The Judicial and Constitutional Review of the Decisions of Courts of Sharia: A Comment Based on *Kedija Bashir et al. vs. Aysha Ahmed et al.*

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Introduction

This comment is based on the landmark case initially instituted by W/o Aysha Ahmed *et al.* against W/o Kedija Bashir *et al.* at the 3rd Naiba First Instance Court of Sharia (hereinafter *Kedija Bashir et al.* Case).[1] The *Kedija Bashir et al.* Case went through all levels of Federal Courts of Sharia and was reviewed by the Federal Supreme Court Cassation Division, the Council of Constitutional Inquiry and the House of Federation. This comment focuses on the legality and effect of the judicial and constitutional review of the decisions of the Courts of Sharia by the Federal Supreme Court and the House of Federation vis-à-vis the status of the Courts of Sharia as part of the non-state religious justice system that function primarily on the basis of Islamic law.

Part one of the comment provides the structure of the *Kedija Bashir et al.* Case focusing on the main issues raised at the Courts of Sharia, the Federal Supreme Court Cassation Division, the Constitutional Inquiry Council and the House of Federation. The second part is a reflection on the legality and effect of the judicial review of the *Kedija Bashir et al.* Case by the Federal Supreme Court Cassation Division while the third part provides comments in connection with the constitutional review of the *Kedija Bashir et al.* Case. Part four offers conclusion.

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[1] The Case came to be known as the Kedija Bashir Case after the applicant who refused to submit to the jurisdiction of the Courts of Sharia and went all the way to the CCI. The Case has been cited by a number of writers on human rights and legal pluralism. See for eg. Getachew Assefa, "Federalism and Legal Pluralism in Ethiopia: Reflections on their Impacts on the Protection of Human Rights", in Girmachew Alemu and Sisay Alemahu (eds), The Constitutional Protection of Human Rights in Ethiopia: Challenges and Prospects, Human Rights Law Series, volume 1, Addis Ababa University Press, 2008. Nonetheless, there has never been a full and proper presentation of the case by anyone yet. This writer has consulted all court documents of the case from the First Instance Naiba Court up to the CCI to prepare the full summary of the Case under section 1 below.

1. The Anatomy of the *Kedija Bashir et al.* Case

1.1 The Initial Pleading and the Decisions of the Courts of Sharia

A) The Case was initially presented to the 3rd Naiba First Instance Court of Sharia (Naiba Court)[2] in Addis Ababa on Hidar 14, 1992.[3] The plaintiffs were W/o Aysha Ahmed, W/o Fantu Ali, W/o Leila Hussein, and W/o Bedria Issa. The defendants were W/o Kedeja Bashir, Ato Ibrahim Hassen, Ato Ahmed Hassen, and Ato Mohamed Hassen.

B) The plaintiffs claimed that they are heirs to their late grandfather, Ato Aman Shene. The plaintiffs also claimed that Ato Aman's dwelling house located in Addis Ababa, Woreda 2, Kebele 11, House No. 439 was in the hands of the defendants, who are also the grandchildren of the late Ato Aman Shene. According to the plaintiffs, the defendants refused to recognize their right over their grandfather's house. The plaintiffs pleaded the Court to order the defendants to handover their share on the "basis of part 4, chapter 4 of the Sharia law". The plaintiffs presented a tax document and listed three witnesses to verify that Ato Aman Shene was the owner of the abovementioned dwelling house.

C) On Tahsas 14, 1992 the defendants submitted their preliminary objection to the Naiba Court stating in writing that they do not want to be adjudicated by the Court on the basis of their right to refuse its jurisdiction pursuant to Article 34(5) of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution). Also, the defendants alleged that the suit is *res judicata* as the issue has been settled in another case between the parties in a regular state court on the basis of the Ethiopian Civil Code.

D) In a written response on Tir 4, 1992 to the Naiba Court the plaintiffs rejected the preliminary objection of the defendants. In its session on Megabit 13, 1992, the Naiba Court passed a decision that overruled the defendants' preliminary objection against its jurisdiction. The reason forwarded by the Court was that the defendants did not appear in the Court when they were summoned to explain their preliminary objection. The Court further found that the case filed by the defendants in the regular

[2] The Naiba Court was operating on the basis of the Kadis and Naibas Councils Establishment Proclamation No.62/1944, which is repealed by the Federal Courts of Sharia Consolidation Proclamation No.188/1999.

[3] All dates in this summary are in Ethiopian Calendar.

state court had nothing to do with the present Case and was closed by the time the applicants filed the present Case.

E) On Hamle 5, 1992 the Naiba Court in Addis Ababa passed a Judgment on the merits of the Case and ordered the defendants to handover the plaintiffs' share of their grandfather's house.

F) The defendants appealed to the Federal High Court of Sharia over the Judgment of the Naiba Court. In their appeal the defendants stated that the Naiba Court has erroneously passed its verdict on the merits of the Case even though they clearly notified the Court that they did not accept its jurisdiction on the basis of Article 34(5) of the FDRE Constitution. In their response to the appeal, the respondents(the initial plaintiffs) agreed that Article 34(5) of the FDRE Constitution requires consent but argued that the consent of one party was enough for the Court to assume jurisdiction.

G) On Megabit 17, 1995, the Federal High Court of Sharia upheld the Judgment of the Naiba Court. In its ruling, the Federal High Court of Sharia stated that Article 34(5) of the FDRE Constitution needed enabling law to be applied by Courts of Sharia. According the Court, the present Case was filed before the promulgation of the Federal Courts of Sharia Consolidation Proclamation No.188/1999, which makes the later inapplicable to the Case.

H) Subsequently the defendants submitted their second appeal to the Federal Supreme Court of Sharia, which rejected the appeal as inadmissible on Ginbot 28, 1995.

1.2 The Ruling of the Federal Supreme Court Cassation Division

On Sene 1, 1995, the defendants filed their memorandum of appeal to the Federal Supreme Court Cassation Division contending that the decisions of the Courts of Sharia contain fundamental error of law because the Courts have ignored their preliminary objection against the jurisdiction of the Naiba Court of Sharia. In its ruling of Hamle 25, 1995, the Federal Supreme Court Cassation Division rejected the submission of the appellants stating that there was no fundamental error of law committed by the Courts of Sharia.[4]

[4] See Annex I of this Comment for the ruling of the Federal Supreme Court.

1.3 The Petition to the Council of Constitutional Inquiry (CCI)

A) On Tikemt 2, 1996 the Ethiopian Women Lawyers Association (EWLA) filed a petition to the Constitutional Inquiry Council (CCI) on behalf of W/o Kedija Bashir, a member of EWLA and one of the initial defendants in the present Case. EWLA based its petition on Articles 17, 20(2) and 23 of Proclamation 250/93, Article 4(1) of Proclamation 251/93 and Articles 9(1), 13 and 83 of the FDRE Constitution.

B) In its petition, EWLA argued that the decisions of the Federal Supreme Court Cassation Division and the Courts of Sharia have violated Article 34(5) the FDRE Constitution, one of the basic provisions under the bill of rights section of the Constitution. EWLA outlined the following main arguments as basis for its petition to the CCI:

1) The decisions of all the Courts contradict Article 9(1), Article 13(2) of the FDRE Constitution.

2) Article 34(5) of the FDRE Constitution shall be interpreted in light of Articles 14 and 18 of the International Covenant on Civil and Political Rights.

3) Under Article 34(5) of the FDRE Constitution religious laws cannot be applied unless there is consent from all parties to a dispute.

4)The requirement of consent under Article 34(5) of the FDRE Constitution should be observed by religious courts without a mandatory reference to subsidiary laws. Moreover, in this particular Case the Federal Courts of Sharia Consolidation Proclamation No.188/1999 had entered into force at the time of the commencement of the Case at the Naiba Court.

1.4 The Recommendation of the CCI

In its Tahsas 1, 1996 deliberation, the CCI found that the decision of the Naiba Court has violated Article 34 (5) of the FDRE Constitution and recommended the nullification of the decision on the basis of Article 9(1) of the FDRE Constitution.[5] The CCI forwarded the following main reasons as a basis for its recommendation:

A) The CCI noted that the Naiba Court, the High Court of Sharia and the Supreme Court of Sharia have all admitted that both the FDRE Constitution and Proclamation

[5] See Annex II of this Comment.

No.188/92 require consent of the parties to adjudicate cases on the basis of religious law.

B) Nonetheless, the Courts of Sharia rejected the defendants' preliminary objection against the jurisdiction of the Naiba Court claiming that the Case has been filed before the entry into force of Proclamation 188/92. However, the CCI noted that Proclamation No.188/92 has entered into force on Hidar 27, 1992, well ahead of the preliminary objection against the jurisdiction of the Naiba Court by the defendants on Tahsas 14, 1992. Thus, the application of Proclamation 188/92 could not be taken as retroactive application of the law.

C) The CCI reasoned that even if the application of Proclamation 188/92 was overlooked, the FDRE Constitution has entered into force when the initial plaintiffs in this Case filed their petition to the Naiba Court. The CCI further pointed out that the mere fact that Article 34(5) of the FDRE Constitution refers to enabling law does not alter the fundamental essence of the principle that affirms in its own right that no one shall be judged on the basis of religious or cultural law without his/her consent.

1.5. The Decision of the House of Federation

The House of Federation heard the legal opinion given by its Standing Committee on Constitutional and Regional Affairs on the recommendation of the CCI on Ginbot 7, 1996. On the same day, the House discussed and approved the recommendation of the CCI with one abstention.[6]

2. The Legal Basis and Effect of the Power of Cassation of the Federal Supreme Court over Courts of Sharia

In the *Kedija Bashir et al.* Case, the Federal Supreme Court Cassation Division has passed a ruling that rejected the appellants' petition stating that there was no fundamental error of law committed by the Federal Courts of Sharia.[7] However, the

[6] See Annex III of this Comment.

[7] The ruling on the absence of fundamental error of law by the Federal Supreme Court Cassation Division contrasts with two recent cases reviewed by the Federal Supreme Court Cassation Division. In W/o Salia Ibrahim et al. vs. Haji Seman Issa (Cassation File No. 31906) and W/o Shamse Yenus vs. W/o Nuria Mame (Cassation File No.38745), the Federal Supreme Court Cassation Division found that the violation of the right of individuals to choose between state courts and Courts of Sharia in getting divorce and the trespass of their jurisdiction by the Courts of Sharia constitute fundamental error of law.

Federal Supreme Court did not provide the basis for its jurisdiction to review the decisions of the Courts of Sharia. The FDRE Constitution proclaims that the 'Federal Supreme Court has a power of cassation over any final court decision containing a basic error of law'. [8] The Federal Courts Proclamation [9], the implementing law on the jurisdiction of the Federal Supreme Court, does not provide a power of cassation review of decisions of Courts of Sharia by the Federal Supreme Court.

Moreover, there is no reference to the possibility of cassation review of the decisions of Courts of Sharia by the Federal Supreme Court under the Federal Courts of Sharia Consolidation Proclamation. To the contrary, the Proclamation provides that Federal Courts of Sharia are given exclusive jurisdiction over a case brought before them. Once a case is brought before a Court of Sharia and consent is clearly given by the parties, such a case cannot be transferred to a regular court.[10] Thus, except the general and controversial phrase 'over any final court decision' under the FDRE Constitution, there is no clear legal basis for the Federal Supreme Court to exercise cassation power over decisions of Courts of Sharia.[11]

Even if one were to establish a power of cassation for the Federal Supreme Court over the decisions of Courts of Sharia, such mandate gives rise to range of issues. The first relates to the fact that the Courts of Sharia are non-state religious justice institutions. The Courts of Sharia are established on the basis of the constitutional recognition of the application of religious laws in personal and family cases.[12] The rationale for such recognition is the accommodation of diversity in establishing justice systems that are different in their jurisdiction and structure from the regular

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[8]Proclamation No.1/ 1995, Proclamation of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution), 21 August 1995, Article 80(3) (a).

[9] See Federal Courts Proclamation 25/1996,as amended by Federal Courts (Amendment) Proclamation 138/1998, Federal Courts (Amendment) Proclamation 254/2001, Federal Courts (Amendment) Proclamation 321/2003, and Federal Courts Proclamation (Re-amendment) Proclamation 454/2005 (Federal Courts Proclamation).

[10]Federal Courts of Sharia Consolidation Proclamation No 188/1999, Article 5(4).

[11] For extensive analysis of the debate, see Muradu Abdo , "Review of Decisions of State Courts over State Matter by the Federal Supreme Court", Mizan Law Review, Vol. 1, No.1, June 2007, pp 60-74.

[12]FDRE Constitution, Article 34(5) and Article 78(5). Article 34 (5) of the FDRE Constitution provides the principle: 'This Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute. Particulars shall be determined by law.' For the Common Jurisdiction of the Federal Courts of Sharia, see the Federal Courts of Sharia Consolidation Proclamation No 188/1999, Article 4(1) (a), (b), (c).

state courts. Thus, cassation review of the decisions of Courts of Sharia by the Federal Supreme Court amounts to a review of a separate and parallel non-state justice system by a state justice system. Also, the cassation review of the decisions of Federal Courts of Sharia by the Federal Supreme Court adds to the unwarranted powers of the Federal Supreme Court over the Federal Courts of Sharia.[13]

The second problem relates to the applicable substantive law by the Courts of Sharia. Even though the Courts of Sharia are obliged to apply the civil procedure laws promulgated by the state[14], the substantive law applied by the Courts in the adjudication of cases is Islamic law.[15] The FDRE Constitution recognizes the application of Islamic law by the Courts of Sharia. The Federal Supreme Court does not have the legal mandate and capacity to review the application of Islamic law. The only comparable instance that may justify the review of the application of Islamic law by the Courts of Sharia would be the protection of constitutional rights, which is not the mandate of the Federal Supreme Court.[16]Limiting the scope of the cassation review to the interpretation and application of state procedural laws applied by Courts of Sharia may not be a straightforward solution since such review may end up in providing unintended interpretation of substantive Islamic law.

The third issue relates to the binding interpretation of law that is rendered by Federal Supreme Court Cassation Division. Introducing the doctrine of *stare decisis*, Proclamation 454/2005 provides that decisions of the Federal Supreme Court Cassation Division on the interpretation of laws are binding on federal as well as state courts at all levels when rendered by not less than five judges.[17]Proclamation 454/2005 does not stipulate that Courts of Sharia are to be bound by the interpretation of law rendered by the Federal Supreme Court Cassation Division.

In practice, the Federal Supreme Court Cassation Division has rendered binding interpretation of law at least in two Cases that originated in the Federal Courts of Sharia and the Oromia Courts of Sharia.[18]Nonetheless, the idea of maintaining a

[13] See Federal Courts of Sharia Consolidation Proclamation No 188/1999, Article 17(3), Article 18, Article 20(3) & (4).
[14] Federal Courts of Sharia Consolidation Proclamation No 188/1999, Article 6(2).
[15] Federal Courts of Sharia Consolidation Proclamation No 188/1999, Article 6(1).
[16] See section 4.2 below on the constitutional review of decisions of Courts of Sharia.
[17] See Federal Courts Proclamation Re-amendment Proclamation 454/2005, Article 2(1).
[18] See W/o Salia Ibrahim et al. vs. Haji Seman Issa (Cassation File No. 31906) and W/o Shamse Yenus vs. W/o Nuria Mame (Cassation File No.38745) in Federal Supreme Court Cassation Division Decisions, Volume 9.

uniform interpretation of law[19] through binding decisions from the Federal Supreme Court Cassation Division is contrary to the recognition of Courts of Sharia as institutions that apply a different set of rules on the basis of their own method of interpretation and reasoning.

In this regard it is worth noting that the Federal Supreme Court of Sharia is not endowed with the power of cassation review, which might have been used to maintain uniform interpretation of substantive and procedural laws within the Courts of Sharia.There is an ad-hoc cassation hearing in the Federal Supreme Court of Sharia when there is basic difference between the divisions of the Federal Supreme Court of Sharia in the interpretation of Islamic law.[20] Such oversight does not extend to the differences of interpretation that may occur in the First Instance and High Courts of Sharia. Moreover, the review mandate does not cover the differences in the interpretation of state procedural laws applied by the Courts of Sharia.[21]

3. The Constitutional Review of the Decision of Courts of Sharia

3.1 The Legal Basis for Constitutional Review

As outlined under section 1.4 above, EWLA's petition to the CCI states that the decisions of the Federal Supreme Court Cassation Division and the Courts of Sharia have violated Article 34(5) the FDRE Constitution. The CCI is an organ established by the FDRE Constitution with the power to examine applications that require constitutional interpretation and submit its recommendation to the House of

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[19] See Muradu Abdo , "Review of Decisions of State Courts over State Matter by the Federal Supreme Court", Mizan Law Review, Vol. 1, No.1, June 2007, p. 70. See also 'Message from the President of the Federal Supreme Court', Federal Supreme Court Cassation Division Decisions, Volume 9.

[20]Federal Courts of Sharia Consolidation Proclamation No 188/1999, Article 20 (6) states: 'He [Chief Kadi], on his own initiative, or suggestions made to him by the divisions of the court or upon petitions made by parties to a dispute, direct cases involving a basic difference between divisions of the Federal Supreme Court of Sharia, as regards interpretation of Islamic law, to be heard by ta division composed of not less than five Kadis'.

[21]Strangely enough, the criteria for appointment of *Kadis* of the Federal Courts of Sharia do not include knowledge of state procedural laws even though the Federal Courts of Sharia are obliged to apply state procedural laws.The Federal Courts of Sharia Consolidation Proclamation No 188/1999, Article 16 provides the following criteria for the appointment of Kadis: Any Ethiopian who: 1) is trained in Islamic law in Islamic Educational Institutions or has acquired adequate experience and knowledge in Islamic law; 2) is reputed for his diligence and good conduct; 3) consents to assume the position of Kadi; and 4) is more than twenty five years of age.

Federation for final decision.[22] The Council of Constitutional Inquiry Proclamation specifies that the CCI has the power to investigate a petition that alleges that 'any law or decision given by any *government organ* or official' is contrary to the provisions of the FDRE Constitution.[23]Article 2(6) of the English version of the Council of Constitutional Inquiry Proclamation defines 'state organ' rather than 'government organ'. Nonetheless, the Amharic version of Article 2(6) is consistent with Article 17 (2) when it refers to "Yemengist Akal" to mean Federal and State legislative, executive and judicial organs and other organs that are given judicial power. [24]

In *Kedija Bashir et al.* Case, the CCI investigated the petition for constitutional review of the decisions of the Courts of Sharia and the Federal Supreme Court Cassation Division, all judicial organs that are listed under Article 2(6) of the Council of Constitutional Inquiry Proclamation. Thus, *lex lata* it is clear that the CCI and the House of Federation have the power to review the decisions of the Federal Supreme Court Cassation Division and the Courts of Sharia.[25] What is not clear, however, is whether the CCI and the House of Federation can review the final judgment of the Courts of Sharia that was passed on the basis of Islamic law. The next section dwells on the issue.

3.2 The Constitutional Review of the Judgments of Courts of Sharia

We can identify four instances where violation of the FDRE Constitution may occur in the operation of the Courts of Sharia:

(1) Where there is no consent of all the parties to a dispute;
(2) When the subject matter of a case does not fall within the jurisdiction of the Courts of Sharia;
(3) When there is error in the application of the state procedural laws;
(4) When the final judgment of a case contradicts the FDRE Constitution.

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[22] FDRE Constitution, Article 62(1), Article 82(1); Council of Constitutional Inquiry Proclamation 250/2001, Article17 (2), Article 19.
[23]Council of Constitutional Inquiry Proclamation 250/2001, Article17 (2). Emphasis added.
[24] See Council of Constitutional Inquiry Proclamation 250/2001, Article 2(6) English and Amharic versions.
[25] The power of the House of Federation to review the decisions of courts is controversial. See for instance Abebe Mulatu, "Issues of Constitutional Interpretation under the 1995 Federal Democratic Republic of Ethiopia Constitution: the Case of Kedija Beshir et al. vs. Ansha Ahmed et al.", Wonber-Alemayehu Haile Memorial Foundation's Periodical, 8th Half Year , May 2011, pp.46-54.

Constitutional review in the first three instances listed above is not controversial. This is because consent, jurisdiction and procedural laws are all part of the state made laws. The CCI recommendation and the decision of the House of Federation in the *Kedija Bashir et al.* Case is an example of constitutional review in the first instance.

The constitutional review at the fourth instance i.e. the review of the final judgment of the Courts of Sharia is controversial due to the application of Islamic law in dealing with cases before the Courts. For instance, Mohamed Abdo states that "if parties to a dispute voluntarily take their case to a sharia court, the outcome should be exempted from constitutional standards" and further argues that "...subjecting final decision of sharia courts to the supremacy clause and the human rights norms of the constitution goes against the very essence of legal pluralism advocated by the Constitution."[26] Even though it is true that the FDRE Constitution protects legal and judicial pluralism, such protection is not a carte blanche especially vis-à-vis the recognition and protection of human rights under the FDRE Constitution. In fact the FDRE Constitution clearly proclaims that the obligation of the state relates to "the duty to support, on the basis of equality, the growth and enrichment of cultures and traditions *that are compatible with fundamental rights, human dignity, democratic norms and ideals, and the provisions of the Constitution.*"[27] Moreover, the FDRE Constitution imposes a specific duty on all legislative, executive and judicial organs all over the country to respect and enforce the provisions of the bill of rights under the Constitution.[28]Thus, the legal and judicial plurality recognized under the FDRE Constitution is subject to the supremacy clause of the Constitution and the protection of the rights recognized under the Constitution.[29]

Otherwise those who chose to utilize religious laws and religious justice systems on the basis of their religious belief will be accorded less or no protection of their constitutional rights.[30] Moreover, one should not assume that all judgments of the

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[26] Mohamed Abdo, "Legal Pluralism, Sharia Courts and Constitutional Issues in Ethiopia", Mizan Law Review Volume 5(1), 2011, p.100.
[27] Article 91 of the FDRE Constitution, emphasis added.
[28] Article 13(1) FDRE Constitution
[29] Article 9(1) of the FDRE Constitution.
[30] It is thus unfortunate and hasty for Moahmed Abdo to make the following statement: "If final decisions rendered by the Sharia courts are reviewed by the House of Federation and finally declared unconstitutional, this may be treated by Muslim communities as an onslaught on their religious values

Courts of Sharia would violate the FDRE Constitution. Also, Islamic jurisprudence should be taken as an evolving set of rules that may benefit from in-depth constitutional review in the context of latest notions and interpretations of rights.[31] In this connection, it is worth noting that the CCI needs to develop a capacity to deal with applications that may involve the review of final judgments of Courts of Sharia.

4. Conclusion

There is no clear legal basis for the review power of the Federal Supreme Court Cassation Division over decisions of Courts of Sharia. Even if one is to assume the existence of such mandate of the Federal Supreme Court, it is contrary to the recognition and existence of the Courts of Sharia as part of a separate and autonomous justice system that has a parallel existence with the regular justice system. As such, the idea of maintaining uniform interpretation of laws through the decisions of the Federal Supreme Court Cassation Division does not apply to Courts of Sharia. In this regard, it is not clear why the Federal Supreme Court of Sharia is not endowed with the power of cassation review over substantive and procedural laws, which may eventually lead to a uniform application of the laws within the Sharia justice system.

Unlike the cassation review, the constitutional review of the *Kedija Bashir et al.* Case has a clear legal basis. Constitutional review of the cases at the Courts of Sharia can happen at four main instances: in relation to consent of parties; in relation to the jurisdiction of the Courts; in relation to the interpretation and application of state procedural laws; and in relation to the judgment of a case. The constitutional review of the first three instances is not controversial since all relate to the obligation of Courts of Sharia set under state laws. The fourth instance of constitutional review of decisions of Courts of Sharia is debatable since the Courts apply Islamic law to pass the judgment. This writer is of the opinion that the supremacy clause of the FDRE Constitution should be observed against judgments of Courts of Sharia that are based on Islamic law. Three main reasons have been forwarded: 1) The recognition of judicial and legal plurality is a qualified recognition that should

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and identity". See Mohamed Abdo, "Legal Pluralism, Sharia Courts and Constitutional Issues in Ethiopia", Mizan Law Review Volume 5(1), 2011, p.100.

[31] On the evolving nature of Islamic jurisprudence, see Joseph Schacht, An Introduction to Islamic Law, Oxford University Press, pp.69-75; See also Council of Constitutional Inquiry Proclamation 250/2001, Article 20(2) on the principle of interpretation in cases that involve the human rights protected under the FDRE Constitution.

operate within the framework of the rights protected under the FDRE Constitution; 2) Those who agree to the jurisdiction of the Courts of Sharia deserve equal protection of their constitutional rights; and 3) As an evolving system, Islamic jurisprudence benefits from an in-depth constitutional review process in the context of the developing notions and interpretations of the rights protected under the FDRE Constitution.

ANNEX I

የኢትዮጵያ ፌዴራላዊ ዴሞክራሲያዊ ሪፐብሊክ

ፌዴራል ጠቅላይ ፍ/ቤት

የሰበር መ/ቁ 12400
ሐምሌ 25 ቀን 1995

ዳኞች፡- 1. አቶ ከማል በድሪ
2. አቶ ፍስሐ ወርቅነህ
3. አቶ ዓብዱልቃድር መሐመድ

አመልካች፡- እነ ወ/ሮ ከድጃ በሺር /4 ሰዎች/ ጠበቃቸው ወ/ሮ ማሪያ ሙኒር ቀረበች፡፡
መልስ ሰጭ፡- እነ ወ/ሮ አንሻ አህመድ /4 ሰዎች / አልተጠሩም፡፡

ለዚህ ችሎት ሰኔ 1 ቀን 1995 በተጻፈ አቤቱታ በጠ/ሸሪአ ፍ/ቤት በመ/ቁ 7/95 በግንቦት 28 ቀን 1995 የተሰጠው ውሳኔ መሰረታዊ የሕግ ስሕተት አለበት በማለት ጉዳዩ በሰበር እንዲታይ ማመልከቻ ቀርቧል፡፡ አንድ መዝገብ ለሰበር ችሎት ሊቀርብ የሚችለው ቅሬታ የቀረበበት ውሣኔ መሠረታዊ የሕግ ስሕተት የተገኘበት እንደሆነ ብቻ መሆኑን አዋጅ ቁ. 25/1988 አንቀጽ 22/1/ ይደነግጋል፡፡ በዚህ መሠረት ችሎቱ አቤቱታውን መነሻ በማድረግ የሕግ ስሕተት ተፈጽሞባቸዋል የተባሉትን ውሣኔዎች አግባብ ካለው ሕግ እና በየፍርድ ቤቱ ከተደረጉ ክርክሮች ጋር መርምሯል፡፡

ትእዛዝ

በቀረበው ጉዳይ መሠረታዊ የሕግ ስሕተት ተሠርቷል ለማለት አልተቻለም፡፡ በመሆኑም መዝገቡ ለሰበር ችሎት አይቀርብም ብለናል፡፡ ይጻፍ፡፡

ተጨማሪ ትእዛዝ

በዚህ ችሎት ሐምሌ 2/95 የተሰጠው የእግድ ትእዛዝ ተነስቷል፡፡ ይጻፍ፡፡

የማይነበብ የሦስት ዳኞች ፊርማ አለበት፡፡

ዓ.ማ

ANNEX 11

በስብሰባው ላይ የተገኙ የሕገ መንግሥት ጉዳዮች

ኣጣሪ ጉባኤ አባላት ስብሰባ

1/04/1996

	በስብሰባው ላይ የተገኙ አባላት	
1	አቶ ከማል በድሪ	
2	አቶ መንበረፀሐይ ታደሰ	
3	አቶ ጌታሁን ካሳ	
4	አቶ በየነ ቢልቱ	
5	አቶ ሙሉጌታ አያሌው	
6	ዶ/ር ፋሲል ናሆም	
7	አቶ ደግፌ ቡላ	
8	አቶ ሐሰን ኢብራሂም	
9	አቶ አባይ ወልዱ	
10	ዶ/ር ደምሴ ታደሰ	

አቤቱታ አቅራቢ - ስለ ወ/ሮ ኪድኛ በሽር የሕግ ባለሙያ ሴቶች ማኅበር

ይህ ጉዳይ ለዚህ ጉባዔ ሊቀርብ የቻለው የሕግ ባለሙያ ሴቶች ማኅበር ጥቅምት 2 ቀን 1996 በተጻፈ ማመልከቻ ባቀረበው ጥያቄ መነሻነት ነው፡፡ ለማመልከቻው ምክንያት የሆነው በናኢባ ፍርድ ቤት በሸሪያ ሕግ መሠረት የቀረበው ክስ ነው፡፡ ክሱ የቀረበው ህዳር 14 ቀን 1992 ነው፡፡ የአሁኗ አመልካችን ጨምሮ በጉዳዩ ላይ ተከሳሽ የነበሩት ሰዎች በክሱ ላይ መልሳቸውን እንዲያቀርቡ ሲጠየቁ ታህሣሥ 14 ቀን 1992 በተጻፈ ማመልከቻቸው የሕገ መንግሥቱን አንቀጽ 34/5/ በመጥቀስ በሸሪዓ ሕግና ፍ/ቤት መዳኘት የማይፈልጉ መሆናቸውን ገለጹ፡፡ ለዚህ ምክንያት በማድረግ የጠቀሱት ጉዳዩ የቀረበው ሕገ መንግሥቱ ከፀደቀ በኋላ መሆኑን በመግለጽ ጭምር ነው፡፡ ጉዳዩን የያዘው የ3ኛ ናሚባ ፍርድ ቤት ከአመልካች የቀረበውን መቃወሚያ ባለመቀበል ጉዳዩን ማየት ቀጥሎ ውሣኔ ሰጠ፡፡ ጉዳዩ በይግባኝና በሰበር ለፌደራል የሸሪዓ ከፍተኛ ፍ/ቤት፣ ለጠቅላይ ሸሪዓ ፍ/ቤት፣ ለፌደራል ጠቅላይ ፍ/ቤት ሰበር ችሎት የቀረበ ቢሆንም ሁሉም ፍርድ ቤቶች የቀረበላቸውን አቤቱታ ውድቅ በማድረጋቸው የ3ኛ ናሚባ ውሣኔ ፀንቷል፡፡

ለዚህ ጉባዔ አቤቱታ የቀረበው በሁሉም ፍርድ ቤቶች የተሰጠው ውሣኔ በሕገ መንግስቱ ምዕራፍ 3 ሥር ከተዘረዘሩት መብቶች አንዱ የሆነውን የመዳኘት መብት የሚመለከት በመሆኑ፣ ጉዳዩ የቀረበላቸው ፍ/ቤቶች ለሕገ መንግሥቱ አንቀጽ 34/5/ የሰጡት ትርጉምም ሆነ የአተረጓጎም ስልት ከሕገ መንግሥቱ ጋር የሚቃረን

በመሆኑና ከሕገ መንግሥቱ ጋር የሚቃረን የፍ/ቤት ውሣኔ ሊፈጸም ስለማይችል ጉባዔው ጉዳዩን መርምሮ ለፌዴሬሽን ምክር ቤት አስተያየት ያቅርብልን በማለት ነው።

ጉባዔው የሕገ መንግሥት ትርጉም ጥያቄ የተነሣበትን ፍሬነገር፣ ለሁኔታው አግባብነት ያለውን የሕግ ማዕቀፍ በየደረጃው ከተሰጡ ውሣኔዎች ጋር በማያያዝ ተመልክቷል።

በፍሬ ነገር ደረጃ ለናኢባ 3ኛ ፍርድ ቤት የቀረበው ክስ የተመሠረተው ህዳር 14 ቀን 1992 ቢሆንም ተከሣሾች በዚህ ጉዳይ በሸሪዓ ሕግና ፍ/ቤት ለመዳኘት ፈቃደኛ አለመሆናቸውን የገለጹት ታህሳስ 14 ቀን 1992 መሆኑን ተገንዝበናል። በሌላ በኩል የፌደራል ሸሪዓ ፍርድ ቤቶችን ለማጠናከር የወጣው አዋጅ ቁጥር 188/92 ተፈጻሚ የሆነው ከህዳር 27/92 ጀምሮ እንደሆነም ተገንዝበናል። ስለዚህ አመልካቿ ፈቃደኛ አለመሆናቸውን በገለጹበት ወቅት ይኸው አዋጅ ተፈጻሚ ነበር።

የሕገ መንግሥቱ አንቀጽ 34/5 ሕገ መንግሥቱ «የግልና የቤተሰብ ሕግን በተመለከተ በተከራካሪዎች ፈቃድ በሃይማኖታቸው ወይም በባህል ሕጎች መሠረት መዳኘትን አይከለክልም» በማለት ይደነግጋል። ዝርዝሩ በሕግ እንደሚወሰንም ይገልጻል። ይህ የሕገ መንግሥት ድንጋጌ የሃይማኖትና የባህል ሕጎች ተፈጻሚነት በተከራካሪ ወገኖች ፈቃድ ላይ የተመሠረተ እንዲሆን መሠረታዊውን መርሕ አስቀምጧል። ዝርዝር ሕግ እንደሚወጣ ቢያመለክትም ዝርዝር ሕጉ የመርሑን አፈጻጸም የሚመለከት ከመሆን አልፎ የመርሑን መሠረታዊ ይዘት ይቀይራል ተብሎ የሚገመት አይደለም። የዚህ መሠረታዊ ይዘት ደግሞ ማንም ያለፈቃዱ በሃይማኖት ወይም በባህል ሕግ አይዳኝም የሚለው ነው። በመርሕ ደረጃ የዳኝነት ሥልጣን በፌደራል ወይም በክልል የተቋቋሙ መደበኛ ፍርድ ቤቶች ወይም «በሕግ ዳኝነት የተሰጣቸው ሥልጣን» አካላት ነው። በሕግ የተቋቋሙት የእነዚህ ተቋማት የዳኝነት ሥልጣን አስገዳጅ /Compulsory jurisdiction/ ነው። በመሆኑም የሃይማኖት ወይም የባህል ተቋማት የዳኝነት ሥልጣን ከዚህ የተለየ ነው። ሥልጣኑ በተከራካሪ ወገን ፈቃድ ላይ የተመሠረተ ነው። ይህ ፈቃድ ከሌለ የዳኝነት ሥልጣን አይኖርም።

ሕገ መንግሥቱን ተከትሎ የወጣው አዋጅ ቁ.188/92 አንቀጽ 4/2/ በተመሣሣይ ሁኔታ «በሕገ መንግሥቱ አንቀጽ 34 ንዑስ አንቀጽ 5 በተገለጸው መሠረት ከፍ ብሎ በተገለጹት ጉዳዮች ላይ ፍ/ቤቶች የዳኝነት ሥልጣን የሚኖራቸው ተከራካሪ ወገኖች በእስልምናው ኃይማኖት ሥርዓት ለመዳኘት ግልጽ በሆነ መንገድ በፈቃዳቸው መርጠው የቀረቡ ከሆነ ብቻ ይሆናል» በማለት ይደነግጋል። ይህ ድንጋጌ ሕገ መንግሥቱ ያሰፈረውን ግልጽ መርሕ አስፈላጊነት ይበልጥ አስምሮበታል። የሃይማኖት ፍርድ ቤቶች የዳኝነት ሥልጣን ከመተግበራቸው በፊት ባለጉዳዮች ፈቃደኛ መሆናቸውን ማረጋገጥ እንዳለበት በግልጽ ሰፍሯል። ፈቃደኛ መሆናቸውን ማረጋገጥ የዳኝነት አካላት ኃላፊነት ነው።

በመግቢያው እንደተገለጸው ውሣኔውን የሰጠው የናሚባ ፍርድ ቤትም ሆነ ጉዳዩን በአቤቱታ ቀርቦላቸው የተመለከቱት ፍርድ ቤቶች የሃይማኖት ተቋማት የዳኝነት ሥልጣን በፈቃድ ላይ መመሥረት እንዳለበት በሕገ መንግሥቱም በአዋጅም የሰፈረ መሆኑን ይቀበላሉ። የአመልካችን ማመልከቻ ውድቅ ያደረጉት አዋጁ ከሱ ሲጀመር ሥራ ላይ ስላልነበረ በጉዳዩ ላይ ተፈጻሚ ማድረግ አይቻልም በሚል ምክንያት ነው።

ሆኖም እላይ በመግቢያው ላይ እንደተጠቀሰው ለጉዳዩ አግባብነት ያለው አዋጅ ተፈጻሚ የሆነው ከህዳር 27 ቀን 1992 ጀምሮ ሲሆን ተከሳሾች ፈቃደኛ አለመሆናቸውን የገለጹት አዋጁ ተፈጻሚ ከሆነ በኋላ ታህሣሥ 14 ቀን 1992 ነው፡፡ ፍርድ ቤቶች አዋጁ ወደኋላ ተመልሶ መሥራት የለበትም የሚለው መደምደሚያ ላይ የደረሱት ክሱ የተመሠረተበትን ቀን ህዳር 14/1992 መሠረት በማድረግ ነው፡፡

ከላይ እንደተገለፀው ሕገ መንግሥቱም አዋጁም ተከራካሪዎቹ ፈቃደኛ ካልሆኑ በሃይማኖች ተቋማት እንደማይዳኙ ይገልጻሉ፡፡ ተከራካሪዎች ፈቃደኝነታቸውን መግለጽ የሚችሉት እንደነገሩ ሁኔታ ክስ በመሰረቱበት ወይም ለክሱ መልስ እንዲሰጡ በተጠየቁበት ጊዜ ነው፡፡ ከሳሽ የሆነው ወገን በሃይማኖት ተቋማት ክስ በመመሥረቱ ምክንያት ፈቃደኝነቱን እንደገለጸ ሊቆጠር ይችላል፡፡ ከሣሽ ፈቃደኛ መሆኑ ብቻውን በቂ ባለመሆኑ ተከሣሹም ፈቃደኛ መሆኑ መረጋገጥ አለበት፡፡ ይህ ደግሞ ሊሆን የሚችለው በተመሠረተበት ክስ መልስ እንዲሰጥ ቀጠሮ በተያዘበት ቀን ነው፡፡ በመሆኑም የአዋጁ ተፈጻሚነት መታየት የሚገባው ከተከሳሽ /የአሁኑ አመልካች/ መልስ የቀረበበትን ቀን መሠረት በማድረግ እንጂ ክሱ የቀረበበትን ቀን ግምት ውስጥ በማስገባት መሆን አልነበረበትም፡፡ አመልካች መልሱ በሚቀርብበት ቀን ደግሞ ፈቃደኛ መሆንን የግድ የሚል አዋጅ ተፈጻሚ ነበር፡፡ የናሚባ ፍርድ ቤትም ፈቃደኛ አለመሆናቸውን ሲያውቅ ክሱን መዝጋት ነበረበት፡፡ ስለዚህ ይህን ጉዳይ በአዋጁ መሠረት ማስተናገድ የሕጉ ወደኋላ ተመልሶ መስራትን የሚያመለክት አይደለም፡፡

ይህ እንኳን ቢታለፍ ዞሮ ዞሮ ፈቃደኛ መሆን የሕገ መንግሥቱ አንቀጽ 34/5/ አቢይና ሊታለፍ የማይችል መርሕ ነው፡፡ ዝርዝር አዋጁ እንኳን ባይወጣ ሕገ መንግሥቱ መተግበር ይገባዋል፡፡ ክስ ሲመሰረትም አመልካች ፈቃደኛ አለመሆናቸውን ሲገልጹ ደግሞ ሕገ መንግስቱ ሥራ ላይ ውሎ ነበር፡፡ ስለዚህ በዚህ ምክንያት ብቻ እንኳን የናሚባ ፍርድ ቤት የአመልካችን ፈቃደኛ አለመሆን በመገንዘብ ክሱን መዝጋት ይጠበቅበት ነበር፡፡

ናሚባ ፍርድ ቤቱ የተከተለው አካሄድ በሕገ መንግሥቱ የሰፈረውን ግልጽ ድንጋጌ የሚጥስ ነው፡፡ በመሆኑም በሕገ መንግስቱ አንቀጽ 9/1/ መሠረት ተፈጻሚነት ሊኖረው አይገባም ብሎ ውሳኔውን እንዲሽር ይህን የውሣኔ ሃሣብ ለፊዴሬሽን ምክር ቤት አቅርበናል፡፡

(የአሥር ሰዎች ፊርማ አለበት)

ANNEX III

የፌዴሬሽን ምክር ቤት
በአመልካች ወ/ሮ ከድጃ በሽር የሕገ መንግሥታዊ መብት መከበር
አቤቱታ ላይ በፌዴሬሽን ም/ቤት የተሰጠ ውሣኔ

የኢትዮጵያ ፌዴራላዊ ዴሞክራሲያዊ ሪፐብሊክ 2ኛው የፌዴሬሽን ምክር ቤት 4ኛ ዓመት የሥራ ዘመን ሁለተኛ መደበኛ ስብሰባ ግንቦት 7 ቀን 1996 ቀጥሎ የዋለ ሲሆን ክቡር አፈ ጉባኤው ቀጣዩ አጀንዳ ከሕገ መንግሥት ጉዳዮች አጣሪ ጉባኤ በቀረበው የሕገ መንግሥት ትርጉም ጉዳይ ላይ ቤቱ ተመልክቶ ውሳኔ መስጠት ስለሚሆን የውሳኔ ሀሳቡ አስቀድሞ የተሰራጨና የተነበበ መሆኑ ታስቦ የሕገ መንግሥትና ክልል ጉዳይ ቋሚ ኮሚቴ ስለ ጉዳዩ ማብራሪያ እንዲሰጥበት ጠይቀዋል፡፡

በዚህም ክቡር አቶ ዳንኤል ደምሴ የሕገ መንግሥት ጉዳዮች አጣሪ ጉባዔ ያቀረበውን የውሳኔ ሀሳብ የሕገ መንግሥትና ክልል ጉዳይ ቋሚ ኮሚቴ የተመለከታቸውን ፍሬ ሃሳቦች የወ/ሮ ከድጃ በሽር ጉዳይን በሚመለከት ከሥስት ተከሳሾች ጋር ለኢትዮጵያ የሕግ ባለሙያ ሴቶች ማኅበር ውክልና በሰጡት መሠረት የባለ ጉዳይዋን ክስ ለሕገ መንግሥት ጉዳዮች አጣሪ ጉባዔ አቅርበው መከራከራቸውን ጠቁመው የምክር ቤቱ ዋና ፍሬ ሀሳብ የሚሆነው በሕገ መንግሥት ትርጉም ጉዳይ እንጂ በአቤቱታ አቅራቢና በሌሎች ጉዳዮች ላይ ትኩረት ማድረግ ተገቢ ባለመሆኑ ሕገ መንግሥቱን መሠረት በማድረግ ጉዳያቸው በሸሪያ ፍርድ ቤት በሚታይበት ሁኔታ ላይ ተከሳሾች አዋጅ ቁጥር 250/93/ አንቀጽ 17፣20፣23 እና 22 በአዋጅ ቁጥር 251/93 አንቀጽ 4/1/ የሕገ መንግሥቱን አንቀጽ 34/5/ በመጥቀስ በሸሪያ ሕግና ፍርድ ቤት መዳኘት እንደማይፈልጉ ጠቁመው የሕገ መንግሥቱን አንቀጽ 34/5/ "…. በተከራካሪዎች ፈቃድ በኃይማኖት ወይም በባህሎች ሕጎች መሠረት መዳኘትን አይከለክልም፡፡" የሚል ስለያዘ ይህንኑ መሠረት በማድረግ አግባብ አለመሆኑን ያቀረቡት መንግሥት በበኩሉ የሸሪያ ፍርድ ቤቶች የዳኝነት ሥልጣን የሚኖራቸው በእስልምናው ሃይማኖት ለመዳኘት በግልጽ በፍቃዳቸው መርጠው የቀረቡ እንደሆኑ ነው በሚል ስለተቀመጠ ጉዳዩ የቀረበለት የሸሪያ ፍርድ ቤት ውሳኔ ሰጥቶበት የጠቅላይ ሸሪያ ፍርድ ቤትም ይግባኝ ቀርቦለት ውሳኔውን ያፀደቀው መሆኑን አስታውሰዋል፡፡

አከለውም ጉዳዩ በሰበር ታይቶ እንዲለወጥ ለፌዴራሉ ጠቅላይ ፍርድ ቤት ቀርቦ አቤቱታው ተቀባይነት ማጣቱንና በሕገ መንግሥቱ አንቀጽ 9/1/ ድንጋጌ መሠረት ከሕገ መንግስቱ ጋር የሚቃረን ውሳኔ የተሰጠበት ሆኖ በመገኘቱ የሕገ መንግስት ጉዳዮች አጣሪ ጉባኤ የሰጠውን የውሳኔ ሀሳብ የሕገ መንግሥትና የክልል ጉዳይ ቋሚ ኮሚቴ የተመለከተውና ክርክሩ በቀረበበት ጊዜ የተጠቀሰው አዋጅ በሥራ ላይ ስለነበር ውሳኔ ሊሰጡ መቻላቸውን በሕገ መንግሥቱ አንቀጽ 34/5/ መሠረት ተከሳሾቹ የጠቀሱትን አንቀጽና መመሪያ በመቀበል መዳኘት ሲገባቸው የሕገ መንግሥቱ አንቀጽ 34/5/ ተፈጻሚነት ዝርዝር ሕግ ከወጣ በኋላ እንደሆነ ወደፊትም የሚወጣው ሕግ በሥራ ላይ ካልዋለ ተከሳሽ ተጠርቶ በሚቀርብበት ጊዜ በሥራ ላይ የዋለ ቢሆንም ለክርክሩ ተፈጻሚነት እንደማይኖረው አድርገው ለሕገ መንግሥቱ የተሳሳተ ትርጉም በመስጠታቸው ከዳኝነት ሥልጣናቸው የዘለለ በመሆኑ የሕገ መንግሥት ጉዳዮች አጣሪ ጉባኤ ከሥር ፍርድ ቤቶች ጀምሮ እስከ ላይኛው ፌደራል ጠቅላይ ፍርድ ቤት ሰበር ችሎት ድረስ የሄደበትና በጥልቀት የመረመረበት ሁኔታ ስለታየ በአዋጅ

ለፌዴራሽን ምክር ቤት በተሰጠው ሥልጣን መሠረት ፍርድ ቤቶች የሰጡትን ውሳኔ ሕገ መንግሥቱን የሚቃረን በተለይ አንቀጽ 13 እና አመልካቾቹ ያቀረቡት የመቃወሚያ አንቀጽ 34/5/ የሚጥስ ሆኖ መገኘቱን የሚዘረዝሩበትን የውሳኔ ሀሳብ ስላቀረቡ የሕገ መንግሥት ጉዳዮች አጣሪ ጉባኤ የውሳኔ ሀሳብ ምክር ቤቱ ሊያፀድቀው ወይም ሊሽረው ስለሚችል ጉዳዩ መቅረቡን ገልጸዋል፡፡

ክቡር አቶ ፀጋዬ ማሞ በበኩላቸው የቀረበው የውሳኔ ሀሳብ አሳማኝና ብዙ የማያከራክር ስለሆነ የሕገ መንግሥት ጉዳዮች አጣሪ ጉባኤ ያቀረበው እውነትነት ያለው በልዩነት ያልቀረበ ቢጋራ የተወሰነና ከሴቶች መብት አንፃር ሲታይ ትርጉም ያለው ሥራ በመሆኑ በቀረበው መንገድ ቤቱ እንዲቀበለው ጠይቀዋል፡፡

በማስከተል ክቡር ዶ/ር ሰለሞን እንቋይ የሸሪያ ፍርድ ቤት የሰጠው ውሳኔ ሕገ መንግሥቱን የጣሰ ለመሆኑ በማያሻማ ሁኔታ በመቅረቡ የሕገ መንግሥት ጉዳዮች አጣሪ ጉባኤን የውሳኔ ሀሣብ ተቀብለን ብናሳልፈው የተሻለ ነው ብለዋል፡፡

ክቡር አቶ ደሣለኝ ደመቀ በበኩላቸው ለናኢባ 3ኛ ፍርድ ቤት የቀረበው ክስ የተመሠረተው ህዳር 14 ቀን 1992 ቢሆንም ተከሣሾቹ በሸሪያ ሕግና ፍርድ ቤት ለመዳኘት ፈቃደኛ አለመሆናቸውን የገለጹት ታህሣሥ 14 ቀን 1992 መሆኑን ግንዛቤ ስላለ ተከሳሾቹ መጀመሪያ ወደ ክርክር ገብተው ወይም ክርክሩ ሳይጀመር ቆይቶ አንስማማም ብለው ጉዳዩን ያነሱ ከሆነ በአንድ ወር ጊዜ እንዴት ሊሆን እንደቻለ ተጨማሪ ማብራሪያ እንዲሰጥበት ጠይቀዋል፡፡

ከዚያም ክቡር አቶ ዳንኤል ደምሴ ለቀረበው ጥያቄ መልስ ሲሰጡ በክርክር ደረጃ በፍርድ ቤቶች ጉዳዩ የተጀመረው ህዳር 14 ቀን 1992 ሆኖ መቃወሚያና ክሱ በተመሳሳይ ጊዜ በሸሪያ ፍርድ ቤት ለመዳኘት ፈቃደኛ አለመሆናቸውንና በመደበኛ ፍርድ ቤት ቀደም ብሎ ፋይል በመክፈቱ የተከራከሩበት በታህሣሥ 14 ቀን 1992 መቃወሚያ መጻፋቸውን ገልጸው ህዳር 14 ቀን 1992 ደግሞ የሸሪያ ፍርድ ቤትን ለማጠናከር የወጣው አዋጅ ቀድሞ ሥራ ላይ የዋለና የተደነገገ ስለሆነ በሁለቱ ፍቃድ ካልተቀመጠ በስተቀር ፍቃዳቸውን ካልገለጹ ለመዳኘት አይገደዱም ብሎ ደንብ ወጥቶ የነበረው አዋጅ ወደፊት አሳልፈው ወደ ኋላ ተመልሶ አይሠራም በሚል ስሕተት መፈጸሙን ገልጸዋል፡፡

በመቀጠል ክቡር አቶ አታክልቲ ግደይ ከቀረበው ሀሣብና ጥያቄ እውነታ አንጻር ልዩነት ያላቸው ሆኖ ክሱ እንደመጣ መነሻ የሆነው ከናዒባ ፍርድ ቤት ጀምሮ እስከ ጠቅላይ ፍርድ ቤት ሰበር ድረስ እንዲታይ አቤቱታ ቀርቦበት የመጀመሪያው ውሳኔ እንዲጸድቅ የተገደዱበት ሁኔታን አውስተው ከሣሽ ሆነው የቀረቡት ሰዎች ህዳር 14 ቀን 1992 ማመልከቻቸውን ፍርድ ቤት ያቀረቡ ሲሆን ለፌዴሬሽን ምክር ቤት ሕገ መንግሥታዊ መብቴ ተጥሷል ብለው አቤቱታ ያቀረቡት ወ/ሮ ከድጃ በሸሪያ ፍርድ ቤት ተከሰው መጥሪያ ተሰጥቷቸው መልስ እንዲሰጡ የቀረቡት ታህሳሥ 14 ቀን 1992 ሲሆን የሸሪያ ፍርድ ቤት አዋጅ ደግሞ ህዳር 27 ቀን 1992 ወደ ተግባር ተለውጧል፡፡ የናዒባ ፍርድ ቤት ለቀረበው አቤቱታ ውሳኔ የሰጠበት ምክንያት የፌዴራል ሸሪያ ፍርድ ቤቶችን አቋም ለማጠናከር በወጣው አዋጅ ቁጥር 188/92 አንቀጽ 4 ንዑስ ቁጥር 2 ላይ "...ተከራካሪ ወገኖች በእስልምናው ሃይማኖት ሥርዓት ለመዳኘት ግልጽ በሆነ መንገድ በፈቃዳቸው መርጠው የቀረቡ ከሆነ ብቻ

ይሆናል" ስለሚል የሕገ መንግሥቱን ደንብ ያካተተ ነው፡፡ የሸሪያ ፍርድ ቤት ማጠናከሪያ አዋጅ ከሕገ መንግሥቱ ጋር የሚሄድ አንቀጽ ቢኖረውም ባይኖረውም በሕግ ተዋረድ ሕገ መንግሥቱ የበላይ ሆኖ በሕገ መንግሥቱ መገዛት ሲገባው ሕገ መንግሥቱን ማጣቀስ ተስኖት ከሕገ መንግሥቱ በመነጨ ሕግ የሚውለውን ብቻ ይዞ መሄድ ግጭት ያመጣል ብለዋል፡፡ አያይዘውም የሕገ መንግሥት ጉዳዮች አጣሪ ጉባኤም ተከሳሾች በሃይማኖታቸው ለመዳኘት ፈቃደኛ መሆናቸውን መግለጽ የሚችሉት በተጠሩበት ታህሣሥ 14 ቀን 1992 ሆኖ በቀረቡበት ጊዜ ደግሞ በሃይማኖቱ ለመዳኘት ፍቃደኛ አለመሆናቸውን ገልጸው እያለ ይህን ችላ ብሎ በሸሪያ ፍርድ ቤት ለመዳኘት ፈቃደኛነታውን ገልጸው ሳይሆን መጨረሻ ላይ የሚያመቻቸው ሆኖ ሲያገኙት ከመጀመሪው ሕገ መንግሥቱ ሁለት ዕድል ሰጥቶ ሲፈልግ በመደበኛው ፍርድ ቤት ካልሆነ በሃይማኖት በልማዳዊ አሠራር መሄድ እችላለሁ ብለው እያለ ማለትም ሕገ መንግሥቱ በአንቀጽ 34 ንዑስ ቁጥር 5 መሠረት ማንኛውም ሰው ሕገ መንግሥቱን በማይጸረር መልኩ በመደበኛ ፍርድ ቤት ወይም በሃይማኖታዊ ልማድ ፈቃዱን ገልጾ እዳኛለሁ ብሎ ከገባ አይከለከልም የሚለውን ፈቃዳቸውን በገለጹበት ጊዜ ለማስኬድና ችሎቱን ለማስቻል የተሞከረ ስለሆነ የሕገመንግሥት አጣሪ ጉባኤን መሠረት በማድረግ በሕገመንግሥቱ አንቀጽ 13/1/ የፍትሕ አካላት ሕገ መንግሥቱን መሠረታዊ መርሖዎች የማስፈጸም ግዴታ ያለባቸውና ሕገ መንግሥቱ የሚጸረር ልማዳዊ አሠራር በሚኖርበት ጊዜ በሕገ መንግስቱ አንቀጽ 9/1/ "... ማንኛውም ሕግ ልማዳዊ አሠራር፣ እንዲሁም የመንግሥት አካል ወይም ባለሥልጣን ውሣኔ ከዚህ ሕገመንግሥት ጋር የሚቃረን ከሆነ ተፈጸሚነት አይኖረውም" በሚል መንገድ ተከትሎ ሕገ መንግሥቱ ያስቀመጠላቸውን ፈቃዳቸውን ገልጸው ለመዳኘት የሚችሉበትን ሁኔታ ማመቻቸት ሲገባው አስገድዶ ውሳኔውን እንዲቀበሉ ማድረግ ሕገ መንግሥቱን የሚጸረር ስለሆነ የሕገ መንግሥት ጉዳዮች አጣሪ ጉባኤ ያቀረበውን የውሳኔ ሃሳብ የሕገ መንግሥትና ክልል ጉዳይ ቋሚ ኮሚቴም አሳማኝ ሆኖ ስላገኘው የውሳኔ ሀሳቡ በምክር ቤት ተቀባይነት እንዲያገኝ ጠይቀዋል፡፡

በመቀጠል ክቡር ዶ/ር ሙላቱ ተሾመ ሕገ መንግሥቱ ለዜጎች የሰጠውን መብት መሠረት ተደርጎ የተሰጠው የውሳኔ ሀሣብና በሕግ አተናተኑ ብስለት ያለው ትንተና የቀረበበት በመሆኑ የሕገ መንግሥት ጉዳዮች አጣሪ ጉባኤ ያቀረበውን የውሳኔ ሃሳብ ቤቱ እንዲቀበለው ለድምፅ አቅርበዋል፡፡ በዚህም የውሳኔ ሀሳብ ከአንድ ድምፅ በስተቀር ቤቱ በሙሉ ድምፅ ተቀብሎ አፅድቆታል፡፡