረሰቡን በድርጊቱ ተጸጽቶ እንዲክስ ማስቻል ነው።[57] ታራሚን በአመክሮ ለመልቀቅ ከሚያስፈልጉ መስፈርቶች አንዱ የባሕርይ መሻሻል ሲሆን፣ ይህ የወንጀል ሕግ ዋነኛና ቀዳሚ የወንጀል ቅጣት ዓላማ እንደሆነ ይታወቃል።[58] ታራሚዎች በአመክሮ ከእስር በሚለቀቁበት ጊዜ ይህ ዓላማ በትክክል ስለመሳካቱ መመዘን እንዳለበት በዙሪያው የመስኩ ጠበብት ይስማማሉ።[59] የብዙ ሀገሮች የወንጀል ሕግጋትም የወንጀለኛውን የባሕርይ መሻሻል እንደዋና ቅድመሁኔታ አድርገው ይደነግጋሉ።[60] ስለሆነም በአመክሮ አንድን ታራሚ ከእሥራት ለመልቀቅ የባሕርይ ለውጥ ማምጣቱንና ከማህበረሰቡ ጋር በመቀላቀል እንደ መልካም ዜጋ ለመኖር የሚያስችለውን መልካም ባሕርይ የተላበሰ መሆኑን ማረጋገጥ በአመክሮ አሠራር ትልቅ ቦታ የሚሰጠው መስፈርት መሆኑን መገንዘብ ይቻላል።

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[51] Champion, D.J, supra note 47

[52] ዝኒ ከማሁ

[53] Cromwell, P.F. & Del Carmen, R.V, supra Note 50

[54] Champion, D.J, supra note 47

[55] Clear, T.R. & Dammer, H.R, supra Note 30

[56] Cromwell, P.F. & Del Carmen, R.V, supra Note 50

[57] Stevens, D.J, *Community corrections: An applied approach,* Upper Saddle River, NJ: Prentice Hall, 2006, p. 291

[58] Thom Brooks, *Punishment,* Routledge, 2012, pp.51-52

[59] ዝኒ ከማሁ

[60] ለምሳሌ የአሜሪካ የተለያዩ ክልል መንግሥታት የወንጀል ሕግጋት ለአመክሮ የባሕርይ መሻሻል ዋና መስፈርት እንደሆን ይደነግጋሉ፤ ለተጨማሪ ማብራሪያ ይህን ጽሑፍ ይመለከቷል።

Prison Law Office, The Parolee Rights Handbook (Updated August 2013) available at www.prisonlaw.com, last accessed on July 14 2018.

የተለያዩ የአውሮፓ ሀገሮች ሕግጋትም ተመሳሳይ የአመክሮ ቅድመሁኔታን እንደያዙ የበለጠ ለመረዳት የሚከተለውን ጽሑፍ ይመልከቷል፤ *Pierre V. Tournier*, Systems of Conditional Release (Parole) in the Member States of the Council of Europe, A New French Journal, vol 1, 2004, available at https://journals.openedition.org/champpenal/378, last accessed on July 14 2018.

ከላይ የተመለከተውን የባሕርይ ለውጥ መላበሱ የታመነበት ታራሚ ከእስር ሲለቀቅ ከማህበረሰቡ ጋር ተቀላቅሎና ተስማምቶ ለመኖር እንደማይችገር በዘርፉ የተካኑ የማህበረሰብ ሳይንስ ባለሙያዎች ያስረዳሉ።[61] ምክንያቱም በማረሚያ ቤት ቆይታው ባገኘው ትምህርትና ልዩልዩ ሥልጠናዎች የነበረውን የወንጀል ባሕርይ በማስወገድ መልካም ጸባይና ለሕግ ተገዥ እንዲሆን የሚያስችለው የባሕርይ ለውጥ ስለሚያመጣ ነው። በተጨማሪም አመክሮ ለረጅም ጊዜ ከማህበረሰቡ ተገልሎ በማረሚያ ቤት እንዲቆይ ከተሰጠው የፍርድ መጠን ላይ በከፊል ተቀንሶ የነበረበትን ማህበረሰብ ወግና ባህል ሳይረሳና ብቸኝነትን ሳይላመድ የመጨረሻው የእሥራት ዘመን ከመድረሱ በፊት ከእስር ወጥቶ ከማህበረሰቡ ጋር ተቀላቅሎ እንዲኖር ስለሚያስችለው ነው።[62]

ሌላው ከግለሰቡ ባሕርይ ጋር የተያያዘው የአመክሮ አመክንዮ በአመክሮ ከእስር ተለቅቆ ከማህበረሰቡ ጋር ተቀላቅሎ በሚኖርበት ጊዜ በፈጸመው ድርጊት ተጸጽቶ የወንጀል ድርጊቱ ሰለባ የሆነውን ግለሰብና የበደለውን ማህበረሰብ ለመካስ የሚያስችለው የባሕርይ ለውጥ ማምጣቱ ነው።[63]

በሦሥተኛ ደረጃ የሚነሳው የአመክሮ አስፈላጊነት ታራሚው በማረሚያ ቤት ሳለ የአመክሮ ተጠቃሚ ለመሆን ሲል ለማረሚያ ቤቱ ሕግና ደንብ የሚኖረው ተገዥነትና ባሕርይውን ለማሻሻል የሚያደርገው ጥረት ነው።[64] በተለይ ታራሚው በማረሚያ ቤት ቆይታው በሚያሳየው ብልሹ ስነ-ምግባር የተነሳ አመክሮ አንድ ጊዜ ከተከለከለ በሚቀጥለው እድል ለመጠቀም የሚያደርገው የባሕርይ ማሻሻል እጅግ ከፍተኛ እንደሆነ ጥናቶች ያሳያሉ።[65]

አመክሮ ከላይ ከተጠቀሱት ጠቀሜታዎች በተጨማሪ የቅጣት ዓላማም አለው።[66] በአመክሮ የሚለቀቅ ሰው ሙሉ ነጻነት ሳይሰጠው በገደብና በቁጥጥር ሥር እንዲንቀሳቀስ ተደርጎ የቀረውን የእሥራት ዘመን እንዲፈጽምና ይህንን ሳያከብር ከቀረም አመክሮው ተነስቶ ወደማረሚያ ቤት እንዲገባ የሚደረገው ቅጣቱን እንዲፈጽምና መልካም ዜጋ እንዲሆን ለማድረግ ነው።[67] በመሆኑም አመክሮ ታራሚውን ከቅጣት ሙሉ በሙሉ ነጻ እንደሆነ እንዲሰማው አያስችለውም።[68] በማረሚያ ቤት ውስጥ የሚፈጠረውን የእስረኞችን መጨናነቅና የመንግሥትን ወጭ መቀነስም የአመክሮ ሌላው አስፈላጊነት እንደሆነ ይታመናል።[69]

4. አመክሮ በተመረጡ ጥቂት ሀገሮች

አመክሮ በብዙ ሀገሮች የሕግ ማእቀፍ ተበጅቶለትና ሥርዓት ተዘርግቶለት እየተከናወነ ያለ የሕግ አሠራር ነው። በመሆኑም የኢትዮጵያን አመክሮ አሠጣጥ ሕግና አፈጻጸም ከማውሳት

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[61] Keith Spencer, 'community Reintegration',2006, pp. 2 &3, http://heinonline.org, last accessed on 22 July 2017),

[62] ዝኒ ከማሁ

[63] Stevens, D.J., supra note 57

[64] Proctor, J.L. & Pease, M. 'Parole as institutional control: A test of specific deterrence and offender misconduct', *The Prison Journal*, 80(1), March 2000, pp. 39-55.

[65] ዝኒ ከማሁ

[66] Clear, T.R. & Dammer, H.R., supra note 30, p. 21

[67] ዝኒከማሁ

[68] ዝኒ ከማሁ

[69] ዝኒ ከማሁ

በፊት በዘርፉ ጥሩ ልምድ ያላቸውን ሀገሮች መርጦ መመልከቱ ጠቃሚ ይሆናል። ለዚህ ጥናት ዓላማም በዘርፉ የዘመነ ሕግና የዳበረ ልምድ ያላቸው ሀገሮች ተመርጠው አመክሮ በእነዚህ ሀገሮች ምን መልክ እንዳለው ቀጥሎ ተቃኝቷል።

4.1 ካናዳ

ካናዳ አመክሮን የሚመለከት ብሄራዊ ቦርድ አቋቁማ በአመክሮ መለቀቅ ያለባቸውን እስረኞች በየጊዜው የአመክሮ ተጠቃሚ ከሚያደርጉ ሀገሮች አንዷ ናት። የሀገሪቱ የአመክሮ ብሄራዊ ቦርድ በአመክሮ ጉዳዮች ላይ ውሳኔ ለማስተላለፍ ገለልተኛ፣ ነጻና ምክንያታዊ ሆኖ ይሠራል።[70] በዚህ መልኩ ውሳኔዎችን ለማስተላለፍ የማህበረሰቡንና የወንጀል ሰለባዎችን ደህንነት መጠበቅ፣ የፍትህ አካላትን በሂደቱ ማሳተፍ፣ የአመክሮ ተጠቃሚው መቼና ለምን ከእስር እንደሚለቀቅ እንዲሁም ይህን ተከትሎ ያለበትን ግዴታና መብት የማሳወቅና ሌሎችንም መርሆዎች መሠረት ያደርጋል።[71] እነዚህን መርሆዎች መሠረት በማድረግ አመክሮ ተጠቃሚዎችን ለመለየት ብሄራዊ ቦርዱ የሚከተሉትን ቅድመሁኔታዎች ግምት ውስጥ ያስገባል።[72]

- የተፈጸመው የወንጀል አይነት፣
- የታራሚው የቀደመ የወንጀል ባሕርይ፣
- በቅድመአመክሮ ያከናወናቸው ተግባራት፣
- የደባል ሱስ ተገዥ መሆን አለመሆኑ፣
- ወደፊት ለወንጀል ያጋልጠዋል ተብሎ የሚታመን የአእምሮ ሁኔታ መኖር አለመኖሩ፣
- የታራሚውን የሥራና ሌሎች ማህበራዊ ግንኙነቶችን የሚመለከት መረጃ፣
- ታራሚውን በሚመለከት የቀረቡ ስነልቦናተኮር መግለጫዎች፣
- የፍትህ አካላት ባለሙያዎችና የወንጀል ሰለባዎችን አስተያየት፣

የካናዳ አመክሮ ብሄራዊ ቦርድ እነዚህን ቅድመ-ሁኔታዎች በሕግ አስፍሮ መሟላታቸውን እያረጋገጠ ታራሚዎች በአመክሮ እንዲለቀቁ ማድረጉ የተለመደ አሠራር ነው።[73] መስፈርቶቹን አሟልተው ለተገኙ ታራሚዎች ሦስት አይነት የአመክሮ መርሃ-ግብሮች በሀገሪቱ ይተገበራሉ። የመጀመሪያው ታራሚው ቀን ቀን እየተለቀቀ የማህበረሰብ አገልግሎት ሥራዎችን ሲሰራ ውሎ አዳሩን ማረሚያ ቤት የሚያሳልፍበት ነው።[74] የዚህ ዓላማ ታራሚው በማረሚያ ቤት ቆይታው ያሳየውን የባሕርይ ለውጥ ለመፈተሽና ለሙሉ አመክሮ ያለውን ዝግጁነት ለማረጋገጥ ነው።[75] በዚህ ሙከራ የባሕርይ ለውጥ እንዳመጣ ከተረጋገጠ ታራሚው የሙሉ አመክሮ ተጠቃሚ እንዲሆን ይወሰንለታል። ሁለተኛው የባሕርይ ለውጥ ያመጡትን ታራሚዎች ሙሉ በሙሉ ከማረሚያ ቤቱ አስተዳደር በማውጣት የቀረውን የእሥራት ዘመን ወደማህበረሰቡ በመመለስ መደበኛ ኑሯቸውን እንዲኖሩ የሚያደርጋቸው

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[70] Parole board of Canada, available at https://www.canada.ca/en/parole-board.html, last accessed 02 July 2018.

[71] ዝኒ ከማሁ

[72] ዝኒ ከማሁ፣ገጽ 109

[73] ዝኒ ከማሁ

[74] Dunberry, O.G., *Parole in Canada: Community safety through effective reintegration of offenders*, 2004,available at http://www.isrcl.org/Papers/2004/ Dunberry.pdf last accessed 20 September 2008.

[75] ዝኒ ከማሁ

ነው።[76] ይሁን እንጂ ታራሚዎቹ በአመክሮ እስካሉ ድረስ የተጣለባቸውን ገደብና ቁጥጥር እንዲያከብሩ ይገደዳሉ።[77] ሦሥተኛውና የመጨረሻው ታራሚው በፍርድ ቤቱ ከተጣለበት ውሳኔ በሕግ የተወሰነውን 2/3 ጊዜ በማረሚያ ቤቱ ከቆየና መስፈርቶቹን ካሟላ ከማህበረሰቡ ጋር ተቀላቅሎ መደበኛ ኑሮውን እንዲመራ የሚደረግበት ሥርዓት ነው።[78]

ካናዳ አመክሮን ከፍ ብሎ በተገለጸው መልኩ ለረዥም ዘመናት ስትሰጥ የቆየችና እየሰጠች ያለች አገር ስትሆን፣ አመክሮን ለመጀመሪያ ጊዜ የሕግ ድጋፍ እንዲኖረው በማድረግ መስጠት የጀመረችው እ.አ.አ በ1899 እንደሆነ ይነገራል።[79] የዚህን ሕግ መውጣት ተከትሎ በርካታ ታራሚዎች በሁኔታ ወይም ያለሁኔታ የአመክሮ ተጠቃሚ መሆን በመጀመራቸው ከማህበረሰቡ ጋር ተቀላቅለው ሲኖሩ የሚያሳዩትን ባሕርይ ለመገምገምና ከሚያጋጥማቸው ችግር እንዲላቀቁ የሚያግዛቸው የክትትል ባለሙያ እንዲኖር ተደርጓል።[80] ባለሙያው በአመክሮ የሚለቀቁትን ታራሚዎች ሁኔታ ከማረሚያ ቤት ጀምሮ ክትትልን እያደረገ ድጋሜ ወደ ወንጀል ድርጊት እንዳይገቡ አስፈላጊውን የጥንቃቄ ሥራ ያከናውናል።[81] ባለሙያው በአመክሮ ቦርድ ሥር ተደራጅቶ ይህንን መሰል ተግባር ማከናወኑ ለአመክሮ መርሀ-ግብሮቹ ውጤታማነት ትልቅ አስተዋፅኦ እንዳለው ይታመናል።[82]

በአጠቃላይ የካናዳው ብሄራዊ አመክሮ ቦርድ ከማረሚያ ቤቱ አስተዳደርና ቁጥጥር ገለልተኛና ነጻ በመሆን ከፍ ብሎ የተመለከቱትን መርሆዎች መሠረት አድርጎ የቅድመ-ሁኔታዎችን መሟላትና አለመሟላት በአግባቡ እየመዘነ ታራሚዎች የአመክሮ ተጠቃሚ እንዲሆኑ ውሳኔ በማስተላለፍ በማረሚያ ቤቶች በኩል ተፈጻሚ እንዲሆን ያደርጋል። በተጨማሪም በሥሩ የክትትል ባለሙያ እንዲኖር በማድረግ የአመክሮ ተጠቃሚዎች ባሕርይ መሻሻልን ከማረሚያ ቤት ጀምሮ በመከታተል ከማህበረሰቡ ጋር ተቀላቅለው ሲኖሩ የሚያጋጥማቸውን ችግር እንዲፈቱ የማስቻል ሥራ ያከናውናል።

4.2 አሜሪካ (United Sates of America/USA)

አመክሮ በአሜሪካ እ.አ.አ በ1850ዎቹ በሚችጋን ግዛት ይጀመር እንጂ በ20ኛው ክፍለ-ዘመን መጀመሪያ በብዙዎቹ የአሜሪካ ግዛቶች መሰጠት ተጀምሯል።[83] እ.አ.አ በ1930 ሁሉም የአሜሪካ ግዛቶች አመክሮን የወንጀል ፍትህ አስተዳደር አካል በማድረግ አፈጻጸሙን በተደራጀ መልኩ ለመከወን የሚያስችል የአመክሮ ቦርድ በሁሉም ግዛቶች ተቋቁሟል።[84] ይሽው አሰራር በፌዴራልና በሁሉም የክልል መንግሥታት እ.አ.አ እስከ1975 ተደራሽ እንዲሆን ተደርጓል።[85] በአሜሪካ የአመክሮ አሠጣጥ ከግዛት ግዛት ወይም ከክልል ክልል

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[76] ዝኒ ከማሁ

[77] ዝኒ ከማሁ

[78] ዝኒ ከማሁ

[79] A. Keith Bottomley, 'Parole in Transition: A Comparative Study of Origins, Developments, and Prospects for the 1990s,' *Crime and Justice*,Vol. 12, The University of Chicago Press, 1990, pp. 334-336

[80] ዝኒ ከማሁ

[81] ዝኒ ከማሁ

[82] ዝኒ ከማሁ

[83] A. Keith Bottomley, supra note 79, p. 322

[84] ዝኒ ከማሁ

[85] ዝኒ ከማሁ

የተለያየ ይሁን እንጂ በጥቅሉ ሲታይ አመክሮ በሁለት አይነት መዋቅር ይፈጸማል። በማረሚያ ቤቶች ድፓርቲሜንት የሚሰጠው የአመክሮ አይነት (a consolidation model) እና እንደ ካናዳና አፍሪካዊቷ ናሚቢያ አይነት ራሱን ችሎ በሀገርአቀፍ ደረጃ ተዋቅሮ እየሰራ ያለ የአመክሮ ቦርድ (autonomous model) ናቸው።[86] ሁለቱም የአመክሮ ቦርድ አወቃቀር አይነቶች ግን ተመሳሳይ ዓላማና መስፈርት ባለው መልኩ አመክሮን በአሜሪካ ግዛቶች ያከናውናሉ።[87] ለዚህ ጥናት ዓላማ በአሜሪካ የፌዴራል መንግሥት ሥራ ላይ ባለው ሞዴል የወንጀል ሕግ ሥር የተደነገጉትን መሪ የአመክሮ አሠጣጥ መስፈርቶች መመልከቱ በቂ ይሆናል። በዚህ ሕግ የተመለከቱ መሪ የአመክሮ መስፈርቶች በርከት ያሉ ሲሆኑ፣ ዋና ዋናዎቹም፤ በአመክሮ ተቋም ባለሙያ ጥናት የሚቀርብ የታራሚው ሰብዕና፣ ማህበራዊ ሁኔታ፣ ከተቋሙ ጋር ያለው ቀረቤታና ሌሎችንም የግል ሁኔታዎች የተመለከተ መረጃ፣ የቀደመ የወንጀል፣ የገደብና አመክሮን የሚመለከት መረጃ፣ ፍርዱን የሰጠው ፍርድ ቤት ቅድመውሳኔ አስተያየት፣ በቅጣት አወሳሰን ወቅት አመክሮን አስመልክቶ በዳኛ ወይም በዓቃቤ ሕግ የተሰጠ አስተያየት፣ የአመክሮ ተጠቃሚውን አካላዊ፣ አእምሯዊና ስነልቦናዊ ቁመናውን በተመለከተ ከጤና ተቋማት የተገኘ መረጃና በታራሚው፣ በጠበቃው፣ በወንጀል ሰለባው ወይም በሌላ ጉዳዩ በሚመለከተው ሰው በኩል የቀረበ አግባብነት ያለው መረጃ እንዲሁም ሌሎች ናቸው።[88]

ከላይ የተመለከቱትን መስፈርቶች በመመዘን የሚሰጠው አመክሮ የሚከተሉትን ስድስት የተለያዩ እሴቶች መሠረት ማድረግ እንደሚገባው ይታመናል። እነዚህም፤ ለታራሚው በወንጀል ሕግ የተሰጠውን በአመክሮ የመለቀቅ እድል፣ ታራሚው በአመክሮ ከመለቀቁ በፊት በእስር የሚቆይበት ጊዜ፣ ታራሚው በማረሚያ ቤት ቆይታው ያሳየውን የባሕርይ ለውጥ፣ የማህበረሰቡን ደህንነት ግምት ውስጥ በማስገባት በታራሚው ላይ ክትትልና ቁጥጥር ማድረግ፣ የማህበረሰቡን ጥቅምና ከታራሚው የሚጠብቀውን ሃላፊነት መሠረት ያደረገ የአመክሮ ውሳኔ መስጠትና የአመክሮ ተጠቃሚው ውሳኔውን ተከትሎ የሚሰጠው ምላሽ (reactions) ናቸው።[89]

በአጠቃላይ በአሜሪካ ልየልዩ ግዛቶች የፌዴራል መንግሥቱን ጨምሮ አመክሮ በተለያየ መልኩ የሚሰጥ ቢሆንም ከፍ ብሎ የተመለከቱ መስፈርቶችና እሴቶች መሠረት ሆነው ያገለግላሉ።

5. አመክሮ በኢትዮጵያ የሕግ ማዕቀፍና በባሕር ዳር ማረሚያ ቤት ያለው አፈጻጸም

በቀደሙት የጥናቱ ክፍሎች ስለአመክሮ በጠቅላላውና የዘመነ ሕግና አሰራር ባላቸው ሀገሮች አመክሮ ያለውን ይዘት ለማብራራት ተሞክሯል። በዚህ ክፍል ደግሞ አመክሮ በኢትዮጵያ በፌዴራል መንግሥትና በአማራ ብሄራዊ ክልል የወንጀል ፍትህ አስተዳደር በጠቅላላው፤ በባሕር ዳር ማረሚያ ቤት በተለይ ምን እንደሚመስል፣ የሚስተዋሉ የሕግና የአፈጻጸም ክፍተቶች ምን እንደሆኑ በመለየት መፍትሄ ሆነው ሊያገለግሉ የሚችሉ ሐሳቦችን ለማመላከት ጥረት ተደርጓል።

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[86] Clear, T.R. & Dammer, H.R,supra note 30, p. 369

[87] ዝኒ ከማሁ

[88] The Parole System, supra note 24, p. 302

[89] Champion, D.J. supra note 23, P. 324

5.1 አመክሮ በኢፌዴሪ የወንጀል ሕግ

የኢፌዴሪ የወንጀል ሕግ አመክሮን በተመለከተ ከአንቀጽ 201 እስከአንቀጽ 207 ባሉ ድንጋጌዎች መሠረታዊ መርሆዎችን ይዟል። በዚህ መሠረት አመክሮ አንድ ታራሚ በፍርድ ቤት ከተወሰነበት ነጻነትን ከሚያሳጣ የቅጣት ውሳኔ ወይም የጥንቃቄ እርምጃ ከሦስቱ እጅ ሁለቱን እጅ የፈጸመ እንደሆነ፣ ቅጣቱ የእድሜ ልክ እሥራት ከሆነ ቢያንስ 20 ዓመት በእስር ከቆየና በሕጉ የተመለከቱትን መስፈርቶች አሟልቶ ሲገኝ ቀሪውን ቅጣት ከማረሚያ ቤት ውጭ ሆኖ እንዲፈጽም ከእስር የሚለቀቅበት መንገድ ነው።[90] አመክሮ የሚሰጥበት ምክንያት ታራሚው ጠባዩን እንዲያሻሽልና ወደ ማህበረሰቡ ተመልሶ መደበኛውን ማህበራዊ ሕይወት በአግባቡ እንዲኖር ለማስቻል እንደሆነ ከዚሁ ድንጋጌ መገንዘብ ይቻላል። ነገርግን አመክሮ ይህንን ውጤት ማስገኘት እንደማይችል ከታመነ ታራሚው በዚህ መልኩ ከማረሚያ ቤት ወጥቶ ከማህበረሰቡ ጋር እንዲቀላቀል መደረግ እንደሌለበት የኢፌዴሪ የወንጀል ሕግ ያስገነዝባል።[91]

በአመክሮ የሚለቀቀው ታራሚ ከላይ የተመለከተውን ባሕርይ የተላበሰ መሆኑን ለመለካት ሕጉ መሟላት ያለባቸውን ቅድመሁኔታዎች በዝርዝር ደንግጓል። ቅድመ-ሁኔታዎቹም፤ በፍርድ ቤት ከተላለፈው ቅጣት 2/3ኛውን መፈጸም፣ ከተበዳይ ጋር በተደረገ ስምምነት ወይም በፍርድ ቤት ውሳኔ መሠረት ሊከፍል የሚገባውን ካሳ መክፈል፣ በማረሚያ ቤት ቆይታው በሥራውና በጠባዩ መሻሻል ማሳየትና ልማደኛ ደጋጋሚ ወንጀለኛ አለመሆን ናቸው።[92] እነዚህ መስፈርቶች ከተሟሉና ታራሚው ቢለቀቅ ከማህበረሰቡ ጋር በመልካም ሁኔታ ሊኖር የሚያስችለው መልካም ጠባይ አለው ተብሎ ከታመነበት በአመክሮ ሊለቀቅ ይችላል። ሆኖም በአመክሮ መለቀቅ ሙሉ በሙሉ ነጻነትን የሚያጎናጽፍ ሳይሆን ይልቁንም የቀረውን 1/3ኛ ቅጣት ታራሚው በገደብ ወይም ሥልጣን በተሰጠው አካል ክትትል ሥር ሆኖ እንዲፈጽም የሚደረግበት የቅጣት አፈጻጸም ሥርዓት ነው።[93] የዚህን ቅጣት አፈጻጸም ሥርዓት የበለጠ ፍሬያማ ለማድረግ የአመክሮ ተጠቃሚው በተጨማሪ የፈተና ጊዜ እንዲቆይ የሚደረግበትን አሰራር ለማበጀት ለፍርድ ቤቶች የኢፌዴሪ የወንጀል ሕግ ሥልጣን ሰጥቷል።[94] በዚህ ድንጋጌ መሠረት አመክሮን የሚወስነው ፍርድ ቤት የአመክሮ ተጠቃሚው በፈተና ጊዜ እንዲቆይ ለመወሰን አንዳንድ ሁኔታዎችን ግምት ውስጥ በማስገባት ይወስናል። የፈተና ጊዜውም በማንኛውም ሁኔታ ከሁለት ዓመት ሊያንስ ከአምስት ዓመት ሊበልጥ እንደማይችል ሕጉ ይደነግጋል።[95] ሆኖም በአመክሮ የሚለቀቀው ሰው የእድሜ ልክ እስረኛ በሆነ ጊዜ ፈተናው ከአምስት እስከ ሰባት ዓመት እንዲሆን በልዩ ሁኔታ ሊወሰን ይችላል።[96] እንዲህ አይነቱ ልዩ ውሳኔ በፍርድ ቤት በአመክሮ ጊዜ ካልተሰጠ የፈተና ጊዜው በፍርድ የተመለከተው የቅጣት ዘመን ሲጠናቀቅ የፈተና ጊዜው አብሮ እንደተጠናቀቀ የሕግ ግምት መውሰድ ይቻላል።[97]

በአመክሮ የሚለቀቀው ሰው በፈተና ጊዜ ሊከተላቸው የሚገባ የጸባይ አመራር ደንቦች በሕጉ በግልጽ ተደንግገዋል። ሆኖም እነዚህ ደንቦች በአመክሮ ተጠቃሚው ተግባራዊ ይደረጉ ዘንድ

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[90] የኢፌዴሪ የወንጀል ሕግ፣ በግርጌ ማስታወሻ ቁጥር 1 ላይ እንደተገለጸው፣ አንቀጽ 201

[91] ዝኒ ከማሁ፣ አንቀጽ 202

[92] ዝኒ ከማሁ፣አንቀጽ 2002

[93] ዝኒ ከማሁን ሕግ፣ አንቀጽ 201 እና 204 ይመለከቷል

[94] ዝኒ ከማሁ፣አንቀጽ 204

[95] ዝኒ ከማሁ

[96] ዝኒ ከማሁ

[97] ዝኒ ከማሁ

ፍርድ ቤቱ በሚሰጠው ፍርድ ውስጥ በግልጽ መታዘዝ ይኖርባቸዋል። የአመክሮ ተጠቃሚውም እነዚህን የጸባይ ደንቦች በሙከራ ጊዜው ተግባራዊ የማድረግ ግዴታ ይኖርበታል።[98] በፍርዱ መሠረት የጸባይ አመራር ደንቦችን ግለሰቡ የማክበር ግዴታ ሲኖርበት እንደ አስፈላጊነቱ አፈጻጸሙን የሚከታተል ባለሙያ ተመድቦ ተገቢው ክትትልና ቁጥጥር እንደሚደረግ ሕጉ ጨምሮ ያዝዛል።[99] ገደብና ቁጥጥሩን ተላልፎ ወይም ሌላ ወንጀል ፈጽሞ የተገኘ እንደሆነ ወደ ነበረበት ማረሚያ ቤት ከመመለሱም በላይ ቀሪው ቅጣት አዲስ ለፈጸመው ወንጀል በፍርድ ቤት ከተጣለበት ቅጣት ጋር ተደምሮ ለመፈጸም እንደሚገደድ ሕጉ በአጽንኦት ይደነግጋል።[100] በሕጉ ከተመለከቱት የአመክሮ ቅድመሁኔታዎች መካከል አንዱና መሠረታዊ የሆነው የባሕርይ መሻሻል እንዴት ይለካል? የሚለው ሐሳብ በሕጉ በደምሳሳው የታለፈ ነው። በመሆኑም ከወንጀል ሕጉ በተጨማሪ አመክሮን ለማስፈጸም ወጥተው ሥራ ላይ እየዋሉ ያሉ ዝርዝር መመሪያዎችን መመልከቱ ከፍ ብሎ የተነሳውን ጥያቄ ለመመለስ ፋይዳው ግልጽ ነው። ስለሆነም ይህ ጥናት በተደረገበት ማረሚያ ቤት እየተሰራበት ያለውን በአብክመ አስተዳደርና ጸጥታ ጉዳዮች ቢሮ የወጣውን መመሪያ ለዚህ ጥናት ዓላማ መመልከቱ ተገቢነት ያለው ጉዳይ ይሆናል።

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[98] ዝኒ ከማሁ፣ አንቀጽ 205 እና አንቀጽ 198. በእነዚህ አናቅጽ ሥር የደነገጉትን የጸባይ ደንቦች እንሆ!

የወንጀል ሕጉ አንቀጽ 205፦ የጠባይ አመራርና ቁጥጥር ደንብ

1. ከዚህ በላይ በተመለከቱት ጠቅላላ ድንጋጌዎች መሠረት የተለቀቀው ጥፋተኛ ለፈተና በተወሰነለት ጊዜ ተገቢ የሆነውን የጠባይ አመራር ደንብ/አንቀጽ 198 እንዲከተል ይወሰንበታል፤

   የተለቀቀው ጥፋተኛ ሊከተላቸው የሚገቡ የጠባይ አመራር ደንቦች የሚወሰኑት በተለይ የተለቃቂውን እድሜና ጠባዩን፣ ከተፈታ በኋላ ሊደርስበት የሚችለውን ለወንጀል የመጋለጥ እድል፣ የቤተሰቡን አስተማማኝነት፣ የሙያ ስራና የማህበራዊ ኑሮውን ሁኔታ መሠረት በማድረግ ነው፤

   የሚቻልም ሲሆን ለተለቃቂው መተዳደሪያ የሚሆኑት ሁኔታዎች ተቀጪው ከመለቀቁ በፊት በሚመለከተው ተቋም ወይም የአሳዳሪነት ወይም የሞግዚትነት ስልጣን በተሰጣቸው የጥበቃ ባልደረቦች ወይም አግባብ ባለው መንግስታዊ አካል ድጋፍ መዘጋጀት አለባቸው።

2. በመሰረቱ በሌላ ሁኔታ ካልታዘዘ በስተቀር ተለቃቂው በአንድ አሳዳሪ ወይም በአንድ የጠባቂነት ስልጣን በተሰጠው ባልደረባ ተቆጣጣሪነትና መሪነት ስር እንዲቆይ/ አንጽ 208። ይህም የጥንቃቄ ስርአት ሊፈጸም የማይቻልበት ሁኔታ ካጋጠመና ጠቃሚነት የሌለው መሆኑ ከታወቀ በተለቃቂው ላይ ተፈጻሚ ላይሆን ይችላል።

   በዚህም መሠረት በአመክሮ የሚለቀቀው ጥፋተኛ በፈተናው ጊዜ ሊከተላቸው የሚገቡ የጠባይ አመራር ደንቦች በአንቀጽ 198 የተመለከቱ ሲሆን ድንጋጌውም የሚከተለውን ይመስላል።

አንቀጽ 198 በጥፋተኛው ላይ የሚወሰን የጠባይ አመራር ደንብ

1. ፍርድ ቤቱ ተገቢ መስለው የታዩትን የጠባይ አመራር፣ የአጠባበቅና የቁጥጥር ደንቦች በፍርዱ ላይ ይወስናል።

   እነዚህ ደንቦች በተለይ በአንድ የጥበብ መስክ ሙያ መማርን፣ በተወሰነ ስፍራ የመቀመጥን፣ የመስራትን ወይም የመኖርን ግዴታ፣ ከአንዳንድ ሰዎች ጋር እንዳይገናኝ መከልከልን ወይም በአንዳንድ በተወሰኑ ስፍራዎች ከመድረስ መታገድን፣ አልኮል መጠጣት የመከልከልን፣ በስራ ከሚያገኘው ገቢ ሙሉ በሙሉ ወይም በከፊል ለቤተሰቡ፣ ለሰሞግዚቱ ወይም ለአሳዳሪው መስጠትን፣ አስፈላጊ የሆነውን ህክምና መፈጸምን ወይም የሙከራውን ጊዜ ውጤት ፍሬ ለማስገኘት የሚችል ለዚሁ ተገቢ የሆነውንና ይህን የመሳሰለውን ሌላ የአመራር ደንብ የመፈጸም ግዴታን የሚመለከቱ ሊሆኑ ይችላሉ።

2. በጥፋተኛው ላይ የሚወሰኑት የጠባይ አመራር ደንቦች የጥፋተኛውን አቅምና ፍላጎት፣ የነገሩን ሁኔታና ጥፋቱ ያደረሰውን ጉዳት መሠረት በማድረግ የጥፋተኛውን ጠባይ በማሻሻል ወደታሰበው ግብ ለማድረስ የሚያስችሉ መሆን አለባቸው።

   የጠባይ አመራር ደንቡ ግብ ከፍርድ ማገድ ግብ ልዩ ሊሆንና ከሕጉም ጋር የማይስማሙ ግዴታዎችን ሊያስከትል አይችልም።

3. አዲስ ሁኔታ ሲያጋጥም ወይም አስፈላጊ ሆኖ ሲገኝ ፍርዱ በታገደለት ሰው፣ በባልደረባቸው፣ በሞግዚቱ ወይም በዋሱ አመልካችነት ወይም በዓቃቤ ሕግ ጠያቂነት የተወሰኑት የጠባይ አመራር ደንቦች ሊለወጡ ይችላሉ።

[99] ዝኒ ከማሁ፣ አንቀጽ 205(2)

[100] ዝኒ ከማሁ፣ አንቀጽ 206 እና 207

5.2 አመክሮ በአማራ ብሔራዊ ክልል የሕግ ማዕቀፍ

በአማራ ብሔራዊ ክልል መንግሥት ፍትህ አስተዳደር ሥርዓት ውስጥ የኢፌዴሪ የወንጀል ሕግንና ሌሎች የክልሉ መንግሥት ሕጎችን መሠረት በማድረግ አመክሮ ለታራሚዎች ይሰጣል። ይህንኑ ተግባራዊ ለማድረግ ዝርዝር ሁኔታዎችን የያዙ ደንቦችና መመሪያዎች በክልሉ መንግሥት ወጥተው ሥራ ላይ የዋሉ ሲሆን ዋና ዋናዎቹም የሕግ ታራሚዎች አያያዝና አጠባበቅ መወሰኛ ደንብና የአመክሮ አሰጣጥ ሥርዓትንና አፈጻጸምን ለመወሰን የወጣ ጊዜያዊ መመሪያ ናቸው። ደንቡና መመሪያው አመክሮን ተግባራዊ በማድረግ ረገድ ከወንጀል ሕጉ በተጨማሪ በክልሉ እየተሰራባቸው ይገኛሉ። በወንጀል ሕጉ የተመለከቱት የአመክሮ መሠረታዊ መርሆዎች በቀደመው የጥናቱ ክፍል የቀረቡ በመሆኑ በዚህ ክፍል የክልሉ ደንብና መመሪያ የያዟቸውን አመክሮን የሚመለከቱ ድንጋጌዎች ለመቃኘት ጥረት ተደርጓል።

በወንጀል ሕጉ የተመለከተውን አመክሮ በክልሉ በተሟላ መልኩ ለመፈጸም የሚያግዝ ደንብ በ1997 ወጥቶ ሥራ ላይ የዋለ ሲሆን፣ ደንቡም ታራሚዎችን በአመክሮ ለመልቀቅ የሚያስችል አሠራርና መስፈርት አለው። በደንቡ የተካተቱ የአመክሮ ቅድመ-ሁኔታዎች ከሞላ ጎደል በወንጀል ሕጉ አንቀጽ 202 ሥር ከተመለከቱት ጋር የሚመሳሰሉ ናቸው።[101] ሆኖም ደንቡ በወንጀል ሕግ በግልጽ ከተመለከቱት ቅድመሁኔታዎች በተጨማሪ እድሜያቸው ከ70 ዓመት በላይ የሆነ አዛውንቶች፣ የአእምሮ ሕመም ያለባቸውና ሌሎች በማይድን በሽታ እየተሰቃዩ ያሉ ታራሚዎች፣ ይኸው በሕክምና ማስረጃ ሲረጋገጥ የአመክሮ ተጠቃሚ ሊሆኑ እንደሚችሉ ልዩ ሁኔታን ደንግጓል።[102] የቅድመሁኔታዎችን መሟላት እያረጋገጠ የአመክሮ ተጠቃሚዎችን ለይቶ በማቅረብ ረገድ ኃላፊነትን የሚሸከም ኮሚቴ በክልሉ በሚገኙ ማረሚያ ቤቶች ውስጥ መቋቋም እንዳለበት ይኸው ደንብ ደንግጓል።[103] በመሆኑም ኮሚቴው በወንጀል ሕጉና በደንቡ የተመለከቱትን ቅድመሁኔታዎች በአመክሮ የሚለቀቀው ታራሚ ያቀረበውን ማመልከቻና ማስረጃ በመመርመር የውሳኔ ሐሳብ የማቅረብ ኃላፊነት ተጥሎበታል።[104]

ከአመክሮ አሰጣጥ ሥነ-ሥርዓትና አፈጻጸም አኳያ ሊፈተሽ የሚገባው ሌላው ሕግ የአብክመ የአመክሮ አሠጣጥ ሥርዓትንና አፈጻጸምን ለመወሰን የወጣው ጊዜያዊ መመሪያ ቁጥር 1/2003 ዓ.ም ነው። መመሪያው በወንጀል ሕጉና በአብክመ የሕግ ታራሚዎች አያያዝና አጠባበቅ ደንብ የተመለከቱትን የአመክሮ ቅድመሁኔታዎች በዝርዝር ለመወሰንና ለማስፈጸም የወጣ ነው። በተጨማሪም በፍርድ ቤቶች ሲሰጥ የነበረው አመክሮ በማረሚያ ቤቶች በኩል እንዲፈጸም በአብክመ ጠቅላይ ፍርድ ቤትና ማረሚያ ቤቶች አስተዳደር ኮሚሽን የተደረሰውን ስምምነት ተግባራዊ ለማድረግ የሚያስችል አሠራርን ለመዘርጋት ታስቦ የወጣ መመሪያ ነው።[105] መመሪያው በወንጀል ሕጉና በደንቡ የተመለከቱትን የአመክሮ ቅድመሁኔታዎችና መሥፈርቶች ይበልጥ ግልጽና ዝርዝር በሆነ መልኩ በማስፈር በዘርፉ ያሉ ባለሙያዎች እንዲሁም ታራሚዎች በቀላሉ እንዲረዷቸውና እንዲጠቀሙባቸው አድርጓል። በዚህ

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[101] የሕግ ታራሚዎች አያያዝ እና አጠባበቅ ለመወሰን የወጣ ደንብ፣ ደንብ ቁጥር 26/97፣ ዝክረ-ሕግ፣ 1997፣ ቁጥር 49፣ አንቀጽ 48/2

[102] ዝኒ ከማሁ፣ አንቀጽ 48 (1) (መ)

[103] ዝኒ ከማሁ፣ አንቀጽ 47

[104] ዝኒ ከማሁ

[105] የአመክሮ አሰጣጥ መመሪያ፣ በግርጌ ማስታወሻ ቁጥር 15፣ የመሠረታዊ የስራ ሂደት ለውጥ ጥናት ግኝትን መሠረት በማድረግ በአብክመ ጠቅላይ ፍርድ ቤትና ማረሚያ ቤቶች ኮሚሽን መካከል በተደረገ ስምምነት መሠረት አመክሮ በማረሚያ ቤቶች ውሳኔ መሠረት እየተሰጠ ይገኛል። ለተጨማሪ ማብራሪያ የመመሪያውን መግቢያ ይመለከቷል፤

መሠረት አመክሮ የሚያሰጡ፣ የሚያዘገዩና የሚያሳግዱ ወይም የሚያስከለክሉ ሁኔታዎችን በዝርዝር ያመለከተ ሲሆን፣ በአመክሮ አሰጣጥ ስነሥርዓትና አጠቃላይ አፈጻጸም ውስጥ ትልቅ ሚናን በመጫዋት ላይ ይገኛል። አመክሮን ለመስጠት መሟላት ያለባቸው በወንጀል ሕጉና በደንቡ የተመለከቱ ቅድመሁኔታዎች በመመሪያውም የተመለከቱ ሲሆን[106]፣ ከእነዚህ ቅድመሁኔታዎች መካከል አንዱ የሆነውን የታራሚው ባሕርይ መሻሻልን ለመመዘን የሚያስችሉ ከ100 የሚታሰቡ ነጥቦችን[107] በዝርዝር በማመልከት የወንጀል ሕጉንና ደንቡን ለማስፈጸም የሚያግዝ ሥርዓትን ዘርግቷል። መመሪያው ታራሚው የጸባይ ለውጥ ማምጣቱን ለመመዘን ከ100 ውጤት እንዲሰጠው ያመላከተ ሲሆን፣ በዚህም መሠረት ከ75 በላይ ውጤት ያስመዘገበ እንደሆነ ለአመክሮ ብቁ ይሆናል። የእነዚህ ቅድመሁኔታዎችና የሌሎች በመመሪያው የተመለከቱ ተያያዥ መሥፈርቶች አለመሟላት ለምሳሌ፣ ታራሚው ከእሥራት ቅጣት በተጨማሪ የገንዘብ መቀጮ ቅጣት ተወስኖበት ከሆነ መቀጮውን አለመክፈሉ አመክሮን እንደሚያዘገይ ወይም እንደሚያሳግድ መመሪያው በተጨማሪ ደንግጓል።[108] በአጠቃላይ በአማራ ክልል አመክሮን አስመልክቶ ያለው የሕግ ማእቀፍ ከላይ የተመለከተውን ሲመስል ከኢፌዴሪ የወንጀል ሕግ ጋር በተለይ መመሪያው ሲነጻጸር ሰፊ ልዩነትና አልፎ አልፎም ተቃርኖ ስላለው በሚቀጥለው የዚህ ጥናት ክፍል ይህንኑ ለማሳየት ተሞክሯል።

5.3 በኢፌዴሪ የወንጀል ሕግና በአብክመ አመክሮ አሰጣጥ መመሪያ መካከል የሚስተዋሉ ልዩነቶችና ለአፈጻጸም የሚያስቸግሩ መስፈርቶች

የወንጀል ሕጉ አመክሮንና ተያያዥ ጉዳዮችን ማለትም በአመክሮ ጊዜ የሚሰጥ የፈተና ጊዜ፣ ከእሥራት ቅጣት በተጨማሪ በፍርድ ቤቱ የሚወሰኑ የጥንቃቄ እርምጃዎች እንዲሁም ሌሎች መሰል ጉዳዮችን የመወሰን ሥልጣንን ለፍርድ ቤቶች የሰጠ ሲሆን[109]፣ መመሪያው ደግሞ በሁለቱ ተቋማት ስምምነት መሠረት አመክሮ ታራሚዎቹ በየሚገኙበት ማረሚያ ቤቶች እንዲሰጥ አድርጓል።[110] ይህም የሆነው በክልሉ በተደረገ የመሠረታዊ የሥራ ሂደት ለውጥ ጥናት በፍርድ ቤቶች የሚሰጠው የአመክሮ አሰራር በታራሚዎች ላይ እንግልትን የሚፈጥርና የተንዛዛ የሥራ አካሄድ ያለበት እንደሆነ በመታመኑና አመክሮን የመስጠት ሥልጣን በመመሪያው ለማረሚያ ቤቶች መሰጠቱ ነው።[111] ይሁን እንጂ አመክሮን የመወሰን ስልጣን ለማረሚያ ቤቶች መሰጠቱ በወንጀል ሕጉ ለፍርድ ቤቶች በዚህ ረገድ የተሰጣቸውን ሥልጣን ይጋፋል። በተጨማሪም መመሪያው በወንጀል ከአመክሮ ጋር ተያያዥነት ያላቸውን ሌሎች ጉዳዮች ለምሳሌ፣ በወንጀል ሕጉ አንቀጽ 204 ሥር የተመለከተውን የፈተና ጊዜ በማን እንደሚፈጸሙ መመሪያው ባለማመልከቱ የሕግና የአሰራር ክፍተትን ፈጥሯል። ይህ መመሪያ ከወንጀል ሕጉ ጋር መቃረኑና እየተሰራበት ያለ መሆኑ ከአጠቃላይ የሕግ መርህ አንጻር ሲታይ ትክክል ነውን? የሚለው ጥያቄ ጉዳዩ በሚመለከታቸው አካላት ትኩረትና ምላሽ የሚሻ ስለመሆኑ አመላካች ነው።

ሌላው በመመሪያውና በወንጀል ሕጉ መካከል የሚታየው የሐሳብ ልዩነት ከአመክሮ መስፈርቶች ጋር የተያያዘ ነው። በዚህ ረገድ ሊታይ የሚገባው የአመክሮ መስፈርት

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[106] የአመክሮ አሰጣጥ መመሪያ፣ ግርጌ ማስታወሻ ቁጥር 15፣ ቁጥር 4.2 (1-5)

[107] ዝኒ ከማሁ፣ ቁጥር 4.3 (1-9)

[108] ዝኒ ከማሁ፣ቁጥር 6ን ይመልከቱ

[109] የኢፌዴሪ የወንጀል ሕግ፣በግርጌ ማስታወሻ ቁጥር 1 ላይ እንደተገለጸው፣ አንቀጽ 202፣ 204-207

[110] የሕግ ታራሚዎች አያያዝና አጠባበቅ ለመወሰን የወጣ ደንብ፣ግርጌ ማስታወሻ ቁጥር 101፣ አንቀጽ 46

[111] የኢትዮጵያ ሰብዓዊ መብት ኮሚሽን ሪፖርት፣ ግርጌ ማስታወሻ ቁጥር 17፣ ገጽ 54ና 55

"ልማደኛ ደጋጋሚ አለመሆን" የሚለው ነው።[112] በልማደኛ ደጋጋሚነትና በደጋጋሚ ወንጀለኛ (recidivist)[113] በሚሉት ጽንሰ ሐሳቦች መካከል ያለውን ልዩነት በአግባቡ ተገንዝቦ ተግባራዊ በማድረግ ረገድ ግልጽ ያለመሆን ችግር ይስተዋላል።[114] ስለ አመክሮ በሚደነግገው የወንጀል ሕጉ አንቀጽ 202 ሥር የተመለከተውን አመክሮን ከሚያስከለክሉ ሁኔታዎች ውስጥ ልማደኛ ደጋጋሚ ወንጀለኛ መሆን ሲሆን፣ የዚህ ድንጋጌ ጽንሰ-ሐሳብ በዚሁ ሕግ አንቀጽ 67 ሥር ከተመለከተው ደጋጋሚ ወንጀለኛ የተለየ እንደሆነ የሕጉን ሐተታ ዘምክንያት በመመልከት መገንዘብ ይቻላል። ልማደኛ ደጋጋሚ ማለት ወንጀለኞች በተደጋጋሚ የወንጀል ድርጊትን ሲፈጽሙ እንደሆነ ከዚሁ ትንታኔ መገንዘብ ይቻላል። ደጋጋሚነት ግን ወንጀለኛው ከዚህ በፊት ጥፋተኛ ተብሎ የእሥራት ጊዜውን ጨርሶ ወይም በሕግ እንዲፈታ ከተደረገበት ጊዜ አንስቶ ባሉት አምስት ተከታታይ አመታት ውስጥ ሌላ ወንጀል ሆነ ብሎ ከፈጸመና ጉዳዩ በፍርድ ቤት ሲታይ ዝቅትኛው የእሥራት መጠን ስድስት ወርና ከዚያ በላይ ቀላል እሥራት የሚያስቀጣ ከሆነ ነው።[115] ከዚህ ትርጓሜ መረዳት እንደሚቻለው ደጋጋሚነትና ልማደኛ ደጋጋሚነት ሁለት የተለያዩ ጽንሰሐሳቦችና በውጤት ደረጃም የተለያዩ መሆናቸውን ነው። የወንጀል ሕጉ ሐተታ ዘምክንያት ይህንን ልዩነት ይበልጥ ግልጽ ለማድረግ የሚከተለውን ምሳሌ በመስጠት ለማብራራት ሞክሯል።

> ...ለምሳሌ በአዲሱ የወንጀል ሕግ አንቀጽ ተራ ሥርቆት (አንቀጽ 665) እስከ አምስት ዓመት ሊደርስ የሚችል ጽኑ እሥራት ቢያስቀጣም መነሻ ቅጣቱ 10 ቀን ነው። በዚህ መሠረት ተራ ሌባ ደጋጋሚ ነው ላይባል ነው፤ ደጋጋሚ ነው ካልተባለም ልማደኛ ሌባ ነው የሚባልበት ጊዜ አይኖርም። በሌላ አነጋገር አንድ ሌባ ቀን በቀን ከሜዳ ላይ በሬ በመስረቁ የተፈረደበትን የቀላል ወይም የጽኑ እሥራት ቅጣት ከጨረሰ በኋላ አምስት ዓመት ሳይሞላው ከታክሲ ተሳፋሪ ላይ ዘጠኝ መቶ ብር ቢሰርቅ ደጋጋሚ ሌባ ሊባል አይችልም፤ ምክንያቱም የተራ ሥርቆት መነሻ ቅጣት 10 ቀን እንጂ 6 ወር ወይም ከዚያ በላይ ባለመሆኑ ነው። በዚህ መልክ አምስት ወይም ከአምስት የሚበልጥ የሥርቆት ሪከርድ ያለበት ሌባ ልማደኛ ሌባ ሊባል አይችልም ማለት ነው። ይህ አተረጓጎም ግን የኢትዮጵያን ህዝብና ሕግ አውጭውን ሐሳብ ይጻረራል፤ የሁለቱም ዓላማ የተጠቀሰው አይነቱ ሌባ ልማደኛ ወይም ደጋጋሚ ተብሎ ከባድ ቅጣት እንዲወሰንበት ነው። .....በደጋጋሚነት በሥርቆት ብዙ ጊዜ ከተቀጣም ልማደኛ ሌባ ነው ተብሎ ከባድ ቅጣት ሊወሰንበት ይችላል። ልማደኛ ሌባ ከሆነም የተፈረደበትን ቅጣት ሙሉ በሙሉ ከመጨርስ በቀር በአመክሮ የመፈታት እድል አይኖረውም። ይህም ከኢትዮጵያ ህዝብና ከሕግ አውጭው ዓላማ ጋር የሚጣጣም ነው።"[116]

ከዚህ ትርጓሜ መረዳት የሚቻለው በደጋጋሚ ወንጀለኛና በልማደኛ ደጋጋሚነት መካከል የጽንሰ-ሐሳብና የሕጋዊ ውጤት ልዩነት እንዳለና በሕግ አውጭው ሐሳብ ልማደኛ ደጋጋሚነት አመክሮን የሚያስከለክል፤ አደገኝነትን የሚያሳይ የወንጀለኞች ባሕርይ ሲሆን፣ ደጋጋሚነት ግን ቅጣትን ለማክበድ እንጂ አመክሮን የሚያስከለክል ጉዳይ እንዳልሆነ ነው። የሁለቱን ጽንሰሐሳቦች ልዩነት ይበልጥ ለመገንዘብ የወንጀል ሕጉ ደጋጋሚና ልማደኛ ድጋጋሚነት በቅጣት አወሳሰን ላይ የሚኖራቸውን ተጽእኖ ያመለከቱበትን አግባብ መመልከቱ ተገቢ ይሆናል። ደጋጋሚነት በልዩ የቅጣት ማክበጃነት በቀረበ ጊዜ ጉዳዩን በዳኝነት የሚመለከተው ፍርድ ቤት በጥፋተኛው ላይ የሚወስነውን የእሥራት ቅጣት

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[112] የኢፌዴሪ የወንጀል ሕግ፣ በግርጌ ማስታዎሻ ቁጥር 1 ላይ እንደተገለጸው፣ አንቀጽ 202(2)

[113] ዝኒ ከማሁ፣ አንቀጽ 67

[114] በባሕር ዳር ማረሚያ ቤት፣ ከማረሚያ ቤቱ ባለሙያዎች፣ የሥራ ሃላፊዎችና ታራሚዎች ጋር በአመክሮ አሰጣጥ ላይ የተደረገ የቡድን ወይይት፣ ግንቦት 2008 ዓ.ም

[115] የኢትዮጵያ ፌደራላዊ ዴሞክራሲያዊ ሪፐብሊክ የተሻሻለው የወንጀል ሕግ ሐተታ ዘምክንያት፣ አንቀጽ 67

[116] ዝኒ ከማሁ

ወንጀለኛው ጥፋተኛ ከተባለበት በወንጀል ሕጉ ልዩ ድንጋጌ ከተመለከተው የቅጣት ጣሪያ በማለፍ ሊወስን እንደሚችል ተመልክቷል። በፍርድ ቤቱ የሚወሰነውን ቅጣት የተፈጸመው አዲስ ወንጀል ወይም ተደራራቢ ወንጀል ከሆነ በሕጉ ልዩ ክፍል ለከባዱ ወንጀል የተመለከተውን ቅጣት እስከ እጥፍ ሊደርስ የሚችል ቅጣት ሊወስን ይችላል፤ የተፈጸመውን የወንጀል አይነት ክብደትና ብዛት እንዲሁም የወንጀለኛውን ባሕርይ አደገኝነት ግምት ውስጥ በማስገባት ፍርድ ቤቱ በወንጀል ሕጉ ጠቅላላ ክፍል የተመለከተውን የአሥራት ጣሪያ ሊደርስ የሚችል ቅጣት ሊወስንበት እንደሚችል ድንጋጌው በተጨማሪ አመልክቷል።[117] ይኸው ድንጋጌ ደጋጋሚ የሚለውን ጽንሰሐሳብ ከልማደኛ ደጋጋሚ በመለየት ለልማደኛ ደጋጋሚ ከፍ ብሎ ከተመለከተው የቅጣት አወሳሰን የተለየ ድንጋጌን አመልክቷል። ድንጋጌው ጥፋተኛው ልማደኛ ደጋጋሚ ሆኖ በተገኘ ጊዜ በሕጉ ልዩ ክፍል የተመለከተውን ቅጣት እጥፍ በማለፍ ቅጣት የመወሰኑ ጉዳይ የፍርድ ቤቱ ፍቅድ ሥልጣን መሆኑ ቀርቶ አስገዳጅ እንደሆነ አመልክቷል።[118] ይህም ልማደኛ ደጋጋሚ ወንጀለኛ ከደጋጋሚው ይልቅ አደገኛ ባሕርይ ያለውና ሊጣልበት የሚገባው ቅጣት ከፍተኛ የመሆኑ ጉዳይ ከፍርድ ቤት ፍቅድ ሥልጣን ይልቅ በሕግ አውጭው የተወሰነና ግዴታ መፈጸም ያለበት መሆኑን በማመላከት በሁለቱ ጽንሰ-ሐሳቦች መካከል ያለው ልዩነት በሕግ አውጭው ተገቢውን እይታ ያገኘ መሆኑን ያሳያል። ይህንን ይበልጥ የሚያጠክረው ሌላው አንኳር ነጥብ ስለአመክሮ የሚገልጸው የወንጀል ሕጉ አንቀጽ 202 በግልጽ አመክሮን የሚያስከለክለው ልማደኛ ደጋጋሚነት (persistent recidivist) መሆኑን ያመላከተ በመሆኑና በዚሁ ሕግ አንቀጽ 67 ሥር የተደነገገው ስለደጋጋሚነት (recidivisim) በመሆኑ በሕግ አደረጃጀት ረገድ ተመሳሳይ ሐሳብን በተለያየ አገላለጽ መጠቀም የሕጉን ግልጽነት ስለሚያጠፋው ሁለቱ ሐሳቦች የተለያየ ትርጉም እንዳላቸው መረዳት ይቻላል። ስለሆነም በወንጀል ሕጉ አመክሮን ሙሉ በሙሉ የሚያስከለክለው ልማደኛ ደጋጋሚነት እንጂ ደጋጋሚነት አለመሆኑን መገንዘብ ይቻላል።

ይህ በእንዲህ እንዳለ የአብክመ የአመክሮ አሰጣጥ መመሪያ በቁጥር 4(2) ሥር አመክሮን ከሚያስከለክሉ ሁኔታዎች መካከል ከዚህ በፊት በወንጀል ጥፋተኛ የተባለና ሬኮርድ ያለበት ከሆነ አመክሮ እንደማይሰጠው ያመላክታል። በዚህ ረገድ መመሪያው ከላይ ከተገለጸውና ከተብራራው የወንጀል ሕጉ መንፈስ ጋር የሚቃረንና አመክሮን የሚያስከለክሉ ሁኔታዎችን አስፍቶ በመተርጎም የአመክሮን መሠረታዊ አስፈላጊነት በሚያጣብብ መንገድ እንዲከናወን ያደርጋል። የዚህ ድንጋጌ አተረጓጎም በወንጀል ሕጉ አንቀጽ 67 እንዲሁም 202 ሥር የተመለከቱትን ሐሳቦች እንዲሁም ከነዚህ ውጭ የሆነን ያለፈ የወንጀል ሬኮርድ ያለበትን ሰው ሙሉ በሙሉ ከአመክሮ የሚከለክል ይመስላል። በመሆኑም ደጋጋሚና ልማደኛ ደጋጋሚ ተብለው በኢፌዴሪ የወንጀል ሕግ አንቀጽ 67 እና 202 እንደ ቅደምተከተላቸው የተደነገጉት ከመመሪያው ጋር ተገናዝበው ሊተረጎሙ ስለሚገባ መመሪያው የወንጀል ሕጉን ጽንሰሐሳብ በማይቃረን መልኩ ሊከለስ ወይም ሊሻሻል ይገባዋል።

ይህንን ጽንሰ-ሐሳብ በተመለከተ ያለውን ብዥታ ለማጥናት በባሕር ዳር ማረሚያ ቤት በተደረገ ውይይት ይኸው ችግር ተስተውሏል።[119] ተወያዮች በኢፌዴሪ የወንጀል ሕግ አንቀጽ 67 እና 202 መሠረት ደጋጋሚ መሆኑ የተረጋገጠ ታራሚ የአመክሮ ተጠቃሚ እንደማይሆን ቢታወቅም ጽንሰ-ሐሳቡን በመረዳትና በመተግበር ረገድ ብዥታ እንዳለ ገልጸዋል። የወንጀል መረጃን አጠናቅሮ በአንድ ቋት ሊይዝ የሚችል ራሱን የቻለ አካል በሀገር አቀፍም ይሁን በክልል ደረጃ ተለይቶ አለመቋቋሙ ለማረሚያ ቤትም ይሁን ለፍርድ

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[117] የኢፌዴሪ የወንጀል ሕግ፣ በግርጌ ማስታወሻ ቁጥር 1 ላይ እንደተገለጸው፣ አንቀጽ 188 (1 እና 2)

[118] ዝኒ ከማሁ፣ አንቀጽ 188 (2 -ሁለተኛው አንጓ)

[119] በባሕር ዳር ማረሚያ ቤት፣ ከማረሚያ ቤቱ ባለሙያዎች፣ የስራ ሃላፊዎችና ታራሚዎች ጋር በአመክሮ አሰጣጥ ላይ የተደረገ የቡድን ወይይት፣ ግንቦት 2008 ዓ.ም.

ቤት ደጋጋሚና ልማደኛ ደጋጋሚ ወንጀለኞችን በሕጉ መንፈስ ለመቅጣትና ለማረም አስቸጋሪ እንደሆነ በውይይቱ ተሳታፊዎች ሐሳቡ ተወስቷል። በአብክመ ማረሚያ ቤቶች አስተዳደር ማረምና ማነጽ የሥራ ሂደት ኃላፊ ጋር በተደረገ ውይይትም ይኸው ችግር እንዳለ ተገልጸ ደጋጋሚንና ልማደኛ ደጋጋሚነትን ባልየ መልኩ የደጋጋሚ ወንጀለኞች ቁጥር እየጨመረ መሆኑን የሚያሳይ አህዛዊ መረጃ በአመታዊ የሥራ ሪፖረት ላይ ተመልክቷል። በዚህ መሠረት የ2009 ዓ.ም የክልሉ ማረሚያ ቤቶች አስተዳደር ኮሚሽን የሥራ አፈጻጸም ሪፖርት 1238 የሚደርሱ ታራሚዎች ደጋጋሚ ወንጀለኞች እንደሆኑና ይህም በክልሉ ያሉ ታራሚዎችን 5.5 በመቶ የሚሆን ቁጥር እንደሚሸፍን ያመለክታል።[120] ይህ ደጋጋሚነትና ልማደኛ ደጋጋሚነት በተግባር ያለ መሆኑን ያሳይ እንጂ በጽንሰ-ሃሳብ ደረጃ ተገቢውን ግንዛቤ አግኝቶ በተግባር ተለይቶ መረጃ እንደማይያዝ ያሳያል። በመሆኑም ደጋጋሚና ልማደኛ ደጋጋሚ በባሕር ዳር ማረሚያ ቤትም ይሁን በአጠቃላይ የወንጀል ፍትህ ሥርዓት አይነተኛ ችግር መሆኑን ተገንዝቦ ያለውን የጽንሰሐሳብ ብቹርታና የአፈጻጸም ችግር ለመቅረፍ የሚያስችል እርምጃ ሊወሰድ ይገባል።

ሌላው በወንጀል ሕጉና በመመሪያው መካከል ልዩነት እንዳለ የሚያሳየው የአመክሮ መስፈርት እርቅ ነው። እርቅ በአመክሮ የሚለቀቀው ሰው የወንጀሉ ሰለባ ከሆኑ ግለሰቦችና ዘመዶቻቸው ጋር መልካም ግንኙነትን እንዲፈጥርና በበቀል ተነሳስቶ ተጨማሪ ወንጀሎች በመካከላቸው እንዳይፈጸሙ በማድረግ በኩል የላቀ ሚና ሊኖረው እንደሚችል ይታመናል። ይሁን እንጂ የወንጀል ሕጉ አንቀጽ 202 (1) (ለ) ታራሚው በፍርድ ወይም በስምምነት የተወሰነበትን ካሳ ለተበዳዩ የመክፈል ግዴታን እንደ ቅድመሁኔታ በግልጽ ሲያመላክት በሁለቱ ወገኖች መካከል ሊፈጸም የሚገባውን እርቅ አልፎታል። በመመሪያው ቁጥር 4.3 (4) ላይ እንደተመለከተው የተፈጸመው ወንጀል በግለሰብ ላይ በደልን ወይም ጉዳትን የሚያደርስ በተለይም የሰው መግደል ወንጀል፣ የመግደል ሙከራና አስገድዶ መድፈር በሆነ ጊዜ ከግል ተበዳዮች ጋር እርቅ መፈጸም ለአመክሮ የሚያስፈልግ መስፈርት ወይም ቅድመሁኔታ ሆኖ ተመልክቷል። ይህን በወንጀል ሕጉ ያልተመለከተ የአመክሮ ቅድመሁኔታ መመሪያው መጠየቁ በሁለቱ መካከል መጣረስን ያስከተለ ይመስላል።

ይህ ቢሆንም መመሪያው እርቅን በቅድመሁኔታነት ማኖሩ በአመክሮ ተጠቃሚዎችና በግል ተበዳዮች መካከል መልካም ግንኙነት እንዲፈጠር አስተዋጽኦ እንዳለው ግልጽ ነው። ይህንን ግምት ውስጥ በማስገባት መመሪያው እርቅን የአመክሮ አንድ መስፈርት አድርጎ ያመላከተ ቢሆንም በወንጀል ሕጉ ካለመመልከቱም በላይ በተግባር ከእርቅ አፈጻጸም ጋር ተያይዞ በርካታ ችግሮች እንዳሉ ለዚህ ጥናት ዋቢ በመሆን ቃለ-መጠይቅ የተደረገላቸው ታራሚዎችና ባለሙያዎች አውስተዋል።[121] ምንም እንኳ በአመክሮ የሚለቀቁ ታራሚዎች ከተጎጂው ወይም ከቤተሰቦቹ ጋር እርቅ እንዲፈጽሙ መደረጉ በመሰረተሐሳብ ደረጃ መልካም ቢሆንም ለረጅም ጊዜ ማረሚያ ቤት የቆዩ ሰዎች ከባላንጋራዎቻቸው ጋር እርቅ እንዲፈጽሙ ሲገደዱ በአፈጻጸም ስለሚችገሩ አመክሮን አስቸጋሪ ሊያደርገው ይችላል። ይህን ግምት ውስጥ ያስገባ በሚመስል መልኩ እርቅ መፈጸም ከአመክሮ መስፈርቶች አንዱ ሆኖ በመመሪያው ቢካተትም የተሰጠው ዋጋ ዝቅተኛ[122] ከመሆኑም በላይ ተግባራዊ እየተደረገ አይደለም።[123]

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[120] ኮማንደር አማረ ወርቁ፣ በአብክመ ማረሚያ ቤቶች አስተዳደር ኮሚሽን ማረምና ማነጽ የስራ ሂደት ባለቤት፣ በአመክሮ ላይ የተደረገ ቃለመጠይቅ፣ ሐምሌ 2009 ዓ.ም.

[121] ኮማንደር እውነቱ፣ በአብክመ ማረሚያ ቤቶች አስተዳደር ኮሚሽን የማረምና ማነጽ ባለሙያ፣ ስለአመክሮ የተደረገ ቃለመጠይቅ፣ ባሕር ዳር፣ ግንቦት 2008

[122] የአመክሮ አሰጣጥ መመሪያ፣ የግርጌ ማስታዎሻ ቁጥር 15 እንደተገለጸው፣ ቁጥር 4.3 (4)

[123] የኢፌዴሪ የወንጀል ሕግ፣ በግርጌ ማስታዎሻ ቁጥር 1 ላይ እንደተገለጸው፣ አንቀጽ 188 (2 ሁለተኛው አንቀ)

ታራሚው የአመክሮ ተጠቃሚ ለመሆን የባሕርይውን መሻሻል ሊያሳዩ የሚችሉ መስፈርቶችን ከማሟላቱ በተጨማሪ በፍርድ ቤት ውሳኔ ወይም ከተበዳዮች ጋር በተደረገ ሥምምነት መሠረት ለደረሰው ጉዳት ካሳ መክፈል ለአመክሮ እንደአንድ ቅድመሁኔታ ሆኖ እንደሚያገለግል የወንጀል ሕጉ[124] እና መመሪያው[125] ያመላክታሉ። ይሁን እንጂ በተግባር የሚሰጠው ትኩረት ዝቅተኛ እንደሆነ ከባለሙያዎችና ከሥራ ኃላፊዎች ጋር በተደረገው ውይይት ተረጋግጧል።[126]

ሌላው ከአመክሮ አፈጻጸም ጋር ተያይዞ የሚነሳው ችግር አመክሮን የሚያስከለክሉ ወይም የሚያዘገዩ ተብለው በመመሪያው የተዘረዘሩ ወንጀሎች ጉዳይ ነው። በመመሪያው አንቀጽ 11 (ሰ) ሥር አመክሮን የሚያስከለክሉ ወይም የሚያዘገዩ ተብለው የተገለጹ ወንጀሎች ሲታዩ በባሕርያቸው ከባድና በህዝብ ጥቅም ላይ ከፍተኛ ጉዳትን የሚያስከትሉ እንደሆኑ መረዳት ይቻላል። ይህንን ግምት ውስጥ በማስገባት ሆን ብሎ ሰው በመግደል፣ በዘረፋ፣ በአስገድዶ መድፈር፣ በሕገ-መንግሥቱና በመንግሥት ላይ አድማ መጠንሰስና በመሰል ከባድ ወንጀሎች መጠርጠር ወይም መከሰስ አመክሮን ለማስከልከል ወይም ለማዘግየት በቂ ምክንያት እንደሆኑ ተመልክተዋል።[127] ሆኖም ይህ አይነቱ ክልከላ ከሕግ አንጻር ሲታይ ተቀባይነቱ አነጋጋሪ ነው። በመመሪያው ላይ የተዘረዘሩት አመክሮን ሊያዘገዩ ወይም ሊያስከለክሉ የሚችሉ የወንጀል አይነቶች በወንጀል ሕጉ አመክሮን በሚመለከቱ ድንጋጌዎች በገደብነት ያልተመለከቱ ከመሆናቸውም በላይ ታራሚው በእነዚህ ወንጀሎች በመጠርጠሩ ብቻ የአመክሮ ተጠቃሚ እንዳይሆን መከልከሉ የተጠረጠረባቸውን ወንጀሎች በተመለከተ እንደንጹህ የመገመት መብቱ ላይ ተጽእኖ ያሳርፋል።

አመክሮን ሊያሳግድ ወይም ሊያዘገይ የሚችል በመመሪያው የተመለከተ ሌላው ነገር ታራሚው ከእሥራት ቅጣቱ በተጨማሪ የገንዘብ መቀጮ ተወስኖበት ከሆነ ይህንን አለመፈጸሙ ነው።[128] የገንዘብ መቀጮ ያለበት ታራሚ በወንጀል ሕጉ የተመለከቱትን የአመክሮ መስፈርቶች ሙሉ በሙሉ አሟልቶ ቢገኝም መቀጮውን እስካልከፈለ ድረስ በአመክሮ የመለቀቅ እድል አይኖረውም። ይህም በወንጀል ሕጉ ያልተካተተና ከእሥራት ቅጣቱ ጋር ግንኙነት የሌለው ከመሆኑም በላይ ታራሚው መቀጮውን እንዲፈጽም ለማድረግ ሌላ ሥልጣን ያለው አካል ሌሎች ስልቶችን[129] ተጠቅሞ በማስፈፀም ፋንታ የአመክሮ ተጠቃሚ እንዳይሆን ታራሚውን መከልከሉ የሕግ መሠረት የሌለው አሠራር ነው።

በወንጀል ሕጉና በመመሪያው ከተመለከቱት የአመክሮ መስፈርቶች መካከል አንዱ በፍርድ ቤቱ ከተወሰነው የእሥራት ቅጣት ውስጥ 2/3ኛውን መፈጸም፤ የሚለው ነው። ይህንን ነጥብ በተመለከተ ሕጉና መመሪያው ልዩነት የማይታይባቸው ቢሆንም የመስፈርቱን

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[124] የኢፌዴሪ የወንጀል ሕግ፣ በግርጌ ማስታወሻ ቁጥር 1 ላይ እንደተገለጸው፣ አንቀጽ 202 (1) (ለ))

[125] የአመክሮ አሰጣጥ መመሪያ፣ የግርጌ ማስታወሻ ቁጥር 15 እንደተገለጸው፣ ቁጥር 4.2 (2)

[126] ኮማንደር አማረ ወርቁ፣በግርጌ ማስታወሻ ቁጥር 120 እንደተገለጸው

[127] የአመክሮ አሰጣጥ መመሪያ፣ የግርጌ ማስታወሻ ቁጥር 15 እንደተገለጸው፣ ቁጥር 11(ሰ)

[128] ዝኒ ከማሁ፣ ቁጥር 6.2 (3)

[129] የመቀጮ ቅጣት አወሳሰንና አፈጻጸምን በተመለከተ የተደነገጉትን የኢፌዴሪ የወንጀል ሕግ ከአንቀጽ 90-96 ይመለከታል። መቀጮ የተወሰነበት ታራሚ ገንዘቡን ወዲያውኑ መክፈል እንዳለበት በመርህ ደረጃ በአንቀጽ 93 ስር የተመለከተ ሲሆን ይህን ማድረግ እንደማይችል ፍርድ ቤቱ የተረዳ እንደሆነ እንደሁኔታው ከአንድ እስከአስርት ወር ሊያራዝምለት እንደሚችል በዚሁ ድንጋጌ ተመልክቷል፤ እንደነገሩ ሁኔታም ክፍያው በጊዜ ተከፋፈሎ (by installment) ከሦስት ዓመት በማይበልጥ ጊዜ ታራሚው እንዲከፍል ይደረጋል። እነዚህን አማራጮች በመጠቀም ታራሚው መቀጮውን መክፈል ያልቻለ እንደሆነ መቀጮው ወደተልበት ስራ ተቀይሮ መፈጸም እንዳለበት በአንቀጽ 95 እና 96 ስር ተደንግጓል።

ተግባራዊነት በተመለከተ በታራሚዎች በኩል የሚነሳ ችግር አለ። ይኸውም የእሥራት ቅጣቱ በፍርድ ቤት ሲወሰን ታራሚው ከፍርድ በፊት በፖሊስ ጣቢያ ወይም በማረፊያ ቤት የቆየበት የእሥራት ጊዜ በግልጽ በፍርድ መዝገቡ ላይ ባለመስፈሩ የ2/3ኛ የእሥራት ጊዜን ለማስላት የመረጃ ችግር ይፈጠራል። በሌላ አነጋገር ታራሚው ወንጀሉን እንደፈጸመ በፖሊስ ቁጥጥር ሥር የዋለበትን ጊዜ ለ2/3ኛ የእሥራት ጊዜ ስሌት መነሻ እንዲደረግለት ለፍርድ ቤቱ ባለማመልከቱ ሊታለፍ የሚችል ከመሆኑም በላይ በፍርድ መዝገቡ ይህ የሚገለጽበት አግባብ 'እጁ ከተያዘበት ጊዜ ጀምሮ በሚታሰብ' በሚል ፍርዱ ሲገለጽ በ2/3ኛ ጊዜ ስሌት ላይ ብዥታን ይፈጥራል። ምክንያቱም ታራሚው በፖሊስ በቁጥጥር ሥር የዋለበት ጊዜ በግልጽ አለመመልከቱ ወይም እጁ ከተያዘበት ጊዜ ጀምሮ በሚል በደምሳሳው መገለጹ ታራሚዎችን በሚያስተዳድረውና የእሥራት ጊዜውን በማስላት የአመክሮ ተጠቃሚዎችን ለሚለየው ማረሚያ ቤት ግልጽ የሆነ መረጃን ስለማይሰጥ ነው። ይህም ጥናቱ በተደረገበት ባሕር ዳር ማረሚያ ቤት በሚገኙ ታራሚዎች ላይ ከፍተኛ ቅሬታን የፈጠረና ለከፍተኛ ምሬትና እሮሮ የዳረገ መሆኑን በማረሚያ ቤቱ ከተደረገው ምልከታ መገንዘብ ተችሏል። በተለይ ታራሚዎች የአመክሮ ጊዜያቸውን በፖሊስ ቁጥጥር ሥር ከዋሉበት ጊዜ ጀምሮ በማስላት በአመክሮ መለቀቅ እንዳለባቸው ጥያቄ ሲያቀርቡ በቁጥጥር ሥር ከነበሩበት ፖሊስ ጣቢያ ወይም ማረፊያ ቤት ማስረጃ እንዲያመጡ ሲጠየቁ ማስረጃውን የሚያመጣላቸው ሰው በማጣት መቸገራቸው ለቅሬታው ምክንያት እንደሆነ ታራሚዎች በአፅንኦት ያነሳሉ።[130]

በአጠቃላይ አመክሮ በኢፌዴሪ የወንጀል ሕግና ሌሎች መመሪያዎች ላይ እውቅናን ያገኘና በስፋት እየተፈጸመ ያለ የወንጀል ፍትህ አስተዳደሩ አሰራር ቢሆንም በርካታ የሕግና የአፈጻጸም ችግሮች ያሉበት መሆኑን መገንዘብ ይቻላል። በተለይ በወንጀል ሕጉና በመመሪያው መካከል የሚንጸባረቁ ልዩነቶች እንዲሁም በወንጀል ሕጉና በመመሪያው በየራሳቸው ላይ የሚስተዋሉ የሕግ ክፍተቶች በአመክሮ ጽንሰሐሳብ ላይ ብዥታን የፈጠሩ በመሆናቸው ጉዳዩ የሚመለከታቸው አካላት ለችግሩ ትኩረት በመስጠት በሕግ ማእቀፉ ላይ ማሻሻያ እንዲያደርጉ በዚህ ጥናት ተጠቁሟል።

ማጠቃለያና የመፍትሄ ሐሳብ

በዚህ ጥናት አመክሮን በተመለከተ በርካታ የሕግና የአፈጻጸም ችግሮች የተለዩ ሲሆን፣ አንኳር አንኳር ችግሮችና የመፍትሄ ሐሳቦቻቸው እንደሚከተለው በአጭሩ ቀርበዋል፤

አመክሮ በኢትዮጵያ የወንጀል ፍትህ አስተዳደር ሥርዓት ውስጥ የታራሚዎችን የባሕርይ ለውጥ መሠረት አድርጎ የሚሰጥና ታራሚዎች ከእስር ተለቅቀው ወደ ማህበረሰቡ ተመልሰው ቀሪውን የቅጣት ጊዜ በሙከራ የሚያሳልፉበት እንደሆነ ይታወቃል። ታራሚዎች ያሳዩትን የባሕርይ ለውጥ መሠረት በማድረግ የሚሰጠው አመክሮ በኢፌዴሪ የወንጀል ሕግና እሱን ለማስፈጸም በወጣ መመሪያ መሠረት ይመራል። ይህ ጥናት በተደረገበት ባሕር ዳር ማረሚያ ቤትም ከላይ የተጠቀሰው የወንጀል ሕግና በአብክመ የአመክሮ አሰጣጥ መመሪያ መሠረት ታራሚዎች በአመክሮ እንዲለቀቁ ይደረጋል። በጥናቱም በነዚህ የአመክሮ ሕጎችና አፈጻጸም ላይ የሚስተዋሉት ችግሮች ተለይተዋል፤ የመፍትሄ ሐሳብም ተመልክቷል።

በዚህ መሠረት በጥናቱ የተገኙ በርካታ የሕግ ክፍተቶች ያሉ ሲሆን፣ ክፍተቶቹ በአመክሮ አፈጻጸም ላይ ችግር አስከትለዋል። ከተለዩ የሕግ ክፍተቶች መካከል አንዱ የአብክመ

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[130] አቶ ደሳለኝ ጥጋቡ፣ በባሕር ዳር ዩኒቨርሲቲ ሕግ ት/ቤት ነጻ የሕግ ድጋፍ መስጫ ማእከል ምክትል አስተባባሪ፣ አመክሮን በተመለከተ የተደረገ ቃለመጠይቅ፣ ሐምሌ 27 ቀን 2009 ዓ.ም.

አመክሮ አሰጣጥ መመሪያ ከወንጀል ሕጉ ጋር ተጣጥሞ እንዲወጣ አለመደረጉ ነው። የአብክመ የአመክሮ አሠጣጥ ሥርዓትንና አፈጻጸምን ለመወሰን የወጣ ጊዜያዊ መመሪያ ቁጥር 1/2003 አመክሮ በክልሉ ባሉ ማረሚያ ቤቶች አማካይነት እንዲሰጥ ማድረጉና ይኸም ከክልሉ ጠቅላይ ፍርድ ቤት ጋር በተደረገ ስምምነት መሠረት መሆኑን ይገልጻል። ይሁን እንጂ ይህ አሰራር የሀገሪቱ ሕግ አውጭ አካል ያወጣውን የወንጀል ሕግ ድንጋጌ በግልጽ የሚጻረር ሆኖ ተግኝቷል። ጠቅላይ ፍርድ ቤቱ በሕግ አውጭው የተሰጠውን አመክሮን የመስጠት ሥልጣን በስምምነት ለማረሚያ ቤቶች መስጠቱ ከሕግ አኳያ ችግር ያለበት መሆኑ በግልጽ ተመልክቷል።

የኢፌዴሪ የወንጀል ሕግ አመክሮን ከሚያስከለክሉ ሁኔታዎች መካከል ልማደኛ ደጋጋሚነትን አንዱ አድርጎ በአንቀጽ 202/2 ሥር ቢደነግግም ልማደኛ ደጋጋሚነት ምን እንደሆነ አለመግለጹ ሌላው የሕግ ክፍተት ነው። ይህን ተከትሎ የአመክሮ አሰጣጥ መመሪያው ደጋጋሚ ወንጀለኛነት አመክሮን እንደሚያስከለክል የገለጸ ቢሆንም የደጋጋሚ ወንጀለኛነትን ጽንሰሐሳብ በወንጀል ሕጉ አንቀጽ 67 እና 202 ድንጋጌዎች መንፈስ ጋር በተጣጣመ መልኩ አላመላከተም። በመሆኑም ደጋጋሚና ልማደኛ ደጋጋሚ ከወንጀል ሕጉና ከአመክሮ አሰጣጥ መመሪያው አኳያ ሲታዩ እርስበርሳቸው የማይጣጣሙ በመሆናቸው በተግባር በአመክሮ አሰጣጥ ላይ የግልጽነት ችግር አለ።

በሌላ በኩል የአመክሮ አፈጻጸም መመሪያው በወንጀል ሕጉ ያልተመለከተ አዲስ የአመክሮ ቅድመሁኔታ ይዟል። ይኸውም ታራሚዎች በወንጀል ድርጊታቸው ጉዳት ካደረሱባቸው ሰዎች ወይም ከተበዳይ ወገን ጋር እርቅ መፈጸም እንዳለባቸው መደንገጉ ነው። እርቅ በመርህ ደረጃ ጠቃሚና ተቀባይነት ያለው ቢሆንም ለረጅም ጊዜ ከማህበረሰቡ ተለይተው በማረሚያ ቤት የቆዩት የአመክሮ ተጠቃሚዎች ከወንጀል ሰለባዎችና ቤተሰቦቻቸው ጋር ያለምንም ምቹ ሁኔታ እርቅ እንዲፈጽሙ መገደዳቸው በተግባር ጫና እያሳድረባቸው እንደሆነ ጥናቱ አመልክቷል።

በመመሪያው ከተመለከቱት ዋና ዋና ጉዳዮች መካከል በክባድ ወንጀሎች የተጠረጠሩ ወይም የተከሰሱ ታራሚዎች በነዚህ ወንጀሎች በመጠርጠራቸው ብቻ አመክሮው ሊዘገይ ወይም ሊታገድ እንደሚችል መገለጹ የተጠርጣሪዎችን እንደ ንጹህ ሰው የመገመት መብት ጥያቄ ውስጥ ያስገባል። በተጨማሪም ክልከላው በወንጀል ሕጉ ወይም በሌላ እናት ሕግ ያልተመለከተ በመሆኑ የመመሪያውን ሕጋዊነትና ተቀባይነት ከሕግ አወጣጥ መርህ አንጻር አጠያያቂ ያደርገዋል። መመሪያው በወንጀል ሕጉ ባልተመለከተበት ሁኔታ ከእሥራቱ በተጨማሪ የገንዘብ መቀጮ ፍርደኛ የሆነ ታራሚ መቀጮውን እስካልከፈለ ድረስ የአመክሮ ተጠቃሚ መሆን እንደማይችል ማስፈሩም በተግባር የአመክሮ ተጠቃሚው በሕግ የተመለከቱትን ሌሎች መስፈርቶች አሟልቶ እያለ በአመክሮ እንዳይለቀቅ እንቅፋት ይሆንበታል። በአጠቃላይ ከላይ በተመለከቱት በወንጀል ሕጉና በመመሪያው መካከል የተፈጠሩ አለመጣጣሞች የአመክሮ አፈጻጸምን በባሕር ዳር ማረሚያ ቤት አስቸጋሪ እንዲሆን አድርገውታል።

ከነዚህ የሕግ ክፍተቶችና ከሌሎች ተያያዥ ጉዳዮች የመነጩ ችግሮች በአመክሮ አሰጣጡ ሥርዓት ላይ ሳንካን ሲፈጥሩ ተስተውለዋል። ሕጉ የያዛቸው አመክሮን የሚመለከቱ ድንጋጌዎች በአፈጻጸም ወቅት ተገቢው ግንዛቤና ትኩረት ሳይሰጣቸው ተዘንግተዋል። አመክሮ በወንጀል ሕጉ አንቀጽ 202 መሠረት ታራሚዎች መልካም የሚባል የባሕርይ መሻሻል በማሳየታቸውና 2/3ኛውን የእሥራት ጊዜ ካጠናቀቁ በኋላ ቀሪውን የፍርዱን 1/3ኛ ወይም በዚሁ ሕግ አንቀጽ 204 መሠረት በፍርድ ቤቱ የሚወሰነውን የሙከራ ጊዜ በአመክሮ ውስጥ በመሆን እንደሚፈጽሙ የተደነገገ ቢሆንም ከጥናቱ ተሳታፊዎች የተሰበሰበው መረጃ እንደሚያሳየው አመክሮ የሚሰጠው የእሥራት ጊዜን ለመቀነስ ብቻ

እንደሆነ ነው፡፡ በአመክሮ የሚለቀቁ ታራሚዎች ቀሪውን የእሥራት ጊዜ በክትትልና በቁጥጥር ሥር ሆነው በፈተና እንደሚያልፉ ግንዛቤ ካለመኖሩም ባሻገር በኢፌዴሪ የወንጀል ሕግ አንቀፅ 205 (2) ሥር በአመክሮ የተለቀቁ ታራሚዎች ላይ ክትትልና ቁጥጥር የሚያደርግ አካል መኖር እንዳለበት ቢመለከትም በተግባር ሕጉ ሲፈጸም አይስተዋልም፡፡

ሌላው በወንጀል ሕጉ በአመክሮ ለመለቀቅ ቅድመሁኔታ ሆኖ ቢመለከትም በተግባር የማይፈጸመው ካሳ የመክፈል ግዴታ ነው፡፡ ታራሚው በወንጀል ደርጊቱ ጉዳት ያደረሰባቸው ተበዳዮችን ለጉዳቱ ካሳ መክፈል እንዳለበትና ይህም ለአመክሮ ቅድመሁኔታ እንደሆነና የዚህ ሁኔታ አለመሟላት አመክሮን ሙሉ በሙሉ ከሚያስከለክሉ ሁኔታዎች አንዱ መሆኑን በወንጀል ሕጉ አንቀጽ 202 (1) (ለ) እና በመመሪያው ቁጥር 6.1(3) ላይ ቢመላከትም በተግባር ግን ከግምት ውስጥ እንደማይገባና አመክሮን የማስከልከል ውጤት እንደሌለው ለመረዳት ተችሏል፡፡

በመጨረሻም ከአመክሮ አፈጻጸም ጋር የሚነሳው ችግር ከላይ በተጠቀሰው የወንጀል ሕግ ድንጋጌ ላይ የተመለከተው 2/3ኛ የእሥራት ቅጣት ጊዜ ስሌት ነው፡፡ ይህ የእሥራት ጊዜ ከፍርድ በፊት በፖሊስ ጣቢያ ወይም በመሰል ስፍራዎች ታራሚዎች ያሳለፏቸውን የእሥራት ጊዜያት ሊያካትት ይችላል፡፡ ይሁን እንጂ በፍርድ ቤቶች ውሳኔ ላይ ታራሚው ከመቼ ጀምሮ በእሥራት ላይ እንደነበረ ሳይገለጽ 'እጁ ከተያዘበት ጊዜ ጀምሮ በሚታሰብ' የሚል የቅጣት ውሳኔ በሚተላለፍበት ጊዜና ትእዛዙ ብቻ ለማረሚያ ቤቶች እንዲደርስ ሲደረግ የአመክሮውን ጊዜ ለማስላት ችግር እንደሚያጋጥም በጥናቱ ለመረዳት ተችሏል፡፡

የመፍትሄ ሐሳቦች

በጥናቱ መሰረታዊ የሆኑ የሕግና የአፈጻጸም ችግሮች ተለይተዋል፡፡ እነዚህ የሕግና የአፈጻጸም ችግሮች አመክሮ በባሕር ዳር ማረሚያ ቤት ውስጥ በተሳካ ሁኔታ እንዳይከናወን እንቅፋት እንደሆኑም በጥናቱ ተረጋግጧል፡፡ በመሆኑም ለችግሮቹ መፍትሄ ሊሆኑ የሚችሉ ዋና ዋና ሐሳቦች እንደሚከተለው ቀርበዋል፡፡

- አመክሮ በፍርድ ቤት አለመሰጠቱ ከኢፌዴሪ የወንጀል ሕግ ጋር በግልጽ ስለሚቃረን በፍርድ ቤት እንዲሰጥ ወይም ይህን የሚተካ አዲስ ሕግ ሥልጣን ባለው አካል መውጣት ይገባዋል፤
- እንደሌሎች ሀገሮች ሁሉ አመክሮን ከመነሻ እስከ መድረሻው በባለቤትነት ይዞ ሊሰራ የሚችል ገለልተኛ የሆነ ቦርድ ቢቋቋምና ሥራውን እንዲሰራው ቢደረግ፤
- መመሪያው ደጋጋሚነትን ያመላከተበት መንገድ ከወንጀል ሕጉ ጋር የተጣረሰ በመሆኑ የወንጀል ሕጉን መንፈስ በተከተለ መልኩ ቢሻሻል፤
- የወንጀል ሕጉ ደጋጋሚንና ልማደኛ ደጋጋሚን ለይቶ በማመላከት ልማደኛ ደጋጋሚን ለአመክሮ መከልከል እንደሁኔታ ቢያመላክትም የልማደኛ ደጋጋሚ ትርጉምና ሁኔታ በአግባቡ በሕግ ስላልተወሰነ ሕጉ ይህንን ግልጽ ሊያደርግ በሚችል መልኩ ቢሻሻል፤
- መመሪያው በከባድ ወንጀሎች ማለትም በሰው መግደል፣ በዘረፋ፣ በአስገድዶ መድፈርና በሌሎችም የተጠረጠሩ ወይም የተከሰሱ ሰዎችን የአመክሮ ተጠቃሚ እንዳይሆኑ መከልከሉ ከሀገሪቱ ሕገመንግሥትና የወንጀል ሕጉ ጋር የማይጣጣም በመሆኑ ቢሻሻል፤
- ታራሚዎች በአመክሮ ከተለቀቁ በኋላ ቀሪውን የእስር ጊዜ ከማህበረሰቡ ጋር ተቀላቅለው ሕግ አክባሪ ዜጋ ሆነው እየኖሩ መሆናቸውን የሚከታተል አካል

እንደሚቋቋም ሕጉ ቢደነግግም እስከአሁን እየተሰራበት ስላልሆነ በየወረዳው አስተዳደርና ጸጥታ ጽ/ቤት ባለሙያ ተመድቦ ሥራው እንዲሰራ ቢደረግ፤

- ስለ ታራሚው በቂ መረጃ ለማግኘት ሁሉም ፍርድ ቤቶች የእሥራት ቅጣት ሲወስኑ ታራሚው እጁ የተያዘበትንና ቅጣቱ መፈጸም የሚጀምርበትን ጊዜ በውሳኔው ውስጥ በግልጽ እንዲያሰፍሩ ቢደረግ፤ ታራሚው ወደማረሚያ ቤት ሲላክ የእሥራት ትእዛዙና የፍርድ ግልባጩ ለማረሚያቤቱ እንዲደርሰው ቢደረግ፤
- በፍርድ ቤት ውሳኔ ወይም በስምምነት ታራሚው ለተጎጅዎች የሚከፍለው የጉዳት ካሳ ካለ ይኸው መፈጸሙን ከአመክሮ በፊት ቢረጋገጥ።

Ethiopian Parole Laws and Their Enforcement in Bahir Dar Prison

Belayneh Admasu[♣]
Alemu Dagnew[♣]

Abstract

In Ethiopia, a court may, upon the recommendation of a prison, order that an inmate shall be, after serving two-third of the sentence of the imprisonment and securing good characteristic, conditionally released from the prison and s/he will serve the remaining one-third of the imprisonment within the society. Despite common and long time implementation of the laws, the Inmates of the prison grumble that critical legal and practical challenges exist there in. With the main objective of scientifically identifying the challenges, the study employed a qualitative research method to enquire the concerns and methodologically analyze the tremendous data collected from informants. In conclusion, it ascertained the existence of the legal gaps and practical challenges encumbering effective implementation of parole laws in the prison.

Key words: - *Parole, prison, Imprisonment, Inmate, good characteristics*

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የተከፋፈሉ ማሕበረሰቦች (Divided Society) እና የሕገ-መንግስት ንድፍ፤ ኢትዮጵያ በተከተለችው አማራጭ ላይ ምልከታ

ጎሳዬ አየለ*

አህጽሮ-ፅሁፍ

የተከፋፈሉ ማህበረሰቦች የሚያጋጥማቸው አብይ ችግር በማንነት ላይ የተመሰረተ አለመግባባት ወይም ግጭት ነው። ይህ በቋንቋ ፣ብሄር፣ ኃይማኖት ወዘተ ልዩነት ላይ ተመስርቶ የሚነሳ አለመግባባት ወይም ግጭት ያለባቸው ማህበረሰቦች የተከፋፈሉ ማህበረሰቦች ይባላሉ። ለነዚህ ማህበረሰቦች በማንነት ላይ ተመስርቶ ለሚነሳው ግጭት ማረቂያ /management/ እንዲሆኑ ከቀረቡት መፍትሄዎች ወስጥ የሕገ-መንግስት ንድፉ ይህን ችግር እንዲቀርፍ አድርጎ መቅረፅ አንደኛው ነው። በዚህ ጉዳይ ላይ በጣም የሚታወቁትና ተወዳዳሪ ንድፍ ያቀረቡት አረንድ ላይፓርትና ሮናልድ ሆሮዊትዝ ናቸው። ላይፓርት የስምምነት ወይም የአስፈፃሚውን ስልጣን ማጋራት ሕገመንግስታዊ ንድፍ /Consociationalism/ ሲያቀነቅን ሆሮዊትዝ በበኩሉ የማሳሳብ ንድፍን /Centripetalism/ ይደግፋል። ሁለቱም ፀሀፊዎች የብዙሃን ዴሞክራሲ ንድፍ /Westminster majoritarian democracy/ ለተከፋፈሉ ማህበረሰቦች የማይሰራና እንዲይተገብሩት ቢመክሩም አማራጭ ብለው ያቀረቧቸው ንድፎች ደግሞ በጣም የተለያዩ ናቸው። የኢትዮጵያ ፌደራላዊ ዴሞክራሲያዊ ሕገ-መንግስት በማንነት ላይ ተመርኩዞ ሊሚነሳ አለመግባበት ወይም ግጭት መፍትሄ አንዲሆን ተብሎ የተቀረፀ ቢሆንም አነዚህ ለተከፋፈሉ ማህበረሰቦች መፍትሄ ይሆናሉ ተብለው ከቀረቡት አማራጭ ንድፎች አንፃር ሲታይ አነዚህ ንድፎችን በተገቢው መጠንና ዓይነት በአጥጋቢ ሁኔታ አላካተተም። ሕገመንግስቱን የቀረፁት ሰዎች የማሳሳብ ንድፍ ከናካቴው ከግምት ውስጥ አላስገቡም። የተወሰኑ የስምምነት ወይም የአስፈፃሚውን ስልጣን ማጋራት የሚጠይቀውን ንድፍ አንዳንድ ጉዳዮችን ያካተተ ቢሆንም ዋና ዋና የንድፉ መገለጫዎች የሆኑትን አንደ አስፈፃሚውን ሥልጣን ማጋራት እና ተመጣጣኝ ውክልና የምርጫ ሥርዓት የሚመለከቱትን አላካተተም። በተከፋፈሉ ማህበረሰቦች ውስጥ ሰላም ማምጣት የሚቻለው ወይም በማንነት ልዩነት ላይ ተመርኩዞ ሊሚነሳ ግጭት ማረቅ የሚቻለው ሁለቱ ፀሃፊዎች እንዳቀረቡት አማራጭ ንድፎች ከሆነ የኢትዮጵያ ሕገመንግሰት ይህን ችግር የሚያስታምም ወይም የሚቀርፍ ንድፍ የለውም።

ቁልፍ ቃላት፡- የተከፋፈለ ማህበረሰብ ፣የስምምነት/ሥልጣን ማጋራት/ ዴሞክራሲ ፣የማሳሳብ ዴሞክራሲ

1. መግቢያ

አብዛኛው በአለም ላይ ያሉ አገራት ብዝሃነት መገለጫቸው ነው። በብሔር፣ በቋንቋ፣ በባሕል፣ በሐይማኖት ወዘተ ልዩነት የሌለበት ማሕበረሰብ ያለው አገር ማግኘት አስቸጋሪ ነው። ብዝሃነት ባለባቸው የተወሰኑ አገራት አብይ የሆነ የሚያጋጥማቸው ችግር በተለይ በብሄር/ቋንቋ ልዮነት ላይ ተመርኩዞ የሚነሳ ግጭት ነው። ይህ የብሔር/ቋንቋ ማንነት ላይ መሰረት ያደረገ አለመግባባት ወይም ግጭት ወደ ፖለቲካ ግጭት ሊያመራ ወይም ሊለወጥ

* ጎሳዬ አየለ፣ በሃዋሳ የኒቨርሲት ፣ ሕግ ትምህርት ቤት የሕግ መምህር። ፀሃፊውን በሚከተለው የኢሜይል አድራሻ ሊያገኙት ይችላሉ። gosayeayele@gmail.com

ይችላል፡፡ በብሔር/ቋንቋ ልዩነት ላይ ተመርኩዞ የሚነሳ የፖለቲካ አለመረጋጋት ወይም ግጭት ችግር የሆነባቸው አገራት የተከፋፈሉ ማሕበረሰቦች (divided society) ተብለው ይጠራሉ[1]፡፡ ይሁንና ብዝሃነት በተለይም የብሔር/ቋንቋ ልዩነት በራሱና ሁልጊዜም የአለመረጋጋት ወይም የግጭት መንስኤ አይደለም፡፡ በመሆኑም ብዝሃነት መኖሩ በራሱ የማንነት ፖለቲካዊ ግጭት ሁሌም የሚያስከትል ባለመሆኑ ብዝሃነት ያለባቸው አገሮች ሁሉ የተከፋፈሉ ማሕበረሰቦች ናቸው ማለት አይደለም፡፡

የተከፋፈሉ ማሕበረሰቦች ያለበት አገር በብሄር/ ቋንቋ ልዩነት ላይ ተመርኩዞ የሚነሳ አለመረጋጋት ወይም ግጭት ችል ሊባል የሚገባ ወይም የሚቻል ችግር አይደለም፡፡ ለዚህ ችግር ከሚሰጡ የመፍትሔ አቅጣጫዎች ውስጥ ተቋማዊው መንገድ አንዱና ዋነኛው ነው፡፡ ይህ የዴሞክራሲውና የሕገ-መንግስቱን ቅርጽ ይዘትና ንድፍን ይመለከታል[2]፡፡

በብሔር/ ቋንቋ ልዩነት ላይ ተመርኩዞ የሚነሳ የፖለቲካ አለመረጋጋት ወይም ግጭት ችግር የሆነባቸው አገራትን ምን ዓይነት የዴሞክራሲና ሕገ-መንግስት ንድፍ ሊያረግበው ወይም ሊቀንሰው ይችላል? የሚለው ላይ በንድፈ-ሐሣብ ደረጃ የዘርፉ ምሁራንን የሚያስማማ አንድ ወጥ የሆነ ንድፍ የለም፡፡ ምሁራኑ የተከፋፈሉ ማሕበረሰቦች ያሏቸው አገራት ያለባቸውን በብሔር/ ቋንቋ ልዩነት ላይ የተመረኮዘ ችግር ለማስታመምና ለመምራት ያስችላሉ የሚሏቸውን የተለያዩ የፖለቲካ ተቋማዊ አደረጃጀቶች ያቀረቡ ቢሆንም ከነዚህ ውስጥ ጐልተው የወጡት ግልጽ፣ ተነፃፃሪ ወይም ተወዳዳሪ ንድፎች ሁለት ናቸው፡፡ አንደኛው የስምምነት/ስልጣን የማጋራት/ዴሞክራሲ (Consociational Democracy) ሲሆን ሁለተኛው የማሳሳብ ዴሞክራሲ (Centripetalism) ናቸው[3]፡፡

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[1] Choudhry Sujit, Bridging Comparative Politics and Comparative Constiutional Law: Constiutional Design in Divided Soicieties: Integration or Accomodation. Oxford University Press, 2009፣ p. 4.

[2] ልዩነት (diversity or plural societies) ባለባቸው ወይም ብዙሃነት ባለባቸው አገራት በዚህ ላይ ተመርኩዞ ወይም በተያያዘ ለሚነሱ ግጭቶች ማስታረቂያ ወይም ማለዘቢያ ሶስት አጠቃላይ አቅጣጫዎች አሉ፡፡ እነዚህም ማመሳሰል (Assimilation)፣ ማዋሃድ (Integration) እና ማቻቻቻል (Accomodation) ናቸው፡፡ ማመሳሰል (Assimilation) ልዩነትን የማይቀበል ብቻ ሳይሆን ልዩነቶችን ማጥፋት እንደአቀጣጫ የሚከተል ነው፡፡ ማዋሃድ (Integration) ግለሰቦች ወይም ቡድኖች ባህላቸውን፣ ልማዳቸውን፣ ቋንቋቸውን ወይም ማንነታቸውን ማክበራቸው፣ መግለጻቸውን ባይከለክልም እንደማመሳሰልም (Assimilati on) ልዩነቶች መደፍጠጥ አለባቸው የሚለውን ባይቀበልም እንደማቻቻል አቅጣጭ (Accomodation) የመንግስት ወይም ይፋዊ ዕውቅና እንዲኖረው ግን አይፈቅድም፡፡

የማቻቻል ስትራቴጂ (Accomodation) በበኩሉ ማመሳሰልም (Assimilation) ሆነ ማዋሃድን (Integration) በጽኑ የሚቃውምና ልዩነቶች በግል ብቻ ሳይሆን ይፋዊ (Public) ዕውቅና ሊሰጣቸው ይገባል ብሎ የሚያምን ነው፡፡ ይህ ጥናት ከነዚህ አቅጣቻዎች ውስጥ የትኛው ነው ትክክለኛ ወይም በኢትዮጵያ ሁኔታ የትኛው ነው የሚያስኬደው? የሚለውን አይዳስስም፡፡ የኢትዮጵያ ፌደራላዊ ዴሞክራሲያዊ ሕገመንግስት ቀራጮች የማመሳሰልም (Assimilation) ሆነ የማዋሃድ (Integration) ፖሊሲ በኢትዮጵያ ሁኔታ የማይሰራ ነው በማለት አልተቀበሏቸውም፡፡ ለአገሪቱ ብቸኛው ሰላምን የሚያሰፍነው የማቻቻል ፖሊሲ (Accomodation) ነው ብለው ይህንን በሕገመንግስቱ አካተዋል፡፡ የኢትዮጵያ ሕዝብም የተከፋፈለ ማሕበረሰብ ነው አይደለም የሚለውን ጉዳይ ጥናቱ አይሞግትም፡፡ ጥናቱ የሚመለከተው የሕገመንግስቱ ቀራጮች በኢትዮጵያ በማንነት ላይ የተመረኮዘ ፖለቲካዊ ችግር የሆነና በማቻቻል ስትራቴጂ መፍትሄ ሊበጅለት ይገባል ብለው በማመን የቀረጹት ሕገመንግስት ንድፍ ለተባለው ችግር መፈትሄነት በቂነትና ተገቢነት ላይ ነው፡፡

[3] እንዚህን ጽንሰሃሳቦች ቀጥተኛ የሆነ ሁሉንም የሚያግባባ ቃል ስላላገኘሁ ተቀራራቢና ይገልጻቸዋል ብዬ ያሰብኩትን ቃላት ተጠቅሚያለሁኝ፡፡ የበለጠ ለመረዳት እንዲረዳ የእንግሊዘኛውን ቃል ከጎኑ ሰፍሯል፡፡ ጽንሰሃሳቦች ሁሉንም የሚያስማማ ትርጉም ስለሌላቸው የማሳሳብ (Centripetalism) እና የስምምነት/የስልጣን ማጋራት (Consociationalism) ዴሞክራሲ ንድፍ ዋና መገለጫቸው በሚመለከተው የጥናቱ ክፍል በሰፊው ተተንትኗል፡፡

የዚህ ጥናት ዓላማ የኢትዮጵያ ፌደራላዊ ዴሞክራሲያዊ ሪፐብሊክ (ኢ.ፌ.ዴ.ሪ) ሕገ-መንግሥትን ከነዚህ ንድፎች (ሞዴሎች) አንፃር መገምገም ነው፡፡ የኢ.ፌ.ዴ.ሪ ሕገ-መንግስት የማሳሳብ ዴሞክራሲ ሞዴልን (Centriptalism) አልተቀበለም፡፡ የስምምነት/የስልጣን ማጋራት/ዴሞክራሲ ንድፍን (Consociational Democracy) የሚያሳዩ ወይም የሚያመላክቱ ነገሮች የኢትዮጵያ ሕገ-መንግሥት ቢኖረውም ንድፉ የሚያዘውን አንኳር አንኳር መገለጫዎች ትታቸዋል፤ ወይም አያካትትም፡፡

ሁለቱም ንድፎች እንደሚያስቀምጡት በብሔር/ቋንቋ ማንነት ላይ ተመርኩዞ ለሚነሳ አለመረጋጋት ወይም ግጭትን ለማቻቻልና ለመምራት ሁነኛና ብቸኛ መንገዶች ከሆኑ[4] ይህ ጥናት የኢ.ፌ.ዴ.ሪ ሕገ-መንግሥት ቅርጽና ይዘት በኢትዮጵያ ያለውን የብሔር ግጭት በዘላቂነት የሚፈታ የዴሞክራሲ ንድፍ የለውም ብሎ ይከራከራል፡፡

የመጀመርያው የጥናቱ ክፍል ለተከፋፈሉ ማሕበረሰቦች አማራጭ ሆነው የቀረቡትን የማሳሳብ ዴሞክራሲና የስምምነት/ስልጣን የማጋራት/ዴሞክራሲ ንድፎች ይተነትናል፡፡ ከዚያም የኢ.ፌ.ዴ.ሪ ሕገ-መንግሥት በብሔር/ቋንቋ ላይ ተመርኩዞ ለሚነሳ ፖለቲካዊ ግጭት ለማቻቻልና ለመምራት ያስቀመጠውን ንድፍ ይዳስሳል፡፡ በመጨረሻው ክፍል የተከፋፈሉ ማሕበረሰቦች ሊኖራቸው ይገባል ከተባሉት የዴሞክራሲ/ሕገመንግስት ንድፎች አንፃር የኢ.ፌ.ዴ.ሪ ሕገመንግሥትን ይመረምራል፤ ይገመግማል፡፡

2. ለተከፋፈሉ ማሕበረሰቦች ተገቢ የሆነው የዴሞክራሲና ሕገ-መንግሥት ንድፍ፤ ንድፈ-ሃሣባዊ ዕይታ

በዓለም ላይ ያሉ አገራት ከብሔር፣ ከቋንቋ፣ ከባህል፣ ከሀይማኖት ወዘተ ልዩነት ጋር የተያያዘ ብዝሃነት አለባቸው፡፡ እነዚህ ሁሉ ልዩነቶች ሁሌም ፖለቲካዊ አለመረጋጋትን ወይም ግጭቶችን አይጋብዙም[5]፡፡ አገራቱም ከነዚህ የማንነት ልዩነቶች ጋር በተያያዘ የሚነሱ ግጭቶች የሚጋፈጡት ችግሮች መጠንና ደረጃም ይለያያል፡፡

ከነዚህ የማንነት ልዩነቶች ውስጥ በብሔር /ቋንቋ ላይ መሠረት ያደረጉ ግጭቶች አንደኛው ነው፡፡ በብሔር/ቋንቋ ላይ ተመርኩዘው የሚነሱ ግጭቶች በአንዳንድ አገራት ወደ ፖለቲካ ግጭት ይለወጣሉ፡፡ በመሆኑም ችግሩን መፍታት የግድ አስፈላጊ ነው፤ አማራጭም የለም፡፡

በብሔር /ቋንቋ ልዩነት ላይ ተመርኩዞ የሚነሳ የፖለቲካ አለመረጋጋት ወይም ግጭት ማቻቻልና መምራት እንጂ ችግሩን እስከ ወዲያኛው ለአንዴና ለመጨረሻ ግዜ መፍታት እንደማይቻል የዘርፉ ምሁራን ይገልጻሉ፡፡ የዚህን አይነት ግጭት በተገቢው መንገድ በመምራት ችግሩን መቀነስ እንጂ ሙሉ በሙሉ ማስወገድ አይቻልም፤ አይሞከርም፡፡ ታዲያ ዋነኛው ቁምነገር የግጭት አፈታት ሥርዓቱ ነው፡፡

ችግሩን ለመፍታት ከሚቀርቡ አማራጮች ውስጥ አንዱ ተቋማዊ መፍትሄ ነው፡፡ የፖለቲካ ተቋማትን በማደራጀት በብሔር/ ቋንቋ ላይ የተመረኮዘ አለመረጋጋትን ወይም ግጭትን

[4] የትኛው ንድፍ ችግሩን ይቀርፈዋል? ለሚለው ጥያቄ ቁርጥ ያለ መልስ የለም፡፡ ላይፓርትም ሆነ ሆሮዊትዝ አንዱ ያቀረበው ንድፍ ችግሩን ያባብሰዋል ከሚል ሙግት የትኛው በትክክል የችግሩ መፍትሄ ነው፤ ወይም ችግሩን የበለጠ ይቀንሰዋል በሚለው ላይ ስምምነት የለም፡፡

[5] ቁጥር 1፣ ገጽ 5 ይመለከቷል፡፡

በማቻቻል ችግሩን መቀነስ ይቻላል። ይህ ደግሞ ፖለቲካዊ ብሎም የሕግ ማዕቀፉን የሚመለከት ነው። የፖለቲካ ተቋማዊ አቅጣጫው (Political Institution) የዴሞክራሲ ንድፉን (the design of the democracy) የሚመለከት ሲሆን የሕግ ማዕቀፉ ደግሞ የሚወሰነው በሚነደፈውና ሥራ ላይ በሚውለው ሕገ-መንግሥት ነው።

በርካታ ተቋማዊ አደረጃጀቶችና ንድፎች[6] በመፍትሔነት የቀረቡ ቢሆንም ሁለት ንድፎች (ሞዴሎች) በዋነኝነት ጐልተው ይጠቀሳሉ። እነዚህ ንድፎች ተነፃፃሪና ተወዳዳሪ ናቸው። የመጀመሪያው የስምምነት (ሥልጣን የማጋራት) ዴሞክራሲ (consociational democracy) ሲሆን፣ ሁለተኛው የማሳሳብ ሞዴል (Centripetalism) ነው።[7]

የምዕራባዊያን የዴሞክራሲ ንድፍ ለተከፋፈሉ ማህበረሰቦች ተገቢ አለመሆን

በአብዛኛው በምዕራብ አገሮች በተለይም በብሪታንያና በአሜሪካ በተግባር ላይ የዋለውና በስፋት የሚታወቀው የብዙሃን ዴሞክራሲ ስርዓት (Western Majoritarian Democracy) ነው። የምዕራባውያኑ የብዙሃን ዴሞክራሲ ሥርዓት የሕዝብ ተወካዮች በአብላጫ ድምፅ የምርጫ ስርዓት (Majority or Plurality Electoral system) የሚመረጡበትና ፖለቲካዊ ውሳኔዎች በአብላጫ ድምፅ የሚወሰንበት ስርዓት ነው። የዌስት ሚኒስትር ሞዴል በመባልም ይታወቃል።

የዚህ ሥርዓት መሠረቱ ፖለቲካዊ ውሳኔዎች በብዙሃን ብልጫ ውሳኔ መስጠት ወይም ማሳለፍ ነው። ይህ የዴሞክራሲ ንድፍ (ሞዴል) ተግባራዊነትና መፍትሔ ሰጭነቱ በማሕበረሰብ ውስጥ ያሉ ልዩነቶች በብሔር/ቋንቋ/ ማንነት ላይ የተመሠረቱ ሳይሆን ጥቅምና ፍላጐት ላይ መሠረት ያደረገ ልዩነት ባለባቸው አገራት (ማህበረሰቦች) ነው።[8]

የብዙሃን ዴሞክራሲ ሥርዓት በውድድር ፖለቲካ ላይ የተመሰረተ ነው። ፓርቲዎች ፖሊሲዎቻቸውን ለህዝብ በማቅረብ ይወዳደራሉ። የብዙሃኑን ድጋፍ ያገኘው ፓርቲ መንግስት ይሆናል የተሸነፈው ደግሞ ተቃዋሚ ሆኖ ይቀጥላል። የፖለቲካ ውድድሩ የፖለቲካ አለመረጋጋት ወይም ግጭት ብዙ ጊዜ አያስከትልም። የተሸነፈው ፓርቲ ለሌላ ምርጫ ራሱን ያዘጋጃል እንጂ ስርዓቱን ለማወክ ወይም ለመገልበጥ አይንቀሳቀስም።

ይህ የብዙሃን ዲሞክራሲ ሥርዓት እንዲሰራ ያስቻለው ወይም ግጭት ብዙ ግዜ የማይጠናወተው በሁለት መነሻ ሃሳቦች ላይ የተመሠረተ ወይም የተንጠለጠለ በመሆኑ ነው[9]። የመጀመሪያው ተቃዋሚዎች በምርጫ ቢሸነፉም ፍላጐትና ጥቅማቸውን የሚያራምድና የሚያስጠብቅ ነው፤ የሚሉት ሐሣብ ተቀባይነት ካገኘ ሥልጣን ላይ

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[6] ከስምምነት ዴሞክራሲና (Consociational democracy) ከማሰሳብ ዴሞክራሲ ሞዴል (Centriptalism) በተጨማሪም ልዩነታቸውን ለማስመርም በጣም አስቸጋሪ የሆኑት እንደ Multiculturalism እና Territorial Pluralism የመሳሰሉትም እንደአማራጭ ግጭት መቀነሻ ወይም መፍቻ ይቀርባሉ። የሚከተለውን Yemlektu John McGarry et al, Integration or Accommodation? The enduring debate in conflict regulation in Constiutional Design in Divided Socities, oxford university presss, 2009, p. 51-67.

[7] ዝኒ ከማሁ ገጽ 51-67

[8] ቁጥር 1ን ገጽ 14-18 ይመለከቷል።

[9] ዝኒ ከማሁ ገጽ 18

የመውጣት ዕድል ያላቸው መሆኑ ነው[10]። ሁለተኛው ገዢ ብዙሀን ፓርቲ ወይም ፓርቲዎች ስልጣናቸውን አላግባብ በመጠቀም ለመጨቆኛ አያውሉትም፤ የሚል መነሻ ሃሳብ ነው[11]። ይህ የሚሆንበት ምክንያት ደግሞ ጥምረት የሚመሰርቱትና ወይም አብላጫ የሚሆኑት ከጉዳይ ጉዳይ ስለሚለያይ ነው። በመሆኑም የምዕራባውያን ዴሞክራሲ የተመሠረተበት መነሻ እሳቤ ልዩነቶች በማንነት (identity cleavage) ሳይሆን በጥቅምና ፈላጮት (Crosscutting cleavage) ላይ የተመሠረቱና በዴሞክራሲያዊ አግባብ መስተናገድ የሚችሉ ናቸው በሚል አስተሳሰብ ላይ ነው።

ይህ የብዙሃን ዴሞክራሲ ሥርዓት ለተከፋፈሉ ማሕበረሰቦች የማይሰራበት ምክንያት እነዚህ ሁለት መነሻ እሳቤዎች በነዚህ ማሕበረሰቦች ውስጥ ስለማይኖሩ (ስለማይገኙ) ነው። በነዚህ ማሕበረሰቦች ውስጥ ያለው ልዩነት በማንነት ላይ (identity based cleavage) እንጂ የጥቅምና ፍላጮት ላይ ብቻ የተመረኮዘ አይደለም። በተከፋፈለ ማሕበረሰብ ውስጥ የሚገኙ አናሳዎች በፖለቲካ ውድድር ወደ ሥልጣን የሚመጡበት አግባብ ጠባብ ነው፤ ወይም የለም። በተከፋፈለ ማሕበረሰብ ውስጥ ብዙ ጊዜ የሚከተለው ቋሚና ዘላለማዊ አናሳነት ተብሎ ይገለፃል[12]። አናሳዎች ሥልጣን የማግኘት ተስፋቸው በጣም ጠባብ፤ ወይም ዜሮ ነው።

አናሳዎች በምርጫ ስልጣን የሚይዙበት አጋጣሚ በጣም ትነሽ በመሆኑ የብዙሃን ዴሞክራሲ ሥርዓት የውድድር ፖለቲካ ንድፍ የተከፋፈሉ ማህበረሰብ ባለባቸው አገራት ሰላምን ሳይሆን ግጭትና አለመረጋጋትን የማስከተል ዕድሉ ከፍተኛ ነው። እንደዘርፉ ምሁራን የምዕራባውያን የብዙሃን ዴሞክራሲ ሥርዓት ለተከፋፈሉ ማሕበረሰቦች አለመረጋጋቱን ወይም ግጭቱን ከማባባስ የዘለለ ፋይዳ የለውም።

በዚህም ምክንያት የምዕራባውያን የብዙሃን ዴሞክራሲ ሥርዓት ለተከፋፈሉ ማሕበረሰቦች ላለባቸው አገራት ተገቢ አይደለም ብለው ይከራከራሉ። እነዚህ አገራትም ይህንን እንዳይተገብሩ ያስጠነቅቃሉ።

የሕገመንግስት ንድፍ አማራጮች የተከፋፈሉ ማሕበረሰቦች ላሉባቸው አገራት

ምሁራኑ የምዕራባዊያን የብዙሃን ዴሞክራሲ ለተከፋፈሉ ማሕበረሰቦች የማይሠራና አደገኛ መሆኑን ቢስማሙም ለተከፋፈሉ ማህበረሰቦች ተገቢ አማራጭ የሚሉት አንድ የዴሞክራሲ ንድፍ ግን የላቸውም። በብሔር /ቋንቋ ላይ የተመረኮዘ አለመረጋጋት ወይም ግጭት ባላቸው አገሮች ችግሩን ለማቻቻልና ለመምራት ሁሉንም የሚያስማማ ተገቢ የሆነ የሕገመንግስት ንድፍ የለም።

ችግሩን ለመቅረፍ ከሚቀርቡ የሕገ-መንግስት ንድፎች ግልጽ ልዩነት ያላቸውና ተነፃፃሪ (ተወዳዳሪ) ሆነው የቀረቡት ሁለት ናቸው። የመጀመሪያው በአረንድ ላይፓርት የሚቀነቀነው የስምምነት (ስልጣን የማጋራት) ዴሞክራሲ (consociationalism) ሲሆን፣ ሁለተኛው ደግሞ

[10] ዝኒ ከማሁ ገጽ 18

[11] ዝኒ ከማሁ ገጽ 19

[12] ዝኒ ከማሁ ገጽ 17

የማሳሳብ ዴሞክራሲ (centripetalism)[13] ነው፤ የዚህ ንድፍ አመንጭ ሮናልድ ሆሮዊትዝ ነው።

የሁለቱም ንድፎች በብሄር/ቋንቋ ላይ የተመሠረተ ግጭት ያለና ተቋማዊ መፍትሔ ሊሰጠው የሚገባ ነው፤ ከሚል መነሻ ሀሳብ ላይ የተመሠረተ ነው። ብሔር/ ቋንቋ ልዩነትን እውቅና ሰጥቶ መፍትሔ ከመስጠት ባሻገር ለመደፍጠጥ ወይም ልዩነት ለማጥፋት መሞከር ወይም ፖለቲካዊ እውቅና አለመስጠት አደገኛ መሆኑን ያሰምራሉ[14]።

ላይፓርትና ሆሮዊትዝ የምዕራባዊያን ብዙሃን ዴሞክራሲ ለተከፋፈሉ ማሕበረሰቦች ተገቢ አለመሆኑን ቢስማሙም ያቀረቧቸው አማራጭ የዴሞክራሲ ንድፎች ፍጹም የተለያዩ ናቸው። ከላይ እንደተገለጸው ላይፓርት የስምምነት (ስልጣን የማጋራት) ዴሞክራሲን (consociationalism) በመደገፍ የሚያቀርብ ሲሆን በሆሮዊትዝ የቀረበውን አማራጭ ያጣጥላል።

ሆሮዊትዝ በበኩሉ ላይፓርት ያቀረበው የዴሞክራሲ ሞዴል ችግሩን የማይፈታና ይብሱንም የብሔር ግጭት የሚያባብስ ነው፤ ብሎ ይከራከራል። የተከፋፈሉ ማሕበረሰቦች ያላቸው አማራጭ የማሳሳብ ደሞክራሲ ሞዴል (centripetalism) ብቻ እንደሆነ ይሰብካል።

ሁለቱም በጣም የተራራቀ የዴሞክራሲ ንድፍ እንዲኖራቸው የሆነበት ምክንያት በብሄር/ ቋንቋ ማንነትና ልዩነት ላይ ተመርኩዞ ለሚነሳ ፖለቲካ አለመረጋጋት ወይም ግጭት የሚፈታው የብሔር ልሂቃንን የሚያስማማ ወይም የሚወክሉበት ሥርዓት ነው? ወይስ የብሄር ልሂቃንን ሚና በማሳነስና ቦታ ባለመስጠት? በሚለው ላይ ከሚነሣ የተለያየ ግምት ነው።[15] ላይፓርት የብሄር ልሂቃንን ተመጣጣኝ ውክልና የሚያስረግጥ ሥርዓት በብሔር /ቋንቋ ላይ ተመስርቶ ሊነሳ የሚችል የፖለቲካ አለመረጋጋት ወይም ግጭት መቀነስ ያስችላል፤ ብሎ ያምናል[16]። ሆሮዊትዝ በበኩሉ የዴሞክራሲ ንድፍ የብሔር/ቋንቋ ልሂቃንን አስፈላጊነትና ሚና ማቀጨጭ ብቸኛው በተከፋፈሉ ማሕበረሰቦች ውስጥ ሊነሣ የሚችለውን በብሔር /ቋንቋ ላይ የተመሠረተ ግጭትን መቀነሻ ቁልፍ ጉዳይ ያደርጋል[17]።

2.1. የላይፓርት የስምምነት/ስልጣን የማጋራት/ ዴሞክራሲ ንድፍ (Consociationalism)

ይህ የዴሞክራሲ ንድፍ እላይ እንደተጠቀሰው በላይፓርት የሚቀነቀነው ነው። የስምምነት/ስልጣን የማጋራት ዴሞክራሲ መሠረታዊ ሐሣብ የብሔር/ ቋንቋ ቡድኖች የአስፈላሚውን ሥልጣን ማጋራት (Executive Power-sharing) ሁነኛ መገለጫው ነው።

የስምምነት/ ስልጣንን የማጋራት ዴሞክራሲ (Consociationalism) ቀዳሚ መገለጫዎችና (primary attributes) ተከታይ መለያዎች (secondary attributes) አሉት[18]። ቀዳሚ

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[13] ቁጥር 1 እና 4ን ይመለከቷል።

[14] ዝኒ ከማሁ ቁጥር 1 ገጽ 26፤ ቁጥር 4 ገጽ 53-59 ይመለከቷል።

[15] ቁጥር 1፣ ገጽ 25፣ይመለከቷል።

[16] ዝኒ ከማሁ

[17] ዝኒ ከማሁ

[18] Lijphart Arend Constiutional Design for Divided Societies, *Journal of Democracy Volume 15, Number 2 April 2004 p.97*

መገለጫዎቹ (primary attributes) ራሳቸው ሁለት ናቸው፡፡ የመጀመሪያው የተለያዩ የብሔር/ ቋንቋ ቡድኖች ያቀፈ ሥልጣን መጋራት በተለይ የአስፈፃሚ ስልጣን ማጋራት (executive power-sharing) ሲሆን፣ ሁለተኛው ብሔር/ቋንቋ ቡድኖች በውስጥ ጉዳዮች ራስን የማስተዳደር ነፃነት (regional autonomy) ነው[19]፡፡ ተከታይ መለያዎቹ (secondary attributes) ብሎ የሚያስቀምጣቸው የብሔር/ ቋንቋ ቡድኖች በተለይም አናሣዎች ጥቅምና ፍላጐታቸውን በሚመለከት ጉዳይ ላይ ድምጽን በድምጽ የመሻር መብት (veto power) እና ተመጣጣኝ ውክልና (proportional representation) ማግኘት ናቸው[20]፡፡

ላይፓርት እላይ ካመለከታቸው ቀዳሚና ተከታይ መገለጫዎች በተጨማሪ የሁለት ምክር ቤቶች መኖር (Bicameralism) እና የሕግ ሥርዓት ብዙሃነትን (Legal Pluralism) ተጨማሪ የንድፉ አካል አድርጎ ያቀርባል[21]፡፡

ላይፓርት በአንድ ጽሁፉ የተከፋፈሉ ማሕበረሰብ ያለባቸው አገራት ሕገ-መንግስት የሚፅፉ ወይም የሚቀርጹ ሰዎች ምን አይነት ዝርዝር ተቋማት ሊዘረጉ ይገባቸዋል፤ የሚላቸውን ጥርት ባለ መልኩ አመላክቷል[22]፡፡ ይህም ከመንግስት ቅርጹ እስከ ምርጫ ሥርዓት ጉዳዮችን ይመለከታል፡፡

አንደኛው የሕግ አውጭው ምክርቤት የሚመረጡበትን የምርጫ ሥርዓት ይመለከታል[23]፡፡ አባላቱ የሚመረጡበት ከላይ እንደተገለፀው በተመጣጣኝ ውክልና የምርጫ ሥርዓት መሆን አለበት፡፡

ሁለተኛው ላይፓርት ስልጣን የማጋራት ዴሞክራሲ ቀዳሚ መገለጫ ያለው የብሔር/ቋንቋ ቡድኖች በፓለቲካ ውስጥ አሳታፊነትን ሆኖ፣ ዋናው የአስፈጻሚ ሥልጣንን መጋራት ነው[24]፡፡ የአስፈጻሚው ስልጣን መጋራት ሙሉ ለሙሉ ሁሉንም የብሔር/ቋንቋ ቡድኖች የተወከሉበት ወይም ዋና ዋና የብሔር/ቋንቋ ቡድኖች የተወከሉበት ወይም ወሳኝ የሆኑ የብሔር/ ቋንቋ ቡድኖች የተወከሉበት ሆኖ ሊዋቀር ይችላል፡፡ እያንዳንዱ አገር ተገቢ ነው፤ የሚለውን አማራጭ መዘርጋት የሚችል ሲሆን የአስፈጻሚው ሥልጣንን የብሔር/ቋንቋ ቡድኖች የሚጋሩት እስከሆነ ድረስ ላይፓርት ሙሉ ለሙሉ፣ ዋና ዋና ወይም ወሳኝ ጥምር የብሔር/ቋንቋ ቡድኖች ውክልና መቼና ለምን አይነት የተከፋፈሉ ማሕበረሰቦች ተገቢ ነው? የሚለውን አላሳየም፡፡

ሦስተኛው ሥርዓተ-መንግስትን ይመለከታል፡፡[25] ላይፓርት ከፕሬዚደንታዊ ወይም ከፊል ፕሬዚደንታዊ ሥርዓተመንግስት ይልቅ ፓርላሜንታዊ ሥርዓተ-መንግስት የተከፋፈሉ ማህበረሰቦች ላለባቸው አስፈላጊ ነው፤ ብሎ ይከራከራል፡፡ ምክንያቱ ደግሞ ፓርላሜንታዊ ሥርዓተ-መንግስት ሥልጣንን ለማጋራት ከሌሎቹ አማራጮች የተመቻቸ በመሆኑ ነው፡፡

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[19] ዝኒ ከማሁ ገጽ 25 እንዲሁም ቁጥር 1 ገጽ 18-19

[20] ቁጥር 1 ገጽ 18-19

[21] ዝኒ ከማሁ ገጽ 18-19

[22] ዝኒ ከማሁ ገጽ 99-106

[23] ዝኒ ከማሁ ገጽ 100

[24] ዝኒ ከማሁ ገጽ 103

[25] ዝኒ ከማሁ ገጽ 101

ፓርላሜንታዊ ሥርዓተ-መንግስት ከፕሬዚደንታዊ ሥርዓተ-መንግስት አንፃር ቶሎ የመበተን አደጋ የተጋረጠበት ቢሆንም ላይፓርት ይህ በጣም አሳሳቢ ችግር እንዳልሆነና የተለያዩ መፍትሔዎች ማቅረብ እንደሚቻል ይናገራል። ከዚህም ውስጥ አንዱ ችግሩን በጀርመን ሕገ-መንግስት እነደተደነገገው ሕግ አውጪው አስፈፃሚውን ከስልጣን የሚያስናብተው በምትኩ ሌላ ጠቅላይ ሚኒስትር ሲሾም ነው፤ የሚለውን እንደአማራጭ ማቅረብ እንደሚቻል ይገልጻል[26]።

አራተኛው የርዕሰ-ብሔር አመራረጥን ይመለከታል[27]። የተከፋፈሉ ማህበረሰቦች ባለባቸው አገራት ላይፓርት የሚመክረው ርዕሰ-ብሔር በቀጥታ እንደ ፕሬዚደንታዊ ሥርዓተ-መንግስት በሕዝቡ መመረጥ እንደሌለበትና ለፕሬዚደንቱ ስልጣኑም በጣም ትንሽና የጌጥ ሥልጣን (Ceremonial powers) ብቻ ሊሆን ይገባል። ይህን የሚልበት ምክንያት ፕሬዚደንቱ በቀጥታ ከተመረጠ ዴሞክራሲያው ተቀባይነት (democratic legitimacy) ስለሚያስገኝለትና ትልቅ ስልጣን ከተሰጠው በሂደት ሥርዓቱ ወደ ከፊል ፕሬዚደንታዊ ሥርዓተ-መንግስትነት (Semi-presidentialism) የማዘንበል ወይም የመቀየር አደጋ ስለሚያስከትል ነው[28]።

አምስተኛው የፖለቲካ ሥርዓቱን በተመለከተ ላይፓርት የተከፋፈሉ ማህበረሰቦች ባሉበት አገር የሚመክረው እንደየአገራቱ ሁናቴ ፌዴራላዊ የፖለቲካ ሥርዓት በመዘርጋት ወይም ሥልጣንን ወደታች በማውረድ (Decentralization) ነው[29]። የማህበረሰቡ ጂኦግራፊያዊ አሰፋፈር በአንድ አካባቢ የተወሰነ ከሆነ ለማህበረሰቡ አካባቢያዊ የአስተዳደር ነጻነት ለመስጠት ፌደራላዊ የፖለቲካ ሥርዓት በጣም ተመራጭ እንደሆነ ያስረዳል።

በአጠቃላይ የፌደራል ሥርዓቱ ሥልጣንን ወደታች በደንብ ያወረደና አባል ክልላቱ በተቻለ መጠን መጠናቸው (የቆዳ ስፋትና የህዝብ ቁጥርን ይመለከታል) ትንሽ ቢሆን ይመረጣል። የአባል ክልላቱ መጠን ትንሽ ይሁን የሚልበት በሁለት ምክንያት ነው[30]። አንደኛው ማህበረሰቡ አንድ አይነት ወይም ተመሳሳይ የመሆን ዕድልን ስለሚጨምር ሲሆን ሁለተኛው ትልልቅ አባል ክልላት ካሉ በፌደራል መንግስት ላይ ሊያሳርፉ የሚችሉትን ተፅዕኖ መቀነስ ስለሚያስችል ነው[31]።

ስድስተኛው ማህበረሰቡ በአንድ መልካምድራዊ አካባቢ የማይገኝ ከሆነ ራስን የማስተዳደር ነፃነትን ግዛት ላይ መሰረት ባላደረገ መልኩ ማደራጀት እንደሚቻልና እንደሚገባ ያመላክታል[32]። ለዚህም በህንድ፣ በቤልጂየምና በኔዘርላንድ የመንግስት አኩል የገንዘብ እርዳታ ለሁሉም ትምህርትቤቶች መስጠት፤ የሐይማኖት ቡድኖችን ትምህርትቤቶችን ለመቆጣጠር ያላቸውን ፍላጎት የሚመልስና ምንም እንኳን መንግስትና ሐይማኖት መለያየት

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[26] ዝኒ ከማሁ ገጽ 101

[27] ቁጥር 17 ይመልከቱገጽ 104

[28] ዝኒ ከማሁ ገጽ 104

[29] ዝኒ ከማሁ ገጽ 104

[30] ዝኒ ከማሁ ገጽ 105

[31] ዝኒ ከማሁ ገጽ 105

[32] ዝኒ ከማሁ ገጽ 105

አለባቸው፤ የሚለውን መርህ የሚጥስ ቢሆንም መንግስትን በሐይማኖት ጉዳይ ገለልተኛ ያደርገዋል፤ ይላል[33]፡፡

ሰባተኛው ከአስፈፃሚውና ሕግ አውጪው ምክርቤት ውጪ ያለውን ሥልጣንን መጋራት ይመለከታል[34]፡፡ የተከፋፈሉ ማህበረሰቦች ባሉባቸው አገራት በአስፈፃሚውና ሕግ አውጪው ምክርቤት ብቻ ሳይሆን በሌሎች ዘርፍም ሰፋ ያለ ውክልና መኖሩን ማረጋገጥ እንደሚገባ ላይፓርት ይከራከራል፡፡ በመንግስት ስራዎች /በሲቪል ሰረቪስ/፣ በፖሊስ፣በመከላከያ እና በፍርድ ቤትም ውስጥ ሰፋ ያለ ውክልና ማረጋገጥ አስፈላጊ ነው፡፡

2.2. የማሳሳብ ዴሞክራሲ ንድፍ (Centriptalism)

ይህ የዴሞክራሲ ሞዴል/ንድፍ/ የሚያተኩረው በማሳሳብ፣ አንድ ላይ በማምጣት ወይም በማዕከላዊነት ላይ ነው[35]፡፡ መነሻ እሳቤው በተከፋፈሉ ማሕበረሰቦች ያለው በብሔር /ቋንቋ ልዩነት ላይ የተመሠረተ ግጭት የሚፈታው ላይፓርት እንደሚለው ልሂቃኑን ሥልጣን በማጋራት ሳይሆን የልሂቃኑ ሚና መቀነስና ፓርቲዎችን ከብሔርተኮር አጀንዳ ላይ አውጥቶ ወደ ማዕከላዊ አጀንዳ መግፋት ወይም ማዕከላዊ አጀንዳ ላይ እንዲያተኩሩ ማድረግ፤ በሚለው ላይ ነው፡፡

ሆሮዊትዝ በላይፓርት የቀረበውን የማስማማት/የስልጣን መጋራት/ዴሞክራሲ (consociational arrangment) ልሂቃኑን በማቻቻል በብሔር/ቋንቋ ልዩነት ላይ የተመሠረተ ግጭትን መቀነስ ይቻላል፤ የሚለውን ይተቻል፡፡ እንደሆሮዊትዝ ከሆነ ችግሩን ከመፍታት ይልቅ ያባብሱታል፡፡ ምክንያቱ ደግሞ የዴሞክራሲ ንድፉና የምርጫ ሥርዓቱ ልሂቃኑ የሚወክሉትን ብሄር/ ቋንቋ ቡድን ጥቅምና ፍላጐት ላይ ብቻ እንዲያተኩሩ የሚያደርግ በመሆኑ ነው[36]፡፡ በምርጫም ወቅት ፓርቲዎች ብሔር-ተኮር ጥቅምና ፍላጐት ላይ እንጂ የጋራ ጉዳዮች (ጥቅምና ፍላጐት) ላይ እንዳያተኩሩ ያደርጋል፡፡ ይህ በሂደት ብሔር-ተኮር ጥቅምና ፈላጐት በማተኮር የተከፋፈሉ ማሕበረሰቦች ውስጥ ያለውን ልዩነት የበለጠ ያሰፈዋል፤ ሲከፋም ወደ ግጭት ያመራል፤ የሚል ነው፡፡

ሆሮዊትዝ ያቀረበው የተሳሳቢነት (ወደየጋራ አጀንዳ የመሳብ) ዴሞክራሲ ንድፍ (centripetalism) የምርጫ ስርዓቱን በመጠቀም ፓርቲዎች ከብሔር-ተኮር ጥቅምና ፍላጐት ይልቅ ወደ ጋራ የሆኑ ጥቅምና ፍላጐቶችን እንዲመጡ መገፋፋት (incentive) ነው፡፡ በመሆኑም ፓርቲዎቹን ወደ ማዕከላዊ አጀንዳ በማምጣት ላይ ያለመ ነው፡፡ ይህን ማሳካት የሚቻለው በለዘብተኛ የብሔር ልሂቃን ነው፡፡ እንደ ሆሮዊትዝ ገለጻ የላይፓርት ንድፍ የብሔር ሊሂቃኑን ብሔርተኮር በመሆን ለዘብተኛ ከመሆን ይልቅ ጽንፈኛ እንዲሆኑ ያበረታታል፡፡ ይህ የሚሆንበት ምክንያት ማዕከላዊ ወይም ለዘብተኛ አቋም የሚይዙ ፓርቲዎችና ልሂቃን አክራሪ በሆኑ ፓርቲዎች ከባድ ፉክክር ይገጥማቸዋል[37]፡፡ ብሔር-ተኮር አጀንዳዎች ማራገብ የመመረጥ እድል ስለሚያሰፉና ለዘብተኝነት የመመረጥ እድል

[33] ዝኒ ከማሁ ገጽ 105

[34] ዝኒ ከማሁ ገጽ 105-106

[35] ቁጥር 4 ገጽ 53 ይመለከቷል፡፡

[36] ቁጥር 1፣ ገጽ 21 ይመለከቷል፡፡

[37] ዝኒ ከማሁ ገጽ 21-22

ስለሚያጠብ፤ በሂደት አክራሪ አጀንዳ የሚያራምዱ ፓርቲዎች ለዘብተኛዎችን ሚናቸውን አቀጭጨው ከጨዋታ ውጭ ሊያደርጓቸው ይችላሉ፡፡

በመሆኑም ሂደቱ አክራሪ አቋም የሚያራምዱ ፓርቲዎችንና ልሂቃንን እያጉላ ልዩነቶች እያገነነ በብሔር /ቋንቋ ላይ የተመሠረተ ግጭቱ ጥልቀትና ሥፋቱ እንዲጨምር ያደርጋል፡፡ ስለሆነም እንደሆሮዊትዝ ገለጻ የዴሞክራሲ ንድፉ ለዘብተኛ ልሂቃን አሸናፊ የሚሆኑበትና አክራሪ/ ጽንፈኛ ልሂቃን አስፈላጊነትና ሚናን ቦታ የሚያሳጣ መሆን አለበት፤ ብሎ ይከራከራል፡፡ ለዚህ ደግሞ ሁነኛ መሣሪያ አድርጐ ሆሮዊትዝ የሚወስደው የምርጫ ሥርዓቱን ነው፡፡

የምርጫ ሥርዓቱ አቀራረጽ ከብሔር/ቋንቋ ይልቅ የጋራ ጥቅምና ፈላጐት የሚያራምዱ ፓርቲዎችንና ልሂቃንን የሚሸልም፤ የሚያበረታታ መሆን አለበት፡፡ የምርጫ ሥርዓቱ አክራሪ ፓርቲዎችንና ልሂቃንን የሚያኮስሰው ከራሳቸው ብሔር/ ቋንቋ ቡድን ብቻ ሳይሆን ከሌሎች ብሔር/ቋንቋ ቡድንም ድምጽ ማግኘት እንደሚችሉና እንደሚገባቸው ሆኖ ሲቀረጽ ነው፡፡ ከብሔር/ቋንቋ ቡድናቸው ውጭ ከሆኑ ማሕበረሰቦች ድምጽ ለማግኘት ደግሞ አክራሪ ፓሊሲዎቻቸውንና አጀንዳዎቻቸውን እንዲሞርዱና እንዲያለዝቡ ይገደዳሉ፡፡ በመሆኑም እንደ ሆሮዊትዝ ገለፃ ሂደቱ ፓርቲዎችና ልሂቃኑን አክራሪ አቋሞችና አጀንዳዎች ወደማዕከላዊ/ የጋራ አጀንዳዎች እንዲመጡ ይገፋፋቸዋል፡፡ ስለሆነም በብሔር/ ቋንቋ ለይ የሚመሠረቱ ግጭቶች በከፍተኛ ደረጃ ይቀንሳሉ፡፡

ካሉት የምርጫ ሥርዓቶች ይህንን ግብ ያሳካል ብሎ ሆሮዊትዝ የተከራከሉ ማሕበረሰቦች እንዲጠቀሙበት የሚያሣስበው አማራጭ ድምጽ የምርጫ ሥርዓት (Alternative vote) የሚባለውን ነው[38]፡፡ ይህ የምርጫ ሥርዓት ላይፓርት የተከራከሉ ማሕበረሰቦች ሊኖራቸው ይገባል ብሎ፤ ካቀረበው የተመጣጣኝ ውክልና የምርጫ ሥርዓት (proportional representation) በእጅጉ የተለየ ነው፡፡

አማራጭ ድምጽ የምርጫ ሥርዓት በብዙሃን የምርጫ ሥርዓት (Majority or Plurality electoral system) ውስጥ የሚመደብ ነው[39]፡፡ የብዙሃን የምርጫ ሥርዓት (Majority or Plurality electoral system) መለያው ከተወዳዳሪዎች ውስጥ አብላጫ ድምጽ ያገኘው አሸናፊ የሚሆንበት ሥርዓት ነው[40]፡፡

አማራጭ ድምጽ የምርጫ ሥርዓት (Alternative vote) በብዙሃን የምርጫ ሥርዓት ውስጥ የሚመደብ ቢሆንም ለየት ያለ ይዘት አለው፡፡ በአማራጭ ድምጽ የምርጫ ሥርዓት (Alternative vote) ተወደዳሪው አሸናፊ የሚሆነው አብላጫ ድምጽ ስላገኘ ሳይሆን ከግማሽ በላይ ድምጽ (50%+1) ካገኘ ነው[41]፡፡ በዚህ የምርጫ ሥርዓት መራጮች አንድ

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[38] ዝኒ ከማሁ ገጽ 21

[39] Reynolds Andew et al, Electoral System Design: The New International IDEA Handbook , Stockholm, 2005, p.35

[40] ዝኒ ከማሁ ገጽ 35

[41] ዝኒ ከማሁ ገጽ 47 አማራጭ ድምጽ የምርጫ ሥርዓት በእጅጉ ከሁለት ዙር የምርጫ ሥርዓት ጋር የሚመሳሰል ሆኖ የሚለያቸው በሁለት ዙር የምርጫ ሥርዓት ምርጫው እንደስሙ በሁለት ዙር የሚካሄድ መሆኑ ነው፡፡ በአማራጭ ድምጽ የምርጫ ሥርዓት ግን ምርጫውን ሁለት ዙር ማካሄድ ሳያስፈልግ መራጮች በድምጽ መስጫ ወረቀት ላይ እንደየደረጃቸው ተወደደሪዎቹን እንደመርጡ ይደረጋል፡፡

የሚፈልጉትን ተወዳዳሪ ብቻ ሳይሆን የሚመርጡት በምርጫ መስጫ ወረቀቱ ላይ ተወደዳሪዎቹን ቁጥር በመስጠት እንደ ምርጫ ፍላጐታቸው በደረጃ ያመለክታሉ፡፡ ከተሰጠው ድምጽ ውስጥ ከግማሽ በላይ ድምጽ በአንደኛ ደረጃ የተመረጠ ካለ አሸናፊ ይሆናል፡፡ ከግማሽ በላይ ድምጽ ያገኘ ተወደዳሪ ከሌለ አነስተኛ ድምፅ ያገኘው ተወዳዳሪ ይወገድና የመራጮች ሁለተኛ ደረጃ ምርጫቸው ከፍ ያለ ላገኙት ይደመርላቸዋል፡፡ በዚህ ሂደት ድምጹ እየተደመረ ከግማሽ በላይ ድምጽ ያገኘው ተወዳዳሪ አሸናፊ ይሆናል፡፡

እንደ ሆሮዊትዝ አገላለጽ አማራጭ ድምጽ የምርጫ ሥርዓት (Alternative vote) ከሌሎች የምርጫ ዓይነቶች የተከፋፈሉ ማሕበረሰቦች ተመራጭ/ የተሻለ የሚያደርገው ፖርቲዎችንና ልሂቃኑን የምርጫ አጀንዳቸውንና ፖሊሲዎቻቸውን ብሔር/ቋንቋ ዘለል ሆኖ ወደ ጋራ ጥቅምና ፍላጐት የሚገፋቸው ስለሆነ ነው[42]፡፡ በምርጫ ስርዓቱ ተመራጩ/ተወዳዳሪው ከግማሽ በላይ ድምጽ ማግኘት ስለሚገባውና አክራሪ አጀንዳ ማራመዱ ድምጽ የማግኘት እድሉን ስለሚያጠበው የጋራ ጥቅምና ፍላጐት ጉዳዩች ላይ እንዲያተኮር ያደርገዋል፡፡ በዚህ ምርጫ ሥርዓት ለማሸነፍ/ድምጽ ለማግኘት ከብሔር/ቋንቋ ውጪ ያሉ ማሕበረሰቦች ድምጽ ማግኘት ይገባዋል፡፡ ይህ ደግሞ ሊሳካ የሚችለው ፓርቲዎችና የብሔር ልሂቃን የሚያራምዱት አጀንዳ ከተወዳዳሪው/ከተመራጩ ብሔር/ቋንቋ ውጪ ያሉ ማሕበረሰቦችን ጥቅምና ፍላጐት የሚያንፀባርቅ ከሆነ ብቻ ነው፡፡

በዚህ መልኩ የምርጫ ሥርዓቱ ፖርቲዎችንና ልሂቃንን ወደ ማዕከልና አቻቻይ አጀንዳ በመግፋት አክራሪ አጀንዳ የሚያራምዱ ፓርቲዎችንና ልሂቃንን ያዳክማል፤ ያኮሰምናል፡፡ አክራሪ ፖርቲዎችና ልሂቃን ለዘብተኛ ፖሊሲዎችን እንዲቀበሉና እንዲያራምዱ በማመቻቸት በብሔር/ ቋንቋ ላይ የተመሠረተ ግጭት እንዲቀንስ ይረዳል[43]፡፡

በተለይም በናይጀሪያ ያለውን ፕሬዝደንቱን የሚመረጥበት መንገድ መከተል ለተከፋፈሉ ማሕበረሰቦች አስፈላጊ እንደሆነ ይገልጻል፡፡ በናይጀሪያ ሕገ-መንግስት መሠረት ፕሬዚደንቱ ከግማሽ በላይ ድምጽ ማግኘት ብቻ ሳይሆን፣ 25% የሚሆን የክልሎች ድምጽ ማግኘት ይጠበቅበታል[44]፡፡ ይህ ድንጋጌ ፕሬዚደንቱ የመመረጥ ዕድሉን ለማስፋት ድምጽ አገኛለሁ፤ ብሎ ከሚያገኝበት የራሱ ብሔር/ ቋንቋ ቡድኖች የሚገኝበት ክልሎችን ብቻ ሳይሆን ሌሎችም ድምጽ እንዲሰጡት የነሱን ጥቅምና ፍላጐት የሚያራምድ ፖሊሲ/ አጀንዳ ይዞ መቅረብ ይኖርበታል፡፡ ሆሮዊትዝም አጽኖት የሚሰጠው በምርጫ ሥርዓቱ አስታራቂነትና አለዛቢነት ላይ ነው፡፡

አሀዳዊ ወይም ፌደራላዊ የመንግሥት ሥርዓትን በሚመለከት ሆሮዊትዝ አሀዳዊ ሥርዓተ-መንግስት የተከፋፈሉ ማህበረሰቦች ሊኖራቸው ይገባል ብሎ ባይከራከርም የፌደራል ሥርዓተ-መንግስት አስታራቂነትና አለዛቢነት ጥቅምን ከግንዛቤ በመውሰድ የተከፋፈለ ማሕበረሰቦች ይህን ሥርዓተ-መንግስት እንዲያቋቁሙ ያበረታታል[45]፡፡ የፌደራል ሥርዓተ-

[42] ቁጥር 1 ይመልከቱ ገጽ 21

[43] ዝኒ ከማሁ ገጽ 21-26

[44] ቁጥር 4 ገጽ 54 እንዲሁም የ1999 (የአውሮፓ ካላንደር) የናይጀሪያ ፌዴራላዊ ሪፐብሊክ ሕገመንግስት ክፍል 133 እና 134ን ይመለከቷል፡፡.

[45] ዝኒ ከማሁ

መንግስት ሥልጣንን ከማዕከል ወደክልል ለመውሰድ ዕድል የሚሰጥ በመሆኑም ይህንን ሥርዓተ-መንግሥት ይደግፋል፡፡

3. የኢ.ፌ.ዴ.ሪ ሕገ-መንግሥት ንድፍ

የኢ.ፌ.ዴ.ሪ ሕገ-መንግሥት ዋና አጀንዳ/ ዓላማ በብሔር/ቋንቋ ልዩነት ላይ የተመሠረተ አለመረጋጋት ወይም ግጭት ለመፍታት መሆኑ አያከራክርም፡፡ ሕገ-መንግስቱ የተቀረፀበትና የፀደቀበት ጊዜና ሁኔታም፣ አገሪቱ ብሔር-ተኮር የነፃነት ትግል ሲያካሂዱ የነበሩ ቡድኖች ማዕከላዊ መንግስትን በ1983 ዓ.ም አሸንፈው ከወጡ በኋላ መሆኑ ሕገ-መንግሥቱ እንደ ዋነኛ በብሄር/ ቋንቋ ማንነት ላይ ተመርኩዞ ለሚነሳ ግጭት እንደ መፍቻ መንገድ ለመወሰዱ በቂ ማስረጃ ነው[46]፡፡

ከዚህም በላይ ሕገ-መንግስቱ ከመግቢያው ጀምሮ አንኳር አንኳር የሚባሉ አንቀጾቹ በዚህ ጉዳይ ላይ ያተኮሩ መሆናቸው አሌ አይባልም፡፡ የሕገ-መንግስቱ ምሰሶ የቆመው በብሔር/ ቋንቋ ቡድኖች ጥቅምና ፈላጐት ነው፤ ቢባል ማጋነን አይሆንም፡፡ ይህ የሕገ-መንግስቱ የማዕዘን ድንጋጌ ተብሎ ከሚወሰደው አንቀጽ 39 ጀምሮ መግቢያው፣ አንቀጽ 8፣ አንቀጽ 47፣ አንቀጽ 48፣ አንቀጽ 61 እንደሁም በነዚህ ላይ ተንተርሰው በፌደራልና ክልል መንግስታት ስላለው የሥልጣን ክፍፍል የሚያውጁት አንቀጾች፤ 50፣ 51፣ 52፣ 55፣ 96፣ 97፣ 98፣ 99 ሕገ-መንገስቱ የኢትዮጵያ ማሕበረሰብ የተከፋፈሉ ማሕበረሰብ የነበረና መሆኑን፤ በኢትዮጵያ የነበረውና ያለው ግጭት ብሔር/ቋንቋ ይዘት ነበረው፤ እንዲሁም አለው፤ ከሚል መነሻ ሐሣብ የተነሳ መሆኑን መመልከትና መገንዘብ ይቻላል፡፡

ስለዚህም ሕገ-መንግስቱ ፖለቲካዊ ፋይዳው ከፍተኛ መፍትሔ ሊሰጠው ይገባል፤ ብሎ የወሰደው በብሔር/ቋንቋ ልዩነት ላይ የተመሠረተ ግጭት ነው፡፡ በዚህ ረገድ ማመሳሰል/ ልዩነትን ማጥፋት ፖሊሲ (Assimilation) እንዲሁም ማዋሃድ (Integration) ፖሊሲ ብሔር/ቋንቋ ላይ የተመሠረተ ግጭት ለመፍታት እንደ አማራጭ ፖሊሲ ያልተቀበለውና እንዲያውም የማመሳሰል ወይም ማዋሃድ ፖሊሲ በገባው ፓርቲና በሌሎችም በኢትዮጵያ ያሉ ብሄረሰቦችን ማንነትን ለማጥፋት የታቀደ ሴራ ተደርጎ የተሰበከና አሁን ይህንን ማንሳት የተከነነ/ነውር (taboo) ሆኗል፡፡ በመሆኑም ሕገ-መንገሥቱ በብሔር/ቋንቋ የተመረኮዘ ልዩነት ማስታረቂያው፤ የማቻቻል ፖሊሲ (Accomodation) ብቻ እንደሆነ ያቀርባል፡፡

3.1. የሕገ-መንገስቱ የማቻቻል ፖሊሲና ስትራቴጂ

የኤ.ፌ.ዴ.ሪ ሕገ-መንግሥት መሠረቱ በብሔር፣ ብሔረሰብ፣ ሕዝብ ማንነት ላይ የተገነባ ነው፡፡ መነሻውና ማጠንጠኛውም የብሔር፣ ብሔረሰቦች፣ ሕዝቦች ጥቅምና ፍላጐት ላይ ነው፡፡ የማዕዘን ድንጋዩም የራስን አድል በራስ መወሰን መብት ነው፡፡ ሕገ-መንግስቱ የቆመበት፣ የሚሠራበት፣ የሚፈርስበትም በብሔር፣ ብሔረሰቦች፣ ሕዝቦች ፈቃድና ፍላጐት ላይ ነው፡፡

[46] ደርግን ከስልጣን ሲወርድ ብሄርተኮር ከነበሩት ድርጅቶች ውስጥ ሕ.ወ.ሀት (የትግራይ ሕዝብ ነፃ አውጭ ድርጅት፣ የኤርትራ ሕዝብ ነፃ አውጭ ድርጅት፣ ኦ.ነ.ግ (የኦሮሞ ሕዝብ ነፃ አውጭ ድርጅት) ዋና ዋናዎቹ ነበሩ፡፡

የሕገ-መንግስቱ በብሔር/ቋንቋ ማንነት ላይ የተመሠረተ አለመረጋጋት ወይም ግጭት መፍቻ ቁልፍ የራስን እድል በራስ መወሰን መብት የላይ የቆመ ነው። የሕገመንግስቱና የዴሞክራሲው ንድፍ፣ ቅርጽና ይዘት የሚፈሰው ከዚሁ ከብሔር፣ ብሔረሰቦችና ሕዝቦች የራስን አድል በራስ መወሰን መብት ነው።

በመሆኑም በመጀመሪያ ብሔር ብሔረሰቦችና፣ ሕዝቦች ሉዓላዊ ሥልጣን ባለቤትነት ደንግጓል[47]። የሕገ-መንግሥቱ መግቢያ የሚጀምረው እኛ የኢትዮጵያ ሕዝቦች ብሎ ሳይሆን እኛ የኢትዮጵያ ብሔርብሔረሰቦችና ሕዝቦች... ብሎ ነው። ሉአላዊ ስልጣን የብሔር ብሔረሰቦችና ሕዝቦች እንደ ቡድን እንጂ ሉዓላዊ ስልጣን፤ የአጠቃላይ የኢትዮጵያ ሕዝቦች እያንዳንዱ ኢትዮጵያዊ ተደምሮም እንዳልሆነ መገንዘብ ይቻላል። የሕገ-መንግሥት መግቢያ የተገለጸበት ዓረፍተ-ነገር የቃልኪዳን ስምምነቱ አባላት ግለሰቦች በድምር ሳይሆን ብሔር ብሔረሰቦችና ሕዝቦች ብቻ ናቸው።

የኢትዮጵያ ሰሪዎችም ሆኖ አፍራሾች ብሔር ብሔረሰቦችና ሕዝቦች ናቸው። የመግቢያው ዓረፍተ-ነገር ሆነ ከላይ የተገለጹት ሌሎች የተለያዩ አንቀጾች የሚያስረግጡት ይሄንን ነው።

ሁለተኛ የሕገ-መንግሥቱ መገለጫ ብሔር-ተኮር የፌደራል ሥርዓት-መንግስት ማቋቋሙ ነው። ይህ የሚያሰኘው በአንቀጽ 47 የተዘረዘሩት አባል ክልላት በዋነኛነት በብሔር ላይ የተመረኮዙ መሆናቸው ነው። በርግጥ በአገሪቱ ከሰማንያ የማያንሱ የብሔር/ ቋንቋ ቡድኖች እንደሚኖሩ ቢገመትም የኢ.ፌ.ዴ.ሪ ሕገ-መንግስት እያንዳንዱ ብሔር/ ቋንቋ ቡድን ክልል አድርጐ አላደራጀም። ነገር ግን በንድፈ-ሀሳብም ሆነ በሕገ-መንግስቱ ደረጃ ሁሉም ብሔር/ ቋንቋ ቡድን የራሱን ክልል መመስረት የሚያረጋግጥ በመሆኑ እንዲሁም የድንበር ማካለል ውስጥ አንደኛው መስፈርት ማንነትን ማድረጉ ሲታይ ብሔር-ተኮር የፌደራል ስርዓት የገነባ ተደርጐ ሊወሰድ ይችላል።

ሦስተኛ ልዩ የሕገ-መንገሥቱ መገለጫና በብሔር/ ቋንቋ መሠረት ያደረገ ግጭትን መፍቻ አድርጐ የወሰደው የራስን እድል በራስ ማስተዳደር አካል ወይም ተቀጥላ ተደርጐ ሊወሰድ የሚችለው የመገንጠል መብትን ማረጋገጡ ነው[48]።

ከላይ ከተገለጹት ዋነኛ የሕገ-መንግስቱ መሠረታዊ በብሔር/ቋንቋ ላይ ተመርኩዞ የሚነሳ ግጭት መፍቻ ስትራቴጂዎች በተጨማሪ ሕገ-መንግስቱ ያቋቋመው ሥርዓተ-መንገሥት ፖ`ርላሜንታዊ ነው[49]። የምርጫ ሥርዓቱም በግልጽ በሕገ-መንግስቱ የተመለከተ ሲሆን ካሉት የምርጫ ሥርዓት አይነቶች የአብላጫ ድምጽ የምርጫ ሥርዓት እንደሆነ ደንግጓል[50]።

[47] የኢ.ፌ.ዴ.ሪ ሕገመንግስትን አንቀፅ 8 ይመለከቷል። የሕገመንግሥቱ መግቢያ፣ አንቀጽ 8፣ አንቀጽ 39 እና አንቀጽ 47 ተነጣጥለው የማይታዩ ናቸው።

[48] የኢ.ፌ.ዴ.ሪ ሕገመንግስት አንቀፅ 39 ይመለከቷል።

[49] የኢ.ፌ.ዴ.ሪ ሕገመንግስት አንቀፅ 45፣ 69-77 ይመለከቷል።

[50] ዝኒ ከማሁ አንቀፅ 54(2)

ከላይ እንደተገለጸው ሕገ-መንግስቱ ከአሀዳዊ ሥርዓት ይልቅ ፌደራላዊ የፖለቲካ ሥርዓት መርጧል[51]። የመንግስት ስልጣንም በፌዴራልና በክልል መንግስታት መካከል አከፋፍሏል። የሥልጣን ክፍፍሉ የገቢ ምንጮችንም ይመለከታል[52]።

ሕገ-መንግስቱ ሁለት ምክርቤቶች እንዳሉት ቢደነግግም ሁለቱም እኩል ሥልጣን የላቸውም። በሕገ-መንግስቱ መሠረት የታችኛው ምክርቤት የተወካዮች ምክርቤት ነው። ይህ ምክርቤት የተዋቀረው በሕዝብ በቀጥታ በአብላጫ የምርጫ ሥርዓት በተመረጡ ተወካዮች ሲሆን የምክርቤቱ ሥልጣን ለፌደራሉ መንግስት በተሰጡት ሥልጣኖች ላይ ሕግ ማውጣት ነው[53]። አስፈጻሚው የሚወጣውና የሚዋቀረውም ከዚሁ ምክርቤት ነው[54]።

ሁለተኛው ምክርቤት የፌደሬሽን ምክርቤት ሲሆን የብሔር፣ ብሔረሰብ፣ ሕዝብ ተወካዮች የተዋቀረ ምክርቤት ነው[55]። በፌደራሉ ደረጃ በዋነኝነት በፌዴሬሽን ምክርቤት ውስጥ የብሔር ብሔረሰብ፣ ሕዝቦች የመወከል መብት ነው። እንደ ሕገ-መንግስቱ እያንዳንዱ ብሔር ብሔረሰብ፣ ሕዝብ አንዳንድ ተወካይ የሚኖረው ሲሆን ተጨማሪ አንድ ሚሊዮን የሕዝብ ብዛት ያለው ብሔር ብሔረሰብ፣ ሕዝብ አንድ ተጨማሪ ተወካይ ይኖረዋል።[56]

ሕገ-መንገስቱ የብሔር ብሔረሰብ፣ ሕዝቦች ተመጣጣኝ ውክልና በዚህ መልኩ እንደሚያገኙ ያመላክት እንጂ የፌዴሬሽን ምክርቤቱ እኩል ሕግ የማውጣት ስልጣን ከተወካዮች ምክርቤት ጋር እንዲኖረው ስላልተደረገ ብሔር ብሔረሰቦችና ሕዝቦች በዚህ መብት አኳያ የመጠቀም መብታቸው ውጤታማነት አጠቃያቂ ነው። ብሔር ብሔረሰቦችና ሕዝቦች በፌዴሬሽን ምክርቤት ውክልና ቢኖራቸውም እኩል ሕግ የማውጣት ስልጣን በሌለበት ሁኔታ ብሔር ብሔረሰቦችና ሕዝቦች የፌደራል መንግስት በሚያወጣው ፖሊሲ ላይ ተጽእኖ በማሳረፈ የጋራ ማስተዳደር መርህን ለመተግበር ብሎም የተመጣጣኝ ውክልና የማግኘት መብቱ ውጤታማ እንዳይሆን አድርጐታል።

3.2. የኢትዮጵያ ሕገ-መንግስት የተከፋፈሉ ማሕበረሰቦች ሊከተሏቸው ይገባል ከተባሉት አማራጭ ንድፎች አንፃር

በጥናቱ በመጀመሪያው ክፍል ከቀረቡት የተከፋፈሉ ማሕበረሰቦች ያሉባቸው አገራት ሊኖሯቸው ስለሚገባው የሕገ-መንግስት ንድፍ አንፃር የኢትዮጵያ ንድፍ በደፈናው ወይም በጠቅላላው ሁለቱን ንድፎች አይቀበልም ወይም ከነሱ የተለየ ነው።

የኢትዮጵያ ሕገ-መንግስት ሆሮዊትዝ ለተከፋፈሉ ማህበረሰቦች ሊወስዱትና ሊተገብሩት የሚገባቸው፤ ብሎ ያቀረበውን የተሣሣቢነት ዴሞክራሲ ንድፍ (centripetalism) ጠቅላላ ትቶታል ወይም አልተቀበለም። የማሳሳብ ዴሞክራሲ ንድፍ (centripetalism) ለተከፋፈሉ ማህበረሰቦች የሚያዘው መድሐኒት የአማራጭ ድምጽ የምርጫ ሥርዓት (Alternative

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[51] ዝኒ ከማሁ አንቀፅ 1፣50-52፣94-100 ይመለከቷል።

[52] ዝኒ ከማሁ አንቀፅ 51፣ 52፣ 55፣ 96፣97፣ 98፣ 99

[53] ዝኒ ከማሁ አንቀፅ 55

[54] ዝኒ ከማሁ አንቀፅ 56 እና 72

[55] ዝኒ ከማሁ አንቀፅ 61

[56] ዝኒ ከማሁ አንቀፅ 61

Vote) ነው። ኢትዮጵያ የመረጠችው የምርጫ ሥርዓት ደግሞ በብዙሃን የምርጫ ስርዓት (Majority or Plurality electoral system) ውስጥ የሚመደበውን አብላጫ ድምፅ የምርጫ ሥርዓት (First Past the Post) ነው። በመሆኑም ኢትዮጵያ ሕገ-መንግስት የቀረጹ ሰዎች በብሄር/ ቋንቋ ላይ ተመርኩዞ የሚነሳ የፖለቲካ አለመረጋጋት ወይም ግጭት ያለባቸው አገራት ሊኖራቸው ይገባል ብሎ ያቀረበውን የሆሮዊትዝ ንድፍ አልተቀበሉትም።

የኢትዮጵያን ሕገ-መንግስት የቀረጹ ሰዎች በተወሰነም ደረጃ ቢሆን በንዱፉ ውስጥ ለማካተት ሙከራ ያደረጉት የላይፓርትን የስምምነት/ስልጣን የማጋራት ንድፍ (consociationalism) ነው። ይሁንና አንኳር የተባለውን የስምምነት/ስልጣን የማጋራት ንድፍ (consociationalism) ስለማያካትት የኢትዮጵያ ንድፍ የላይፓርት ንድፍን ከመቅረብ ይልቅ ይርቃል።

የኢትዮጵያው ንድፍ ከላይፓርት የስምምነት/ስልጣን የማጋራት ንድፍ (consociationalism) በዋነኛነት የሚጋራው በውስጥ ጉዳዮች ላይ እንደ ትምህርትና ባሕል የመሳሰሉት ላይ የመወሰን ነፃነት ክልላዊ/ አካባቢያዊ ራስን የማስተዳደር ነፃነቶች/ እና በተወሰነ ደረጃ ተመጣጣኝ ውክልና ነው። ከዚህ ውጭ አንኳር የሆኑትን የማስማማት/ ስልጣን ማጋራት ንድፍ አላካተተም። አንደኛ የምርጫ ስርዓቱ የተመጣጣኝ ውክልና (Proportional Representation) መሆን እንደሚኖርበት ላይፓርት ያመላከተ ቢሆንም የኢትዮጵያ ሕገ-መንግስት የደነገገው የምርጫ ስርዓት የአብላጫ ድምፅ የምርጫ ስርዓት (First Past the Post) ነው። ሁለተኛ የአስፈፃሚ ስልጣን መጋራትን በተመለከተ የኢ.ፌ.ዴ.ሪ ሕገ-መንግስት ምንም የደነገገው ነገር የለም[57]። ሶስት ላይፓርት ሁለት ምክርቤቶች ማዋቀር እንደ ተጨማሪ የስምምነት ዴሞክራሲ ገፅታዎች ያቀረበና የኢትዮጵያ ሕገመንግስቱም ሁለት ምክርቤቶች መዋቀራቸውን ቢደነግግም የኢትዮጵያው ሁለተኛው ምክርቤት ሕግ የማውጣት ሥልጣን የለውም።

ስለዚህ የኢትዮጵያ የሕገ-መንግስት ንድፍ በአማራጭነት የቀረቡትን የላይፓርትንም ሆነ የሆሮዊትዝ ንድፎች አይቀበልም፤ አይተገብርም። በመሆኑም የሁለቱም ንድፎች አቀንቃኞች/ ደጋፊዎች በተከፋፈለ ማሕበረሰብ ሊኖር የሚገባው ንድፍ እነሱ እንደሚሉት ከሆነ ኢትዮጵያ ችግሩን ለመቅረፈ የቀረፀችው የፖሊሲና የሕግ ማዕቀፈ ግማሽ እንጂ ሙሉ መልስ አይደለም። በሌላ አባባል በብሔር/ ቋንቋ ተመርኩዞ ለሚነሳ የፖለቲካ አለመረጋጋት ወይም ግጭት ሁነኛ መፍትሔው የስምምነት/ የስልጣን ማጋራት/ዴሞክራሲ (Consociationalism) ወይም የማሣሣብ ዴሞክራሲ (centripetalism) ከሆነ የኢትዮጵያ ሕገ-መንግስትን የቀረፁት እንዳሰቡት ለችግሩ ሁነኛ መፍትሔ አልሰጡም።

ይልቁንም የኢትዮጵያው የሕገ-መንግስት ንድፍ የአብላጫ ድምፅ ምርጫ ሥርዓት ላይ መሰረት ባደረገ የብዙሃን ዴሞክራሲ የተቃኘ ነው። ይህ ደግሞ ላይፓርትም ሆነ ሆሮዊትዝ የተከፋፈሉ ማሕበረሰቦች የምዕራባውያን አይነት ብዙሃን ዴሞክራሲ እንዳይሞክሩት ብሎም

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[57] በተግባር በሥልጣን ላይ ያለው ፓርቲ የአስፈጻሚውን ጥንቅር በብሔር ውክልና ላይ የተመሰረተ ስብጥር እንዲሆን የተመሰረተ እንዲሆን የሚሞክር የሚታወቅ ቢሆንም ሁለት መሰረታዊ ገደቦች አሉበት። የመጀመሪያው ተመጣጣኝ አይደለም። ሌላው ፓርቲው የአራት ፓርቲዎች ግንባር እንደመሆኑ ግንባሩ ውስጥ ያልታቀፉ የብሄር/ ቋንቋ ቡድኖች መኖራቸው ሊዘነጋ አይገባም።

እንዳይተገብሩ አበክረው የሚመክሩትንና የሚያስጠነቅቁትን ቸል በማለት ሳይቀይር፣ ሳይክልስ የኢትዮጵያ ሕገ-መንግስት የምዕራባውያን የብዙሃን ዴሞክራሲ ንድፍ ተቀብሏል፡፡

መደምደሚያና አስተያየት

ላይፓርቲና ሆሮዊትዝ የምዕራባዊያን ብዙሃን ዴሞክራሲ ለተከፋፈሉ ማህበረሰቦች ተገቢ አለመሆኑን ቢስማሙም በብሄር/ቋንቋ ማንነት ላይ ተመርኩዞ ለሚነሳ ፖለቲካዊ አለመረጋጋት ወይም ግጭት የሚያዙት መድሐኒት ግን በመሠረታዊነት የተለያየ ነው፡፡

ላይፓርት የስምምነት (ሥልጣን የማጋራት) የዴሞክራሲ ንድፍ ሆሮዎትዝ በበኩሉ የማሳሳብ የዴሞክራሲ ንድፍ አማራጮች አቅርበዋል፡፡ ይህ የሆነበት ምክንያት ችግሩን ሊፈታ የሚችለውና የሚገባው የብሄር ሊሂቃንን ስልጣን በማጋራት ወይስ የነሱን በፖለቲካ ሚና በማሳነስ ወይም በማቀጨጭ፤ በሚለው ላይ የተለያየ አቋም ስላላቸው ነው፡፡ ላይፓርት የመጀመሪያውን ሲደግፍ ሆሮዊትዝ ሁለተኛውን ይደግፋል፡፡

ላይፓርት የብሄር ሊሂቃንን ሥልጣን በማጋራት ችግሩን መቅረፍ ይቻላል ብሎ ስለሚያምን ሥልጣን የማጋራት ዴሞክራሲ ለተከፋፈሉ ማህበረሰቦች ተገቢው የሕገ-መንግስት ንድፍ ነው፤ ብሎ ይከራከራል፡፡ ሆሮዊትዝ በበኩሉ ችግሩ የሚፈታው የብሄር ልሂቃንን ሥልጣን በማጋራት ሳይሆን ልሂቃኖቹ በፖለቲካ ሂደቱ ያላቸውን ወይም የሚኖራቸውን ሚና በማቀጨጭ ነው፤ ብሎ ስለሚያምን በአማራጭ ድምፅ የምርጫ ስርዓት መሰረት ያደረገ የሕገመንግስት ንድፍ ለተከፋፈሉ ማህበረሰቦች ተገቢ ነው፤ ብሎ ይከራከራል፡፡

ሁለቱ የዘርፉ ምሁራን የተከፋፈሉ ማህበረሰቦች ያሉባቸው አገራት ሊኖራቸው ይገባል፤ ብለው ከሚያቀረቡት የዴሞክራሲ ንድፍ አንፃር የኢ.ፌ.ዴ.ሪ ሕገ-መንግስት የራቀ እንደሆነ መገንዘብ ይቻላል፡፡ የኢ.ፌ.ዴ.ሪ ሕገ-መንግስት የማሳሳብ ዴሞክራሲ ንድፍ (Centripetalism) የሚጠይቀውን የአማራጭ የምርጫ ስርዓት (Alternative vote electoral system) አልተቀበለውም፡፡ የአካባቢያዊ ነጻነትና ብሄር ብሄረሰብና ሕዝቦች ተመጣጣኝ ውክልና የማግኘት መብት የኢ.ፌ.ዴ.ሪ ሕገ-መንግስት እውቅና የሰጠ ቢሆንም የስልጣን መጋራት የዴሞክራሲ ንድፍ (consociationalism) አንኳር የሆኑትን ተመጣጣኝ የምርጫ ስርዓትና የአስፈጻሚውን ስልጣን መጋራት በግልጽ ሳያስቀምጥ አልፏቸዋል፤ ወይም ዘሏቸዋል[58]፡፡ በመሆኑም ከንድፈ-ሃሳብ አንጻር ሁለቱ ምሁራን የሚያቀርቧቸው ንድፎች ብቻ ከሆኑ ብሔር/ ቋንቋ ላይ ተመርኩዞ ለሚነሱ ግጭቶች መግራትና መምራት የሚያስችሉት የአገራችን የዴሞክራሲው ንድፍ ርቀት የማስኬድ ዕድሉ በጣም የሳሳ ነው፡፡

ከንድፍ ውጪ ከተግባር አንፃር የኢ.ፌ.ዴ.ሪ ሕገ-መንግስት ብሔር/ቋንቋ ላይ ተመርኩዞ የሚነሱ ግጭቶችን የመግራትና የመምራት ብቃቱን ለመገምገም አስቸጋሪ ነው፡፡ የኢ.ፌ.ዴ.ሪ ሕገ-መንግስት ከልደት እስከ ወጣትነቱ በተቃውሞና በድጋፍ የታጀበ ጎዞ ተጉዟል፡፡ ይህ ሕገ-መንግስት 23 ዓመታት አስቆጥሯል፡፡

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[58] ቁጥር 17 ይመለከቷል፤ ላይፓርት በዋነኝነት ቤልጅየምንና ደቡብ አፍሪካን እንደጥሩ ምሳሌ ያጣቅሳል፡፡ የቤልጅየም ሕገመንግስት ካቢኔው በአብዱል ቁጥር ከደችና ከፈረንሳይኛ ተናጋሪዎች እንዲዋቀር ሲደነግግ፣ የደቡብ አፈሪካው ሕገመንግስት ከዚህ በተለየ በፓርላማ በትንሹ 5% መቀመጫ ያገኘ ፖለቲካ ፓርቲ ተመጣጣኝ በሆነ ሁኔታ በካቢኔው ውስጥ የመሳተፍ መብት ይሰጣል፡፡ ቡድኖቹን መለየት ቀላል ከሆነ የቤልጅየም ሞዴል የተሻለ ሲሆን፣ ይህ አስቸጋሪ ከሆነ የደቡብ አፍሪካው የተሻለ አማራጭ ነው ብሎ ይከራከራል፡፡

የኢ.ፌ.ዴ.ሪ ሕገ-መንግስት ደጋፊዎች እንዳሉት ሁሉ ተቃዋሚዎችም አሉት፡፡ ለዚህ አንድ ማሣያ በተቀናጀ የተቃውሞ ፓለቲካ ያሉ ቡድኖች አሁንም መሠረታዊ በሆኑ የሕገ-መንገስት መርሆዎች ላይ ተቃውሞ ያሰማሉ፡፡ ይህ ተቃውሞ በፌደራል ስርዓቱ ብሔር-ተኮርነትና እስከ መገንጠል መብቶች እንዲሁም በምርጫ ሥርዓቱ ላይ ያተኩራል፡፡ አገራዊ ምርጫ በተካሄደም ቁጥር የምርጫ አጀንዳ ሆኖ የሚቀርበው ከሕገ-መንገስቱ መልስ ባሉ ጉዳዮች እንደ ኢኮኖሚያዊ ማሕበራዊ ሳይሆኑ ሕገ-መንግስቱ ራሱ ነው፡፡

ይህ እንደ አንድ ትልቅ ፈተና ሊወሰድ ቢገባውም አጠቃላይ በብሄር/ ቋንቋ ላይ ተመርኩዞ ለሚነሳ የፖለቲካ አለመረጋጋት ወይም ግጭት በመቀነስ ረገድ የሕገ-መንግስቱን ስኬትና ድክመት በዚህ መመዘን አስቸጋሪ ነው፡፡ በተለይ በአሁኑ ሰዓት የሕገ-መንግስቱ ስኬትና ድክመት ግምገማ እጅግ ቁልፍ የሆነው አብይ ችግር አሁንም በስልጣን ላይ ያለው ፖርቲ ሕገ-መንግስቱን ከውልደቱ እስከ ጉርምስና ባለው ሂደት አገሪቱን ያስተዳደረ መሆኑ ነው፡፡ የዚህን ሕገ-መንግስት ስኬት ወይም ድክመት ሌላ ስልጣን ይዞ የማያውቅ ፖርቲ በምርጫ ስልጣን ላይ ወጥቶ የተከታታይ ፖርቲዎች ስልጣን መውረድና መውጣት ባልታየበት ሁኔታ ግምገማውን ማካሄድ አስቸጋሪ አድርጐታል፡፡

ሌላኛው ግምገማውን አስቸጋሪ ከሚያደርጉት ቁልፍ ችግሮች ውስጥ በንድፈ-ሃሳብና በተግባር መካከል ያለው ልዩነት ነው፡፡ ገዢው ፖርቲ ላይ ከሚቀርቡ አብይ ትችቶች አንዱ ሕገ-መንግስቱን በተግባር ላይ አያውለውም፤ የሚለው ክስ ነው፡፡ ከተቃዋሚዎች ጀምሮ ሥርዓቱን ያጠኑ ምሁራን ሕገ-መንግስቱን በተግባር የመተርጐም ችግርን በአጭር ቃል ለመግለጽ በቅርጽ ፌደራላዊ በተግባር አሀዳዊ ብለው የሰላ ትችት ይሰነዝራሉ፡፡

ከላይ እንደተጠቀሰው በኢትዮጵያ ሁኔታ አዲሱን የብሔር-ተኮር የፌደራል ፖለቲካ ሥርዓት መከራ ስኬትና ድክመት በተለያዩ ምክንያቶች መገምገም አስቸጋሪ ነው፡፡ በተከፋፈሉ ማህበረሰቦች የሕገ-መንግስት ንድፍ ምን አይነት መሆን አለበት፤ የሚለውን የዘርፉ ምሁራኑ ከቀመሩት ንድፍ አንጻር ከታየ የኢ.ፌ.ዴ.ሪ ሕገ-መንግስት በብሄር/ ቋንቋ ማንነት ላይ ተመረኩዘው ለሚነሱ ግጭቶች ዘላቂ መፍትሄ አላበጀም፡፡ እንዲያውም የንድፉ ይዘት የተከፋፈሉ ማህበረሰቦች እንዳይከተሏቸውና እንዳይተገብሯቸው የመከሩትን ችላ ያለ ነው፡፡ በመሆኑም መሰረታዊው ጥያቄ እንዴት የአብላጫ ድምፅ የምርጫ ስርዓት መሰረት ላይ ያደረገ የብዙሃን ዴሞክራሲ ስርዓት ይዞ ቀጠለ? የሚለው ነው፡፡ የኢትዮጵያ የዴሞክራሲና የሕገ-መንግስት ማዕቀፍ ስኬታማ ነው፤ የሚባል ከሆነ ለስኬቱ ዋና ምክንያቶች ምንድን ናቸው? ሕገ-መንግስቱን የቀረጹ ሰዎች ንድፍ እንደ ሌላ አማራጭ ሊወሰድ ይችላልን? ወይስ ሕገ-መግስቱ በአካባቢያዊ የአስተዳደር ነፃነት ላይ ትኩረት መስጠቱ ላይፖርትና ሆሮዊትዝ ትኩረት ያደረጉባቸው የማእከላዊ መንግስትና የምርጫ ሥርዓቱ አደረጃጀትና አወቃቀር እዚህ ግባ የሚባል ፋይዳ የላቸውም ማለት ነው? ወይስ በኢትዮጵያ ሁኔታ አሁን ያለውን ንድፍ ስኬታማ የሚያደርጉ ሌሎች ፖለቲካዊ፣ ማሕበራዊ፣ ኢኮኖሚያዊ፣ ባሕላዊ ምክንያቶች አሉ? ካሉስ ምንድን ናቸው? የሚሉትን ጥያቄዎች ያስነሳል፡፡

እነዚህ ሁሉ ሁኔታዎች የሕገ-መንግስቱን በብሄር/ ቋንቋ ልዩነትና ማንነት ላይ ተመርኩዞ ለሚነሳ ግጭት ያስቀመጠውን ስትራቴጂ ስኬትንም ሆነ ድክመት ለማወቅ፣ ለመመዘንና ለመገምገም የበለጠ ከባድና ውስብስብ ያደርጉታል፡፡ እነዚህ ሁሉ ጥያቄዎችም ተጨማሪ ምርምር የሚጠይቁ ናቸው፡፡

Constitutional Design in Divided Societies: the Ethiopian approach

Gosaye Ayele[*]

Absrract

One of the biggest challenges divided societies, in which identity conflicts spill over into political or become political, face is how to manage conflict that arise from or are based on ethnic, linguistic, religious differences. Among a variety of responses, constitutional design is one. Two of the most prominent writers on the issue, ArentdtLijphart and Donald Horwitz, though they agree on the impropriety of Western Majoritarian democracy for countries with divided societies; they disagree on the alternative constitutional design for these countries. They have presented a competing constitutional design. Lijphart advocates consociationalism, Horowitz centriptalism.

The Federal Democratic Republic of Ethiopia (FDRE) Constitution, designed with the spirit of addressing these challenges, does not comport with these alternative constitutional designs offered. Centriptalism is out of the equation of the makers of the constitution. Though the Constitution exhibits certain elements of the features of consociationalism, it has overlooked the central features of consociationalism such as the proportional representationelectoral system and executive power sharing, among others. If the prospect for peace and democracy in divided societies is as suggested by these models, Ethiopia does not have a proper constitutional design that addresses the challenges of divided societies.

Key words: divided societies, consociationalism, centriptalism

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የተመረጡ ፍርዶች

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ዳኞች፡- ተሸገር ገ/ሥላሴ
መስጠፋ አህመድ
ተፈሪ ገብሩ
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አብረሃ መሰለ

አመልካች፡- አቶ ነጂብ አደም አቡበክር - ጠበቃ ጌቱ ሶሬሳ - ቀረቡ

ተጠሪ፡- የኢትዮጵያ ገቢዎችና ጉምሩክ ባለስልጣን ዐቃቤ ሕግ - ነስሪያ ሡልጣን - ቀረቡ

መዝገቡ ተመርምሮ የሚከተለው ፍርድ ተሰጥቷል፡፡

<u>ፍ ር ድ</u>

በዚህ መዝገብ አመልካች የሰበር አቤቱታ ያቀረቡት ተጠሪ ያቀረበባቸውን ሁለት የወንጀል ክሶች የተመለከተው የፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት በሁለቱም ክሶች ጥፋተኛ በማለት በመዝገብ ቁጥር 179576 በ14/02/2006 ዓ.ም. እና በ22/02/2006 ዓ.ም የሰጠባቸው እና በፌደራል ከፍተኛ ፍርድ ቤት በመዝገብ ቁጥር 143236 በ08/07/2006 ዓ.ም በፍርድ የጸናው የጥፋተኝነት እና የቅጣት ውሳኔ መሰረታዊ የሕግ ስህተት የተፈፀመበት በመሆኑ ሊታረም ይገባል በማለት ነው፡፡

ተጠሪ 1ኛ ተከሳሽ በነበሩት በአሁኑ አመልካች እና የተጠሪ ተቋም ሰራተኛ በነበሩት የስር 2ኛ ተከሳሽ አቶ ስዩም በላቸው ላይ በ15/03/2004 ዓ.ም አሻሽሎ ያቀረበው ክስ ይዘት ባጭሩ፡- በአንደኛ ክስ ተከሳሾቹ በኢ.ፌ.ዲ.ሪ. የወንጀል ሕግ አንቀፅ 32 (1) (ሀ) እና በጉምሩክ አዋጅ ቁጥር 622/2001 አንቀጽ 95 (1) (ሐ) ስር የተደነገገውን በመተላለፍ 1ኛ ተከሳሽ ረዳት የጉምሩክ አስተላላፊ፣ 2ኛ ተከሳሽ ደግሞ የጉምሩክ መጋዘን ቁጥር 8 በመቅረብ እና የዚሁ መጋዘን ሰራተኛ የነበረው 2ኛ ተከሳሽም በዚሁ ድርጊት በመተባበር በግል ተበዳይ ለትውልድ ምስክር አስመጭነት በመጋዘኑ ውስጥ የነበረውን ኮንቴይነር ቁልፍ ገንጥለው ቀረጥና ታክስን ጨምሮ የዋጋ ግምታቸው ብር 54,733.07 የሆነ ሁለት ቴሌቭዥኖችን የወሰዱ በመሆኑ አግባብ ካለው የባለስልጣኑ ሹም ፈቃድ ሳያገኙ እሽጎችን የመፍታት እና ምልክቶችን የማንሳት ወንጀል አድርገዋል፤ በሁለተኛ ክስ ተከሳሾቹ በኢ.ፌ.ዲ.ሪ. የወንጀል ሕግ አንቀጽ 32 (1) (ሀ) እና አድርገዋል፤ በሁለተኛ ክስ ተከሳሾቹ በኢ.ፌ.ዲ.ሪ. የወንጀል ሕግ አንቀጽ 32 (1) (ሀ) እና በጉምሩክ አዋጅ ቁጥር 622/2001 አንቀፅ 94 (1) የተደነገገውን በመተላለፍ የባለስልጣኑን ሰነዶች እና መለያዎች ወደ ሀሰት የመለወጥ ወንጀል አድርገዋል የሚል ነው፡፡

አመልካቹ ያቀረቡት መቃወሚያ ውድቅ ተደርጎ የእምነት ክህደት ቃል ሲጠየቁ ወንጀሉን አላደረግሁም በማለታቸው ፍርድ ቤቱ የግል ተበዳይን ጨምሮ በተጠሪው በኩል የተቆጠሩትን ስምንት ምስክሮች ከሰማ እና የተጠሪውን የሰነድ ማስረጃ ከመረመረ በኃላ አመልካቹ እንዲከላከሉ በሰጠው ብይን መሰረት ከስር 2ኛ ተከሳሽ ጋር በመሆን ሦስት የመከላከያ ምስክሮትን አቅርበው ያሰሙ ከመሆኑም በላይ የተለያዩ ሰነዶችንም በመከላከያ

ማስረጃነት አቅርበዋል፡፡ ፍርድ ቤቱም አመልካቹ ባሰሟቸው ምስክሮች እና ባቀረቧቸው ሰነዶች በተጠሪ ማስረጃ የተመሰከረባቸውን ማስረጃ ማስተባበል አለመቻላቸውን ገልፆ በሁለቱም ክሶች በተጠቀሱባቸው ድንጋጌዎች ስር የጥፋተኝነት ውሳኔ ከሰጠባቸው በኃላ የግራ ቀኙን የቅጣት አስተያየት ተቀብሎ ወንጀሎቹ በተሸሻለው የቅጣት አወሳሰን መመሪያ ደረጃ ያልወጣላቸው መሆኑን ገልጾ በሁለቱም ክሶች ወንጀሉን በዝቅተኛ ደረጃ መድቦ ለእያንዳንዱ ወንጀል መነሻ የሆኑን ገልፆ በሁለቱም ክሶች ወንጀሉን በዝቅተኛ ደረጃ መድቦ ለእያንዳንዱ ወንጀል መነሻ አድርጎ በመያዝ፣ ይህ የቅጣት መጠን የሚወድቀው በአባሪ አንድ በእርከን 29 ስር መሆኑን በመግለፅ፣ ወንጀሉ የተደረገው በግብረአበርነት መሆኑን በምክንያትነት ይዞ በወንጀል ሕጉ አንቀጽ 84 (1) (መ) መሰረት ቅጣቱን በአንድ ማክበጃ ወደ እርከን 30 ከፍ በማድረግ እና ቀጥሎም የቀድሞ ፀባይ መልካምነትን እና የቤተሰብ አስተዳዳሪነትን በሁለት የማቅለያ ምክንያትነት ተቀብሎ ቅጣቱን ወደ እርከን 28 ዝቅ በማድረግ እና ለሁለት የማቅለያ ምክንያትነት ተቀብሎ ቅጣቱን ወደ እርከን 28 ዝቅ በማድረግ እና ለሁለቱ ወንጀሎች የተቀመጠውን መነሻ መቀጮ እንደቅደም ተከተላቸው ብር 5,000 እና ብር 10,000 ደምሮ ተከሳሾቹ እያንዳንዳቸው በዘጠኝ ዓመት ጽኑ እስራት እና በብር 15,000 (አስራ አምስት ሺ) መቀጮ እንዲቀጡ ውሳኔ ሰጥቷል፡፡

በዚህ ውሳኔ ቀር በመሰኘት ሁለቱ ተከሳሾች በተለያዩ መዝገቦች ያቀረቡትን ይግባኝ አጣምሮ የተመለከተው የፌደራል ከፍተኛ ፍርድ ቤት የግራ ቀኙን ክርክር ከሰማ በኃላ በስር 2ኛ ተከሳሽ ላይ በ2ኛ ክስ ተሰጥቶ የነበረውን የጥፋተኝነት እና የቅጣት ውሳኔ በመሻር እና በብር ሁለት ሺ መቀጮ እንዲቀጡ ሲወሰን የአሁኑን አመልካች ይግባኝ ግን ሙሉ በሙሉ ውድቅ አድርጎ የስር ፍርድ ቤት ውሳኔን በማጽናት ውሳኔ ሰጥቷል፡፡ የስር 2ኛ ተከሳሽ በይግባኝ ሰሚው ፍርድ ቤት ውሳኔ ላይ ያቀረቡት አቤቱታ በሰበር አጣሪ ችሎት በመዝገብ ቁጥር 101241 በ25/10/2006 ዓ.ም በተሰጠ ትዕዛዝ ውድቅ የተደረገ መሆኑንም መዝገቡን አስቀርበን ተመልክተናል፡፡

አመልካች ለዚህ ችሎት አቤቱታ ተመርምሮ በዚህ ጉዳይ አመልካች በ1ኛው ክስ ስር ጥፋተኛ መባላቸው እንደተጠበቀ ሆኖ 2ኛውን ክስ በተመለከተ ግን ድርጊቱን መፈጸሙ ግምት የሚያስወስድ ነው የመባሉን አግባብነት ተጠሪው ባለበት ለማጣራት ይቻል ዘንድ ጉዳዩ ለሰበር ክርክር እንዲቀርብ በመደረጉ ግራ ቀኙ የጽሁፍ ክርክር ተለዋውጠዋል፡፡

የጉዳዩ አመጣጥ እና የክርክሩ ይዘት ከላይ የተመለከተው ሲሆን እኛም፡-

1. አመልካቹ በሁለቱም የወንጀል ክሶች ጥፋተኛ የተባሉት ነው ወይስ አይደለም
2. ቅጣቱ ሊሻሻል ይገባል ወይስ አይገባም

የሚሉትን ነጥቦች መሰረት በማድረግ ጉዳዩን መርምረናል፡፡

የመጀመሪያውን ነጥብ በተመለከተ አመልካቹ ወንጀሎችን አላደረኩም በማለት የተከራከሩ ቢሆንም ተጠሪው ያቀረበው የሰው እና የሰነድ ማስረጃ አጠቃላይ ይዘት ሲታይ አመልካቹ ረዳት የጉምሩክ አስተላላፊ ሆነው ይሰሩ የነበረ መሆኑን፣ በስራው ደንብ መሰረት እሽጎች ተከፍተው ናሙና ሊወሰድ የሚችለው ባለዕቃውን፣ የጉምሩክ ሹምን እና የመጋዘን ኃላፊውን ጨምሮ አግባብነት ያላቸው አካላት በተገኙበት መሆኑን፣ አመልካች ሀሰተኛ የናሙና መጠየቂያ ቅጽ ይዘው በመቅረብ እና ከስር 2ኛ ተከሳሽ ጋር በመተባበር ለናሙና ነው በሚል

እሸጉን ከፍተው ሁለት ቴሌቭዥኖችን የወሰዱትከእርሳቸው እና ከመጋዘን ጠባቂው ውጪ ሌላ ሰው ባልተገኘበት መሆኑን፣ በግል ተበዳይ ጋር የነበራቸውን ግንኙነት ያቋረጡ መሆኑን እና መሰል ፍሬ ነገሮችን የሚያረጋግጥ ሲሆን ከተሰሙት የተጠሪ ምስክሮች መካከል በተጠሪ ተቋም መጋዘን የገቢ እና የወጪ ዕቃዎች መዝጋቢ መሆናቸውን የገለፁት 8ኛው ምስክር አመልካቹ ሰነዱን በማቅረብ የስር 2ኛ ተከሳሽ ከሚጠብቁት መጋዘን ቴሌቭዥኖቹን ይዘው ሲወጡ ማየታቸውን በማረጋገጥ የመሰከሩ መሆኑን የመዝገቡ ግልባጭ ያመለክታል፡፡

አመልካቹ ወንጀሎቹን አለማድረጌን ያስረዱኛል በማለት ያቀረቡት የሰው እና የሰነድ ማስረጃ የተጠሪን ማስረጃ ሊያስተባብል ያልቻለ ስለመሆኑ ፍሬ ነገርን የማጣራት እና ማስረጃን የመመዘን ስልጣን የተሰጣቸው ሁለቱ የስር ፍርድ ቤቶች የተስማሙበት ጉዳይ ሲሆን በ1ኛ ክስ የተሰጠባቸውን የጥፋተኝነት ውሳኔ አስመልክቶ አመልካቹ ያቀረቡት የአቤቱታ ነጥብ በአጣሪው ችሎትም ቢሆን ተቀባይነት ያላገኘ መሆኑን ከማስቀረቢያ ጭብጡ ይዘት መገንዘብ ይቻላል፡፡ 2ኛውን ክስ በተመለከተ አመልካች ድርጊቱን መፈፀሙ ግምት የሚያስወስድ ነው የመባሉን አግባብነት ለማጣራት በሚል በአጣሪው ችሎት የተያዘውን ነጥብ ነጥብ በተመለከተ በመሰረቱ ይህ አነጋገር የተገለፀው በይግባኝ ሰሚው ፍርድ ቤት ውሳኔ ላይ ሲሆን የተገለፀውም የአሁኑን አመልካች በሚመለከት ሳይሆን የስር 2ኛ ተከሳሽን በሚመለከት ሆኖ ከድርጊቱ አጠቃላይ አፈፃፀም አንፃር 2ኛ ተከሳሽ በ1ኛው ክስ በተመለከተው ወንጀል ከአሁኑ አመልካች ጋር ወንጀሉን በመተባበር ያደረገው ስለመሆኑ ግምት የሚወስድበት ነው ተብሎ ነው፡፡ በሌላ በኩል አመልካች ቴሌቭዥኖቹን ከስር 2ኛ ተከሳሽ ጋር መሆኑን እሸጉን ከፍቶ የወሰደው ሀሰተኛ የሆነ የናሙና መጠየቂያ ፎርም ለተጠሪ 8ኛ ምስክር በማቅረብ ስለመሆኑ በማስረጃ ተረጋግጧል፡፡ ይህ በሁለተኛ ክስ የተመለከተው የባለስልጣኑ ሰነዶችን ወደ ሀሰት የመለወጥ ተግባር ራሱን ችሎ በአዋጁ በወንጀልነት የተደነገገ በመሆኑ በማስረጃ በተረጋገጠው መሰረት አመልካቹ በ2ኛው ክስ ጭምር ጥፋተኛ መባሉን የሚነቅፍ ሆኖ አላገኘውም፡፡ ከይግባኝ ሰሚው ፍርድ ቤት ውሳኔ በግልፅ መገንዘብ እንደሚቻለው የስር 2ኛ ተከሳሽ ከ2ኛው ክስ በነፃ እንዲሰናበቱ የተደረገው የሰነዱን ሀሰተኝነት ያውቁ የነበረ ወይም ማወቅ ይገባቸው የነበረ ስለመሆኑ አልተረጋገጠም በሚል እንጂ የሰነዱ ሀሰተኝነት ጉዳይ ጥያቄ የሚያስነሳ ሆኖ አይደለም፡፡ በመሆኑም አመልካቹን በሁለቱም ወንጀሎች ጥፋተኛ በማድረግ የተሰጠው ውሳኔ የሚነቀፍበት ሕጋዊ ምክንያት አላገኘንም፡፡

ሁለተኛውን ነጥብ በተመለከተ አመልካች ጥፋተኛ የተባሉት በጉምሩክ አዋጅ ቁጥር 622/2001 ድንጋጌዎች ሲሆን ጉዳዩ በስር የመጀመሪያ ደረጃ እና ይግባኝ ሰሚ ፍርድ ቤቶች ውሳኔ ካገኘ በኃላ በዚህ የሰበር ደረጃ በክርክር ላይ ባለበት ሂደት አመልካቹ ጥፋተኛ ተብለውበት የነበረው የጉምሩክ አዋጅ ቁጥር 622/2001 ከ30/03/2007 ዓ.ም ጀምሮ ተሸሮ በጉምሩክ አዋጅ ቁጥር 859/2006 ተተክቷል፡፡ አመልካች የተከሰሱባቸው ድርጊቶች በአዲሱ አዋጅም ቢሆን እንደቅደም ተከተላቸው በአንቀጽ 170 (1) እና በአንቀጽ 167 (1) ስር በወንጀልነት ተደንግገዋል፡፡ ለ2ኛው ክስ በቀድሞውም ሆነ በአዲሱ ሕግ የተደነገገው የእስራት ቅጣት መጠን ተመሳሳይ ሲሆን በ1ኛው ክስ በቀድሞው ሕግ በአንቀጽ 95 (1) (ሐ) ስር ከሰባት ዓመት እስከ አስር ዓመት ጽኑ እስራት ሊደርስ ይችል የነበረው የቅጣት መጠን ግን በአዲሱ ሕግ ከአምስት ዓመት ወደማያንስ እና ከአስር ዓመት ወደማይበልጥ ጽኑ እስራት ዝቅ የተደረገ መሆኑን ተገንዝበናል፡፡

በአንድ በኩል አዲሱ የወንጀል ሕግ እንዲፀና ከተደረገ በኃላ አድራጊው ሕጉ ከመጽናቱ በፊት ላደረገው ወንጀል ሲፈረድበት ወንጀሉን በፈጸመበት ጊዜ በስራ ላይ ከነበረው ሕግ ይልቅ አዲሱ ሕግ ቅጣትን የሚያቀልለት በሆነ ጊዜ ተፈፃሚ መደረግ የሚገባው በአዲሱ የወንጀል ሕግ የተመለከተው ቅጣት ስለመሆኑ በኢ.ፌ.ዲ.ሪ. የወንጀል ሕግ ጠቅላላ ክፍል በአንቀፅ 6 ተደንግጎ የሚገኝ ሲሆን በሌላ በኩል ደግሞ በሌሎች ሕጎች የተደነገገው እንደተጠበቀ ሆኖ አዋጅ ቁጥር 859/2006 ከፀናበት ቀን በፊት የተጀመሩ ጉዳዮች ፍፃሜ የሚያገኙት በነበረው ሕግ መሰረት ስለሆነም በአዋጅ ቁጥር 859/2006 አንቀጽ 182 ስር ተደንግጎ ይገኛል፡፡ በመሰረቱ ድርጊቱ ከተፈጸመ በኃላ የወጣ ሕግ ለተከሳሹ ወይም ለተቀጣው ሰው ጠቃሚ ሆኖ በተገኘ ጊዜ ተፈፃሚነት ሊኖረው የሚገባው ድርጊቱ ከተፈፀመ በኃላ የወጣው ሕግ ስለመሆኑ በኢ.ፌ.ዲ.ሪ. ሕገ መንግስት አንቀጽ 22 (2) ስር የተደነገገ ከመሆኑም በላይ አዋጅ ቁጥር 859/2006 ከፀናበት ቀን በፊት የተጀመሩ ጉዳዮች ፍፃሜ የሚያገኙት በነበረው ሕግ መሰረት ስለመሆኑ በአዋጁ አንቀጽ 182 ስር የተመለከተው ድንጋጌ ተፈጻሚነት ሊኖረው የሚገባው ክርክር ስላስነሳው ጉዳይ በሌሎች ሕጎች የተመለከቱትን ድንጋጌዎች በማይነካ ሁኔታ ስለመሆኑ ከላይ ከተጠቀሰው የአዋጁ አንቀጽ 182 ድንጋጌ አነጋገር መገንዘብ የሚቻል በመሆኑ በተያዘው ጉዳይ በአዋጅ አንቀጽ 182 የተመለከተው ድንጋጌ በኢ.ፌ.ድ.ሪ. የወንጀል ሕግ ጠቅላላ ክፍል በአንቀጽ 6 ስር የተመለከተውን ድንጋጌ ተፈፃሚነት የማያስቀር መሆኑን ተገንዝበናል፡፡ በመሆኑም በ1ኛው ክስ በአመልካቹ ላይ ለሚጣለው ቅጣት መሰረት ተደርጎ መያዝ የሚገባው በአዲሱ የጉምሩክ አዋጅ ቁጥር 859/2006 በአንቀፅ 170 (1) ስር የተመለከተው የቅጣት መጠን ሆኖ ተገኝቷል፡፡

በሌላ በኩል አመልካቹ ወንጀሎቹን ያደረጉት በ17/08/2003 ዓ.ም ሲሆን የጥፋተኝነት እና የቅጣት ውሳኔ የተሰጠባቸው ደግሞ እንደቅደም ተከተሉ በ14/02/2006 ዓ.ም እና በ22/02/2006 ዓ.ም ነው፡፡ ይህንኑ ጊዜ መሰረት በማድረግ በስር ፍርድ ቤቶች ቅጣቱ የተሰላውም ከጥቅምት 1 ቀን 2006 ዓ.ም ጀምሮ በስራ ላይ በዋለው የተሻሻለው የቅጣት አወሳሰን መመሪያ መሰረት በማድረግ ነው፡፡ የጥፋተኝነት እና የቅጣት ውሳኔ በተሰጠበት ጊዜ በስራ ላይ ከነበረው የቅጣት አወሳሰን መመሪያ ቁጥር 2/2006 ይልቅ ለተከሳሽ ወገን ቅጣቱን የሚያቀለው ወንጀሉ በተደረገበት ጊዜ በስራ ላይ የነበረው የቅጣት አወሳሰን መመሪያ ቁጥር 2/2006 ይልቅ ለተከሳሽ ወገን ቅጣቱን የሚያቀለው ወንጀሉ በተደረገበት ጊዜ በስራ ላይ የነበረው የቅጣት አወሳሰን መመሪያ ቁጥር 1/2002 ከሆነ ለቅጣቱ አወሳሰን መሰረት ተደርጎ መያዝ የሚገባው ይኸው መመሪያ ስለመሆኑ የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ችሎት በመዝገብ ቁጥር 95440 እና በሌሎችም መዝገቦች በሰጠው አስገዳጅ የሕግ ትርጉም መሰረት ለቅጣቱ አወሳሰን መሰረት ተደርጎ መያዝ የሚገባው የቀድሞው መመሪያ መሆኑን መነሻ ቅጣት የአስር ዓመት ጽኑ እስራት ሲሆን ይህም በአባሪ አንድ በእርከን 27 ስር የሚወድቅ ነው፡፡ ይህ የቅጣት መጠን በስር ፍርድ ቤት ተቀባይነት ባገኘው አንድ የማክበጃ ምክንያት ወደ እርከን 28 ከፍ ከተደረገ በኃላ በተመሳሳይ ሁኔታ በስር ፍርድ ቤት ተቀባይነት ባገኘው አንድ የማክበጃ ምክንያት ወደ እርከን 28 ከፍ ከተደረገ በኃላ በተመሳሳይ ሁኔታ በስር ፍርድ ቤት ተቀባይነት ባገኙት ሁለት የማቅለያ ምክንያቶች ወደ እርከን 24 ዝቅ የሚደረግ በመሆኑ በአመልካቹ ላይ ለሚጣለው ቅጣት መነሻ ተደርጎ መያዝ የሚገባው በእርከን 24 ስር የተመለከተው የቅጣት ፍርድ ስልጣን ነው፡፡ በተመሳሳይ ምክንያት በመቀጮው መጠን ላይም ተገቢው ማሻሻያ ሊያረግበት የሚገባ መሆኑን ተገንዝበናል፡፡

ሲጠቃለል በአመልካቹ ላይ በስር ፍርድ ቤቶች የተሰጠው የጥፋተኝነት ውሳኔ መሰረታዊ የሕግ ስህተት የተፈፀመበት ነው ለማለት የሚቻል ባይሆንም ከላይ በተጠቀሱት ምክንያቶች በአመልካቹ ላይ ተጥሎ የነበረው የቅጣት መጠን ሊሻሻል የሚገባው ሆኖ በመገኘቱ የሚከተለው ውሳኔ ተሰጥቷል፡፡

<u>ው ሳ ኔ</u>

1. በአመልካቹ ላይ በፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት በሁለቱም ክሶች በመዝገብ ቁጥር 179576 በ14/02/2006 ዓ.ም ተሰጥቶ በፌዴራል ከፍተኛ ፍርድ ቤት በመዝገብ ቁጥር 143236 በ08/07/2006 ዓ.ም በፍርድ የጸናው የጥፋተኝነት ውሳኔ በወንጀለኛ መቅጫ ስነ ስርዓት ሕግ ቁጥር 195 (2) (ለ) (2) መሰረት ፀንቷል፡፡
2. በአመልካቹ ላይ በፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት በሁለቱ ክሶች በመዝገብ ቁጥር 179576 በ22/02/2006 ዓ.ም ተሰጥቶ በፌዴራል ከፍተኛ ፍርድ ቤት በመዝገብ ቁጥር 143236 በ08/07/2006 ዓ.ም በፍርድ የፀናውን የዘጠኝ ዓመት ጽኑ እስራት የብር አስራ አምስት ሺ መቀጮ የቅጣት ውሳኔ በወንጀለኛ መቅጫ ስነ ስርዓት ሕግ ቁጥር 195 (2) (ለ) (2) መሰረት በማሻሻል አመልካቹ በዚህ ጉዳይ የታሰሩበት ጊዜ ሁሉ ታስቦላቸው በሰባት ዓመት ጽኑ እስራት እና በብር ስምንት ሺ መቀጮ እንዲቀጡ ወስነናል፡፡
3. በተሸሻለው የጽኑ እስራት ቅጣት ውሳኔ መሰረት እንዲያስፈጽም የዚህ ውሳኔ ግልባጭ ከመሸኛ ትዕዛዝ ጋር አመልካቹ ለሚገኙበት የአዲስ አበባ ማረሚያ ቤት ይላክ፡፡ ለአመልቹም በዚያው በኩል ይድረስ፡፡
4. እንዲያውቁት የዚህ ውሳኔ ግልባጭ ለፌዴራል የመጀመሪያ ደረጃ ፍርድ ቤት እና ለፌዴራል ከፍተኛ ፍርድ ቤት ይላክ፡፡
5. ውሳኔ ያገኘ ስለሆነ መዝገቡ ተዘግቷል፡፡

የማይነበብ የአምስት ዳኞች ፊርማ አለበት፡፡

የሰ/መ/ቁ/121063
የካቲት 24 ቀን 2008 ዓ/ም

ዳኞች፡- አልማው ወሌ
ዓሊ መሐመድ
ተክሊት ይመሰል
እንዳሻው አዳነ
ቀነዓ ቂጣታ

አመልካች ፡- መ/ርት ሙሉነሽ መለሰ ወኪል ገ/አምላክ አበጋዝ ቀረቡ

ተጠሪ፡- ወሊያ አጠቃላይ 1ኛ ደረጃ ት/ቤት የቀረበ የለም

መዝገቡ ተመርምሮ የሚከተለውን ፍርድ ተሰጥቷል፡፡

<u>ፍ ር ድ</u>

ጉዳዩ የአሰሪና ሠራተኛ ጉዳይ ክርክርን የሚመለከት ሲሆን ክርክሩ የተጀመረው የአሁኑ አመልካች በአሁኑ ተጠሪ ላይ በአ/ብ/ክ/መንግስት ጎንደር ከተማ ወረዳ ፍ/ቤት በመሰረቱት ክስ መነሻነት ነው፡፡ የክሱ ፍሬ ነገርም ባጭሩ በአመልካች ድርጅት ውስጥ በመምህርነት የስራ መደብ ላይ ከ2004 ዓ/ም እስከ 2007 ተቀጥረው ስራቸውን ሲሰሩ እንደረበር፣ በስራቸው ላይ እያሉ ነፍሰጡር የነበሩ ቢሆንም የቅድመ ወሊድ ፈቃድ ሳይወስዱ በመውለዳቸው በህጉ የተጠበቀላቸውን የድህረ ወሊድ ፈቃድ በመጠቀም ላይ እያሉ ያልተጠቀሙበትን የቅድመ ወሊድ ጊዜ በድህረ ወሊድ በመጠቀም ወደ ስራቸው ሲመለሱ ተጠሪ አመልካች ከሰራ ተሰናብተሻል ያላቸው መሆኑንና ይህም ከህጉ ይዘትና መንፈስ ውጭ መሆኑን ጠቅሰው የተጠሪ እርምጃ ህገ ወጥ ነው ተብሎ የተለያዩ ክፍያዎችን እንዲከፈላቸው ዳኝነት መጠየቃቸውን የሚያሳይ ነው፡፡ የአሁኑ ተጠሪም ቀርቦ በሰጠው መልስ አመልካች በራሳቸው ጊዜ ያልተጠቀሙበትን የቅድመ ወሊድ ፈቃድ ለድህረ ወሊድ መጠቀማቸው ህጋዊ ያለመሆኑና ህጋዊ ፈቃድ ሳይኖር ከሰራ ገበታቸው በመቅረታቸው መሰናበታቸው ህጋዊ ነው በማለት ተከራክሯል፡፡

ፍ/ቤቱም የግራ ቀኙን ክርክርና ማስረጃ መርምሮ አመልካች የቅድመ ወሊድ ፈቃድ ሳይጠቀሙ በድህረ ወሊድ ጊዜ መጠቀማቸውና ከሰራ መቅረታቸው ህጋዊ አይደለም በማለት ስንበቱ ህጋዊ ነው በማለት በዚህ ረገድ የተጠየቁትን የአመልካች ክፍያዎችን ውድቅ አድርጎ ከህዳር 01 ቀን እስከ ከህዳር 12 ቀን 2007 ዓ/ም ድረስ ያለውን ውዝፍ ደመወዝ ብቻ ይክፈላት ሲል ወስኗል፡፡ አመልካችም በውሳኔው ቅር በመሰኘት ቅሬታውን ለሰሜን ጎንደር መስተዳደር ዞን ፍ/ቤትና ቀጥሎም ለክልሉ ሰበር ሰሚ ችሎት ያቀረበ ቢሆንም በሁለቱም ተቀባይነት አላገኘም፡፡

አሁን የቀረበው የሰበር አቤቱታ ከፍ ሲል በተገለጸው መልኩ የተሰጡትን ውሳኔዎች በመቃወም ለማሰቀየር ሲሆን ይዘቱም ባጭሩ የበታች ፍርድ ቤቶች አመልካች በቅድመ ወሊድ ጊዜ ያልተጠቀመችበት የአንድ ወር የእረፍት ጊዜ በድህረ ወሊድ ጊዜ ከሚሰጠው ሁለት ወር የእረፍት ጊዜ ጋር መጠቀም አትችልም በማት የሰጡት ውሳኔ የህጉን መንፈስና ይዘት ያላገናዘበ ከመሆኑም በላይ አንድ ሴት ከወለደች በኋላ ከአራት ወራት በፊት ከስራ

መሰናበት የለባትም ተብሎ በአዋጅ ቁጥር 377/96 አንቀጽ 87/4/ስር የተመለከተውን ድንጋጌ ያላገናዘበ እንዲሁም በሌሎች የመንግስት ሰራተኞች ህግጋት የተመለከተውን የመብት ጥበቃና የህግ አተረጓጎም ያልተከተለ ነው በማለት መከራከራቸውን የሚያሳይ ነው።

አቤቱታውም ተመርምሮ የስር ፍርድ ቤቶች በጉዳዩ ላይ የህግ ትርጉም ተገቢ መሆን ያለመሆኑን ለመመርመር ሲባል መዝገቡ ለሰበር ችሎት እንዲቀርብ ተደርጎ ተጠሪም ቀርበው መልስ ሊሰጡ ስላልቻሉ መብታቸው ታልፏል።

የጉዳዩ አመጣጥ አጠር አጠር ባለመልኩ ከላይ የተገለጸው ሲሆን ይህ ችሎትም የግራ ቀኙን ክርክር ለሰበር አቤቱታ መነሻ ከሆው ውሳኔና አግባብነት ካላቸው ድንጋጌዎች ጋር በማገናዘብ ጉዳዩ ለሰበር ችሎት ሊቀርብ ተይዞ ከነበረው ጭብጥ አንጻር በሚከተለው መልኩ መርምረናል።

በመሰረቱ የአሰሪና ሰራተኛ ህጉ በአንድ በኩል ሰራተኛው ያለአግባቡ ከስራ እንዳይፈናቀል ጥበቃ የሚያደርግ ሲሆን በሌላ በኩል የኢንዱስትሪ ሰላም በመፍጠር የምርትና ምርታማነት እድገቱ እንዲጨምር ዋስትና ሲጪም እንደሆነ የሚታወቅ ነው። ይሄንኑ መሰረታዊ ሐሳብ መነሻ ባደረገ መልኩ ብሎም የኢንዱስትሪ ሰላሙን ከመጠበቅ አኳያ አንድ ሰራተኛ በአዋጅ ቁ/377/96 አንቀጽ 27 ንዑስ አንቀጽ 1 ከፊደል "ሀ" እሰከ "በ" ባሉት ስር የተዘረዘሩትን ጥፋት ፈጽሞ ከተገኘ አሰሪው ያለቅድሚያ ማስጠንቀቂያ የስራ ውሉን ማቋረጥ እንደሚችል መደንገጉን ከህጉ አጠቃላይ ድንጋጌዎች ከአንቀጽ 87/6/ ድንጋጌ የምንረዳው ጉዳይ ነው።

እንዲሁም ህጉ ለተለዩ የሰራተኛ ክፍሎች የተለዩ ጥበቃ የሚያደርግባቸው ምክንያቶች መኖራቸውን ህጉ ያሳያል። ህጉ በአዋጅ አንቀጽ 14፣ ከአንቀጽ 87 እስከ 88 ድረስ ባሉት ድንጋጌዎች በተለየ መልኩ ድንጋጌዎች ከአስቀመጠላቸው ሰራተኞችን መካከል ሴት ሰራተኞች የሚገኙ ሲሆን እነዚህ ድንጋጌዎች በአንድ በኩል ሁሉምን ሴት ሰራተኞችን፣ በሌላ በኩል ደግሞ በተለየ ሁኔታ ውስጥ የሚገኙ ሴት ሰራተኞችን የሚመለከቱ ናቸው። እርግዝናና ወሊድ ደግሞ ሴቶችን በተለያየ ሁኔታ ውስጥ እንዲገኙ የሚያደርጉ ሁኔታዎች በመሆናቸው በእነዚህ ሁኔታዎች ውስጥ የሚገኙ ሴቶች ህጉ ልዩ ጥበቃ ያደርግላቸዋል። ወሊድን በተመለከተ ህጉ ለሴቶች የሚያደርገው ልዩ ጥበቃ የቅድመ ወሊድና የድህረ ወሊድ ፈቃድ ከክፍያ ጋር የማግኘት መብትና እንዲሁም በሌላ ጊዜም ሀኪም እንድታርፍ ካዘዘ ከክፍያ ጋር እረፍት የማግኘት መብት ስለመሆናቸው የአዋጅ ቁጥር 377/96 አንቀጽ 88 ድንጋጌዎች ያሳያሉ። እዲሁም አሰሪው ሰራተኛዋ ነፍሰ ጡር ከሆነችበትና ከወለደችበት ቀን ጀምሮ በአራት ወራት ውስጥ ከስራ እንዲያሰናብታት ህጉ ጥበቃ የሚያደርግ መሆኑን ከአዋጅ አንቀጽ 87/5/ድንጋጌ በግልጽ ያሳያል።

ወደ ተያዘው ጉዳይ ስንመለስ አመልካች የቅድመ ወሊድ ፈቃድ ባለወሰዱበት ሁኔታ የወለዱ ሲሆን በአዋጅ አንቀጽ 88/3/ የተጠበቀላቸውን የስልሳ ቀን የድህረ ወሊድ ፈቃድ ከክፍያ ጋር አግኝተው በቅድመ ወሊድ ጊዜ ሊጠቀሙ ይችሉ የነበረውን የሰላሳ ቀን የወሊድ ፈቃድ በህጉ የተጠበቀላቸው የድህረ ወሊድ ጊዜ ሲያልቅ አንድ ላይ በመጠቀም ላይ እያሉ ተጠሪ በህጉ የተጠበቀላቸው የድህረ ወሊድ ጊዜ በማለቁ አመልካች ስራ ላይ አልተገኙም በሚል የስራ ውልን ያቋረጠባቸው መሆኑን ክርክሩ ያሳያል። ከላይ እንደተገለጸው አንዲት ሴት በእርግዝና ምክንየት በህጉ የተጠበቀላት የቅድመ ወሊድና የድህረ ወሊድ ፈቃድ ጊዜ የሚታወቅ መሆኑን ህጉ ቢያስቀምጥም በቅድመ ወሊድ ጊዜ በህጉ የተጠበቀላትን የፈቃድ ጊዜ ሳትጠቀም ብትወልድ በቅድመ ወሊድ ጊዜ ይሰጥ የነበረው ፈቃድ ያልተጠቀመች ሴት

ሰራተኛ ይህንኑ ጊዜ በድህረ ወሊድ ጊዜ መጠቀም የምትችል መሆኑን ያለመሆኑን ግን ህጉ በግልጽ አያስቀምጥም ። ይሁን እንጂ ህጉ ከወሊድ በኋላ አንድ ሴት ሰራተኛ አራት ወር ሳይሞላት ከስራ ልትሰናበት እንደማትችል በአዋጅ አንቀጽ 87/5/ ስር የተመለከተው ድንጋጌ በህጉ ያለውን ክፍተት ለመሙላት የሚያስችል መሆኑን ተቀባይነት ያላቸው የህግ አተረጓጎም ደንቦች ያስገነዝባሉ። አንድ ልዩ ህግ አግባብነት ባለው ድንጋጌ ውስጥ ግልጽ የሆነ መፍትሄ ካላስቀመጠ ይኸው ድንጋጌ ባለበት ክፍልና ምዕራፍ ስር ያሉትን ድንጋጌዎች አስተሳስሮ በማየት ተገቢውን ትርጉም መስጠት የህግ ትርጉም ደንቦች የሚፈቅዱት ጉዳይ ነው። ከዚህ አንፃር ጉዳዩን ስንመለከተው አመልካች በአዋጅ አንቀጽ 25፣27 እና 29/3/ ድንጋጌዎች አግባብ ካልሆነ በስተቀር ከወሊድ በኋላ አራት ወራት ውስጥ ከስራ ያለመባረር መብት ያላቸው መሆኑን የአዋጅ ቁጥር 377/96 አንቀጽ 87/5/ እና /6/ የሚያስቀምጥ በመሆኑና ተጠሪ ደግሞ ለስንበቱ ህጋዊ ምክንያት ነው በማለት የሚያቀርበው ክርክር በአዋጅ አንቀጽ 27/1/ለ// ድንጋጌ ስር የተለመከተውንና ህግ አውጪው ከወሊድ ጋር ባልተያያዘ ሁኔታ ተቀባይነት ያለውን ድንጋጌ በመጥቀስ በመሆኑና የአመልካች ከስራ መባረር ከዲሲፕሊን ወይም ከቅነሳ ስርዓት ጋር የተያያዘ ስለመሆኑ ባላስረዳበት ክርክሩ የህግ መሰረት የሌለው ነው። የስር ፍርድ ቤቶች በህጉ ያለውን ክፍተት በማየት ተገቢውን የህግ አተረጓጎም በመከተል ለጉዳዩ በአዋጅን አንቀጽ 87/5/የተመለከተውን ጥበቃ ተግባራዊ ማድረግ ሲገባቸው ለጉዳዩ ቀጥተኛ ተፈፃሚነት የሌለውን የአዋጅን አንቀጽ 88/4/ ድንጋጌን መሰረት በማድረግ መወሰናቸው ተቀባይነት ሊሰጠው የሚገባው የህግ ትርጉም አተገባበር ሆኖ አልተገኘም። ቀጥሎ መታየት ያለበት ውጤቱ ነው። የስራ ውል የተቋረጠበት አግባብ ከህግ ውጭ ነው ከተባለ ውጤቱ በአዋጅ ቁጥር 377/96 አንቀጽ 42 እና ተከታይ ድንጋጌዎች መሰረት የሚወሰን ይሆናል። አመልካች በስር ፍርድ ቤት የጠየቁት የተለያዩ ክፍያዎች ተከፍሏቸው እንዲሰናበቱ ነው። በመሆኑም በአዋጅ ቁጥር 377/96 አንቀጽ 35/1/ለ/ መሠረት የሁለት ወር ደመወዝ፣ ክፍያ ለዘገየበት ደግሞ በአዋጁ አንቀጽ 38 መሠረት የሁለት ወር ደመወዝ፣ በአዋጅ አንቀጽ 43/4// ደግሞ ካሳ በህጉ በተቀመጡት ስሌቶች መሠረት አመልካች ሊከፍላቸው ይገባል። በሌላ በኩል አመልካች የዓመት እረፍት የጠየቁ በመሆኑና ተጠሪ ደግሞ አመልካች የወሰዱ ስለመሆኑ ገልጾ የሚከራከር በመሆኑ አመልካች የአመት እረፍት ያልተጠቀሙ መሆን ያለመሆኑ በፍሬ ነገር ደረጃ ተጣርቶ እንዲወሰን ማድረጉ ተገቢ ሆኖ ተገኝቷል። ሌላው አመልካች የጠየቁት የዳኝነት ጥያቄ ያልተከፈላቸው ደመወዝ ነው። ሆኖም ይህ ክፍያ ከድህረ ወሊድ ፍቃድ መጠናቀቅ በኃላ ለነበረው ጊዜ ስራ ስላልሰሩ በአዋጅ አንቀጽ 377/96 አንቀጽ 54 መሠረት እንዲከፈላቸው ማድረግ ሕጋዊ ሆኖ አልተገኘም። በመሆኑም በዚህ ረገድ የተጠየቀው ክፍያ ህጋዊ ሆኖ አልተገኘም። በእነዚህ ሁሉ ምክንያቶች ተከታዩን ወስነናል።

ው ሳ ኔ

1. በጎንደር ከተማ ወረዳ ፍርድ ቤት በመ/ቁጥር 0122481 በ16/06/2007 ዓ.ም ተሰጥቶ በሰሜን ጎንደር ዞን ከፍተኛ ፍርድ ቤት በመ/ቁጥር 0123818 በ30/06/2007 ዓ.ም በክልሉ ጠቅላይ ፍርድ ቤት በመ/ቁጥር 46890 በ18/02/2008 ዓ.ም የጸናው ውሳኔ በፍ/ብ/ሥ/ሥ/ህ/ቁ. 348/1/ መሠረት ተሽሯል።
2. አመልካች ተጠሪን ያሰናበተው ከሕግ ውጪ ነው ብለናል። በመሆኑም ተጠሪ ለአመልካች በአዋጅ ቁጥር 377/96 አንቀጽ 35/1/ለ/ መሠረት የሁለት ወር ደመወዝ፣ በአዋጁ አንቀጽ 43/4/ሀ/ ደግሞ ካሳ እና በአንቀጽ 39 እና 40 መሠረት

ደግሞ የአገልግሎት ክፍያ በህጉ በተቀመጡት ስሌቶች መሠረት ሊከፈሏቸው ይገባል ብለናል፡፡ የአመት እረፍትን በተመለከተ ግን አመልካች የወሰዱ መሆን ያለመሆኑ በፍሬ ነገር ደረጃ ተጣርቶ እንዲወሰን ማድረጉ ተገቢ ሆኖ ስለተገኘ በዚህ ረገድ የጎንደር ከተማ ወረዳ ፍርድ ቤት ጉዳዩን አጣርቶ እንዲወሰን በፍ/ብ/ሥ/ሥ/ሕ/ቁጥር 343/1/ መሠረት መልሰን ልከንለታል፡፡ ይፃፍ፡፡

3. ከድህረ ወሊድ ፈቃድ በኃላ ላለው ጊዜ አመልካች የሚከፈላቸው ደመወዝ የለም ብለናል፡፡
4. የሰበር ክርክር ወጪና ኪሳራን ግራ ቀኙ የየራሳቸውን ይቻሉ ብለናል፡፡
   መዝገቡ ተዘግቷል ወደ መዝገብ ቤት ይመለስ፡፡

የማይነበብ የአምስት ዳኞች ፊርማ አለበት፡፡

Call for Contributions

The Law School of Bahir Dar University publishes a bi-annual peer-reviewed journal of law, the *Bahir Dar University Journal of Law* (BDU Journal of Law). The main aim of the *Journal* is to create a forum for the scholarly analysis of Ethiopian law and to promote research in the area of the legal system of the country in general. The Journal also encourages analyses of contemporary legal issues.

The assessment of various manuscripts submitted for Volume 7 issue No.2 is now underway. The *Journal* is now calling for contributions for its next issues. The Editorial Committee of the *Journal* welcomes scholarly *articles, notes, reflections, case comments* and *book reviews* from legal scholars, legal practitioners, judges and prosecutors and any legal professional who would like to contribute his/her own share to the betterment of the legal system of Ethiopia and of the world at large.

Any manuscript which meets the preliminary assessment criteria shall be referred to anonymous internal and external assessors for detailed and critical review. Authors may send us their manuscripts any time at their convenience.

Submissions should include:

- Full name (s) and contacts of author (s);
- Declaration of originality;
- A statement that the author consents to the publication of the work by the *Bahir Dar University Journal of Law*.

All submissions and enquiries should be addressed to:

The Editor- in-Chief,
Bahir Dar University Journal of Law;
E-mail: bdujol@yahoo.com, or jol@bdu.edu.et

Guide for Authors

Aim and scope of the *Journal:*

The *Bahir Dar University Journal of Law* is established in 2010 G.C. under the stewardship of the School of Law Bahir Dar University. It aims to promote legal scholarship and critical inquiry. The *Journal* places the needs of the readers first and foremost in its composition and aspires to become a well-cultivated resource for the community of legal professionals. While, in principle, it is open for any kind of contributions on the subject matter of law or interdisciplinary issues related to law, it gives high priority to contributions pertaining to Ethiopian laws to encourage discourse on Ethiopian laws where literature is scanty.

Manuscript submission:

The *Bahir Dar University Journal of Law* invites submission of manuscripts in electronic format (Soft copy). Manuscript should be sent in Microsoft Word format as attachment to;

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Review procedure

The *Bahir Dar University Journal of Law* is a peer-reviewed journal. All submissions are reviewed by the editor-in-chief, one member of the editorial committee. The publication of feature articles is further subject to review by an anonymous external referee and final discussion and approval by the editorial committee. Please note that our evaluation process takes account of several criteria. While excellence is a necessary condition for publication, it is not always the only condition. The need for balance of topics, the *Journal's* particular area of interest which may change overtime, and the fact that an article discussing a similar topic has already been commissioned, etc., may also influence the final decision.

Therefore, a rejection does not necessarily reflect upon the quality of the piece.

Time frame

You can submit your manuscript at any time. We do not have deadlines for submission of manuscripts. Each day we accept submissions and those qualified submissions will be commissioned for publication on a rolling basis. As soon as we receive your submission we will send you an acknowledgement email. We aim to give notification of acceptance, rejection, or need for revision within four weeks of acceptance, although exceptions to this timeframe may occur. In the event of final acceptance you will be notified when it will be published and in which issue of the *Journal* the paper will feature.

Language

All submissions need to be written in articulate and proficient language either in English or Amharic. Authors who lack good command of the language are encouraged to send their article to language editing prior to submission.

Size of contributions

The size of contributions shall be as follows:

- feature articles: Min 15 pages, max 40 pages
- case comments: Min 3 pages, max 15 pages
- Book Review: Max 3 pages
- Reflections: Min 3 pages, max 15 pages

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Bahir Dar University Journal of Law generally follows the style and citation rules outlined below.

Author's affiliation:

The author's affiliation should be indicated in a footnote marked by an asterisk and not by an Arabic number. Authors should refer to themselves in the third person throughout the text.

Headings:

Manuscripts shall have an abstract of approximately 200 words and introduction and the body should be arranged in a logically organized headings and sub-headings. Headings in the various sections of the manuscript shall be aligned to the left margin of the page and shall be as follows:

Abstract
Introduction
1. First Heading
1.1. Second Heading
1.1.1. Third Heading
1.1.1.1. Fourth heading
i. Fifth heading
a. Sixth heading
Conclusion

Italicization:

All non-English words must be *italicized*

Emphasis:

To indicate emphasis use *italics*.

References:

All contributions should duly acknowledge any reference or quotations from the work of other authors or the previous work of the author. Reference shall be made in the original language of the source document referred to.

Quotations:

Quotations of more than three lines should be indented left and right without any quotation marks. Quotation marks in the block should appear as they normally do. Quotations of less than three lines should be in quotation marks and not indented from the text. Regarding alterations in a quotation, use:-

Square bracket "[ ]" to note any change in the quoted material,

Ellipsis "…" to indicate omitted material,
"[sic]" to indicate mistake in the original quote.

Footnotes:

Footnotes should be consecutively numbered and be set out at the foot of each page and cross-referenced using *supra*, *infra*, *id* and *ibid,* as appropriate. Footnote numbers are placed outside of punctuation marks.

References in footnotes:

References in footnotes should generally contain sufficient information about the source material. In general, references should have the content and style outlined below in the illustrations for the various types of sources.

Books:

Brownlie,I., *Principles of Public International Law*, 6th edition, Oxford University Press, Oxford, New York, 2003(first published in 1966), p. 5, [hereinafter Brownlie, *Principles of Public International Law*]

Contributions in edited books:

Fleck, Dieter, the Law of Non-International Armed Conflicts, *in* Fleck, Dieter (ed.),*The Handbook of International Humanitarian Law*, Second Edition, Oxford University Press, Oxford, New York, 2008, p. 613, [hereinafter Fleck, *The Handbook of International Humanitarian Law*]

Articles in Journals:

Jinks, D., September 11 and the Laws of War, *Yale Journal of International Law*, Vol.28, No. 1, 2003, p. 24.

Legislations:

Federal Courts Proclamation, 1996, Art. 8(1) & (2), Proc.no.25/1996, *Fed. Neg. Gaz*., year 2, no. 13.

Codes:

Revised Family Code, 2000, Art. 7 (1), Proc.no. 213/2000, *Fed. Neg. Gaz*. (Extraordinary issue), year 6, no. 1.

Treaties:

Vienna Convention on the Law of Treaties, 1969, Article 31.

Resolutions:

Security Council Resolution 1368 (2001), at http://www.daccessdds.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement > (consulted 10 August 2008).

Cases:

International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Dusko Tadic*, Appeals Chamber, Judgement, 15 July 1999, para. 120, at <http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf> (consulted 7 August 2008), [hereinafter, ITY, Tadic case, Appeals Chamber, Judgement].

የኢትዮጵያ መድን ድርጅት vs. **ጊታሁን ሀይሉ፣ጠቅላይ ፍርድቢትሰበር ሰሚ ችሎት፣ መ.ቁ.** 14057፣ 1998 **ዓ.ም.**

Format requirements:

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