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CHAPTER ONE

Constitutions and Constitutionalism

1. Features of a Constitution

There are four basic features that distinguish constitutional law from other lower-level laws in a given political society. These are **"generality," "supremacy," "stability,"** and **"rigidity."**

1. Generality:

Constitutions are general laws as opposed to detailed ones. Since, the broad range of the subjects with which a constitution has to deal would not allow it to be detailed and exhaustive in each and every area. They provide for a little bit of everything in the social, political, economic, cultural, legal, security, and institutional realms of a nation-state. Therefore, the specific rules that are needed to regulate the specific areas should be made by the legislature of the political society.

Note that; though generality is a feature for all constitutions, not all constitutions in the world have a similar level of generality. Some are more detailed than others.[1]

In most modern constitutions, the entrenchment of human rights provisions consumes a good portion of the constitutions. In the FDRE 1995 Constitution, approximately 30% of the Constitution devoted to the entrenchment of human and democratic rights.

2. Stability or Permanence:

Constitutions are worked out in order to govern the social relationships in the political society for an indefinite period of time. The permanence of constitutions is related to their nature and subject matter.

[1] **For Example:-**

A. The Indian Constitution of 1950, which is over 390 articles long in an attempt to cover as many important concerns as possible,
B. The South African Constitution has 243 articles
C. The Pakistani Constitution of 1973 it contains 280 articles. These are comparatively detailed constitutional texts

- The U.S. Constitution is the most general constitution. The original Constitution (of 1787) was only 7 articles
- The French Constitution of 1958 can also be considered as one of the shortest constitutions with its 89 articles
- The 1995 Constitution of Ethiopia, lies somewhere in the middle between these extremes with 106 articles

3. **Supremacy:** This is one of the distinctive marks of all written constitutions, but not necessarily of unwritten constitutions.
4. **Rigidity:**

This feature also is peculiar to written constitutions as opposed to unwritten constitutions. The formal procedures of changing constitutions, i.e., making amendments, should not be passed in an ordinary law making procedure.

2. Fundamental Principles/Values in a Constitution

Under the FDRE Constitution, we find clearly defined fundamental principles and values under its second chapter. In fact, there are certain important declarations in the preamble as well as in the substantive parts (e.g., the "Policy objectives" chapter). Let us study each of the fundamental principles contained under chapter 2 of the FDRE Constitution.

A. Sovereignty of the People

Art. 8 stipulate:

1) All sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia.
2) This Constitution is an expression of their sovereignty.
3) Their sovereignty shall be expressed through their representatives elected in accordance with this Constitution and through their direct democratic participation.

What is meant by sovereignty? It is the power of deciding on all **internal** economic, political, social, cultural, legal and other such matters of importance to them jointly and individually. As regards these matters, the idea is that, there shall be no authority that can stop them from making decisions that they believe in. As regards external sovereignty, i.e., Ethiopia's relations with foreign powers and bodies, though the Constitution does not specifically make any stipulations, a unified sovereignty is implicit.

The right to self-determination recognized in Art. 39 of the Constitution are usually linked to the provisions of art 8. The rights in art 39 are explained as rights that belong to entities that are sovereign to enjoy each and all of those rights.

Note that: - Art 8 is one of the most controversial provisions of the 1995 Constitution. The other one is art 39 of the Constitution. Critiques argue that the notion of sovereignty has always been associated with independent states that are members of the international community and has never been associated with entities within sovereign states. Likewise, the right to secession without any strings attached to it strikes one as the most unprecedented constitutional dispensation in modern history.

B. Supremacy of the Constitution

Article 9 (1) declares that laws, practices and decisions that contravene with the constitution shall have no effects. This is an assurance that the decisions of the peoples (or of the Nations, Nationalities and Peoples) which are expressed and embodied in the Constitution are immutable by any force, law, body. The Constitution also supplants any possibility for assumption of state power other than in the manner provided in it.

What are the authorities to support the claim of supremacy of a constitution?

The primary source of authority is the constitution itself, since it contains a declaration to the effect that it is the supreme law of the land.

The constitution is made by the people directly who have sovereign power of the state, therefore the representatives have no equal power with people who they represents thus their act cannot override the decision of sovereign.

The rationale for the supremacy of constitutions is limiting government powers and ensuring government by law.

Supremacy of the Constitution, Article 9

Art 9(4); All international agreements ratified by Ethiopia are an integral part of the law of the land. This article leaves many questions unanswered regarding the relationship between the treaty laws of Ethiopia and the national laws, as well as the scope of the responsibilities of the national institutions of the country regarding international treaties.

- Are all international agreements subject to ratification in Ethiopia? If so, is that feasible? If so, is that feasible?
- If not, what would be the status of those international agreements not needing ratification? Are they not the integral part of the law of the land?
- In relation to those international agreements, which are ratified by Ethiopia, do they become an integral part of the law of the land immediately upon ratification? Or do they need additional requirements such as publication in the official law gazette of the country?

Automatic or Legislative Incorporation?

Whether treaties obtain domestic effect automatically upon ratification or whether they need some form of publication via or incorporation into domestic legislation in addition to ratification. Different legal systems have adopted two approaches in regards to this matter: **The Monist** and **The Dualist Approach.**

1. **The Dualist Approach**[2]: ratified treaties can have domestic effect only after incorporation by Parliamentary legislation
2. **The Monist Approach**[3]**:** ratified treaties are automatically applicable on the domestic plane without any further action.

An examination of the Ethiopian legal order reveals that neither the Constitution nor any sub-constitutional law unequivocally settles how treaties are domesticated.

Some authors hold that by virtue of Article 71 of the Constitution, treaties ratified by the HPR can come into domestic effect only upon proclamation or publication in the federal government's official law gazette. Article 71 states the president shall proclaim in the Negarit Gazeta laws and international agreements approved by the' House of Peoples' Representatives in accordance with the Constitution.

Other authors argue that ratification by the HPR brings treaties into domestic effect, whether or not they are published in the official law gazette. The Author of this text book took this stand too and provides the following reasons:-

I. Treaties are ratified by the HPR (the legislature) based on its regular law-making procedure, thus allowing the treaties to obtain a stamp of approval from the federal lawmaker in the same manner as other federal laws.
II. Publication of laws, even of the Constitution, does not seem to be a validity requirement in the Ethiopian legal dispensation. Nowhere does the Constitution mention of the need for its publication as a requirement for its entry into force.

In many foreign constitutions in regards to both the constitutions themselves and parliamentary legislation publication requirements explicitly set forth. E.g. Spanish Constitution states it shall become effective on the day of the publication 'in the Official State Gazette'". On the contrary, the Ethiopian Constitution does not say anything in regards to its publication.

[2] UK, Germany, Ireland, Sweden, Norway and also South Africa fall within the dualistic apporach
[3] Adopted by US, Greece, Bulgaria and Serbia

Moreover, art 57 states that "…The President shall sign a law submitted to him within fifteen days. If the President does not sign the law within fifteen days it shall take effect without his signature." This provision does not make any reference to the need for publication but only to the law's taking effect with or without the signature of the President.

III. The practice in Ethiopia with respect to ratified treaties demonstrates that publication is not a requirement for a treaty law to enter in to force domestically. Texts of ratified treaties, including all human rights treaties to which Ethiopia is a party, are not published in the official law gazette.

The Self-Executing/Non-Self-Executing Nature of Treaties

A treaty is said to be self-executing if it is capable of judicial enforcement without an intervening legislative or executive act being required. If not, a treaty is non-self-executing. For instance; The US Senate and courts have categorically treated virtually all human rights treaties as non-self-executing thereby making their domestic enforcement subject to implementing legislation. South African constitution section 231 (4) states that self-executing provisions of treaties approved by the Parliament could directly become law without the need to be enacted by the national legislation.

Although the Ethiopian Constitution is not clearly forthcoming on this matter, one can draw a conclusion from the provisions of Article 9(4)[4] that, ratified treaties are presumed to be self-executing. This conclusion is strengthened by the fact that ratification of most human rights treaties by Ethiopia has not been accompanied by any declarations that categorized any number of the provisions of any of these treaties as non-self-executing treaties.

Together with the provisions of art 9(4) of the Constitution, art 13(2)[5] brings to the fore complex legal issues. One such issue is the hierarchical relationship between ratified international agreements and national laws of the country.

The Hierarchical Relationship Between International Law and Domestic Law in Ethiopia

The 1995 Constitution of Ethiopia does not recognize non-treaty sources of international law. Thus, we cannot talk about the status of these sources of international law in the Ethiopian domestic legal setting from the point of view of the Constitution. It declared that ratified treaties form an integral part of the law

[4] **Art 9(4);** All international agreements ratified by Ethiopia are an integral part of the law of the land.
[5] Art 13 (2) reads as "The fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, international covenants on human rights and international instruments adopted by Ethiopia."

of the land, the Constitution fails to clearly pronounce the place such treaties occupy in the country's hierarchy of laws.

Regarding the status of ratified treaties there are two groups with opposing views

The first view holds that ratified treaties in general have equal normative status with the Constitution while ratified human rights treaties are superior to or at least on par with the Ethiopian Constitution. Regarding the status of ratified treaties vis-a-vis domestic primary laws, their view is that treaties override sub-constitutional laws, including federal proclamations. However this, camp fail to understand the textual reading of the Ethiopian Constitution and are its drafting history.

The second camp argues that the treaties are on equal with federal proclamations and are subordinate to the Constitution. Thus, according to this view, conflict between treaties and primary legislation would be resolved by resorting to ***the principle of lex posterior derogate legi priori.***

Art 9(4) makes ratified treaties of all sorts with the body of Ethiopian law. But Article 9 (1) has already singled out the Constitution as "the supreme law of the land" leaving no doubt that it alone is "the" supreme law. When treaties are made an integral part of **the law of the land** (comprise federal, as well as state laws of various sources and hierarchies), cannot be supreme law of the land. Rather they are part of the body of laws to which the Constitution is declared supreme.

Primary concern of article 13(2) is to provide for the interpretation and enforcement of the constitutional rights and not the hierarchical relationship.

C. Human and Democratic Rights

As per Art 10 of the FDRE Constitution, human and democratic rights constitute another fundamental principle of the Constitution.

1) Human rights and freedoms, **emanating from the nature of mankind**, are inviolable and inalienable.
2) Human and democratic rights of **citizens and peoples** shall be respected.

Sub 10(1) indicates these rights and freedoms are not given by the state or by authorities. It is good to pay attention to the sort of difference Art. 10 of the Constitution maintains between human rights on the one hand and democratic rights on the other.

Note that:

- Democratic rights are not considered by the Constitution to be inalienable and inviolable, nor are they considered to be emanating from the nature of mankind.
- Art. 10(2) do not restrict itself to only human and democratic rights of citizens; rather it expressly states that those of peoples shall as well be respected. ***This is an expression of the fact that the Ethiopian Constitution does not only champion individual rights but also respects group rights equally.***

D. Separation of State and Religion or the Principle of Secularism

The fourth fundamental principle of the Constitution is the principle of separation of state and religion.

Art 11 separation of state and religion

1) State and religion are separate
2) There shall be no state religion.
3) The State shall not interfere in religious matters and religion shall not interfere in state affairs.

The unequivocal statement under Art 11(1) of the Ethiopian Constitution that "State and Religion Are Separate,"' aims at ensuring that so far as the Ethiopian state is concerned any and all religions and belief systems in Ethiopia are equally outsiders to the secular political community forming the Ethiopian state. Thus, what we have as entrenched in the Constitution is a principle or a model of separation as well as non-interference.

E. Transparency and Accountability of Government

The principle of transparency and accountability is the last of the five fundamental principles in the Ethiopian Constitution. Art 12 makes accountable not only political appointees or top appointed public servants, but also elected people such as house members.

Art 54(4) deals with the accountability of the Members of HPR. Accordingly there are three authorities that reign over MPs. It reads as;

"Members of the House are representatives of the Ethiopian People as a whole. They are governed by:

a. The Constitution;
b. The will of the people; and
c. Their Conscience"

However the question here is that,

The Constitution says that Members of the House are representatives of the Ethiopian People as a whole. What is the significance of this statement? How would this resonate with the fact that an MP is elected from a constituency and that he/she is expected to represent it?

How should an MP vote in case the interests of his constituency are found to be conflicting with those of the Ethiopian people as a whole?

How does this fit into the fact that Ethiopia follows an ethnically based federal system wherein MPs coming from a given state would tend to speak for their specific state rather than for Ethiopia as a whole?

- **NB. The Constitution says nothing about the accountability of the House of the Federation.**

Article 55(17) and (18) deals with the accountability of the executive organ and offer checking and balance by the legislature.

3. Types of Constitutions

Wheare classify the six types of the constitution. The bases of classification are the outstanding characters of the concerned constitutions.

a. Written/unwritten
b. Rigid/flexible
c. Supreme/subordinate
d. Federal/unitary
e. Separated powers/fused powers; and
f. Republican/Monarchical.

- **Written/unwritten**

A written constitution is a constitution that is contained in a single document or a series of documents. Written constitutional systems are the most dominant types of constitutions as opposed to unwritten constitutions.

Unwritten constitution is a type of constitution that does not exist in a single document, and therefore cannot be known as a constitution. The UK, Israel and New Zealand are the three famous political systems without written constitutions.

- **Rigid/ Flexible**

Classification of constitutions into "rigid" and "flexible" is made on the basis of amendment procedures or requirements of constitutions. A flexible constitution is one where all laws of the constitution can be amended by an ordinary law-making process. On the contrary, in a rigid constitution, the laws of the constitution can only be amended by a special procedure.

- **Unitary/ Federal**

A unitary Constitution is the one that creates a system of government in which power is vested in the central government organs. The administrative sub-divisions in unitary form of government are subordinate to the center and function under the direct authority of the center.

A Federal constitution on the other hand creates layers of government. Such layers of government a have constitutional existence and are on most powers independent from each other.

- **Supreme/Subordinate**

Supreme, if it cannot be changed by the act of legislature whether through simple or special majority procedures.

Subordinate, if it can be changed or amended by the act of legislature in either of the two procedures.

- **Separated powers/fused powers**

Fused powers constitution, if there is a substantial overlap of personnel and functions of the three branches

Separate power constitution, if it allows only a limited or no overlap of personnel and functions.

- **Monarchical/Republican**

A constitution is monarchical if the head of state is a monarch who assumes power through hereditary succession to the throne.

A republican constitution is the one that institutes a head of state as an elected person, normally in the name of a president.

Other scholars have added more classifications;

- **Presidential/parliamentary**

They are designated on the basis of the type of the executive they put in place. Accordingly, a presidential constitution creates a form of government to be led by the president as the chief-executive, while a parliamentary constitution establishes a government to be led by a prime minister.

- **Competitive/Consolidatory**

A competitive constitution is one that allows a multiparty political platform for assumption of powers, while a consolidatory constitution does not allow a competitive political platform for assumption of government powers; the latter creates a situation whereby political power is held either hereditarily or by a single party.

Note that; a given constitution may display different features from the different groupings. For example, a given constitution can be written, federal, separated powers, superior, rigid, republican, parliamentary, etc. But it is good to note that one constitution cannot be both written and unwritten, or rigid and flexible, or federal and unitary.

National Policy 'Principles and Objectives'[6] of the Ethiopian Constitution ((Arts. 85-92)

The Ethiopian Constitution does not state whether the provisions or principles in 10th Chapter are justiciable or non-justiciable. Art. 85 states that "any organ of Government shall, in the implementation of the Constitution, other laws and public policies, be guided by the principles and objectives specified under this Chapter." It gives the policy objectives and principles a very important place in the implementation of laws and policies in the country. They are made to be the guiding star for government actions.

Democracy and Constitutionalism

Democratic theory is based on a notion of human dignity: as human beings worthy of respect because of their very nature. Constitutionalism, too, enshrines respect for human worth and dignity as its central principle. To protect that value, citizens must have a right to political participation.

For democratic theory, what makes governmental decisions morally binding is process. Democracy may cause a people to accept respect for competing interests as not only legally but, more importantly, as "itself a form of justice."

Constitutionalism: Constitutionalists tend to be more pessimistic about human nature, fearing that people are sufficiently clever to oppress without hurting themselves. Constitutional theorists do not deny the importance of institutional and cultural checks but see those as insufficient.

[6] What are difference between "principles" and "objectives"

Constitutionalism is, a constitution's ability to constrain government

- Whereas democratic theory turns to moral relativism, constitutionalism turns to moral realism.

What is by Constitutional Democracy mean?

The Constitution as a Political Instrument

State elites proceeded to insert new devices in the constitutions whose purpose was to recentralize power as it had been under colonial rule through four main mechanisms:-

1. The extension of appointive and dismissal authority of the chief executive to all offices in the public service: civil, military, and "constitutional," such as those of judges and attorneys-general.
2. Subjection of political recruitment at all levels (local, municipal, and parliamentary) to strict party sponsorship, the more effectively to monitor commitment to retime values.
3. The expansion of the coercive powers of the state by allowing extensive derogation from "Bills of Rights" wherever these were justiciable. This expansion was usually accomplished by the removal (or weakening) of parliamentary supervision of emergency powers.
4. To ensure that the constitutional order conformed to the inherited legal order; this device was often preferred whenever conflicts arose between the provisions of the constitution and those of specific legislation.

The Constitution lost most of its claim to being the basic law of the land, the arbiter in the power process. Dunce, State elites then revised the domain of administrative law so as to reserve to themselves full and unfettered discretion over public affairs.

Constitutionalism at Sub-National Level in Federations

In federal systems most of the interactions between governments and citizens in federal systems take place at subnational levels. Although citizens are both legally bound to and beneficiaries of both levels of government, they are more affected by the goings-on at the state level. Therefore, the concern for constitutionalism must hold the subnational level institutions and laws accountable to basic standards of rights and freedoms.

The 1995 Constitution of Ethiopia oversees the challenge of accountability of subnational state institutions. **Thus, it has taken a meaningful step by:-**

1. Ordering the fundamental rights and freedoms in its third chapter binding on all levels of Federal and State legislative, executive and judicial organs (Art 13(1)), and

2. Ordering fundamental rights and freedoms specified in chapter three to be interpreted in a manner conforming to the principles of the UDHR, International Covenants on Human Rights and international instruments adopted by Ethiopia (Art 13(2)).

These constitutional rules have established a national minimum standard for the protection and enforcement as well as interpretation of the most basic fundamental rights and freedoms covered in the Constitution. Also, there are other significant provisions in the Constitution regarding subnational constitutionalism. These are:-

Art 50(4) "State government shall be established at State and other administrative levels that they find necessary. ***Adequate power shall be granted to the lowest units of government to enable the People to participate directly in the administration of such units***."

As per art 52, states' constitutions should be consistent with the federal Constitution.

As per art 52/2(a); State shall establish a State administration that best advances self-government, a democratic order based on the rule of law; to protect and defend the Federal Constitution. Therefore, these constitutional provisions significantly contribute to the maintenance of subnational constitutionalism in Ethiopia.

Sub-national Constitutionalism

Subnational constitutionalism is the application of the principles of constitutionalism at the subnational level.

In federal system, subnational constitutions might protect liberty of its people in one of two ways.

1. Directly, through the identification and explicit protection of human rights in a charter of rights or its equivalent.
2. Indirectly, by granting subnational governments affirmative powers sufficient to permit them to shield their citizens from abuses of centralized power at the national level.

The most common method of protecting rights in subnational constitutions is through express specification in a charter or declaration of rights. However, interestingly, provisions found in subnational declarations of rights often duplicate protection for rights entrenched in the national constitution.

A subnational constitution that neither embodies the values of the populace that framed and adopted it, nor establishes for the subnational government any significant role in the direct or indirect protection of

the liberty of subnational citizens, is not a document that drawn by popular ideology of constitutionalism.[7] This analysis suggests that the presence of subnational constitutions need not imply the presence of subnational constitutionalism, just as it is possible to have federation without federalism.

Subnational constitutionalism rests on the premise that an important purpose of subnational constitutions is the direct or indirect protection of liberty through the independent agency of subnational power.

Federalism implies subnational constitutionalism, since such constitution reflect distinctive values and choices of subnational populations, a situation consistent with the widespread existence of subnational constitutionalism.

CHAPTER TWO

FRAMING CONSTITUTIONS: CONSTITUTIONAL MOMENTS AND TRANSITIONS

1. Constitution-Making in General

Constitution-making consists of public participation, inclusiveness (including gender equity) and representation, transparency, and national ownership of the process.

One of the intriguing issues in constitution making is that of popular participation. However, there are very basic questions here:-

Whether popular participation in constitution making is an essential precondition for its legitimacy or not?

What if an excellent constitution is drafted by a body of experts and submitted to the public or to an elected assembly for its approval?

Would that be different from the draft being discussed widely by the various sections of the society and then discussed by a body like constituent assembly or a parliamentary assembly to ratify constitutions?

Another very relevant issue is that of how to ensure quality popular participation. This is particularly a problem in African societies, where the majority of the populace is illiterate and lack exposure to sophisticated, abstract issues. How would we be able to involve the public meaningfully in such situations? Thus, the issue of feasibility poses its own difficulty.

[7] For example, a subnational constitution that does nothing more than formalize the administrative subordination of the subnational to the national government would lack the qualities that indicate an underlying popular commitment to subnational constitutionalism.

Normative Standards for Constitution Making

Effective Participation: The right of rights.

Participation purports the legitimation of a new political order by creating a link between the framers of the constitution and the public. The right to participation in constitution making is derived from the right to "democratic participation" under art 21 of the UDHR. UDHR recognizes the concept of public participation as "democratic participation" whereas Article 25 of the ICCPR provides for every citizen's rights to take part in the conduct of public affairs.

Effective public participation implies the involvement of the public at all stages of the constitution making including in the selection of members of the review process. The process of constitution making can only claim legitimacy and credibility if the people have been meaningfully involved in each stage of the process. There is need to involve the people at all levels whether in a constituent assembly or through a referendum. ***In some cases, the role of the public is limited to providing input in the drafting of the constitution and in the final decision making process of voting through referendum.***

Effective participation also implies that each community, including minorities and the disadvantaged should be consulted. The quality of the process is determined by ensuring the participation of all those who have views and grievances which makes participation genuine and not a charade.

Issues like how and when the people should be involved in the constitution making process have been a subject of debate. Public participation can come in different forms: namely a constituent assembly, public meetings and a referendum.

Consultation on the process and the content

The process of constitution making should be guided by consultation. The consultation process should be transparent and inclusive.

Inclusiveness of the Process

1. **The role of civil society organizations**

Civil society organizations have been recognized as an important force in constitution making process. Members of the civil society, both registered and unregistered, should be allowed to present their views both on the content and the process of constitution making.

2. **The role of religious leaders**

The right to religion and belief is enshrined in most international human rights documents. Each religious group ought to be represented and their views need to be taken into consideration.

3. **The role of women**

Constitution making ought to be inclusive and must protect all especially vulnerable members of the community. In most African patriarchal societies where women have limited or no rights, constitution making is an opportunity to address gender inequality.

4. **Minorities and marginalized**

The process of constitution making should put into account the concerns of minorities and the marginalized. The minorities could be tribal, religious or other divides depending on a particular society. In any process of decision making, equal rights and justice should be of primary consideration. The exclusion of minorities from the process of constitution making affects the democratic character of the process.

5. **Control of the agenda**

The constitution making process should be controlled and owned by the people who form the "constituent power." In some situations, Parliament and political parties drive the process and the people are often neglected throughout the process. The people ought to participate through a structured process at all stages and the parliament should not determine the process.

6. **The level of civic education and awareness campaigns**

The process of constitution making must empower the people through civic education programs. The population must be educated about the role they are supposed to play in the process of constitution making.

7. **Political will**

The political leadership needs to be an honest broker throughout the whole process with the spirit of nation building. It is believed that "Society will not attribute legitimacy to the constitution if the leadership is seen corrupt or having mala fides."

8. **Timing**

In constitution making, the time allocated for each stage and phase matters. The problem is that in most countries, the constitution making process sets the foundation in post conflict countries for incoming elections. This leads the drafters and the organs to work under time constraints, sometimes even omitting important information that would have been received from the public.

9. The referendum

The constitution making process sometimes ends with the people deciding through a referendum. In constitution making, the referendum will be the endorsement of the people to the constitution by the people. The people must be educated and knowledgeable about the referendum process and how it is conducted. The people should be aware of what they are approving and disapproving through a referendum. Referendums should be seen as making decisions on laws that will affect policy and decisions, not voting for political parties in power.

2. The Making of the 1995 Ethiopian Constitution

The making of the 1995 Constitution of Ethiopia does share in both the good and bad stories of constitution making around the world. In 1992, a constitution-drafting commission was established by law (Proclamation No. 24/1992).

The Constitution-Drafting Commission had undertaken the drafting task by dividing itself up into four committees: governmental structure committee; individual and group rights committee; legal affairs committee and miscellaneous committee.

The process of the making of the 1995 constitution was principally guided by the provisions in the Transitional Charter. According to the Charter:

"The Council of Representatives shall constitute the Constitutional commission [sic] to draw up a draft constitution. The Constitutional Commission shall submit to the Council of Representatives the draft constitution." (Article 11)

"Upon adoption of the draft constitution by the Council of Representatives the constitution shall be presented to the people for discussion. The final draft shall be presented for adoption in the constituent assembly to be elected pursuant to the final draft of the constitution." (Article 12)

The Constitutional Commission had the mission of preparing the draft, submitting the same to the COR (Council of Representatives), presenting the draft as adopted by the COR to the people, incorporating the

comments in the final draft as may be deemed necessary, and finally submitting the final draft to the Constituent Assembly (art 4).

Note that; the issue of the composition of the drafting commission was not detailed in the Charter.

Steps in the Making

The making of the Ethiopian constitution underwent the stages of drafting, deliberation, adoption, and ratification. More or less in a manner the proclamation dictates, the drafting process was accomplished in the Commission.

There was little meaningful public participatory debate, especially debate focused on devolution versus ethnic federalism. However, the process was not fully participator.

Thirty years after its entry into force, the 1995 Constitution of Ethiopia has not been formally amended at all. Of course changes to the Constitution have been brought about by political practice and through constitutional interpretation, example for this is:-

1. One can cite changes made to article 98 (on joint taxation power).
2. The procedures for determining identity claims presented by communities to be recognized as distinct nation/nationality/people. This change was brought about by the decision of the House of Federation in the Silte case (further discussed in chapter 12).

Other than these very limited changes, the constitution remained unchanged. What do you think is the main reason for this state of fact?

One thing that has always been there but has emerged more clearly over the past few years is the demand for amending or even discarding the Constitution in order to solve the socio-political and legal problems of Ethiopia.

Those who were highly attached to the making of the Constitution, Primarily the Tigriyan People's Liberation Front (TPLF), the Oromo People's Liberation Front and others having closer political outlook are largely against amending or changing the Constitution.

Another point of critics against the FRDE constitution is that it weakening the country by declaring an unconditional right to self-determination, including secession, of the ethno-linguistic communities in the country; territorializing ethnicity thereby turning Ethiopian citizens into owners and non-owners of ethnic regions and sub-regional entities. They also accuse the Constitution of undermining the synergy and natural integration of the Ethiopian society.

CHAPTER THREE

AMENDMENT AND REVISION OF CONSTITUTIONS

3.1. Introduction

Amendment is the most formal way of addressing problems with the constitution. However, also usage and interpretation are other means to amend a constitution.

A. Unamendability

The constitution may contain formally unamendable provisions. Constitutions often make principles, structures, and symbols impervious to formal amendment by removing them from the realm of amendable provisions. Whatever the motivation for making a provision formally unamendable, it will be necessary to interpret the scope of its formal unamendability against any set of facts that arise.

B. The Operation of Constitutional Amendment

One of the first building blocks in the procedures of constitutional amendment is the power to initiate a constitutional amendment.

Constitutional amendment rules are both sword and shield. Political actors may use them to build or break the constitutional order, to strengthen or weaken institutions, to expand or retrench rights, to 'deconstitute and reconstitute', as Finer well recognized.

3.2. THE RATIONALE FOR SPECIAL PROCEDURES TO AMEND THE CONSTITUTION

The necessity of amending a constitution is inherent in its very nature. A constitution must be regarded as a living document which is designed to serve present and future generations as well as embody and reflect their fears, hopes, aspirations and desires.

Every political system needs to be modified over time as a result of changes in the environment within which the political system operates (including economics, technology, foreign relations, demographics, etc.); changes in the value of the population; unwanted or unexpected institutional effects; and the cumulative effect of decisions made by the legislative, executive, and judiciary.

Another reason that renders constitutions amenable is the fallibility of human nature that is usually reflected in its content. If human beings were perfect and omniscient there would be no need for

constitutions in the first place. Since fallibility is part of human nature, provision needs to be made for revising constitutions to take account of those shortcomings that are revealed by time and practice.

Perhaps the fundamental rationale for providing a special method for amending a constitution is the fact that, unlike any other law, it is in almost all systems explicitly or implicitly declared to be the supreme law of the land.

A written Constitution is the legislation or compact which establishes the State itself. It is a document of immense dimensions, portraying, as it does, the vision of the peoples' future. Because of its very nature and origins, a constitution will lose its value as the supreme law of the land based on the sovereign will of the people if it could be altered easily, casually, carelessly, by subterfuge or by implication through the acts of a few people holding leadership positions.

Three conditions must be present for the amendment process to make a difference.

First, a formal super majoritarian amendment process is unlikely to be an important means of change unless the other usual means of change, such as legislation and judicial interpretation, are unavailable for some reason. If other means of change are available, they will probably have effected the change to a significant degree before a supermajority can be assembled to amend the Constitution.

Second, a formal amendment process is likely to make a difference only when the supermajority that adopts the amendment is a temporary one that was assembled even though society had not fundamentally changed. Deep, enduring changes in society will find some way to establish themselves with or without a formal amendment - if not through legislation or changes in the composition of the courts, then through changes in private behavior. The formal amendment process will have its most significant effect when the supermajority sentiment does not persist.

Finally, for an amendment to matter, it must be unusually difficult to evade. An amendment that specifies a precise rule, for example, is more likely to have an effect than one that establishes only a relatively vague norm. If its text is at all imprecise, an amendment that is adopted at the high-water mark of public sentiment will be prone to narrow construction or outright evasion once public sentiment recedes, as the Fourteenth and Fifteenth Amendments were.

3.3. Amendment of a Federal Constitution

Amendment of a federal constitution may not be handled in the same fashion as that of a unitary constitution.

3.3.1. The involvement of sub-national units in national constitutional amendment

1. The initiation of constitutional amendments

In most federations, it is the national Parliament which has the power to initiate constitutional reforms. This "contributes to the centralist bias built into most federations." There are some exceptions. For example, in Brazil constitutional amendments may be initiated by more than half the legislative assemblies of the States.

2. Constitutional amendment primarily by national Parliaments

In some federations, the amendment procedure is left to the national Parliament with no additional involvement of sub-national units or the people.

3. Amendment by a combination of the national Parliament and sub-national units

A more common method of constitutional amendment in federations is to require the approval of both the national Parliament and a proportion of sub-national units in relation to all amendments or those of particular importance to sub-national units. The United States Constitution, as the first modern federal Constitution, has been a significant influence on other federations.

The involvement of sub-national units in the constitutional amendment process helps ensure that the federal balance is not tipped too far in favor of national power and protects the special interests of sub-national units. It may also have the advantage of preserving liberty by checking the power of the national government.

4. Inviolable protection of the federal structure

Some federal Constitutions refer to their federation as "indissoluble' or 'indivisible," or otherwise expressly prohibit its dissolution. It is not always clear whether such statements are simply aspirational in nature, or whether there is an intention to prohibit constitutional amendments that would abolish subnational units and the federal system.[8]

Germany has a constitutional provision known as the "eternity clause" which prohibits amendments to the Basic Law that would remove the federal system or impinge on the basic principles set out in Articles 1

[8] For instance; In Brazil, amendments to the Constitution may not be considered if they propose the abolition of the federal system. The immutability of the federal system was first included in the Brazilian Constitution in 1891 and has been maintained in all Constitutions since. Such a provision, however, does not prevent a new Constitution being brought into effect which is unitary in nature.

and 20. The German Constitutional Court has therefore held that constitutional amendments may be null and void if they are contrary to these fundamental constitutional provisions.

As a general principle, the inclusion of inviolable provisions in a Constitution is anti-democratic and denies ultimate sovereignty to the people.

3.3.2. Representation in the upper House of the national Parliament

Most federations have bicameral national Parliaments with the upper House of that Parliament representing to some extent the interests of sub-national units. Sub-national representation in upper Houses is important both in relation to the passage of national legislation which may affect sub-national units, and in relation to constitutional amendment.

Three factors tend to influence the effectiveness of sub-national representation in national upper Houses.

1. **The Extent Of Sub-National Representation**

In most cases each sub-national unit is given equal representation regardless of size or population. This can lead to significant over-representation of smaller States.[9]

2. **The System Used For Choosing Sub-National Representatives In The Upper House**

Where representatives are appointed by the federal government, then party politics tends to prevail (e.g. Canada). Where the system is one of direct popular election, representatives also tend to regard themselves as being beholden to party interests rather than the interests of the sub-national unit which they formally represent.

Where representatives are chosen by the legislature or government of the sub-national unit[10], they are more likely to regard themselves as representing the interests of that sub-national unit, although party interests may still play a significant role.

3.4. The Amendment Procedure of the 1995 Constitution of Ethiopia

The amendment of the Ethiopian Constitution is governed by Arts 104 and 105. The Constitution does not regulate how proposals for amendment should be conceived. ***Do you think the people can directly table constitutional amendment proposals for consideration in the absence of a clear procedure in this regard?***

[9] (e.g. Argentina, Australia, Brazil, Malaysia, Mexico, Nigeria, Russia, South Africa and the United States)
[10] (e.g. Austria, Germany, India, Malaysia, Russia and South Africa)

Article 104: Initiation of Amendments

> Any proposal for constitutional amendment, if supported by a **two-thirds majority vote in the HPR**, or by a **two-thirds majority vote in the HF** or when one-third [two third] of the State Councils[11] of the member States of the Federation, by a majority vote in each Council have supported **it, shall be submitted for discussion and *decision* *to the general public*** and to those whom the amendment of the Constitution concerns.

Article 105: Amendment of the Constitution

1. All rights and freedoms specified in Chapter Three of this Constitution, this very Article, and Article 104 can be amended only in the following manner:
   a) When all State Councils, by a majority vote, approve the proposed amendment;
   b) When the House of Peoples' Representatives, by a two-thirds majority vote, approves the proposed amendment; and
   c) When the House of the Federation, by a two-thirds majority vote, approves the proposed amendment.
2. All provisions of this Constitution other than those specified in sub-Article I of this Article can be amended only in the following manner:
   a) When the House of Peoples' Representatives and the House of the Federation, in a joint session, approve a proposed amendment by a two-thirds majority vote; and
   b) When two-thirds of the Councils of the member States of the Federation approve the proposed amendment by majority votes.

As you can see from Art 104, without a clear indication as to how the proposal may get to the table, it is stated that if a proposal for constitutional amendment is supported by two-thirds majority vote in the HPR or by the same majority in the HF or by a majority each in one-third of state legislatures in the Federation, the proposal would be submitted for discussion and decision to the general public and to those whom the amendment of the Constitution concerns. This stage is technically known as initiation of amendment. Once amendment is initiated at either level, the next process is its submission for discussion and "decision' to the general public and others particularly interested.

One perplexing/Confusing issue here is the idea of **"decision"** under art 104. What does decision mean here? How would the general public decide on an amendment "initiated' but not subjected to the Art 105

[11] This statement seems unintentional mistake because it is illogical to require a minimum votes to pass a valid decision. Thus I think it should corrected as "two-thirds of the Councils of the member States of the Federation"

procedures? What is the consequence of "rejection" by the general public of the initiated amendment? Would it return the initiated amendment to second consideration of the body that initiated the amendment? What other possible consequence does it have? On the contrary, what would be the consequence of approval by the general public of the initiated amendment? Would it make the Art 105 procedure redundant or unnecessary?

It is difficult to understand the real term meaning of the idea of "decision" by the general public in Art. 104. Obviously it cannot be taken as a referendum because it was not intended to be a final decision on whether the amendment should be ratified or not; there is no indication to that effect either in Art 104 or 105.

We may argue: - it is a decision by the general public and those concerned to say the initiated amendment is fine with them, or may be to modify the amendment after their deliberation. If this argument is correct, then it means that there would be three procedural decision making stages in amending the Constitution:

1. Initiation by the elected bodies as provided in Art. 104
2. Discussion and decision by the general public and those concerned, again as in Art 104; and
3. Finally ratification of the amendments as per Art. 105.

But even if we accept this argument, the possible conflict between decision by the elected bodies under Art 104, and sort of direct democratic decision in the same article is apparent and there is no mechanism designed to solve these problems. Some commentators are tempted to say that in the absence of a clear regulation as to how the two systems under Art. 104 relate, there is no way out except disregarding the term "decision" in Art. 104.

As regards the approval of the initiated amendment, Art 105 lays down two tracks/procedures: one more stringent/strict and relating to Arts 104, 105, and those of Chapter Three of the Constitution, and the other relatively less stringent, embracing the remaining provisions of the Constitution.

In the case of the first track, for a given amendment to be made part of the Constitution it have to be approved by a majority of all State Councils; two-thirds vote of the House of Peoples' Representatives; and by a two-thirds majority vote of the House of the Federation.

In the case of the other constitutional provisions, approval by a two-thirds majority of a joint session of the House of Peoples' Representatives and the House of the Federation; and ***by a simple majority*** in two-thirds of the Councils of the member States of the Federation.

Both procedures described above could be considered as very rigid procedures. Especially as regards the first track, we can say that the Constitution fulfills what is generally known as entrenchment/encroachment of human rights in national constitutions by protecting both the rights provisions and the procedure for amending the constitution from being easily changed.

CHAPTER FOUR

ETHIOPIAN CONSTITUTIONAL DEVELOPMENT

4.1. THE 1931 CONSTITUTION

The first Ethiopian Constitution was proclaimed by Emperor Haile Selassie I on 16 July 1931, in the second year of his reign. This brief constitution consisted of 55 articles which formalized what had already prevailed defacto – i.e. that the power of government in Ethiopia rested essentially with the Emperor.

One significant innovation was the introduction of quasi-representative structures in the forms of two "Deliberative Chambers":

1) The Senate (yaheg Mawossena Meker-beth), and
2) The Chamber of Deputies (yaheg Mamria Meker-beth).

Neither of these was elected nor, strictly speaking, representative. The members of the Senate were appointed by the Emperor "from among the Nobility and the local Chiefs, who served his Empire as Princes or Ministers, Judges, or high military officers."

As for the Chamber of Deputies, "temporarily, and until the people are in a position to elect them themselves, the members of the Chamber of Deputies shall be chosen by the Nobility and the local Chiefs." Neither the size of the chambers, nor the duration of their sessions, or the length of their members' terms of service were specified in the Constitution. These were presumably left to the discretion of the Emperor.

The two deliberative chambers were bound to discuss proposals submitted to them, but had no veto power. The chambers had the constitutional right to reject decrees promulgated by the Emperor during their recess; however, there is no recorded instance of their ever having exercised this right.

The Constitution also formalized the existence of Ministers, but not as a collective body. Ministers were individually appointed by, and were personally responsible to, the Emperor. The deliberative chambers were bound to receive and deliberate on the proposals submitted to them by the Ministers.

4.1.1. The Motives behind the Introduction of the 1931 Constitution by a Monarch

- To consolidate the legitimate exercise of power in the hands of the Emperor. The constitution designed to establish a legal framework that centralized power in the hands of Emperor Haile Selassie, effectively eliminating the personal and arbitrary power of the nobles. It ensured that all authority emanated from the Emperor, who retained control over the constitutional process, thereby legitimizing his complete dominance over governance while allowing others to exercise power only through temporary and revocable delegation. Ultimately, the Constitution facilitated the centralization of authority within the monarchy.
- Emperor's high regard for world respect, and his concern for improving his country's image abroad, an image that was none too bright at the beginning of this century.

4.2. THE 1955 CONSTITUTION

4.2.1. Motives behind the Introduction of the 1931 Constitution by a Monarch

1) Two of the basic motives that inspired constitutional reform in 1955 were the same ones that had inspired the experiment of 1931, namely, a concern for Ethiopia's international image, and the centralization of governmental authority in the hands of the Emperor.
2) Other African states, soon to become independent, were adopting constitutions of the most advanced kind; and Eritrea, with whom Ethiopia had formed a federal union, already possessed a Constitution far more modern than Ethiopia's.
3) The Emperor Haileselassies who is very sensitive to international opinion desired to eliminate the grounds for adverse criticism, ***provided that the process of revision did not threaten the established authority of the throne.*** Far from threatening that authority, the new Constitution greatly reinforced it by continuing the formal process of centralization begun by the 1931 Constitution.
4) Another motive for the constitutional revision of 1955 sprang from the deep concern of the Ethiopian Government for the territory of Eritrea.

Following its liberation in 1941, Eritrea was placed under British military control. In 1950 the United Nations decided that Eritrea should become part of a federal system with Ethiopia, maintaining self-government in domestic affairs, and having her own parliament, chief executive, and administration. Eritrea adopted a modern constitution and a surprisingly effective administration. The Ethiopian Government, however, was extremely worried about emerging separatist tendencies in that region and the

opportunity for their growth provided by regional autonomy.[12] There is not a single mention of federation or any federal provisions in the 1955 Constitution. See highlighted part 208.

5) The internal political situation had changed significantly between 1931 and 1955.
6) A basic change effected by the 1955 constitutional revision was the introduction of the representative principle. While under the 1931 Constitution both chambers were appointed by the Emperor, the 1955 reform made the Chamber of Deputies elective, on the basis of universal adult suffrage. The terms of office are fixed by the Constitution at six years for senators and four years for deputies. The Senate remains an appointive chamber reserved for the nobility.

4.2.2. PARLIAMENT

The first election in the history of the nation was held in 1957, two years after the constitutional revision. In 1957 the National Board of Elections launched an educational campaign, which lasted several months, to encourage voters to register. Approximately 3-5 million registered to vote out of 20.8 million Ethiopia populations in time. The major reasons for the low turn-out were widespread ignorance of the purposes of registration and general lack of interest in the election.

In the absence of political parties, and with only the beginnings of group organization along modern lines, the candidates are usually self-chosen and privately promoted.

The Senate remains an appointed chamber, members being selected by the Emperor.

The size of the Senate, according to the Constitution, should not exceed one-half the size of the Chamber of Deputies. The composition of the Senate should make it a more influential body than the lower house. Composed of former high officials in the administration and armed forces, it commands talent and experience that is not found in the Chamber of Deputies. Many regard their appointment as an involuntary retirement from active governmental service.

Parliament's role in the decision-making process is severely limited. By political reality and constitutional design, Parliament is not a partner in the process of making decisions, but a body which has the right to scrutinize and comment upon proposed decisions and, ***in the ordinary course of events, to give its approval.*** *Does the right of approval imply the right of disapproval?*

In practice, the executive power is widely exercised than the legislature/parliament. The Emperor retains widespread decree power, as previously mentioned. Such decrees, however, require subsequent

[12] The Eritrean Constitution was one modeled on those of Western democracy. It provided for three branches of government based on the rule of law, it stipulated for fundamental freedoms and a multi-party system.

Parliamentary approval. Realistically speaking, Parliament is not expected to, and ordinarily does not, thwart/hinder the executive.[13]

Parliament, nevertheless, occasionally makes a show of opposition. For instance:-

- In 1964, a proposal regulating landlord-tenant relations concerning the sharing of crops was permanently blocked by the Senate.
- In 1964, a proposed loan from the Italian Government aroused intense opposition, and was rejected by the Senate.
- In 1966 a proposal by the Telecommunications Board for a loan by the World Bank was twice voted-down (rejected) in the Chamber of Deputies.

Nevertheless, both proposals were eventually approved. When Parliament tries to oppose the executive, it becomes subject to pressures it cannot resist. Therefore,

- ***Parliament had more opportunities to modify than to reject legislation.***

Parliamentary initiative in this process is practically non-existent. Theoretically, any ten members have the right jointly to propose legislation. In practice, although a considerable number of proposals are made by members in both houses, almost none progress beyond that stage.

To date, Parliament has not made any significant impact on the political process of Ethiopia.

The Ethio-Eritrean Federation (1952-1962)

Eritrea did not exist as an entity of its own prior to 1890 when it was created by Italy. It named Eritrea by Rome.

Menelik seized the opportunity provided by the political vacuum created and sealed an Italo-Ethiopian pact, the treaty of Wuchale, in May 1889. As a result, part of the territory was ceded and in January 1890, Eritrea was born as an entity. From 1890 until its liberation in 1941, Eritrea was administered as a colony by the Italian Colonial Ministry and after liberation from Italy Eritrea remained under British rule till 1952. In November 1949, The UN General Assembly passed the resolution on December 2, 1950 and the Resolution stated that ***Eritrea should form "an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian crown."*** The first seven Articles of the Resolution passed by the UN General Assembly on December 2, 1950 formed the Federal Act. A draft constitution prepared by UN

[13] As the Emperor pointedly reminded members in 1964, "laws proposed to you have been prepared by experts, reviewed by the responsible Minister and the Council of Ministers as a whole and approved by us. Only when they have been found to serve the interest of the nation are they submitted to you.

experts was submitted to an Eritrean Assembly and the latter adopted it on 10 July 1952. By proclamation Number 124 of 11 September 1952 the Eritrean Constitution with the Federal Act was put into force in Negarit Gazetta. At this point in time, the federation of Eritrea with Ethiopia came into effect.

The government of Eritrea was authorized, as a manifestation of its autonomy, to exercise legislative, executive and judicial powers. The actual division of power under the federal act vested a number of basic functions in the federal government: notably defense, foreign affairs, currency and external trade while reserving residual powers to the Eritrean government.

The Resolution characterized Eritrea as "an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown." It did not accord Eritrea the status of a state in a federal union with Ethiopia. In a federation resulting from two units, one would expect there to be three institutions. The two constituent units and one other overarching federal government for both of them, furthermore, a supreme constitution which both units submit to, is a requirement. None of them existed in the UN sponsored federal compromise.

However, this constitutional ambiguity could not serve as a justification for not implementing even the regional autonomy. Even Eritrea's mere status of autonomous region was not tolerated by Haile Selassie's regime.

In 1958 the Eritrean Assembly voted unanimously to abolish the Eritrean flag and use only the Ethiopian flag. In 1959 the Ethiopian penal code replaced the existing legislation in Eritrea. In 1960 the Eritrean assembly voted unanimously to change the name Eritrean government to Eritrean administration. On 14 November 1962 again the Assembly voted unanimously for the abolition of the federation.[14] Thus, Eritrea did not have a legal personality under international law until 1993.

4.3. The 1987 Constitution

The draft constitution was completed in 1986 and was formally submitted to public debate and ratified by a referendum in February 1987. While formally the Shengo constituted the highest legislative body, in practice, the Shengo was not to be sitting continuously but only once a year for a set period.

The Constitution stated that Ethiopia is a unitary state constituting administrative and autonomous regions.

[14] Therefore, it was the elected Eritrean Assembly that unanimously decided to terminate the federation in the first place.

4.3.1. An important political development of the 1980s Derg Epoch

The PDRE Constitution expressly stated the possibility of organizing regional autonomies, With a view to calm this resistance and to rob the rebels' cause.

The 1987 Constitution was also the first to recognize the presence in Ethiopia of different nationalities, to address the question of nationalities. The National Shengo was empowered to determine by subsequent legislation the autonomous regions, their powers and boundaries.

CHAPTER FIVE

DEMOCRACY, ELECTIONS AND THE RULE OF LAW

5.1. DEMOCRACY

Democracy is a term that is used to describe a political system that puts in place rules and procedures through which the people govern themselves through representatives they periodically elect. Democracy also connotes a system through which the people directly take part in decision making and conduct of public affairs. The roots of "democracy" are the Greek words *demos* and *kratos*. *Demos* mean the people, while *kratos* means rule; hence, rule by the people.

Robert Dahl stipulates five process-oriented criteria for democracy:-

1) Effective participation: Before a policy is adopted by the association, all the members must have equal and effective opportunities for making their views known to the other members as to what the policy should be.
2) Voting equality: When the moment arrives at which the decision about the policy will finally be made, every member must have an equal and effective opportunity to vote, and all votes must be counted as equal.
3) Enlightened understanding: Within reasonable limits as to time, each member must have equal and effective opportunities for learning about the relevant alternative policies and their likely consequences.
4) Control of the agenda: The members must have the exclusive opportunity to decide how and, if they choose, what matters are to be placed on the agenda. Thus the democratic process required by the three preceding criteria is never closed. The policies of the association are always open to change by the members, if they so choose.

5) Inclusion of adults: All, or at any rate most, adult permanent residents should have the full rights of citizens that are implied by the first four criteria. Before the twentieth century this criterion was unacceptable to most advocates of democracy.

5.2. ELECTIONS AND ELECTORAL SYSTEMS

Electoral system can be categorized in to four categories

- Plurality • Majority • Proportional ♣ Mixed

5.2.1. Plurality Electoral System

A plurality system, also called "First-past-the-post" or "winner-take-all". It is a method used in many electoral systems where the candidate with the most votes wins, even if they do not achieve an absolute majority (more than 50% of the votes). Such an electoral system clearly does not represent the interests of all (or even most) voters.

For instance: Imagine a small town that is holding an election for a single seat in the local council. There are four candidates running for the position:

Candidate A: 40 votes

Candidate B: 35 votes

Candidate C: 20 votes

Candidate D: 5 votes

Despite not having a majority of the votes, Candidate A wins the election because they have more votes than any other candidate.

Advantages of plurality systems:-

1) It is easier to understand than are Majority or Proportional Representation systems
2) The system also tends to produce a single party government which can adopt policies and legislation without the need to rely on the consent and support of any other party.

Disadvantages of plurality systems:-

1) It results in the election of a government that does not receive support from a majority of the electorate, or even the largest number of votes.
2) It resulted to Many votes are wasted. Since a candidate needs to have only a plurality of votes to be elected, most voters may actually have voted against the winner (although their votes are split among several candidates).

5.2.2. MAJORITY ELECTORAL SYSTEM

Attempt to provide a greater degree of representativeness by requiring what candidates need to achieve a majority of votes in order to win. "Majority" is normally defined as 50%-plus-one-vote. If no candidate gets a majority of votes, then a second round of voting is held. In the second round of voting, only a selected number of candidates from the first round are allowed to participate. In some countries the top two vote-getters in the first round move on to the second round.

Advantages of Majority Electoral System:-

It prevents the election of any candidate who lacks an absolute majority of the vote, thus overcoming one of the main criticisms of First-past-the-post.

5.2.3. PROPORTIONAL REPRESENTATION ELECTORAL SYSTEM

Proportional representation (PR) is an electoral system designed to allocate seats in a legislature in proportion to the number of votes each party or candidate receives.

Advantages of PR:-

1) **It** creates a system whereby votes cast would not be wasted and thus encourages greater voter turnouts.
2) It gives the chance for diverse representation diverse political parties and, thus, political opinions.

3) It gives a better chance for minorities and women to be represented.

Disadvantages of PR System

1) It will not give voters a chance to choose their favorite representative in their constituency.
2) It may also result in a very fragile government that is not in a position to implement its policies.

5.2.4. Universal Instruments and Elections

Article 21 of the 1948 Universal Declaration of Human Rights, sets out the basic premises for "election rights," which were later developed in article 25 of the 1966 Covenant on Civil and Political Rights

Declaration on Criteria for Free and Fair Elections Adopted By UN Inter-Parliamentary Council At Its 154th Session In Paris On 26 March 1994:-

1. Free and Fair Elections

In any State the authority of the government can only derive from the will of the people as expressed in genuine, free and fair elections held at regular intervals on the basis of universal, equal and secret suffrage.

2. Voting and Elections Rights

1) Every adult citizen has the right to vote in elections, on a nondiscriminatory basis.
2) Every adult citizen has the right to access to an effective, impartial and non-discriminatory procedure for the registration of voters.
3) No eligible citizen shall be denied the right to vote or disqualified from registration as a voter, otherwise than in accordance with objectively verifiable criteria prescribed by law, and provided that such measures are consistent with the State's obligations under international law.
4) Every individual who is denied the right to vote or to be registered, as a voter shall be entitled to appeal to a jurisdiction competent to review such decisions and to correct errors promptly and effectively.
5) Every voter has the right to equal and effective access to a polling station in order to exercise his or her right to vote.
6) Every voter is entitled to exercise his or her right equally with others and to have his or her vote accorded equivalent weight to that of others.
7) The right to vote in secret is absolute and shall not be restricted in any manner whatsoever.

5.2.5. The Ethiopian Election System

The Ethiopian legal regime on election comprises various laws and regulations that one way or another deal with elections in Ethiopia. The main ones are:-

- The FDRE Constitution
- Proclamation No. 1133/2019 (Electoral Board of Ethiopia Establishment Proclamation)
- Proclamation No. 1162/2019 (Ethiopian Electoral, Political Parties Registration and Election's Code of Conduct Proclamation)
- Proclamation No. 88/1997 (Proclamation on the Loss of Mandate of Members of the House of Peoples' Representatives)

Article 38 of the Ethiopian Constitution provides that every Ethiopian national has the right to vote and to be elected, in accordance with the law, without any discrimination on the basis of color, race, nation, nationality, sex, language, religion, political or other opinion or other status. It also provides in a clear manner that elections shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expressions of the will of the electors. The Constitution also guarantees everyone the right to be a member in a political organization. It also guarantees to everyone the right to freedom of association for any constitutional or legal purpose or cause.

Proclamations No. 1133/2019 and 1162/2019 provides for a comprehensive set of election rules. Proclamation No. 1133/2019 establishes a National Election Board (NEBE) as an independent entity with legal personality accountable to the House of Peoples' Representatives. NEBE has now 5 members that are designated by the House of Peoples' Representatives (HPR) who work on full-time basis.

NEBE is entrusted with such important powers and duties as to conduct any election in the country that is carried out in accordance with the Constitution and Proc. No 1162/2019, to issue directives necessary for the implementation of the Proclamation, to evaluate the conduct of elections held from time to time and cause studies to be conducted, to provide public civic education regarding elections, to organize and train the manpower required for conducting elections, to investigate, cancel election results and order re-election where it has evidence to believe that the scope and nature of any fraudulent practice in the course of elections is bound to determine the outcome of the election, to rectify electoral irregularities and decide on complaints submitted to it, and to confirm and officially announce electoral results (see Proc. No. 1133/2019).

5.2.6. Appointment of Board Members – Process, Number and Criteria

According to article 5 of Proclamation No. 1133/2019, the [prime minister] establishes an independent committee composed of eight representatives of religious institutions, trade unions, employer association, the national human rights commission, civil society, and elders, who will prepare a shortlist of nominees for Board membership. The Committee then receives nominations from the public, political parties and civil society organizations and prepares a shortlist of nominees twice the number of vacant positions through transparent and competitive processes and sends it to the PM. After that, the PM conducts consultations with representatives of competing political parties on the shortlist and presents nominees to the available position/s to the HPR, by identifying the nominee for Chairperson and Deputy Chairperson, in case those positions are open. A nominee gets confirmed a member of the Board if s/he receives a majority vote of the HPR.

some political party representatives were not satisfied that the law does not require their consent, rather than consultation, on the nominee to be presented to parliament and the super-majority vote proposed for HPR's confirmation was not accepted, the process of appointment is as participatory as it could be within the appointment process defined by article 102 of the Constitution.

Tenure and Removal of Board Members

The tenure of appointment of members of EMBs (Election Management Board Members) is a factor that affects their independence. The new Proclamation provides that the term of office of Board members shall be six years, with a possibility of reappointment for an additional one term.

The Proclamation further provides that a Board member shall not be appointed to any high government office, which it defines as including the positions of Minister, State Minister, Ambassador, Commissioner, and deputy Commissioner, for two years after finishing his/her term of office or resigning on his/her own accord.

To ensure their independence and impartiality, members of EMBs should be protected from undue threats of dismissal or other disciplinary actions. The grounds for removal must be clearly outlined and relate to gross misconduct, incompetence, and physical or mental incapacity. The procedure of removal should be strict enough to protect the independence and impartiality of the members. The members of EMBs may enjoy the protection, status and positions equivalent to high level officials, such as the highest judges.

5.2.7. Mandate of NEBE

The new Proclamation separated the powers and duties of the Board as a whole and those of the now five-member body called "Management Board".

The Proclamation further defines the mandate of the Management Board as one of determining overall policy directions, adopting directives and making final decision on all election-related matters. One notable mandate is the power to appoint the Chief Executive and Deputy Chief Executive of the Secretariat, which was done by the HoPR under the previous law.

Another notable change is the fact that the Board no more has power to adopt regulations, which it had under the previous Proclamation. Because the Board is directly answerable to the HPR and not to the Council of Ministers, which normally issues regulations, the fifth HPR held the position that it is within its mandate to issue regulations for independent institutions that report to it, despite arguments to the contrary. Consequently, under Proclamation No. 1133/2019, the Board can adopt only directives.

Financial Autonomy

Independence of National Election Board also depends on their financial autonomy. The EMB may be given the authority to directly make submissions to parliament on its proposed budget.

5.2.8. The conduct of elections – from constituency mapping to vote counting

In order to realize the principle of every vote carrying equal weight, recognized in Proclamation No. 1162/2019 requires that constituencies shall comprise of comparable size of population and the disparity between them may not in any case exceed 15%.

The necessary level of standard setting and exercise of supervision by NEBE and the national government on local elections is required under the proclamation. The law further empowers the Board to put in place standards for local elections by issuing a directive to that effect.

Proclamation No. 1162/2019 lays down the principles, rules and procedures on the conduct of democratic elections. It guarantees broadly defined right to vote by providing only minimal restrictions. In order to make sure that these minimum restrictions are not posed as pretext to restrict citizens' right to vote, the law provides sufficient guidance to election officials on how to carry them into effect. For example, regarding the ascertainment of the duration of residence (6 months required), the law accepts not only residence ID cards but also many other identification documents and even sworn oral testimonies made by acquaintances.

Likewise, the law maintains minimum requirements for candidature. One of the most important achievements of the reform of the electoral law is the change made to the language requirement for candidacy that was maintained in the repealed electoral law, which prescribed knowledge of the language of the regional state or the area of his/her intended candidature as one of the requirements for candidature.

Other requirements for candidature in the new law are citizenship, being 21 years of age at the time of registration and one year continuous residence in the constituency of intended candidature. Candidates and political parties participating in elections are assured strong rights and freedom under the new electoral legislation.

For example, it provides that candidates registered for elections cannot be arrested or prosecuted until election results are officially known, unless he/she is apprehended flagrante delicto.

A registered election candidate, on her/his own or through her/his supporters, has the right to call rallies/gatherings and organize peaceful demonstrations without the need to request permission from the administration or municipality but by simply sending a written notification and respecting his/her legal duties.

Candidates also enjoy equal access to state-owned media such as radio, TV and newspapers. It unequivocally stipulates that government officials at any level shall have the obligation to create conducive conditions for candidates to utilize such facilities as radio and television stations, newspaper, and assembly halls under their respective authority without discrimination.

The election law prohibits persons with guns or intoxicated individuals from being found within 500 meters' radius of polling stations. The law allowed persons who need assistance to vote to bring their own helpers

5.2.9. The Registration and Regulation of Political Parties

A political party is an association created by individuals who want to take part in the management and administration of public affairs of their country by assuming different public roles through democratic elections and various other ways.

Regulation of political parties is justified on at least two grounds.

1. The fact that political parties are special types of 'public utility' associations whose purposes are among others to assume political power on behalf of the electorate, 'linking the citizen and the state'. Political parties have two broad functions: ***Representative Function*** and ***Institutional Function***. Thus, the centrality of the role of political parties in the democratic process necessitates the establishment of some ground rules according to which all political parties function.

2. The growing challenges in regard to political party financing: Political parties obtain substantial amount of money in public funding. The state therefore wants to make sure that the funding it provides are properly utilized and accounted for

The legal regulation of political parties needs to balance the regulatory disposition with the freedom to associate for political purposes.

The proclamation required minimum number of founding members for the establishment of a political party. Accordingly, ten thousand founding members are required in order to establish a nationwide party, and such party must have at least 15% membership in four regions of the country and its members from any one region must not exceed 40% of the required number of founding members.

In the case of regional parties, the law requires 4000 founding members, of which more than 60% should be permanent residents of the designated region.

Registration is a requirement for legality of political parties in Ethiopia.

The provisions of the law pay serious attention to ensuring the internal democracy of political parties. It provides that the bylaws of a political party shall include: details of the various organs of the party, the procedure for their election, their tenure and description of their respective functions. It also provides the procedure for the nomination of party members for national and other various level elections; and the election of its leadership and other officials at all levels must be conducted in a transparent, free and fair manner, where secrecy of the ballot is protected.

Case Study

Benishangul-Gumuz region adopted a law requiring being able to speak one of the five endogenous languages of the region in order to be eligible to be a candidate in the region.

The complainants argued that Art. 38 of Proc. No. 111/95 violated Art 38 of the Constitution which prohibits discrimination in voting and candidacy rights on the basis of language. The HoF did not deal with the constitutionality issue. But it said in its 2000 decision that if the candidate can speak the working language of the state, s/he can run for election. So by implication the decision means one cannot be a candidate in a region unless he/she speaks the working languages of the region. **Do you think this decision is consistent with the requirements of Art 38 of the Ethiopian Constitution?** It is worth noting that Proclamation No. 1162/2019 has removed the requirement for proficiency in any language from being a criterion for candidacy.

5.2.10. Electoral Dispute Resolution Mechanisms under Proclamation No. 1162/2019

It establishes judicial review of the administrative decisions of various structures of NEBE by various levels of courts, including those of the Management Board.

The decisions of the Management Board on administrative matters, such as political party registration, can go on appeal to the Federal High Court whereas decisions relating to electoral processes and results are appealable to the Federal Supreme Court.

Regarding appeals from the decisions of Grievance Hearing Committees at the polling station, constituency and regional office levels regional courts of different levels have been authorized to consider cases on appeal from the grievance committees.

'***Grievance hearing committees'*** are the lower level administrative decision-making bodies and which are unique to the Ethiopian election dispute settlement system.

The grievance hearing committee members at the polling stations and constituencies are now directly elected from the voters who live in the respective constituencies. They should not be members of any political party and be personalities known for their integrity and be representative of gender.

It prescribed specific time for settlement of the disputes, including by the Board and the Federal Supreme Court that are required to hand down their decisions with ten days and one month, respectively, from the time of receipt of the complaints.

5.3. THE RULE OF LAW

"Rule, supremacy, or predominance of law," means in the first place that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land.[15] ***"Rule of Law"*** mean that no man is above the law and that every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.[16]

5.3.1. The important concept of rule of law by the International Commission of Jurists (ICJ)

The commission identified and elaborated four thematic areas:-

1) The Legislative and the Rule of Law
2) The Executive and the Rule of Law

[15] Dicey
[16] 2nd definition by Dicey

3) Criminal Process and the Rule of Law, and
4) The Judiciary and Legal Profession under the Rule of Law.

1. The Legislative and the Rule of Law

The legislature carried out the function of creating and maintaining conditions that would uphold the dignity of man. The committee also stated that, limitations on the legislative power should be enshrined in a constitution and safeguarded by an independent judicial tribunal. Thus, the legislature had the responsibility to: abstain from enacting retroactive penal legislation; not discriminate in its laws between one citizen and another; not interfere with freedom of religious belief; not deny constitutionally granted rights and principles.

2. The Executive and the Rule of Law

The committee on the executive concluded that the granting of power by the legislature to the executive should be undertaken within the narrowest possible limits and that legislature should define the extent and purpose of such delegated powers, as well as the procedures by which such delegated power was to be brought into effect. An independent judicial body should be given the power to review the legislation passed by the executive (Judicial review).

3. Criminal Process and the Rule of Law

The committee made its conclusions regarding the prohibition of retrospective enactment of penal legislation (certainty of the law) as well as on the principle of presumption of innocence; the burden of proof should only be shifted once facts creating a contrary presumption had been established. The prosecution should not withhold favorable evidence from the accused.

4. The Judiciary and the Legal Professions under the Rule of Law

The independence of the judiciary would be safeguarded by certain measures, including co-operation between at least two branches of the state (i.e. judiciary and legislative) on the appointment of judges. Furthermore, the committee perceived the “irremovability” of the judiciary as an important safeguard of the Rule of Law.

CHAPTER SIX

FORMS OF GOVERNMENT AND SEPARATION OF POWERS

6.1. FORMS OF GOVERNMENT

There are three major forms of government: Parliamentarism, Presidentialism, and Semi-Presidentialism.

The study of democratic regimes cannot be separated from the study of electoral systems

6.2. SEPARATION OF POWERS AND ORGANS OF STATE

6.3. SEPARATION OF POWERS

Separation of powers is a means of limiting government power and hence for institutionalizing constitutionalism.

Political theorists, such as Aristotle, J. Locke and Montesquieu paid a good attention to the concept of separation of powers. But it was Montesquieu, who fully articulated the notion of separation of powers between the three branches of government.

In his work, ***The Spirit of Laws (1748),*** Montesquieu taught us that the three government institutions must be kept separate from each other. The idea of separation of powers between the three branches of governments is aimed at avoiding, to the extent possible, the concentration of power in one branch of government and reducing the risks attached to it (likelihood of having arbitrary/tyrannical government that combines in one person or organ the power to make, execute, and interpret laws).

- Both Separation of powers and the relationship between the three branches of government should exist to ensure **Check and Balance.**

It is important noting that it has become difficult to uphold the traditional concept of separation of power due to the modern political practice. The legislature may delegate some powers to the executive, including the power to issue regulations, directives that resemble law making, with some guidelines to be followed. A Parliament may also employ quasi-judicial functions against its members when they violate the disciplinary codes adopted by parliament, or it may remove the immunity of its members.

A. Legislative–Executive Relations in the Ethiopian Parliamentary System

The executive is the most important and most powerful of the three branches of government and operates more or less as the engine of the state.

The EPRDF has controlled Ethiopia's parliament for four consecutive elections since 1995; in none of these elections has the opposition posed a threat. Parliament remained a weak institution unable to monitor the executive, and, save for the 2005-2010 term. While parliament's supremacy over the executive is stipulated in the constitution, in practice ***'democratic***[17] ***'centralism'***[18] seems at odds with an autonomous, sovereign legislature. In practice whatever comes from the political leadership must be obeyed at all costs. In short, it is 'centralism with little or no democracy'.

In Ethiopia the Party is omnipresent: both within the party and parliament, voting is more a matter of organisational coercion than of democratic decision-making process. Operating under party discipline, MPs are consequently not free agents but instruments of party preferences as determined by party leaders. In effect, the MP's mandate as trustee is 'expropriated', with the executive.

6.4. Organs of State

I. The Legislature

The powers legislative assemblies wield depend on forms of government, and a host of other things. For example, in a parliamentary form of government, the legislature is the pinnacle of political power with the power to fire the chief executive, and force out members of the cabinet as it deems needed. Legislative assemblies can be one-house or two-house. In two house assemblies, we have job-division between the chambers, often the lower house being a direct representative of the people while the upper house represents different organized groups within the society (HoF in Ethiopia). In the parliamentary form of government, the lower house in addition is normally more powerful and is more directly concerned with the executive than the upper house.

Parliamentary immunities

The representatives of the people must enjoy certain guarantees, on the one hand to underline the dignity, gravity and importance of their office and, more importantly, to give them the peace of mind they need to discharge their mandate.

Dissolution of Parliament

The situation in which the parliament is disbanded before the expiry of its term is very common in parliamentary and semi-parliamentary systems, and is rare in presidential systems.

[17] The possibility of grassroots participation and influence over the higher levels of party structure (hence 'democratic')

[18] Lower-level party members must accept decisions made by the higher level (hence 'centralism')

Art 60 of the FDRE constitution regulates the dissolution of HPR. The first scenario is said to be that the Prime Minister may cause the dissolution of the House with the consent of the House, before the expiry of its term in order to hold new elections. Here we see that it is the Prime Minister who can cause the dissolution, not the head of state. The other point is that the House must consent to its dissolution. How would the House consent to its dissolution? This means that if the House refuses to consent, the Prime Minister cannot dissolve the House; in such a case what would happen to the relationship between the Prime Minister and the House? Can they undertake the government's business properly?

Article 60(5):- Following the dissolution of the House, the previous governing party or coalition of parties shall continue as a caretaker government. Beyond conducting the day to day affairs of government and organizing new elections, it may not enact new proclamations, regulations or decrees, nor may it repeal or amend any existing law. However, What if an emergency situation has occurred while a parliament has been dissolved? Should the care-taker government be prohibited from passing an emergency declaration as per Art 93 of the Constitution?

1. **Functions of parliament**

The essential common feature of legislatures of modern democracies is their representation of the popular will.

"**Parliaments of Democracies"** those that represent the will of the people, whereas **Parliaments of Non-Democracy** are those who cannot live up to the ideals of representing the popular will.

- The non-democratic nature of a parliament may be immediately linked to the absence of free and fair elections in the election of its members.

2. **The Constitutional Legal Dispensation on Oversight and Accountability in Ethiopia**

Federal Constitution or the Constitution) created a federal republic composed of nine states and two administrative districts. The Constitution details the powers of the two tiers of government, i.e., the national and regional state levels under Articles 51 and 52.

Article 51

Enumerate the powers and functions of the Federal government. This article empowers the federal government to formulate and implement policies, strategies, and plans which affect the whole nation in economic, social, fiscal, monetary, development, science and technology fields. It also empowers the Federal government to do many other things with national and international implications such as formulation and implementation of foreign policy; negotiation and ratification of international

agreements; regulation of inter-state and foreign commerce; make interventions in the regional states in cases of deteriorating human rights and security situations; giving practical effect to the political rights recognized in the Constitution; and enactment of laws for the utilization and conservation of land and other natural resources.

Article 52

Details the powers and functions of the federating states. This article includes the principle of residual powers It also explicitly lists certain powers of the states which include the powers to: establish a state administration that best advances self-government and a democratic order based on the rule of law; enact and execute state constitutions and other laws, and; formulate and execute economic, social and development policies, strategies, and plans of the state. Though the constitution does not include a provision that requires states to establish parliamentary form of government, several parts of the Constitution (such as Art. 50) seem to imply that states should also establish a parliamentary form of government.

Art. 50 lay down the basic structure of the Federal and regional governments. It stipulates that the Federal government and the state governments shall have legislative, executive and judicial powers.

Art. 45 of the Federal Constitution stipulate that "The Federal Democratic Republic of Ethiopia shall have a parliamentary form of government." As an essential mark of this form of government, we have the executive branch of the Federal government (i.e., the executive) to come from among the members of the House of Peoples' Representatives.

Accordingly: Art. 56 of the Constitution states that "A political party or a coalition of political parties that has the greatest number of seats in the House of Peoples' Representatives shall form the executive and lead it;" Art. 73(1) states that "The Prime Minister shall be elected from among the members HPR" Art. 73(2) further states: "Power of Government shall be assumed by the political party or a coalition of political parties that constitutes a majority in the HPR."

- It should be noted that legislative control over the executive in presidential systems and parliamentary systems are different from each other. Any legislative control over the executive depends greatly on the nature of legislative-executive relations.
- In parliamentary systems members of the legislature are required to show loyalty to the government (executive) coming from their party whether the latter does good or bad. This means that due to the kind of loyalty imposed on the party members in the legislative bodies, the latter would not clamp down on the executive as this would be considered to be endangering the interest of the party as a

whole. As the executive leaders often come from the party leadership, it is easy to imagine the executive's indirect control on the legislature in parliamentary systems.

- ***Because of the peculiar relationship between the legislative and executive organs in parliamentary systems, their relationship cannot easily be characterized in terms of checks and balances. Since, there is legally no process by which the executive "checks" the powers of the legislative body. Legally speaking, the executive can be held accountable by the legislature without having the power to demand accountability from that legislative body. The legislative body in such case will only be formally accountable to the constitution and to the electorate.***
- The constitutional system has also created a system of review of the constitutionality of laws and decisions of the legislature by a body in charge of constitutional interpretation. This is a system in which the laws and decisions of the legislature (and in fact of the executive as well) would be nullified if found to be in transgression of the constitution.
- The other control on the legislature is the will of the electorate who would vote members of the former out of office when they become not worthy of support and replace them with others.

Articles 74 and 77 of the Constitution also detail the answerability to the HPR of the prime minister and the Council of Ministers respectively. The overall idea of the two provisions is that these bodies, the two highest executive bodies of the Federal government, are responsible for implementing and executing the laws, policies, plans and strategies put in place by the HPR. This also means that the prime minister and the Council of Ministers are accountable for non-performance or failures.

3. The Legislative Function of Parliaments

The function with which a parliament is most clearly associated is legislative. Currently, the process of legislation in the Ethiopian HPR is guided by Regulation No. 3/2006.

In federal systems, the law making powers are normally divided among national and sub-national legislatures. As to which powers are assigned to which level, there is no universal formula, and the division of powers is made according to the underlying agreements in the society and the main political forces.

The FDRE Constitution has clearly designated legislative powers of the federal legislature, HPR. While those not clearly assigned were reserved to the states' legislatures as per Art. 52 (1)). The important legislative functions of the HPR are set out in Art 55. The main source of federal powers is Art 51, supplemented with other provisions like Arts 96, 99, and 55, itself, which appropriates more law making functions for the federal government, not expressly envisaged in Art 51.

Brainstorming Questions

Art. 55(1) declares that the HPR is the legislature on all matters under the federal jurisdiction, but 55(2), (3), (4) and (5) go on to enumerate the law-making competence of the HPR. What are the distinctions between the three: 55(1); 55(2); and 55 (3-5)? Do you think they serve exclusive purposes as they stand or are they just the result of poor draftsmanship?[19]

II. The Executive

The executive is the other political branch along with the legislature. It's the most powerful of the branches of government as it has a control of the sword.

The Ethiopian constitution also maintains a division and institutional separation between the executive and the legislature, although as a parliamentary system the two politically speaking are "fused" together. The fundamental distinguishing feature of the parliamentary form of government is that the majority party in the legislature or HPR forms and leads the executive. Also it provides that "a political party, or a coalition of political parties that has the greatest number of seats in the House of Peoples' Representatives shall form the Executive and lead it." (Art 56)

The constitution specifically states that "the highest executive powers of the Federal Government are vested in the Prime Minister and in the Council of Ministers." Thus in the absence of a better clarity, one can say that the Prime Minister and the Council of Ministers jointly serve as the highest executive. One should of course be mindful of the division of "the highest executive power" undertaken by Art 74 (for the Prime Minister) and Art. 77 (for the Council of Ministers)

It is interesting to note that the Constitution clearly (Art. 72) establishes the responsibility of the two, saying that "the Prime Minister and the Council of Ministers are responsible to the House of Peoples' Representatives,' while it also stipulates that "in the exercise of State functions, members of the Council of Ministers are collectively responsible for all decisions they make as a body." The Constitution further provides for what seems to be a dual accountability of the council of Ministers under Art. 76: "The Council of Ministers is responsible to the Prime Minister; in all its decisions, the Council of Ministers is accountable to the House of Peoples' Representatives." This begs the question as to how this works in practice.

[19] In my opinion it seems the result of poor draftsmanship. Since under art 55 (1) it concludes that HPR is legislature in all matter fall under the federal jurisdiction. Under its sub art 2 it specify on what matters the HPR is mandated to legislate (this is unnecessary repetition because it is obvious from sub art 1 that the federal legislature mandated to legislate on matter that fall under federal government. Thus, art 55(2) should specify the mater under the federal jurisdiction rather than outlining legislative powers of HPR. Or the art 55 (1) should be deleted from the constitution.
Note this is my personal opinion Abdulfetah. You can take your own stand.

III. The Judiciary

The judiciary is one of the three branches of government and it is the weakest of the three. A fully independent judiciary with the power to make decisions against any and all bodies, governmental or otherwise, official or an ordinary citizen ultimately ensures the vibrancy of democracy and respect for the rights of members of the society. The Ethiopian Constitution is one of those that have entrenched judicial independence in clear and emphatic terms. Art. 78(1) states that an independent judiciary is established by the Constitution.

The removal of judges has also been regulated by the Constitution as an aspect of judicial independence. Accordingly, the retirement age fixed by law; the decision of the Judicial Administration Council (JAC) to remove a judge for violation of disciplinary rules or on grounds of gross incompetence or inefficiency; and the decision of Judicial Administration Council that a judge can no longer carry out his responsibilities on account of illness are the alternative grounds to terminate the tenure of a judge. The approval of such decisions of the Judicial Administration Council by the House of Peoples' Representatives or the concerned State Council is then required. Look at also Arts 79 and 81 on further institutional guarantees for independence of the judiciary.

CHAPTER SEVEN

GOVERNMENT, THE JUDICARY AND EMERGENCY POWERS

The power of the government in times of public emergency is found necessary due to at least two main reasons:-

1. The extra-ordinary power that the government wields during the times of national calamities is almost naked and therefore is a matter of grave concern.
2. The second reason which emanates from the first is that, due to the legal justification for the government to take all necessary measures to put the emergency situation under control, the government authorities and its security forces may abuse their power and unjustifiably trample upon the rights of citizens. It is therefore absolutely necessary to put in place the necessary guard-rails to keep the government's actions within the constitutional-legal framework put in place beforehand for the emergency situations.

Emergency powers are part of the political power. Constitutions empower respective governments to take the necessary measures to save the life of the nation from the danger posed by the exigency situations.

7.1. STATE OF EMERGENCY AND THE FDRE CONSTITUTION

1. Declaration of State of Emergency

According to art 93(1) of the constitution the situations that justify the declaration of a state of emergency are an external invasion, a breakdown of law and order which endangers the constitutional order and which cannot be controlled by regular law enforcement agencies and personnel, a natural disaster, or an epidemic. In these situations, the Council of Ministers can lawfully exercise its power to declare a state of emergency. **To put it differently,**

a) A war of aggression
b) Internal disturbance, such as rebellion and subversive movements
c) Natural calamities like flood, wildfire and transmissible diseases are the only grounds on which a state of emergency could be declared under the Constitution.

The Constitution requires the actual occurrence of the circumstance for a state of emergency to be put in place. Near occurrence or quite immanency are insufficient. The requirement that the breakdown of law and order must be such that it endangers the Constitutional order and cannot be controlled by the regular law enforcement agencies and personnel indicates that a declaration of emergency should be of an exceptional nature.

Article 93(1) (b) authorizes state executives to declare state of emergency within their respective regions when they are confronted with natural disasters or epidemic, provided that such declaration is in conformity with the constitution of the particular state.

Where a state of emergency is declared while the HPR is in session, it should be submitted to the House within 48 hours for endorsement. If the House is in recess, it should be submitted within 15 days of its adoption by the Council of Ministers. If the declaration gets the assent of the HPR, the state of emergency will remain in effect for up to six months. If the members of the HPR, by a two-thirds majority vote so decide, an emergency proclamation may be renewed for a four-month period successively.

2. Non-Derogable Rights under the FDRE Constitution

Article 93 (4) of the Constitution States:

a) The Council of Ministers shall have the power to suspend such political and democratic rights contained in this Constitution to the extent necessary to avert the conditions that required the declaration of a state of emergency.

b) In the exercise of its emergency powers the Council of Ministers cannot, however, suspend or limit the rights provided for in Articles 1, 18, 25, and subArticles 1 and 2 of Article 39 of this Constitution.

The Constitution puts certain rights and freedoms beyond the reach of the emergency powers of the government even when there is an actual and imminent danger against the life of the nation. The list of fundamental rights and freedoms that are non-derogable under the FDRE Constitution include:

Article 1

Although it is not a right, nomenclature of the State is also made non-derogable under the Constitution

Article 18: Prohibition against Inhuman Treatment

1) The right to protection against cruel, inhuman and degrading treatment or punishment
2) The right to be protected against slavery, servitude and the trafficking of human beings

Article 25: The right to equality or Non-Discrimination

Article 39 Rights of Nations, Nationalities, and Peoples

1) The right of Nations, Nationalities and Peoples of Ethiopia to self-determination up to secession
2) The right to speak, to write and to develop their own language as well as to express, to develop and promote their culture and to preserve their history

The FDRE Constitution (under its art 93/ 4 (c)) leaves out some Non-derogable rights and freedoms demonstrated under article 4 (2) of ICCPR. **Thus,** The Constitution fails to exempt the right to life, freedom against imprisonment for contractual debt, right to recognition everywhere as a person before the law and **the prohibition against ex posto facto penal law** as well as right to freedom of thought, conscience and religion from suspension during emergencies.

- **The Prohibition against Ex Posto Facto Penal Law mean:** if a person commits an act that is not considered a crime at the time it is done, they cannot later be charged with a crime if a law is passed that makes that act illegal.

3. Constitutional Safeguards against Abuse of Emergency Powers

Domestic control over emergency power takes two main forms: legislative control and judicial review.

A. Legislative Control

Specific controls may include: a requirement that any resort to emergency powers must be approved, either before introduction or soon after that, by a specified majority of the legislators; a duty on the executive to seek periodic renewals for emergency mandate; time limits on the overall duration of the emergency; and a right on the part of the legislature to terminate the emergency at its discretion.

In the Ethiopian Constitution, an attempt has been made to give HOPR some control over the executive act of proclaiming or declaring an emergency.

The first limitation is that if the state of emergency is declared while the HOPR is in session, the emergency decree should be submitted to the House within forty-eight hours of its declaration. If the emergency is decreed when the HOPR is in recess, then, it needs to be submitted to the House within 15 days of its declaration. In both cases, if the decree fails to get the approval of a two-third majority vote of the members of the HOPR, it has to be repealed forthwith.

The second limitation relates to the scope of the emergency regulations, i.e., the executive can only derogate from what the Constitution designates as "political and democratic rights."

The third safeguard is temporal, i.e., the declaration of emergency is limited to six months. Although the Constitution does not put an upper limit to the number of renewals, it requires the HOPR to reconsider the emergency publicly on a bi-annual basis.

The Constitution entrusts the duty to administer a state of emergence to the **Emergency Inquiry Board** constituted by the HOPR. The Board undertakes a series of tasks including inspection and follow up to ensure that measures taken during the state of emergency are not inhumane. When the Board finds any case of inhumane treatment, it is mandated to suggest certain corrective actions to the Council of Ministers or to the Prime Minister and to ensure that the perpetrators of those acts are prosecuted. It is also empowered to publicize the names of all persons detained by reason of the declared state of emergency within one month and to convey its views to the House of Peoples Representatives on matters of extension of the duration of the state of emergency.

B. JUDICIAL REVIEW

In a system in which the judiciary is empowered to review acts of parliament and the executive action, a declaration of emergency that fails to meet legal requirements could be declared null and void by a court of law.

The Ethiopian Constitution diverges a great deal from the South African and many other constitutions in many important ways. It is plausible to argue that its emergency power arrangement is heavily tilted towards the government and opens leeway for the government to act extra-constitutionally with little control from the parliament and none at all from the judiciary. The Constitution does not say clearly as to who ensures whether the SoE legislation is in conformity with the Constitution.

The reading of art 93 of the Constitution seems to imply that the Council of Ministers is the one to ensure the conformity of particular exercise of emergency power with the emergency legislation, but this is against the notion: ***nemo iudex in sua causa***. The political branches are exclusively in charge: the judiciary or other independent bodies are almost completely shut out of any checking or review of the actions taken by the executive in relation to the emergency situation.

For instance art 8(1) state of emergency proclamation No 5/2021 state that; ***Any judicial organ shall not have authority with regards to the enforcement of this Proclamation until the expiry of the same.*** Therefore in Ethiopia the executive granted power to literally make the emergency law, interpret them and execute them single-handedly. The Emergency Inquiry Board is not given sufficient power to safeguard the rights of citizens in the emergency situation. Members of the Board are selected from among the members of the House (and legal experts).

Ethiopia's constitutional standards on state of emergency tilt towards power and undermine rights. It also denies the judiciary completely of any review power leaving the rights of citizens in the hands of the executive which has high stakes in the matter. It makes the right to life and some other rights, which are made non-derogable by the international human rights instruments, derogable.

CHAPTER EIGHT

FEDERALISM, DECENTRALIZATION AND POWER-SHARING

7.1. Federalism

A constitutional distribution of powers between the center and the sub-national units is an important operational or practical feature of federations. The participation of the federal units in the national decision making process while self-ruling their distinct affairs is an essential mark of a federation. In a federal arrangement, the center cannot unilaterally change, abolish or modify the covenant that creates the federal polity. And sub-national units derive their rights and existence not from the national government but from the constitution that creates them both.

The oldest federation is the U.S. followed by the Swiss federation that was established in 1848, and the Canadian one in 1867.

Experiences of both successful and disbanded federations show that democracy is a condition for a successful perseverance of a federal system.

Although there are many multinational polities in the world, few of them are democracies.

1. **Models of Federalism**

William H. Riker was one of the most influential political scientists to write about federalism, who stresses three factors present in the U.S. form of federalism that he claims to be true for federalism in general:-

A. Coming-Together Federalism

Refers to a model of federalism where independent states or entities voluntarily come together to form a single federal system. It is the result of a bargain whereby previously sovereign polities agree to give up part of their sovereignty in order to pool their resources to increase their collective security and to achieve other goals, including economic ones.

B. Holding-Together Federalism

It refers a situation where a central government seeks to maintain unity among diverse groups or regions within a country. The primary goal is to prevent fragmentation or secession while ensuring that different groups feel represented and included within the larger national framework. It often arises in multi-ethnic or multi-national states where the central government provides varying degrees of autonomy to different regions to accommodate their unique identities and interests.

C. Demos-Constraining Federalism

One of the goals of federalism is to protect individual rights against encroachments/infringement on the part of the central government (or even against the "tyranny of the majority") by a number of institutional devices, such as a bicameral legislature in which one house is elected on the basis of population, while in the other house the subunits are represented equally. In addition, many competences are permanently granted to the subunits instead of to the center. If we can call all of the citizens in the polity taken as a whole the demos, we may say that these devices, although democratic, are "demos-constraining."

D. Demos-Enabling Federalism

Refers to a framework of governance that empowers local or regional governments within a federal system to make decisions and implement policies that reflect the needs and preferences of their

communities. This approach emphasizes democratic participation, local autonomy, and the capacity of smaller political units to address specific issues effectively. By enabling local governments, Demos-Enabling Federalism aims to enhance responsiveness, accountability, and citizen engagement in the political process, ultimately fostering a more vibrant and participatory democracy.

E. Constitutionally Symmetrical and Asymmetrical Federalism

Symmetrical Federalism: - refers to a system of governance where all constituent units (such as states or provinces) have the same powers and responsibilities relative to the central government. In this model, each unit is treated equally, with uniform rights and obligations, leading to a balanced distribution of power.

Asymmetrical Federalism: - refers a system where different constituent units have varying degrees of autonomy and powers. This can occur when certain regions are granted special status or privileges, often due to historical, cultural, or demographic factors. Asymmetrical federalism allows for a more tailored approach to governance, accommodating the unique needs of diverse regions within a single federal framework.

F. Promotion of Political and Economic Unity in Federations

When a federation, not a confederation, is opted for, it means that there is a strong desire to have a political and economic union. There are long-standing shared social and cultural values that unite the people of such a federation more than what separate them.

The rationale of any federation is the same; it is the maintenance of sufficient unity in context of regional diversity and particularities.

One of the reasons for which the Ethiopian federal system is criticized is that it is believed by many not to have laid down a strong anchor for maintaining an everlasting political bond among the various members of the Ethiopian society. This is seen by some as an alarming state of fact because of the existence of the right to secession in favor of the cultural communities. Sure, the constitution says that the nations, nationalities and peoples have the right to equitable representation in the institutions of federal and state governments. But this right remains very general and how and to what extent, and in which government organs it can be demanded is not clear.

G. Regionalism and Democracy in Ethiopia

A. The devolution problematic

The basis of regional governments and one of the unique elements of the constitution is expressed in Article 8 (1), "all sovereign power resides in the nations, nationalities, and peoples of Ethiopia" and further that the constitution is "an expression of their sovereignty." Not only does sovereignty not lie with individual citizens, they in turn are divided into three groups-nations, nationalities and peoples. From this premise it is further held that, ***"Every nation, nationality and people in Ethiopia has an unconditional right to self-determination, including the right to secession" (Article 39 (1)).***

The conditions under which the right to secession can be accomplished include a two-thirds vote of the state legislature, the organization by the federal government of a referendum, majority support of voters in that referendum for separation, and subsequent agreement on the division of public assets.

Although some analysts find the constitutional right to secession extremely dangerous, satisfying the necessary conditions is prove extremely onerous.

7.2. Decentralization

Decentralization of power does not stop only at the division of power between the center and the regional or sub-national levels. It can and should go below the regional level to local levels. Decentralization of power can be devised in unitary systems as well.

Federations follow different approaches to the issue of decentralization of power concerning sub-regional or local governance. Some federations explicitly entrench local governments in their national constitution and determine their powers and functions while others provide for general framework and leave the detail either to regional laws or sub-constitutional national laws. Other still relegate the issue of local governments entirely to the regional governments.

1. LOCAL GOVERNMENT'S EXISTENCE AS SPHERE/LEVEL OF GOVERNMENT IN ETHIOPIA

The recognition of local government in a national constitution as a sphere/level of government is considered the most effective formal mechanism of ensuring the security of local government. The Constitutional recognition of local government in Ethiopia is contentious despite the fact that almost all federal states have three levels of government: ***federal, state/regional, and local***. Having perceived a constitutionally entrenched local government as a threat that may upset the 'federal equilibrium', sub-national units of federal countries often resist its recognition in national constitutions.

A perusal of Ethiopia's federal Constitution reveals that the Constitution envisions the establishment of two categories of local government, ***The Ethnic Local Government*** and ***The Regular Local Government.***

The two categories of local government are meant to realize two distinct objectives.

The ethnic local government is the sub-regional extension of Ethiopia's ethnic-based dual federal structure whose establishment is linked to the right to self-determination of the ethnic communities of the country; a principle that serves as the foundation of Ethiopia's federal system. The argument here is that the Constitution envisages the establishment of ethnic-based sub-regional territorial and political units for the purpose of allowing intra-regional ethnic minorities since those communities, like the larger communities with their own regional states, have the aforementioned rights.

- The ethnic local government is thus a special type of sub-regional government; not a regular system of local government that is established in every part of the country.

The Constitution also enjoins regional states to establish the ***Regular Local Government*** for the purpose of enhancing democratic participation and ensuring efficient service delivery.

The ethnic local government, made up of liyu woredas and nationality zones, is established as per Article 39 of the federal Constitution with the purpose of allowing intra-regional minority ethnic communities to exercise some form self-government.

A nationality zone is established to serve the same purpose as the liyu Woreda, even though it is larger than liyu Woreda.

The Ethiopian Constitution does not explicitly provide for the establishment of ethnic-based sub-regional or local government as, for instance, the Nigerian Constitution, which provides that the system of local government by democratically elected local government councils is under this Constitution guaranteed'. Nor is it like the South African Constitution that expressly establishes local government as one of the three spheres of government.

The FDRE constitution only implies the need for their establishment by recognizing the right to self-government of all ethnic communities; including intra-regional ethnic minorities. Moreover, only one sub-article (Article 50(4)) in the FDRE Constitution, principally dealing with the structure of the regional states, makes a passing reference to the regular local government. The Constitution refers to ***The Regular Type of Local Government*** as ***'other administrative level' not as a level or sphere of government;*** conveying the impression that the regional states have the authority, if they so choose, to create their own administrative arms, not necessarily an autonomous level of government.

- Thus, the lack of explicit recognition of local government in the Ethiopian Federal Constitution coupled with the political practice in the country puts the existence of local government as sphere or level of government under permanent insecurity. Thus, ***the Constitution is not explicit in requiring local political institutions are democratically constituted.***

2. The Ambiguity of Articles 50(4) and 88 of the federal Constitution

Art 50(4): - State government shall be established at State and other. Administrative levels that they find necessary. Adequate power shall be granted to the lowest units of government to enable the People to participate directly in the administration of such units.

Art 80(1):- Guided by democratic principles, Government shall promote and support the People's self-rule at all levels.

7.3. Power-Sharing Arrangements

The ethnic federal/self-determination arrangement made in the Ethiopian Constitution is one version of the institutional response given to the demand for accommodation made by ethnolinguistic communities. To be a solution to political ills of a society, the institutional arrangements for the accommodation of diversity need to be all-rounded and comprehensive, dealing with all areas of public life. Power-sharing arrangements through various institutional mechanisms are one important way of creating mutual trust and harmony between ethnic/linguistic cleavages.

CHAPTER NINE

SELF-DTERMINATION AND MINORITY RIGHTS

9.1. Self-Determination

TWO TYPES OF NORMATIVE THEORIES OF SECESSION:

1. Remedial Right Only Theories

It assert that a group has a general right to secede ***if and only if*** it has suffered certain injustices, for which secession is the appropriate remedy of last resort. This theory typified by John Locke's theory of Revolution, according to which the people have the right to overthrow the government if and only if their fundamental rights are violated, and more peaceful means have been to no avail.

The point of Remedial Right Only Theories is not to deny that there can be special rights to secede in the absence of injustices. Rather, it is to deny that there is a general right to secede that is not a remedial right.

Because they allow for special rights to secede, Remedial Right Only Theories are not as restrictive as they might first appear. They do not limit permissible secession to cases where the seceding group has suffered injustices. What all Remedial Right Only Theories have in common is the thesis that there is no (general) right to secede from a just state.

There can be Special Right to Secede; if

a) The state grants a right to secede (as with the secession of Norway from Sweden in 1905),
b) The constitution of the state includes a right to secede (as does the 1993 Ethiopian Constitution),
c) The agreement by which the state was initially created out of previously independent political units included the implicit or explicit assumption that secession at a later point was permissible.

II. The Right to Secede Vs. the Right to Revolution

The chief difference between the right to secede and the right to revolution, according to Remedial Right Only Theories, is that the right to secede accrues to a portion of the citizenry, concentrated in a part of the territory of the state. The object of the exercise of the right to secede is not to overthrow the government, but only to sever the government's control over that portion of the territory.

The issue of revolution arises usually only when there has been a persistent pattern of abuses affecting large numbers of people ***throughout the state.***

Secession may be justified, and may be feasible, as a response to selective tyranny, when revolution is not a practical prospect. In both the case of revolution and that of secession, the right is understood as the right of persons subject to a political authority to defend themselves from serious injustices, as a remedy of last resort.

2. Primary Right Theories

Primary Right Theories, in contrast, assert that certain groups have a (general) right to secede based on their identity, characteristics, or social contract in the absence of any injustice. They do not limit legitimate secession to being a means of remedying an injustice. It falls into two main classes: ***Ascriptive Group Theories*** and ***Associative Group Theories.***

- **Ascriptive Group Theories:**

These theories assert that the right to secede is based on inherent characteristics of a group, such as ethnicity, culture, language, or religion. The idea is that groups with distinct identities have a natural claim to self-determination.

- **Associative Group Theories:**

Associative group theories emphasize the social contracts and voluntary associations among individuals within a group. These theories argue that if a group of people has formed a distinct political community through mutual agreement or shared interests, they possess the right to secede.

9.2. Protection of Minority Rights

In Ethiopia, we have Ethnic/Linguistic-Based as well as some Caste- Based Minority Groups.

Caste-Based Minority Groups refer to social groups that are marginalized or disadvantaged within a society based on the traditional caste system. The caste system is a hierarchical social classification system that divides people into different categories based on their birth and occupational roles, often leading to systemic discrimination and social exclusion.

Ethnic/Linguistic-Based Minority Groups consists of those small nationalities that are found in different parts of the country. Thus, all groups that cannot have their representatives elected through a normal election process can be generally categorized as minorities.

1. **Power sharing and Non-territorial autonomy**

Titular Ethno-National Group refers to a specific ethnic or national group that is recognized as the primary or dominant group within a particular state or political entity. This group typically has historical, cultural, and political significance in that area and often holds a privileged status in terms of governance, language, and national identity.

"**Intra-Unit Minorities**" refers to minority groups that exist within a larger political or administrative unit, such as a state, province, or municipality. Intra-unit minorities are distinguished from the majority population within that specific unit but may not necessarily be minorities at a national level. For example, an ethnic group may be considered a minority in one region of a country but could be part of the majority in another region.

Although titular ethno-national groups have a constitutionally protected mandate to self-rule, they do not have exclusive control over territory. Instead, the Ethiopian state retains ultimate sovereignty and control over all territory within its borders.

2. Federal government political safeguards regarding intra-unit minority rights

The Ethiopian federal and regional-state constitutions are silent about ***external political safeguard***[20] for intra-unit from titular ethno-national groups. Intra-unit minorities continue to face various kinds of discrimination and marginalization and this has so far been left to the discretion of the states.

[20] [by federal government]

CHAPTER TEN

CIVIC NATIONALISM AND ETHNIC NATIONALISM

What is the place of Ethiopian citizenship beyond membership to one or the other ethno-linguistic communities? Is it desirable to promote civic nationalism in Ethiopia beyond Ethnic nationalism?

10.1. CIVIC AND ETHNIC NATIONALISM

Civic nationalism/ liberal nationalism refer to identity tied to a certain nation or political community (Ethiopia) based on shared values, citizenship, and political principles, regardless of ethnicity or cultural background. It promotes inclusivity and focuses on the rights and responsibilities of citizens.

Ethnic nationalism refers to identity tied to a certain nation based on shared ethnicity, culture, language, and heritage. It emphasizes a common identity among people of the same ethnic group and can be more exclusive.

As per the preamble of the constitution, FDRE is imagined as a community of [nations, nationalities and peoples] membership to NNPs is a condition precedent to be Ethiopian. Thus, it envisages Ethnic Nationalism.

The FDRE constitution is not the constitution of the Ethiopian citizens. [Instead], the Ethiopian citizens are first categorized in their different ethno linguistic groupings and then these groups come together as authors of and beneficiaries from, the Constitution. The result is individual membership to the FDRE requires prior membership to NNPs. In other words, membership of an individual to the FDRE is no longer automatic but conditional.

Even if article 6 of the Constitution says “any person of either sex shall be an Ethiopian national where both or either parent is Ethiopian”, it does not say anything about how Ethiopian nationality is originally gained in the first place, i.e. how parents become Ethiopian nationals. Thus, being Ethiopian is essentially attached to and contingent up on being a member of one of the NNPs as per the preamble.

The only exception where Ethiopian citizenship will be gained without being a member of NNPs is when foreign nationals acquire Ethiopian nationality.

However, as a matter of practice, there is a mismatch between constitutional design, on the one hand, and Ethiopian reality, on the other hand, related to who is Ethiopian and under what conditions one becomes Ethiopian.

CHAPTER ELEVEN

FUNDAMENTAL RIGHTS AND FREEDOMS

11.1. The Structure of Rights and Freedoms under the Ethiopian Constitution

The 1995 Constitution of Ethiopia entrenches in its Third Chapter (from Articles 14 to 44) one of the most comprehensive lists of individual and group rights and freedoms that one can ever find in modern constitutional laws. Moreover, Article 105 of the Constitution ends with an extremely stringent requirement for the amendment of its chapter on fundamental rights and freedoms. International human rights law, upon which domestic human rights laws including ours have thrived, obtained its concrete shape with the coming into existence of the UDHR. The UDHR provided for a set of rights in its 30 articles, the rights that ranged from civil, political, economic, social and cultural in nature.

The human rights laws of Ethiopia consist of the ratified international human rights instruments, the Ethiopian Constitution, the constitutions of the federating states and the national and regional laws that are passed by the national and regional legislatures.

1. The Justiciability of Human Rights in the Federal Democratic Republic of Ethiopia

The effective protection of human rights requires, among others, that they be justiciable. Justiciability refers to the capability of rights to be enforced by a judicial or quasi-judicial organ and the existence of procedures to contest and redress violations.

Domestic legal systems take precedence over international human rights systems in terms of their effectiveness in the protection of human rights. This is because domestic systems offer a more accessible forum for victims of violations and because they have more effective enforcement mechanisms.

In elaborating a framework for the domestic protection of human rights, emphasis is usually placed on their inclusion in a constitutional bill of rights and ordinary legislation and the review ability of their implementation by judicial and quasi-judicial organs. Less attention is paid to the existence of procedures that allow persons or organizations to institute cases on behalf of victims of violations of human rights (*action popularis*).

The Ethiopian Constitution enshrines robust provisions on civil and political rights, including the right to life, security of the person and liberty, the right to protection against cruel, inhuman or degrading treatment or punishment, the rights of arrested, accused and convicted persons, the right to dignity, the right to equality, the right to privacy; freedom of religion and belief, freedom of thought, opinion and

expression, the right to assembly, demonstration and petition, freedom of association; freedom of movement, the right of nationality, marital, personal and family rights, the rights of women and children, the right to vote and to be elected, and the right to property.

The Constitution further incorporates economic, social and cultural rights under the crudely formulated provisions of article 41. Without specifically listing and defining these rights, the article generally requires the creation of equal opportunities to freely chosen means of livelihood and the allocation of ever-increasing resources for health, education and other social services. It is argued that certain economic, social and cultural rights can be read into the broad provisions of article 41. However, the poor formulation of the article increases the ambivalence regarding the justiciability of this group of rights as it is difficult to clearly delineate the precise scope of the rights.

Collective rights such as trade union rights, the right to development and environmental rights are also included in the Bill of Rights of the Ethiopian Constitution.

Under chapter 10, the Ethiopian Constitution provides for "national policy principles and objectives" that guide any government organ in the implementation of constitutional provisions, other laws and public policies. These objectives, among others, require the government to promote self-rule and equality of the people, to formulate policies that ensure equal economic opportunities and benefits, and to adopt policies that aim at providing all Ethiopians access to public health and education, clean water, housing, and social security to the extent the country's resources permit. Thus, while the provisions of the Bill of Rights provide for individual and group entitlements, the policy objectives extend this protection by imposing the duty to adopt policies that ensure the enjoyment of rights by citizens.

Division of Powers Among Three Organs

The reason for the separation of government powers is that if the powers of law making, execution and adjudication are merged in the same organ, this would create a concentration of power and it would be impossible to control whether such a government functions on the basis of the trust entrusted to it by the people and respects the constitution.

Check and Balance

The legislature, in order to make sure that the laws it enacted are being properly implemented, is given by arts 55(17) and (18) of the Constitution the power to cause that the executive submits reports and also to take measures that it deems appropriate. Similarly, the legislature has the power up to dismissing the

judges for disciplinary reasons. However, is there any mechanism that the act of the legislature is to be checked? No method is envisaged under the constitution.

Art. 40 of the Ethiopian Constitution

It was one of the most highly debated provisions at the time of the making of the Constitution. It is one of the provisions that guarantees "a citizenship-based" see sub art 1

The most controversial part of Art 40 is its Sub-article (3), which states: The right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested in the State and the peoples of Ethiopia. Land is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange.

This provision has effectively placed land under the ownership of the state. But it is interesting to look at the wording of the above provision. The first one says that ownership of land lies "in the state and the peoples of Ethiopia." It is not clear exactly what this means. Is it a common property concept that we see here? If that is the case, the state (meaning the government here) cannot make a decision on land (and natural resources) simply because it is elected or it holds government power. It must consult with and obtain the assent of the people when it makes major decisions on land and natural resources. We can plausibly argue in this case that, for example, at the present time when the government makes major concessions on foreign agricultural investment (land lease terms of up to 99 years), it must first obtain the assent of the people (through a referendum, for example) on whether investment in agriculture by foreigners in such a large scale is advantageous for the people or not. So all the decisions that the state (government) makes on its own are tantamount to unilateral decisions by one of the common owners of a property, which cannot be a legitimate action.

In the same Sub-article is the last statement, which says "Land is a common property of the Nations, Nationalities and Peoples of Ethiopia . . ." What is the legal effect of such a statement? This statement carries the ordinary meaning of the concept of "common property." Therefore, it will have a meaning that all land in Ethiopia is an indivisible common heritage (or property) of all nations and nationalities of Ethiopia. A land everywhere is a common property of a nationality anywhere in the country. But when we see constitutions of states of Ethiopia, they contain a declaration that the land of the given state (e.g. Amhara or Somali state) is the common property of the people (s) of that particular state.

2. Legal Pluralism and Human Rights

LP refers situations in which more than one "legal system" functions in a given country. Where,

- In a federal state structure in which the laws of the federal, states and sometimes of the local governments act upon citizens.
- But legal pluralism is a concept associated more with the parallel existence of state-sponsored law and legal institutions and customary or traditional, and/or religious laws and institutions.

The Ethiopian Constitution can be said to embrace the notion of legal pluralism of some sort in its articles 34(5) and 78(5)

Today, more than half a century after the adoption of the Universal Declaration of Human Rights, the entire Declaration has still not achieved the status of binding international customary law, and the primary reason is resistance to the provisions relating to women. The provisions relating to the personal and family lives of individuals have failed to achieve universal acceptance because these matters have traditionally been covered by religious law.

The issue of universality of human rights, customary practice or laws and cultural relativism discussed under this part of the text book.

CHAPTER TWELVE

ENFORCEMENT AND INTERPRETATION OF THE CONSTITUTION

12.1. The Meaning of Constitutional Interpretation

Constitutional interpretation as a concept should be understood to mean two important things.

1. Textual interpretation of the Constitution, For example, if there is a dispute as to whether two provisions or principles in the constitution conflict.
2. Review of constitutionality of laws and decisions.

12.2. Models of Constitutional Interpretation

By models, we mean the approaches that are used for having the task of constitutional interpretation performed. There are generally two major models for constitutional interpretation. The first and the most popular one is the Court model. The second model is the non-court model.

1. Court Model Constitutional Interpretation

There are two components of the court model:

A. **The American model** also known as the **Decentralized or Defused Model**, according to this model all ordinary courts have the power to interpret the constitution. In this system, constitutional interpretation is not different from an adjudication of any other cases and controversies. It arises only in relation to cases and controversies. It does not get to court on its own.

B. The European model also known as centralized. It is named as such because it has originated in continental Europe. The main feature of this model is that constitutional interpretation is done by a court, usually known as a constitutional court, which is not part of the ordinary court structure but established by law to primarily deal with interpretation of the constitution.

2. Non Court Model Constitutional Interpretation

This is a system whereby constitutional interpretation is done through bodies other than courts, usually by a body with political representation or accountability. The 1995 Constitution of Ethiopia is one of those.

12.3. Constitutional Interpretation in Ethiopia

In Ethiopia, the interpretation of the Constitution is a task to be undertaken by the House of the Federation (HF). Art. 62(1) of the Constitution stipulates that HF interprets the Constitution. Furthermore, Arts 83 and 84 of the Constitution also give some more rules regarding the powers of the HF and its aide,

the Council of Constitutional Inquiry (CCI), also established in the Constitution (Art 82). Art 83 stipulates that all constitutional disputes shall be decided by the House of the Federation.

Art. 84, stipulates that the Council of Constitutional Inquiry shall have powers to investigate constitutional disputes. If the Council, upon consideration of the matter, finds it necessary to interpret the Constitution, it submits its recommendations to the House of the Federation about the matter. Regarding the interpretable matters that originate from courts or interested parties art 84(2) states that if Federal or State law is contested as being unconstitutional and such a dispute is submitted to it by any court or interested party, the Council shall consider the matter and submit it to the House of the Federation for a final decision. If issues of constitutional interpretation arise in the courts, the Council may remand the case to the concerned court if it finds there is no need for constitutional interpretation. In such a case, the interested party, if dissatisfied with the decision of the Council, may appeal to the House of the Federation.

The Ethiopian federal system allows the states to have their own constitutional interpretation institutions to interpret the states' constitutions. For example, the revised Constitution of the Oromia State has established a Constitution Interpretation Commission which is staffed by representatives from the Woreda councils in Oromia. But the Commission has not been functional so far and has not seen any case of interpretation.

1. Review of the Jurisprudence of the CCI and the HoF

The Ethiopian HoF and the CCI have dealt with more than 80 cases so far. But to date, only three cases have been accepted by the HoF for interpretation; all the rest were rejected at the level of the CCI as not involving any issue of constitutional interpretation.

I. Silte Case, Study: -

In the Silte case, the central issue was the determination of the identity of a group, the Silte, which claimed for a distinct identity, as opposed to the assumption that it was part of the Gurage people. The CCI stated that there were two major questions to be answered for the resolution of the case:

- **a.** On which organ or body does the Constitution bestow the power to determine the identity of a group?
- **b.** What procedures should be utilized in order to decide on an identity claim by a group?

In regard to the first question, the CCI arrived at a conclusion that there is no provision in the Ethiopian Constitution that "directly and clearly" states who has the power to determine the identity claim of a group. Having made the above-stated conclusion regarding the apparent gap in the Constitution, it went

on to make a textual interpretation of the latter. It stated that a close reading of Article 52(2, a) of the Constitution would give a direction to the resolution of the case. The CCI went on to hold that when the states establish their respective state administrations that best advance self-government, they need to first decide on the question of identity. It also unambiguously stated that "since the federal state structure put in place by the Ethiopian Constitution gives states the power to decide on their internal matters and that identity questions arise within states, such questions must obtain the decision of the state in question." The CCI also opined that by virtue of article 62(3) of the Constitution, the HoF will remain to be the ultimate settler of questions of self-determination. But it also said that the HoF shall be the appellate body in relation to questions of identity determination while the concerned state council remains to be the body to serve as a first instance venue with original jurisdiction. As regards the second question (the question of procedure), the CCI recommended that referenda be used in the same way as in the claims for statehood (Art. 47) and secession (Art. 39). This opinion of the CCI was endorsed by the HoF.

Constitutional dispute is said to have arisen if there is a real and important disagreement between two or more constructions of a constitutional rule or principle, each of which is forcefully persuasive. Constitutional disputes involve in terms of the text of the Constitution issues like the resolution of gaps in the Constitution (such as the one determined in relation to the Silte case), conflict of norms in the Constitution and problems arising from the sui generis nature of the Constitution.

The second category of the CCI's jurisprudence is review of the constitutionality of laws and decisions

interpretive jurisdiction of the HoF (and CCI) is meant to be all-encompassing. In other words, whether at issue is the constitutionality of a proclamation or a regulation of the executive or a decision of an official or organ of state, the ultimate settler is the HoF.

II. The 2020 general elections of Ethiopia

The 2020 general elections could not take place in 2020 due to global outbreak of COVID-19 pandemic. The postponement of the elections became a thorny issue finding opposition political parties. As a result, it became a subject of constitutional interpretation. On May 6, 2020, the HoPR sent a request to the Council of Constitutional Inquiry (CCI) seeking the interpretation of the 1995 Constitution, framing the following two questions.

1. If a situation that calls for the declaration of state of emergency—and thereby making pre-election preparations and the conduct of elections impossible—occur during the election year, what would be the fate of the executive and federal and regional parliaments whose terms are due

to expire soon? What can be done about the terms of office of the executive officials and elected bodies?

2. What should be the appropriate time for holding the elections once the grounds for the declaration of the state of emergency have disappeared?

Because the Constitution did not provide for situations like this it simply states that elections shall be held every five years but did not regulate what would happen if a state of emergency that makes the conduct of elections impossible is declared on constitutionally legitimate grounds during an election year.

Based on the request, the CCI considered the matter and made recommendations to the House of Federation (HoF). The CCI recommended that the terms of offices of the federal and regional executive and legislative bodies can legitimately continue owing to the declaration of the state of emergency declared to prevent and control COVID-19 pandemic until elections are held; and that elections should be held within 9-12 months from the time the national and international health authorities and scientists confirm that COVID-19 is no more a public health threat. These recommendations were adopted by the HoF.

Short Note From New Ethiopian Constitutional Law Text Book

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