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CRIMINALIZATION OF SAME-SEX RELATIONS IN CAMEROON: APPRAISAL FROM GROUP RIGHTS PERSPECTIVE

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Abstract

Cameroon's anti-homosexual law has put the country on the spotlight for wrong reasons. The country has been criticized by human rights groups for its treatment of sexual minorities. Mostly based on a liberal paradigm that emphasizes individual claims, the criticisms argue that the anti-homosexuality law is inconsistent with the enjoyment of some rights and freedoms, notably equality, non-discrimination and freedom of expression. By analyzing the relevant domestic and international laws and reviewing selected literatures, this article opines that the conventional position which frowns at the anti-homosexuality law is undermined in Cameroon where criminalization of homosexuality also enforces moral and cultural values. Consequently, within the context of the Constitution of Cameroon, as read alongside international laws, the offence involves competing categories of rights. Though it is inconsistent with some individual rights, it conversely protects group rights which inevitably leads to rights prioritization in the country. This article argues that resistance against decriminalization of same-sex relations is informed by the desire to protect the family, health and moral of society and to reinforce duties owed by individuals to society. To mitigate the tension between individual and group rights inherent in Cameroon's anti-homosexuality law, this article recommends a limited moratorium on prosecutions of homosexuals provided that they are discreet about their sexual orientation. Any attempt at decriminalizing homosexuality without ushering changes in the country's communitarian values will rarely protect homosexuals from persecution and harassment.

Keywords: *Communitarian, Constitution, Criminalization, Homosexuality, Human Rights*

I. INTRODUCTION

Homosexuality involves sexual relations between persons of the same sex. Like in most countries of sub-Saharan Africa, homosexuality is punishable under Cameroonian law.[1] Within the context of both the 1996 Cameroon's Constitution (hereinafter, the Constitution) and international laws, the offence is seemingly at crossroads of competing, and perhaps conflicting,

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[1] See Section 347 *bis* of the Penal Code 1967 of Cameroon, *available at*: https://www.wipo.int/edocs/lexdocs/laws/en/cm/cm014en.pdf.

categories of rights. On one hand, the anti-homosexuality law violates the right to equality, non-discrimination and freedom of expression. On the other hand, however, it potentially protects the country's moral and cultural values. These competing claims have led to a regime of rights prioritization in Cameroon.

The practices that embody the offence of homosexuality in Cameroon are punishable under section 347 *bis* of the penal code 1967 that punishes same-sex relations.[2] As depicted in the relevant part below, the provision is broadly interpreted by the courts as criminalizing 'homosexuality' in general. Compared with other offences of a sexual flavor, including adultery and rape, the rate of prosecutions for homosexuality is much higher that suggests high level of intolerance against the acts.[3]

The anti-homosexuality law has been criticized for being contrary to the equality and non-discriminatory provisions of the Constitution.[4] Moreover, it is said to be inconsistent with the country's international human rights obligations since it contravenes the rights to privacy, personal autonomy and freedom of expression.[5] According to the Constitution, human rights are fundamental norms that rank higher than, override and prevail over any municipal law in conflict with them.[6] Since, conceptually, there is no hierarchy in human rights, these rights are liable to conflict with one another such that enforcing one right may result in the violation of another. Unsurprisingly, due to the plethora of rights recognized in Cameroon, its anti-homosexuality law deals with competing rights creating a scenario leading to rights prioritization whereby some rights are elevated above others. Although the anti-homosexuality law infringes on the rights of LGBT[7] citizens, it has, deliberately or inadvertently, led to the protection of the moral and

[2] In Cameroon, people have been arrested and others charged under section 347 *bis* of the penal code for indulging in the following practices: touching and fondling someone of the same sex in an erotic manner, dressing in the outfit of opposite sex, erotic kissing of members of the same sex, seducing, sending affectionate text messages to someone of the same sex, drinking feminine drinks like baileys, and anal intercourse. Thus, although the law relates specifically to sexual conduct, it is usually applied in a broad context to prosecute individuals on the basis of their appearance, their mannerisms, style of speech or general conduct.

[3] Records suggest that the offence of adultery, punishable under section 361 of the penal code, is of frequent occurrence than that of homosexuality. Nonetheless, in terms of prosecutions, there have been fewer prosecutions for adultery in the courts compared to homosexuality. Indeed, despite its frequency in society, the anti-adultery law is almost a dead letter unlike the provision of section 347 *bis* which is aggressively enforced by the courts. In the case of rape, punishable under section 296 of the penal code, the National Network of Associations of Aunties, a coalition of groups working to combat rape in Cameroon estimates that over 500,000 rapes occur every year. See Irene Zeh Fon, Global Press Journal, Underreporting, Burden of Proof foils Justice for People Who Have Been Raped in Cameroon, *available at* https://globalpressjournal.com/africa/cameroon/underreporting-burden-of-proof-foils-justice-for-rape-victims-in-cameroon/ (Accessed on 4th of May, 2019). But many are never documented nor prosecuted because of underreporting and the stigma associated with the offense.

[4] Atoh Walter Tchemi, *The Non-Repeal of Section 347 (bis) of the Cameroon Penal Code on Cameroon's vis-à-vis International Treaty Commitments Pertaining to LGBT Rights*, 6(2) INTERNATIONAL JOURNAL OF SCIENTIFIC AND RESEARCH PUBLICATIONS 77, 80 (2016).

[5] *Id*.

[6] Article 45 of the 1996 Constitution, *available at* https://ihl-databases.icrc.org/ihl-nat/0/7e3ee07f489d674dc1256ae9002e3915/$FILE/Constitution%20Cameroon%20-%20EN.pdf.

[7] It is believed Cameroon has LGBT citizens. Indeed, there are several associations in the country fighting for the protection of the human rights of these citizens. Amongst them is Humanity First Cameroon, which is an association that fights against HIV/AIDS, and defends and protects the human rights of vulnerable people including

cultural claims of the community. By outlawing homosexuality, Cameroon has prioritized cultural claims over, albeit, the legitimate individual rights of LGBT.[8] Criminalizing homosexuality does not resonate with western thinking and challenges the conventional understanding of rights which attributes rights to individuals rather than to groups.

This article does not reject the conventional understanding of human rights. Neither should it be read as an attack on homosexuality. Contrarily, it recognizes the need to respect the rights of LGBT but provides an alternative position that is consistent with local realities. In addition, the article does not aim to project cultural relativism of human rights although the arguments incidentally raised the saliency of the debate. This article rather documents the criminalization of same-sex relations in Cameroon and unravels the tension it fosters in the domain of human rights. Inasmuch as it recognizes the negative impact of criminalization to the individual rights of LGBT, it advances and explores an alternative argument: criminalization of same-sex relations enforces cultural and group rights.

To meet its aim, the article resorts to conducting an extensive review of selected literatures and in-depth interpretation of the relevant domestic and international laws and legal doctrines. The sources of the data used to arrive at the conclusions are, therefore, basically derived from municipal statutes and international laws.

The rest of the article is organized under four sections. Section two discusses the offence of homosexuality in Cameroon and examines the impact on LGBT. Section three explores the plethora of divergent, and related, rights recognized by the Constitution and under international law. Section four establishes a relationship between the anti-homosexuality law and the protection of cultural and group rights. It argues that upholding group rights may justify the rejection of homosexuality. Finally, section five concludes and provides recommendations.

II. THE CRIME OF HOMOSEXUALITY UNDER CAMEROONIAN LAW

Homosexuality in Cameroon is punishable under section 347 *bis* of the penal code. According to the provision, "whoever has sexual relations with a person of the same sex shall be punished with imprisonment for from six months to five years and a fine of from CFAF 20000 to CFAF 200000."[9] It also states that the penalties shall be doubled if the prohibited acts are carried out with a minor of sixteen to twenty-one years of age.[10] For the offence to be consummated,

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the LGBT community. See the group's website at: https://www.astraeafoundation.org/stories/humanity-first-cameroon/ (Accessed on 12 May, 2019).

[8] UDHR includes right of every person to life, privacy, health and equality before the law, the right to freedom of expression and freedom from discrimination and violence, including torture. In countries like Cameroon where homosexuality is criminalized, LGBT persons fear or face imprisonment and persecution solely because of their sexual orientation, gender identity or gender expression. It has been extensively documented that homophobic laws infringe on individual human rights of LGBT. See, Erica Nordberg, *Ignoring Human Rights for Homosexuals: Gross Violations of International Obligations in Cameroon*, 27(2) AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 440, (2012); and ATOH WALTER TCHEMI, *supra* note 4, at 80.

[9] The CFA franc is the name of two currencies, the West African CFA franc, used in 8 West African countries, and the Central African CFA franc, used in 6 Central African countries including Cameroon. The exchange rate to the Euro is approximately 655 CFA francs to 1 Euro.

[10] Section 347(1) of the penal code.

there must be an act of sexual relations between persons of the same sex. "Sexual relations", based on the practical enforcement of the law, refers to physical sexual activity including touching, fondling, kissing, and even sexual intercourse. In reality, people are arrested and charged for homosexuality without proof of engaging in sexual relations. Behaving and dressing in a so-called 'feminine' manner, consuming feminine drinks (like baileys), and sending affectionate text messages to a person of the same sex are sufficient grounds to be charged.[11] Sometimes, in the absence of direct evidence of sexual relations, people are charged and convicted under section 94(1) & (2) of the penal code for attempted homosexuality. Section 347 *bis* is said to be homophobic as not only same-sex intercourse is criminalized, but also homosexuality as an orientation which includes a psychological state.[12] LGBT are prosecuted under section 347 *bis*. Generally, whoever engages in same-sex relations, even in the presence of a subsisting heterosexual relationship, infringes section 347 *bis*. In fact, prosecutions have been common against gays than lesbians.[13]

According to Human Rights Watch, Cameroon has the unenviable record, amongst countries still penalizing homosexuality, as being one of the most aggressive in terms of prosecutions for consensual same-sex relations.[14] Out of the 76 countries in the world that prosecute people for same-sex relations, the rate of enforcement of the law in Cameroon is amongst the highest.[15] The report avers that the law has been subjected to abuse by the police and others as it is used for extortion and to settle scores.[16] It further states that alleged homosexuals lack legal representation and are usually subjected to torture and other degrading forms of treatment to extract confessions.[17] The pathetic story of Roger Mbede, a gay man who became a global face of the fight for gay rights in Cameroon, reveals the plight of sexual minorities in the country. He was arrested, tried and imprisoned on the basis of text message alleging his sexual preference for men. His imprisonment was also confirmed on appeal. He encountered discrimination, threats and persecution even from his own family who allegedly failed to provide him with medical care until his death.[18]

The anti-homosexuality law has exposed LGBT to persecution. They are regularly harassed by the police often with the support of the population that is mostly homophobic and intolerant towards them. The stigmatization is extended to their families who are also subjected to ridicule.

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[11] Neela Ghoshal, Human Rights Watch, Guilty by Association: Human Rights Violations in the Enforcement of Cameroon's Anti-Homosexuality Law (21 March 2013), *available at* https://www.hrw.org/report/2013/03/21/guilty-association/human-rights-violations-enforcement-cameroons-anti (Accessed on 7th of November, 2018).

[12] Sydoine Claire T. Matsinkou & Juakom J. Emmanuel, *Homosexuality as a Crime in Cameroon*, 3(2) INTERNATIONAL JOURNAL OF GENDER & WOMEN'S STUDIES 138, 141 (2015).

[13] Human Rights Watch reports that most of those who have been arrested and charged for the offense of homosexuality are men. *Supra* note 11.

[14] *Id*.

[15] *Id*.

[16] *Id*.

[17] *Id*.

[18] Robbie Corey-Boulet, Aljazeera America, Who Killed Roger Mbede? (26 March 2015), *available at* http://america.aljazeera.com/articles/2015/3/26/who-killed-roger-mbede-gay-rights-cameroon.html (Accessed on 12th of December, 2018).

Homosexuality is associated with witchcraft, cultism, and family curse and injures the reputation both of the individual and his family. To shield themselves from blame and shame, family members often report other members suspected of committing the offence to the authorities. Offenders are regarded as social deviants and outcasts. Arguably, the anti-homosexuality law may be said to deny the humanity of homosexuals and, by implication, attempts to alter it. It is at the backdrop of these developments that Cameroon has been criticized for its treatment of sexual minorities. Irrespective of the merits of the criticism, at least from a liberal human rights perspective, Cameroon's attitude towards homosexuality can still be justified on the basis of human rights.

III. THE CAMEROON CONSTITUTION: A RIGHTS-BASED PROJECT

Cameroonian law guarantees the protection of numerous human rights most of which are recognized in the Constitution.[19] The 1996 Constitution makes numerous references to human rights which are recognized as fundamental values. By virtue of the Preamble of the Constitution:

> we, the people of Cameroon, declare that the human person, without distinction as to race, religion, sex or belief, possesses inalienable and sacred rights; affirm our attachment to the fundamental freedoms enshrined in the Universal Declaration of Human Rights, the Charter of the United Nations, the African Charter on Human and Peoples' Rights and all duly ratified International Conventions relating thereto, in particular, to the following principles: all persons shall have equal rights and obligations…; the State shall ensure the protection of minorities and shall preserve the rights of indigenous populations in accordance with the law.

The Preamble further guarantees freedom of expression and recognizes the responsibility of the state to "protect and promote the family which is the natural foundation of human society."[20] Article 1(2) of the Constitution authoritatively mandates the state to "recognize and protect traditional values that conform to democratic principles, human rights and the law" and to "ensure the equality of all citizens before the law."

Furthermore, Article 45 of the Constitution reiterates the importance that the state attaches to human rights. Based on this provision, "duly approved or ratified treaties and international agreements shall, following their publication, override national laws…" The provision incorporates ratified international treaties, including human rights treaties, into the body of municipal law. Perhaps due to the importance accorded to them, the Preamble expressly mentions three instruments: the Universal Declaration of Human Rights 1948, the United Nations Charter 1948, and the African Charter on Human and Peoples' Rights (ACHPR) 1981. In addition to these instruments, Cameroon is also a signatory to the International Covenant on Civil and Political Rights (ICCPR) 1966, and the International Covenant on Economic, Social

[19] There have been 3 major constitutional developments in Cameroon. Upon re-unification of *La Republique du Cameroun* and British-administered Cameroon, a Federal Constitution came in 1961. Following a referendum in 1972, the Federal Constitution was replaced by a Unitary Constitution, which was in turn amended in 1996.

[20] The rights recognized in the Preamble to the Constitution are justiciable on the basis of Article 65 of the Constitution which states "the Preamble shall be part and parcel of this Constitution".

and Cultural Rights (ICESCR),[21] etc. Following their ratification, the principles enshrined in these conventions have become part of Cameroonian law and ranked higher than the provisions of municipal law in conflict with them.

The ratified conventions put Cameroon under an obligation to protect and promote the rights and freedoms enshrined therein. By virtue of the conventions, read alongside the Constitution, a multiplicity of rights and freedoms are available to Cameroonians including equality and non-discrimination,[22] freedom of expression,[23] the right to participate in the cultural life of the nation,[24] the duty to protect the family[25] and duties owed by citizens to the society and the state.[26] The rights enumerated above are mostly of individual and collective in nature and are associated with the offence of homosexuality. Moreover, these rights recognized in the Constitution are not arranged in a hierarchy and there is no coherent pattern for their realization or enjoyment. Therefore, the inference would be that the rights are equal in status and importance, and the offence of homosexuality is at the crossroads of these rights.

The rights protected in the Constitution are varied and punishing homosexuality deals with competing categories of rights: while the offense violates individual rights, it protects group rights. The conventional position, based on Western liberal thinking, opines that homophobic laws infringe on individual rights and freedoms notably equality and non-discrimination, and freedom of expression.[27] This position, which is not without merits, has been extensively documented and does not fall within the purview of this article. A different narrative can be advanced which argues that section 347 *bis* of the penal code, inasmuch as it violates individual rights and freedoms, also strengthens positive cultural values: it protects the family, upholds cultural and moral values, and reinforces the notion of duties. These alternative values are presented not as complementary. They are rather presented as divergent and competing claims. In the following, I will establish the legal bases of these claims.

The protection of the family is guaranteed under the Preamble of the Constitution and in several conventions. Article 10(1) of ICESCR is forceful in its protection of the family. It states that "The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society…" In almost similar terms, Article 23(1) of ICCPR[28] and Article 18(1)[29] & (2)[30] of the ACHPR also protect the family. This protection

[21] Cameroon acceded to the ICCPR and ICESCR on 27 June1984.
[22] See UDHR, Art. 7, ICCPR, Art. 26, and ACHPR, Art. 19.
[23] See UDHR, Art. 19, and ICCPR, Art.19(2).
[24] See ICESCR, Art. 15(1)(a), UDHR, Art. 27, ACHPR, Art. 17(2). Article 17(3) of the ACHPR affords protection to the moral and cultural values of a community.
[25] See ICESCR, Art. 10(1), ACHPR, Art. 18(1) & (2), and ICCPR, Art. 23(1).
[26] UDHR, Art. 29 and ACHPR, Arts 27(1) and 29.
[27] ERICA NORDBERG, *supra* note 8, ATOH WALTER TCHEMI, *supra* note 4, at 80.
[28] "The family is the natural and fundamental group unit of society and it is entitled to protection by the society and the state".
[29] "The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral".

recognizes the right to marry, freedom of thought, conscience, and religion of members of the family, respect of family life and non-discriminatory treatment between spouses in relation to marriage and divorce.[31] This protection enhances the contribution of the family to the realization of the right to an adequate standard of living for its members and achieving sustainable development. The protection also extends to family values.

Moreover, Article 15(1) (a) of the ICESCR guarantees the right of individuals to participate in the cultural life of the society.[32] Article 17(3) of the ACHPR further guarantees "the promotion and protection of morals and traditional values recognized by the community…" This right recognizes the freedom not to suffer from any interference in the access and participation to cultural life. It involves both negative and positive actions from the State: non-interference with the exercise of cultural practices and with access to cultural goods and services on the one hand and ensuring preconditions for participation, facilitation and promotion of cultural life on the other.[33] Traditionally, this right was confined to education, access to artistic events, and protection of the rights of authors in the form of individual rights.

Participation in cultural life of the community refers not only to the individual dimension of the rights, but also to the possible enjoyment of those rights in community with other members of their group.[34] This right encompasses that the educational programs of States should respect the cultural specificities of national or ethnic, religious or linguistic minorities as well as indigenous peoples and incorporates in those programs their history, knowledge and technologies, as well as their social, economic and cultural values and aspirations. The enjoyment of this freedom encompasses a respect for culture which is interpreted in the broadest possible terms to include ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sports and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts. It also includes customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their worldview representing their encounter with the external forces affecting their lives.[35] This right precludes the observance of cultural practices that may impede the respect of other rights.

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[30] "The State shall have the duty to assist the family which is the custodian of moral and traditional values recognized by the community…"

[31] Office of the High Commission for Human Rights, 1990. CCPR General Comment No: 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses' (1990), *available at* http://www.refworld.org/pdfid/45139bd74.pdf (Accessed on 4 November 2018).

[32] This is also the case with Article 27 of the UDHR and Article 17(2) of the ACHPR.

[33] See UN Committee on Economic, Social and Cultural Rights, 2009. General Comment No. 21, Right to Take Part in Cultural Life (Art. 15, para 1a of the Covenant of Economic, Social and Cultural Rights) 21 December 2009, *available at* http://www.refworld.org/docid/4ed35bae2.html (Accessed 4 November 2018), Celine Romainville, Defining *the right to participate in cultural life as a human right*, 33(4) NETHERLANDS QUARTERLY OF HUMAN RIGHTS 405, 408 (2015).

[34] Marco Odello. *The Right to take part to Cultural Life: General Comment No. 21 of the United Nations Committee on Economic, Social and Cultural Rights*, 27ANUARIO ESPANOL DE DERECHO INTERNACIONAL 493, 498 (2011).

[35] UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *supra* note 31.

Duties are also recognized under human rights instruments and this is most apparent in the ACHPR. According to Article 27(1) of the ACHPR, "every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community." Article 29 lists out the duties owed by an individual to his community including "to preserve and strengthen positive African cultural values in relations with other members of the society…" Attributing rights to individuals with correlative duties is ingrained in the African worldview where the individual is placed at the centre of his community and acts in their interests. The individual is thus a moral being endowed with rights, but also bounded by duties, proactively uniting his needs with the needs of others. This conception was the basis of the formulation of rights in pre-colonial societies.[36] The notion of duties negates the individualization of rights and puts the role of the individual to promoting the collective interests.

The rights and duties elaborated above are interrelated, group-oriented, and are different from those traditionally associated with the criminalization of same-sex relations. Most of these rights and freedoms reinforce traditional values of individual responsibility, group solidarity and identity and emphasize the contribution of the individual towards his society. I shall explain the relationships these rights foster with homosexuality.

IV. ALTERNATIVE REFLECTION ON ANTI-HOMOSEXUALITY LAW: ENFORCING GROUP-ORIENTED RIGHTS

Although the Constitution and other laws emphasize individual rights, the reality on the ground suggests strong preferences for communal values. These values, amongst others, are reflected in the protection of the family alongside duties owed toward it and in respect for moral values. I shall treat them in turn.

The conception of family in Cameroon is different from that in the West. The Cameroonian family is extended. Beside the immediate nuclear family, members of the family include half brothers and sisters, cousins, aunts, uncles, nephews, and nieces. As part of the unit, extended members play an active role in the running of the whole family and in the socialization process. In the extended family, members cater for the wellbeing of one another and it is not unusual for children to regard their cousins, nephews, and nieces as brothers and sisters. Similarly, children may live with, and be brought up by, their uncles and aunts where, in principle, they are considered and treated as biological children of the household. The support system ensures that, in the death of their parents, orphaned children are cared for by surviving members of the extended family especially uncles and aunts. This support system reflects group solidarity at its best and elevates family interests above private considerations. The protection of the family, guaranteed under human rights, entails respect for this communal value that projects the family

[36] Makau Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VIRGINIA JOURNAL OF INTERNATIONAL LAW 339, 359-364 (1995).

as a unit. Homosexuality, as will subsequently be documented, threatens family values and exposes the family to ridicule thereby undermining its protection.

The traditional notion of family consists of the husband, his wife or wives, their children and extended relations. Like the extended family, the Cameroonian nuclear family is large by every account. The belief in large families is in part influenced by polygamy, a practice that allows men to marry more than one wife.[37] Polygamy is prevalent in rural communities and increases the prospects of large families with several half brothers and sisters living together. Ensuring discipline amongst the children and cooperation between competing wives sharing the same husband is a difficult task indeed and requires instilling in them communitarian values capable of fusing diverse interests for the common good. Poverty and illiteracy are blamed for the belief in large families. The assumption is that extended and large families provide safety net to their members: in the event that a member becomes successful, he or she will, in the spirit of communality, be morally obliged to assist less successful members including parents. This gesture further promotes solidarity and unity of purpose and undermines individual preferences. Homosexual relations, including marriages, are not only inconsistent with the traditional notion of marriage, which is equated only with heterosexual relations, but also undermines the intrinsic love for children in Cameroonian society. In conformity with the traditional notion of marriage, section 52(3) of the Civil Status Registration Ordinance outlaws homosexual marriages.[38]

Like elsewhere, children are considered the basis of marriage and the foundation of society. In addition to acting in the future as safety net to less successful members of the family, children are key determinants of a stable marriage and in their absence the survival of the marriage is often on the line. Thus, in addition to marriage pressures, couples experiencing fertility issues and childlessness are often stigmatized by society. Since procreation is an essential feature of marriage, in the absence of children, a marriage is almost always doomed to fail. Here, reference to children is to biological children as adopting children would not preclude a Cameroonian family from stigmatization. Consequently, it is not unusual for an unfertile wife to permit the husband to engage in adulterous relationships in order to father a child to save her marriage. Similarly, it is not uncommon for a wife to be either chased out of the matrimonial home or replaced by another woman because of her inability to bear children for the husband.

Because of the importance of children to marriage and its stability, sexual intercourse that is not predicated on procreation is devoid of social utility in spite of the altruistic benefit of pleasure. It does not guarantee continuity of communal life as it is premised on considerations other than procreation. Homosexuality is an anathema, inconsistent with the goals of marriage, and expresses a breakdown of social values. The acts, if encouraged to develop into uncontested cultural norms, will threaten the very survival of the communitarian society. Adoption of children, an option available to homosexual couples in some jurisdictions,[39] is available only to

[37] Polygamy is recognized under section 49 of the Civil Status Registration Ordinance 1981, (Law no. 81-002 of 29 June, 1981).

[38] It provides: "No marriage may be celebrated: if the spouses to-be are of the same sex."

[39] Historically, the first country to approve same-gender adoption without restrictions was Canada in 1999. This was followed by the Netherlands (2001), South Africa (2002) and Sweden (2002). Most recently, the French

heterosexual couples in Cameroon because of the inability to naturally perform a marital obligation which, in itself, cannot be substituted for biological children. Further, adopting children outside the extended family distorts the family bloodline which is regarded as the basis of family relationships, and inheritance, in Cameroon.

The family is, therefore, at the core of social organization in Cameroon. Although it consists of individual members, the collective interest of the unit is elevated above that of its members and the role of each member is to ensure the realization of the collective wellbeing. As an institution, the family defines and projects the image of its members. Thus, in traditional societies, the worth of a person is measured not only on the basis of personal achievements but also on the integrity and moral compose of his family. In this context, in negotiating inter-family relations such as marriage, an important criterion often used to either approve or disapprove of the union is the reputation of the other family. Irrespective of his positive attributes, the family of the bride to-be is unlikely to approve the marriage if the bridegroom to-be originates from a family with questionable reputation. A person's values are said to be molded by those of his family and the family's reputation inevitably affects the perception of its members. The fear is that, on marriage, negative values inherited from the family are liable to be transferred to the offsprings of the union.

Moreover, marriage is perceived not only as a union between two individuals, but also that of two families. Family reputation is protected through traditional values including proper upbringing of children, respect for elders, moral rectitude, and upholding social conducts that strengthen community cohesion. Homosexuality is inconsistent with the protection of the family and violates the traditional concept of marriage thereby exposing the entire family, including the individual, to shame and disrepute. Obviously, homosexuality undermines communitarian values as it elevates individual choices above all others, including the superior interests of the family. Thus, the consequences of homosexuality extend beyond the individual and affect the reputation of the entire family which is prejudicial to inter-family relations.[40] Consequently, homosexuality is vehemently opposed to the extent that family members have assumed the responsibility of uprooting it within the unit by reporting suspected cases to the authorities.[41]

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government approved same-gender marriage and adoption despite France's long religious tradition of opposition to this policy. See Darrel Montero, *Attitudes toward same-gender adoption and parenting: An Analysis of Surveys from 16 Countries*, 15(2) ADVANCES IN SOCIAL WORK 444, 445 (2014).

[40] In her examination of Uganda, Lydia Boyd asserts that homosexuality is seen as a problem that exceeds the individual. It brings shame to one's family and the practice is viewed as undermining other social relationships and obligations. See Lydia Boyd, *The Problem with Freedom: Homosexuality and Human Rights*, 86(3) ANTHROPOLOGICAL QUARTERLY 697, 711 (2013).

[41] It is on record that some of the arrests made against suspected homosexuals have been orchestrated by complaints filed by family members of the accused including parents against children and sibling against sibling. It has also been reported that suspected homosexuals in custody are often abandoned by their families and even, on occasions, are ill treated by them, perhaps due to the stigma the accusations will have on the family. See Andy Copsa, The Nation, Abandoned and Imprisoned for being gay in Cameroon, (March 4, 2014), *available at*: https://www.thenation.com/article/abandoned-and-imprisoned-being-gay-cameroon/ (Accessed on 3 of May 2019).

On top of the above, homosexuality could amount to violation of legal duties imposed on individuals. Among the duties listed under Article 29 of the ACHPR are duties to respect one's parents and work for the harmonious development of the family, to preserve social and national solidarity, to preserve and strengthen positive African cultural values and to promote the moral wellbeing of society. Preserving the moral wellbeing of society is the responsibility of each individual and requires a display of moral rectitude and integrity. The practice of homosexuality infringes these goals and is detrimental to the common good. It is not only contrary to traditional African spirituality, but it is also morally abhorrent and inconsistent with the natural orderings of life. It is also said to be inconsistent with both Christian and Islamic values.[42] In a society plagued with insurmountable problems, including poverty, the harmonious development of the family is best achieved through cooperation between members and maintaining moral integrity.

Homosexuality is a negation of those duties and a threat to the health of society. Bernard Matolino justifies the rejection of homosexuality on African communitarian values.[43] He argues that the activities of an individual are constrained by the objectives of the community and this extends to issues of sexuality and sexual morality.[44] An individual should engage in responsible social and sexual behavior that seeks to construct and build her community in ways that promote the survival of the community as well as maintaining its harmony.[45] He opines that a homosexual fails the ultimate communitarian society test in that he or she fails to display a characteristic that seeks to contribute to the social good.[46]

The protection of positive African values is also provided under Article 29 of the ACHPR. 'Positive African values' are those that assert African civilization and identity and promote African consciousness. Those values exclude conducts and practices that forestall the progress of the individual, the family, and society in general. One of the most positive African contributions to the global culture is the communitarian principle.[47] Communal tendencies are at the centre of

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[42] Peter Geschiere, Homosexuality in Cameroon: Identity and Persecution, *in* URGENCY REQUIRED: GAY AND LESBIAN RIGHTS ARE HUMAN RIGHTS 126-131 (I. Dubei & Hieikema A., eds., Humanist Institute for Cooperation with Developing Countries: The Hague, 2010). It is also understood in popular and political discourses in Zambia that homosexuality is incompatible with Christianity. See Adriaan Van Klinken, *Homosexuality, Politics and Pentecostal Nationalism in Zambia*, 20(3) STUDIES IN WORLD CHRISTIANITY 259, 265 (2014).

[43] Bernard Matolino, *Being Gay and African: A View from an African Philosopher*, 18 UNISA PRESS JOURNALS 59, 70 (2017).

[44] *Id*.

[45] *Id*.

[46] *Id*.

[47] In addition to its articulation above, the principle is also expressed in collective ownership of property, participation of the entire community in the settlement of disputes and in upholding duties to the community. Despite the abrogation of customary tenure in Cameroon by Law no. 74-1 of 6 July 1974 regulating land tenure, most lands, is still basically held under this system. Customary tenure provides for collective ownership or the holding of land individually, but for collective interests. Land is usually held by the chief or the Council of Elders for the benefit of the entire community. Land is attributed based on the size and needs of individuals or families and reverts back to the society if the beneficiary abandons the said parcel of land. Through collective ownership, the wellbeing of the community is placed above the interests of the individual. Community is also expressed in the collective settlement of disputes, which require the participation of community elders and all those who either know the parties or are familiar with the history of the problem. It is a platform where everyone is expected to speak. See Tom Tso, The process of decision making in tribal courts, *in* LAW AND ANTHROPOLOGY 435-447 (P. Sack & J.

social life and are associated with moral responsibilities and duties which each individual is expected to project for the betterment of society. Expressions of communality do not entail complete negation of individual claims. Rather, individual claims are recognized in so far as they strengthen communal interests. Rather than furthering communal interests, homosexuality subverts the standing of the family and threatens its unity as it often leads to recriminations amongst family members.

Based on the analyses above, homosexuality is not amongst the "positive African values" to be protected under Article 29 of the ACHPR nor is it an uncontested feature of cultural life in Cameroon. Arguments have been advanced to suggest that homosexuality was ingrained in African societies, and existed prior to colonialism and, thus, the colonizers enacted homophobic laws to combat the phenomenon in the colonies.[48] Those views cannot be validated in Cameroon. Probably, isolated incidences of homosexuality existed, and perhaps still do, in Cameroonian society. However, they represented deviations from communal patterns rather than the general norm. Contrarily, in large parts of the south of the country, Peter Geschiere reports that homosexually was seen as an abomination and was associated with witchcraft, which places same-sex sexuality outside the order.[49] Hence, he assumes that the practice was present but in very secretive form, whereas in the north of the country, there was a sharp formal condemnation as conflicting the Koran.[50] The secrecy shrouded in the isolated incidences of the practice should not be attributed to its criminalization. Rather, it should be seen as recognition of its abhorrence; thus, for someone to maintain his position and reputation in society, he must not be associated with the anti-social practice of homosexuality. To maintain their standing, the acts had to be

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Aleck eds, Dartmouth Publishing Company Ltd, 1992). There is no belief in *locus standi* as the basis for participation in the litigation as is the situation in Western-style courts.

[48] See, amongst others, Busangokwakhe Dlamini, *Homosexuality in the African Context*, 20(67) AGENDA 128-136, 129 (2006); Deborah P. Amory, *"Homosexuality" in Africa: Issues and Debate*, 25(1) A JOURNAL OF OPINION 5, 5 (1997); Josiah Taru & Hardlife S. Basure, *Rethinking the Illegality of Homosexuality in Zimbabwe: A Riposte to Chemhuru*, 5(1) INTERNATIONAL JOURNAL OF POLITICS AND GOOD GOVERNANCE 1, (2014); Gomes G. Da Costa Santos, Decriminalizing Homosexuality in Africa: Lessons from the South African Experience *in* HUMAN RIGHTS, SEXUAL ORIENTATION AND GENDER IDENTITY IN THE COMMONWEALTH: STRUGGLE FOR DECRIMINALIZATION AND CHANGE 313, 333 (C. Lennox & M. Waites, eds., School of Advanced Study, London, 2013); and Nicholas Alden Kahn-Fogel, *Western Universalism and African Homosexualities*, 15 OREGON REVIEW OF INTERNATIONAL LAW 315, 326 (2013)

[49] PETER GESCHIERE, *supra* note 42.

[50] *Id.* at 128-129. The Koran is very explicit in its condemnation of homosexuality. In the Qur'an homosexuals are referred to as qaum Lut (Lot's people), referring to the prophet Lut (known as Lot in the Christian Bible) who preached against homosexuality in the cities of Sodom and Gomorra, which were subsequently destroyed. In the Qur'an Luts questions, "How can you lust for males, of all creatures in the World, and leave those whom God has created for you as your mates? You are really going beyond all limits." The prophet Muhammad adds, "Doomed by God is who does what Lot's people did [i.e., homosexuality]". The prophet also commented that, "No one should look at the private parts of another man, and no woman should look at the private parts of another woman, and no two men sleep under one cover and no two women sleep under one cover". In his last speech, known as the "Farewell Sermon", the prophet added a last condemnation of homosexuality saying: "Whoever has intercourse with a woman and penetrates her rectum, or with a man, or with a boy, will appear on the Last Day stinking worse than a corpse; people will find him unbearable until he enters hell fire, and God will cancel all his good deeds." See Khalid, Duran, Homosexuality in Islam *in* HOMOSEXUALITY AND WORLD RELIGIONS 181, 182.183, 184 (Swindler, Arlene, ed., Valley Forge, Pennsylvania, 1993).

performed in secrecy. In this connection, those guilty of same-sex relations were deviants who acted contrary to the spirit of moral rectitude rather than in conformity with it.

The suggestion that European colonizers met homosexuality in much of Africa and enacted homophobic laws to combat it is also not sustainable in Cameroon. It is true that most of the laws still in force in Cameroon are of colonial heritage and, arguably, the law on homosexuality is not an exception. The colonial states, France and Britain, merely transposed into their respective colonial territories laws that were tailored to their respective realities. In the foregoing, the Penal Code 1967 is more of a reflection of the French Penal Code and the Nigerian Criminal Code (itself based on the English draft of 1879) that were extended into the various territories and the provision on homosexuality was thus premised not on the social reality of Cameroon, but that of the colonial authorities.[51] Evidently, it seems that Cameroonian authorities believe that same-sex relations is a foreign concept that has no place in Cameroonian culture and society and the objective of section 347 *bis* of the penal code is therefore to ensure that it does not gain roots.

The rights and duties analyzed above are as relevant as those traditionally associated with homosexuality considering that human rights are universal, inalienable, indivisible, interdependent, and interrelated and none can be fully enjoyed without the realization of others. Since the Constitution does not provide a hierarchy of rights nor establish a consistent pattern for their realization, by punishing homosexuality, the authorities in Cameroon have deliberately or inadvertently elevated group rights of the community above individual rights of homosexuals, inevitably leading to rights prioritization. This is unsurprising development given the important roles played by traditional values in the country.

By prioritizing in favour of communal values, the state has infringed on the individual rights of LGBT through the criminalization of homosexuality. A violation of one category of rights to enforce another is, at best, an uncomfortable and provocative compromise. The trend towards rights prioritization is not an isolated occurrence and is mostly evident in group-oriented cultures, especially when individual and communitarian claims compete with each other. Though no general pattern has emerged in Cameroon, rights prioritization has featured in case law, notably in *Ako Vincent Bissong v. Endeley Emmanuel*[52] where the Court of First Instance, Limbe, prioritized cultural claims over individual claims. The claimant's action against the defendant was in the sum of 250.000 francs CFA being for general damages for conversion, loss of

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[51] The penal code 1967 harmonized disparate criminal laws applicable in the former West and East Cameroons. It was inspired by the ill-fated French draft of 1934, which has no more become law than the 1879 draft in England. Indeed, the influence directly came from the Nigerian Criminal Code which was based closely on the English draft of 1879 which also inspired the Canadian and Queensland codes. In addition to these foreign laws, the Italian Penal Code 1931 was also of great influence. See. Clarence, J.A. Smith, *The Cameroon Penal Code: Practical Comparative Law*, 17(3) INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 651, 651-52 (1968).

Although homosexuality was decriminalized in France after the French Revolution, it was only decriminalized in England in 1967. The Italian Criminal Code 1931 outlawed homosexual acts amongst gay men who were persecuted under a law prohibiting acts 'corrupting the morals.' Although most European countries have changed their attitudes and legal positions toward same-sex relations, the Cameroon Penal code adopted a homophobic stance. Arguably, this was because most of the foreign codes that inspired the Cameroon code were, by then, intolerant towards homosexuals and homophobic.

[52] Court of First Instance Limbe, suit no. LM/83/99: unreported (1999).

business, and for the recovery of his canoe. The claimant's canoe was seized by local traditional authorities, in coordination with the defendant, for his violation of a custom prohibiting the setting of fire on an island used by the village communities to perform rituals. His failure to secure the release of his canoe with the assistance of the local administrative authorities and a human rights group prompted this action. The Court ruled against the claimant on the ground that his action was misdirected against the wrong defendant (which should have been the traditional authorities that ordered the seizure of the canoe). Nonetheless, the court pointed out that even if the action had been brought against the correct defendants, the outcome could not have been any different for "a [customary] rule forbidding a particular act or acts from being done at a shrine or place of sacrifice is not repugnant to natural justice." The court ordered the claimant to write a letter of apology to the traditional authorities and, thereafter, go to the village to retrieve his canoe.

Although the court did not employ the language of rights, the saliency of human rights issues is evident from the facts. Apparently, the case is at the centre of divergent and competing rights: the claimant's right to freedom of expression, as evidenced by his desire to set a fire on the island to warm himself, and his right to quiet enjoyment of property without undue interference;[53] and the right of the traditional communities to live according to their customary values. These rights are competing before the court: recognizing the claimant's right to set fire on the Island or to enjoy his property without undue interference would violate the local communities' right to preserve their indigenous belief which is to prohibit persons from setting fire on certain areas of the Island. Intimating that the claimant will not succeed in his action even against the correct defendants indicates the prioritization of the communities' rights against those of the individual.[54]

Prioritization of rights is not restricted to jurisdictions in sub-Saharan Africa. Heather Montgomery documents this phenomenon through the eyes of children involved in prostitution in the village of Baan Nua, Thailand.[55] Using the Convention on the Rights of the Child, she reveals the conflict involved in implementing certain provisions of the Convention, particularly the protection from sexual exploitation under Article 34, freedom of expression, freedom of

[53] This right is provided, amongst others, under article 17(1) of the UDHR which states: "Everyone has the right to own property alone as well as in association with others. Subsection (2) is to the effect that "No one shall be arbitrarily deprived of his property".

[54] Notwithstanding that the verdict was in favour of the defendant, it reveals an attempt by the court to balance both rights. Firstly, it rejected the claimant's action as misdirected and cautioned that a substitution of the defendants would not change the outcome of the case. Secondly, it intimated that upon writing a letter of apology, the claimant would be able to retrieve his canoe. Therefore, irrespective of the collapse of his claim, he was still entitled to his canoe. The balancing act of the judgment is intriguing. It suggests that although the claimant's action is genuine, the defense of custom advanced by the defendant is also compelling. The defendant is not liable in damages and the claimant is still entitled to retrieve his canoe. Implicitly, the court stated that both parties were right in their actions in one form or another although, in the circumstances of the case, more consideration had to be given to group rights as against individual rights. Thus, in its desire to balance both rights, it gave priority to one as against the other.

[55] Heather Montgomery, Imposing rights? A case of child prostitution in Thailand, *in* CULTURE AND RIGHTS: ANTHROPOLOGICAL PERSPECTIVES 80-101 (J.K. Cowan, M.-B. Dembour & R. A. Wilson, eds., Cambridge University Press, Cambridge, 2001).

thought and conscience under Articles 13 and 14 respectively. She intimates that human rights activists are inclined toward the protection of the right stipulated under Article 34 whereas the children are more interested in safeguarding those provided under Articles 13 and 14, which in essence, repudiate the exercise of the right provided under Article 34. She states that the children in exercising their rights to freedoms of expression, thought and conscience see no evil in prostitution which provides the income needed to cater for their families; they participate in prostitution to fulfill the duties owed to their family. Therefore, the children's desires to realize their cultural obligations under Articles 13 and 14 have driven them into prostitution thereby violating their freedom from sexual exploitation provided under Article 34.[56]

Apparently, the criminalization of same-sex relations in Cameroon does not seem to be a deliberate attempt to abrogate the individual rights of homosexuals. Rather, it should be seen as an unavoidable consequence of rights prioritization which, unfortunately, is a regular feature of modern human rights. Prioritization repudiates freedom of expression in favour of group-oriented obligations. Evidently, the notion that homosexuals are entitled to legal protection that overrides cultural rights, family duties, and responsibilities seems inappropriate in Cameroon.

V. CONCLUSION AND RECOMMENDATION

Despite Western condemnation of section 347 *bis* of the penal code, state attitude towards homosexuality is rarely polarizing in Cameroon. Although dissenting opinions in favour of decriminalization of same-sex relations are becoming louder nowadays, and mostly promoted by human rights groups on the basis of individual rights, they are usually superseded by conservative forces, relying on the argument of culture to forestall attempts at decriminalization. Each of these antagonistic positions is sustainable and justified under Cameroonian and international laws. Thus, evidently, based on the interpretation of the applicable laws, the offence of homosexuality involves competing categories of human rights: inasmuch as it violates the individual rights of homosexuals, it also enforces group-oriented rights of the community.

Although most of the laws in force in Cameroon are still of Western liberal inspiration, communitarian values continue to play an essential role in their interpretation. Seemingly, some of these communitarian values are inconsistent with liberal ideologies which, as in the case of homosexuality, do not respond to the belief system of the people and thus create tensions. The current legal climate presents no easy option to the Cameroonian authorities. It is not an acceptable option to abrogate the individual claims of homosexuals. Similarly, it is not sustainable to ignore the cultural sensitivity of the people. To put it simply, there is a need for the state to enact laws which are not homophobic, and which equally reflect the aspirations of a greater majority of Cameroonians to ensure to the people a sense of ownership of the legal process. Achieving such an outcome in a conservative and group-oriented society as Cameroon is a tall order indeed.

In spite of the anticipated difficulties, attempts should, nonetheless, be made at protecting sexual minorities while at the same time respecting cultural sensitivity. A potential compromise,

[56] *Id*.

unlikely to be satisfactory to conservative forces, will require a limited moratorium on prosecutions of homosexuals if they are discreet about their sexual orientation and if they act in ways that do not offend public sensitivities. Such a restrictive but tolerant approach to homosexuality will allay fears against the emergence of an alternative sexual culture capable of threatening the traditional notion of marriage, and with it, the dignity and respect accorded to the family. Failure to adopt such a restrictive, but permissive approach in favour of outright decriminalization of same-sex relations in Cameroon will rarely improve social attitudes toward homosexuals and other sexual minorities.

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THE POLITICS OF CONSTITUTIONAL AMENDMENT IN ETHIOPIA: ISSUES WORTH CONSIDERING

Zelalem Eshetu Degifie[*]

Abstract

The 1995 Federal Democratic Republic of Ethiopia (FDRE) Constitution suffers from weak legitimacy and imperfections. Such legitimacy deficit and constitutional flaws can be rectified through the power of constitutional amendment. This article examines the politics of constitutional amendment in Ethiopia in light of the current political reforms by looking at the diverse amendment models and views of selected political parties. Drawing on Richard Albert's amendment theory, the article argues that the textual and substantive models of constitutional amendment are not workable in Ethiopia. The article then suggests the political model of amendment for making the necessary changes in the FDRE Constitution. In this regard, active and genuine participation of the public and all political parties in the political process of amendment is crucial to (re)confer legitimacy. The civic engagement and deliberation part of the process would retrospectively cleanse the violation of the stringent rules of amendment and then heal the 'original sin' of the Constitution. However, this article ultimately suggests that the timing for doing so should be considered seriously in light of the level of national consensus and security conditions across the country.

Keywords: *amendment, constitutional imperfections, FDRE Constitution, legitimacy, political model*

I. INTRODUCTION

A constitution once drafted is not final, perfect and unamendable for all times to come. The ideologies, interests and ambitions that played major roles in framing of a constitution may be changed and outdated through time. As a result, the constitution must be modified to make it suitable to changing realities and needs. A constitution and political scene that makes amendments impossible, Mulford said, is the "worst tyranny of time" and, hence, invites the

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people and politicians to recourse to upheavals and revolutions.[1] Indeed, this alternative is not helpful to nation building, peace and development since it may shake the peaceful continuity of the state's legal and political environment by upending the foundations of the constitution and constitutional order. Therefore, the power of constitutional amendment is important to avoid the danger of anti-constitutional or revolutionary methods of constitutional change.

The FDRE Constitution has not been formally amended more than twice since its inception due to the authoritarian political practices of the ruling party- Ethiopian People's Revolutionary Democratic Front (EPRDF), which is a coalition of four ethnic-based political parties that advocates for revolutionary democracy.[2] However, after six years of public protests, EPRDF has been changed from within and elected Dr. Abiy Ahmed, who has promised to undertake political reforms on a broad spectrum of issues including the Constitution, as a new Prime Minister on April 2, 2018. This indeed creates an opening to consider the possibility of constitutional reforms in Ethiopia. Nevertheless, the main political players have different and competing views, ranging from amendment to replacement or remaking, on the future of the FDRE Constitution.

The main purpose of this article is, therefore, to examine the politics of constitutional amendment and its possible implications for Ethiopia's current political reforms based on a qualitative approach that uses primarily and secondary data. The article is divided into five main sections. Following this short introduction, the second section discusses the theoretical and conceptual frameworks of constitutional amendment. More specifically, it presents the various forms and models of amendment and their implications for legitimacy. The third section gives a particular focus on the views of political parties about the future of the FDRE Constitution and explores the discourses of constitutional change in the Ethiopian context. In connection, this section highlights some of the divisive provisions of the Constitution that cause hostility between political parties. The challenges for amending the Constitution in the current political setup are also identified under section four. Finally, section five provides the concluding remarks.

II. THEORETICAL FRAMEWORKS OF CONSTITUTIONAL AMENDMENT: A SKETCH

The constitutional amendment power is an authority for prospective constitutional changes and is a pivotal of future power that can change even sensitive issues once settled during constitution-making.[3] As such, it enables future generations to make a constitution compatible with changing circumstances and new public demands.[4] In addition, the power gives remedies

[1] ASHOK DHAMIJA, NEED TO AMEND A CONSTITUTION AND DOCTRINE OF BASIC FEATURES 15-16 (Revised 1st ed. Wadhwa and Company Nagpur Law Publisher 2007).

[2] The ideology has been used just for the purpose of consolidating power. However, currently, EPRDF's ideology and organizational structure has been challenged within the coalition. See Jean-Nicolas Bach, *Abyotawi Democracy: Neither Revolutionary Nor Democratic, A Critical Review of EPRDF's Conception of Revolutionary Democracy in Post-1991 Ethiopia*, 5(4) JOURNAL OF EASTERN AFRICAN STUDIES 641, 641-663(2011).

[3] Walter Dellinger, *The Amending Process in Canada and the United States: A Comparative Perspective*, 45 DUKE LAW JOURNAL 283, 283-284(1982).

[4] MARKUS BÖCKENFÖRDE, CONSTITUTIONAL AMENDMENT PROCEDURES 4-5 (Stockholm, International IDEA, 2nd ed., 2017); Charles Manga Fombad, *Some Perspectives on Durability and Change under Modern African Constitutions,* 11 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW I•CON 382, 383-387 (2013).

for constitutional imperfections by rectifying provisions that have proven, through time and practice, to be inadequate, unworkable and cause of inconvenience.[5]

Moreover, constitutional amendment is an ongoing process of popular participation in constitution-making. More importantly, the direct involvement of the public in the process is an indication of a continuing exercise of popular sovereignty.[6] Needless to say, the process offers a golden opportunity for the people to amend the constitution which creates a strong link between constitutional changes and the will of the people that legitimates the changes as well as the status quo.[7] However, it is important to note that the consent of the people reflected in the process of amendment alone is not a sufficient condition for legitimacy.[8] Accordingly, it can legitimate political actions only when they are morally justifiable. As a result, the consent of the people is insufficient to legitimate undemocratic and morally wrong amendments.[9]

For the above reasons, almost all national constitutions commonly deal with the power of constitutional amendment. As such, no constitution is considered to be complete without having an amending clause that dictates the process of constitutional change.[10] Therefore, amendment rules are a near-universal feature of contemporary constitutions.[11] These amendment rules, Richard Albert explained, provide a roadmap for constitutional changes by answering basic questions that could be raised in the process of amendment: how and when to amend the constitution, who amend the constitution, and what within the constitution is (un)amendable.[12] For this, the rules must be clear, understandable, certain and reliable to guide actions concerning amendments and should also balance rigidity with flexibility for allowing a moderate amendment rate to the constitution.[13] However, it is a fact that the nature of the amendment processes and practices vary across countries.

Indeed, the study of constitutional amendment implies more than how a state changes its constitution and hence presents a window into the politics of a state.[14] For instance, the debates over amendment rules signify the level of consensus and unity within the society in regard to the

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[5] YANIV ROZNAI, UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS: THE LIMITS OF AMENDMENT POWERS 1-5 (Oxford University Press, 2017).

[6] Rosalind Dixon & Adrienne Stone, Constitutional Amendment and Political Constitutionalism: A Philosophical and Comparative Reflection, *in* PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW 95-118(David Dyzenhaus &Malcolm Thorburn eds., 2016).

[7] *Id*. at 99.

[8] VICKI JACKSO & MARK TUSHET, COMPARATIVE CONSTITUTIONAL LAW 251-257 *(*2nd ed. Cambridge University Press 2006).

[9] *Id*.

[10] Countries that do not have a written/codified constitution such as the United Kingdom, Israel and New Zealand are exceptions in this regard. See DHAMIJA, *supra* note 1, at 9; Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective,* Chicago Public Law And Legal Theory Working PAPER No. 347, 96 (2011).

[11] BÖCKENFÖRDE, *supra* note 4, at 3.

[12] Richard Albert, *How Unwritten Constitutional Norms Change Written Constitutions*, 38 DUBLIN U. L.J. 387, 388-389 (2015).

[13] Walter Dellinger, *The Legitimacy of Constitutional Change; Rethinking the Amendment Process,* 97 HARVARD LAW REVIEW. 386, 386-389(1983); Donald S. Lutz, *Towards A Theory of Constitutional Amendment,* 88(2) THE AMERICAN POLITICAL SCIENCE REVIEW 355, 355-370(1994).

[14] DONALD LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN 145-148(Cambridge University Press 2006); Lutz, *supra* note 13, at 355.

underlying questions of nationhood.[15] According to Donald Lutz, the amendment process hints at the fundamental political theories and constitutional values that guide a state.[16] Albert also asserts that amendment rules and practices sketch out some ideas about the basic principles of nationhood.[17] More importantly, they indicate the place where the state situates the seat of sovereignty and the sources of legitimacy.[18]

For the purposes of this Article, sovereignty denotes "the body or the institution that retains a final decision-making authority." [19] And legitimacy is understood in its multidimensional sense: as a legal, political and moral concept.[20] Legal legitimacy is about the adoption of a constitutional amendment as per the codified rules of constitutional change.[21] A constitutional amendment enjoys political legitimacy when it reflects the will of the general public for which it can be accepted by the people at large as appropriate.[22] With respect to the most fundamental matters, like constitutional amendment, political legitimacy is a sufficient condition of legal legitimacy.[23] Furthermore, the change acquires moral legitimacy when it reflects the shared values, desires and hopes of the people and deals with any of the societal problems.[24]

According to Fallon, "judgments of legal, political and moral legitimacy all reflect concerns with the necessary, sufficient, or morally justifiable conditions" for the exercise of the amending power.[25] In this context, amendments that are not embraced by the people cannot claim legitimacy though they are made with the support of political actors according to the textual rules of amendment and correct a terrible mistake in the original constitution.[26] Consequently, mere legal validity without broad public support does not confer legitimacy to constitutional amendments. Nevertheless, the legitimating role of popular will or consent is also restricted. It can "legitimate political actions only to the extent that the people agree as reasoning, morally autonomous and responsible human beings."[27]

Although scholars have recently produced ingenious study in constitutional amendment, the fullest explanation of the models of amendment appears in Richard Albert's comparative and comprehensive study of constitutional amendments in Canada, South Africa, German, India and

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[15] Dellinger, *supra* note 3, at 283-284.

[16] LUTZ, *supra* note 14.

[17] Richard Albert, Introduction: The State of the Art in Constitutional Amendment, *in* THE FOUNDATIONS AND TRADITIONS OF CONSTITUTIONAL AMENDMENT 1-2(Richard Albert, Xenophon Contiades & Alkmene Fotiadoueds, Hart Publishing, 2017).

[18] *Id*.

[19] For more discussion on sovereignty, see LUTZ, *supra* note 14, at 26-107.

[20] MARKUS BÖCKENFÖRDE, NORA HEDLING & WINLUCK WAHIU, A PRACTICAL GUIDE TO CONSTITUTION BUILDING 2-3 (Stockholm, International IDEA, 2011); Richard H. Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1789, 1789-1853(2005).

[21] *Id*.

[22] *Id*.

[23] Fallon, *supra* note 20, at 1805.

[24] BÖCKENFÖRDE et al, *supra* note 20.

[25] Fallon, *supra* note 20, at 1791.

[26] *Id*. at 1794-1795.

[27] JACKSO & TUSHET, *supra* note 8

the United States.[28] In this seminal work, Albert identifies four forms and three models of constitutional amendment based on the practice of states. In a broad sense, constitutional amendments can be made in constitutional or non-constitutional ways.[29] The constitutional way connotes changes made in compliance with the textual amendment rules which, in turn, lead to the notion of 'constitutional constitutional amendment.'[30]

According to Albert, constitutional amendments can also be non-constitutional on the basis of unconstitutionality, extra-constitutionality and anti-constitutionality that could result in 'unconstitutional, extra-constitutional and anti-constitutional constitutional amendments.[31] Generally, constitutional amendments can happen in the form of constitutional, unconstitutional, extra-constitutional and anti-constitutional constitutional amendment. From these forms, Albert derives the textual, political and substantive models of constitutional amendment.[32]

A. Constitutional Constitutional Amendments and the Textual Model

'Constitutional constitutional amendment' refers to formal constitutional changes carried out by complying with the amendment rules provided in the constitution, *i.e.,* they respect the methods and conditions enshrined in the constitution.[33] According to Albert, this form of constitutional change supplements the textual model of amendment.[34] This model underlines that the constitutional text holds the necessary and sufficient conditions to amend it, so amendments are valid and become part of the constitution only when they are made strictly in accordance with such amendment rules.[35] Needless to say, this model privileges the process of amendment over its substance.[36]

Rules of amendment codified in the constitution mostly give the decision making power of constitutional amendment to national legislatures by which the textual model often places sovereignty on national assemblies.[37] It is also possible for this model to put sovereignty on another body than the legislature.[38] In both cases, constitutional amendments derive their legitimacy from the constitutional text itself.[39] However, in practice, the mere adherences to amendment procedures may not necessary accord legitimacy to constitutional changes since legitimacy sometimes goes beyond legality.[40] For instance, incumbent presidents in Africa

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[28] Richard Albert, *Non-constitutional Amendments*, 22 CANADIAN JOURNAL OF LAW & JURISPRUDENCE 5, 5-47 (2009). On the recent development of the scholarships in amendment , see Albert, *supra* note 17, at 2-3.

[29] *Id.*

[30] *Id.*

[31] *Id*.

[32] *Id.*

[33] *Id*.

[34] *Id*.

[35] *Id.*

[36] *Id.*

[37] JACKSO & TUSHET, *supra* note 8,at 319-322

[38] *Id*. See also DHAMIJA, *supra* note 1, at 250-252.

[39] Albert*, supra* note 28, at 13-15.

[40] Richard Albert, *Four Unconstitutional Constitutions and their Democratic Foundations*, 50 CORNELL INT'L L.J. 169, 169-198 (2017).

change term limit provisions by complying strictly with procedures stipulated in the constitution while the people stand against these amendments and publicly protest against the changes.[41]

B. Extra-constitutional Constitutional Amendments and the Political Model

Extra-constitutional constitutional amendment refers to as changes made in the constitution without complying with the rules of amendment in the constitution. It is the result of actions that can be justified based only on sources exterior to the text of the constitution.[42] In this regard, the political actors may make "popular appeals or may invoke divinity or natural law" to justify their actions.[43] According to Albert, this form of amendment does not defy the text or spirit of the constitution and seek to undermine the existing constitutional order.[44] Amendment by popular majority or referendum, which is not prescribed by the constitution, is typically an extra-constitutional means of constitutional change.[45]

This form of constitutional change is the base of the political model of constitutional amendment.[46] The model rejects the conservative view of textual model that restrains constitutional amendments on procedural grounds. Instead, it allows for amendments by the interactions of political actors though it is not enshrined in the constitution as a procedure.[47] As a result, the political model, which imposes no limits on the will of the people, authorizes an amendment that is unconstrained by the constitutional text. Hence, political players can appeal to the people, who are a higher source of authority, particularly when the codified amendment rules obstruct the needed reforms.[48] Therefore, the will of the people, manifested in dialogues between the political players and the public, can bring about constitutional amendments.[49]

In fact, the political model reflects the theory of popular sovereignty and it is the people at large that assume the decision making power in this regard.[50] In view of this, the political process that activates political interactions and deliberations among the people is the source of legitimacy.[51] With hindsight, the consent of the people would validate the actions of the political players that infringe the amendment rules in the constitution and the constitutional amendment itself.[52]

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[41] Charles Manga Fombad, Presidential Term Limits Through Constitutional Amendments in Africa: Deconstructing Legitimacy, *in* CHECKS AND BALANCES AFRICAN CONSTITUTIONS AND DEMOCRACY IN THE 21ST CENTURY 45, 45-58(Grant Masterson & Melanie Meirotti eds., Published by EISA, 2017)

[42] Albert, *supra* note 28.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id*.

[48] *Id*. Richard Albert, *The Case for Presidential Illegality in Constitutional Amendment*, DRAKE LAW REVIEW (*forthcoming symposium issue* 2019)1, 19(2019).

[49] *Id.*

[50] *Id.*

[51] *Id*.

[52] Albert, *supra* note 48.

C. Unconstitutional Constitutional Amendments and the Substantive Model

Unconstitutional constitutional amendments are non-constitutional changes that go against the substance of the constitution though they satisfy the procedural requirements for making amendments.[53] This form of amendment infringes the essence of a constitution when it disrespects immutable principles that are protected by eternity clauses of the constitution and/ or when it disregards basic features of the constitution that are impliedly understood from the constitutional order.[54] At this juncture, it is usually the court that determines whether the amendment is unconstitutional.[55] Nevertheless, unconstitutional constitutional amendments do not necessarily demand an intimidating stance toward the existing constitutional system and involve any kind of hostility and subversion against the state.[56] Due to this, political players undertaking it do not think to exit from the existing constitutional order and, therefore, it comes about within the current political system and structure of government.[57]

The notion of unconstitutional constitutional amendment leads to the substantive model of constitutional amendment that forbids unconstitutional constitutional changes.[58] This model does not accept the convention of the textual model that the constitutional text preserves the necessary and sufficient conditions to amend the constitution.[59] As a result, it discards amendments that break the substance of the constitution even if they meet the amendment procedures put in the constitutions.[60] The substantive model gives more weight to constitutional substance over process, so it considers the likelihood of invalidating amendments that depart from the content and spirit of the constitution.[61] The model is also suspicious of the political process and rejects the assertion that politics necessarily gives legitimacy to amendments. Instead, it attaches legitimacy of an amendment to the decision of the judiciary.[62]

For this purpose, the substantive model authorizes the judiciary/constitutional court to nullify amendments that disregard the basic values of the constitution.[63] Accordingly, the judiciary holds an exclusive authority over the content and meaning of the constitutional text based on the principle of constitutional supremacy.[64] For instance, the Colombian Constitutional Court has developed the "constitutional replacement doctrine" through series of judgments.[65] In

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[53] Albert, supra note 28.

[54] Aharon Barak, *Unconstitutional Constitutional Amendments*, 44 ISRAEL LAW REVIEW 321, 321-341 (2011); Gray Jacobsohn, Unconstitutional *Constitution? A Comparative Perspective*, 4 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 460, 460-470*(2006)*; Rosalind Dixon, *Transitional Constitutionalism and Unconstitutional Constitutional Amendments,* Chicago Public Law and Legal Theory Working Paper No. 349, *1*-8(2011).

[55] Albert, *supra* note 28.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] Carlos Bernal, *Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine*, 11 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW I CON. 339, 339-357 (2013).

its judgments, the Court provides that the power of constitutional amendment does not imply the power to replace the constitution.[66] The Court further argues that the amending power is about an authority to modify the constitution and hence institutions authorized to amend the constitution do not have the competence to replace its essential elements.[67] Likewise, the Supreme Court of India has developed the "basic structure doctrine" and the amending power could not thus be invoked to change the fundamental features of the Constitution.[68]

D. Anti-constitutional Constitutional Changes and the Revolutionary Model

The idea of anti-constitutional constitutional change denotes a wholesale constitutional alteration that seeks to transform the entire constitutional order through violent or nonviolent revolution.[69] Needless to say, the purpose of this form of constitutional change is to undermine the entire constitutional system and it is certainly indifferent to the state, and it often entails some form of violent conduct in the pursuit of constitutional changes.[70] So, it explains most revolutionary incidents seeking to radically alter the constitutional order. The constitutional practices of states do not allow anti-constitutional constitutional changes to happen since the very object of it is to upend the existing constitutional setup.[71] In view of this, it is not helpful to the development of any model of constitutional amendment that is useful for nation building, political stability and development.[72]

III. THE POLITICAL DISCOURSES OF CONSTITUTIONAL AMENDMENT IN ETHIOPIA (1995-2019)

The 1995 FDRE Constitution has been contentious since its adoption. It is still a basic point of difference among political parties. As a result, there is a gulf of views between EPRDF and most of the oppositions toward the future of the Constitution.[73] Recently, however, unusual views begin to be heard even within EPRDF. For instance, some members of EPRDF are raising questions against various provisions of the Constitution and looking for ways of amending them.[74] The Constitution is also tabled as an issue in the current political reform and listed in the

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[66] *Id.*
[67] *Id.*
[68] DHAMIJA, *supra* note 1, at 331-332, 433.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] Zelalem Eshetu, *The Scope and Limitation of the Amending power in Ethiopia: Thinking beyond Literalism*, 4 MEKELLE UNIVERSITY LAW JOURNAL.1, 1-33(2016).
[74] The Prime Minister, who is the chairman of ODP and EPRDF, argues that the FDRE Constitution can be amended and he specifically hinted at a constitutional change for adopting a presidential system. See; The Prime Minister's Speech at Hawassa (2018), *available at* https://www.youtube.com/watch?v=tbcEb1yuzww.(Accessed on 21st February, 2019); Ethiopia's New Leader, Abiy Ahmed, Draws Red Lines on Graft and Calls for Term Limits(2018), *available at* https://www.opride.com/2018/04/27/ethiopias-new-leader-abiy-ahmed-draws-red-lines-on-graft-and-calls-for-term-limits/ (Accessed on 21st of February, 2019). More notably, ADP officially demands amendments on the FDRE Constitution. See *Amhara Region decides on the amendment of the Ethiopian Constitution,* Amhara TV News, May 8.2019, Mastewal Dessalew, *TPLF Hegemony has ended, but EPRDF Power Struggle is Just Beginning*, ETHIOPIA INSIGHT, Jan. 9, 2019, *available at* https://www.ethiopia-

first place of the concerns for dialogue among political parties.[75] For the moment, some of the political parties and elites have given priority to the issue of constitutional change as a result of the 'political transition' that promises a comprehensive reform in the country.[76] In effect, they are rushing to (de) constitutionalize their political 'interests and worries' through constitutional reforms by (re)negotiating on the Ethiopian political puzzles including the questions of nationalities, land tenure system and democracy.[77]

A. Constitutional Controversies

Indeed, the constitutional provisions dealing with unconditional secession, national flag, state ownership of land, the institutionalization of ethnicity, Addis Ababa (the Federal Capital), administrative boundaries and identities, working/national language choice, the role of House of Federation (HoF) and the preamble of the Constitution are hot and controversial matters in Ethiopia.[78] Article 39 of the Constitution provides unconditional right to self-determination, including the right to secession to every nation, nationality and people in Ethiopia. While many argue that Article 39 endangers national unity, the ethno-nationalist groups consider it as a solution to the national question that was initiated by the students' movement in the 1960s and1970s.[79] Article 40 of the Constitution states that all urban and rural land is the property of the "state and the Ethiopian people", *i.e.,* it advocates the state ownership of land.[80] EPRDF has a firm stand in favour of this provision and argued excessively that it will be changed only on its grave.[81] The Constitution also advocates an ethnic-based federal structure that divided the country into nine regions based on ethnic identity and affiliation. This makes ethnicity one of the most crucial aspects of political life in Ethiopia.[82]

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insight.com/2019/01/09/tplf-hegemony-has-ended-but-eprdf-power-struggle-is-just-beginning/ (Accessed on 21 February , 2019).

[75]Alemayehu Anbese, *What are the Issues Listed for Dialogue among Political Parties*, ADDIS ADMASS AMHARIC, Jan. 12, 2019. See also; Political Parties List 32 Agendas for Dialogue, Jan 10, 2019,*available a t*https://fanabc.com/english/2019/01/political-parties-list-32-agendas-for-dialogue/(Accessed on 11 March 2019)

[76]*Id*.

[77] For more on the puzzles see; Paul H. Brietzke, *Ethiopia's "Leap in the Dark": Federalism and Self-Determination in the New Constitution*, 39 JOURNAL OF AFRICAN LAW. 19, 19-35 (1995); Dustin Miller & EyobTekalignTolina, *Land to the Tiller Redux: Unlocking Ethiopin's Land Potential*, DRAKE JOURNAL OF AGRICULTURAL LAW. 1, 1-17 (2008); Jon Abbink, *Ethnicity and Constitutionalism in Contemporary Ethiopia*, 41 JOURNAL OF AFRICAN LAW. 159, 159-174(1997); Temesgen Thomas Halabo,*Ethnic Federal System in Ethiopia: Origin, Ideology and Paradoxes,* 4 INTER. J. POLIT. SCI. DEVELOP.1, 1-15(2016).

[78]Asefa A. Lemu, The Making of Ethiopian Constitution of 1995(2018), *available at* https://kichuu.com/making-ethiopian-constitution/ (Accessed on 20th January, 2019). See also; A Discussion on the Ethiopian Constitution & Federalism System-Part 1, *available at* http://www.news.marakitube.net/watch.php?vid=97d3206c0(Accessed on 10 August ,2019); Discussion on the Ethiopian Constitution & Federalism System-Part 2, *available at* http://www.news.marakitube.net/watch.php?vid=f6a345b13(Accessed on 10 August ,2019).

[79]Alem Habte, *Multiethnic Federalism in Ethiopia: A Study of the Secession Clause in the Constitution*, PUBLIUS: THE JOURNAL OF FEDERALISM 313, 313-335(2005).

[80]Belay Zerga, *Land Resource, Use and Ownership in Ethiopia: Past, Present and Future*, 2(1) INTERNATIONAL JOURNAL OF SCIENTIFIC RESEARCH & ENGINEERING TRENDS 17, 20(2016).

[81]Lemu, *supra* note 78.

[82]CONSTITUTION, Proclamation 1/1995, FED. NEGARIT GAZETTA, 1st Year No. 1, 1995 (hereinafter FDRE CONSTITUTION), Art 8, 46 and 47. For more see also; Abbink, *supra* note 77.

The preamble of the FDRE Constitution, which begins as "We the Nations, Nationalities and Peoples of Ethiopia", makes it clear that the ethno-cultural communities as a group, not Ethiopian nationals, are sovereign and the bricks of the federation.[83] Practically, some regions have claims to territories administered by other constituent units of the federation. For instance, the Amhara region as well as the people of Amhara have claimed ownership of the Welqait and Raya territories which are currently administered by Tigray region.[84] The Somali and Oromo ethnic groups have also their own claims of land from each other.[85] Furthermore, the status and governance of Addis Ababa city and the 'special interest clause' reserved to Oromia regional state are divisive constitutional matters in Ethiopia.[86] The national flag and emblem, recognized under Article 3 of the Constitution, also remains a source of controversy.[87] It is clear that, unlike other federations, the FDRE Constitution gives the power to interpret the Constitution to the HoF. In fact, the HoF could not be an impartial adjudicator on sensitive intergovernmental conflicts due to its composition and political affiliation.[88]

B. **Major Competing Political Blocs**

Generally, the abovementioned matters are some of the most disputed parts of the Constitution among the main political actors. There are a number of political parties that have promised and sought to amend these provisions of the Constitution. For example, in the May 2005 national election, the Coalition for Unity and Democracy (CUD) marked many provisions including Article 39, 40 and 46 and promised to amend them upon assuming power.[89] It also proposed a series of constitutional amendments that it claimed would enhance individual rights.[90] CUD also sought private and communal land holdings and then pledged to amend the provision

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[83]FDRE CONSTITUTION, Preamble. See also SEMAHAGN GASHU ABEBE, THE LAST POST-COLD WAR SOCIALIST FEDERATION: ETHNICITY, IDEOLOGY AND DEMOCRACY IN ETHIOPIA 80(Ashgate Publishing Limited 2014).

[84]Yohannes Gedamu, *How Ethiopia's History of Ethnic Rivalry is destabilizing its Reform Gains*, QUARTZ AFRICA WEEKLY BRIEF, Oct.2, 2018, *available at*.https://qz.com/africa/1411519/ethiopias-ethnic-violence-history-with-oromos-amharas-somalis-tigray/(Accessed on 21st of January , 2019); Amanuel Tesfaye, *Commentary: the Birth of Amhara Nationalism: Causes, Aspirations, and Potential impacts*, ADDIS STANDARD, May 4, 2018, at 2-10, *available at*http://addisstandard.com/commentarythe-birth-of-amhara-nationalism-causes-aspirations-and-potential-impacts/(Accessed on 21st of January, 2019).

[85]Gedamu, *supra* note 84.

[86]FDRE CONSTITUTION, Art.49. For more see; Wondwossen Wakene, Self-Governing Addis Ababa, the Federal Government &Oromia: Bottom lines and Limits in Self Governance (Unpublished LLM Thesis, Addis Ababa University, December 2010); Fitsum Getachew, The 'Constitutional Controversy' Over Addis Ababa (2019), *available at* https://7dnews.com/article/the-constitutional-controversy-over-addis-ababa(Accessed on 10th of August , 2019).

[87]Goshu Wolde Tefera & A. Peter Castro, *Flag Politics in Ethiopia and the Ethio-American Diaspora*, 8:1 JOURNAL OF INTERNATIONAL AND GLOBAL STUDIES 1, 1-18(2016).

[88]FDRE CONSTITUTION, Art. 62(1) and 83. See also; Assefa Fiseha, *Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation (HoF)* 1 MIZAN LAW REVIEW 1, 1-32(2007).

[89]The CUD's Manifesto, at 54-56, *available at* https://zelalemkibret.files.wordpress.com/2011/11/kinijit-manifesto-english.pdf(Accessed on 19th of May ,2019) See also: Leonardo R. Arriola, *Ethnicity, Economic Conditions, and Opposition Supports: Evidence From Ethiopia's 2005 Elections*, 10 NORTHEAST AFRICAN STUDIES 115, 118-121 (2008); Tsegaye Regassa, *The Making and Legitimacy of the Ethiopian Constitution: Towards Bridging the Gap Between Constitutional Design and Constitutional Practice*, 23 AFRIKA FOCUSE. 85, 85-88 (2010).

[90]*Id*.

that deal with the state ownership of land.[91] Additionally, the party criticized the ethnic-based federalism in its manifesto as a threat to national unity. Alternatively, it suggested a federal arrangement based on the will of the people, historical and cultural links, language, settlement pattern, geographical location, developmental viability and administrative efficiency.[92] In this regard, the party claimed that it favors decentralization and the recognition of ethnic diversities. Patriot Ginbot 7, that was believed to be the inheritor of CUD, also argued to the de-ethnicization of politics and redrawing of the administrative boundaries of regional states based on geographical and administrative convenience. [93]

The Ethiopian Democratic Party (EDP) also proposed changes to some of the controversial provisions of the FDRE Constitution. The party complains about the preamble of the Constitution that embodies origin of the federation, the ethnic- based federal system, and the right of nations, nationalities and peoples to unconditional secession, the constitutional distribution of power that makes regions unnecessarily powerful than the federal government as well as the amending clauses that promotes a rigid amendment procedure.[94] On their part, the United Ethiopian Democratic Forces (*Medhin*), the Unity for Democracy and Justice (UDJ), the All Ethiopian Unity Party (AEUP), and the Ethiopian Federal Democratic Unity Forum (MEDREK) has grumbled about the constitution-making process that produced the FDRE Constitution.[95] In this connection, they have denounced that the process was not inclusive and the Constitution contains ill-advised provisions which do not address the problems of the country.[96] These parties cry out for constitutional amendments including Article 39 to heal the Constitution from its defects.[97]

Resentfully, the Union of Ethiopian Democratic Forces (UEDF) and the National Movement of Amhara (NAMA) deem the FDRE Constitution as a reflection of the ideological program of the TPLF-dominated EPRDF.[98] The UEDF, which was established as a coalition of fifteen parties, five based in Ethiopia and ten based overseas (now, they have returned home), further claimed that the rigid amendment procedure adopted by the Constitution deprives the people of

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[91] *Id.*

[92] *Id.*

[93] The Political Program of Ginbot 7 Movement for Justice, Freedom and Democracy, *available at* http://www.ginbot7.org/program-3/(Accessed on 15 April, 2019). See also; Rene Lefort, Ethiopia: Climbing Mount Uncertainty, (2018), *available at* https://www.opendemocracy.net/en/ethiopia-climbing-mount-uncertainty/ (Accessed on 21 February, 2019).

[94] The Ethiopian Democratic Party (EDP), *The Analysis of the Political Program of EDP; EDP's Political Lines and Strategies* (Vol.1, 2003), at 42-49, *available at* http://edponline.org/ (Accessed 29 April, 2019); LIDETU AYALEW, MEDLOT: CONTROVERSIAL POLITICAL ISSUES AND THE ROLE OF THE THIRD ALTERNATIVE IN ETHIOPIA 282-330 (2010); See also; Arriola, *supra* note 89.

[95] Teguadda Alebachew, When Constitution Lacks Legitimacy in the Making: The Case of Ethiopia 74-75(LL.M Thesis, Addis Ababa University 2011). See also; The Ethiopian Federal Democratic Unity Forum's (MEDREK) Manifesto, at 11, *available at* https://zelalemkibret.wordpress.com/2011/11/23/major-political-manifestos-in-ethiopia-yesterday-today/9 (Accessed on 29 April, 2019).

[96] *Id.*

[97] *Id.* See Arriola , *supra* note 89.

[98] Alebachew, *Supra* note 95; Interview with AtoYesuf Ibrahim, NAMA's Chief Political Strategist, on 20th of July 2019.See also, Dawit Endeshaw, *National Movement of Amhara Announce Establishment of Party*, THE REPORTER, June 16, 2018, *available at* https://www.thereporterethiopia.com/article/national-movement-amhara-announce-establishment-party(Accessed on 21 April , 2019).

their right to change the Constitution and proposes for the re-constitution of the country by establishing a transitional government which would prepare a publicly honored democratic constitution. [99] However, most of Ethiopian- based parties in the UEDF such as the Oromo National Congress, Ethiopian Social Democratic Federal Party, and Southern Ethiopia Peoples' Democratic Coalition supported the ethnic-based federal system and state ownership of land while they opposed the secession clause and EPRDF's authoritarian implementation of the federal system and land policy.[100] Conversely, the All Amhara People's Organization, Ethiopian Democratic Unity Party and the other ten parties allied with UEDF such as the Ethiopian People's Revolutionary Party and the All Ethiopian Socialist Movement opposed the ethnic-based federal setup and state ownership of land.[101]

The National Movement of Amhara, which believes that the FDRE Constitution was designed in a way that ignores the interest of the Amhara ethnic group, demands a substantial amendment or replacement of the Constitution.[102] The party further complains about the constitution-making process and the alleged "anti-Amhara sentiments" institutionalized in the Constitution.[103] For this reason, the party questions the validity of the entire document and promises to reverse the past mistakes and to end the marginalization of the people of Amhara by (re)negotiating with other nations, nationalities and peoples of Ethiopia.[104]

Moreover, the controversial provisions of the Constitution, particularly Articles 39 and 40 as well as the ethnic-based federal arrangement cannot be sacred in the views of recently formed political parties like Ethiopian Citizens for Social Justice Party (ECSJ).[105] ECSJ advocates citizen- based politics and criticizes most of the aforementioned provisions on the ground that they could not promote national unity, individual rights and economic development.[106] As Rene Lefort wrote, if ESCJ could rewrite the FDRE Constitution, it would open with "We the people", and not "We the nation nationalities and peoples of Ethiopia."[107] Besides, the demarcation of

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[99] Arriola, *supra* note 89, at 118-120. The Oromo National Congress, Ethiopian Social Democratic Federal Party, Southern Ethiopia Peoples' Democratic Coalition, All Amhara People's Organization and Ethiopian Democratic Unity Party were Ethiopian-based members of the UEDF.

[100] *Id.* See; INTERNATIONAL CRISIS GROUP, ETHIOPIA: ETHNIC FEDERALISM AND ITS DISCONTENTS, CRISIS GROUP AFRICA REPORT NO 153, (September 2009), at 8-10, *available at* http://ehrp.org/wp-content/uploads/2014/05/Crsis-Group-Ethiopia-Ethnic-Federalism-and-Its-Discontents.pdf) (Accessed on 20 April 20. 2018).

[101] *Id.*

[102] Dessalegne Chanie, *Ethiopia: NAMA is expected to be the Guardian of a Fully Fledged Amhara Nationalism* ADDIS STANDARD, June 19, 2018, *available at* http://addisstandard.com/the-interview-nama-is-expected-to-be-the-guardian-of-a-fully-fledged-amhara-nationalism-dr-dessalegn-chanie/(Accessed on 29 April, 2019).

[103] *Id.*

[104] *Id.*

[105] Rene Lefort, Political Shake-Up and Localism Can Edge Ethiopia Forwards, (2019), *available at* https://www.ethiopia-insight.com/2019/05/29/political-shake-up-and-localism-can-edge-ethiopia-forwards/(Accessed on 17 July, 2019).

[106] *Id.* ECSRJ is a merger of seven parties. The Seven parties are Ethiopian Democratic Party (EDP), All Ethiopian Democratic Party (AEDP), Blue Party, New Generation Party (NGP), Gambella Regional Movement (GRM) and Unity For Democracy and Justice (UDJ). ECSJ has called for constitutional amendment. See Addis Getachew, Ethiopian Party Wants Constitutional Change Amid Unrest, Politics Africa, (2019), *available at* https://www.aa.com.tr/en/africa/ethiopian-party-wants-constitutional-change-amid-unrest/1539343(Accessed on 20 August ,2019).

[107] *Id.*

regional states would be on geographic basis.[108] The Citizens Charter Group (CCG) is also crying out for a new citizen-based and liberal constitution that would bring about transformational changes in regard to the form of government, territorial administration, electoral procedures, and checks and balances.[109]

However, the idea of Constitutional amendment has been a sort of "political taboo" during the pre-Abiy Ahmed period.[110] At that time, EPRDF labeled such ideas as anti- democratic thoughts from anti-democratic forces to destroy the Constitution.[111] In the aftermath of Abiy Ahmed's election, however, the discourses of constitutional amendment have been changed. More significantly, the Prime Minister promised to broaden Ethiopia's democratic space by reforming state institutions and legal frameworks including the Constitution.[112] However, the fate of the Constitution is a point of disagreement even within EPRDF whose members are now eyeing each other suspiciously.[113] For instance, at the outset of their tactical alliance, both the Oromo Democratic Party (ODP) and the Amhara Democratic Party (ADP) have looked ahead about the amendment of the Constitution.[114] Nonetheless, the issue has been relegated to a secondary matter in the course of time on the table of ODP while ADP insists on the agenda eagerly and passed a resolution that supports the amendment of the Constitution.[115] On the other hand, TPLF is still resisting any claim of constitutional change, and it often acts as if it is the guardian of the Constitution and the ethnic-based federal system.[116] It further reflects a view that

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[108] *Id.*

[109] The Citizens Charter Group (CCG), People's Transition Manifesto for a United Democratic Republic of Ethiopia, (March 2019), *available at* https://borkena.com/2019/03/26/a-peoples-transition-manifesto-for-a-united-democratic-republic-of-ethiopia-the-citizens-charter-group/(Accessed on 5 August ,2019).

[110] At that period, EPRDF accused all oppositions challenged it tautly as enemies of the state and the nations, nationalities and peoples of Ethiopia. See Gudeta Kebede Asfaw & Alemu Kassa Reta, *Ethiopian Opposition Political Parties in the Post-1991 Political Structure,* 6:1 INTERNATIONAL JOURNAL OF CURRENT RESEARCH 4784, 4787-92(2014).

[111] *Id*. See also ABEBE, *supra* note 83, at 74 & 96.

[112] In the meeting between Prime Minister Abiy Ahmed and the leaders of opposition parties, the Prime Minister said that "there will be no issue left untouched, stretching to constitutional amendment." See Yared Tsegaye, *News: Defunct Political Parties Negotiation Forum Leaders at Odd with PM Abiy's Fresh Talk with Opposition*, ADDIS STANDARD, Dece. 5, 2018, *available at* http://addisstandard.com/news-defunct-political-parties-negotiation-forum-leaders-at-odds-with-pm-abiys-fresh-talk-with-opposition/(Accessed on 10 April, 2019).

[113] International Crisis Group (ICG), Restoring Calm in Ethiopia after High-profile Assassinations, Statement/Africa, (June 25, 2019), *available at* https://www.crisisgroup.org/africa/horn-africa/ethiopia/restoring-calm-ethiopia-after-high-profile-assassinations(Accessed on 15 August, 2019).

[114] The Prime Minister promises changes including a constitutional amendment. The same position is also reflected by the ADP. However, latter on, ODP announced that it would not negotiate over the federal system and identity politics. Additionally, The Prime Minister at his performance report to parliament on July 1, 2019, advocated the textual model of constitutional amendment by saying that the only way to change the constitution would be through legal means. On the other hand, ADP still considers a constitutional amendment as its main agenda. See Teshome M.Borago, *Adwa and Abiy's Mixed Message on Federalism in Ethiopia*, SATENAW, Feb. 24, 2019, *available at* https://borkena.com/2019/02/24/adwa-and-abiys-mixed-message-on-federalism-in-ethiopia-by-teshome-m-borago/ (Accessed on 15 August, 2019).

[115] Interview with a Higher Official within ADP, Whose Name is Confidential, on 10 July 2019.

[116] *Tigrai State President Dr. Debretsion Gebremichael Says the Ethiopian Federal System is Being Destroyed*. TIGRAI ONLINE, Aug. 15, 2018, available at http://www.tigraionline.com/articles/debretsion-gmichael-pr818.html (Accessed on 17 August 2019); Kibreab Beraki, *TPLF: Struggle in Defense of Revolutionary Democracy…and Federal System is Expected*, ETHIOPIA INSIGHT, Oct. 24, 2018, *available at* https://www.ethiopia-

is based on a strictly procedural understanding of amendment which subsequently promotes a textual model in the event of constitutional changes.[117]

As said, the future of the FDRE Constitution is also a point of dispute among opposition political parties. Most of ethno-nationalist opposition parties are siding with TPLF's position and they are less interested on the issue of constitutional reform.[118] Instead, they are more concerned about the democratic implementation of the Constitution though some of their demands, like making Affan Oromo an additional working language of the federal government, require an amendment.[119] These ethno-nationalist groups are actually disfavoring the amendment agenda and struggle for preserving the FDRE Constitution as it is or they support only minor modifications by strictly following the procedures put in the constitution.[120] In contrast, the multiethnic political parties that are promoting Ethiopian nationalism and the Amhara based ethno-nationalist groups are eager to amend the Constitution. Therefore, they struggle for its substantial change or remaking.

The dispute over the future of the Constitution among political parties generally shows that there are serious difficulties with the constitution and indicates the absence of consensus within the society and elites on the basic questions of nationhood such as the structure of the state, the proper relationship between central and regional power, and the land tenure policy options. In spite of the debates, a national committee has been established to conduct studies regarding the amendment of the Constitution.[121] Therefore, a constitutional change through the power of constitutional amendment seems to be certain to happen in Ethiopia.

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insight.com/2018/10/24/tplf-struggle-in-defense-of-revolutionary-democracy-and-federal-system-is-expected/ (Accessed on 10 August 2019).

[117] TPLF as a party often expresses its stand in this regard and frequently demands the reformists to "respect the Constitution and the federal system." See Abdur Rahman Alfa Shaban, Ethiopia's Tigray Region Plans 'Respect the Constitution' Rally (2018) *available at* https://www.africanews.com/2018/12/07/ethiopia-s-tigray-region-plans-respect-the-constitution-rally// (Accessed on 23 February, 2019) ; Amdom Gebre-Selassie, Exclusive interview with Tigray-Ethiopian Hero Amdom (2018), *available at* https://www.satenaw.com/exclusive-interview-tigray-ethiopian-hero-amdom/(Accessed on 23 February, 2019).

[118] Arena Tigray for Democracy and Sovereignty (ATDS), Tigray Alliance for National Democracy (TAND), the Oromo Democratic Front (ODF) and other Oromia-based ethno-nationalist parties can be mentioned in this regard. See *Tigray Opposition Parties Arena Tigray and Tigray Alliance for National Democracy (TAND) Agree to Work Together*, EZEGANEWS, Oct.18, 2019, *available at* https://www.ezega.com/News/NewsDetails/6736/Tigray-Opposition-Parties-Arena-Tigray-and-TAND-Agree-to-Work-Together (Accessed on 10 August, 2019). For these parties, having a Constitution that allows secession is not a problem by itself. And it is the failure to establish a democratic political system that leads to ethnic tensions. The Tigray-based opposition party, ATDS also argues that the current Constitution must be changed by following the procedures codified in the Constitution itself. See; The Debate Between the Representatives of the Oromo Democratic Front, the National Movement of Amhara and Arena Tigray for Democracy and Sovereignty (ATDS) on LTV Show (Dce.,18, 2018).

[119] FDRE CONSTITUTION, Art.5 (2). This provision provides that "Amharic shall be the working language of the Federal Government." However, most of the Oromo nationalist activists, politicians and academicians argue for the proper implementation of the Constitution including the ethnic based federal system, rather than amendment.

[120] *Id.*

[121] (Telephone) Interview with Seifu Gebremariam, Senior Legal Advisor to the Speaker of the House of Peoples Representatives, on 20 January 2019.

IV. HEALING THE FDRE CONSTITUTION: CHALLENGES CONSIDERING THE CURRENT ETHIOPIAN CONTEXT

As noted above, constitutional amendment is a means for "perfecting the imperfections" of a constitution experienced through time and practice.[122] Supporting this view, Roznai considers constitutional amendment as a "healing principle" that would allow the constitution to stand the test of time.[123] Moreover, an amendment process provides a peaceful method for changing the constitution without recourse to a violent revolution by which it serves as the "safety-valve to a nation."[124]

On the same vein, constitutional amendment is presently imperative in Ethiopian. First, the FDRE Constitution is the result of the constitution-making process that was not inclusive. Important political players and constituencies who identified themselves as Amhara or as mixed-ethnic and pan-Ethiopian forces were systematically excluded from meaningful participation in the process.[125] As a result, the whole process was under the influence of the TPLF dominated EPRDF.[126] In addition, the Constitution has come with no due and proper consultation with the public at large.[127] Due to these, the Constitution has weak original legitimacy. At this juncture, it is indeed important to note that "the making of a constitution is a continuous process that never ends."[128] The power of amendment can thus reinstate the Constitution's legitimacy by making the people and concerned political actors to be involved in the process of constitutional change and, at the end, the amended constitution will be regarded as manifesting the consent of the people and the compromised interests of all political forces.

Second, the youth in different parts of the country went to the streets since 2012.[129] After six years of protests, EPRDF has been internally changed which led to the start of the current reforms in Ethiopia.[130] Some impractical and indeterminate provisions relating to the principle of secularism and freedom of religion, the governance of Addis Ababa and its relation with Oromia region, the administration of land and other natural resources, regional state border changes and

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[122] Ulrich K. Preuss, *The Implication of Eternity Clauses: the Germen Experience*, 44 ISRAEL LAW REVIEW. 429, 433-455 (2011); JACKSO & TUSHET, *supra* note 8, at 202-203.

[123] ROZNAI, *supra* note 5, at 1-5.

[124] *Id.*

[125] Seyoum Mesfin, Issues and Challenges in Federal Constitution-Making Process in Ethiopia*, in* PROCEEDINGS OF THE 5th INTERNATIONAL CONFERENCE ON FEDERALISM(2010); Kassahun Berhanu, Political Parties and Political Culture in Ethiopia *in* AFRICAN POLITICAL PARTIES EVOLUTION; INSTITUTIONALIZATION AND GOVERNANCE 118-124 (M.A .Mohammed Salih ed., 2003) ; Regassa, *supra* note 89,at 85-118;ABEBE *supra* note 84, at 75-80.

[126] *Id.*

[127] *Id*.

[128] Regassa, *supra* note 89, at 95.

[129] The Muslim protest was started in 2012 and followed by the Oromo Protests, Amhara Protest and the Konso Protests, to name a few . See ASSEFA ENDESHAW, ETHIOPIA TODAY AND TOMORROW: THE COMING INTO POWER OF ABIY AHMED AND THE CHALLENGES 11-37(Alfa Printing Press, 2019).

[130] *Id*. The ODP-ADP alliance edged out TPLF in the rigging power struggle within EPRDF coalition and the alliance has brought the incumbent Prime Minister to the front. However, this alliance is now argued to seem on the verge of breakdown due to pressures on both sides form radical ethno-nationalist movements within their regions.

disputes, the federal-regional budget transfers and the question of self-government were sources of grievances that caused the protests.[131]

Thirdly, various political, economic and social changes have happened since the promulgation of the FDRE Constitution. For instance, the EPRDF's two decades control of the federal and regional institutions through the party channel has been challenged since 2016 owing to the new assertiveness and alliance of ODP and the ADP.[132] The absence of democratic centralism as a political management tool in turn weakens the solidity of the federal government and its influence on regional states.[133] The recently opened political space together with ill-formulated constitutional provisions that generously grant every nation, nationality and people the right to form their own regional state based on the sole criteria of ethnicity prompts most of the nations, nationalities and peoples in the Southern Nations Nationalities and Peoples Regional State to raise new questions for statehood.[134] Practically, however, it is impossible to deal with all these aspirations for statehood based on the Constitution.[135]

Fourthly, the FDRE Constitution is made by "men, not gods." As Ivor Jennings explained, "….the framers have not the gift of prophecy" and then could not foresee all the problems and challenges that we are facing now.[136] Accordingly, it is constitutional amendment that enables us to correct the weaknesses of the Constitution that are revealed through time and experience. For instance, the practice demonstrates that the HoF cannot be the appropriate institutions to umpire sensitive constitutional disputes between ethnic groups due to its composition, political affiliation, incompetence, and limited accessibility.[137] The plurality electoral system established in the FDRE Constitution is simply reinforcing the one-dominant party system that sets back the development of democracy and constitutionalism.[138] The constitutional provision that allows regions to organize their security forces is now threatening the federal system and the process of democratization due to ethno-nationalist Special Forces and militias standing against the federal

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[131]Christophe Van Der Beken, The Challenge of Reform within Ethiopia's Constitutional Order, Rift Valley Institute Briefing Paper (September 2018), *available at* http://riftvalley.net/news/challenge-reform-within-ethiopia%E2%80%99s-constitutional-order#.XVbBYfk97IU(Accessed on 17 July, 2019).

[132]*Id*.See also Lefort, *supra* note 93.

[133]*Id*.The federal government cannot fully exercise its power over regional states. For instance, it cannot arrest and bring into justice suspects hiding therein.

[134] International Crisis Group (ICG), Time for Ethiopia to BargainWith Sidama Over Statehood, Crisis Group Africa Briefing No146 (July 2019), *available a*t https://www.crisisgroup.org/africa/horn-africa/ethiopia/b146-time-ethiopia-bargain-sidama-over-statehood(Accessed on 15 August, 2019). In addition to Sidama, Dawro, Gamo, Gofa, Gurage, Hadiya, Kafficho, Kambatta, and Wolayta have raised questions for their own regional states.

[135]*Id*.

[136] DHAMIJA , *Supra* note 1, at 13

[137]Adem Kassie Abebe, Access to Constitutional Justice *in* ACCESS TO JUSTICE IN ETHIOPIA: TOWARDS AN INVENTORY OF ISSUES 41, 48-68 **(**Pietro S. Toggia, Thomas F. Geraghty, & Kokebe W. Jemaneh eds., 2014); Fiseha*, supra* note 88. Assefa predicts HOF's impartiality will be tested when it deals with sensitive intergovernmental disputes in a multiparty setting. In fact, this is now happening due to the decline of party centralism within EPRDF. The case of Welqayit can be mentioned here. The members of HOF representing the Amhara regional state complained about the Speaker of the HoF, who is a member of TPLF. See; *Panel Discussions on Federalism, Constitutional Interpretations, and Identity Questions Held in Adam*, Amhara TV, Feb.15, 2019.

[138]MOHAMED SALIH, ANDREAS ESHETE &SAMUEL ASSEFA(eds), REFLECTIONS ONEXPANDING ETHIOPIA'S DEMOCRATIC SPACEASPIRATIONS, OPPORTUNITIES, CHOICES (Friedrich-Ebert-Stiftung Addis Ababa Office, November 2018), at 23-27. In the former Political Parties Negotiation Forum, opposition political parties and EPRDF agreed to change the First-Past -the –Post electoral system into a mixed one. See Tsegaye, *supra* note 112.

and adjacent regional states security forces.[139] Also, the move to secede by Abdi Illey and the alleged sub national coup attempt in Somali and Amhara regional states warn that the role of the federal government at the time of crises within regional states needs reconsideration to introduce a provision that reserves a power to the center to immediately deal with such crisis.[140]

The aforesaid situations increase the practical importance of constitutional provisions and, at the same time, reveal the gaps and flaws of the current Constitution.[141] Therefore, the FDRE Constitution needs an amendment in response to the new political demands and changing political environment, and to heal its identified defects and gaps. A constitution that does not allow for adjustments on these and other related grounds is less likely to endure.[142] Indeed, constitutions that endure are more likely to promote effective, equitable and stable democracy and constitutionalism.[143]

However, it is known that the FDRE Constitution remains untouched for a long period of time. And, it is a stagnant document owing to few formal amendments in the past twenty-four years.[144] This is in marked contrast with the average life expectancy of national constitutions, which is nineteen years.[145] Besides, unlike the US, that supplements its rigid amendment process through judicial interpretation, the role of the judiciary in Ethiopia with regard to constitutional modification is nil.[146] These conditions, according to Donald Lutz, produce a higher likelihood that the Constitution will be replaced entirely which, in turn, risks constitutional endurance.[147] Additionally, constitutional replacement makes everything including a settled political matter up for grabs and, hence, it must be avoided.[148] On this point, it has been famously argued that "Constitutions that do not allow for the readjustment of the constitutional bargain from time to time are much less resilient and much more likely to be replaced in their entirety."[149]

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[139] International Crisis Group (ICG), Managing Ethiopia's Unsettled Transition, Crisis Group Africa Report No 269, (February 21, 2019), at 26 *available at* https://www.crisisgroup.org/africa/horn-africa/ethiopia/269-managing-ethiopias-unsettled-transition (Accessed on 14 June, 2019); International Crisis Group (ICG), *supra* note 113.

[140] *Id*. Similar norm exists in Spain. See The Spanish Constitution of 1987, Art 155. This provision allows the federal government to take measures in exceptional cases to restore constitutional order or to prevent any great damage to the general interests of Spain. The federal government invoked this provision against the 2017 secession referendums in Catalonia. See; Erin C. Houlihan, Referendums on Secession and State Responses in 2017: Catalonia and Kurdistan 22, 22-34 *in* ANNUAL REVIEW OF CONSTITUTION BUILDING PROCESSES: 2017(International IDEA, 2018).

[141] Van Der Beken, *supra* note 131.

[142] Lutz, *supra* note 13, at 364.

[143] ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS 1-11 (Cambridge University Press 2009). See also Fombad, *supra note* 4.

[144] Zelalem Eshetu, *Unconstitutional Constitutional Amendments in Ethiopia: The Practice under Veil and Devoid of a Watch Dog,* 4 HARAMAYA LAW REVIEW 60, 64-68 (2015).

[145] The research conducted by Zachary Elkins *et al*. reveals that the life expectancy of national constitutions is nineteen years. See; ELKINS et al., *supra* note 143.

[146] Amendment rate is the average number of formal amendments passed per year since the constitution came into effect. A successful constitutional system, according to Lutz, is defined by a constitution of considerable age that has a total number of amendments, which when divided by the constitution's age in years, represents a moderate amendment rate- that is between 0.75 and 1.25 amendments per year. For more see; LUTZ, *supra* note 13.

[147] *Id*.

[148] *Id*., at 366.

[149] ELKINS et al, *supra* note 143, at 81.

In Ethiopia, for the reasons indicated, the issue of constitutional reform is therefore important. Moreover, it is constitutional amendment that upholds constitutional continuity by providing a peaceful way for constitutional changes. Although amending the FDRE Constitution is indispensable to the current political reforms, it is important to note that there are various challenges in this regard. More specifically, what within the text is (un)amendable, and how and when to amend the Constitution are currently some of the tough questions in the country.

A. What within the FDRE Constitution is (un)amendable?

This first question is about the scope and boundary of the amending power. In this regard, the substantive model of constitutional amendment suggests that the amending power may not be exercised to change the core elements of a constitution.[150] As a result, the constitution could not be amended to the extent of creating a completely new one through substantial alteration of its fundamental elements.[151] In effect, this model distinguishes between the amendment and remaking of a constitution and thereby sets an inherent boundary to the amending power.[152]

Right then, what within the FDRE Constitution is (un)amendable and how much amendment is required to say that the Constitution is not radically changed is one of the challenges in the discourse of constitutional amendment in Ethiopia. Most of the provisions marked out for amendment by the opposition political parties reflect the basic political and philosophical assumptions that form the foundational substance of the Constitution.[153] They simply embody the basic values and the very purpose of the FDRE Constitution.[154] As a result, amending any of these provisions would bring about a radical and transformative change to the FDRE Constitution. Indeed, this change would be against the spirit and essence of the Constitution. For instance, the change of the federal system from ethnic to geography would substantially change the structure and function of the state and the purpose of the federation. This would be no mere correction of the Constitution within the existing framework. Instead, its effect would be to replace the Constitution with a new one.

However, no institution is expressly authorized to rule against unconstitutional constitutional amendments in Ethiopia.[155] Although the HoF has the power to decide on all constitutional disputes, including assuming jurisdiction to examine the constitutionality of constitutional amendments, this would not make sense since the HoF is one of the veto players that decide on amendment proposals and, therefore, it cannot sit as a judge to review its handiwork.[156] Additionally, the Constitution or any other legislation does not give this power to the

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[150] The word "*amend"* comes from the Latin '*emendere*' which means to correct and then the power of constitutional amendment corrects the system without fundamentally changing its nature. See; DIXON, *supra* note 10, at 96; JACKSO & TUSHET, *supra* note 8.

[151] Preuss, *supra* note 122, at 433-455; JACKSO & TUSHET, *supra* note 8, at 202-203.

[152] *Id.*

[153] Eshetu, *supra* note73.

[154] *Id.*

[155] FDRE CONSTITUTION, Art.62 & 83.

[156] *Id*, at Art. 83, 104 & 105

judiciary.[157] This is the same as in the Indian Constitution though the Indian Supreme Court has exercised the power.[158] Unlike India, the Ethiopian Courts restrain themselves from reviewing constitutional matters and judicial activism is uncommon. In effect, neither the HoF nor the judiciary can review the constitutionality of amendments.

This indeed reveals that the substantive model of constitutional amendment is not tenable in Ethiopia. As a result, the amending power cannot be constrained and overseen on substantive reasons due to institutional gaps. Hence, at least in theory, amendments that amount to a replacement of the Constitution could not be rejected. Therefore, the power of amendment can be exercised to bring changes that would replace the Constitution with a completely new one. As a matter of politics, however, this leads to a situation in which the Constitution could not endure. Making transformative changes using the procedures of amendment would also raise a question of appropriateness. There may also be the risk of upheaval attending creation of a new constitution. This would certainly occur if Ethiopian political actors undertook the effort to write a new constitution in the guise of amendment. Thus, the extent to which the FDRE Constitution can be changed through amendment is one of the challenges in the current political reform.

B. How to Amend the FDRE Constitution?

Obviously, the FDRE Constitution contains provisions on its own amendment under Article 104 and 105. Nevertheless, these provisions do not deal with the substance of constitutional amendments. The judiciary does not also develop and enforce any kind of doctrine that constrains the amending power in Ethiopia. At least in theory, all provisions of the FDRE Constitution are freely amendable by following the process prescribed under it. Thus, it is possible to think about the textual model of constitutional amendment to make the necessary changes in the FDRE Constitution.

However, the rules spelled out under Article 104 and 105 of the FDRE Constitution are seriously flawed and insufficient when viewed from the conventional theory of constitutional amendment. Firstly, the provision that deal with initiation is so ambiguous that the bodies that can propose amendments cannot be known undoubtedly.[159] The constitution does not unequivocally answer the question as to who should be allowed to initiate a constitutional amendment.[160] Secondly, the amendment rules do not clarify the ambiguity that surrounded the issue of public participation. Although the rules require proposals to be submitted for the public, the mode of submission, the manner of decision-making and the nature of decisions demanded from the public are not comprehensible from the text of the Constitution.[161]

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[157] *Consolidation of Powers of the House of Federation (HoF) and Definition of its Powers and Responsibilities*, Proclamation No. 251/2001, FED.NEG.GAZETTA, 7th Year No. 41, Addis Ababa, 6th July 2001; *The Council of Constitutional Inquiry* Proclamation No. 798/2013, FED.NEG.GAZETTA, 19th Year No 65,Addis Ababa, 30th August, 2013.

[158] ROZNAI, *supra* note 5, at 42-47.

[159] FDRE CONSTITUTION, Art.104. For more discussion see: Zelalem Eshetu, *Apprising Constitutional Amendment in Ethiopia: Vexing Questions and Qualms*, 5 BAHIR DAR U. J.L 315, 322-46(2015).

[160] *Id.*

[161] *Id*.

Thirdly, the rules do not provide a timeline for carrying out different actions of the amendment.[162] The timelines are important to ensure that constitutional amendments are not hastily carried out without enough time and opportunity being given to the people and other concerned bodies to be consulted.[163] Owing to this, the rules provided in the FDRE Constitution cannot prevent hasty and less communicated constitutional changes. Fourthly, the amendment procedure does not specify the time limit for ratifying an amendment proposal by state legislatures.[164] Therefore, the formal rules stated in the Constitution are not satisfactory and clear enough to guide actions concerning constitutional amendments.

In addition to the aforementioned shortcomings, the FDRE Constitution sets forth a more stringent procedure for amending Chapter Three of the Constitution (Article 13-44) that contains most of the provisions demanding rectification in the views of most opposition political parties and elites.[165] The stringency is mainly the result of the unanimous consent required for amending the most contentious provisions of the Constitution including Article 39 and 40.[166] Put differently, most of the controversial provisions of the Constitution cannot be amended without the assent of all regional states. This unanimity requirement is unique to the Ethiopian federation and makes the amendment procedure overtly rigid.[167] Moreover, the direct participation of the regions through their state councils to approve all amendment proposals is an additional hurdle that contributes to the rigidity of the process.[168]

In view of these, the textual model of amendment is unrealistic and impracticable in the current Ethiopia's context. At this moment, the overtly rigid amendment procedure would make constitutional changes difficult; perhaps even impossible since the polarized political climate will prevent regions from reaching an agreement required to amend the most disputed provisions of the Constitution.[169] Of course, constitutional rigidity has proven problematic for many countries, including the US, whose current constitution was the product of the impossibility of amending the prior constitution (the Articles of Confederation).[170] Therefore, the ongoing political reform cannot bring about the necessary constitutional changes by sticking to the strictures of the constitutional text and this means that the amendment rules in the FDRE Constitution should be disregarded in some ways.[171] Indeed, this situation makes it necessary to

[162] Eshetu, *supra* note 159, at 343-46.
[163] *Id*.
[164] *Id*.
[165] FDRE CONSTITUTION, Art.105 (1).
[166] *Id.*
[167] Dellinger, *supra* note 3, at 302. Mostly, unanimity requirement is the feature of confederations.
[168] In German for instance, the Landers are involved in the amendment process indirectly through the second chamber. In contrast, regional states in Ethiopia will engage in the process of amendment directly through their state councils and indirectly through the House of Federation.
[169] A refusal of one regional state would bar a constitutional amendment in regard to Article 39, 40 and the amending clauses of the Constitution. Amending the rest of the provisions can be denied when four regional states refused to approve a proposal.
[170] Albert, *supra* note 28, at 173-77; see Larry Alexander, What Are Constitutions, And What Should (And Can) They Do? *in* WHAT SHOULD CONSTITUTIONS DO? 21-23 (Ellen Frankel Paul, Fred D. Miller, Jr., & Jeffrey Paul *eds*, 2011).
[171] See the discussion on the political model of constitutional amendment.

pursue extra-constitutional methods to break through the barriers standing in the way of amending the Constitution.

C. Timing of Constitutional Amendment

As said, constitutional amendments are expected to bring legitimacy and to cure identified defects of the constitution. In some instances, however, amendments may exacerbate divisions, deepen conflict or bring a risk of democratic backsliding.[172] Therefore, the timing of amendments can significantly affect their outcomes. Indeed, constitutional amendments are required to be carried out based on national consensus.[173] As Walter Dellinger pointed out, "no satisfactory agreement can be reached on a process of amendment until a substantial consensus is reached on the underlying questions of nationhood."[174] Additionally, a peaceful political environment that is free from political assassinations, police assaults and undue interference from security forces and party affiliated militia groups is a prerequisite for amendments.[175]

When viewed from these perspectives, the present situation of Ethiopia is not conducive for making constitutional amendments. Currently, the animosity among Ethiopia's ethnic-groups is rising sharply.[176] The competing claims of ethnic forces and political parties have not been narrowed through dialogues, and the level of their political disagreement remains rather high.[177] This in turn would make constitutional amendment not only impossible, but also a risky process that may end up with a worse situation. The "flag war" that becomes common between competing nationalists in Addis Ababa may be worthy of mentioning in this regard.[178]

In addition to this, the level of stability and security is not suitable for making constitutional amendments. Presently, political parties and civil societies cannot freely move to have access to their members and supporters in some parts of the country due to non-state actors, most of which are ethnic-militias and ethno-nationalist youth groups, creating threats and violence whilst the government cannot fully enforce rule of law in the country.[179] This situation would complicate the efforts of political parties and civil societies to freely market their ideas about the future of the FDRE Constitution Therefore, insecurity and political polarization negatively affects the political setting of Ethiopia which would impede the process of making a purposeful constitutional amendment. At this moment, a move to amend the FDRE Constitution may further destabilize the country and worsen the situation.

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[172] ELKINS et al., *supra* note 143, at 18-19.

[173] African Charter on Democracy, Elections and Governance, adopted on 30 January 2007 by the Eighth Ordinary Session of the Assembly Held in Addis Ababa, Ethiopia and entered into force on 15 February, 2012 (hereinafter, ACDEG),Art. 10(2). See; Micha Wiebusch & Christina Murray, *Presidential Term Limits and the African Union*, 63 JOURNAL OF AFRICAN LAW 131, 157-60 (2019). Ethiopia ratifies this Charter in December, 2008.

[174] Dellinger, *supra* note 3, at 284.

[175] ACDEG, 14, 32(5) & 38 See Wiebusch & Murray, *supra* note 173.

[176] International Crisis Group (ICG), *supra* note 139.

[177] *Id*.

[178] Andrew Korybko, The Flag War; Ethiopia's Competing Nationalism (2018) *available at* https://www.globalresearch.ca/the-flag-war-ethiopias-competing-nationalism/5654087(Accessed on 9 February, 2019). In the rallies that took place in Bahir Dar and Addis Ababa in July 2018 and September 2018 respectively, the issue of flag was divisive, and in Addis Ababa, there was even a physical violence between the competing Oromo and Ethiopian nationalists.

[179] *Id*.

V. CONCLUDING REMARKS

The FDRE Constitution has been a point of difference among political parties since its inception. There are still starkly contradictory views between EPRDF and most of the opposition political parties toward the existing constitutional framework and future of the FDRE Constitution. Differing views are also observed within EPRDF and among the opposition parties as well. This article concludes that the most contentious matters are the institutionalization of ethnicity and the ethnic-based federal structure, the unconditional secession, the preamble of the Constitution, the national flag and emblem, the state ownership of land, the status and governance of Addis Ababa, and the constitutional amendment mechanism. It is also disclosed that there are parties, such as NAMA, that question the validity of the entire document.

It is also showed that most of the opposition parties organized based on civic nationalism and Amhara affiliated parties associate the FDRE Constitution with TPLF/EPRDF. As such, they have vowed to struggle for its substantial change or its replacement. On the other hand, most of the ethno-nationalist political parties including TPLF are scuffling for the preservation or minor modification of the Constitution. More importantly, it is revealed that both of these views are not sensible and realistic in the Ethiopian context. A radical constitutional change that totally replaces the current Constitution will not be an option as it would break the legal continuity of the Constitution and contributes little for peace and nation building. Besides, making transformative changes using the procedures of amendment would raise a question of appropriateness. Yet, it is also recognized that writing a new constitution would create chaos and the possibility of collapsing the regime. Similarly, the view that deems the FDRE Constitution like the "ark of the Covenant" that is too sacred to be touched is unreasonable and cannot ultimately preserve the Constitution. As Edmund Burke wrote, "a state without the means of some change is without the means of its conservation."[180] Therefore, it is argued that making the necessary amendments on the FDRE Constitution is the appropriate way to preserve it.

This article also presented the justifications to amend the FDRE Constitution. Generally, a cumulative effect of the tapered constitution-making process, dysfunctional provisions, recognized constitutional gaps and defects, and the emerging needs and new political realities create serious difficulties with the Constitution that call for its amendment. It is argued that the legitimacy deficit of the Constitution and its imperfections can be rectified. However, it is better to do this by amendment, not by creating a new constitution or replacement.

It is also aptly indicated in this article that the textual and substantive models of amendment cannot bring about the necessary changes in the FDRE Constitution by correcting its awful deficiencies due to the procedural and substantive barriers they place in the ways of a constitutional amendment. It is also revealed that the political model of constitutional amendment that invites the participation of the people is the appropriate way to change the FDRE Constitution. This must, however, be exercised with certain cautions. First, the amendments should reflect the genuine will of the people. Second, they must help consolidate

[180] EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 16 (First Published 1790, Kessinger Publishing 2004).

federal, democratic and constitutional governance in Ethiopia. The model would enable the political players to surpass the ambiguous and stringent procedures of amendment in the Constitution. The active and genuine participation of the public, civic societies and political parties in the process of amendment would retrospectively cleanse the violation of the stringent rules of amendment of the Constitution. This would in turn overwhelm the claim that the reformers are acting illegally. In so doing, the deliberation and dialogue part of the process is vital. However, the timing for doing so should be considered seriously to avert a further deterioration of peace and stability. Indeed, the bottom line is the rule of law and national consensus on the basic issues of Ethiopian nationhood. Therefore, the formation of national consensus, stability and peaceful political environment should be prioritized before appealing into constitutional amendment.

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VALUE ADDED TAX ASSIGNMENT UNDER THE FDRE CONSTITUTION: DESIGNATED OR UNDESIGNATED?

Yibekal Tadesse Abate[*]

Abstract

Whatever form of tax assignment a federal system of government adopts, an assignment of taxation power for each tier of government shall be determined under the constitution. The FDRE Constitution is detailed in terms of allocating taxation powers between the federal government and the regional States. Despite this, following the late introduction of value-added tax (VAT), there are arguments concerning the taxation power over it. Pieces of legal literatures deem VAT as an undesignated tax while, on the other side, some persons argue that it is a designated one. This leaves the constitutional status of VAT in Ethiopia to remain questionable. Practically, it is the federal government that takes the legislative competences over all sources of VAT in the country. This paper aims at examining the stance of the FDRE Constitution concerning taxation power over VAT and to scrutinize whether VAT is practically levied as per the VAT assignments set under the Constitution. Finally, the paper argues that the FDRE constitution has designated VAT (as a family of sales tax and 'in other forms' too) for both tiers of government within their respective taxation powers. In fact, it is also revealed that there are certain undesignated VAT sources from which the government practically collects a VAT. There, the existing practice where the federal government takes the legislative competence over VAT sources shall be re-visited in light of the constitutional provisions.

Keywords: *Fiscal Federalism, Sales tax, VAT, Constitutional Status, Ethiopia.*

I. INTRODUCTION

"Scholars are undivided in arguing that fiscal federalism may aggravate imbalances and contests if there are ambiguities in the tax assignment of major tax bases."[1] Hence, the assignment of the power of taxation of each tier of the government in a federal system needs to have constitutional status and guarantee. Like other federal states, Ethiopia has assigned the sources of revenue for the two tiers of the government under the FDRE Constitution. The

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[1] Alefe Abeje Belay, *System of Division of Revenue in Ethiopia*, 2 EUROPEAN SCIENTIFIC JOURNAL, /Special/ 95 (2014).

Constitution allocates the power of taxation in the forms of federal exclusive, state exclusive, concurrent power and undesignated power of taxation.[2] According to the Constitution, federal exclusive and state exclusive taxation power is not the tax base but the tax source.[3]

However, due to its late introduction as **"**new tax**"**, the constitutional status of VAT turns out to be argumentative. As exemplified below, it is sometimes argued that VAT is an undesignated tax whose assignment to a level of the government needs to pass the requirements of Article 99 of the FDRE Constitution.[4] Contrarily, it is also stated that VAT is a designated tax under the Constitution as a family of sales tax. By and large, the source of such a dispute is the absence of VAT by name in the Constitution.

Constitutional assignment of power of taxation in a federal system is very difficult as, among others, the two different authorities are arising from the same body of taxpayers. States may apportion the sources of revenues to each tier of the government based on the theories of fiscal federalism and political processes and behavior of political agents.[5] Many federal states do not, however, assign the power of taxation in accordance with the theories of fiscal federalism.[6] When it comes to Ethiopia, as indicated above, to which level of the government the country allocates the power over VAT is still argumentative. Literatures written on the tax assignments in Ethiopia have divided standings pertaining to the constitutional status of VAT. In fact, so far, one cannot find a literature devoted to addressing the constitutional status of VAT in Ethiopia as a sole endeavor. Largely, literatures touched the constitutional status of VAT tangentially while discussing the concept of the so-called undesignated power of taxation. For instance, Taddese Lencho argued that, depending on different considerations, VAT can be deemed as designated or undesignated tax. "If we considered the substance, VAT is designated under the Constitution as a family of general sales tax. And "If we take 'undesignated' to mean literally 'unmentioned,' VAT qualifies as an undesignated tax and thus falls under Article 99 of the Constitution."[7] Ghebrehiwet Tesfai has also argued that "the assignment of VAT implicitly respects the assignment of sales tax which has been stipulated in the FDRE Constitution."[8]

Despite the above, the joint session of the Federal Houses designated the power to levy VAT to the federal government.[9] Hence, it means that the two Houses had apparently taken VAT as an

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[2] *The Constitution of the Federal Democratic Republic of Ethiopia*, Proclamation No 1/1995, FED. NEGARIT GAZZETA 1st Year No.1, Addis Ababa 21st August 1995. (Hereinafter, FDRE CONSTITUTION).

[3] For example, the FDRE Constitution does not assign the whole income tax base to the federal. It assigns this base to both levels of the governments. The same holds for excise tax and sales tax.

[4] As per Art. 99 of the Constitution, taxes which have not been specifically provided for in the Constitution will be assigned as federal exclusive, state exclusive or concurrent power by the joint session of the Federal Houses.

[5] See NERINGA SLAVINSKAITE, FISCAL DECENTRALIZATION AND ECONOMIC THEORY 88- 97(2015). *available at* https://parc.ipp.pt/index.php/rebules/article/ (Accessed on 10 September 2018)

[6] See Taddese Lencho, *Income Tax Assignment Under the Ethiopian Constitution: Issues to Worry About*, 4(1)MIZAN LAW REVIEW 31, 36 (2010).

[7] Taddese Lencho, *The Ethiopian Tax System: Excesses and Gaps*, 20(2) MICHIGAN STATE INTERNATIONAL LAW REVIEW 327, 333 (2013).

[8] Ghebrehiwet Tesfai Baraki, *The Practice Of Fiscal Federalism In Ethiopia: A Critical Assessment 1991-2012, An Institutional Approach*, (unpublished, Doctoral Thesis, Fribourg University, Switzerland, 2015). at 249. (Herein after, Ghebrehiwet Tesfai).

[9] See the Minutes of the joint session of the House of Peoples' Representatives and the House of Federation, at 1-6 (1994). (As quoted in Getachew Mengeste, *Intergovernmental Fiscal Transfers In Ethiopia: Challenges And Some*

undesignated tax. Moreover, currently, the federal government defines and determines the tax bases, exemptions and the rate for overall sources of VAT in the country. As a result, VAT is uniform across the country and the states are administrators of the federal Value Added Tax Proclamation No.285/2002.[10]

In general, it can be concluded that, though there are pieces of literature on VAT, none of them deeply scrutinize its constitutional assignment in Ethiopia. In addition, literatures that considered VAT as a designated tax (as sale tax) neither critically examine how VAT is a variety of sales taxes nor do they examine the modes used in the FDRE Constitution in the tax assignments. Moreover, there are practical scenarios where VAT in Ethiopia is collected from activities/supplies which are not properly sale transactions.[11] The constitutional base of VAT on such non-sale transactions is therefore unclear. Hence, whether the power of taxation over VAT is only anecdotal with the provisions that state about sales tax or VAT can also be inferred in other cases is an important question.

As per the theories of fiscal federalism and theories of tax assignment, any tax base which has a macroeconomic stabilization and income redistribution role should automatically belong to the central government.[12] Among others, personal income tax, corporate income tax and VAT are some of the major revenue sources that have redistribution impact and, hence, they need to be sacred to the center.[13] With regard to VAT, the theories of fiscal federalism recommend that the tax base determination, tax administration and collection shall be given to the central government while VAT rate determination shall be exercised jointly by the central and regional governments.[14] The rationale of the theories for such allocation is the assumption that VAT is among taxes with the role of wealth/income redistribution.[15]

This article aims at shedding light on the overall constitutional status of VAT by examining the nature and notion of VAT, its relation with sales tax, and by making inferences from the tax assignment modes used in the FDRE Constitution. To meet its purpose, the paper analyzes the relevant provisions of the FDRE Constitution and other relevant laws. The constitutions of

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Options, A Comparative Study, available at http://www.aau.edu.et/library/resources/aau-institutional-repositoryelectronic-thesis-and-dissertation/ (Accessed on 10 May 2019)

[10] *Value Added Tax Proclamation*, Proclamation No. 285/2002. FED NEGARIT GAZETA, 18th Year, No. 33, Addis Ababa, 4th July (2002) (Hereinafter, VAT Proclamation).

[11] A 'supply' as defined in the VAT proclamation is much broader that a sale transaction. According toArt.2 (17) of the VAT Proclamation, supplies means the sale of goods or the rendition of services or both. More importantly, Art. 4 of the same Proclamation defines both supply of goods and services. Supply of goods means 1) a sale of goods; 2) a grant of the use or right to use goods, whether with or without a driver, pilot, crew or operator, under a rental agreement, credit agreement, freight contract, agreement for charter or any other agreement; 3) a transfer or provision of thermal or electrical energy, gas or water. And a rendition of services means *anything* done which is not a supply of goods or money, including; 1) the granting, assignment, cessation, or surrender of any right: 2) making available a facility or advantage.

[12] Alene Agegnehu and Ayele Behaylu, *Tax Assignment: Theory Nexus Practice in Australia, Canada, Germany, Ethiopia and Switzerland: Review*, 6(7) RESEARCH JOURNAL OF FINANCE AND ACCOUNTING, 123 (2015).

[13] *Id.*

[14] Taddese, *supra* note 6, at 37.

[15] Alene and Ayele, *supra* note 12, at 123- 124.

selected federal states, books and journals are also consulted to know the approaches used in the assignment of the value added tax.

The rest of this article is divided into five sections. Section II addresses the general conceptual framework of VAT. Under section III, the assignment of taxation power and constitutional status of VAT in federal systems have been discussed. Section IV briefly examines the methods and principles of tax assignment embodied under the FDRE Constitution. Section V is about the constitutional assignment of VAT in Ethiopia. Finally, section concludes and forwards recommendations.

II. VALUE ADDED TAX: CONCEPTUAL FRAMEWORK

Before the emergence of VAT, taxes imposed on transactions were known as sale taxes that consisted of retail, wholesale and manufacturer's sales tax.[16] Countries used different variants of these sales taxes. For example, a Retail Sales Tax was known in Sweden and various states of United States [17] while at the same time other forms of sales taxes have been used by other nations such as Wholesale Sales Tax in Switzerland[18], Two-Stage wholesale-Retail Sales Tax in Finland, Manufacturer's Sales Tax in Canada[19], Value Added Tax in France, Turnover or Cascade Tax in Germany, Italy, Belgium, Netherlands, and Luxembourg.[20] If VAT is considered as a variant of a sales tax, its origin run deep though it is generally perceived as a modern fiscal innovation.[21] The German businessman, Wilhelm Von Siemens, is credited for the idea of VAT in the 1920s.[22] However, VAT was first introduced at a national level in France in 1954.[23]

Because of the pitfalls or distortionary character of general sales taxes, countries have been moving to different variants of sales taxes, including VAT.[24] As of the mid-20th century, most countries of the world have moved to VAT by replacing their general sales tax and its varieties.[25] VAT is now the most important form of general sales tax in use.[26] Under a general sales tax system, businesses do not have an opportunity to recover sales taxes (input tax) they paid in the previous transactions for intermediate goods and services. Therefore, they would shift the input

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[16] Ann F. Friedlaender, *Indirect Taxes and Relative Prices*, 81(1) THE QUARTERLY JOURNAL OF ECONOMICS, 126 (1967).

[17] *Id*. It is a single-stage taxes that may be imposed at one of several stages in the manufacturing and distribution process. In the US, it is a retail sales tax which is enforced even today.

[18] *Id.*

[19] *Id.,* A single-stage tax at the manufacturers' level is designed to limit tax to sales by manufacturers to wholesalers or retailers.

[20] *Id.*

[21] Kathryn James , The Rise of the value-added tax, Part of Cambridge Tax Law Series, Cambridge University Press, 978-1-107-04412-8, at 1, (2015), *available at* https://www.cambridge.org/core/series/cambridge-tax-law-series/(Accessed on 17 July 2018).

[22] Ebrill et al., *The Modern VAT* (Washington: International Monetary Fund). at 4 (2001); *available at* <https://www.elibrary.imf.org/doc/IMF>(Accessed on 10 June 2019).

[23] *Id.*

[24] Dasalegn Mosissa Jalata, *The Value Added Tax and Sales Tax in Ethiopia: A Comparative Overview*, 6(23) EUROPEAN JOURNAL OF BUSINESS AND MANAGEMENT, 246 (2014).

[25] GOODE RICHARD, GOVERNMENT FINANCE IN DEVELOPING COUNTRIES, 157 (Washington D.C.: Brookings Institution, 1984).

[26] WORLD BANK, THE TAX ASSIGNMENT PROBLEM: CONCEPTUAL AND ADMINISTRATIVE CONSIDERATIONS IN ACHIEVING SUBNATIONAL FISCAL AUTONOMY 29 (Proceedings. Washington DC: World Bank Group.1999).

taxes to the next chain of transactions by adding to the sale price of the taxed goods or services. Since the sales tax base is going to be the gross receipt (includes the sales value of the goods plus the tax charged accumulatively in previous stages), the imposition of sales tax on business inputs led to cascading tax (tax on tax).[27] This in effect will increase the amount of tax to be paid by business persons especially in capital intensive industries, and increased export prices compared to countries operating a VAT.[28] General sales tax can, thus, increase the prices across the chains, distort market signals and influence efficient allocations of resources, and ultimately impeded economic growth.[29]

Unlike general sales tax, which is applied to the full value of a product every time it changes hands in the process of production and distribution, VAT is assessed at each stage only on the value added to the product or service after the last taxable transaction. At the end of the chain, the total amount of tax paid on a given commodity or service is only a function of the rate of tax and of the final price of the commodity independently of the number of stages through which it has passed.[30] This is because VAT is levied on each of the entities in the supply chain with the facility of set-off of input tax.[31] For this reason, in contrast to general sales tax, there is no space in the VAT system for cascading of tax and hence the amount of tax liability will not get higher even if the production chains are longer.[32] Indeed, end users of products and services bear the tax burden or the incidence since they cannot recover the tax paid on the consumption of goods and services.

Moreover, the nature of VAT may be explained based on the fact that taxes can commonly be classified as direct and indirect taxes. While direct taxes are those taxes whose official burden (the impact) and economic burden (the incidence) fall on the same person, indirect taxes are those taxes whose impact and incidence fall on different persons. VAT is a typical example of an indirect tax since it is possible to set-off input tax. The incidence of a VAT is identical to that of a final-point sales tax (a consumption or retail sales tax if that final-point sale is to a consumer).[33]

In general, sales tax is a *basket of taxes* which comprises different taxes, including VAT. However, VAT falls under the general category of a consumption tax as it is imposed on consumptions and it is to be charged on the value of imports and on value added to goods and services supplied by one business to another person.[34] Despite its name, the VAT is not thus generally intended to be a tax on value added as such; rather, it is usually intended as a tax on

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[27] As sales taxes paid for inputs at earlier stages are not credited (refunded), businesses will shift them to the next chain. In the next chain, the input taxes will constitute part of the base for the tax. This results in tax over tax.

[28] South African Revenue Service, *Key Revenue Sources a Brief History of Income Tax and VAT, available at* www.sars.gov.za, (Accessed on 13 May 2019).

[29] DASALEGN, *supra* note 24, at 246-247.

[30] See "The Value-Added Tax in Developing Countries*",* Staff Papers- International Monetary Fund, Vol. 20, No. 2 At 318-378(Jul., 1973), *available at* http://www.jstor.org/stable/3866322, (Accessed on 13 April 2019)

[31] For example, input VAT paid at the stage of the purchase of goods by a trader and on the purchase of raw materials by a manufacturer.

[32] DASALEGN, *supra* note 24, at 246-247.

[33] Richard Bird and Sijbren Cnossen, Policy Watch, Value-Added Tax Options for India, Kluwer Academic Publishers, at 115, (1995), *available at* http://personal.lse.ac.uk/sternn/077NHS.pdf (Accessed on 13 May 2019)

[34] Dasalegn, *supra* note 24, at 246.

consumption.[35] Correspondingly, VAT is practically charged on certain transactions such as the sale of goods, the provision of services, and other types of supplies.[36]

III. VALUE ADDED TAX UNDER THE CONSTITUTIONS OF SELECTED FEDERAL SYSTEMS

In this section, the author presents experiences of selected countries on the basis of the character of their constitutions and practical situations with regard to assignment of VAT. Accordingly, brief discussion is made on the experience of countries having different constitutional clauses regarding VAT. When we look at constitutional tax assignment, federal constitutions have assigned taxes by specifically mentioning the name of the tax base or merely the name of the 'tax family'. The constitutions that assign by general tax families to either tiers of the government consider that the specific taxes within that tax family are deemed to be assigned together.[37] As succinctly depicted below, while there exist constitutions that consider VAT under generic terms like 'sales tax' or 'transaction taxes', there are constitutions that expressly mention VAT by name. Moreover, there are countries with no indication at all for sales taxes or VAT in their constitution. In this case, subsidiary legislations are important to know which level of the government has the power to levy and collect the taxes.

In Switzerland, the federal constitution gives the three levels of the government, federal, cantonal and municipal, the right to levy taxes. The Confederation (Center) relies on consumption (indirect) taxes whereas the cantons and municipalities are largely accredited on direct taxes like income and wealth taxes.[38] The cantons have fiscal sovereignty where it is not the domain of the Confederation.[39] As the Confederation may only claim exclusive jurisdiction over relatively few types of taxes such as on customs duties, VAT, special expenditure taxes, stamp duties and Swiss withholding tax, the cantons are given broader scope to define their own tax legislation.[40] Accordingly, each canton has its own tax legislation and taxes as appropriate on the income and assets of individuals, the profits and capital of legal entities, inheritances and donations, property gains, etc. The Confederation may administer only those taxes which the federal constitution expressly authorizes it.[41] As to VAT, the constitution specifically gives the power of taxation to the central government by expressly mentioning the name VAT.[42]

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[35] Njogu, L. K. (2015). The effect of value added tax on economic growth in Kenya. International Academic Journal of Economics and Finance, 1 (5), 13. *available at*: http://www.iajournals.org/articles/iajef_v1_i5_1 0_30.pdf (Accessed on October 23 2019).

[36] Bekure Herouy, The VAT Regime under Ethiopian Law with Special Emphasis on Tax Exemption: The Ethiopian and International Experience,7(2004); *available at* http://www.crdaethiopia.org/; (Accessed on 18 October, 2019).

[37] For example, in India power on VAT is exercised on the basis of the constitutional power on sales taxes. See Value Added Tax (VAT) at Central and State Level means, *available at* https://howtoexportimport.com/Value-Added-Tax-VAT-at-Central-and-State-level-mea-9453.aspx, (Accessed on 17 May, 2019).

[38] Macos Terak, *The Swiss Taxation System*, at 11. *available at* https://www.caminada.com/sites/default/files/See also ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT(OECD), FISCAL FEDERALISM AND FINANCIAL EQUALIZATION, at 55 (2002).

[39] Federal Constitution of the Swiss Confederation of 18 April 1999 (status as of January 2018), Art. 3, *available at* http://www.constituteproject.org), (Accessed on 27 April, 2019).

[40] *Id.* Art. 130- 133.

[41] Macos Terak *supra* note 38, at 11.

[42] Federal Constitution of the Swiss Confederation, *supra* note 39, Art. 130.

Like Switzerland, the Constitution of Nepal of 2015 has clearly assigned the revenue power between three layers of the government. Schedules 5 to 9 of the constitution have provided the exclusive and concurrent revenue assignments of the federal, state, local governments.[43] In respect to VAT, the constitution expressly (by name) assigned to the central government.[44]

In Nigeria, section four of the 1999 constitution provides the exclusive federal powers and the concurrent powers. It reserves the residual power of taxation to the states.[45] The Nigerian constitution empowers the federal government to have exclusive power to collect taxes on incomes, profit, and capital gain.[46] And the concurrent powers of taxation are over capital gains, incomes or profits of persons other than companies, and documents or transactions by way of stamp duties.[47] Therefore, other forms of taxes are given to the states based on residuallity.[48] Since VAT or sales taxes is not mentioned by name or substance in the constitution, the power of taxation over VAT is thus assigned to states.[49] In practice, however, it is the federal government that has a legislative competence over VAT though the federal government has a duty to distribute the proceeds among the three tiers of governments.[50]

In India, the assignment of tax powers is based on the principle of separation (the tax bases are exclusively assigned to the center or states) and the principle of residuality.[51] Most of the broad-based and productive tax bases are to the center. Hence, taxes such as corporation tax and customs duty, taxes on the sale or purchase of newspapers and on advertisements published therein, taxes on the sale or purchase of goods that take place in the course of inter-state commerce are assigned to the center.[52] On the other hand, states have the power of taxation over, among others, sale or purchase of goods other than newspapers, taxes on the consumption or sale of electricity.[53] Besides, the center is given all residual powers.[54] Though the India constitution is too detailed in specifying power of taxation, it does not mention VAT by name. As a result, the government is assuming power *on the basis of sales taxes* in the constitution which, as shown

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[43] Nepal's Constitution of 2015 with Amendments through 2016, *available at* http://www.constituteproject.org), (accessed on 20 July, 2019).

[44] *Id*, Schedule 5(5).

[45] Section 4 (7) of the 1999 constitution of Nigeria provides that the House of Assembly of a state shall have power to make laws for the peace, order and good government with respect to any matter not included in the exclusive legislative list and concurrent list in the second schedule to this constitution. It is clear from this that states have residual powers to make laws on any matter that is not on either the exclusive or concurrent legislative list.

[46] Constitution of the Federal Republic of Nigeria, 1999 Schedule II, parts I, item 59, *available at* https://www.wipo.int/edocs/lexdocs/laws/en/ng/ng014en.pdf, (Accessed on 27 April, 2019).

[47] *Id,* schedule II, part II, item 7.

[48] Ayodele Odusola, *Tax Policy Reforms in Nigeria*, RePEc, at pp 12-13(2006) *available at* https://www.researchgate.net/publication/ (Accessed on 17 May, 2019).

[49] *Id,* at 49.

[50] Abiola Sanni, *Current Law and Practice of Value Added Tax in Nigeria*, BRITISH JOURNAL OF ARTS AND SOCIAL SCIENCES, 196. (2012).

[51] The Constitution under art 268, art 269 and under the seventh schedule apportion the tax power of the union and the states (See the Constitution of India (2015), Articles 268 and 269 and Entry in List I of the Seventh Schedule, 92 A. and 97).

[52] *Id.,* Articles 268 and 269 and Entry in List I of the Seventh Schedule, 92 A.

[53] *Id*, at List II of the Seventh Schedule, Entry No. 52-54.

[54] *Id.,* Entry in List I of the Seventh Schedule, 97.

here, are allocated to both layers of the government on different subjects.[55] Hence, the tiers of the government may levy VAT on their respective sales tax competence. Accordingly, India introduced a VAT by replacing federal sales tax and state sales tax.[56] Now, India has adopted a system of dual VAT: central VAT at the federal level, and state VAT at the state level.[57] Thus, the constitutional provision of sales tax in India is considered as it includes VAT.

In some other federations, power of administering sales taxes or VAT is allocated through subsidiary legislations since their constitutions are not detailed on the allocation of taxing power on tax bases. For example, the constitutions of Belgium, Australia and Canada do not contain provisions regarding sales taxes in general and VAT in particular. Through their legislations, Australia (as of 2000), and Belgium have assigned VAT only to the center.[58] Indeed, the countries have chosen an indirect method of VAT decentralization which is VAT revenue sharing arrangements between the center and regions.[59] In Canada, both federal and provincial governments can levy consumption taxes.[60] While the federal government levies a VAT (goods and services tax- GST), the provinces levy a retail sales tax (RST).[61] However, Quebec collects the federal VAT along with its own VAT (known as the QST, the Quebec sales tax).[62]

From the abovementioned discussions, it can be noticed that constitutional assignments can be categorized into three forms. The first category is countries, like Switzerland and Nepal, which specifically assigned VAT by name under the constitution. Secondly, there are countries that assign taxes by the name of the 'sales/transaction tax family'. In this regard, India can be mentioned. Thirdly, there are countries that assign VAT by the principle of residual power. A case in point here is Nigeria.

IV. TAX ASSIGNMENT UNDER THE FDRE CONSTITUTION

The tax assignment between the federal and state governments under the FDRE Constitution is made in the forms of exclusive federal taxes, exclusive state taxes, concurrent taxes, and undesignated power of taxation. The Constitution departs from the assignment formula set for expenditure powers and prescribes a special procedure for assignment of taxes which are neither concurrent nor exclusive to either levels of the government.[63] In this sense, the Constitution

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[55] Value Added Tax (VAT) at Central and State level means, *supra* note 37.

[56] Vishwa Nath Alok, *Assignment Systems in Federations*, Work Session 4, at 107 (2008). *available at* www.**for**umfed.org/libdocs/...2/IntConfFed07-Vol2-AS-Alok.pdf (Accessed on 17 May, 2019).

[57] Mahesh C. Purohit, Emerging Issues in Fiscal Federalism, Subtheme Paper Assignment Systems in Federations, p.41 (2008), *available at* http://www.forumfed.org/library/theme-paper-emerging-issues-in-fiscal-federalism/(Accessed on 17 May, 2019). ; See also Dil Bahadur Chhetry, *Tax Assignment in Selected Federations: Lessons for Nepal*, INTERNATIONAL JOURNAL OF SOCIAL SCIENCES, 515 (2017).

[58] Richard M. Bird and Pierre -Pascal Gendron, *VATs in Federal States*: International Experience and Emerging Possibilities, Working Paper #01 -4, International Studies School of Policy Studies Georgia State University Atlanta Georgia, 7, (2001) *available at* <https://www.researchgate.net/.../4737794>(Accessed on 18 May, 2019).

[59] Katarzyna wójtowicz, *Decentralizing VAT – appearance or reality?* Maria Curie, Sklodowska University, at 1294 (2015). *available at* https://www.semanticscholar.org/.../(Accessed on 17 May, 2019).

[60] Richard M. Bird and Pierre -Pascal Gendron*, supra* note 58, at 8.

[61] *Id.*

[62] Martin A. Sullivan, VAT Lessons from Canada, 285 (2011); *available at* <www.taxhistory.org/www/...nsf/.../SULLIVAN.../SULLIVAN-22.pdf> (Accessed on 17 May, 2019).

[63] Taddese, *supra* note 6*,* at 31

comes up with the so called 'undesignated taxes' which should pass through the allocation process to be done by the two-thirds majority vote of the two Federal Houses.[64] Generally, the tax assignment in Ethiopia is not exhaustively made at least for two reasons. First, either of the governments may introduce new taxes from the grand tax bases assigned under the Constitution. This is so because the tax assignment in the Constitution is not based on the tax base. Second, new tax bases and/or sources may be invented by either layers of government since the Constitution does not adopt the concept of residual power.

Global experiences show that tax assignments to different levels of a federal government are done on tax bases.[65] A certain tax base, say personal income tax or VAT, is assigned exclusively to either levels of the government. Nevertheless, such method of tax assignment is not as such reflected in the FDRE Constitution in which a single tax base is divided between the federal and state governments based on various principles. If we take the income tax assignment as an example, the Constitution divides different income tax sources into smaller pieces and apportions them to both levels of the government. In assigning taxation power to the federal, state and to both concurrently, the FDRE Constitution has relied on various principles such as ownership principle [66], type of business form[67], principle of origin[68], domiciliation principle[69], inter-State and international trade[70], and administrative feasibility.[71]

On the basis of the aforementioned principles, the FDRE Constitution assigns taxes by name and/or substance.[72] Taxes mentioned by name are income taxes, monopoly tax, excise tax and customs duty. Unlike other tax families, the income tax assignment under the FDRE constitution is too detailed. The Constitution has divided and assigned income taxes in specific names such as personal income tax, agricultural income tax, income from game of chance, rental income tax and profit income tax. Furthermore, personal income taxes are apportioned into federal exclusive, state exclusive and concurrent powers. Profit income tax is also divided and assigned

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[64] FDRE CONSTITUTION, Art. 99.

[65] Ghebrehiwet Tesfai, *supra* note 8, at 233.

[66] According to this principle, the owner of a certain public sector or a business activity has taxation power on the resulting tax yield. See Ghebrehiwet Tesfai, *supra* note 8 at 233- 238. See also Taddese*, supra* note *7,* at 331.

[67] It has to do with the legal registration of business organization form. If the body has a form of private limited company and share company, it is concurrent power of taxation. On the other hand, revenues generated from sole proprietorship business are under State taxation powers. See Ghebrehiwet Tesfai, *supra* note 8, at 233- 238.

[68] This refers to as the business place from where a particular revenue is generated. For example, Tax on incomes from transport services rendered on waters within State territory is assigned to the States, save for the matters considered as a concurrent power of taxation. See Ghebrehiwet Tesfai, *supra* note 8, at 233- 238.

[69] It refers to the assignment of taxation power to different levels of government which are the permanent residences of the taxpayer. Regardless of the form of business organization, personal income tax on employees of private companies is assigned to the States on domiciliation principle. See Taddese, *supra* note 7, at 331.

[70] In this regard, we find custom duties and other charges on imports and exports are exclusive taxation powers of the federal government. As it is presumed to be a huge revenue source and the international trade relations are the jurisdiction of the federal government and to redistribute the revenue generated in equitable manner, such taxes shall be assigned to the central government. See Ghebrehiwet Tesfai, *supra* note 8, at 233.

[71] The constitution assigns to the central government tax relating to institutions which have more connection with the federal government for administrative conveniences. Such as personal income tax on employees of international organizations, taxes on incomes of air, rail, and sea transport services; taxes on monopolies. See Ghebrehiwet Tesfai, *supra* note *8*, at 233.

[72] Taddese, *supra* note 7, at 333.

as federal exclusive, state exclusive and concurrent power of taxation.[73] To show how much the Constitution is detailed as to income tax, it may be good to bring some instances. For example, the Constitution does not simply allocate income taxes by declaring that "income taxes on enterprises owned by the federal government to the federal" or it does not stipulate that "regional States shall levy income taxes on individual traders carrying out a business within their territory" either. Rather, it has divided the *grand family income tax* into personal income tax (personal income tax on employees of state owned enterprises, personal income taxes from employees of private enterprises, personal income tax on enterprises they jointly establish, etc.), profit income tax (profit income tax on individual trader, profit income on companies/enterprises, etc.), rental income tax (rental income taxes on income of houses owned by the Federal, rental income taxes on income derived from private houses, etc.), and agricultural income tax (taxes on income of private farmers and farmers incorporated in cooperative associations).

The very intention of the Constitution in getting into such specification is not without reason. It was intended that a tax which is not named and assigned under the Constitution, while its folks (found within the same family) are assigned, will be deemed as unassigned (undesignated) tax and hence shall undergo the procedure set under Article 99 of the Constitution.[74] Since the Constitution is detailed with regard to such types of tax family, assignment by constitutional interpretation is difficult. Thus, for example, an income tax not specifically named under the Constitution needs to pass through Article 99. This is because the Constitution is very specific as far as income tax family is concerned so that placing new income taxes to one tier of government is very difficult. It is, therefore, in such cases that the role of Article 99 comes into play. For example, income taxes on royalties from the exercise of copyrights and patents, personal income tax of employee of domestic NGOs and income taxes on bank deposit interest are not designated in the Constitution while their folks under the same family are specifically designated. For these mentioned income taxes, either level of the government cannot have power except through Article 99 of the Constitution. That is why, in their joint meeting, the Federal Houses designated the above-mentioned taxes.[75] In support of the argument, Taddese stated that 'income tax from royalties, the exercise of copyright and patent, and from interest from bank deposit could not be considered as designated either in name or substance and there would be little debate over the decisions the Federal Houses.'[76]

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[73] FDRE CONSTITUTION, Arts. 96-98.

[74] The practice shows such proposition. For example, income from royalties, exercise of copyright and patent, income derived by an entertainer, musician or sportsman/woman from his/her personal activities and income on interest from bank deposit are considered as an unassigned as they are unmentioned while their folks are mentioned in the constitution and hence passed through Art 99 of the constitution. Likewise, though the federal houses have appreciated VAT as unassigned tax, the latter decision of the federal government permission to regions to collect and take proceeds of VAT from sources of which they are empowered under the constitution to levy sales taxes, in turn confirms that, Article 99 works for taxes whose tax family is not put in grand and general way.

[75] Minutes of the 1st Joint Session of the House of Federation and the House of Peoples Representatives (Meskerem 26, 1996 E.C. in Amharic), as quoted in, TADDESE, *supra* note 7, at 334.

[76] *Id., supra* note 7, at 334.

V. THE VALUE ADDED TAX ASSIGNMENT UNDER THE FDRE CONSTITUTION: DESIGNATED OR UNDESIGNATED?

In the above discussion, it is said that the FDRE Constitution assigns taxes to the two levels of the government by name and/or in substances. It is also added that income taxes are mentioned by their specific names and that power of taxation in relation to a new income tax should be exercised after the decision pursuant to Article 99 of the Constitution. Furthermore, as it can be observed from the Constitution, certain powers of taxation are expressed by mentioning the tax families.[77] For the tax bases stated in the form of general tax families in the Constitution, the government with the power of taxation over that tax family will have the same power over the specific taxes within the tax family. The Constitution deliberately assigns certain tax families in a beta way. Had it not been the intention of the Constitution to permit a tier of the government to have a power over specific taxes within a tax family, it would have specified the taxes by name like what it does for income taxes.[78]

Having said the above, it is essential to briefly discuss as to what kinds of taxes are provided under the Constitution in the form of tax family or/and by substances. In this regard, it is good to first read Article 96(1) of the Constitution which states that "The federal government shall levy and collect custom duties, *taxes* and other charges on imports and exports." [Italics added]. Article 96(1) gives the power to the federal government to levy '*taxes…..on import and exports'* without mentioning the specific type of the import and export taxes. In other words, each and every kind of tax the federal government may impose cannot surely be known since the Constitution simply states "*taxes* on import and export".

Unlike income taxes, the Constitution does not make specification on taxes on import and export in the above provision. In such cases, the federal government can levy specific types of import/export taxes which are not actually named in the Constitution as long as they can fall within the frame of the substances (taxes on import and export). Hence, the federal government does not need to get the blessing of the two houses because such taxes are not regarded as unassigned taxes. It is for this reason that the federal government imposes surtax on imported goods though it is not mentioned under the Constitution by name.[79]

The other tax base which is assigned in the form of tax family in the FDRE Constitution is the *sales taxes*. Unlike income taxes, the Constitution does not make a specification on the '*sales tax family'*. With regard to sales taxes, the Constitution has assigned to both levels of the government on ownership principle, domiciliation principle and type of business form/structure, without breaking down the tax family into various slices. The Constitution, for instance, provides that "states shall levy and collect *sales taxes* on enterprises owned by the States". Unlike income tax family, it does not break down the sales tax family like into retail, wholesale, manufacture's

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[77] For example, taxes on import and export, sales taxes. See the FDRE CONSTITUTION, Art 96-98.

[78] Here, given the general nature of constitutions, one cannot surprise himself by the position taken by the FDRE Constitution.

[79] *Import Sur-Tax Council of Ministers Regulations*, Regulations No. 133/2007, 13th Year No. 23, Addis Ababa, 11th April 2007.

sales tax, turnover tax and VAT. As shown above, this model of assignment of the constitution is similar with the form adopted by Indian constitution.

As a supreme law, the Constitution may not do this simply without taking into consideration the situations that existed at the time of drafting and the social, political and economic factors in the making up of the federation.

It may not be tenable to say that the Constitution does not break down the sales tax into its members because the framers of the Constitution did not know the fact that sales taxes have varieties.[80] It could be presumed that Ethiopian scholars at the time of drafting the Constitution had knowledge of the varieties. As of 1954, the time Ethiopia introduced the first general sales tax, the country has been introducing different varieties of sales tax.[81] Accordingly, from general sales tax, Ethiopia has introduced manufacturer's sales tax in 1956.[82] Besides, the country introduced turn over tax upon all sales at all levels in 1963.[83] These forms of sales tax were popular forms of sales tax for the Ethiopian government in the 1970s, 80s and early 90s. Thus, the fact that sales tax has different varieties like that of income tax was known in Ethiopia long before the promulgation of the FDRE Constitution in 1995. Even after the FDRE government came to power, manufacturer's sales tax and turn over tax as types of sales tax were administered in Ethiopia although the government eliminated turn over tax from the sales tax regime in the 1993 tax reform.[84] Hence, it can be fairly argued that the framers of the Constitution knew that sales taxes have various slices.

As it can be inferred from the 1993 sales and excise taxes laws, the transitional government had decided to have a single-stage sales tax regime with application upon imports, goods manufactured locally and a limited number of services at that time.[85] The consideration that the 1993 sales tax regime was "a single stage sales tax" and the fact that turn over tax was eliminated may tell us that the intention of the transitional government, influential in making the Constitution, was to have a single stage sales tax than the various varieties of sales tax. Based on this, it may be argued that the Constitution refers to the single-stage sales tax recognized in the 1993 Sales and Excise Taxes Proclamation when it talks about 'sales taxes'. It then means that power of taxation over new varieties of sales taxes shall be determined in accordance with Article 99 of the Constitution. This argument could not, however, be accepted at least for three reasons.

First, in stating sales taxes, the Constitution uses '*sales taxes',* not "sales tax" in a singular form.[86] Hence, the fact that sales taxes contain more than one variety was known to the framers of the Constitution. Second, the Constitution would have put a fencing clause stating that other

[80] The fact that the family of sales tax has different varieties was known long time ago. Even VAT as a form of sales taxes has been spreading throughout the world since its introduction in 1954.

[81] Taddese, *Towards Legislative History of Modern Taxes in Ethiopia (1941-2008)*, XXV (2) JOURNAL OF ETHIOPIAN LAW, at 138 (2012).

[82] *Id.,* at 137.

[83] *Id.,* at 138.

[84] The Sales and Excise Tax Proclamation No 68/1993, FED. NEGARIT GAZZETA 52nd Year No.61, Addis Ababa.

[85] *Id.*

[86] See FDRE CONSTITUTION, Arts. 96(3), 97(4, 7), 98(1), and 98(2, the Amharic version).

varieties of sales taxes shall not be introduced had it assumed that there is only a single sales tax. Unless the Constitution has fenced it, problems such as the constitutional status of VAT would inevitably arise. Third, as pieces of literature have indicated, the reasons for the late introduction of sales tax, for elimination and addition of sales tax varieties were associated with the tax administration capacity of the country.[87] Corresponding to this, Taddese stated that subsequent amendments of Ethiopian sales tax laws predictably widened the coverage of sales taxes as the tax administration became more confident in its enforcement capacities.[88]

In conclusion, the framers of the Constitution had recognized the existence of varieties of sales tax and had knowingly put the power of taxation in terms of tax family.[89] In view of that, it can be understood that the Constitution has assigned all forms of sales tax with the knowledge and after close examination of each form of sales tax. So, for economy of words (especially it matters in constitutions), it has preferred to put in a broad way. Thus, as sales tax is not apportioned into smaller pieces, it means that VAT, as a tax base within sales taxes, is entrusted to the government to which that respective sales tax is allocated for the following reasons. First, the Constitution deliberately puts such kinds of allocation of taxation as discussed above. Second, if, for example, the Constitution had not intended the regions to have power over VAT within the sales tax family, it would have specified like what it has done regarding income taxes.

On the basis of the aforementioned discussion, we can therefore conclude that the Constitutional status of VAT in Ethiopia is a designated tax base as a family of sales taxes. Hence, both levels of government can levy VAT over areas where they are given the power to levy sales taxes.[90] Accordingly, the federal government has exclusive power to levy VAT on enterprises it has owned.[91] Likewise, states have an exclusive power to levy VAT on individual traders carrying out a business within their territory and enterprises owned by the States.[92] Moreover, both tiers of governments have also concurrent power over VAT to be collected from enterprises jointly establish by the federal and state governments and on companies.[93] In respect of VAT, the rationales for bestowing competence over it to regions could be related to the second generation theory of tax assignment that inserts other noneconomic elements such as accountability, administrative feasibility and tax autonomy of regions.[94]

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[87] Taddese, *supra* note 81, at 137- 138.

[88] *Id.,* at 138.

[89] Accordingly, it is presumed the framers knew that VAT and turnover tax are forms of sales tax, but they preferred to entrust "a sales tax as a family" to the levels of the government in their respective competence as shared power.

[90] It is the "separate VATs or dual VAT" concept whereby both levels of the government collect the VAT independently on a separate economic base as per the powers defined in the constitution. In this case, both tiers retain autonomy in fixing tax rates, exemptions and administrative procedures.

[91] FDRE CONSTITUTION, Art. 96(3).

[92] *Id.,* Art. 97(4,7).

[93] *Id.,* Art. 98(1) and art 98(2) of the Amharic version).

[94] Alene and Ayele, s*upra* note 12, at 124 and 126.

Nevertheless, in practice, it is the federal government that takes the legislative competence on all sources of VAT in the country leading to a single national VAT in Ethiopia.[95] Accordingly, there is a federal VAT law which regulates the exclusive VAT sources of regions and the central government, and the concurrent sources of VAT. Thus, the federal government takes away the powers of states given under the Constitution which makes the federal VAT law unconstitutional. In fact, the federal government has assumed power on the basis of erroneous appreciation and decision of the Federal Houses pertaining to VAT as undesignated and their decision to give the power to the federal government.[96]

Be the above as it may, close examination of the scope of the VAT proclamation may give rise to certain undesignated VAT sources. Currently, as already said, the federal government levies VAT generally on taxable supplies of goods and services.[97] As per the VAT Proclamation, save for the exempted supplies, VAT is applied on every taxable transaction or activity (of goods and services) so long as the supply is made as a commercial activity.[98] Nevertheless, every taxable activity is not necessarily a sale,[99] and it can be observed from the VAT Proclamation that VAT is also collected from supplies which are not sale. By virtue of the law, supply of services rendered as part of commercial activities is subject to VAT.[100] For example, VAT is collected on rental of buildings in Ethiopia. In such cases, the VAT is not collected from sales, but from leasing activities or supplies of services. However, the constitutional base for levying VAT on supplies other than sales would be another question in the Ethiopian VAT system. Arguably, unlike other quarrelsome areas, levying VAT on non-sale activities does not have a constitutional base. As a result, the competency of the federal government in this regard is dubious from the constitutional point of view.

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[95] Practically, the model of VAT assignment in Ethiopia is Federal VAT with Tax Sharing. The VAT is collected at the federal level and shared with the regional governments based on a formula.

[96] Minutes of the 1st Joint Session of the House of Federation and the House of Peoples Representatives (Meskerem 26, 1996 E.C. in Amharic), *supra* note, 74.

[97] The Value Added Tax Proclamation, Art 7. As per the VAT proclamation, taxable supply means any supply of goods or services by a person registered for Value Added Tax which is not an exempt supply. Hence, irrespective of the character of sale, supplies are going to be subject to VAT as long as the supply is made as a commercial activity. This can be understood from the cumulative reading of Articles 2(17), 6 and 7 of the VAT proclamation.

[98] The Value Added Tax Proclamation, Arts. 6 and 7(3).

[99] For example, a legal dictionary defines that sale is a transaction, contract or an agreement by which one of the contracting parties, called the seller, gives a thing and passes the title to it, in exchange for a certain price in current money, to the other party, who is called the buyer or purchaser, who, on his part, agrees to pay such price. *A Law Dictionary, Adapted to the Constitution and Laws of the United States. By John Bouvier.*. (1856), *available at* https://legal-dictionary.thefreedictionary.com/sale, (Accessed on 8 August 2019). Similarly, Merriam-Webster Dictionary defines sale as the act of the transfer of ownership of and title to property from one person to another for a price, *available at* https://www.merriam-webster.com/dictionary/, (Accessed on 8 August 2019). As can be understood from different dictionaries, sale involves the transfer of title from the seller to the buyer. Therefore, while the law says sales tax, it is to mean sale transaction in proper sense of the term. Similarly, in Ethiopia, sale is defined as 'a contract whereby one of the parties, the seller, undertakes to deliver a thing and transfer its ownership to another party, the buyer, in consideration of a price expressed in money which the buyer undertakes to pay him'; See CIVIL CODE OF THE EMPIRE OF ETHIOPIA, Proclamation No 165/1960, NEGARIT GAZETA, 19th Year No. 2, 5th May 1960, Addis Ababa, Art 2266).

[100] Value Added Tax proclamation, Arts. 6, 7(1) and 7(3), See also *supra* note 11.

VI. CONCLUSION

The FDRE Constitution has assigned power of taxation to the tiers of the government upon different methods and principles. In the assignment of taxes, the Constitution breaks down certain tax families (such as income tax) into pieces and it allocates them to the tiers of the government by specific tax names. In such cases, assigning a new tax of a tax family to the layers of the government by way of interpreting the constitutional provisions would not be easy. The only possibility would be an assignment through Article 99 of the Constitution. On the other hand, the Constitution assigns some taxes in the form of tax families without naming specific varieties within them. An example in this respect is *sales tax* in which the VAT, as a variety, is the major one. Since the FDRE Constitution assigns sales taxes in the form of a tax family, it does not mention VAT by name. Attributed to this, it is identified that there are arguments regarding the constitutional status of VAT.

Despite the arguments, this paper revealed that the Constitution has broadly assigned the grand sales taxes with the knowledge of the varieties within them. This means that the Constitution has assigned VAT in substance like the case of Indian constitution. Moreover, the assignment of VAT in the Constitution can be inferred from cases other than a sales tax form. In this regard, Article 96(1) of the Constitution that empowers the federal government to levy "*taxes on imports*", without any further qualification, can be mentioned. Accordingly, the FDRE Constitution adopts the dual VAT, where the two levels of government collect VAT independently, and joint VAT system of assignment. Both levels of the government are given the power to administer VAT independently on a separate economic base and jointly from enterprises they jointly establish and on companies.

Furthermore, it is noted in practice that VAT is not levied based solely on the constitutional provisions of sales tax. It is also administered on other non-sale taxable supplies that are not indicated in the Constitution. Based on this, it can be argued that the VAT proclamation is unconstitutional to the extent that it imposes VAT on activities other than sale transactions. The practice also tells us that the federal government takes away the constitutional power of states upon sales taxes or/and VAT though the federal government apportioned VAT proceeds to regions.[101] Since the Constitution needs to be respected, states shall be allowed to levy VAT over areas where they have the constitutional power to levy sales taxes. If there can be any justifiable reason to give such power to the federal government alone, it shall only be done through a constitutional amendment. Article 99 of the Constitution should also be triggered in relation to VAT on non-sale activities/supplies because power of taxation needs a clear constitutional support.

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[101] HoF, 1989 E.C 2nd Regular Meeting minute, at 76-80; (as quoted in Ghebrehiwet, *supra* note *8*, at 232.)

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ADMINISTRATIVE TRIBUNALS IN ETHIOPIA: EXPLORING THE ACCESSIBILITY AND INDEPENDENCE OF THE FEDERAL CIVIL SERVANTS ADMINISTRATIVE TRIBUNAL

Ayana Simachew Bekele [*]

Abstract

Administrative tribunals are established for many justifications. One of these tribunals in Ethiopia is the Federal Civil Servants Administrative Tribunal. The Tribunal is entrusted to render administrative justice for aggrieved civil servants. To meaningfully realize its mandate, the Tribunal has to be accessible to litigants and institutionally independent. This paper examines as to what extent the Tribunal is accessible and institutionally autonomous in rendering administrative justice. To this end, it consults relevant provisions from the FDRE Constitution, other relevant laws, some decided cases and relevant literature. In addition, interview was used to garner certain data. The findings indicate that the Tribunal is not autonomous and accessible to aggrieved civil servants. Having made detailed analysis on the issues, it is recommended that the Tribunal should be re-established as a separate institution which should be accountable to the Prime Minister. On top of that, more permanent chambers should be created in regional states to maintain accessibility.

Keywords: *Administrative adjudication, administrative tribunals, FDRE Constitution, Federal Civil Servants Administrative Tribunal, Ethiopia*.

I. INTRODUCTION

All schemes of government regulation and distribution of benefits may generate disputes between the government and private parties. Such disputes may relate to a rejected application for government benefits, a sanctioning decision such as a civil liability or dismissal from government offices or regulatory action that compels a private party to take some actions or to refrain from some actions.[1] As a result, administrative law must prescribe a system of administrative adjudication that resolves the disputes in a fair and efficient manner.

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[1] Michael Asimov, *Five Models of Administrative Adjudication*, 63 AMERICAN JOURNAL OF COMPARATIVE LAW 1, 29-32 (2015).

Administrative adjudication refers to the entire system to resolve disputes between civil servants and administrative agencies.[2] In the process of administrative adjudication, there is no doubt that administrative tribunals occupy significant place. Administrative tribunals are authorities outside the ordinary court system. They are neither courts nor executive bodies, but they are rather mixture of both. They are judicial in a sense that the tribunals are responsible to resolve administrative disputes, and they are administrative because the reasons for preferring them over the ordinary courts are administrative reasons.[3]

In Ethiopia, there are administrative tribunals that review appeals from the decisions of administrative agencies on question of law and fact. The Federal Civil Servants Administrative Tribunal, re-established by the amended Civil Servants Proclamation, is one of the administrative tribunals in the country.[4] The Tribunal reviews administrative measures taken by federal administrative agencies which are submitted to it in the form of appeal by civil servants.[5] This paper aims at investigating the law and the practice related to the Federal Civil Servants Administrative Tribunal with particular emphasis on its accessibility and institutional autonomy. To this effect, relevant laws and decided cases are analyzed. Besides, key informants interviews and consulting relevant literature have been made.

The remaining parts of this paper are organized under four sections. The second section discusses the definitions, basic features and principles of administrative tribunals. It also presents the justifications to have administrative tribunals in a country. The third section explores the constitutional and legal basis of the administrative tribunals in Ethiopia. Moreover, the fourth section examines the practice of the Federal Civil Servants Administrative Tribunal (the Tribunal) in terms of its accessibility and some aspects of institutional independence. Finally, section five provides conclusion and recommendations.

II. ADMINISTRATIVE TRIBUNALS: GENERAL OVERVIEW

A. Meaning and Features

Inevitably, a government organ in charge of executing laws could be involved in the process of exercising judicial or quasi-judicial powers for findings of facts, application of law to facts, and determination of rights and obligations of persons.[6] These processes may take the form of administrative disciplinary procedure, panel inquiry, administrative tribunal and special tribunals.[7] These processes are known as administrative adjudication which is the process by which an administrative agency issues an affirmative, negative, and injunctive or declaratory order.[8] The formal proceedings before an administrative agency adopt the process of either rule making or adjudication. In the former, policies are formulated by setting rules for the future

[2] *Id.*
[3] RADHAKAT NAYAK, ADMINISTRATIVE JUSTICE IN INDIA 51-53 (India Pvt. Ltd. Publications, 3rd ed., 1989).
[4] *Federal Civil Servants Proclamation*, No.1064/2017, FED. NEGARIT GAZETTA, 24th Year, No.12, Addis Ababa, 15th December, 2017, (herein after, Federal Civil Servants Proclamation)
[5] *Id.* Article 81(1).
[6] ASIMOV, *supra* note 1, at 6.
[7] *Id.*
[8] *Id. at 7.*

conduct of persons governed by that agency.[9] In the later, on the other hand, the policies of the administrative agency are applied to the past actions of civil servants and are decided for or against that party. Both these processes are regulated by the law of administrative procedure.[10]

Getting specific to administrative tribunals, they are usually structured outside the ordinary courts to entertain administrative cases though their decisions are subject to judicial control.[11] They are mainly adjudicative in the sense that they render decisions on administrative disputes by applying administrative laws and procedures.[12] In fact, the term tribunal may be used in various senses. For the purpose of this paper, however, it suffices to define a tribunal as an adjudicatory body that is not a court. A tribunal may also be located within an administrative department or outside it.[13]

There exist certain salient features of a tribunal. First, a tribunal is created by the law maker which makes it an organic part of the machinery of the state.[14] Second, it is partly judicial in nature to decide over administrative disputes by applying administrative rules and procedures. Third, a tribunal has a specialized and limited jurisdiction expressly conferred on it by the law.[15] Fourth, administrative tribunals can make legally enforceable decisions although their decisions are reviewable by higher level of court on point of law.[16] Fifth, a tribunal enjoys independence from control of executive body of the government.[17] Lastly, the work of a tribunal is characterized by speed, low cost, specialized expertise, relaxed procedure and freedom from technicalities.[18]

B. Justifications for Establishment of Administrative Tribunals

As already pointed out, administrative tribunals are bodies**,** other than courts**,** that are given the power to resolve administrative disputes. Generally, the establishments of such tribunals can be justified for the following briefly discussed reasons.

1. Cost and Speed

One of the most pressing reasons for the creation of tribunals is cost.[19] Administrative tribunals are cheap and ensure speedy justice. It is known that the procedures in the ordinary courts are long and cumbersome as it involves payment of huge court fees and engagement of lawyers. Unlike this, most administrative tribunals do not require huge fees. Their procedures are simple and informal and can be easily understood by a lay man. As such, there is no need for the

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[9] PETER LEYLAND AND TERRY WOODS, TEXT BOOK ON ADMINISTRATIVE LAW 188-191 (Oxford University Press, 4th ed., 2004).

[10] *Id.*

[11] *Id.*

[12] PAUL CRAIG, ADMINISTRATIVE LAW 734-738 (Sweet and Maxwell, 7th ed., 2012).

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id., at 740.*

[17] *Id.*

[18] These features of administrative tribunals are thoroughly discussed in the next sub-section of the article.

[19] Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMINISTRATIVE LAW REVIEW 329, 356-366 (1991).

aggrieved party to employ a lawyer to fight a case since he can easily represent himself at the tribunal.[20]

In fact, the characteristics of speed and cost are interlinked and contribute to each other. Harlow and Rawlings also identify the positive qualities of administrative tribunals, namely cheapness, speed and accessibility, and how they interact. They say that these values generally contribute for effective resolution of administrative disputes than ordinary courts.[21] Indeed, it should be borne in mind that there will be costs in establishing a new tribunal system, which should, however, be weighed against the future benefit that tribunals could provide.[22]

2. Specialization

The desire to have specific issues dealt with by persons with an intimate knowledge and experience of the problems involved is one of the reasons for the establishment and growth of tribunals. Administrative tribunals are in a more appropriate position than courts to give effect to individual administrative law claims within a broader policy-based frame work. They possess greater technical knowledge/expertise (in fields such as law, medicine, taxation, business, industry, health, engineering, land, etc) than ordinary courts and**,** hence, they can effectively deal with technical and socio-economic problems arising out of administrative action.[23]

3. Informality and Simplicity

Informal process of tribunals and other administrative bodies remarkably distinguish them from the ordinary courts whose proceedings are grounded in decorum, technicalities of procedure, rules of evidence, and *stare decisis*,[24] thus making the proceedings to be formal, cumbersome, and fraught with mystifying technicalities. Even the uniforms of the judges and the lawyers before ordinary courts have their own great implication. They are so formal and foreign to the point of 'intimidation for the 'uninitiated' members of the public.[25]

On the other hand, tribunals can adopt more informal methods and procedures that are more in tune with the common law man's idea of dispensation of justice, as those appearing before tribunals are less likely to be intimidated by their proceedings.[26]

III. PRINCIPLES OF ADMINISTRATIVE TRIBUNALS

Administrative tribunals, as already noted, are necessary institutions to resolve administrative disputes. To effectively do this, they should observe some fundamental principles and values in discharging their responsibilities. These principles and values are explored by

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[20] *Id.*

[21] CAROL HARLOW & RICHARD RAWLINGS, LAW AND ADMINISTRATION 491-493 (Cambridge University Press, 2nd ed., 1997).

[22] *Id.*

[23] Gillian Claire, *Administrative Justice and Tribunals in South Africa: A Common Wealth* Comparison, (LLM Thesis, University of Stellenbosch, 2011), at 67.

[24] *Id.*

[25] MICHAEL ALLEN AND BRIAN THOMSON, CASES AND MATERIALS ON CONSTITUTIONAL AND ADMINISTRATIVE LAW 756-760 (Oxford University Press, 11th ed., 2014).

[26] *Id.*

many writers. For example, Claire explains that administrative tribunals share three essential values, namely 'openness, impartiality and fairness. He defines these values as follows:

> In the field of tribunals**,** openness appears to us to require the publicity of proceedings and knowledge of the essential reasoning underlying the decision; fairness to require the adoption of a clear procedure which enables parties to know their rights, to present their case fully and to know the case which they have to meet; and impartiality to require the freedom of tribunals from the influence, real or apparent, of departments concerned with the subject-matter of their decisions.[27]

Besides, Kirsch and Stewart have identified some lists of principles of administrative tribunals. These comprise accountability, transparency, access to information, participation, the right of access to an independent adjudicator, due process rights, including the right to be heard and the right to reasoned decisions and reasonableness.[28]

As noted above, the principles discussed are quite significant in litigation of administrative cases. Consequently, administrative tribunals should observe these principles in the process of resolving administrative cases.

IV. OVERVIEW OF CONSTITUTIONAL AND LEGAL BASIS FOR ADMINISTRATIVE ADJUDICATION IN ETHIOPIA: FOCUS ON THE FEDERAL CIVIL SERVANTS ADMINISTRATIVE TRIBUNAL

The right to get justice before an impartial and independent tribunal is a fundamental right guaranteed in international human rights instruments. Of the most important treaties, the International Covenant on Civil and Political Rights (ICCPR)**,** in its Article 14 (1)**,** states that "all persons shall be equal before the courts and tribunals'' and further states that 'in the determination of any criminal charge against him, or his rights and obligations in a suit of law, every one shall be entitled to a fair and public hearing by a competent, impartial tribunal established by law." Moreover, Article 8 of UDHR provides the same rights**.**

When it comes to Ethiopia, it is clear that the FDRE Constitution under Article 79(1) provides that judicial power is vested in courts. Besides, according to Article 78(4), institutions other than ordinary courts that do not follow legally prescribed procedures cannot be established to exercise judicial functions.[29] More importantly, however, Article 37 (1) of the Constitution cements that everyone has the right to bring a justiciable matter to obtain a decision or judgment by a court of law or any other competent body with judicial power. It is on the basis of this constitutional rule that administrative tribunals are being entrusted to exercise a quasi-judicial jurisdiction over administrative disputes. In general, Article 37(1) of the Constitution, in line

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[27] Claire, *supra* note 23 at 63.

[28] Kingsbury Kirsch and Stewart, *The Emergence of Global Administrative Law*, 28 LAW AND CONTEMPORARY PROBLEMS 240, 252-253(2005).

[29] CONSTITUTION, Proclamation No. 1/1995, FED. NEGARIT GAZETA, 1st Year No. 1, 1995 (hereinafter, FDRE CONSTITUTION). Article 78(4) implies that due process of law must be observed when institutions exercise judicial functions involving individual rights.

with the UDHR and ICCPR pursuant to its Article 13(2), recognizes the right to fair hearing before competent, independent and impartial courts and tribunals.[30]

In Ethiopia, there are both embedded[31] and extra-departmental administrative tribunals.[32] Embedded administrative tribunals are known by different names in different sectors of the administration, some of them are called committee, commission, and board. They make internal review to the decision of authorities. However, their decisions are reviewed by the head of the concerned agencies. [33] However, extra-departmental administrative tribunals are rare.[34] The Social Security Appeal Tribunal, Tax Appeal Commission, Federal Civil Servants Administrative Tribunal are some of the extra-departmental administrative tribunals.[35] They review appeals from the decisions of embedded administrative tribunals on question of law and fact.

Be the above as it may, Ethiopia has yet not come up with uniform standards or guidelines that regulate administrative agencies' adjudication process. Both at the federal and the regional levels, there is no uniform legislative guidance that dictates administrative agencies concerning the procedural steps they must follow while adjudicating cases. If there are any, such procedures have to be searched in each of the pieces of the enabling legislations that create the respective agencies.[36] In fact, an attempt was made in 2001 to adopt a federal administrative procedure proclamation that was intended to regulate the process of rulemaking and adjudication by federal administrative agencies. For unknown reason, however, it has still remained as a draft.[37] Despite this, it can be said that the federal administrative agencies can refer to the draft like any other nonbinding legal literature at their discretion.

As has been introduced at the outset, the Civil Servants Administrative Tribunal is one of the administrative tribunals in Ethiopia. It exists since 1962 E.C which was created for the first

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[30] Leake Mekonnen, Independence and Accessibility of Administrative Tribunals in Ethiopia: The Case of Federal Tax Appeal Commission in a Comparative Perspective, (LLM Thesis, Ethiopian Civil Service University, 2014), at 4.

[31] These administrative tribunals are attached and formed with the specific administrative agencies, and serve as internal checks on the power exercise of different administrative agencies. It needs the consent of the head of the agencies to have effect.

[32] These are mostly established by an act of parliament to entertain disputes between civil servants and administrative agencies. Even though their decisions can be reviewed by higher courts, unlike embedded tribunals, it does not need the consent of the head of the administrative agencies to have effect.

[33] Tamirat Malefia, Judicial Review and Competence of Administrative Tribunals to give Final Decision in Ethiopia: A Comparative Study with South Africa and the UK, (LLM Thesis, Central European University,2013),pp.27-28.

[34] *Id.*

[35] See Art. 11 of The Social Security Authority Establishment Proclamation, No.38/1996, Art. 6 of the Federal Tax Appeal Tribunal Establishment Proclamation, No. 233/2001 and Art. 81 of Federal Civil Servants Proclamation, No.1064 2017.

[36] Abrham Yohanes and Desta Gebremichael, Forms of Administrative Adjudication, Abyssinia Law,2012,at https://www.abyssinialaw.com/studyon-line/item/312-forms-of-administrative-adjudication, (Accessed on 9 November,2018).

[37] Federal Administrative Procedure Proclamation, Initial Draft (June, 2001, Unpublished, Justice and Legal System Research Institute, Addis Ababa, Ethiopia).

time by Legal Notice No.269/1962.[38] This law provided the details of procedures of hearing, appeal to be lodged in 30 days, the possibility of the late appeal and that the tribunal could only present recommendations, *i.e*., its decisions were not binding unless approved by the Commissioner of the Civil Service Commission.

Later on, the Tribunal was re-established by Federal Civil Servants Proclamation.[39] The proclamation lays down substantive rights and duties upon the civil service institutions and the civil servants in their employment relationship.[40] On top of that, to make the system more effective, the Civil Servants Disciplinary and Grievance Procedure Regulation,[41] which was to be observed by the Tribunal in the course of reviewing the decisions of administrative agencies, was issued to protect the procedural rights of aggrieved civil servants.

Furthermore, the Tribunal was also re-established by Federal Civil Servants Proclamation No.515/2007.[42] Article 75 of this proclamation imposed a number of duties and responsibilities on the tribunal. It was given the power to hear and decide on appeal relating to unlawful suspension or termination of service, an illegal attachment or deduction of salary or other payments.[43] Besides, it was mandated to hear cases related to rigorous disciplinary measures and others. Proclamation No.1064/2017[44], the current law governing the Tribunal, provides similar provisions regarding the tribunal. Although the tribunal is empowered to review administrative cases by way of appeal, simple disciplinary penalties of oral and written warnings are precluded from appeal to the Tribunal.[45]

From the above discussions, it is discernible that the subject matter to be dealt by the Civil Service Administrative Tribunal relates to employment relation and corresponding disputes between the civil servant and administrative agencies. Thus, the Tribunal does not receive complaints brought by other citizens except civil servants.[46] It should also be noted that the decisions of the Tribunal is final on question of facts. However, it can be subject to review by ordinary courts on error of law.[47]

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[38] Public Service Regulations No.1, Legal Notice No.269/1962, NEGARIT GAZZETA, 22nd Year, No.6, Addis Ababa ,19th December,1962. Arts.98-104.

[39] *Federal Civil Servants Proclamation*, No.262/2002, FED. NEGARIT GAZZETA, 8th Year, No.8, Addis Ababa, 3rd January, 2002.

[40] *Id.* Art. 71. These include position classification, salary scale and allowances, staffing like selection scale and recruitment, promotion and transfer, performance safety and health, obligation and ethics of the civil servant, termination and extinction of service, disciplinary measures and etc.

[41] *Federal Civil Servants Disciplinary and Grievance Procedure Regulations*, Regulation No.77/2002, FED. NEGARIT GAZZETA, 8th year, No.29, Addis Ababa, 3rd July 2002. Although this regulation was issued in accordance with the repealed laws, it is applicable so long as it confirms the provisions of the new law. See Federal Civil Servants Proclamation, Art 98(2).

[42] *Federal Civil Servants Proclamation*, No.515/2007, FED. NEGARIT GAZZETA, 13th Year, No.15, Addis Ababa, 19th February 2007.

[43] *Id.*

[44] Federal Civil Servants Proclamation*, supra* note 4.

[45] *Id.,* Art. 81.

[46] Abate Ayana, *The Law and Practice of Administrative Courts in Ethiopia: The Case of Addis Ababa City Administrative Tribunal*, 2 INTERNATIONAL JOURNAL OF ADVANCED LEGAL STUDIES AND GOVERNANCE.1, 9-11(2011).

[47] Federal Civil Servants Proclamation, *Supra note* 4, Art. 81(5).

Generally, as discussed above, the legal basis of the Tribunal rests in the FDRE Constitution, Proclamation No.1064/2017 and Regulation No.77/2002.[48] Consequently, it is amenable to conclude that the Federal Civil Servants Administrative Tribunal has a normative foundation in the law to adjudicate administrative cases brought to it by way of appeal against decisions rendered by different federal administrative agencies. Nevertheless, there can be questions regarding the accessibility, both physical and procedural, and autonomy of the Tribunal in rendering justice. The next section explores these and other similar issues.

V. THE PRACTICE OF THE FEDERAL CIVIL SERVANTS ADMINISTRATIVE TRIBUNAL

As it can be noted from the previous discussions, administrative tribunals are created to review the actions of administrative agencies and solve administrative disputes. They are found to be advantageous in terms of expediency, efficacy and cost. This section evaluates the Federal Civil Servants Administrative Tribunal in terms of reviewing administrative cases through appeal. Specifically, it aims at examining whether the Tribunal is accessible and autonomous.

A. Accessibility of the Tribunal

Administrative tribunals should, institutionally and procedurally, easily be accessible to the aggrieved civil servants. Procedurally, they should follow clear, though informal, procedural steps recognizing the principles of natural justice.[49] Institutionally, they should physically be nearer to the litigants. Institutional accessibility is related to the distance of administrative tribunals from where litigants live.[50]

From its nature, accessibility will be affected by the availability of resource from the government side. Accessibility, whether in the form of more and better facilities, more and better information for parties or more and better representation services, all require resources, and given the high volume of some tribunals, the resource implications may be quite substantial.[51] In addition to resources, access may also depend on how a tribunal accommodates the unequal power and resources between parties.[52]

1. Head Office, Organization of Chambers and Case flow from Regions

The Federal Civil Servants Administrative Tribunal is established as one department under Federal Civil Service Commission[53]. Its head office is located in Addis Ababa. Despite the fact that Article 79(2) of Proclamation No.1064/2017 presupposes the establishment of administrative tribunal chambers throughout the nation, no effort has been made so far to create

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[48] Federal Civil Servants Disciplinary and Grievance Procedure Regulation, *Supra* note 41.

[49] Leake Mekonnen, *supra* note *30.* These include fair and public hearing, independence and impartiality, possibility of judicial remedy (appeal), effective remedy, enforcement of judgments and the like.

[50] Lorne Sossin, *From Neutrality to Compassion: The Place of Civil Service Values and Legal Norms in the Exercise of Administrative Discretion*, 55 UNIVERSITY OF TORONTO LAW JOURNAL 427, 440-447(2005).

[51] *Id.*

[52] *Id*.

[53] The former Ministry of Public Service and Human Resources has been re-arranged as Civil Service Commission. See *A Proclamation To Provide For The Definition of Powers and Duties of the Executive organs of the Federal Democratic Republic of Ethiopia*, Proclamation, No.1097/2018, FED. NEGARIT GAZZETA, 25th Year, No.8, Addis Ababa, 29th November 2018. Arts. 32(1) and 33(3)(b). (Hereinafter the Civil Service Commission)

any chambers in the regional states.[54]At this juncture, it may be interesting to remember the position of the FDRE Constitution with regard to the power of federal courts. To reduce the problem of accessibility of federal courts, the FDRE Constitution delegates the regional Supreme and High court to entertain the power of Federal High and Federal First Instance Courts respectively.[55] Nevertheless, such type arrangement has not been made to regional civil service tribunals to assume the power of adjudication of federal administrative agencies in the regional states nor has it arranged mobile benches to regional states to curb the problem of inaccessibility.

From the experiences of the author as a director of legal affairs of a university in Ethiopia, handling many administrative cases at the tribunal for the last five years (2011-2016), it is still true that the tribunal has only one chamber consisting of three judges who sit for trial on Tuesday and Thursday afternoons. According to 2016 annual report, the Tribunal handled about 56 administrative cases. From these, 38 cases (67.8%) of the cases were filed by aggrieved civil servants from universities and other agencies of four regional states.[56] Similarly, the performance report of the Tribunal reveals that 28 appeal cases (58.33%) out of 48 cases came from distant regional states in the year 2017.[57] Consequently, physical access of the tribunal is not quite attainable to the appellants (aggrieved civil servants) who might come from the four distant places of the country.

2. Working Time , Procedures and Expediency of Decisions

No doubt, the working time of the judges of the Tribunal obviously have direct link with the speed in its decisions which reflects the accessibility of the Tribunal. Art.79 (2)[58] of the Federal Civil Servants Proclamation states the possibility for more than one chamber. However, the Tribunal has only one chamber which consists of three judges one of whom is the presiding judge appointed by the Director of Civil Service Commission.[59] Though the judges are full time workers of the Tribunal, they sit to see cases only on afternoons of Tuesday and Thursday. On the rest of the working days, the judges are engaged in investigation of files.[60] This affects speedy trial before the Tribunal as the dates are limited as stated herein.

With respect to procedural aspect, the Federal Civil Servants Administrative Tribunal employs the Civil Servants Disciplinary and Grievances Procedure (Regulation No.77/2002)[61] to manage the review of administrative actions by way of appeal. This law incorporates detailed provisions as to how the aggrieved civil servant lodges an appeal to the Tribunal against the

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[54] Interview with Ato Mesfin Regassa, Presiding Judge, Federal Civil Servants Administrative Tribunal, (Addis Ababa , On 18th of September,2018)

[55] THE FDRE CONSTITUTION, *Supra* note 29, Art. 78(2).

[56] 2016 / 2017 Plan Performance Report of Federal Civil Servants Administrative Tribunal, File No.13/41, Federal Civil Service Commission, Addis Ababa.

[57] 2017/2018 Plan Performance Report of Federal Civil Servants Administrative Tribunal, File No.15/42, Federal Civil Service Commission, Addis Ababa.

[58] Federal Civil Servants Proclamation, *supra* note 4.

[59] *Id*, Art. 79(3).

[60] Interview with Biniam Tefera, Former Judge, Federal Civil Service Tribunal,(Addis Ababa on 18th of May2019)

[61] Federal Civil Servants Disciplinary and Grievance Procedure Regulations, *supra note* 41.

decisions of administrative agencies.[62] According to Article 37(2) of the regulation, an aggrieved civil servant should lodge a memorandum of appeal against the decisions of administrative agencies to the Tribunal within 30 days from the date the decision are communicated to him in writing. This time limit is short for parties to prepare the memorandum of appeal and take it to the Tribunal for review especially for those who should come from distant areas of regional states.[63] This is because, as it is shown above, the Tribunal is not accessible to all aggrieved civil servants as it is located in Addis Ababa.

Despite the fact that the Federal Civil Servants Proclamation and the regulation do not provide the exact time limit within which the Tribunal decides on appeal cases, it is expected to dispose cases within reasonable period of time. However, case study of the decisions of the tribunal reveals that the Tribunal has not observed the principle of speedy justice. For instance, in Appellant *Gizachew Tirete vs Wollo University* case[64], the Tribunal took four months to decide on the issue of unlawful termination of services. Similarly, in *Alebachew Merka vs Wollo University*[65], the Tribunal rendered decisions on the case 90 days after memorandum of appeal was filed. These delays affected the aggrieved civil servants who lost their jobs and usually attended their cases going to the premise of the Tribunal from distant places.

The other point that has some relevance with the issue of accessibility is judgments of the Tribunal. The practices of the Tribunal indicate that judgments are written not by the hands of the judges themselves, rather by the office secretary and signed later by the judge as though they are the minutes of the discussions in meeting.[66] Due to this, a party cannot get the decisions of the tribunal on the date they are made. The party has to rather file an application to the presiding judge on the next day.[67] This would create problems on the parties who would be exposed for further costs in waiting for an additional day to get a copy of judgment.[68]

B. Independence of the Tribunal

The institutional structure and autonomy of administrative tribunals from other branches of government is the major factor that determines their responsibilities of reviewing the legality of administrative actions.[69] Tribunals need to be structurally independent from the control of at least the specific authority whose decisions they review. Thus, the judges, management and funding of tribunals should be free from the control of such authority.[70] Bryden distinguishes four aspects of independence of administrative tribunals: adjudicative independence, institutional independence,

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[62] *Id.* Arts 35-50.

[63] Interview, *supra* note 60.

[64] Gizachew Tirete Vs Wollo University, Federal Civil Servants Administrative Tribunal, File No.048/06 (Decision of November 28, 2015).

[65] Alebachew Merka Vs Wollo University, Federal Civil Servants Administrative Tribunal, File No.036/03(Decision of December 20, 2012).

[66] Interview with Ato Hussein Mekonnen, Judge, Federal Civil Servants Administrative Tribunal (Addis Ababa, on 18th of May 2019).

[67] Interview, *supra* note 54.

[68] *Id.*

[69] PETER CANE, ADMINISTRATIVE TRIBUNALS AND ADJUDICATION 40-41(Hart Publishing, 2nd ed.,2010)

[70] *Id.*

administrative independence and policy independence.[71] By institutional independence, Bryden refers to the 'structural guarantees designed to satisfy litigants that tribunal members are protected from improper influence in their decisions.[72] These guarantees include those traditionally required for judicial independence, such as security of tenure, and security of remuneration, together with control over listing and allocation of cases to particular members and panels.[73] It also includes appointment, promotion, allowance, conditions, and suspension and removal of adjudicators from office.[74] Institutional independence is about arrangement to ensure that executive powers to appoint and remunerate members do not influence the outcome of the tribunal or impair the perception of impartiality.[75]

According to Bryden, judicial independence is concerned with the ability of tribunal members and panels to make decisions impartially, free from external interference or improper influence from any source, including the executive, the parties, other external persons, and even from the tribunal head and other members.[76] Administrative autonomy, on the other hand, is the ability of tribunals to secure and manage the resources that they need to perform their adjudicative functions, including control of their finances and staff. The fourth aspect, independent policy making, concerns independence from other tribunal members, from the courts and from executive directions.[77] From the above discussions, it can be observed that the independence of the administrative tribunals comprises many aspects in it. However, it is not the aim of this section to evaluate all aspects of the independence of the Federal Civil Servants Administrative Tribunal. Rather, it is limited to examine some aspects of institutional and administrative independence of the Tribunal.

1. Organization , Appointment and Tenure of Judges

As is said, the Federal Civil Servants Tribunal is organized and is accountable to the Federal Civil Service Commission.[78] Importantly, judges of the Tribunal should be designated by the Director of Civil Service Commission.[79] Despite this, the Commission does not have comprehensive directive to select and recruit judges. Judges of the Tribunal are employed using the selection committee and rules of the human resource department of the Commission.[80]Although Article 79 (4) of Proclamation No.1064/2017 empowers the Civil Service Commission to issue a directive to run the judicial functions of judges, their ethics and

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[71] PHILP BRYDEN, HOW TO ACHIEVE TRIBUNAL INDEPENDENCE: A CANADIAN PERSPECTIVE 62-63 (The Federation Press, 2nd ed., 2008).

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id., at 63.*

[76] *Id.*

[77] *Id., at 64.*

[78] *A Proclamation to Provide for the Definition of Powers and Duties of the Executive organs of the Federal Democratic Republic of Ethiopia*, *Supra note* 53, Arts32 (1) and 33(3) (b), Federal Civil Service Proclamation, *Supra* note *4*. Art.79(1).

[79] Federal Civil Servants Proclamation*, supra* note 4, Art. 79(3).

[80] Interview with W/o Emebet Moges, Judge, Federal Civil Servants Administrative Tribunal, (Addis Ababa, on 18th of May2019).

code of conduct and other issues, the Commission has not yet issued such a. Besides, there is no detailed directive issued by the Commission to guide the selection and appointment of its judges. In the absence of the directives, selection and recruitment of judges may be arbitrary which would affect the autonomy of the Tribunal. The human resource department of the Commission opens and posts vacancy announcement to employ judges of the Tribunal from law graduates who serves two years as a judge, prosecutor or as a legal expert in government or private institutions.[81]

Based on the reports of the selection committee, the Commission employs qualified applicants.[82] A judge who has the highest relevant service and better performance in his duties be appointed as presiding judge of the bench.[83] The presiding judge is accountable to the Director of the Commission and other two judges are accountable to the presiding judge.[84] The appalling issue here is that the Director of the Commission evaluates the performance of the presiding judge and the presiding judge evaluates the performance of the two judges.[85] In this case, the Director of the Commission controls the judges of the Tribunal through accountability of the presiding judge to him.[86]

With regard to the removal of judges, there has not been such practice in the tribunal yet. As a result, no judges have been removed from their posts. Indeed, there is no guideline in the Commission to address the removal of judges from their posts in the Tribunal.[87]

2. Budgeting and Necessary Staff

In order to run its adjudicatory functions, the Tribunal needs budget to consume and support staffs. As it has been discussed earlier, the Tribunal is established as one department under the Civil Service Commission. Hence, the Tribunal has not budget of itself and it is helped by the Civil Service Commission even for the materials needed in its day- to-day activities such as stationeries and the like. In fact, the Commission considers the Tribunal's roles while it prepares its budget. Besides, the support staffs who are seven in number are employees of the Civil Service Commission assigned permanently for the Tribunal as it cannot employ by itself.[88]This situation affects the autonomy of the tribunal.

VI. CONCLUSION AND RECOMMENDATIONS

To sum up, administrative tribunals are established to review the actions of administrative agencies and solve disputes between individuals and administrative agencies. In Ethiopia, they are recognized pursuant to Article 37 of the FDRE Constitution to assume quasi-judicial roles. Accordingly, the establishment of the Federal Civil Service Tribunal to render administrative justice for civil servants has a constitutional base. The major aim of this paper was to examine

[81] *Id.*
[82] *Id.*
[83] Interview, *Supra* note 54
[84] *Id.*
[85] *Id.*
[86] *Id*.
[87] Interview, *Supra* note 6o
[88] Interview, *Supra* note 66

the Tribunal in terms of its accessibility to its clients and its autonomy in deciding over cases brought to it.

The Tribunal has only one office in Addis Ababa. It does not establish benches in regional states. Moreover, it has never arranged mobile benches. However, this paper reveals that there are a number of cases from distant places. Despite this, the law allows short period of time for the aggrieved civil servants to lodge appeal in Addis Ababa. In respect of working time, it is the practice that the bench in Addis Ababa sits to entertain cases only on Tuesday and Thursday afternoons. Therefore, these factors are affecting the accessibility of the Tribunal.

Regarding the autonomy of the Tribunal, this paper has revealed certain problems. It is clear from the law that the Tribunal is not created as a separate government institution because it is organized as a department under Federal Civil Service Commission. Furthermore, the judges of the Tribunal are appointed and directly accountable to the Director of the Commission. There is also no directive that properly regulates selection and removal of judges of the Tribunal. Besides, it could not employ its administrative staff and administer its own budget. As a result, the institutional autonomy of the Tribunal is at stake.

In order to solve the problem of inaccessibility of the Tribunal, the Federal Civil Service Commission shall establish additional chambers in regional states. The Tribunal should also increase the working time of the bench from two to five working days. On top of that, the 30 days requirement to appeal to the Tribunal provided under Article 37(2) of Regulation No.77/2002 should be amended in a way that guarantees additional time to aggrieved civil servants. To maintain the autonomy, it would be better to re-establish the Tribunal as a separate institution which should be accountable to the Prime Minister. In addition, for the time being, the Commission should issue comprehensive guidelines to regulate the selection and appointment of judges.

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የሸሪዓ እድገትና ቀዳሚ የሕግ ትምህርት ቤቶች፡ ከኢትዮጵያዊ ምልከታዎች ጋር

*አልዩ አባተ ይማም**

Abstract

Ethiopian Sharia courts, which were given official status by Kadis Court Proclamation (1942) and Khadis and Naiba Councils Proclamation (1944), have been functioning in the country for more than half a century. Since this time, no modification has been introduced in the jurisdiction as well as in the structure of the courts. Moreover, with the adoption of the FDRE Constitution (Article 78(5), the status of Sharia courts has been made firm. Accordingly, a proclamation for the consolidation of Sharia courts was enacted in 1999 by the Federal parliament. As per the consolidation proclamation, the substantive law applicable on cases under the jurisdiction of Sharia courts is Islamic Law. The personal and family laws of Sharia and their general legal frameworks have been developed by two legal disciplines of Islam: Usul al-Fiqh (Islamic Jurisprudence) and Fiqh (Islamic law). These two fields of law are developed by the schools of law (Madhahib) of Sharia that have been evolving and contributing since the formative periods of Sharia law. This paper delves into the discussion of the salient features of schools of Sharia and their contribution in the formulation of Sharia principles of law and detail legal rulings in various fields of law including on personal and family matters. Further, the paper looks into the historical emergence of the Madhahib Sharia tradition in Ethiopia and its dissemination across various Muslim communities of Ethiopia since the 16th C. Ethiopian perspectives, in the sense that how the historical facts and developments of Madhhab are relevant to the interpretation and enforcement of the Sharia in Ethiopia to the extent it is allowed in the FDRE Constitution, are also indicated.

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በኢፌዲሪ ሕገ-መንግሥት አንቀጽ 34 እና 78 መሠረት የግልና የቤተሰብ ግጭቶች በባህላዊ ወይም ሃይማኖታዊ ሕጎች መሠረት ሊዳኙ እንደሚችሉ እንዲሁም ሃይማታዊና የባህል ፍ/ቤቶች በሕዝብ ተወካዮች ምክር ቤትና በክልል ምክር ቤቶች እውቅና ሊሰጣቸውና ሊቋቋሙ እንደሚችሉ ይገልጻል።[1] በኢትዮጵያ የሕግ ብዝኃነት መድረክ ላይ ከግማሽ ምዕተ-ዓመት በላይ መንግሥታዊ እውቅና አግኝተው

* ኤል.ኤል.ቢ፣ ኤል.ኤል.ኤም. በባህር ዳር ዩኒቨርሲቲ በሕግ እጩ ዶክተር፣ ጸሐፊውን በኢ-ሜይል አድራሻ alyuabate09@gmail.com ማግኘት ይቻላል።

[1] የኢፌዲሪ ሕገ-መንግሥት፣ አዋጅ ቁጥር 1/1987፣ ፌዴራል ነጋሪት ጋዜጣ፣ 1ኛ ዓመት ቁጥር 1፣ 1995 (ከዚህ በኃላ የኢፌዲሪ ሕገ-መንግሥት ይባላል)፣ አንቀጽ 34(5) እና 78(5)።

ከመደበኛ ፍ/ቤቶች ጎን ለጎን ሲሰሩ የነበሩት የሸሪዓ ፍ/ቤቶች ብቻ እንደነበሩ የታወቀ ነው።[2] ሆኖም የመጀመሪያውን ሕጋዊ እውቅና ያገኙት በ1934 በወጣው የቃዲ ፍ/ቤቶች ማቋቋሚያ አዋጅ ቁጥር 2/1934 ነው። በኋላም በቃዲዎችና የናኢባ ምክር ቤቶች አዋጅ ቁጥር 62/1936 አማካይነት እንደገና ተደራጅተዋል። ከዚህ ጊዜ ጀምሮ በፍ/ቤቶቹ አደረጃጀትም ሆነ በአሰራር ላይ ለውጥ ሳይደረግ በ1987 ዓ.ም የኢፌዲሪ ሕገ-መንግሥት ሲጸድቅ የሸሪዓ ፍ/ቤቶችን ሕጋዊ አቋም ይበልጥ የሚያጠናክሩ አንቀጾች የሰነዱ አካል ተደረጉ። በዚህ ረገድ ሸሪዓ ፍ/ቤቶች ሕገ-መንግሥቱ ሥራ ላይ ከመዋሉ በፊት በመንግሥት እውቅና አግኝተው ሲሰሩ የነበሩ በመሆኑ[3] ለፍ/ቤቶቹ እውቅና መስጠትና ማደራጀት በፌዴራሉና በክልል ሕግ አውጪ አካላት ላይ የተጣለ ሕገ-መንግሥታዊ ግዴታ ተደርጓል።[4] ባህላዊና ሃይማኖታዊ ፍ/ቤቶችን ማቋቋም በሕግ አውጪ አካላት ይሁንታ ላይ የተመሠረተ ቢሆንም ከሕገ-መንግሥቱ መጽደቅ በፊት እውቅና የነበረው የዳኝነት አካል ሸሪዓ ፍ/ቤቶች ብቻ በመሆናቸው ሕልውናቸው በሕግ አውጪዎቹ ፈቃድ ላይ የተመሰረተ ሳይሆን ሕገ-መንግሥቱ ራሱ እውቅና የሰጣቸው በመሆኑ[5] ወደፊት ከሚቋቋሙ ሌሎች የሃይማኖት ወይም የባህል ፍ/ቤቶች የተለየ ያደርጋቸዋል።

የሸሪዓ ፍ/ቤቶችን አቋም በተመለከተ በሕገ-መንግሥቱ የተጣለውን ግዴታ መሠረት በማድረግ የፌዴራሉና የክልል መንግሥታት የሸሪዓ ፍ/ቤቶችን አቋም የሚያጠናክሩ አዋጆች *(Consolidation Proclamations)* አውጥተዋል።[6] በፌዴራል ሸሪዓ ፍ/ቤት ማጠናከሪያ አዋጅ አንቀጽ 4 መሠረት የሸሪዓ ሕግ ለሸሪዓ ፍ/ቤቶች የሚቀርቡ የግልና የቤተሰብ ጉዳዮችን ለመፍታት ይተገበራል። ሸሪዓ ሲባል ሁለት የሕግ ክፍሎችን ሊወክል ይችላል፤ *አሱል አል-ፊቅሕና ፊቅሕ*። *አሱል አል-ፊቅሕ* ለዝርዝር የሸሪዓ ሕግጋት መሠረት የሆኑ ጥቅል የሕግ መርሆዎችን የሚመለከትና የሚያጠና የእውቀት መስክ ሲሆን *ፊቅሕ* ደግሞ በልዩ ልዩ የሰው ግለሰባዊና ማህበራዊ እንዲሁም ሃገራዊ ጉዳዮችን የሚገዙ ዝርዝር ሕግጋትን የሚመለከት የጥናት ዘርፍ ነው።[7] እነዚህ ሁለት የኢስላም የሕግ ሳይንሶች የረጅም ዘመናት የምርምርና ሥነ-ጽሁፍ እድገት ያላቸዉ ሲሆን በዓለም ዙሪያ ባሉ የሙስሊም ሃገራት ውስጥ በተለያየ ደረጃ ተፈጻሚ ሲደረጉ የነበሩና በመደረግ ላያ ያሉ በመሆኑ በንድፈ-ሐሳብ ደረጃም ሆነ ተጨባጭ ሕብረተሰባዊ ችግሮችን በመፍታት ረገድ ጥልቅና የዳበረ የእውቀትና የተሞክሮ አሻራ አላቸው።[8]

ሸሪዓ በኢፌዲሪ ሕገ-መንግሥት በተፈቀደው የተፈጻሚነት ወሰን ውስጥ በመሆን ለግልና የቤተሰብ ዝርዝር ሕግጋት አረዳድና አተገባበር መሪ መርሆዎችን በ*አሱል አል-ፊቅሕ* አማካይነት ይዘረጋል። ዝርዝር ድንጋጌዎችን በተመለከተ ቀዳሚ የሸሪዓ ምንጮች በሆኑት በቁርአንና *ሱናሕ*[9] ውስጥ በተካተቱት

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[2] Mohammed Abdo, *Legal Pluralism, Sharia Courts, and Constitutional Issues in Ethiopia*, 5(1) MIZAN LAW REVIEW, 78 (Spring 2011). ዝኪ መስጠፋ፣ *በኢትዮጵያ ውስጥ በሚገኙት የእስላም ፍርድ ቤቶች የሚሰራበት ሕግ፤ ለሸሪዓ ሕግ በሥራ ላይ መዋልና መቀጠል ምክንያት የሆኑ ነገሮች*፣ 9(1) JOURNAL OF ETHIOPIAN LAWS፣ 173(1965)።

[3] *የፌዴራል ሸሪዓ ፍርድ ቤቶችን አቋም ለማጠናከር የወጣ አዋጅ*፣ ቁጥር 188/1992፣ ፌዴራል ነጋሪት ጋዜጣ፣ 6ኛ ዓመት ቁጥር 10፣ መግቢያ።

[4] የኢፌዲሪ ሕገ-መንግሥት፣ 78(5)::

[5] ዝኒ ከማሁ

[6] በፌዴራሉ ፓርላማ የወጣው የሸሪዓ ፍ/ቤቶች አዋጅ፣ የፍርድ ቤቶቹን አቋም ለማጠናከር የወጣ እንጂ ማቋቋሚያ አዋጅ እንዳልሆነ ከአዋጁ አጭር ርዕስ (አንቀጽ 1)፣ ‹‹የፌዴራል ሸሪዓ ፍርድ ቤቶችን ***አቋም ለማጠናከር*** የወጣ አዋጅ ቁጥር 188/1992›› መረዳት ይቻላል።

[7] MOHAMMAD HASHIM KAMALI, SHARIA LAW: AN INTRODUCTION 40-41 (Oxford፡Oneworld Publications, Oxford, 2008).

[8] MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE, xi-xvii (Cambridge፡The Islamic Texts Society, 1991).

[9] ቁርአንና ሱናሕ በመለኮታዊ ራዕይ የተገለጹ መለኮታዊ የሸሪዓ ምንጮች ሲሆኑ ቁርአን በቃሉም ሆነ በሐሳቡ ፍጹም መለኮታዊ የሆነ የፈጣሪ ቃል ሲሆን ሱናሕ ደግሞ የመጨረሻውን የአምላክ ነቢይ የሙሀመድ ኢብን ዓብዲላሕ ንግግሮችና

ጥቅል የሕግ መርሆዎችና ልዩ ድንጋጌዎች ላይ በመመርኮዝ በቀደምትና በዘመኑ የሸሪዓ ሊቃውንት የተለያየ አተረጓጎም ሲሰጣቸው ቆይቷል። የሕግ አረዳድ ልዩነት *(ኢኽቲላፍ)* ከሸሪዓ አነሳስ ጀምሮ በግለሰብ ሊቃውንትና በቡድን (*መዛሂብ)* ደረጃ ሲንጸባረቅ የኖረ አይነተኛ የሸሪዓ መገለጫ ነው።[10]

በኢትዮጵያ ሸሪዓ ፍ/ቤት እየቀረቡ ያሉ የቤተሰብና የግል ግጭቶችን ለመፍታት ተፈጻሚ የሚደረጉትን የሸሪዓ ሕግ መርሆዎችና ዝርዝር የቤተሰብ ሕግጋትን ከማጥናት በፊት የእነዚህን የጥናት መስኮች ታሪካዊ ዳራ ማወቅ መርሆዎቹንና ድንጋጌዎቹን በተገቢው መንገድ ለመረዳትና ለመፈጸም አስፈላጊ ነው። በተቃራኒው የሸሪዓን ጠቅላላ እድገት፣ የሕግ ት/ቤቶች ሊመሠረቱና ሊዳብሩ የቻሉበት ዓላማና የርስ-በርስ ግንኙነት አለመገንዘብ በ*መዛሂብ* አማካይነት የዳበሩትን የግልና የቤተሰብ የሥረ-ነገር ሸሪዓዊ ድንጋጌዎች በተሳሳተ አረዳድ ተግባራዊ እንዲሆኑ የሚያደርግ አብይ ምክንያት ነው።[11] ስለሆነም ይህ ጥናታዊ ፅሑፍ ከሸሪዓ ሕግ ጥንስስ ጀምሮ ታሪካዊ የእድገት እርከኖችን እንዲሁም ለዚህ እድገት የሕግ ት/ቤቶችና የቀደምት የሸሪዓ ሊቃውንት የነበራቸውን ምሁራዊ አበርክቶ በማስቃኘት በዚህ ረገድ የሚስተዋሉ ችግሮችን ለመቅረፍ የታሪክ ግንዛቤ የመፍጠር ዓላማ ያለው ሲሆን በሸሪዓ እድገት ታሪክ ሒደት ለተፈጠረው መዝሓባዊ ብዝሓነት ሊሰጠው የሚገባውን ሚዛናዊ አተያይ ያመላክታል። በዚህ ረገድ ጥናቱ ሸሪዓ እድገት ታሪክ ጥናት *(ታሪኽ ኣት-ተሽሪዕ)* ምሁራዊ ተዓማኒነትና ቅቡልነት ያላቸውን ድርሳናት መሠረት ያደረገ ሲሆን ለርዕሰ ጉዳዩ ኢትዮጵያዊ ገጽታዎች ደግሞ ‹በኢስላምና ሙስሊሞች በኢትዮጵያ ጥናት› ታላቅ ምሁራዊ አሻራ ያላቸውን እንደ ሁሴን አህመድ ያሉ አጥኚዎች ያዘጋጇቸውን የታሪክና የሥነ-ማህበረሰብ ምርምር ውጤቶችን ያገናዘበ ነው።

ይህ ጽኑፍ ይህን የመግቢያ ክፍል ጨምሮ በአጠቃላይ በስድስት ክፍሎች የተደራጀ ሲሆን ተከታዩ ሁለተኛ ክፍል ሸሪዓ ከጥንስሱ ጀምሮ እስካለንበት ዘመን ድረስ ያለፈባቸውን አምስት የእድገት ደረጃዎች የሚዳስስ ሲሆን አንዱ ደረጃ ከሌላው የሚለይባቸው የለውጥ ኩነቶችም ተገልፀዋል። በሦስተኛው ክፍል ሥር ለሸሪዓ ሕግ መዳበር የጎላ ድርሻ ያላቸውን *መዛሂብ* ጠቅላላ መገለጫዎችና ለእድገቱ ያላቸው አስተዋጽኦ ሲዳሰስ በሸሪዓ ሕግ ት/ቤቶች መካከል ያሉ የጋራ አቋሞችና የልዩነት ነጥቦች በአራተኛው ክፍል ስር ተለይተዋል። አምስተኛው ክፍል ደግሞ ከጠቅላላው የ*መዝሓብ* እድገት ታሪክ በተለየ የሕግ ት/ቤቶች ወደ ኢትዮጵያ የገቡበትን ወደ ተለያዩ የሃገሪቱ ሙስሊሞች ሕብረተሰቦች የነበራቸውን ሥርጭትና የተከሉትን የሸሪዓ ትምህርት ባህል በጥቅሉ ያስቃኛል። በመጨረሻም በጽኑፉ ውስጥ የተነሱ አብይ ሐሳቦች ተጠቃለው የቀረቡበት የማጠቃለያ ክፍል ሥድስተኛውን ክፍል ይይዛል።

ለ. የመጀመሪያዎቹ አምስት የፊቅሕ እድገት ደረጃዎች

በነቢዩ ሙሀመድ እድሜ የመጨረሻዎቹ 23 ዓመታት (610-32 ዓመተ-ልደት(ዓ.ል)/እ.አ.አ) የቁርአን ራዕይ መውረዱን ተከትሎ የአማኞችን ባህሪና ሥነ-ምግባር የሚመሩ ሕግጋት መውረድና በነቢዩ በኩል በራዕይ ሲገለጹ የነበሩ *የሱናሕ* ድንጋጌዎችና ማብራሪያዎች የመጀመሪያውን የሸሪዓ እድገት ጥንስስ ጥለዋል።[12] ሕግ ነክ የቁርአን ድንጋጌዎች የወረዱት በዋናነት በመዲና ነበር። ሆኖም የወቅቱ ሙስሊም ማሕበረሰብ ዋነኛ ትኩረት የነበረው የቁርአንን መልዕክት መረዳት በመሆኑና ቁርአን ደግሞ ከጥቂት ዝርዝር ሕግጋት በስተቀር እጅግ ሰፊው ክፍል በእምነትና አመለካከት ላይ ያተኮረ ስለሆነ የማሕበረሰቡም ትኩረት ይህንኑ የተከተለ ነበር።[13] መለኮታዊ ሕጎች ይወርዱ የነበረው በግለሰብ

ተግባራትን የሚወክል ቃል ነው። የነቢዩ ሙሀመድን ንግግሮችና ተግባራት የተላለፉባቸው ዘገባዎች ደግሞ *ሀዲስ (አሃዲስ)* ይባላሉ። KAMALI, PRINCIPLES, ዝኒ ከማሁ፣ ገጽ 14-44።

[10] KAMALI, SHARIA LAW, *ግርጌ ማስታወሻ* 7, ገጽ. 9.

[11] ዝኒ ከማሁ ገጽ 10.

[12] ዝኒ ከማሁ ገጽ 246.

[13] ዝኒ ከማሁ

ወይም በሕብረተሰብ ደረጃ ይነሱ የነበሩ ጥያቄዎችንና ያጋጠሙ ችግሮችን ለመፍታት እንጂ በንድፍ-ሐሳብ ደረጃ ያሉና በተጨባጭ ያላገጠሙትን ለመግዛት ጭምር አልነበረም፤[14] ስለሆነም ይነሱ ለነበሩ ጥያቄዎች ቀጥተኛ ራዕያዊ *(የወሀይ)* ምላሽ ይሰጥ የነበረ በመሆኑ ግላዊ የሕግ አስተያየትና ንድፈ-ሐሳባዊ ኢጅቲሓድ አስፈላጊ አልነበረም።[15]

ሁለተኛው የፊቅሕ እድገት ከነቢዩ ሕልፈት በኋላ ያለውን የሙስሊም ግዛት በተመረጡ ቅን አመራሮች ሲተዳደር የነበረበትን ጊዜ (632-661 ዓ.ል) የሚመለከት ነው።[16] በነቢዩ የሕይወት ዘመን ባልተነሱ አዳዲስ ጭብጦች ላይ ቀድሞ በቁርአንና በሱናሕ አስተምህሮት የተተከለዉን የሕግ ውጥን በማስፋፋት ለአዳዲስ ችግሮችና ጥያቄዎች መፍትሔ የሚሆን የሕግ ምርምርና አስተያየት ይሰጥ ነበር። በዚህም በግል አስተያየት ላይ የተመረኮዘ *ፊቅሕ* የሚዳብርበትን መሠረት ጥሏል።[17] የነቢዩ ባልደረቦች ለቁርአንና *ሱናሕ* ሕጎች ምክንያታዊ አቀራረብ ያላቸው ሲሆን ከቋንቋዊ ትርጉም ይልቅ ሕጉ ሊያሳካው ያሰበውን ዓላማ ያገናዘበ አተረጓጎም ይከተሉ ነበር። የባልደረቦቹ የሕግ አረዳድ ከሌሎች የሸሪዓ ሊቃውንት አስተያየት በተለየ የአስገዳጅነት ደረጃ እንዳለው የሚቆጠረውም የነቢዩ አስተምኅሮት ቀጥተኛ ወራሾች በመሆናቸው ብቻ ሳይሆን በየትኛውም ዘመን ከታየው በተሻለ የሕጉን ዓላማ ያማከለና የሕጉን ዓላማ እውን የሚያደርግ የሕግ አተረጓጎም የተከተሉ መሆኑ ስለሚታመንበት ነው።[18]

ሦስተኛዉ የሸሪዓ እድገት ደረጃ የተከታዮች *(ታቢዑን)* ዘመን በመባል የሚታወቀውና ሁለት ታላላቅ የእሳቤ ጎራዎች የተፈጠሩበት ጊዜ ሲሆን የኡመያድ ሥርወ-መንግሥት ሥልጣን ከያዘ ጀምሮ እስከ አገዛዙ ማብቂያ ያለውን ጊዜ (661-750 ዓ.ል) የሚሸፍን ነው።[19] አንደኛው የእሳቤ ጎራ መቀመጫውን በመካሕና በመዲና (ሒጃዝ) አድርጎ የነበረው የ*ሀዲስ ተከታዮች (አሕል አል-ሀዲስ)* የእሳቤና የሕግ ት/ቤት ሲሆን የዚህ ቡድን ሊቃውንት የሚደርሱባቸው የሕግ ድምዳሜዎች ሁሉ ከነቢዩና ከባልደረቦቻቸው የተገኙ ዘገባዎችን የተንተራሱ ሲሆን በምክንያታዊ አስተሳሰብ ላይ ለሚገነቡ ግላዊ የሕግ ምልከታዎች ሽሪዓዊ የአስረጂነት ዋጋ አይሰጡም ነበር።[20] ሁለተኛው ጎራ ደግሞ በዒራቅ በስራና ኩፋ ከተሞች የተመሠረተው የአመክንዮ ተከታዮች *(አሕል አር-ረእይ)* የእሳቤ ቡድን ሲሆን ከአምልካዊ ድንጋጌዎች በስተቀር የሸሪዓ ሕጎች በጠቅላላው የተደነገጉበት የየራሳቸው ምክንያትና ዓላማ አላቸው በሚል እሳቤ የተመሰረተ ነው። ስለሆነም አንድ የሕግ ሊቅ *(መጅተሒድ)* የድንጋጌዎቹን ምክንያት በመመርመር የደረሰባቸውን ድምዳሜዎች ለሕጎቹ አተረጓጎምና ለአዳዲስ ጭብጦች እልባት ለመስጠት መንደርደሪያ ሊያደርጋቸው ይገባል የሚል አቋም አላቸው።[21] ከፖለቲካ አመራርነት ጋር በተያያዙ አለመግባባቶች ምክንያት ሺዓ የሚል መጠሪያ ያገኘው ቡድንም ከዋናው የሙስሊም ሕብረተሰብ የተገነጠለውና በኋላም የሺዓ የሕግ እሳቤ ክፍል የተመሠረተው በዚሁ ዘመን ነበር።[22] በአጠቃላይ

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[14] ዝኒ ከማሁ

[15] ዝኒ ከማሁ

[16] ከነቢዩ *መ*ሀመድ ሕልፈት በኋላ የግዛት አስተዳደሩን ተረክበው በቅንነት ያገለገሉት ተተኪ አመራሮች *(ኸለፋእ አር-ራሺዱን)* የሚባሉት አቡ-በክር አስ-ሲዲቅ ዑመር ኢብን አል-ኸጣብ ዑስማን ኢብን ዐፋንና ዐሊ ኢብን አቢ ጣሊብ ናቸው። እነዚህ የነቢዩ ባልደረቦች በአስተዳዳሪነት ጊዜያቸው ያጋጠማቸው ፈጣንና ተለዋዋጭ ፖለቲካዊና ወታደራዊ እውነታ ተጋፍጠው በተንዳኛ ለሚነሱ የ*ፊቅሕ* ጥያቄዎችና ግጭቶች በጋራና በግለሰብ ደረጃ ኢጅቲሓድ በማድረግ የደረሱባቸው የሕግ አተረጓጎሞችና ድምዳሜዎች የነቢዩ *መ*ሀመድ አስተምኅሮት ነጸብራቅ እንደሆኑና አስገዳጅ እንደሆኑ ብዙኃኑ የሸሪዓ ሊቃውንት የሚጋሩት አቋም ነው። (KAMALI, PRINCIPLES, *ግርጌ ማስታወሻ* 8፣ ገጽ 236-243 ይመለከቷል።)

[17] KAMALI, SHARIA LAW, *ግርጌ ማስታወሻ* 7, ገጽ. 246-247.

[18] ዝኒ ከማሁ ገጽ 247

[19] ዝኒ ከማሁ

[20] ዝኒ ከማሁ

[21] ዝኒ ከማሁ

[22] ዝኒ ከማሁ ገጽ 247-248.

የነዚህ የሕግ እሳቤ ጎራዎች መመስረት ከእነሱ በኋላ ለመጣው ሰፊ የፊቅሕ እድገት መሠረት የጣለና ከፍተኛ ተጽእኖ ያሳረፈ ሆኗል።[23]

አራተኛው የሸሪዓ እድገት የአመክንዮኣዊ የምርምር ዘመን (750-950 ዓ.ል) በሚል የሚታወቅ ሲሆን ፊቅሕ የላቀ እድገት ያሳየበትና ዘመናትን ተሻግረው ተጽእኖ መፍጠር የቻሉ መዝሐቦች የተፈጠሩበትና ሰፊ የሕግ መርሆዎችና ዝርዝር ሕግጋት ከቁርአንና ከሱናሕ የተቀሰሙበትና የተተነተኑበት ዘመን ነበር።[24]

አምስተኛው የእድገት ደረጃ ከአባሲድና ከኡቶማን ሥርዓት መውደቅ ጀመሮ ዘመነኛው የኢጅቲሓድ ንቅናቄ እስከተጀመረበት 20ኛው ም.ል መጀመሪያ ድረስ ያለውን ጊዜ የሚሸፍን ሲሆን በነዚህ ጊዜያት የምዕራብ ቅኝ-ገዢዎች የሙስሊም ግዛቱን በመቆጣጠር በሸሪዓ ሕግ ፍልስፍና ምትክ የራሳቸውን የሕግና የፍትሕ ሥርዓት በሃገራቱ ላይ ጭነውባቸዋል። በዚህም ምክንያት ሸሪዓ የሕብረተሰቡን ሕይወት ከመምራትና በጀመረው የእድገት ጎዳና ላይ ከመራመድ ይልቅ ቀድሞ በሥነ-ጽሑፍና በቃል የተላለፈውን የፊቅሕ የኢጅቲሓደና የመዛሒብ እውቀት በማጥናትና በማብራራት ላይ የተገደበ እንዲሆንና የመዝሐቦችን የሕግ ምልከታዎች የሙጥኝ በማለት አዳዲስ የሕግ ምልከታዎች የማይበረታታበት ሁኔታ ነገሰ።[25] ከሸሪዓ ነባራዊነትና ተለማጭነት ባህሪ ጋር በማይጣጣም መልኩ የጭፍን ተከታይነት (ተቅሊድ) ቡድናዊነትና የአንጃዊነት እሳቤዎች ሥር ሰደው ከ10ኛው ክፍለ-ዘመን አጋማሽ ጀምሮ የዓለም ሙስሊም ማሕበረሰብ አይነተኛ መገለጫ ሆኖ ቆይቷል። ለዘጠኝ ምዕተ-ዓመታት የዘለቀው ይህ እውነታ የፊቅሕ እድገት በነበረበት እንዲገታና ሸሪዓ በየወቅቱ ለሚቀያየረው የማሕበረሰብ ተጨባጭ እውነታና ፍላጎት ምላሽ መስጠት እንዳይችል አድርጎታል።[26] የቀደሙት የመዛሒብ አቋሞች በንድፈ-ሐሳባዊ የሕግ ማብራሪያ ሥራዎች ላይ ብቻ የተንጸባረቁበትና ከማሕበራዊ እውነታ ጋር ያላቸው ተዛምዶ የተቋረጠበት ዘመናት ሆነው ተመዝግበዋል።[27]

ሐ. የሸሪዓ ሕግ ት/ቤቶች (መዝሐቦች)

መዝሐብ ማለት በአንድ ራሱን ችሎ የሕግ ምርምር የማድረግ ችሎታ ባለዉ ሊቅ የሚመራ ከሌሎች መዝሐቦች የሚለይበት የራሱ የሕግ ንድፈ-ሐሳቦችና አቀራረቦች ያሉትና ተከታዮችን ማፍራት የቻለ የሕግ እሳቤ ክፍል ነው።[28] መዝሐቡ በዋናው ኢማም ከተቋቋመና ዋና ዋና የሕግ መርሆዎች ከተቀረጹ በኋላ እነዚህን መርሆዎች በመተንተንና በማብራራት ረገድ የመሪው ተማሪዎችና ተከታዮች ከፍተኛ ሚና ይጫወታሉ። መዝሐብ በአንድ ወይም በተለያየ ዘመናት በሚመጡ ምሁራን የሥነ-ጽሑፍ ቅብብሎሽ እየበለጸገ መጥቶ በእድገቱ አንድ የተለየ የሕግ እውቀት ማዕቀፍ ያለው ነው።[29] መዝሐቦች ‹‹የሕግ ት/ቤት›› የተባሉበትም ምክንያት ዋነኛ የምርምር ትኩረታቸው ከመንፈሳዊ ጉዳዮች ይልቅ በሕግ ላይ በመሆኑና በመዛሒብ መካከል ያለውም ዋነኛ ልዩነት በሕግ ጉዳዮች ላይ በመሆኑ ነው። መሠረታዊ የእምነት ጉዳዮችን በተመለከተ በመዝሐቦች መካከል ልዩነት የለም። በርግጥ በዝርዝር እምነት ጉዳች

[23] KAMALI, ግርጌ ማስታወሻ 7, p. 248
[24] ዝኒ ከማሁ
[25] ዝኒ ከማሁ
[26] ዝኒ ከማሁ
[27] ዝኒ ከማሁ ገጽ 249
[28] Khalifa Babikr Al-Hassan, *Religious Schools of Law*. in The Different Aspects Of Islamic Culture, Vol. 6, Part II, 19 (UNESCO, 2016).
[29] MUHAMMAD HASHIM KAMALI, THE ENCYCLOPEDIA OF RELIGION, 66 (New York: Macmillan Publishing, 1987).

ላይ በምሁራን መካከል ሰፊና ውስብስብ ልዩነቶች ቢኖሩም እነዚህ የልዩነት መስመሮች በመስኩ ሥነ-ጽኑፍ ውስጥ የ*መዝሓብ* ተብለው አይጠቀሱም፡፡[30]

ከላይ እንድተመለከተው የ*መዝሓቦች* አመሠራረት ታሪክ ሲታይ ኢስላማዊ ትምህርትና ምርምር የሚደረግባቸው ሁለት ማዕከላት በዒራቅና በሒጃዝ መቋቋም ጋር የተያያዘ ነው፡፡ በማዕከላቱ ከነበሩ የ*ፊቅሕ* መምህራን መካከል ተጽእኖ ፈጣሪ የነበሩት ወጥተው በጉልህ ተለይተው የወጡት የሕግ እሳቤ ት/ቤቶች የሐሳቦቹ ባለቤት በሆኑት ሊቃውንት ሥም መጠራት ጀመሩ፡፡[31] የሕግ እሳቤ ክፍሎቹ ሁለት መሠረታዊ የአቀራረብ ልዩነቶች ነበራቸው፡፡ አንደኛው የሒጃዝ ቡድን ለሚይዟቸው የሕግ አቋሞች ሁሉ ከነቢዩ በተላለፉ ዘገባዎች ላይ የሚደገፉ ነበሩ፡፡[32] የዒራቁ ክፍል ደግሞ ከነቢዩ ይተላለፉ ለነበሩ የ*ሀዲስ* ዘገባዎች የነበራቸው ተደራሽነት እንደ መዲናዎች ስላልነበርና ከአመክንዮኣዊ አስተሳሰብ አኳያ ለአጠራጣሪ ዘገባዎች አነስተኛ ዋጋ ስለሰጡ ለአዳዲስ የሕግ ጭብጦች ሸሪዓዊ እልባት ለመስጠት በዋናነት በአመክንዮ ላይ ይመረኮዙ ነበር፡፡

1. የ*ሀነፊ መዝሓብ*

የዚህ መዝሓብ መሥራች አቡ-ሀኒፋ ኑዕማን ኢብን ሳቢት ናቸው፡፡ አቡ-ሀኒፋና መዝሓባቸው ከተጨባጭ የሕግ ጉዳዮች ይልቅ በንድፈ-ሐሳባዊ የሕግ ጥያቄዎች ላይ የማተኮር እንዲሁም በ*ረእይ* (ግላዊ አተያይ) እና በ*ቂያስ* (ምስስሏዊ አመክንዮ/*analogical reasoning)* ላይ የመመርኮዝ ከፍተኛ ዝንባሌ አላቸው፡፡[33] አቡ-ሀኒፋ በንግድ ስራ የተሰማሩ ስለነበር በንግድ ግብይቶች ዙሪያ በሚነሱ የሕግ ጉዳዮች ላይ *ኢጅቲሓድ* በማድረግ በዚህ ረገድ ላለው የሸሪዓ እድገት ከፍተኛ አስተዋጽኦ አድርገዋል፡፡[34] አቡ-ሀኒፋ የመዝሓባቸውን መርሆዎች በመቅረጽ ሂደት ላይ ለግለሰቦች መብትና ነጻነት ከፍ ያለ ዋጋ የሰጡ ሲሆን አሳማኝ ምክንያት ከሌለ በስተቀር በግለሰብ መብትና ነጻነት ላይ ዘፈቀዳዊ ገደብ በማስቀመጥ አያምኑም፡፡ ለምሳሌ ያህል የሴቶችን መብት በተመለከተ አንዲት አካለ-መጠን የደረሰች ሴት ያለሞግዚት ፈቃድ ጋብቻ የመፈጸም ሸሪዓዊ መብቷን ያረጋግጣሉ፡፡[35] አካለ-መጠን የደረሰች ሴት ንብረቷን የማስተዳደር ሙሉ መብትና አቅም እንዳላት ቁርአን እስካረጋገጠ ድረስ በጋብቻ ዙሪያ ላይም ቢሆን ዉሳኔ የመስጠት አቅም ላይኖራት አይችልም ይላሉ፡፡[36]

ከአቡ-ሀኒፋ ንግግሮች መካከል የታወቀውና በሌሎች *መዛሕብ* መሪዎችና ተከታዮች ሰፊ ተቀባይነት ያገኘዉ ‹‹*ኢዛ ሶለሃ አል-ሀዲስ፣ ፈሑወ መዝሓቢ* (የአንድ *ሀዲስ* ተዓማኒነት የተረጋገጠ ከሆነ መዝሓቤ (አቋሜ) ነው)›› የሚለው ተራማጅ ንግግራቸው በወቅቱና በኋላ የተፈጠሩት መዝሓቦች የነበራቸው የ*ሀዲስ* ተደራሽነት ውስን የነበረና መጠነ-ሰፊ የ*ሀዲስ* አሰባሰብ ሥራ ያልተከናወነ መሆኑን ታሳቢ ያደረገ ንግግር ነበር፡፡ የመዝሓባቸው ተከታዮች በዚህ መርህ መሰረት ቀደም ሲል የአቡ-ሀኒፋ ወይም ተቀዳሚ ተማሪዎቻቸው የ*ኡሱል* መርሆዎችና የ*ፊቅሕ* ድንጋጌዎች በኋላ ከተገኙ ተዓማኒ *ሀዲሶች* ጋር የሚቃረኑ ከሆኑ ሀዲሱን ቢያዉቁ ኖሮ መርሆው ወይም ድንጋጌው ላይ አይደረሱም ነበር በሚል እሳቤ የአቋም ማስተካከያዎችን አድርገዋል፡፡[37]

ሌላው የአቡ-ሀኒፋ መዝሓብ መሪ ቃል ‹‹ማንም ሰው አስረጂ ምንጩን እስካላወቀ ድረስ በኛ *መዝሓብ* ላይ ተመርኩዞ *ፈትዋ* (የሕግ ብይን) ሊሰጥ አይችልም›› የሚለው ሲሆን ጭፍን ተከታዮች እንደሚሉት ሳይሆን በ*መዝሓብ* መሪዎችና በቀዳሚ ምሁራን እይታ ሳይገደቡ በየወቅቱ የሚነሱ

[30] ዝኒ ከማሁ.
[31] ዝኒ ከማሁ.
[32] ዝኒ ከማሁ.
[33] ዝኒ ከማሁ.
[34] ዝኒ ከማሁ.
[35] ዝኒ ከማሁ ገጽ 70-71.
[36] ዝኒ ከማሁ.
[37] ዝኒ ከማሁ ገጽ 71.

ሊቃውንት አካባቢያዊ እውነታዎችን በማገናዘብ አዲስ ሸሪዓዊ የሕግ ምርምር እንዲያደርጉ የሚያበረታታ ንግግር ነው።[38] የፊቅሕ ሕግጋት መገኛ ምንጭ የተደነገጉበት መንስኤና ዓላማን መለየት ከተቻለ ሕጎቹ ለየወቅቱ ያላቸውን ተገቢነት በመመዘን ከሙተቀዲሙን የፊቅሕ እይታዎች የተለዩ የኢጅቲሓድ ድምዳሜዎች ላይ መድረስ ይቻላል።[39]

መቀሊዱንና የመዝሓብ ወገንተኝነት ያለባቸው ኂሊኛ የሀነፊ ሊቃውንት እንደሚሉት ከሙተአኺሩን መካከል *ሙጅተሒድ* ሊባል የሚችል የሕግ ምኑር የሌለ በመሆኑ በቀደምት የ*መዝሓብ* መስራቾች መካከል ያሉ ልዩነቶችን ከምንጮች አኳያ በመፈተሽ ምርጫ ማድረግ ስለማይቻል የ*መዝሓቡ* ፈር ቀዳጆች እንደ ቅደም-ተከተላቸው ሊመረጡ ይገባል እስከ ማለት ደርሰዋል።[40] እንደ አቡ-ሱለይማንና ዐልዋኒ ያሉ የዘመኑ የሸሪዓ ሊቆች እንደሚያስረዱት የዚህ አይነቱ ጭፍን የሕግ እሳቤ ቁርአንና *ሱናሕን ለመዝሓቦች* ተገዢ ከማድረግ የማይተናነስና የዘመኑን ትውልድ ለእሳቤ ቀወስ *(Crisis of Thought)* የዳረገ ዋነኛ ምክንያት ነው።[41] የእሳቤ ቀውስ ከአምላክ መጽኃፍና ከነቢዩ *ሱናሕ* ጋር ቀጥተኛ ትስስር ካለመፍጠርና ነጻ አስተሳሰብ ከሌለው ወግ አጥባቂነት የመነጨ አሳሳቢ ችግር እንደሆነ ዐልዋኒ ያስገነዝባሉ።[42]

የሀነፊ *መዝሓብ* በ16ኛዉ ም.ዓ በኡቶማን ቱርኮች ዘመን ባገኘው ተቀባይነትና ሰፊ *ሥ*ርጭት ምክንያት ከሌሎቹ መዝሓቦች በበለጠ ባሁኑ ጊዜ በቱርክ በሶሪያ በዮርዳኖስ በሊባኖስ በፓኪስታን በአፍጋኒስታንና በሕንድ በስፋት ተግባራዊ የሚደረግና በአጠቃላይም ከዓለም ሙስሊም ማሕበረሰብ ሲሶው የሀነፊ *መዝሓብ* ተከታይ ነው።[43]

2. የማሊኪ *መዝሓብ*

ይህ መዝሓብ የተመሠረተው የመዲና ከተማ ዳኛና የሕግ አማካሪ በነበሩት በማሊክ ኢብን አነስ አል-አስባሒ ነው።[44] ማሊክ በሌሎች መዝሓቦችና ኢማሞች እንደ አስረጅ ያልተወሰደ ‹የመዲና ነዋሪዎች ተግባር ወይም ልማድ *(ዓመል አሕል አል-መዲና)* የተሰኘ የሸሪዓ አመክንዮኣዊ መርሆ ነድፈዋል። የመርሆው መነሻ ሐሳብ የመዲና ነዋሪዎች በነቂስ ይተገብሩትና ያምኑበት የነበረ ድርጊትና አሰራር ከጥንትም ከመ·ሀመድና ባልደረቦቹ አስተምህሮት ተቀስሞ ሲወርድ ሲወራረድ የመጣ ቢሆን ነው ከሚል ግምት የመነጨ ነው።[45] የማሊኪ *መዝሓብ* ዋነኛ ዋቢ የሆነው በአሰድ አል-ፉራት የተጠናቀረው ‹*አል-መዱወናሕ አል-ኩብራ* (ታላቁ ጥንቅር)› የተሰኘው መጽሐፍ ነው። መዝሓቡ በአሁኑ ወቅት በሞሮኮ አልጀሪያ ቱኒዚያ የላይኛዉ ግብጽ ሱዳን ባህሬንና ኩዌት ሰፊ ድርሻ ይዞ ይገኛል።[46]

ኢማም ማሊክ የመዲና ነዋሪዎች ተግባር ወይም ልማድ በተጨማሪ ቀድመው ከተለዩት የኢጅቲሓድ መርሆዎች ላይ የመዲና ነዋሪዎች ወጥ አቋም *(ኢጅማዕ አሕል አል-መዲናሕ)* *ኢስቲስላሕ* (የሕዝብ ጥቅም)ና *ሰድ አዝ-ዘራኢዕ* (ከምንጩ ማድረቅ) የተሰኙ የሕግ ንድፈ-ሐሳቦችን አክለዋል። ማሊክ ራሳቸው ከለዩኣቸው የሕግ መላምቶች በተጨማሪ ሌሎች የ*መዛሒብ* ሊቃውንት የደረሱባቸውን

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[38] ዝኒ ከማሁ ገጽ 72
[39] ዝኒ ከማሁ
[40] ዝኒ ከማሁ
[41] Taha Jabir Alwani, *The Crisis of Thought and Ijtihad*, 10(2) AMERICAN JOURNAL OF ISLAMIC SOCIAL SCIENCES, 234 (1993).
[42] ዝኒ ከማሁ
[43] KAMALI, SHARIA LAW, *ግርጌ ማስታወሻ* 7, p. 73
[44] KAMALI, THE ENCYCOLPEDIA OF RELIGION, *supra* note 25, p. 67
[45] Khalifa, *supra* note 24, p. 30
[46] KAMALI, THE ENCYCOLPEDIA OF RELIGION, *supra* note 25, p. 68

መርሆዎች ተቀብለው የመዝኃባቸው አካል በማድረጋቸው መዝሓቡ ከየትኛውም *መዝሓብ* በላይ እጅግ ሰፊና የአቃፊነት ባህሪ ያለው እንደሆነ ከማሊ ይገልጻሉ።[47]

የሕዝብ ጥቅም ሐሳብን ያፈለቁት ማሊኪ ባይሆኑም መርሆው በምንም ቅድመ-ሁኔታ ሳይታሰር ራሱን የቻለ የሕግ ምርምር ምንጭ እንዲሆንና ሰፊ ተቀባይነት እንዲያገኝ በማድረግ ቀዳሚና ጉልህ አስተዋጽኦ ያደረጉ በመሆኑ *ኢስቲስላሕ* የማሊኪ ጭማሬ እንደሆነ ተደርጎ ይቆጠራል። ለምሳሌ የሕብረተሰቡን ሰላምና *መረጋጋት* ለመጠበቅ ሲባል ዝቅተኛ ድምጽ ያገኘው እጩ እንዲመረጥና የሃገር መሪ እንዲሆን ቢደረግ ተገቢ እንደሆነ ተናግረዋል። ይህ የከፋ ጉዳትን በመከላከል *(ደፍእ ኣድ-ዶረር)* ላይ የተመሠረተ እሳቤ ከኢስቲስላሕ ሐሳብ የመነጨ መሆኑን ይገነዘቧል።[48]

ማሊክ ከነጠላ *(ኣሀድ)* የ*ሀዲስ* ዘገባ (በአንድ ወይም በጥቂት የዘገባ መስመሮች ብቻ የተላለፈ *ሀዲስ)* ይልቅ ለየባልደረቦችና ለመዲኖች የጋራ ተግባር የበለጠ የአስረጅነት ዋጋ ይሰጣሉ። ለምሳሌ ተዋዋዮች በአካል እስካሉ ድረስ የፈጸሙትን ውል ማፍረስ እንደሚችሉ የሚገልጸውን *ኣሃድ ሀዲስ* አይቀበሉቱም ምክንያቱም በመዲኖች ተግባር *መሠረት* ውል ከተፈጸመ በኋላ የተዋዋዮቹ አብሮነት ለውሉ ማፍረሻ በቂ ምክንያት አይሆንም።[49] ሻፊዒ በበኩላቸው የመዲና ማሕበረሰብ ልማድ ከ*ሀዲስ* ጋር መስማማት ይገባዋል እንጂ የሕብረተሰቡ ተግባር ከነቢዩ አስተምህሮት የመጣ ነው በሚል መላምት *ሀዲሱን* አለመቀበል ተገቢ አይደለም የሚል ትችት ሰንዝረዋል።[50] በተጨማሪም ማሊክ የመዲናዎችን ወጥ አሠራር *መሠረት* በማድረግ ባሏ ያልተገባ አያያዝ እንደሚይዛት *(ዶረር)* ያስረዳች ሚስት ፍቺ መጠየቅ ትችላለች የሚል አስተያየት አላቸው። ሌሎቹ *መዝሓቦች* በዚህ ጉዳይ ፍርድ ቤት ባልየውን መቅጣት እንጂ ፍቺ መወሰን አይችልም የሚል አቋም ይዘዋል።[51] ከቤተሰብ ጉዳይ ሳንወጣ ሚስት በጋራ *ሥምምነት* ፍቺ እንዲፈጸም በምትጠይቅበት *ሥነ-ሥርዓት (ኽል)* የመጨረሻ ውሳኔ የመስጠት መብት ያለው ባል ነው። እንደ ማሊኪ እይታ ደግሞ ነገሩ በፍርድ ሊወሰን እንደሚችል ያስረዳሉ።[52] በእነዚህና መሰል ጉዳዮች ላይ ማሊኪዎች ያንጸባረቋቸው አቋሞች ባለንበት ዘመን በመካከለኛው ምስራቅና በኤስያ የሚገኙ በርካታ ሙስሊም ሃገሮች የቤተሰብ ሕግ ማሻሻያዎቻቸው አካል አድርገዋቸዋል።[53]

የመዝሓቡን ከምንጩ ማድረቅ ንድፈ-ሐሳብ ምንነት በአጭሩ ለማየት ያህል ግዴታን *(ዋጂብ)* ለመፈጸም የሚያሰፈልግ ሁሉ *ዋጂብ* ነው፤ ወደ ክልክል *(ሀራም)* የሚያደርስ ሁሉ የክልከላው አካል ነው የሚል ሐሳብ ያዘለ ነው። በተመሳሳይ *ሀላልን* (የተፈቀደን) ለማከናወን የሚያስፈልግ ሁሉ ያስፈላጊነቱን ያህል *ሀላል* ይሆናል። ለምሳሌ በጦርነት ጊዜ የጦር መሳሪያ ሽያጭ ማድረግ ወይም ለአልኮል (ወይን) ጠማቂ የወይን ፍሬ መሸጥ ወይም ወደ ወለድ *(ሪባ)* የሚያስገባ ማንኛውም ውል ሁሉም ውጤታቸው *ሀራም* በመሆኑ መንስኤዎቻቸውም ክልክል ይሆናሉ።[54] የማሊኪ ሊቅ የሆነው አል-ቀራፊ እንደገለጸው የማሊኪ እሳቤ የሆነው ከምንጩ ማድረቅ በሁሉም መዝሓቦች ዘንድ ተቀባይነት ያገኘ የሕግ ጽንሰ-ሐሳብ ነው።[55]

ባጠቃላይ ኢማም ማሊክ በ*ሀዲስ* መስክ ብቻ ሳይሆን የ*ፊቅሕ* መሠረቶችን (*ኡሱል)* በማዳበር ረገድ ከመሪ ኢማሞች ተርታ የሚሰለፉ ናቸው። ጭፍን የሕግ ተከታይነትንም እርሳቸውና መዝሓባቸው እንደ ሌሎቹ ሁሉ የከረረ ነቀፌታ ሰንዝረውበታል። በዐባሲድ ዘመነ-መንግሥት መሪ የነበረው አል-መንሱር

[47] KAMALI, SHARIA LAW, *ግርጌ ማስታወሻ* 7, p. 75
[48] *ዝኒ ከማሁ*
[49] *ዝኒ ከማሁ ገጽ* 74
[50] *ዝኒ ከማሁ*
[51] *ዝኒ ከማሁ ገጽ* 75-76
[52] *ዝኒ ከማሁ ገጽ* 76
[53] *ዝኒ ከማሁ*
[54] *ዝኒ ከማሁ*
[55] *ዝኒ ከማሁ ገጽ* 77

የማሊክ የ*ሀዲስ* ጥንቅር የሆነው *አል-ሙወጦእ* የግዛቱ ብቸኛ መመሪያ እንዲሆን ሐሳብ አቅርቦላቸው ይህ በነቢዩ ባልደረቦች ጊዜ ከነበረው የሒጅራሓድ ብዝኃነትና የመቻቻል የሕግ ባህል ጋር የሚጣረስና ፈጠራዊ የእሳቤ ነጻነት እንዲነጥፍ የሚያደርግ ነው በማለት ሐሳቡን አልተቀበሉትም።[56]

3. የሻፊዒ *መዝሐብ*

እስካለንበት ዘመን ደርሰው ሰፊ ተቀባይነት ካገኙ ት/ቤቶች መካከል የሻፊዒ *መዝሐብ* አንዱ ነው።[57] *መዝሐቡ* በታችኛው ግብጽ ደቡብ አረቢያ ምስራቅ አፍሪካ ኢንዶኔዥያ ማሌዥያና ብሩናይ (Brunei) በስፋት ተግባራዊ የሚደረግ ሲሆን በፍልስጤም ዮርዳኖስና በሶሪያም ከፍተኛ ቁጥር ያለው ተከታይ ማፍራት ችሏል።[58] *መዝሐቡ* የማሊክ ተማሪ በሆኑት በሙሀመድ ኢብን ኢድሪስ አሽ-ሻፊዒ የሕግ ቀኖናዎች ላይ የተመሰረተ ሲሆን መስራቹ አራት የሸሪዓ ምንጮችን ማለትም ቁርአን *ሱናሕ ኢጅማዕና ቂያስ* በሚል ቅደም-ተከተል ያስቀመጡ የመጀመሪያዉ የኡሱል ተመራማሪ ናቸው።[59] ሻፊዒ የሸሪዓ ምንጮችን የእርስ-በርስ ትስስር የሀነፊንና የመምህራቸውን የማለኪን የሕግ ንድፈ-ሐሳቦች ጽኑእነት በመመርመር የማይስማሙባቸውን ነጥቦች በማስረዳትና የኡሱል መርሆዎችን በአንድነት በማጠናቀር ‹*አር-ሪሳላሕ*› በተሰኘው ድርሳናቸው ወጥ የኡሱል *አል-ፊቅሕ* ትንታኔ ያቀረቡ በመሆናቸው ‹*የኡሱል አባት*› የሚል መጠሪያ ተሰጥቷቸዋል።[60] የሕግ አቀራረብ ዘዴዎችን *(Methodology of Law)* የቀደሙት የኡሱል አጥኚዎች በጨረፍታ ያነሷቸው ቢሆንም አጠቃላይ የሸሪዓ ሕግ መዋቅሩን በመንደፍና የምንጮችንና የአስረጂዎችን የእርስ-በርስ ዝምድና የበላይነትና የበታችነት የመሳሰሉ ርዕሰ-ጉዳዮች ላይ አጽንዖት በመስጠት ሰፊ ዳሰሳ ያደረጉት ኢማም አሽ-ሻፊዒ ናቸው።[61]

በተጨማሪም አሽ-ሻፊዒ እንደ *ዐም* (ጥቅል) እና *ኻስ* (ልዩ) *ሻሪ (ናሲኽ)* እና *ተሻሪ (መንሱኽ)* በመሳሰሉ የሕግ አተረጓጎሞች ላይ ማብራሪያ በማቅረብ የመጀመሪያው ናቸው።[62] አሽ-ሻፊዒ የጨመሯቸው አዳዲስ ጽንሰ-ሐሳቦችና ማብራሪያዎች እንደተጠበቁ ሆነው በኢስላም የሕግ እድገት ውስጥ ያላቸው ዋነኛ ሚና ቀድመው በ*አሱል ሥነ-ጽ*ኑፍ የተዳሰሱ ንድፈ-ሐሳቦችንና ምልከታዎችን ማጥናት በማይስማሙባቸው መርሆዎችና አቀራረቦች ላይ የከረሩ ሂሶችን በመሰንዘር መስኩ ወደፊት የሚያድገበትን አቅጣጫዎች የተለሙ ናቸው።[63] ለምሳሌ ያህል ሻፊዒ ያለፉት የኡሱል ኢማሞች ለ*ሀዲስ* የነበራቸው አቋም ላይ የጠበቀ ሂስ ሰንዝረዋል። አቡ-ሀኒፋ በአንድ የዘገባ *ሠንሠለት* ብቻ የተላለፈ ዘገባ ይልቅ ለአመክንዮ ቅድሚያ መስጠታቸው ኢማም ማሊክ ደግሞ ከአሃድ ዘገባዎች ይልቅ ለ*ዐመል አሕል አል-መዲና* ቅድሚያ መስጠታቸውን በጥብቅ ነቅፈዋል። በሌላ አገላለጽ ለ*ሀዲስ* የሚሰጡት የአስረጅነት ዋጋ ከሌሎች በበለጠ እጅግ ከፍ ያለ እንደሆነ መረዳት ይቻላል።[64]

በ*ኢጅማዕ* ጽንሰ-ሓሳብ ላይ ሻፊዒ የያዙት ግንዛቤ ከአቡ-ሀኒፋና ማሊክ የተለየ ነው። *ኢጅማዕ* እንደ ሻፊዒ ከሆነ የማሕበረሰቡ ወጥ አቋም ማለት ነው። የምኑራን የጋራ አቋም ነው የሚለው የአቡ-ሀኒፋና የማሊኪ ትርጓሜ በተጨባጭ ከዚህ በፊት እውን ሊሆን ያልቻለ ወደፊትም ሊሳካ የሚችልበት እድል የተመናመነ በመሆኑ ለ*ኢጅማዕ* ጠበብ ያለ ትርጉም መስጠትን መርጠዋል።[65] ያም ሆኖ ከሻፊዒ በኋላ

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[56] ዝኒ ከማሁ

[57] KAMALI, THE ENCYCOLPEDIA OF RELIGION, *supra* note 25, p. 68

[58] ዝኒ ከማሁ።

[59] ዝኒ ከማሁ።

[60] ዝኒ ከማሁ።

[61] KAMALI, SHARIA LAW, *supra ግርጌ ማስታወሻ* 7, p. 78

[62] ዝኒ ከማሁ።

[63] COULSON, NOEL J., A HISTORY OF ISLAMIC LAW, 53 (Edinburgh University Press, 1971)::

[64] KAMALI, THE ENCYCOLPEDIA OF RELIGION, *supra* note 25, p. 68

[65] ዝኒ ከማሁ።

በታየው የሸሪዓ እሳቤ እድገት የ*ኢጅማዕ* እይታቸው ተቀልብሶ በሀነፊና ማሊክ የ*ኢጅማዕ* ትርጓሜ እንዲተካ ሆኗል።[66]

በቁርአንና በ*ሱናሕ* መካከል ያለውን ትስስር በተመለከተ የቀደምት የ*መዝሓብ* ባለቤቶች ቁርአን *ሱናሕን* ወይም በተቃራኒው *ሱናሕ* ቁርአንን ሊሸር እንደሚችል ቢገልጹም ሻፊዒ ግን ይህን እይታ ውድቅ በማድረግ *ሱናሕ* በቁርአን ያልተሸፈነ አዲስ ሕግ የሚቀርጽበት ሁኔታ ቢኖርም ዋነኛ ሚናው ቁርአንን ማብራራት በመሆኑ ቁርአንን ሊሸር አይችልም የሚል አተያይ አላቸው።[67]

የሸሪዓ ምንጮች ሲባል ቁርአንና *ሱናሕ* ወይም ከእነዚህ ጋር በጥብቅ የተሳሰረ መሆን አለበት የሚል እሳቤ ካላቸው ሊቃውንት የመጀመሪያው አሽ-ሻፊዒ ናቸው።[68] ለማንኛውም የሕግ ጥያቄ ምላሽ መጀመሪያ ከቁርአንና ከ*ሱናሕ* መፈለግ ይኖርበታል።[69] ጭብጡ በቀጥታ ያልተሸፈነ ከሆነ ከእነዚህ ምንጮች ጋር ቀጥተኛ ትስስር ያለውና የሕጎችን ምክንያት *(ዒላሕ/ratio legis)* እና ዓላማዎች ተራዝሞ ለአዲሱ ጭብጥ ተፈጻሚ እንዲሆን የሚደረግበት ‹ምስስሏዊ አመክንዮ› ተፈጻሚ ይሆናል ማለት ነው። ስለዚህ ለሻፊዒ ከቁርአንና *ሱናሕ* ቀጥሎ ምንጭ ሊሆን የሚችለው የ*ኢጅቲሓድ* መርሆ *ቂያስ* ብቻ ነው። በሌላ አገላለጽ ለሻፊዒ *ኢጅቲሓድ* ማለት *ቂያስ* ማለት ነው።[70] በዚህም መሠረት በሌሎች ኢማሞች የተለዩት የ*ኢጅቲሓድ* መርሆዎች ከምንጮች በጣም የራቁ ናቸው በሚል አይቀበሏቸውም። ለምሳሌ የማሊኪ ‹የሕዝብ ጥቅም› እና የሀነፊ ሐሳብ የሆነውን ‹*ኢስቲሀሳን* (ርትዕ)› አልተቀበሏቸውም።[71] *ቂያስ* ከቁርአንና ከ*ሱናሕ* ጋር ምክንያተ-ሕግ የሚጋራ በመሆኑ ከምንጮቹ እምብዛም አይርቀም። ሌሎቹ መርሆዎች ከምንጮች ጋር ያላቸው ትስስር የላላና በግል እይታ ላይ በእጅጉ የተመረኮዙ በመሆኑ ዘፈቀዳዊ ባህርይ ያላቸው ናቸው በሚል እሳቤ በሻፊዒ ዘንድ የአስረጅነት ዋጋ የላቸውም።[72]

ከ*ሱናሕ* አስረጅነት ጋር በተያያዘ የ*ሀዲስ* ዘገባዎች ከ*ኢጅቲሓድ* መርሆዎች ጋር በተጋጨ ጊዜ ተገቢነታቸው አጠያያቂ በሆኑ የ*ሀዲስ* ተዓማኒነት ምዘና መስፈርቶች መሠረት ዘገባዎቹ ወደጎን ሲደረጉ የነበሩበት የቀደምት *መዛሂብ* አካሄድ ትክክል አይደለም በሚል ሻፊዒ ተችተዋል። ለምሳሌ አንድ *ሀዲስ* በአንድ ወይም በጥቂት አስተላላፊዎች ብቻ ወርዶ መዘገቡ ብቻ ኢ-ተዓማኒ አያደርገውም። ምክንያቱም ሙሀመድ በነቢይነት ደረጃቸው ከብዙኃኑ *ምዕመናን* ጋር ብቻ ሳይሆን ከግለሰቦችና ከጥቂት ሰዎች ጋርም ግንኙነት የነበራቸውና በእነዚህ ግንኙነቶች ወቅት አምላካዊ *መመሪያዎችን* ያስተላለፉ በመሆኑ *አሀድ* ዘገባዎችን ውድቅ ማድረግ ተገቢነት የለውም።[73] በአንድ ዘገባ ብቻ *መተለላፉ* ጥርጣሬ ቢፈጥርም ከመጀመሪያው የሙስሊም ትውልድ በኋላ የመጣው ተተኪ ትውልድ የእነዚህን ዘገባዎች ተዓማኒነት ማረጋገጥና የእርስ-በርስ ተደጋጋፊነታቸውን *መሠረት* በማድረግ ተዓማኒነታቸውን *መመዘን* ሲችል እንዲሁ በጠቅላላው አስረጅ አይሆኑም ማለት ተገቢነት የለውም ይላሉ።[74] እንደ እምነትና አምልኮ ባሉ በአመክንዮኣዊ ምርምር ምላሽ ሊያገኙ የማይችሉ ጉዳዮች በ*አሀድ* ዘገባዎች ሽፋን አግኝተው ሳለ *አሀድ* ሀዲሶች አስረጂነት የላቸውም ማለት ሃይማኖቱን ለመረዳትና ለመተግበር ወሳኝ በሆኑ ርዕሰ-ጉዳዮች ላይ የመመሪያ እጦት እንዲፈጠር የሚያደርግ መሆኑን ሻፊዒ አክለው ያሳሳባሉ።[75]

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[66] ዝኒ ከማሁ።

[67] KAMALI, SHARIA LAW, *ግርጌ ማስታወሻ* 7, p. 78

[68] Ahmad Hasan, *The Sources of "Fiqh": A General Survey*, 29 (2) ISLAMIC STUDIES, 111 (1990).

[69] KAMALI, THE ENCYCOLPEDIA OF RELIGION, *supra* note 25, p. 68. **በቁርአን የሸሪዓ ሕግ ምንጭነት ላይ፣ አልዩ አባተ፣ *‹ቀዳሚዉ የሸሪዓ ሕግ ምንጭ - ቁርኣን*** **2** HAWASSA UNIVERSITY JOURNAL OF LAW, 123-153 (2018) **ያንብቡ**

[70] KAMALI, ዝኒ ከማሁ

[71] Ahmad, *The Sources of "Fiqh"*, *supra* note 63, p. 112.

[72] KAMALI, SHARIA LAW, *supra* note 7, p. 78

[73] ዝኒ ከማሁ

[74] ዝኒ ከማሁ

[75] ዝኒ ከማሁ

እዚህ ላይ ግልጽ ሊሆን የሚገባው የሀነፊና የማሊኪ መዝሓቦች ከሀዲሳዊ ምንጮች ይልቅ ለአመክንዮኣዊ የሕግ መርሆዎች ከፍ ያለ የአስረጂነት ደረጃ የመስጠት አዝማሚያ ያሳዩት ሱናሕ ከአመክንዮኣዊ እሳቤዎች በላይ አስገዳጅ የሸሪዓ ምንጭ መሆኑን ባለመቀበል ሳይሆን የመዝሓቦቹ መርሆዎች በተቀረጹበት ወቅት ከነቢዩ ሙሀመድ ተላለፉ የተባሉ የሀዲስ ዘገባዎች በስፋት ያልተሰበሰቡና ያልተጠናቀሩ በመሆናቸውና የሀዲሶች ተዓማኒነት የሚመዘንባቸው መስፈርቶች ገና ያልበለጸጉ ስለነበር በቂ ምዘና ማድረግ ባለመቻሉ ነው።[76] በተጨማሪም መዝሓቦቹ በተጠነሰሱበት ወቅት ሀዲስ በዋናነት አካባቢያዊ ባህሪ የነበረውና በአንድ አካባቢ የሚታወቅ ሀዲስ ካለ ጥቅም ላይ ሊውል ካልሆነም በምትኩ ሲጅቲሓድ የሚደረግበት አካሄድ ሰፍኖ የነበረ በመሆኑ የወቅቱ የኡሱል ሊቃውንት ለሲጅቲሓድ መርሆዎቻቸው ከፍ ያለ ሚና መስጠታቸው ሁኔታው የሚያስገድድና አማራጭ በማጣታቸው ምክንያት እንደሆነ መገንዘብ ያስፈልጋል።[77] ሻፊዒ የተነሱበት ጊዜ ሐሰተኛ የሀዲስ ዘገባዎች በመበራከታቸው በየአካባቢው ይነገሩ የነበሩ ሀዲሶች በስፋት የተሰበሰቡበትና የተጠናቀሩበት ወቅት በመሆኑ ለአከራካሪ የሕግ ጥያቄዎች ምላሽ የሚሰጡ ተዓማኒ ሀዲሶች ማግኘት የሚቻል ስለሆነና ተዓማኒ ሀዲሶችን መለያ የሆኑ የምዘና ዘዴዎች በወቅቱ ዳብረው የነበረ በመሆኑ በሻፊዒ ዘመን ከሲጅቲሓድ ይልቅ ሀዲስን ቅድሚያ ተፈጻሚ ለማድረግ የሚቻልበት አመቺ ሁኔታ ተፈጥሮ ነበር።[78]

በመጨረሻም ተቅሊድን በተመለከተ ሻፊዒ እንደ ሌሎች ሁሉ የከረረ ነቀፌታ ሰንዝረዋል። ስለ ሙቀሊዶች በተደጋጋሚ የሚጠቀሰው ንግግራቸው ‹‹ያለ አስረጅ እውቀትን የሚፈልግ በጨለማ እንጨት እንደሚለቅም ሰው ነው። ይህ ሰው እንጨት ነው ብሎ እባብ ይዞ እንደተነደፈ ሰው አይነት ነው።››[79] ያሉት ነው። የሙተቀዲሙን የሕግ መርሆዎችና የደረሱባቸው ዝርዝር የሕግ ድምዳሜዎች ዕልፍ ዓመት ተሻግረው ለአሁኑ ዘመን ሙስሊም ማሕበረሰብ አግባብነት አላቸው አይሻሻሉም አይለውጡም እንዲሁም ሲጅቲሓድ ማድረግ የሚችል የለም የሚል የጭፍን ተከታይነትና የወግ አጥባቂነት ዝንባሌ ነው።

4. የሀንበሊ መዝሓብ

የሀዲስ አስረጂነት ከፍ እንዲል የሻፊዒን አሻራ ያስቀጠሉና ያጠናክሩ ሁለት አዳዲስ መዝሓቦች በ9ኛው ም.ል ተመስርተዋል። እነሱም አሁን የማይገኘውና በዳውድ አዝ-ዚሒሪ የተመሠረተው የዚሒሪ መዝሓብ እና በአህመድ ኢብን-ሀንበል የተመሰረተው የሀንበሊ መዝሓቦች ናቸው።[80] ኢብን ሀንበል ከሌሎቹ መዝሓቦች በኋላ ሰፊ የሀዲስ ጥንቅርና ተደራሽነት በነበረበት ወቅት በመምጣታቸው የፊቅሕ ጥያቄዎችን ከሲጅቲሓድ ይልቅ በሀዲስ አማካይነት የመፍታት እድል ነበራቸው። በሲጅቲሓድ ላይ የከረረ ሂስ ይሰነዝሩ ስለነበር በታቻለ መጠን አመክንዮኣዊ የፊቅሕ ምርምርን ተግራዊ ላለማድረግ ይጥሩ ነበር።[81] እንደ ቂያሽና መሰላሃሕ ባሉ የሲጅቲሓድ አስረጂዎችን በስሱ ብቻ ይጠቀሙ ነበር። በዚህም ምክንያት ኢብን ሀንበልና ተከታዮቻቸው እንደ ፉቀሓእ (የሕግ ሊቃውንት) ሳይሆን እንደ ሀዲስ ሰብሳቢዎችና ተንታኞች (Traditionalists) ብቻ ተደርገው ይታዩ ነበር።[82] ከ14ኛው ምዕተ-ዓመት በኋላ የዚህ መዝሓብ ሥርጭትና ተቀባይነት በተለያዩ ታሪካዊ ምክንያቶች እያሽቆለቆለ ቢመጣም በ18ኛው ም.ዓ በአረቢያ ባህረ-ሰላጤ የተንሰራፋው የወሓቢያ ንቅናቄ ተነሳሽነቱንና መርሆዎቹን የወሰደው ከሀንበሊዎች

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[76] Ahmad Hasan, *Origins of the Early Schools of Law: The Historical Background*, 9(3) ISLAMIC STUDIES, 264-265 (1970).

[77] KAMALI, SHARIA LAW, ግርጌ ማስታወሻ 7, p. 80.

[78] ዝኒ ከማሁ.

[79] ዝኒ ከማሁ.

[80] ዝኒ ከማሁ.

[81] ዝኒ ከማሁ.

[82] KAMALI, THE ENCYCOLPEDIA OF RELIGION, *supra* note 25, p. 68.

በመሆኑ *መዝሓቡ* እንደገና ሊያንሰራራ ችሏል። ባለንበት ዘመንም በሳውዲ አረቢያ ሰፊ ተቀባይነት ያለው ሲሆን በኡማን በካታር በባህሬንና ኩዌት ብዙ ተከታዩች አሉት።[83]

ኢብን ሀንበል ከባልደረቦች የሕግ አስተያየት ይልቅ የተዓማኒነት ደረጃው ደካማ ቢሆንም ለ*ሀዲስ* ቅድሚያ ይሰጡ ነበር። ለምሳሌ ለተፈታች ሚስት ቀለብ መቁረጥን አስመልክቶ ዑመር ኢብን አል-ኸጣብ እንዲከፈል የሚያዘውን *ሀዲስ* ደካማ *(ዶዒፍ)* ሆኖ በማግኘታቸው ቀለብ እንዲቆረጥ ያዘዙ ቢሆንም ይህን የባልደረባ *ፈትዋ* ኢብን-ሀንበል አልተቀበሉትም። አስረጂነቱ አጠያያቂ ቢሆንም *ሀዲሱን* መሠረት አድርገው የቀድሞ ባል ለፈታት ሚስቱ ቀለብ የመክፍል ግዴታ የለበትም የሚል አቋም አንጸባርቀዋል።[84]

ሌላዉ የሀንበሊ *መዝሓብ* መገለጫ ከሌሎቹ *መዝሓቦች* በተለየ ለኢባሃሕ (ፍቁድ) የሕግ ቅርጽ የጎላ ሚና እንዲኖረዉ አድርገው የሚተረጉሙ መሆኑ ነው። ለምሳሌ ውል የማድረግ ነጻነትን በተመለከተ ሌሎቹ በተለያየ ደረጃ የውል ነጻነትን የሚገድቡ ቅድመ-ሁኔታዎች በማሰቀመጥ የስምምነቱ ጽኑነት በእነዚህ መስፈርቶች መሠረት እንዲወሰን የሚያደርጉ ቢሆንም የሀንበሊዎች እይታ ዒባዳት (የአምልኮ ሕግጋትን) በተመለከተ መርሁ በሕግ ከተቀመጠው የአምልኮ *ሥነ-ሥርዓት* ውጪ በግል ነጻነት ወይም በስምምነት መጨመር ወይም መቀነስ አይቻልም የሚል ቢሆንም ውሎችንና ግብይቶችን በተመለከተ ግን መርኑ ፍቁድነት ነው። በሌላ አነጋገር በሸሪዓ ግልጽ ክልከላ እንዳለ እስካልተረጋገጠ ድረስ የውል ፍሬ-ነገሮች ለተዋዋዮች ስምምንት የተተው ናቸው ማለት ነው። በቁርአን ላይ የተመለከተውም ውሎች በተዋዋዮች ነጻ ፈቃድ መፈጸም እንዳለባቸው[85] እና ከስምምነት በኋላ የገቡትን ቃል ማክበር እንዳለባቸው ብቻ ነው።[86] ነገሩን በአንድ ልዩ ምሳሌ ግልጽ ለማድረግ ያህል ከአንድ በላይ እስከ አራት ማግባት በሸሪዓ ግዴታ ሳይሆን የተፈቀደ በመሆኑ ጋብቻ የፈጸመ ባል ሌላ ሚስት ላለማግባት ከሚስቱ ጋር ውል ሊገባ ይችላል። ሌሎቹ መዝሓቦችና ብዙኃኑ ሊቃውንት ደግሞ ከአንድ በላይ ማግባት ሸሪዓ የፈቀደው በመሆኑ በውል መገደብ አይቻልም የሚል አቋም ይዘዋል።[87]

ተቅሊድን በተመለከተ ዋናው *ኢማምና* በየዘመናቱ የተተኩት የሀንበሊ *ዑለማእ* በጠቅላላ *ተቅሊድን* ያወገዙ ሲሆን በምትኩ ችሎታው ያለው ሁሉ *ኢጅቲሓድ* እንዲያደርግ ያበረታቱ ነበር። *መጅተሒዶች* እንዲፈጠሩና *ኢጅቲሓድ* ማድረግ የየማሕበረሰቡ የወል ግዴታ *(ፈርድ ኪፋኢ)* እንደመሆኑ በየትኛውም ዘመንና ማሕበረሰብ ውስጥ *ኢጅቲሓድ* ሳይቋረጥ የሸሪዓውን ቀጣይነትና ተለማጭነት ማረጋገጥ እንዳለበት የሀንበሊ ሊቃውንትም በጥብቅ ያሳስባሉ።[88]

5. የሺዓ መዝሓቦች

‹ሺዓ› የሚለው ቃል በአራተኛው የ ሺዓፉ አመራር ዘመን መሪ የነበረውን ዐሊ ኢብን ጧሊብን ለመከተል ከብዘኃኑ የሙስሊም ማህበረሰብ የተለየ የሙስሊም የፖለቲካ ርዕዮት ይዘው የነበሩ ቡድኖችን ለማመልከት የሚውል ሲሆን ይህ ርዕዮት *ኢማሚያ* በመባል ይታወቃል።[89] በ*ኢማምያ* እሳቤ መሠረት አምላክ ነቢይን ከላከና ነቢያዊ ተልዕኮ ዘመን ካበቃ በኋላ የሙስሊም ማህበረሰቡንና ግዛቱን አመራር በተመለከተ ለሕብረተሰቡ ዘፈቀዳዊ ውሳኔ ሊተወው አይችልም። ይልቁንም በነቢይ የተመረጡ አመራሮችን ይሰይማል። ይህ አጠቃላይ መለኮታዊ ባህል ከነቢዩ *ሙሀመድ* ሕልፈት በኋላም ተግባራዊ መደረግ ያለበት ሲሆን በሺዓ ነቢያዊ ዘገባ እንደተረጋገጠው ከዐሊ ኢብን አቢ-ጧሊብና የነቢዩ ልጅ

[83] ዝኒ ከማሁ ገጽ 84.
[84] ዝኒ ከማሁ.
[85] ቁርአን፣ 4፡19.
[86] ቁርአን፣ 5፡1.
[87] KAMALI, SHARIA LAW, *ግርጌ ማስታወሻ* 7, p. 86.
[88] ዝኒ ከማሁ ገጽ 85.
[89] ANWAR AHMAD QADRI, SLAMIC JURISPRUDENCE IN THE MODERN WORLD, 159 (New Delhi, Taj Company, 1997).

ከሆነችው ከባለቤቱ ፋጢማ ቢንት መሀመድ የዘር ሐረግ የተገኙ ተወላጆች ለሕዝበ-ሙስሊሙ የተመረጡ እጩ አመራሮች ናቸው የሚል እሳቤ አላቸው።[90]

ከሺዓ *መዝሓቦች* መካከል ሌሎቹ ጠፍተው ‹*ኢስና ዐሸሪያ* (አስራ-ሁለትዮሽ)› ዘይዲና ኢስማዒሊ ብቻ ቀርተዋል።[91] ልዩነታቸው ከአራተኛው የዘር ሐረግ በኋላ ባሉት ተተኪ አመራሮች ማንነት ላይ ሲሆን እስከ አራተኛው ማለትም ከዐሊ ኢብን ሢሊብ አል-ሀሰን (የዐሊ ልጅ) አል-ሁሰይን (የሁለተኛው የዐሊ ልጅ) እስከ ዐሊ ዘይን አል-ዐቢዲን (የሁሴን ልጅ) ድረስ አንድ አይነት ተወራራሽ ዘውዳዊ ሥርዓትን ይከተላሉ።[92] *ኢስና ዐሸሪያ* እስከ አስራ-ሁለተኛው የዘር ሐረግ ድረስ ያሉ ተወራራሽ ተወላጆችን በኢማምነት የተቀበሉ ሲሆን ይህ *መዝሓብ* የብዙኃኑን የሺዓ ማሕበረሰብ ተከታይነት ማግኘት ችሏል።[93] ከአሥራ-ሁለቱ አመራሮች መካከል ሰባቱን ብቻ የሚቀበሉት ደግሞ ኢስማዒሊያዎች ሲሆኑ *ሰብዒያ* (ባለሰባትዮሽ) እየተባሉ ይጠራሉ።[94] ልዩነቱ የተፈጠረባቸው የዘር ሐረግ እርከኖች ሁለት ሲሆኑ ዐሊ ዘይን አል-ዐቢዲን ሲሞት ከፊሉ የሺዒ ተከታይ ለልጃቸው ለዘይድ ተከታይ ሲሆን እርሱም የዘይዲያ ሺዓ መስራች ሆነ። ሌሎቹ ደግሞ ለሌላኛው የዐሊ ልጅ ለሙሀመድ አል-ባቂር ተከታይ ሆኑ። በዚህም ምክንያት ከዋነኛው የሺዓ ግንድ *ዘይዲያ* የሚባል ቅርንጫፍ እንዲፈጠር ምክንያት ሆኗል።[95] ሌላው ልዩነት የተፈጠረበት የሥልጣን ርክክብ እርከን ጀዕፈር አስ-ሷዲቅ ከታላቁ ልጁ ከኢስማዒል ይልቅ ሙሳ አል-ካዚምን በአመራርነት ሰይሞ ሲሞት እዚህ ላይ በተከታዮች ዘንድ ሁለት ጎራ እንዲፈጠር ምክንያት ሆነ። ታላቁን ወንድም ኢስማዒልን የሺዓዚያ ሥርዓቱ ተተኪ አድርገው የተቀበሉት ‹ኢስማዒልያ› ይባላሉ። ነገር ግን ብዙኃኑ የሺዓ ሕዝበ-ሙስሊም የተቀበለው የሙሳ አል-ካዚምን *ኢማምነት* ነው። በዚህ ልዩነት የተነሳ ከዋናው የሺዓ አመራር የዘር-ሐረግ ተዋረድ ተገንጥሎ ‹ኢስማዒሊያ› የተባለ ሌላ የሺዓ *መዝሓብ* ሊፈጠር ችሏል።[96]

የሺዒ ሥርዓት ጀዕፈር አስ-ሷዲቅ በ*ኢማምነት* እስከተሰየመበት ጊዜ ድረስ በዋናነት *ፖለቲካዊ* ገጽታ የነበረው ነው። በመሆኑም በሥልጣን ሽግግር ላይ ትኩረት የሚሰጥና የራሱ የሆነ ልዩ የሕግ እሳቤዎች የሌለው ነበር። ከጀዕፈር አስ-ሷዲቅና ከሙሀመድ አል-ባቂር በኋላ ልዩ የሕግ እሳቤዎችንና አቀራረቦችን በማዳበር የራሱን የ*መዝሓብ* ቅርጽ ሊይዝ ችሏል። በተለይ የሺዓ *መዝሓብን* በማዳበር ረገድ ፈር ቀዳጅ የሆኑት ሙሀመድ አል-ባቂር ናቸው።[97] እንደ ሸሪዓ *መዝሓብ* ከሌሎች የሕግ ት/ቤቶች አንጻር ልዩነቱ የመጣው በሱኒ የሸሪዓ *መዝሓቦች* ውስጥ የነቢዩ ሙሀመድ ባልደረቦች በተለይም አመራር የነበሩት የአቡ-በክርና የዑመር ኢብን አል-ኸጣብ የሕግ ብይኖች በሱኒ ማሕበረሰብ ዘንድ ከፍተኛ የአስረጅነት ደረጃ ያላቸውን ያህል በሺዓ ዘንድ ምንም አይነት የአስረጅነት ፋይዳ የማይሰጣቸው መሆኑ ነው።[98] በተጨማሪም ከላይ እንደተገለጸው የሊቃውንት ወጥ አቋም በባልደረቦች ዘንድ ከፍተኛ ፋይዳ የነበረውና በሱኒ የኡሱል ሊቃውንት ዘንድ ከቁርአንና ከሱናሕ በመቀጠል ሦስተኛ የአስረጂነት ደረጃ ያለው ሲሆን በሺዓ *መዝሓብ* አተያይ ደግሞ የተለየ ቅርጽ እንዲይዝ ተደርጓል። ይኸውም *ኢጅማዕ* ከተባለ የ*ኢማሞች* ወጥ አቋምን የሚመለከት መሆኑ ነው።[99]

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[90] KAMALI, SHARIA LAW, *ግርጌ ማስታወሻ* 7, p. 88.
[91] *ዝኒ ከማሁ.*
[92] *ዝኒ ከማሁ ገጽ* 87.
[93] *ዝኒ ከማሁ.*
[94] *ዝኒ ከማሁ ገጽ* 88.
[95] *ዝኒ ከማሁ.*
[96] *ዝኒ ከማሁ ገጽ* 87-88.
[97] KAMALI, SHARIA LAW, *supra* note 7, p. 89.
[98] *ዝኒ ከማሁ.*
[99] *ዝኒ ከማሁ ገጽ* 89-90.

የሀዲሰን አስረጅነት በተመለከተ ‹ሥድስቱን ተዓማኒ የሀዲስ ስብስቦችን (ሰል-ሲሃሕ ሰል-ሲታሕ)› የማይቀበሉና በአምስት የሺዓ የሀዲስ ስብስቦች ተተክተዋል:: እነሱም ሰል-ካፊ፣ መን-ላየስተህዚሩሑ ሰል-ፈቂሕ፣ ተሕዚብ፣ ኢስቲብሷርና ነሕጅ ሰል-ብላጋ ናቸው።[100] ለሱኒ ተዓማኒ የሀዲስ ስብስቦች መለወጥ ዋነኛ ምክንያቱ ተመልሶ ከአመራር ሥርዓቱ ጋር ይያያዛል። ለሱኒዎች ማንኛውም ታማኝ የሆነ ሰው የሀዲስ አስተላላፊ ሊሆን ቢችልም ለሺዓዎች ደግሞ አንድ ሀዲስ ተዓማኒ የሚሆነውና ተቀባይነት የሚያገኘው በታወቁ ኢማሞች አማካይነት የተላለፈ ከሆነ ብቻ ነው። ያም ሆኖ የሱኒና የሺዓ የሀዲስ ስብስቦች የዘገባ ሰንሰለት ልዩነት እንጂ በአብዛኛው የይዘት አንድነት ያላቸው ናቸው። ለዚህም አብነት የሚሆነው አስተላላፊዎቻቸው የተለያዩ ግለሰቦች ሆነው አንድ አይነት መልዕክት ያላቸው ሀዲሶች በሱኒና በሺዓ የሀዲስ ጥንቅሮች ውስጥ ተካተው የሚገኙ መሆኑ ነው።[101]

በሸሪዓ የሕግ አቀራረብ ዘዬዎችና የአስረጂነት ጉዳዮች ላይ በሱኒና በሺዓ መዝሐቦች መካከል ያለው ልዩነት ከላይ እንደተዳሰሰው ሆኖ ከሕግ ይዘት አኳያ ያላቸውን ልዩነት ደግሞ በጥቅሉ እንመልከት። በአተረጓጎም ልዩነት የተነሳ የተለያየ የፊቅሕ ድምዳሜ ላይ በመድረሳቸው ምክንያት በሱኒና በሺዓ መዝሐቦች መካከል ያለው ልዩነት በየትኛውም መዝሐቦች መካከል እንደሚኖር የፊቅሕ ልዩነት እንጂ ሱኒና ሺዓ ከመሆን ጋር የተያያዘ አይደለም።[102] ስለሆነም በፊቅሕ ረገድ ያለ የሁክም ሰሸ-ሸሪዒ (ብይን) ልዩነት እንጂ የሱኒ-ሺዓ ልዩነት ተደርጎ መወሰድ የለበትም። ለዚህ ምክንያቱ ደግሞ በሁለቱ የሙስሊም ክፋዮች መካከል ያለው መሠረታዊ ልዩነት የፖለቲካ አመራሮች የሚመረጡበት መስፈርት በመሆኑ ሌሎች እንደ ልዩነት የሚነሱ ነጥቦች ከዚህ መሠረታዊ ልዩነት የመነጩ መሆን ይገባቸዋል።

ፕሮፌሰር ከማሊ ‹Sharia Law: An Introduction› በተሰኘው መጽሐፋቸው በግልና በቤተሰብ ጉዳዮች ዙሪያ ያሉ የሱኒና የሺዓ ሕግ ልዩነቶቸን በአጭሩ ካብራበት ክፍል[103] መረዳት እንደሚቻለው በሱኒና በሺዓ የሀዲስ ስብስቦች መካከል ሰፊ የይዘት ልዩነት አይታይም። ስለሆነም የፊቅሕ ልዩነቶች በቁርአንና በሱናሕ አተረጓጎም ወይም የኡሱል ልዩነት ምክንያት የመጣ እንጂ ከሁለቱ የሙስሊም ማሕበረሰቦች የፖለቲካ እሳቤ የመነጨ ልዩነት አይደለም። በሌላ አገላለጽ የሁለቱ ልዩነት በሱኒ መዝሐቦች መካከል እንዳለ ልዩነት ሊታይ ይገባል። ይህ የእሳቤ ብዝኃነት እንደ ጊዜውና ተጨባጭ ሁኔታዉ ተስማሚ የሕግ አማራጮችን የሚያቀርብ ሰፊ የሕግ ማዕቀፍ እንደሆነ ተደርጎ መታየት ይገባዋል።[104] ብዙኃኑ እንደሚያስበው ይህ ልዩነት በወገንተኝነት ስሜት ጽንፍ የሚያዝበት ሳይሆን ሸሪዓ ነባራዊ ሁኔታውን የሚያገናዝብና ተለዋዋጭ መሆን ይችል ዘንድ የሕግ ምርጫ ለማድረግ (ተኻዩር) የሚያመችና አንዱ ከሌላው የሚማርበት ምሁራዊ አሻራ እንጂ[105] በስፋት እንደሚናፈሰው አንዱ ሌላውን የማይከተል በራሱ እይታ ብቻ ታስሮ የሚኖርበት የጭፍንነትና የቡድናዊነት አመለካከት ተቀባይነት የሌለው መሆኑን ይገነዘባል።[106]

በሱኒ መዝሐቦች መካከል ያሉትን አማራጭ የፊቅሕ እሳቤዎችን ብቻ ሳይሆን የሺዓ መዝሐቦችንም ያማከለ ኢስላማዊ የፊቅሕ ግንዛቤና የሕግ አወጣጥ ሥነ-ሥርዓት በዘመኑ የሸሪዓ ምሁራን አትኩሮትን እያገኘ ያለና በጥቂት የሙስሊም ሃገራት የሕግ አወጣጥ ላይ ተግባራዊ የተደረገ ሚዛናዊ የሕግ

[100] ዝኒ ከማሁ ገጽ 90.
[101] ዝኒ ከማሁ.
[102] ዝኒ ከማሁ ገጽ 92.
[103] በጋብቻ አፈጻጸም በውርስ በእናትነትና በአባትነት አወሳሰንና በሌሎች ተመሳሳይ የቤተሰብ ጉዳዮች ላይ ያሉ የሺዓና የሱኒ የፊቅሕ ሕግጋት ልዩነቶችን በተመለከተ የከማሊ (KAMALI, SHARIA LAW, *supra* note 7, pp. 90-92 ይመለከቷል።)
[104] ዝኒ ከማሁ ገጽ 92.
[105] ዝኒ ከማሁ ገጽ 94-95, 275-276.
[106] ዝኒ ከማሁ ገጽ 92.

ሥልጣኔ ነው።[107] ይህ ኡሱልን መሠረት ያደረገ ፊቅሓዊ ምርጫ ለወቅታዊ ችግሮች ተስማሚ የሆነ ሸሪዓዊ መፍትሔዎችን ከማስገኘቱም በተጨማሪ በሱኒና በሺዓ መካከል ያለውን ለዘመናት ክብደት የተሰጠውን መሠረት-የለሽ ልዩነት የሚያጠብና በእምነት ላይ ለተመሠረተና ብዝኃነት ለተከበረበት የአንድነት ምዕራፍ በር የሚከፍት ነው።[108]

መ. በመዝሓቦች መካከል ያሉ ጠቅላላ የልዩነት ምክንያቶች

በመዝሓቦች መካከል ያለው ልዩነት ከሕግ ጉዳዮች ተሻግሮ የእምነት ጉዳዮችንም የሚመለከትባቸው አጋጣሚዎች ቢኖሩም የመዝሓብ ልዩነት ከተባለ በትርጓሜው የሕግ አረዳድ ልዩነቶችን የሚያመለክት ነው።[109] የመዝሓብ ልዩነቶች በአራት ጥቅል ምክንያቶች ሊፈጠሩ ይችላሉ። ይኸውም በቁርአን አናቅጽ አተረጓጎም፣ በሀዲሰ የተዓማኒነት ምዘናና አተረጓጎም፣ በሲጅቲሓድ መርሆዎችና የአቀራረብ ዘዴዎችና በሲጅቲሓድ በሚደርሱባቸው ፊቅሕ ላይ በሚኖሩ ልዩነቶች ሊሆን ይችላል።[110]

የቁርአን አተረጓጎምን በተመለከተ የአንቀጾች መሻር ላይ በሚኖር የአረዳድ ልዩነት ወይም በሀዲስና ቁርአን መካከል ሊኖር በሚችል የመሻር ግንኙነት ላይ ባለ የአስተያየት ልዩነት ሊሆን ይችላል። ለምሳሌ በአሽ-ሻፊዒ የሃሰኽ እሳቤ ቁርአን በቁርአን ወይም ሱናሕ በሱናሕ ሊሻር የሚችልበትን የሃሰኽ ግንኙነት የሚቀበሉ ሲሆን ሌሎች መዝሓቦች ደግሞ አንዱ ሌላውን ሊሽር እንደሚችል ያምናሉ።[111] በተጨማሪም የቁርአን አንቀፆች ጥቅልና ልዩ በሚል ሊመደቡ ይችላሉ። የሕግ ሊቃውንት የዐም እና የ ኻስ ትርጓሜና አንድምታ ላይ የተለያየ ድምዳሜ ላይ የደረሱ መሆኑ ሌላው የልዩነቱ መንስኤ ነው።[112]

በሱናሕ ላይ ያለው ልዩነት የአተረጓጎም ብቻ ሳይሆን ለሀዲሶች ከሚሰጠው የተለያየ የተዓማኒነት ምዘናና የአስረጅነት ደረጃ የሚመጣ ነው። ሀነፊዎችና ሻፊዒዎች ጥብቅ የሆኑ የምዘና መስፈርቶችን ሲከተሉ ማሊኪዎችና ሀንበሊዎች ደግሞ ልዝብ አቋም አላቸው። ለምሳሌ በአንድ አስተላላፊ ብቻ የተላለፈን ነጠላ ሀዲሰ አሽ-ሻፊዒና ኢብን-ሀንበል በቀጥታ የሚቀበሉት ሲሆን አቡ-ሀኒፋና ማሊክ ደግሞ የተወሰኑ ቅድመ-ሁኔታዎችን የሚያሟላ ከሆነ ይቀበሉታል። በተጨማሪም በሀዲሶች መካከል መሻር ካጋጠመ እነዚህን ጉዳዮች የሚፈቱባቸው የአተረጓጎም ዘዴዎች የተለያዩ ይሆናሉ። ሙተዋቲር ሀዲሰ (በብዙ አስተላላፊዎችና የዘገባ ሰንሰለቶች የተዘገበ) በነጠላ ሀዲሰ ሊሻር የማይችል መሆኑ የብዙኃኑ አቋም ቢሆንም ሀነፊዎች ደግሞ አሀድ ሀዲሰ ሙተዋቲሩን ሊሽር ይችላል የሚል አቀራረብ አላቸው።[113]

በሲጅቲሓድ መርሆዎች ላይ ባለ የመዝሓቦች ልዩነት ምክንያት የፊቅሕ ድምዳሜ ልዩነቶች እንዳሉ ቀደም ባሉት የመዛሒብ ርዕሶች ሥር ተብራርቷል። አንድ ተጨማሪ ምሳሌ ለመስጠት ያህል ሀነፊዎች ቂያስን ተፈፃሚ ማድረግ ያልተፈለገ/አስከፊ ውጤትን የሚያስከትል በሚሆን ጊዜ ርትዕ ተፈፃሚ ሲያደርጉ ማሊኪዎች ደግሞ የሕዝብ ጥቅም ተግባራዊ ያደርጋሉ። ሁለቱ በዋናነት ተመሳሳይ ቢሆንም በአንዳንድ ዝርዝር ነጥቦች ላይ ልዩነት አላቸው።[114] አሽ-ሻፊዒ እነዚህን የሀነፊና የማሊኪ የሕግ መርሆዎች ግልጽ ሸሪዓዊ መሠረት የሌላቸውና በግል እሳቤ ላይ የተገነቡ ዘፈቀዳዊ ጣልቃ-ገብነቶች

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[107] ዝኒ ከማሁ ገጽ 272-273.
[108] ዝኒ ከማሁ ገጽ 92.
[109] KAMALI, SHARIA LAW, ግርጌ ማስታወሻ 7, p. 93.
[110] ዝኒ ከማሁ.
[111] ዝኒ ከማሁ.
[112] ዝኒ ከማሁ.
[113] ዝኒ ከማሁ ገጽ pp. 93-94.
[114] ዝኒ ከማሁ ገጽ 94.

ናቸው በሚል ሁለቱንም አይቀበሉም።[115] ሻፊዒዎች ሀንበሊዎችና ባለ አስራ-ሁለትዮሽ ሺዓዎች *ኢስቲስሃብ* (ነባሩ ይቀጥላል- የቀጣይነት ግምት) የተሰኘውን የሸሪዓ ሕግ ንድፈ-ሐሳብ ይቀበላሉ።[116]

ሠ. መዝሓቦች በኢትዮጵያ

የሸሪዓ ት/ቤቶች በኢትየጵያ ሙስሊም ሕብረተሰብ ውስጥ ከነበረዉ የእድገት ታሪክ በተጨማሪ ባጠቃላይ ከ19ኛዉ ም.ል መጨረሻ በፊት የነበረው የኢትዮጵያ ኢስላምና ሙስሊሞች የሥልጣኔ አሻራን በተመለከተ በዘርፉ የታሪክ ምሁራን እጅ የሚገኙ የታሪክ ምንጮች እጅግ አናሳ በመሆናቸው[117] እንደሌላው የኢትዮጵያ ቀደምት ሙስሊም ማህበረሰብ ልዩ ልዩ የታሪክ ዘውጎች ሁሉ በትምህርትና በእውቀት ባህላቸው ላይ ያሉት መረጃዎች ውስንና አሻሚ ድምዳሜዎች ላይ የሚያደርሱ ናቸው። መዝሓባዊ የፊቅሕ ትምህርት በ16ኛው ም.ል በሐረር ከተማ ይሰጥ እንደነበረና ይህ የእውቀት አሻራ የመን ይገኙ ከነበሩ *ዑለማእ* የተገኘ እንደሆነ ታዋቂው ‹የኢስላም በኢትዮጵያ› አጥኚ ትርሚንግሓም ይገልጻል።[118] እንደ ሁሴን አህመድ ገለጻ ደግሞ የፊቅሕ እውቀት በኢትዮጵያ የተጀመረው ሰፊ ትምህርታዊ አቀራረብና ማህበረሰባዊ ተደራሽነት ላይኖረው ቢችልም ከ12ኛዉ ም.ል ጀምሮ በኢፋት ይኖሩ ከነበሩ ጥንታዊ የኢትዮጵያ ሙስሊም ማሕበረሰብ ውስጥ የሻፊዒ መዝሓብ ይታወቅ የነበረ መሆኑን ሥነ-ቃላዊ መረጃዎችን በማጣቀስ ያስረዳል።[119] ይህ በእንዲህ እንዳለ በ19ኛው መቶ ክ/ዘመን በወሎና ኢፋት የነበረው የሙስሊም ትምህርት ንቅናቄ መሠረቱን ያገኘው በ15ኛዉ ም.ል መጨረሻ ጀምሮ በሐረር ከተዋወቀው የፊቅሕ ትምህርት ነው።[120]

በ14ኛዉ መቶ ክ/ዘመን በሐረር ይታወቁ የነበሩት መዝሓቦች ሻፊዒና ሀነፊ እንደሆኑ ትሪሚንግሓም ገልጿል። ይህ የእውቀት ጥንስስ በጊዜ ሒደት ከወሎ ከይፋት ከጎንደር ይመጡ በነበሩ ተማሪዎች አማካይነት ወደ መሐል ኢትዮጵያና ወሎ ገብቶ በተለያዩ ሃገር-በቀል የሱፊያ ማዕከላት (ዛውያዎች) በኩል ሰፊ ትኩረትንና ሥርጭት ሊያገኝ ችሏል። የሻፊዒና የሀነፊ መዝሓቦች ብቻ በኢትዮጵያ ሙስሊም ሕብረተሰብ የትምህርት ባህል አካል ለመሆን የቻሉ ሲሆን የማሊኪ *መዝሓብ* በሃገሪቱ ሱዳን አዋሳኝ ሥፍራዎች በሚገኙ ሙስሊም ማህበረሰቦች ዘንድ ብቻ ተግባራዊ የሚደረግ እጅግ አናሳ ሥርጭትና እውቅና ያለው ነው።[121] የሀንበሊ *መዝሓብ* በሕግ አረዳድ ዘዴው ጥብቅ በመሆኑና የሃገሪቱ ሙስሊሞች ከሌሎች የእምነት ማህበረሰቦች ጋር ካላቸው ዘርፈ-ብዙ መስተጋብርና ተለማጭ ሃይማኖታዊ እሴቶች ጋር የሚጣጣም ባለመሆኑ መዝሓቡ በአንዳንድ ግለሰቦች በኩል ከሚንጸባረቀው በዘለለ ሰፊ ተቀባይነትና የሙስሊም ትምህርት አካል ለመሆን አልቻለም።[122] የሻፊዒ *መዝሓብ* የመንን መሠረት አድርጎ በጠቅላላው በምስራቅ አፍሪካ ያለውን ሰፊ የሥርጭት እውነታን በተከተለ አኳኋን በኢትዮጵያ ሙስሊሞች ዘንድም ቢሆን ከሀነፊ *መዝሓብ* ጋር በማይነጻጸር ደረጃ ሰፊውን የኢትዮጵያ ሙስሊም የፊቅሕ ትምህርት ባህል ለመያዝ ችሏል።[123] የሀነፊ *መዝሓብ* አሁንም በሐረር የነበረውን

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[115] ዝኒ ከማሁ.

[116] ዝኒ ከማሁ.

[117] HUSSEIN AHMED, ISLAM IN NINETEENTH CENTURY WALLO, ETHIOPIA, REVIVAL, REFORM AND REACTION, 75 (Brill, Lieden, 2000).

[118] J. SPENCER TRIMINGHAM, ISLAM IN ETHIOPIA, 234 (Frank Cass & Co., London, 1965).

[119] Hussein, *ግርጌ ማስታወሻ* 101, p. 65.

[120] Hussein Ahmed, *Harar-Wallo Relations Revisited: Historical, Religious and Cultural Dimensions*, AFRICAN STUDY MONOGRAPHS, Suppl.41, 2010 pp. 112-113.

[121] Hussein, *ግርጌ ማስታወሻ* 115, p. 66.

[122] ዝኒ ከማሁ ገጽ 66.

[123] ዝኒ ከማሁ፣ ገጽ 65-66። የሺዓ መዝሓቦች በኢትዮጵያ ሙስሊም ሕብረተሰብ የፊቅሕ እውቀት አሻራ ውስጥ ያለውን ድርሻ በተመለከተ ከደቡብ አረቢያ ፈልሰው ወደ ኢትዮጵያ የገቡ የሺዓ እሳቤ የሚያራምዱ ጥቂት ዘይዲዎችና ዒባዲዎች እንዳሉ ዛኪ ሙስጠፋ የገለጸውን በማጠቀስ እነዚህ ሺዓ ሙስሊም ማህበረሰቦች ራሳቸውን እንደ ሺዓ የማያቀርቡ ቢሆንም ሃይማኖታዊ ተግባራቸው ሺዓዊ የሆነ ሙስሊሞች ይገኙሉ በማለት መሀመድ አብዶ ገልጿል።

ትምህርታዊ እውቅና ተከትሎ በወሎ በስፋት የሚጠና ሲሆን በጎጃም በጅማና ሐረርም ብዙ ተከታዮች አሉት።[124]

ይህ መዝሓባዊ የፊቅሕ ብዝሓነት በሸሪዓ ፍ/ቤቶች የሸሪዓ አተረጓጎም ላይ አዎንታዊና አሉታዊ ውጤቶች ሊኖሩት እንደሚችል ሙሀመድ አብዶ ሲገልጽ በግልና ቤተሰባዊ ጉዳዮች ላይ በሊቃውንቱ መካከል ያለው የአተረጓጎም ልዩነት ፍ/ቤቶቹ የሙስሊሙን ማሕበረሰብ ነባራዊ እውነታዎችና ለፍ/ቤቶቹ የሚቀርቡ ልዩ ጉዳዮችን ግንዛቤ ውስጥ ያስገባ ተለማጭ የሸሪዓ አረዳድ ለመያዝ የሚያስችል ሲሆን በሌላ በኩል ልዩነቶቹ በሸሪዓ ፍ/ቤቶች የሚሰሩ ዳኞች ለፍ/ቤቶቹ በሚቀርቡ ተመሳሳይ ጉዳዮች ላይ የሚሰጧቸው ውሳኔዎች የተለያዩ እንዲሆኑ በማድረግ ወጥነት የጎደለውና ተገማች ያልሆነ የፍርድ ሥርዓትን የሚፈጥር እንደሆነ ይጠቁማል።[125] ለዚህ እንደ መፍትሔ ያመለከተው በሥነ-ሥርዓት ጉዳዮች ላይ ሸሪዓ ፍ/ቤቶች የፍትሐ-ብሔር ሥነ-ሥርዓት ሕጉን እንዲተገብሩ በመደረጉ የተፈጠረውን ወጥ የሥነ-ሥርዓት አካሄድን በመከተል በግልና በቤተሰብ ጉዳዮች ላይ ተግባራዊ የሚደረገውን የሸሪዓ ሕግ ክፍል በማጥናት መዝሓባዊ የአቋም ልዩነቶችን ሃገራዊና ማሕበረሰባዊ እውነታዎችን ግምት ውስጥ በማስገባት እንዲሁም እንደ ጉዳዩ ሁኔታ አስፈላጊ የሆነውን የዳኝነት የተለማጭነት ደረጃን በመጠበቅ ወጥ የሸሪዓ የግልና የቤተሰብ ሕግ ጥንቅር (Codified Islamic Personal and Family Law) ቢዘጋጅ አሉታዊ ገጽታውን መቀነስ ይቻላል።[126]

ረ. ማጠቃለያ

የኢፌዲሪ ሕገ-መንግሥት የሕግ ብዝኃነትን የሚያረጋግጡ አንቀጾችን ሲያካትት በሃገሪቱ የሚገኙ ባህልና ሃይማኖትን የሚከተሉ ልዩ ልዩ ማህበረሰቦች በሃይማኖትና በባህል ሕጎች የመዳኘት ፍላጎታቸዉን ለማሟላት ሲሆን በሌላ በኩል ደግሞ መደበኛውን የፍትሕ ሥርዓት ከማገዝ አንጻር በግጭት አፈታት ሥርዓታቸው ካላቸው ጠቃማነት ለመጠቀም ይቻል ዘንድ እዉቅናና የተፈጻሚነት ድርሻ ተሰጥቷቸዋል። በተዘረጋው ሕገ-መንግሥታዊ እድል እየተጠቀመ ያለ መደበኛ ያልሆነ የዳኝነት አካል ቢኖር የሸሪዓ ፍ/ቤቶች ብቻ ናቸው።

የሸሪዓ ፍ/ቤቶች የግልና ቤተሰብ ግጭቶችን ለመፍታት ተፈጻሚ የሚያደርጉት ሸሪዓን ስለሆነ የሸሪዓ ሕግ ከታሪካዊ እድገቱ በተጨማሪ አጠቃላይ የሕግ መርሆዎቹና ዝርዝር ሕጎች የሚጠኑበት የእውቀት መስኮችን መረዳት እንዲሁም የሸሪዓ ሕግ በኢትዮጵያ ዙሪያ ተፈጻሚ ከመሆኑ ጋር በተያያዘ ሃገራዊና ማህበረሰባዊ እውነታዎችን ግንዛቤ ውስጥ በማስገባት አግባብነት ባላቸው የሸሪዓ ሕግ ዘርፎች ላይ ጥናት ማድረግ ይገባል። በዚህም የሸሪዓ ፍ/ቤቶች የሕግ አተረጓጎምና አተገባበር የሸሪዓ ዓላማዎችና ግቦች ማሳካት በሚችልበት ጎዳና ላይ እንዲራመድ ማድረግ ይችላል።

በዚህ ጽኑፍ የሉሉል አል-ፊቅሕና ፊቅሕ ጥናቶች ታሪካዊ ዳራ የሆነውን የሸሪዓ ሕግ አነሳስ የመዝሓቦች አመሠራረት ለሸሪዓ የሕግ ፍልስፍና እና ዝርዝር ሕግጋት መዳበር ያላቸው ጉልህ

(Muhammad, *supra* note 2, p. 90, f.n. 61). ነገር ግን ሱኒ እና ሺዓ ማህበረሰቦች ከመሠረታዊ የእምነት ቀኖና አንድነታቸው በተጨማሪ በሱፍያ መንፈሳዊ ሥርዓታቸው የተወራረሱባቸው በርካታ ሥርዓተ-እሴቶች የሚገኙ ከመሆኑ አኳያ በኢትዮጵያ አሉ የተባሉት ሺዓ ሙስሊሞች ከእነዚህ ሰፊ የጋራ እሴቶች መካከል በሸሪዓ ሕግ አቀራረባቸው የሺዓ መዝሓቦችን የሚከተሉ መሆኑ አልተገለጸም። ዛኪ እንደገለጸው በታሪክ ከአረቢያ ወደ ኢትዮጵያ የገቡ ሺዓዎች እንዳሉ የገለጸው ተዓማኒ ቢሆንም እንኳ በዚህ ጽሁፍ አዘጋጅ እውቀት በሸሪዓ አቀረራቡ የሺዓ መዝሓብ ተግባራዊ የሚያደርግ ሙስሊም ሕብረተሰብ በየትኛውም የኢትዮጵያ ግዛት ውስጥ አይገኝም። የሺዓ መዝሓባዊ ቅርጹም በኢትዮጵያ ሙስሊም የፊቅሕ እውቀት ማዕቀፍ ውስጥ አይታወቅም። (ዛኪ ሙስጠፋ፣ በኢትዮጵያ ውስጥ በሚገኙት የእስላም ፍርድ ቤቶች የሚሰራበት ሕግ፤ ለሸሪዓ ሕግ በሥራ ላይ መዋል መቀጠል ምክንያት የሆኑ ነገሮች፣ የኢትዮጵያ ሕግ መጽሔት፣ ቅጽ 9፣ ቁጥር 1፣ 1965፣ ገጽ 143 ይመለከቷል።).

[124] ዝኒ ከማሁ ገጽ 66.

[125] Muhammad, *supra* note 2, p. 90

[126] Muhammad, *supra* note 2, p. 90

አስተዋጽኦዎች አጠቃላይ ዳሰሳ ቀርቧል። በዘመኑ የሸሪዓ እድገት አስተሳሰብ መዝሓቦችን በጭፍን ከመከተል ይልቅ ከሕብረተሰቡ የእድገት ደረጃና ተጨባጭ ችግሮች አኳያ ሸሪዓ ተለማጭ መሆን ይችል ዘንድ ከምክንያታዊ አስተሳሰብና ርትዕ ጋር ተስማሚ የሆነውን *የመዝሓብኹ የፉቅሓእ* የሕግ መርሆዎችና ድንጋጌ ለመምረጥ አመቺ የሆነ የሸሪዓ ብዝኃነት ማዕቀፍ ተደረጎ መወሰድ እንዳለበት እንደ ጧሃ ጃቢር ዐልዋኒ ያሉ ዘመነኛ *የኡሱል* ምሁራን ያስገነዝባሉ። በተጨማሪም *መዝሓቦች*ና ቀደምት የሕግ ሊቃውንት የያዟቸው የሕግ አስተያየቶች ለአጠቃላይ የዓለም ሙስሊምም ሆነ ለኢትዮጵያ ሕዝበ-ሙስሊም ማህበረሰባዊ ሥልጣኔና አስተሳሰብ ጋር የማይጣጣምና ሸሪዓዊ የፍትሕና የልማት ዓላማዎችን የማያሳካ ከሆነ ነባራዊ እውነታውን መሠረት ያደረገ አዲስ የሸሪዓ ምርምር በማድረግ በነባሩ የፊቅሕ ሕግ ላይ አስፈላጊውን ማሻሻያና ለውጥ ማድረግ የሚገባ መሆኑን በአጽንኦት ያስረዳሉ። የኢትዮጵያ ሸሪዓ ፍ/ቤቶችም ቢሆኑ የግልና የቤተሰብ ሕጎችን ተፈጻሚ በማድረግ ሂደት ላይ የመዝሓቦችን ተጓዳኝና ተነጻጻሪ አቋሞች *ለተኽይር* (አማራጭ የሐሳብ ምንጭ) መጠቀም እንዳለባቸው እንዲሁም እንደ አስፈላጊነቱ *መቃሲድንና* የአካባቢውን ማህበረሰብ ታሳቢ ያደረጉ አዲስ የፊቅሕ እይታዎችን ማዳበር ይኖርባቸዋል። በሃገሪቱ ያለው የሕግ ትምህርትና ምርምር አካላት ምኑራንና ተማሪዎች በበኩላቸው ሸሪዓ በሃገሪቱ ዜጎች ላይ ተፈጻሚ በሆነበት መጠን ለትክክለኛ ትግበራውና ውጤታማነቱ አግባብነት ያላቸውና አስፈላጊ የሆኑ *የኡሱል ኦል-ፊቅሕ*ና የፊቅሕ ሕግ ርዕሶችን ከሸሪዓ ፍ/ቤቶች አሰራርና ከተጠቃሚው ማህበረሰብ ጋር በማዛመድ ጥናት ማድረግና ለውጤቱ ምኑራዊ አስተዋጽኦ ማድረግ ይገባቸዋል።

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