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## Legal Instrumentalism: Critical Analysis of the Ethiopian Constitution

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### **Abstract:**

*The Ethiopian People Revolutionary Democratic Front which overthrew the Socialist regime of Ethiopia played a leading role in drafting the Constitution of the Federal Democratic Republic of Ethiopia, in 1995. This Constitution has followed ethnic federalism for the division of political power among ethnic groups. The principle used for the division of power has been alleged as an insulation of political interest in the Constitution which has led the country into conflicts and chaotic situation instead of maintaining unity and peace which might be expected from the normal purpose of law. This raises a concern whether the Constitution is an instrumental to protect group interest of the ruling elites or not.*

*The objective of this essay is to examine whether the Constitution has been instrumental to protect the ideological interest of few groups contrary to the public. In this regard, it analyzes the founding theory of legal instrumentalism; i.e. whether the traditional positivist school conception of law goes in line with the grand purpose of law. For this purpose, the work examines the sufficiency or insufficiency of 'command doctrine' of the positivist school. Consequently, the work is limited to theoretical exposition of legal instrumentalism at higher level focusing on the Constitution.*

*Legal instrumentalism here refers to using law as a means for politically driven interest contrary to public. Issues that have been raised and treated are: - How law is different from politics? Shall a law serve to an instrument of domination? Shall it reflect the will of society or will of the ruling class?*

*Having analyzed and other related matters, a conclusion has been reached on the instrumentality of Constitution in the sense that the division of power based on the principle of ethnicity which led the country into conflicts and chaotic situation. In this regard, the Constitution has caused division and conflict in the political community of the country instead of peace, unity and harmony; inequality and discrimination instead of fairness and justice; arbitrary assignment of power instead of following principles and standards; and closure of doors for remedies instead of providing settling controversies and conflicts. The basic question is why it promotes differences instead of unity in the country? The answer is quite clear and simple. The ruling elites deliberately rendered the country divided so that in the absence of unity they satisfied their unlimited greed for power and material interest. In this regard, corruption is rampant in Ethiopia in the absence of check and balance due to inefficient institutions. Monopolization of power by a single party for twenty-eight years is another example that shows unlimited greed for power by winning hundred percent parliamentary seats in 2015 election.*

**Keywords:** Legal Instrumentalism

### **1. Introduction**

The Ethiopian People Revolutionary Democratic Front which overthrew the Socialist regime of Ethiopia played a leading role in drafting the Constitution of the Federal Democratic Republic of Ethiopia, in 1995 (Proclamation No. 1/1995). This Constitution has followed ethnic federalism for the division of political power among ethnic groups. The division of power based on the principle of ethnicity has been alleged an insulation of political interest in the Constitution which has led the country into conflicts and chaotic situation instead of maintaining unity and peace which might be expected from the normal function of law. This raises a concern whether the Constitution is an instrumental to protect group interest of the ruling elites or not.

The objective of this essay is to examine the salient and manifested features of the Constitution in view of instrumentalism theory, i.e. whether the Constitution has been instrumental to protect the ideological interest of few groups contrary to the public. In this regard, it analyzes the founding theory of legal instrumentalist, traditional positivist conception of law. That is to say, it examines whether the 'sovereign command' conception of law by traditional positivist school goes in line with the grand purpose of law, i.e. keeping peace, harmony in the specific political community. In this case, it has not been intended to deal with all malicious political intricacies that may be implemented to impose group will on the public; but it is limited to theoretical exposition of legal instrumentalism at higher level focusing on the Constitution of Federal Democratic Republic Ethiopia, 1995.

## 2. Legal Instrumentalism and Purpose of Law

### 2.1. General

Law and the form of governance have strong connection. In democratic system, the government represents the majority will and enacts the law that reflects the community interest. On the contrary, an authoritarian regime uses the instrumentality of law to materialize the preordained group interest in the name of law. The elites who control the government apparatus do not actually represent the public will and may enact rules based on their ideological orientation. Generally, law may serve an instrument to bring socially accepted behavior including development, and negatively to promote group interest contrary to the public. Good social behaviors that facilitate peace and security, justice, development, can be achieved by means of law. Environmental policy, human rights principles, good commercial practices, etc. can be converted in to obligatory social norm through legal means. Again, unwanted social behaviors that hinder social and economic development, etc. can be hindered by law. On the other scenario, law serves as an instrument of domination, repression, inequality, injustice, and so on.

Legal instrumentalism is one of the strategies that can be used by authoritarian regime to dominate its ideological will on the public. In this case it refers to using law as a means for politically driven interest contrary to public. The theoretical foundation of legal instrumentalism is based on the politically influenced definition of law that propounded by traditional positivist school which says, 'law is a command of a sovereign' (Wacks, 2006). Marxist philosophy of law also adheres this philosophy of law since it relates law to political supremacy, i.e. the ruling class uses the instrumentality of law to oppress the other. For this reason, the purpose of law has been adulterated in addition to loss of its moral integrity.

### 2.2. Theoretical Ground for Legal Instrumentalism

Duncan Kennedy, in his work, 'A Critique of Adjudication' (1997) associates the concept of 'legal instrumentalism' as 'using law for ideologically motivated group interests'. Accordingly, he defines ideology as 'group interest' in conflict with other groups. In this regard, he labels 'policy' as a potential 'Trojan horse' for ideology. That is to say, policy is an instrument of ideology, in the sense that ideological interests are translated in to legal forms. Consequently, the definition of rules at level of legislative declaration as well as adjudication is influenced by ideological orientation of the ruling group.

The theoretical backing of legal instrumentalism, for the purpose of this article, can be explicated in view of the underlying philosophy of traditional legal positivist school. The fathers of positivist philosophy of law, Jeremy Bentham (1748-1832) and John Austin (1790-1859) postulated, 'law as a command of a sovereign' (Coleman, and Letter, (ed.), 1996). This definition of law given by traditional legal positivist school is politically motivated since it simply reduced law to the 'will and wish' of the politically superior organ. Consequently, this has paved the ground for negative instrumentality of law which uses 'law as a means of ideological domination' by the authoritarian regime. The premise for positivist school lies on 'law is enacted by the government, declared to public by the same, and abides by the public'. This views law from 'top to down' or 'superior and subordinate relations', and hence, fails to recognize the ultimate power of the community in democratic system. It simply focuses on law making and enforcing process without concern for public interest.

Similar to traditional positivist school thought, Marxist theory of law is also based on the instrumentality of law to the ruling class since it relates law to political supremacy. Marxist philosophy of law (Karl Marx (1818-83) and Friedrich Engels (1820-95) propagate "... the human world consists of a struggle for power between weak and strong and that the strong uses the legal system as instrument of domination (cited at Letwin, 2005). How law is different from politics? What is politics? These are some basic question which calls for investigation about the validity of 'command doctrine'. The well-known international public law writer, M. Shaw (2008), labels politics as struggle for power which involves competition among different groups with the objective of domination one the other. Another modern legal theoretician, Cotterrel (1989), in his famous work, 'The Politics of Jurisprudence' defines politics as 'struggle to acquire and make use of power especially through established institutions and formal process, and without resort to direct violence'. In this regard, as he points out, law differently from politics has integrity, independency from politics and placed law above politics. That is to say, the competing group as well as individual interests is balanced through legal methods to create unity and harmony in the system. On the contrary, law that solely serves as instrument of ideologically superior organ lacks rationality as well as moral integrity. As a law needs to have moral quality, the legislator and those administer the law need to possess the desired integrity to enact and administer law fairly on behalf of public.

The other critical question is whether a law shall serve as an instrument of domination or liberty? Shall it reflect the will of society or will of the ruling class? In order to answer these questions, let's see the genesis of modern history of law. Legal historians associate the origin of modern history of law with the ancient Greek, 5<sup>th</sup> century B.C, as an expression of free will of the public (Letwin, 2005). Accordingly, law presupposes free society that could elect its representative freely, able to give its consent freely, and the representatives that work for public. Hence, the fictitious entity which is identified as 'state' together with its apparatus has no its separate goal, separately from public. In democratic form of governance, sovereignty belongs to the people and not to state or its organs. State is just like any legal entity shall represent the interest of general public since the public cannot act together without inconveniences. State organs while acting on behalf of public shall not act against public interest at least the majority.

In this regard, Cotterrel (1989), has criticized the command view since it is devoid of democratic conception as it does not limit the government power, and the principle of rule of law. Thus, traditional positivist approach misconceives law and rendered law as an instrument of the ruling class. Accordingly, whatever declared by the political supreme organ is considered as law, irrespective to the will of people. Traditionally, in monarchy, the king is sovereign, and all powers

belong to the king. Hence, the king does whatever he desires. And hence, this assertion does not indicate the principles rule of law and accountability. The king is above the law and is not accountable either to law or public. Today, this is not the case. In principle, law is made for public, and by public through their representatives. Public representative shall not depart from public interest; and should go beyond the constitutional mandate given to them.

Currently, the traditional positivist approach has been losing its justification after World War II due to renaissance of natural law theory through recognition of human rights as well as reform made by contemporary positivists. Among contemporary positivist schools writers most notably by H.L.A. Hart, in his celebrated work 'Minimum Content of Natural Law', natural law writer Lon Fuller, in his work, 'The Morality of Law', 1964, modern natural law writer, Ronald Dworkin, in his famous work "Taking Rights Seriously", (1978), rejected the command doctrine (Coleman, and Letter, (ed.), 1996 and recognized morality of law. In this regard, Hart provides the 'minimum content of natural law', Fuller advocates the 'inner morality of law', Dworkin asserts the need to apply the principles of justice or fairness to balance conflicting interest while administering law by judiciary.

For this reason, the test for law is not solely limited to fulfillments of procedural requirement, but achievement of the intended purpose. That is to say, 'all things have to be judged from their intended purpose' as proposed by Fitzgerald, (ed.) (1966). It is natural for a tree to bear a fruit keeping all necessary conditions are fulfilled to such end. Similarly, the quality of law has to be evaluated in terms of its intended objectives, what would be desirable to the interest of majority including justice and fairness.

### 3. The Salient Features of the Constitution

The focus here under this Section is to investigate whether the Ethiopian People's Revolutionary Democratic Front (EPRDF), the leading party since 1991, has insulated the principle of ethnic federalism as an instrument to materialize its ideological interest including group gain at the cost of mass majority of the Ethiopian people. These can be investigated based on selected key features including instrumentality of the Constitution for division and conflict of the political communities of Ethiopia instead of peace, unity and harmony; inequality and discrimination instead of fairness and justice; arbitrary assignment of power instead of following principles and standards; and closure of doors for remedies instead of providing settling controversies and conflicts.

#### 3.1. Instigating Division and Conflict

Immanuel Kant (1724- 1804), following Aristotelian philosophy of law underlined competition for goods, honor and, power by human beings (cited at Letwin, 2005). This conflict of interest is not limited to individuals, as it also occurs among formally and informally organized political and social groups. Law is needed to regulate social relationship in orderly manner to create peace, harmony in the social as well as political life. A constitution, as a supreme law of land, is expected to govern relations among political groups by balancing competing interests; and promoting organic unity among constituents to facilitate co-operation. This can be done through distribution of power and resources fairly to constituents based on the principles of justice without neglecting any others.

To this end, the Federal Constitution of Ethiopia has followed the principle of ethnicity to divide state power to all ethnic groups. It says, "All sovereign power resides in the Nations, Nationalities and people" (Article 8/1). Accordingly, nine ethnic based Member states have been formed with one or associations of many ethnic groups (Article 47). Apparently, the Constitution seems progressive in recognizing 'self-administration right' of different ethnic groups by overcoming past historical injustice (Article 39/1, see also the Preamble of the Constitution).

However, there is a major faulting line with division of a country into ethnic groups without regulating inter-regional relationship (ethnic or regional states relations among different regional states) and intra-ethnic relationship (ethnic relations within the same administration region or unit). In the first scenario, different regional states which are based on ethnicity have engaged in competition for power and resources and the Constitution keeps silent about how to regulate such rival relationship; whereas, in the second scenario, different ethnic groups have engaged in competition for power and resources within the same administration region or unit. However, the Constitution has opted to empower majorities and neglected minority's interests.

For instance, according to internal displacement organization, in the absence of inter-regional co-operation more than a million Oromia ethnic groups were displaced from Somalia regional State and vice versa; Amhara ethnic groups were displaced from Oromia and Southern regional state in different periods ([www.internaldisplacement.org](http://www.internaldisplacement.org)). The concerned regional states were not in position to handle such problems due to lack of inter-regional cooperation. The approach which has been followed by the Constitution caused conflicts and hostility by breaking the unifying threads which would be maintained by law among the political communities. It is not the natural objective of law to instigate conflicts through initiating competition in the political and social life of a country. In this regard, it is hard to consider the Constitution as a 'legal one' as it activates conflicts instead of balancing competing interests.

The prime purpose of law, particularly the higher norm, shall be devoted to maintain peaceful and harmonious relationship for betterment of social sustainability. Law is the 'unifying thread' of political groups through equality and justice. The purpose of law is not to justify inequalities, oppression or domination of one group by another, but to create equality, fraternity, and freedom. It is the common interest that calls for the need for law, and the common social behavior is taken as a law. Law imposes social obligation to create harmonious and peaceful relations in the community. The strong shall not affect the less strong, the majority shall not oppress the minority, and the advantageous group shall not neglect the disadvantageous side (Kennedy, 1997).

The basic question is why the Constitution fails to balance majority rights with minority rights? Why it promotes differences instead of unity in the country? The answer is quite clear and simple. The ruling elites has rendered the

country divided so that in the absence of unity they imposed group's ideological will to satisfy unlimited greed for power and material interest. In this regard, corruption is rampant in Ethiopia since there is no mechanism for check and balance as members of parliament came to power through electoral fraud (Federal Ethics and Anti-Corruption Commission, Corruption Survey, 2012)). Monopolization of power by one party is another example that shows unlimited greed for power by winning hundred percent seats in the parliament (Arriola and et.al, 2016). In this case, public officials including judges, ethnic representatives are bribed through undue appointment. They work not for public interest, but for ideological interest.

### 3.2. *Instigating Discrimination and Inequality*

Legal method is needed to promote equality, freedom, liberty, fraternity, and common good; ultimately, fairness and justice (Dworkin, 1978, Kennedy, 1997). For this purpose, law promotes autonomy, freedom, independence, on one hand; and in order to restrict the domination of one by another, it curbs the individual's freedom for common good, on the other. It particularly discourages violence, deceit, duress, fraud, etc. by doing so it maintains peaceful relations in the community.

Viewed from this angle, the Constitution follows ethnicity as a basic principle for power division. Accordingly, all regional states are formed based on ethnicity. Though, the number varies, there is no homogeneous ethnic group that formed a regional state due to intermingled relationship of the Ethiopians for centuries. However, the Constitution is silent about the minority group rights who live in each regional state while dividing regional states basing on ethnicity and distributing powers accordingly. This caused inequality, conflicts and injustice among ethnic groups.

The ideological allies are allowed to participate in sharing of public offices and other opportunities. On the contrary, neglected groups are denied all forms of opportunities including political power in the same country. For instance, in Benshangul Gumuz Regional State, 47 % minority groups were denied to participate in election to share public office considering them as non-indigenous for the Region (CSA, 1994). In 2010, these minority groups were targeted and displaced and they were even further denied residence right ([www.internaldisplacement.org](http://www.internaldisplacement.org)).

This was caused due to a principle which has been followed by the Constitution to distribute power based on ethnicity, neglecting minorities. Minority right here is not only limited to individual rights, since they constitute proportional percentage of population in the regional state. For instance in Harari Regional State, the Harari population who have been conferred regional power of administration accounts 7.1% which followed by minority Oromo and Amhara 52.3% and 32.6 % consecutively ([www.ethiopia.gov.et/harari-regional-state](http://www.ethiopia.gov.et/harari-regional-state)). In this case, majority Oromo and Amhara ethnic groups were neglected, and hence it denotes arbitrarily division of powers which simply based on ideological oriented strategic interest.

Inequality is not limited to minority groups in the intra-ethnic relationship (ethnic groups within the same administration region), but also among inter-ethnic groups relationship (ethnic groups in different regions). For instance, more than half of the total Ethiopian ethnic groups which accounts 20 million population are engulfed under one regional state at Southern Nations and Nationalities and Peoples' State; when less numbered minority groups which accounts 131, 139 are highly elevated to extent of self-administration power at regional state case of the Harari Regional State ([www.ethiodemographyandhealth.org/SNNPRS/HTML](http://www.ethiodemographyandhealth.org/SNNPRS/HTML), and [www.ethiopia.gov.et/harari-regional-state](http://www.ethiopia.gov.et/harari-regional-state)).

Furthermore, the Constitution has completely ignored the inter-racial citizens and urban residents who are not categorized and unwilling to label themselves under ethnic based ideology. The right to form organization which has been enshrined under Article 31 of the Constitution is pseudo and rendered ineffective as far as the underground realities are considered. The reason is quite clear. All doors for sharing of political power are systematically closed for non-ethnic ideology adherents since sovereignty resides into ethnic groups. Here, the 2015 election result which the ruling party won hundred percent evidences this assertion (Arriola, 2016)

### 3.3. *Arbitrary Assignment of Power*

Law in order to bring peaceful relations establishes legal status, sets standards to define status holder, including the pertaining rights and limits associating with status holder. Examples of legal status are ownership, marriage, credit, etc. Owner, husband and wife, creditor and debtor, etc., are examples of status holders. Law provides how such rights are formed, and limits of such rights, pertaining duties of owner towards third parties against the protected rights. In the case of political associations, rights and duties among associates on one hand, between associates and association defined and governed by law. By doing so, legalis expected to govern social, political, and economic life in any society.

In this view, the Constitution while distributing power to ethnic groups failed to define the status holder and the limit of rights. That is to mean, it is not clear who is 'Nation', 'Nationalities' and 'Peoples' to be eligible for 'self-administration right' at different levels including regional state. Once more, the scope of right (self-administration right at different levels) is not delimited well. What are the criteria for regional state administration? What are the criteria for other levels of self-administration? In situation where some ethnic groups ranging above thirty million population other counts hundred thousand and less population, which Nations or Nationalities are eligible to exercise such rights? There are no specific criteria to these ends. In this respect, it is doubtful whether Constitution has achieved of its intended legal purpose, division of power; due to its inability to define the status holder and the limit of rights. The Constitution actually failed to set standards and principles for distribution of federal powers among constituting members. Hence, it manifestly exhibits technical insufficiency due its failure to define the power holder in addition to its inability to regulate the pertaining rights associated with each nation or nationalities. More specifically, it is not clear whether each nation or nationality can claim Zonal or Regional State status of administration.

Furthermore, the Constitution promotes inequality and injustice among political groups by neglecting minority rights and systematically closing all political power for those outside of ethnicity political ideology. Here, it is good to remind again the need for legal method which normally defines the status holder, including the limits of rights to make any group or entity to be a subject of rights and duties to balance competing interests to create smooth and harmonious relationship. Unless powers, opportunities, burdens are distributed based on the accepted principles justice, there would be no peace and security as it has currently been evidenced in the country. At this juncture, it would be important to understand the implication of using such vague terms, since the situation has paved the way for ruling elites to use official discretion to confer or deny the right of self-administration based on ideological preferences contrary to accepted rules and standard (see the case of Harari Regional State and Southern Regional State above).

### 3.4. Closure of Doors for Remedies

One of the functions of law is to give remedy for legal disputes and controversies through establish in gneutral dispute settling institution. Some controversies require immediate solution through interpretations of controversial rules. No matter how well rules are written, there is always a grey area that calls for interpretations. It is often up to court to interpret rules to apply and give meaning to actual cases and controversies.

Relating to settlement of controversies including gaps, this requires a long-term solution, i.e., amendment of law. In this view, laws may not be amended annually. That is to mean, some degrees of permanency are needed. On the other hand, in order to accommodate dynamism certain degree of flexibility is needed in a legal system.

In the case of Federal Constitution, the neutrality of court has not opted for the purpose of interpretation of the Constitution since this power has been conferred to the House of Federation(Proclamation No. 250/2001). This again raises a doubt about such conferment of power to politicians contrary to the principle of autonomy given to legal professionalism in order to deliver their functions free from politics (Cotterrel, 1989).

Furthermore, in spite of latent defects that have been existing in the body of law, the Constitution has opted to follow very stringent procedures for amendment and interpretation (see Article 104 and 105). And this causes difficulty to search solution through familiar legal methods, and hence the ruling group might want the erupted fire among the constituents for a longer period of time.

## 4. Conclusion

Politically backed conception of law has caused adulteration in the legal realm. Law has been abused, adulterated, disgraced, and manipulated by politics. The fascist regime had committed crime against humanity in the name of law. Many dictatorial regimes have been using rule of law as a mask to justify violations of human rights. Draconian laws have been enacted which go against human right to strengthen the power of the ruling elites so as to satisfy unlimited greed's for power and material gain. These have shaded doubt about the purpose of law, distorted its concepts and purpose. Citizens, including legal professionals are confused about the purpose of law whether it is an instrument of oppression or aimed at to bring justice particularly in the authoritarian regime. Political definition of law blurs the common purpose of law since it renders law as instrument of repression by ideological dominating class; quite contrary to the principle of equality and justice which normally expected from legal method.

The Federal Constitution Ethiopia has following ethnic federalism to overcome past historical injustice associating with group rights. However, in reality it has created another form of historical injustice by setting discrimination, conflicts, and inequality. It is an imposed law from 'top to down' on the public. However, currently, the Ethiopian government is undertaking political reform; in this regard this short essay may be helpful to lighten the hidden group interest covered in the name of law.

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