

**COMPATIBILITY OF STATE CONSTITUTIONS WITH THE FDRE
CONSTITUTION: THE CASE OF OROMIYA AND BENISHANGUL-
GUMUZ REGIONAL STATES**

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DECLARATION

I, AMAN SHUGE GANA, declare that the work presented in this THESIS is original. It has not been presented to any other University or Institution. Where the work of other people has been used, references have been provided. It is in this regard that I declare this work as originally mine, and it is hereby presented in partial fulfilment of the requirements for the award of the LLM Degree in Constitutional and Public Law

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Abbreviations

Art	Article
Arts	Articles
CIC	Constitutional Interpretation Commission
CCI	Council of Constitutional Interpretation
IDEA	International Institute for Democracy and Elector Assistance
Ed	Editor
Edn	Edition
EPRDF	Ethiopian Peoples' Revolutionary Democratic Front
FDRE	Federal Democratic Republic of Ethiopia
HF	House of Federations
HPR	House of Peoples' Representatives
HON	House of Nationalities
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
Id.	The same
IGR	Institutions for intergovernmental relations
NEB	National Electoral Board
No.	Number
OLF	Oromo Liberation Front
OPDO	Oromo People Democratic Organization
P	Page
Para.	Paragraph
PDRE	Peoples Democratic Republic of Ethiopia
Procl.	Proclamation
SNNP	Southern Nation nationality & people
SNNPRS	Southern Nation nationality & people Regional State
TGE	Transitional Government of Ethiopia
UDHR	Universal Declaration of Human Rights
UN	United Nations

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ABSTRACT

The 1995 FDRE Constitution has allocated the state power between Federal and states or sub-national units. The regional states are sketched based on Ethnic territorial approach to safeguard the multi-ethnic interests within the country. To this end, the federal constitution is adopted in a more accommodative way giving special emphasis to the group rights of all the Nation, Nationality, and Peoples of Ethiopian.

This is clearly declared by the spirit of common consensus amongst them in the preamble that reads as “We the Nations, Nationalities and Peoples of Ethiopia” strongly committed, in full and free exercise our rights to self-determination, to building a political community founding on the rule of law and capable of ensuring a lasting peace, guaranteeing a democratic order and advancing our economic and social development; firmly convinced that the fulfillment of this objective requires full respect of individual and people's fundamental freedoms and rights to live together on the basis of equality and without any sexual, religious or cultural discrimination;... Moreover, the FDRE Constitution equally bestowed the Sovereignty and self-determination right to Nations, Nationalities and Peoples of Ethiopia under Article 8 and 39 respectively. Pursuant to Article 8 of the federal Constitution, all sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia. In the same fashion, in article 39 also, the nations, nationalities and peoples are equally granted the right to self-determination and up to succession.

Defining "Nation, Nationality or People" a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory, made this right(right to self-determination) absolutely territorial in nature in sub article 5 of article 39 and under sub article 2 and 3 of the same article, it has reserved the so called the group specific rights such as the right to speak, write and to develop its own language; to develop and promote its own culture; and to preserve its history; the right to equitable representation in state and federal governments in addition to universal rights provided in chapter three of the constitutions for the minorities ethnic groups those do not meet the above definition but residing somewhere in Ethiopia within those who meet the above definition.

Accommodating the multi-ethnic interest this way, the FDRE constitution explicitly lists down the federal powers, the state powers, concurrent powers, and leaves residual powers to the states. Pursuant to their power, the regions are authorized to enact their Own constitution within the considerable “constitutional spaces” they are granted, respecting the supremacy of the federal constitution as provided in article 9(1). However, the regional states, specially the Oromiya and Benishangul-Gumuz regional states constitutions, starting from their preamble they tried to weigh down the existence of another resident ethnic groups in the regions expressly proclaiming the sovereignty right and the ownership status of the region only for the indigenous or majority ethnic groups (the only holders of territorial rights) as per article 39(5) of the FDRE constitution. Furthermore, they have denied the non-territorial group specific rights of the minorities or non-indigenous ethnic groups by not incorporating them in their constitution as guaranteed in article 39(2&3) of FDRE Constitution. With the denial of these rights they systematically denied the universal rights of the resident ethnic groups of their regions, which is simultaneously inconsistency with that of the FDRE Constitution as per article 9(1) of the same. Having looked at this way and otherwise, specifically selecting some fundamental rights, specially non-territorial rights (Universal and group specific rights), the thesis has scrutinized that the way these rights are incorporated or treated and even miss incorporated in the Constitutions of the regional states at issue are in compatible to the FDRE Constitution opposite what expected of them.

CHAPTER ONE

INTRODUCTION

1.1 Back Ground of the Study

Ethiopia was named *Federal Democratic Republic*¹ under the 1995 new Constitution. This new constitution declared the new era of democracy and equality to Ethiopians' after a long history of desperate struggle for freedom.

In recent past, the Ethiopian people have lived under a feudal regime followed by a military dictatorship. Rights and freedoms of peoples have been disregarded under both regimes. Although it had written constitutions since 1931, Ethiopia has been unitary state until 1991. The 1931 and 1955 written constitutions did not have significant role in protecting fundamental human and democratic rights of citizens as they were primarily designed to reaffirm and fortify the absolute power of Emperor Haile Selassie I. The state is considered to owe no duty to the people².

The military junta³ took power after dethroning Emperor Haile Selassie I in 1974, and it adopted a Constitution in 1987 after 13 years of constitutional lacuna. The 1987 Constitution⁴ highly accentuates economic, social and cultural rights due mainly to the socialist tendency of the regime. It was nonetheless a regime beset by fear and there was no fertile ground to foster the recognition and exercise of human rights⁵.

Generally, until 1991 except Amhara to whom the de jure hegemonic status has been granted, the fundamental rights of almost all ethnic groups of the country have been denied. The denial to grant these fundamental rights and the then forceful centralization and assimilation policy have raised the ethno-nationalist opposition which ended up the era of centralization collapsing the last glossy dictator of the Military Regime.

¹ Art. 1 of the Constitution of the Federal Democratic Republic of Ethiopia (here after the FDRE Constitution), Federal Negarit Gazeta, 1st Year, No 1, 21 August, 1995

² T. Regassa, "Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia", 3(2) Mizan Law Review, 2009, at p.297; see also CN Paul & C Clapham, Ethiopian Constitutional Development: A Source book, Addis Abeba University Press 1972, (in Adem Kassie Abebe, Human Rights under the Ethiopian Constitution: A Descriptive Overview, Mizan Law Review Vol. 5 No.1, Spring 2011, at p.41)

³ Which called itself the Dergue, (Literally means Committee)

⁴ Constitution of the People's Democratic Republic of Ethiopia (PDRE), Adopted on 22 February 1987 GC

⁵ Adem Kassie Abebe, Human Rights under the Ethiopian Constitution: A Descriptive Overview, Mizan Law Review Vol. 5 No.1, Spring 2011, at p.42.

After the collapse of the military regime, on the Peace and Democracy Conference held in July 1991, coalition of forces including the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) in collaboration with other fronts came with the Transitional Charter⁶ that shifts the country from unitary to federal state structure for the first time. The Transitional Charter as soon recognized Eritrea's secession and the rights of 'Nations and Nationalities' to self-determination up to and including secession. Based on the Charter, the year 1992 saw a restructuring of the country's internal administration and the formation of 14 regional administrations along ethno-linguistic lines⁷. Thus, from 1991 to 1995, Ethiopia was gradually evolving to a full-fledged federal system as it was also experiencing a decentralization that bordered federal non-centralization⁸. Like the 1991 Charter, the 1995 Constitution also recognized the rights of ethnic self-determination up to secession. Moreover, it created a federal government with nine regional States. These include Tigray, Afar, Amhara, Oromiya, Somali, Benishangul-Gumuz, Southern Nations, Nationalities and Peoples (SNNPR), Gambella and Harari⁹. The constitution also left the door open for any Nation, Nationality or People to form its own state setting criteria to be fulfilled¹⁰. However, though some nationality¹¹ has been claiming this right, no new state is formed then after.¹² Hence, the numbers of regions under FDRE constitution are still nine. They are hierarchically divided into zones¹³, woreda¹⁴, special-woreda¹⁵ and kebele¹⁶ for administrative purpose.

⁶The Transitional Period Charter of Ethiopia, Proclamation No. 7/1992, A Proclamation to provide for the establishment of National/Regional Self- governments, Negarit Gazeta 51st Year No. 2.(Now after Transitional Charter of Ethiopia)

⁷ These were Tigray, Afar, Amhara, Oromiya, Somalia, Benishangul, Gurage/Hadya, Sidama, Wolaita, Omo, Kafa, Gambela, Harar and Addis Ababa. (See TGE 1992).

⁸ Tsegaye Regassa, State Constitutions in Federal Ethiopia: A Preliminary Observation, A Summary for the Bellagio Conference, 2004, at p.1

⁹ Art.47(1) of the FDRE Constitution

¹⁰ Id, Art. 47(3/a-e/)

¹¹ The case of Sidama nation from the Southern, Nation, Nationality and Peoples Region is the best example.

¹² From August 21st 1995 up to May 31st 2014

¹³ Zone is an administrative division found immediately below the regions. It is usually responsible for coordination of the activities of the woreda and the regional executive. Except the SNNPR, the regional executive appoints the officials of the zones. (Defined and explained in Asnake Kefale, Federalism and Ethnic Conflict in Ethiopia: A Comparative Study of the Somali and Benishangul-Gumuz Regions, 209, at p. 22)

¹⁴ Woreda in Amharic refers to district and is found below the zone (Id)

¹⁵ Special woreda have been established largely in the Southern region for minority ethnic groups, which cannot constitute either a zone or a regular woreda because of their small population size (Id)

The FDRE constitution explicitly listing down the federal powers, the state powers, concurrent powers, and leaving residual powers to the states and authorized them to enact their own constitution within the considerable “constitutional spaces”, respecting its supremacy as provided in article 9(1).

At national level, since all ethnic groups in the country are indigenous so as to earn equal Constitutional recognition and protection, the federal constitution is adopted in a more accommodative way giving special emphasis to the group rights of all the Nation, Nationality, and Peoples of Ethiopian in addition to their universal individual rights. This can easily understood from the preamble, Articles 8 and 39 of FDRE Constitution, which gave to all Nation, Nationality and Peoples equal recognition as they are the makers of their Constitution, they are sovereign and equally the holders of right to self-determination and up to secession. A close look of article 39(5) show as these rights are territorial and granted to all Nation, Nationalities and Peoples of Ethiopia and hence exhausted within the creation of the regions since any ethnic groups may belongs to one of the nine regional states. However, the regions are designed on ethnic basis and their numbers are not matched with the numbers of ethnic groups in the country which may be ten times the numbers of the existing regions. The regions are therefore established for few ethnic groups majority in number within their regions and the rest are the minorities (especially if they are non-indigenous) having no right to claim the territorial rights due to the definition provided under article 39(5). But, the FDRE Constitution didn't leave them without protection. Under sub art.2 and 3 of the same article it grants them the non-territorial group specific rights, such as, right to speak, write and to develop its own language; to develop and promote its own culture; and to preserve its history; the right to equitable representation in state and federal governments in addition to universal rights provided in chapter three of the constitutions for the minorities ethnic groups those do not meet the above definition but residing somewhere in Ethiopia within one of the nine regional states.

However, the Constitutions of regional states, specially the Constitutions of Oromiya and Benishangul-Gumuz regional states, starting from their preamble they tried to weigh down the existence of another resident ethnic groups in the regions expressly proclaiming the

¹⁶ Kebele was introduced as the lowest tier of local government by the military regime in 1975. It refers to neighborhood associations. In the present local and regional government system, kebele serves as the lowest tier of local government just below the woreda (Id).

sovereignty right and the ownership status of the region only for the indigenous or majority ethnic groups (the only holders of territorial rights) defining contrary to article 39(5) of the FDRE constitution. Furthermore, they have denied the non-territorial group specific rights of the minorities or non-indigenous ethnic groups by not incorporating them in their constitution as guaranteed in article 39(2&3) of FDRE Constitution. With the denial of these rights they systematically denied the universal rights of the resident ethnic groups of their regions, which is simultaneously inconsistent with that of the FDRE Constitution, since better protection of these rights is more expected from them. Due to this, almost all the regional states Constitution in general and the Oromiya and Benishangu-Gumuz regional states Constitutions are in compatible to the FDRE Constitution.

1.2 Statement of the Problems

Every federal system is structured by a national constitution that divides power, establishes central institutions, prescribes the rules for resolving disputes, and provides a procedure for its own alteration¹⁷.

The federal constitution has supreme status in the hierarchy of laws and the basic norm to which all decisions, acts and practices are compelled to conform with. Since Ethiopia is also one of the Federal states, the FDRE constitution get hold of the supremacy status over any other law, customary practice or a decision of an organ of state or a public official and beseeches for their compatibility with it¹⁸. Literally spotting, one can say that starting from numbering of provisions almost all sub-national constitutions are similar, even identical to that of the FDRE constitution.

As pointed by Vender Beken, Ethiopian Federalism is characterized by Ethnic territorial approach. The federal constitution therefore assumes that all Ethiopian ethnic groups have their place of origin in a certain area of the country, which is located in one of the nine regions.¹⁹ Since, the regions have thus been designed as forums for the protection of ethnic interests; the federal constitution authorizes the regions to enact their constitution by granting

¹⁷ Cheryl Saunders, "The Relationship between National and Sub-national Constitutions," Seminar Report: Sub-national Constitutional Governance, 1999, at p. 21

¹⁸ Pursuant to Art. 9(1) of FDRE constitution Sub-national Constitutions must be consistent with federal Constitution.

¹⁹ Art.46(2) of the FDRE Constitution, Christophe Vander Beken also shortly stated that, the regional states under FDRE are delimited primarily on the basis of ethnic criteria

them considerable “constitutional spaces” in which the regions designed their constitutional frame work respecting the supremacy of federal constitution.

Using the granted constitutional spaces all the existing regions have established their states and other administrative levels²⁰ as per article 52(2a) of FDRE Constitution²¹. However, some regional constitutions failed to recognize and accommodate the ethnic diversity in their region and those tried to do so are also seems discriminatory. These problems are highly seen in Oromiya and Benishangul-Gumuz regional state Constitutions. For example, starting from the preamble, the Oromiya constitution acknowledges only the Oromo people. Besides, Article 8 of the Oromiya constitution bestowed the ultimate authority in the region to only Oromo people and in the same fashion Art. 39 of the same grants non-territorial group specific rights in addition to the right to self-determination (territorial right) not to all peoples resides in the region but to Oromo people only. Furthermore, the constitution didn't recognized inter-group equality among the Oromo and non- Oromo ethnic groups in the region. And, it has also limited the electoral rights of non- Oromo's in the region putting the criteria of knowing 'Afan *Oromo*' to participate in electoral process.

The constitution of Benishangul-Gumuz provides for the establishment of the sub-regional or local administrative level of the "Administration of Nationalities” which is territorial right in nature. The constitution has determined that such administration of nationalities is reserved for the Berta, Gumuz, Shinasha, Mao and Komo ethnic groups (the groups those are indigenous to the region)²². This offers opportunities for self rule and identity protection to them irrespective of other ethnic groups residing in the region²³. In addition to this, the same to that Oromiya Constitution the constitution of Benishangul-Gumuz also relegated the non-territorial group specific rights guaranteed by FDRE Constitution in Article 39(2&3) to non-

²⁰ The Constitutions of Gambella, Southern, Benishangul-Gumuz and Oromiya divide their regional administrative structure into four tiers: The Regional level, Zone/ Special woreda Administration of Nationalities/, the woreda and Kebele level. The Constitutions of Tigray, Afar and Somali provide for a three – tier administrative structure: The Region, Woreda and Kebele and the Harari constitution provided only the Regional and Kebele administrative level.

²¹ States shall have power to 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

²² Art.2 of the Revised Constitution of Benishangul-Gumuz Regional state

²³ These ethnic groups are named non- indigenous groups by Benishangul-Gumuz Constitution. But, they constitute more than 50% of the people of the regions. They are also customarily called “High Landers” of which the Oromo, Amhara ethnic groups constitute the highest number.

indigenous or minority ethnic groups in the region and also there is no concept of inter group equality among indigenous and non-indigenous ethnic groups. Amazingly, there is no provision regarding electoral rights in the Benishangul-Gumuz regional state Constitution. Moreover, both sub-national constitutions of Oromiya and Benishangul-Gumuz regional states set conditions for right to secession. Thus, this way desecrated the fundamental rights of citizens or residing Nation, Nationality and peoples guaranteed by Article 8 and 39(2 and 3) *(Sovereignty Right and Non-territorial right to self-determination or group specific rights; such as, such as the right to speak, write and to develop its own language; to develop and promote its own culture; and to preserve its history; the right to equitable representation in state and federal governments), Art. 25 (Right to Equality), and Art. 38 Electoral right (right to elect and to be elected)* of FDRE constitution which deserves better protection in regional states constitution at regional level.

This thesis will therefore, attempt to trace some provisions of Oromiya and Benishangul-Gumuz Regional States constitutions which the researcher's presumes incongruous to the FDRE constitution comparing the two constitutions texts with that of FDRE constitution.

1.3 Research Questions

Questions which the study investigates into include: Whether the 2001 and 2002 Revised Oromiya and Benishangul-Gumuz National Regional State Constitutions respectively are compatible with the 1995 FDRE Constitution with respect to some selected fundamental rights such as Sovereignty right and Non-territorial right to Self-determination, Right to Equality, and Electoral Right of the Nation, Nationality and peoples of these regions, or not.

These questions include:

- Whether the of right to sovereignty and Non-territorial self-determination rights recognized under Oromiya and Benishangul-Gumuz constitutions are assured in accordance with that of FDRE constitution or not?
- Whether the Right to Equality, and Electoral Rights recognized under FDRE Constitution are consistently incorporated and recognized in Oromiya and Benishangul-Gumuz regional state constitutions or not?

1.4. Objective of the Study

The main objective of this study is to scrutinize the compatibility or incompatibility of the Revised Oromiya and Benishangul-Gumuz National Regional State Constitutions with the

FDRE Constitution with respect to some selected fundamental rights, such as Sovereignty Right and Non-territorial Right to Self-determination, Right to Equality, and Electoral Right of the resident Nation, Nationality and peoples of the two regional states.

The specific objective of this study is to examine the extent of protection of the above rights and the reason behind the disparities in line with the objectives and purposes of the respective constitutions. To this end, the two state Constitutions will be analyzed and compared with FDRE constitution in detail in order to reveal where their incompatibility lies and to suggest some feasible solutions for the existing incompatibilities.

1.5. Significance of the Study

This research has great significance in showing the existing discrepancy between Oromiya and Benishangul-Gumuz sub-national state and FDRE constitutions in recognizing and Protecting some selected fundamental rights such as: Sovereignty right and Non-territorial Right to Self-determination, Right to Equality, and Electoral Right (rights to elect and to be elected) of the Nation, Nationality and Peoples of the two regions, comparing with FDRE constitution. Moreover, since very few researches have been done on the Regional Constitutions, this study will have great contribution in showing the extent of protection of the fundamental group rights of citizens at regional level particularly at Oromiya and Benishangul-Gumuz regional state comparing with federal, the reason behind the inconsistencies and the solution thereof.

1.6. Scope of the Study

The study emphasis on constitutional provisions dealing with some important fundamental rights of the Nation, Nationality and Peoples; comparing the 1995 FDRE Constitution and the revised constitutions of Oromiya and Benishangul-Gumuz regional states respectively. Among all constitutional provisions regarding fundamental rights, this study is limited to the Sovereignty right and Non-territorial Right to Self-determination, Right to Equality, and Electoral right (right to elect and to be elected.)

1.7. Research Methodology

This study explores and tries to identify the compatibility of Oromiya and Benishangul-Gumuz regional State constitutions' on some selected provisions comparing with the FDRE constitution.

Its research methodology is qualitative one. Above all, the study has attempted to make an appropriate review of the existing literature on Federalism, Human Rights and Constitutions

in general and state constitutions in particular. To this end, the FDRE Constitution and the Oromiya and Benishangul-Gumuz National Regional State Revised Constitutions are considered as the main legal documents up on which this study is based.

1.8. Limitation of the Study

The researcher believes that the following constraints may reduce the quality of the research. These are, Financial and time constraints to go through the study and scantiness of reference materials regarding Ethiopian Sub-national constitutions since it's novel area in both academic and research on which only few literature have been written.

1.9. Organization of the Study

In brief, this thesis has attempted to test whether the sub-national constitution particularly Oromiya and Benishangul-Gumuz regional States constitutions are compatible with FDRE Constitution regarding recognition and protection of some selected fundamental rights and constitutional designs or not. To this effect, the paper is classified in to six chapters each of which has its own sections and sub-sections.

Chapter one is the introduction; it introduces the background of the study, statement of the problem, research question, objective of the study, significance of the study, research methodology and limitation of the study.

Chapter two gives a brief explanation of the terms and concepts used in the study. It defines terms like Constitution, Federalism, Federal Constitution and Human Rights; it explores the conceptual and theoretical framework of Federal and sub-national constitutions, sub-national constitutionalism and Sub-national constitutional spaces.

Chapter three gives emphasis on some selected the fundamental human rights and freedoms.

Chapter Four deals with the general overview of the FDRE constitution and sub-national constitutions and the sub-national constitutional spaces in Ethiopia.

Chapter Five is the main parts of the paper. Under this chapter, comparative analysis between the FDRE constitution and the revised Oromiya and Benishangul-Gumuz regional state Constitutions will be scrutinized in detail. For the purpose of comparison, some selected fundamental rights will be raised and analysed one by one.

Chapter Six is the final part of this work. It's about conclusion and recommendation of the study. Under this chapter; the research finding will be concluded in short and brief terms and

problems contributed to the incompatibility of both Oromiya and Benishangul-Gumuz regional state constitutions with the FDRE constitution will be indentified. Finally the possible solution to avert the incompatibility between these constitutions will be recommended.

CHAPTER TWO

THE CONCEPTUAL AND THEORETICAL FRAME WORK OF FEDERAL AND SUB-NATIONAL CONSTITUTIONS

2.1. Introduction

Every federal system is structured by a federal constitution that divides power, establishes central institutions, prescribes the rules for resolving disputes, safeguards rights, and provides a procedure for its own alteration.²⁴ In some federal systems, the federal constitution prescribes the political institutions and processes for the country's constituent units as well; thus, furnishing the constitutional architecture for the entire federal system. This is the case in Belgium, Nigeria and Canada, for example. But in most federal systems, the federal constitution is an “incomplete” framework document in that it does not prescribe all constitutional processes and arrangements. Rather, it leaves “space” in the federal system’s constitutional architecture to be filled by the constitutions of its sub-national units, even while it sets parameters within which those units are permitted to act²⁵. However, those federal systems that recognize a place for sub-national constitutions differ markedly in the extent to which the federal constitution is incomplete. That is, in the amount of space that they allocate to constituent units to define their own goals and establish their own governmental institutions and processes²⁶.

Comparative constitutional scholarship identifies sub-national constituent power as one of the main distinctive features of federal systems. In federal theories; at the beginning of the twentieth century, this was part of an endeavor to distinguish federal systems from territorial decentralized systems without abandoning a central sovereignty concept²⁷.

²⁴ Supranote 17

²⁵ Donald S. Lutz, *The United States Constitution as Incomplete Text*, 1988, at p.23- 26 and Donald S. Lutz, *From Covenant to Constitution in American Political Thought*, 1980, at p. 101-02

²⁶ Alan Tarr, *Explaining Sub-national Constitutional Space*, *Penn State Law Review*, p.1133

²⁷ *Id*

In comparative constitutional theory; it is observed that sub-national constitutionalism exists in most federal states. Because, National and Sub-national constitutions are interconnected in the sense that the less complete the national constitution is, the more important sub-national constitutions are, and vice versa. Hence, sub-state constitutional arrangements can be entrenched in more “complete” national constitutions²⁸. Moreover, according to public choice theory, devolutionary federal systems are expected to favor the creation of sub-national constitutions. However, Patricia Popelier argued that, sub-national constitutionalism is a matter of political balance between national and sub-national powers, rather than a principle of federal theory²⁹.

2.2 Definitions and Concepts of Constitution

2.2.1 Definitions

H.W.O.Okoth Ogendo clearly stated that, there is no single or authoritative definition of what a constitution is? ³⁰ Definitions always pose problems and create difficulties. Every scholar attempts his own partisan interest of a certain value. Factual, philosophical, or theological reflections vary. Accordingly, Okoth Ogendo defined constitution as a document which bears the nomenclature and may be called as a single constitutive act³¹.

Another writer tried to define constitution starting from what Constitute mean. As to him, constitute means; to make up, order, or form. Thus a nation’s constitution should pattern a political system³².

As per Blacks law’ definition; “Constitution is the fundamental and organic law of a nation or state that establishes the institutions and apparatus of government, defines the scope of governmental sovereign powers, and guarantees individual civil rights and civil liberties.”³³

²⁸ Williams R.F. and Alan Tarr, Sub-national Constitutional Space: A View from the States, Provinces, Regions, Lander, and Cantons, 2004, at P.4

²⁹ Patricia Popelier, The need for Sub-national constitutions in federal theory and practice; The Belgian case, at p.37

³⁰ Okoth W. Ogendo, A quest for Constitutional Government, in African Perspective on Governance, 2000 (in Wondwossen Demissie, Legitimacy of sub national constitutions in the Ethiopian federation: the case of Amhara regional government constitution, LLM thesis Submitted to the Addis Ababa University at 2010)

³¹ Id.

³² Walter Murphy, Constitutions, Constitutionalism, and Democracy, in Constitutionalism and Democracy: Transition in the Contemporary World, 1993, at p 3.

³³ Black’s Law Dictionary, Ninth Edition, West Publishing Co. Thomson business group, United States of America, 2004 , at p.353

However, whatever its definition, no society is without a constitution although not every constitution is adequate for the society to which it applies³⁴.

2.2.2 Concepts

Constitutions can be written or unwritten. A written constitution is one contained in one or a small group of documents. To many commentators this offers the advantages of clarity, stability and enforceability over states with unwritten constitutions (i.e. constitutions not to be found in one or a small group of documents)³⁵. What distinguishes a written constitution from other legal texts in general terms appears to be its amending procedure. A constitution has sometimes very stringent amendment. Other legal texts simply require a formal law making process.³⁶

Almost all states of the world have constitution whether written or unwritten though their form of government varies.

The form of government of some states are unitary having one central government with a single constitution applicable nationwide; while numerous states are federal form having two tiers of governments, i.e. Federal and state governments. But, what makes the federal states unique is having two types of constitutions at the same time for Federal and sub- national states with the exception of countries like Canada, Belgium, and Nigeria.

The federal constitution has the nationwide application and superior to all sub national constitutions. The sub-national constitutions are only applicable to the concerned regional state respecting the basic tenets and supremacy clauses of the Federal Constitution serving the society of the region enacted for considering their local culture, custom and other unique problems need special solution only within the constitutional space granted to them by the federal constitution.

2.3 Definitions and Concepts of Federalism

³⁴ Supra note 29

³⁵ Beale and Andrew, *Essential Constitutional Law*, 2nd ed, Cavendish Publishing Limited co, Sydney, 1997, at P.233

³⁶ Jon Elster, *Forces and Mechanisms in The Constitution Making Process*, Duke Law Journal, 1995, p. 45

2.3.1 Definitions

Though Federalism like Constitution seems to have triggered scholarly debates about its definition, many attempts at defining federalism emphasise the division of power between two levels of government (Duchacek 1970:192; Elazar 1979b; Riker 1964:5; Wheare 1963: 2).³⁷

William Riker explained the essential features of a federal government by saying ‘a government of the federation and a set of governments rule over the same territory and people and each kind has the authority to make some decisions independently of the other’.³⁸

In contrast to these definitions that focus on territorial division of power, scholars like Daniel Elazar associate federalism with the prevalence of a covenant of partnership between the general government and its sub-units. He, in this respect, suggested that the term federalism was originally derived from the Latin word foedus and compared it with the Jewish covenantal political tradition³⁹.

2.3.2 Concepts

Ronald L. Watts distinguishes between federalism as a normative idea and as a descriptive category of political institutions. He clarifies three terms: Federalism, Federal Political Institutions and Federations.⁴⁰

“**Federalism**” refers the normative aspect in that it advocates a multi-tiered government combining elements of shared-rule and regional self-rule. The value presumed here is the validity of combining unity in diversity. It accommodates, preserves, and promotes distinct identities within the larger political union⁴¹.

“**Federal Political Systems**” is used as a descriptive term that refers to a broad category of political system in which there are two or more levels of government combining elements of

³⁷ In Asnake Kefale, supra note 16, at p.24

³⁸ Riker, William H. *Federalism: Origin, Operation, and Significance*, Boston; Toronto: Little Brown and Company, 1964, at p.5 (in Asnake, at p.25)

³⁹ Elazar, Daniel J. *Federalism and Political Integration*, Israel: Turtledove Publishing, 1979a, at p 4. And Elazar, Daniel J. *From Biblical Covenant to Modern Federalism: The Federal Theology Bridge*, Lanham, MD: Lexington Books, 2000, at p.2(Id)

⁴⁰ Ronald L. Watts, *Comparing federal systems* 3rd ed, 2008, at p.8

⁴¹ Id

shared rule and self-rule. Shared rule encompasses a collaborative partnership through a common government⁴². Regional Self-rule on the other hand recognizes autonomy for the governments of constituent units⁴³. Thus, federal political systems are descriptive manifestations of the value of federalism as a normative term. Daniel Elazar also listed categories that fit this category.

These are: Unions, Constitutionally Decentralized Unions, Federations, Confederations, Federacies, Associate Statehoods, Condominiums, Leagues, and Joint Functional Authorities.⁴⁴

“Federations” refers a particular species in which neither the federal nor the constituent units of government are constitutionally subordinate to the other⁴⁵. Each tier of the government has its own sovereign authority that it attains and derives from the constitution. Separate legislative, executive, and judicial institutions exist that keeps each level in harmony with its citizens. In effect, federations are specific forms of federal political system. Indicating that federalism is indeterminate in its meaning, however, Alemante G. Selassie provides for the two essential attributes of federal systems which, in effect, embodied Ronald Watt’s explanation.

First, political power is require to be structurally dispersed among various centers of authority.

Second, this dispersed power must be guaranteed and legitimated by the constitution⁴⁶.

Essential feature of federal system, therefore, are diversity and unity. A society needs to manifest its distinctive character but also needs to maintain its belongingness to a certain union. Federal systems provide a political system that will allow diversity and unity go together by respecting the self-rule aspect of diversity within the common government structure⁴⁷.

As stated above, a constitution is required to provide for political systems and institutions. It is the constitution that provide for the federal system. The respective mandate of the two

⁴² Id

⁴³ Id

⁴⁴ Id .at p.10

⁴⁵ Daniel J. Elazar quoted in Ronald Watts, Id.

⁴⁶ Alemante G. Selassie, Ethnic Federalism: its’ Promises and Pit falls in Africa, 2003, at P.28.

⁴⁷ Id

tiers of governments and their structure has to be pictured in the constitution. Accordingly, many federations share some common structural characteristics.

Ronald watts provided for the following essential characteristics expected from federal state.

- ✓ *At least two orders of government acting directly on its citizens (the federal and constituent unit governments).*
- ✓ *A formal constitutional distribution of power that maintains a genuine autonomy for each order.*
- ✓ *Representation of distinct regional views, as should be provided by the constitution (usually in the form of federal second chamber)*
- ✓ *Supreme written constitution not unilaterally amendable and requiring consent of constituent units*
- ✓ *An umpire (courts capable of solving problems arise in the federation, constitutional courts, and referendums)*
- ✓ *Institutions for intergovernmental relations(IGR)*

More recently G. Smith has reiterated the idea of federalism as a doctrine of balance aiming at finding equilibrium between forces of centralization and decentralization. The federal idea in short is generally conceived as a compromise between unity and diversity, autonomy and sovereignty, the national and the regional⁴⁸.

Federal governments and the institutions that result there from are organized partly on the principle of majority based on population size and partly on representation of territories, which may grant the territories equal or unequal representation. Stating that federations are based purely on covenants gives too much emphasis to the role of the states during the federal bargain and ignores the role of the citizen as a source of legitimate authority⁴⁹. In other hand, Preston King has rightly pointed out that at the heart of the social contract in federations is the fact that both the individual and territory represent certain interests requiring recognition and protection from the constitution. Federalism assumes that the basic interest bearing units within the federations are territorial, the interests of these units being usually represented in the second chambers. It also assumes that individuals are also the ultimate right and interest bearing units within the federation in so far as the direct operation of the federal center is

⁴⁸ Graham Smith, 'Federalism: the Multi-ethnic Challenge, 1995, at p.5-6 (in Aseffa Fiseha , federalism and accommodation of diversity in Ethiopia: a comparative study, revised edition, 2007, at p.105)

⁴⁹ Aseffa fiseha, Federalism and Accommodation of Diversity in Ethiopia: A Comparative Study, Revised ed, Forum of Federation, 2007, at P.119

concerned. It is thus, the duty of the federation to protect the individuals and the groups who bear specific rights and interests⁵⁰.

2.4 Sub-National Constitutions

Sub-national governments are results of federal arrangements. There exists a remarkable difference between sub-national governments by virtue of federal arrangements and decentralization in a unitary government. The latter is based on the idea that power is being conferred to lower units under the auspices of central governments, whereas; the former encompasses a formal constitutional allocation of powers between the centre and constituent units⁵¹.

Constitutions govern governments. Logically speaking, therefore, sub-national constitutions govern sub-national governments. The distinctive condition is that sub-national constitutions only apply to the respective sub-national peoples. In the words of James A. Gardner, at the same time, it has become common place for autonomous, democratically self-governing populations to adopt rules and principles for their own collective self-governance in the form of a constitution. As a result; the spread of federalism has perhaps predictably, been accompanied by a proliferation of sub-national constitutions.⁵²

Autonomous, self-governing populations in a democracy, as Gardner stated, needs to have a constitution to adopt rules and principles for their own collective manifestations. Sub-national constitutions are therefore, the grand forms by which these rules and principles of autonomous self-governing populations gets properly documented and ensures their autonomy and guaranteeing their self-governance.

2.4.1 The Form of Sub-national Constitution

⁵⁰ Abbink Jon, 'New Configuration of Ethiopian Ethnicity: The Challenges of the South, Northeast African Studies, 1998, at p.58-59

⁵¹ Supra note 37 at p.28

⁵² James A. Gardner, In Search of Sub-National Constitutionalism, Paper for Seventh World Congress, 2007, at abstract paragraph one.

All sub-national units must have a constitution of some kind, formal or informal. Not all are separate from the national constitution, as the examples of Canada and India show. Sub-national units are more likely to have separate constitutions where they existed as units with their own constitutions before federation, as in the United States (US) and Australia. Even in these cases, however, the national constitution may refer to sub-national constitutions and may be interpreted as authorizing them, as in Australia. Authorization of sub-national constitutions by the national constitution raises an important question of principle about the link between a sub-national constitution and the community it serves. It may readily be accepted that national constitutions are based on popular sovereignty. The form that sub-national constitutions should take is therefore, commanded by the national constitution or simply will be left to the discretion of the sub-national units. No sub-national constitution is left free without being referred by the national constitution.

Generally, we can discern two forms of sub-national constitutions in terms of their relations with the national constitutions.

2.4.1.1 Relatively Controlled Sub-national Constitutions

These forms of sub-national constitutions are characterized by stringent regulations in the national constitutions. Types of governments' institutions which should be created, even sometimes amendment procedures and conditions are strictly controlled by the national constitution. There is also a case that the federal parliament and legislature or the national amendment procedure applies to sub-national constitutions.⁵³ Australian and impliedly Ethiopian⁵⁴ sub-national constitutions are the best example of this type.

2.4.1.2 Relatively Free Sub-national Constitutions

In this case; sub-national populations are free to determine the fundamental characteristics of their respective constitutions. Sometimes, these sub-national constitutions are required by the federal constitution not to be inconsistent with some grand principles. However, the requirements do not have the effect of influencing the general constitution making options available to them. United States sub-national constitution can be categorized in this line⁵⁵.

⁵³ Supra note 24.

⁵⁴ See for instance article 52(2d) of FDRE Constitution under which the regional states are ordered to administer land and other natural resources in accordance with Federal laws, though it left even residual power to them.

⁵⁵ Supra note 53

2.4.2 Procedures for Control of Sub-national Constitution

The usual rule is that a national constitution is paramount and that a sub-national constitution must be consistent with it. The significance of such a rule depends on what the national constitution says about sub-national constitutions.

In a hierarchy of norms; a legitimate national constitution usually is paramount over sub-national constitutions as well. The federal division of powers, however, may mean that the capacity of the center to make laws affecting a sub-national constitution is limited. Nevertheless, the possibility that an ordinary national law may override a sub-national constitution raises even more starkly the question about how sub-national constitutions can or should be changed.

A national constitution may expressly control sub-national constitutions. Prescribing all or part of the sub-national constitutions may do this. In theory at least, a national constitution may make full and final provision for sub-national constitutions. Alternatively, a national constitution may provide the framework for sub-national constitutions until individual sub-national units provide otherwise, as in South Africa⁵⁶. In this case, the national constitution is likely to provide some mechanism for controlling the content of new sub-national constitutions. In South Africa, this is achieved through the certification procedure of the Constitutional Court⁵⁷. Even in a system that assumes the separate existence of sub-national constitutions, the national constitution may prescribe particular principles with which sub-national constitutions must comply. For example, the US Constitution requires the US to “guarantee to each State a Republican Form of Government”⁵⁸. The South African Constitution requires sub-national constitutions to comply with basic constitutional values and the principles of cooperative government. The German Constitution requires the constitutions of the Lander to “conform to the principles of republican, democratic, and social government based on the rule of law”⁵⁹.

Although the constitution does not explicitly stipulate the existence of the principle of federal supremacy in the Ethiopian federation, it holds in consonance with the principle of

⁵⁶ Constitution of the Republic of South Africa, Chapter 6

⁵⁷ Id, Section 144

⁵⁸ The Constitution of the United States, Article IV, section 4

⁵⁹ The constitution of Germany Article 28

federal comity; that, “The states shall respect the powers of the Federal Government and the Federal Government shall likewise respect the powers of the States⁶⁰.” Besides, the federal constitution clearly regulated the powers and functions of sub-national states out of which they must not take action⁶¹.

2.4.3 Sub-National Constitutional Spaces

The study of constitutional federalism is most often approached from the vantage point of the national constitution. Analysing constitutional arrangements from this angle encourages thinking from the perspective of the national government: *What powers are constitutionally provided to the national government and to what extent does the national constitution mandated sub-national units of the federal state?*

In response to these questions, a federal country brackets their sub-national constitutional spaces in different ways. Sub national constitutional space⁶² will have both substantive and procedural elements. In other words, the national constitution may specify the areas in which the sub-units may exercise their constitution making competency discretion and also mandate the processes by which that discretion is exercised.⁶³ In addition, these matters may be dealt with the national constitution in either a symmetrical or an asymmetrical manner.

Some federal countries treat their component units differently with respect to their substantive sub-national and procedural sub-national constitutional space. This would involve a determination of legal or de jure concerning the competency of component units to enact their own constitution. Robert F, Williams and G.AllanTarr suggests that, this space would be either wider or narrower depending on the range of spaces the national constitution provided for sub-units to adopt their own constitutions⁶⁴. Furthermore, the prominent scholars of state constitution, G.Allen Tarr argued that, every federal system that recognize a place for sub-national constitutions differ substantially in the extent to which the

⁶⁰ Art 50(8) of the FDRE Constitution

⁶¹ Id, Art. 52

⁶² “Constitutional space” refers to the range of discretion available to sub-national constitution-makers.

⁶³ Alan Tarr, Sub-national Constitutional Space: An Agenda for Research, 2007, at p. 3

⁶⁴ Robert F. Williams and G.AllanTarr, Sub national constitutional space: A view from the states, provinces, Regions, Lander, and Cantons, in Federalism, Sub national Constitutions, and Minority Rights, 2004, at p.13-14.

national constitution is incomplete. i.e., in the amount of space that they allocate to sub-national units to establish their own goals and institute their own governmental institutions and processes. Typically the less detail the national constitution provides or requires of sub-national constitutions and then the greater the sub-national constitutional space will be⁶⁵.

In some federal countries, the national constitution establishes specific guidelines that must be followed in the design of sub-national constitutions, thereby opening up only a modest amount of sub-national constitutional space. In other federal countries, sub-national constitution-makers are allocated somewhat more space, in that they can design their institutions as they see fit, subject to a national homogeneity or compatibility clause. In still other federal countries, sub-national constitution-makers have significant spaces in designing institutions, subject only to rarely invoked principles such as a republican form of government guarantee⁶⁶.

2.4.4 Factors Affecting Scope of Sub-National Constitution

If the scope of sub-national constitutional space varies among federal systems and sometimes even within federal systems, the process by which the federal system was created could be one such factor. Scholars distinguish between federal systems that were created by uniting pre-existing political entities, referring to them as **aggregative or coming-together** federations and those created by the transformation of a previously unitary political system, referring to them as **devolutionary or holding-together** federations⁶⁷. Admittedly, this dichotomy oversimplifies, as there are federations whose formation has involved both aggregative and devolutionary processes. For example, the Swiss Federation was formed by the merger of preexisting political societies, but the subsequent creation of the canton of Jura could be seen as devolutionary. Similarly, the thirteen original states of the United States came together to form a federation, but subsequent states were carved out of the territory of a preexisting federation.

⁶⁵ Supra note 63, at p. 2

⁶⁶ On these various ways that federal constitutions constrain sub-national constitution-makers, see Saunders, *The Relationship Between National and Sub-national Constitutions*, at 27-29; Williams & Tarr, *Sub-national Constitutional Space*, at p.7-11

⁶⁷ Alfred Stepan, *Federalism and Democracy: Beyond the U.S. Model*, *J. Democracy*, Oct. 1999, at p.19 (in G. Alan Tarr, *Explaining Sub-national Constitutional Space*, 2011, at p.1135)

One would expect that aggregative federal systems would be likely to allow more sub-national constitutional space than would devolutionary federal systems. In part, this would simply be the product of historical context or pre-coming together realities.⁶⁸

When political units form a federation, they already have in place their own institutions and political practices and attempts to interfere with them or to prescribe unnecessary uniformities might threaten the process of federation. For example, the drafters of the United States Constitution allowed each state to determine voting qualifications within its borders for federal elections rather than risk opposition to a federal mandate of uniformity in this sensitive area. In addition, one would expect that the federalizing political units would seek to retain self-rule to the extent consistent with achieving the ends that of federation. This likewise suggests maintenance of broad constitutional space. Prospective constituent units might also demand concessions expanding or safeguarding sub-national constitutional space as the price for joining the federation⁶⁹. For example, several southern states threatened not to join the American Union unless states were free to determine their own law with regard to slavery. And in Ethiopia, the Oromo Liberation Front agreed to cease armed resistance and join the Ethiopian Federation only after the constituent states were guaranteed the right to secede.⁷⁰

Finally, as a matter of constitutional design, aggregative federal systems are more likely to lodge residual powers in the constituent units rather than the federal government, and this may also lead to broader sub-national constitutional space.

One would expect the dynamics to be quite different in devolutionary federations. The national authority would be unlikely to surrender powers beyond those necessary to achieve the ends of federation. Moreover, because constituent units are being created rather than pre-existing, they typically would not have the same ability to make demands about the scope of sub-national constitutional space as would pre-exist political entities. Often they would lack a

⁶⁸G. Alan Tarr, *Explaining Sub-national Constitutional Space*, 2011, at p.1135

⁶⁹ Yonatan Tesfaye Fessha, *Institutional Recognition and Accommodation of Ethnic Diversity: Federalism in South Africa and Ethiopia*, June 9, 2008, at p. 425-31 (Ph.D. dissertation, University of the Western Cape), see also FDRE. Const. Art. 39. This right cannot be curtailed even in emergency situations under Art. 93(4)c of the FDRE Constitution.

⁷⁰ Id

strong political identity sometimes intentionally so⁷¹. When South Africa created its nine provinces, for example, it split the provinces that had constituted the original Union of South Africa, incorporated the home lands established by the apartheid government and drew provincial boundaries so that most provinces were ethnically heterogeneous, which dissipated the power of ethnically-based political groups.⁷² Similarly, the states in India did not exist except as administrative units in a unitary state until the adoption of the Indian Constitution.⁷³

In contrast to aggregative federal systems, devolutionary systems are likely to lodge residual powers in the federal government, thereby circumscribing the powers including constitution making powers of the constituent units. Further, factor affecting the scope of sub-national constitutional space might be the purposes underlying federation. Some federations such as Switzerland, Nigeria, and Belgium, as well as quasi-federations such as Spain were designed to recognize and accommodate the multi-ethnic character of the population and provide space for the expression of diversities.⁷⁴ One would expect in such instances that the constituent units would largely correspond with the diversities within the population and that the federation would accord broad constitutional space to the constituent units. This expectation is only partially borne out: although constituent units do mirror the political saliency of ethnicity in the federations, neither Belgium nor Nigeria has sub-national constitutions, and Catalonia and the Basque Country in Spain have only autonomy statutes. Some federations established to accommodate a multi-ethnic population such as Switzerland, provide broad sub-national constitutional space; but others such as Malaysia do not. In those that do not, greater representation in the councils of the federal government often substitutes for self-rule.⁷⁵

Finally, some federations or quasi-federations have been designed to deemphasize the ethnic or religious divisions in the society and replace fragmentation with national solidarity and a common national identity. In such federations, broad sub-national constitutional space may

⁷¹ Id , at p. 244.

⁷² Id

⁷³ Under British colonial rule, India did have some administrative divisions, with the colonial creation of provinces for administrative purposes and the recognition of 562 princely states See Akhtar Majeed, Republic of India, Constitutional Origins, Structure, and Change in Federal Countries 181-82.

⁷⁴ Supra note 68, at. 1137

⁷⁵ Id

be seen as a threat to national unity, particularly if as in India the boundaries of current constituent units reflect the language groupings within the population. Thus, it is hardly surprising that in India and South Africa, two prime examples of multi-ethnic federations committed to forging a common national identity, there is little sub-national constitutional space and the national governments are authorized to invade even those powers that the federal constitution gives exclusively to the constituent units when necessary to serve the purposes of national economic unity, national security, and the need for national uniformity⁷⁶.

Another factor that might influence the scope of sub-national constitutional space is whether the federation has a system of symmetrical or asymmetrical federalism. In a symmetrical federal system, all constituent units have the same powers of self-government, but in an asymmetrical system one or more constituent units are vested with special or greater self-governing powers.⁷⁷

Federations typically create asymmetrical arrangements to “take account of the fact that within a state there are significant cultural or societal differences among the constituent units.”⁷⁸ This is particularly important when there are groups who desire a degree of autonomy but are destined to be permanently in the minority at the national level. Incorporating asymmetrical elements may reduce the conflict that this could produce by allowing minorities concentrated in particular constituent units a greater measure of self-rule, thereby wedding them more closely to the federation. This greater self-rule would likely have constitutional dimensions, so recognizing the diversity that led to the asymmetrical arrangement in the first place would usually require extensive sub-national constitutional space. Yet it may be difficult to limit such self-rule to the distinctive constituent units within the federation. Other constituent units might well resent the “privileges” that are given. Think for instance of the reaction of the Rest of Canada to the claims of Quebec and demand the same opportunity for self-rule; a conversion from asymmetry to symmetry⁷⁹. But whatever the

⁷⁶ South African Const 1996, Chapter 4, § 44(2); India Const Arts. 249-50.

⁷⁷ Supra note 75, at 1138

⁷⁸ Stephen Tierney, *Constitutional Law and National Pluralism*, 2004, at P.188

⁷⁹ Eduardo J. Ruiz Vieytez, *Federalism, Sub-national Constitutional Arrangements, and the Protection of Minorities in Spain*, in *Federalism, Sub-national Constitutions and Minority Rights*, (in G.Alan Tarr, Supra note 58)

eventual outcome, one would expect that there would be broader sub-national constitutional space in asymmetrical federations.

Most federations are not focused primarily on dealing with ethnic or religious diversity. Some countries; such as Argentina, Brazil and the United States, have embraced federalism primarily as a way to govern more effectively large geographic expanses. In such circumstances, one might expect that constituent units would be granted broad constitutional space in order to permit locally appropriate responses to diverse conditions. Other countries, such as Austria and Germany, have embraced federalism as a way to promote administrative efficiency; with the constituent units having primary responsibility for implementing federal policy.⁸⁰

2.4.5 Sub-National Constitutionalism

“We must never forget that it is a constitution we are expounding.”

U.S. Chief Justice John Marshall’s

A constitution is fundamentally different from other legal documents and the main point of difference lies in the purpose for which it is adopted⁸¹. According to a widely accepted political theory typically associated with constitutionalism, a constitution is understood to be a document deliberately created by a society for its own self-governance which expresses that society’s fundamental desires about how it ought to live. It therefore, necessarily reflects the beliefs of the people who make it about the nature of a good life, both for the self-governing community that the constitution directly governs, and for the individuals who inhabit it.⁸²

Sub-national constitutionalism is nothing more than the application of the principles of constitutionalism at the sub-national level. An ideology of sub-national constitutionalism accordingly conceives of state, provincial, or regional constitutions as charters of self-governance self-consciously adopted by sub-national populations for the purpose of achieving a good life by effectively ordering sub-national governmental power and by protecting the liberties of sub-national citizens.⁸³ It also conceives of sub-national units as having an

⁸⁰ Bundes-Verfassungsgesetz [B-VG] [Constitution] BGBl No. 1/1930, arts. 102, 1, & 103, 1 (Austria).

⁸¹ Supra note 52, at p.2

⁸² *Mc Culloch v. Maryland*, 17 U.S. 316, 407, (in James A. Gardner, *In Search of Sub-national Constitutionalism*, 2007, at p.2)

⁸³ *Id*

independent role, a role of constitutional stature in the collective self-governance of a nation. This would mean, typically that sub-national units are, in words of the U.S Supreme Court, “not mere political subdivisions of the nation and state governments are neither regional offices nor administrative agencies of the federal government.”⁸⁴ Instead, sub-national units have a degree of autonomy sufficient to make them efficacious representatives and agents of sub-national populations, and their constitutions meaningful documents of self-governance that provide to some significant degree for independence from processes of self-governance employed at the national level by the national polity⁸⁵.

Sub-national constitutionalism rests on the premise that an important purpose of sub-national constitutions is the direct or indirect protection of liberty through the independent agency of sub-national power. However, provisions found in sub-national declarations of rights often duplicate protection for rights entrenched in the national constitution. Duplicating protection of rights at the national and sub-national levels might well provide evidence where it occurs, of sub-national constitutionalism. Where a supreme national constitution already provides express protection for some kind of right, protection of the same right in a sub-national constitution appears at first glance to be superfluous.

Sub-national units, in other words, do not simply cede to the national government responsibility for protecting the duplicated right for it is always possible that the national government will fail to protect the right with sufficient vigor. If the sub-national unit possesses independent authority to protect the same right, then it may be able to fill any void left by a failure of national power or national will⁸⁶.

Many constitutional systems around the world also create the conditions under which sub-national units may protect the liberty of citizens indirectly, through the affirmative exercise of granted powers. This may occur most commonly where national and sub-national areas of competence overlap, i.e., there are areas of shared competence⁸⁷. Concurrent competence

⁸⁴ Id, at p.3

⁸⁵ *New York v. United States*, 505 U.S. 144, 158 (1992).(in James A. Gardner ,2007).

⁸⁶ James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 2003, at p.91. See also, that the Oromiya Constitution under Art.108 protected right to life not to be limited or suspended during the declaration of state of emergency; while the FDRE Constitution limits the same right at the time of state of emergency.

⁸⁷ For example, Article 74 of the German constitution establishes concurrent legislative competence of the federal and Land governments over criminal law, public welfare, economic affairs, labor, and many other areas

creates the conditions for competition between national and sub national governments even where national law is supreme. This is because, a grant of concurrent authority often permits sub-national governments to enter fields in which the national government has failed to act, or acted incompletely, or irresponsibly, or counter productively in an effort to correct the damage.

2.4.5.1 Legal Characteristics of Sub-National Constitutionalism

Legal parameters that circumscribe sub-national constitutionalism as a distinct institutional phenomenon are:

- *Sub-national units must have independence regarding some fundamental content such as, Government Structure and Individual Rights;*
- *Sub-national constitutions must be Entrench able and Supreme relative to other forms of sub-national law; and*
- *Sub-national constitutions must be endorsed by their respective sub-national communities⁸⁸.*

2.4.5.1.1 Contingent Fundamental Content

A federal system allows for sub-national constitutionalism only if it permits sub-national units some discretion in framing and or limiting sub-national government⁸⁹. That is, the rules of the federal regime must permit sub-national units to address fundamental issues such as government structure and or individual rights. However, sub-national constitutions are by definition substantively contingent.

All federal constitutional democracies have an overarching constitutional structure that captures the people's choices regarding the appropriate allocation of powers between the various levels of government⁹⁰ and the Sub-national constitutions operate within the legally

and FDRE constitution also established concurrent power of federal and regional state governments on some selected area of taxation as per article 98.

⁸⁸ Koen Lenaerts, Constitutionalism and the Many Faces of Federalism, 38 AM. J. COMP. L. 205, 1990, at p 205(in Jonathan L. Marshfield, Models of Sub-national Constitutionalism, PENN STATE LAW REVIEW [Vol. 115:4], 2011, at p.1158)

⁸⁹ Id

⁹⁰ Supra note 59, at p .25

defined “space,” which is circumscribed by the national constitution⁹¹. The national constitution determines exactly what “range of discretion is available to the component units in a federal system in designing their constitutional arrangements.⁹²” Sub-national constitutions are therefore, second order institutions in that their scope of substantive content and the realm of permissible constitutional choices available to sub-national communities are legally constrained by the national constitution⁹³. In this sense, the content of sub-national constitutions is contingent on the rules of the particular federal regime within which they reside. Thus, the “constitutional space” allotted to sub-national units regarding fundamental content takes various forms. Some federal regimes, for example, allow sub-national units to establish legislative and executive branches, but prohibit sub-national units from creating their own judiciary⁹⁴. Many federal regimes impose specific structural and procedural parameters within which sub-national units must operate when designing their institutions⁹⁵. Federal regimes may also establish default structural provisions for all sub-national governments, but allow sub-national units to adopt their own constitutions that deviate from those default provisions if they choose⁹⁶.

It is also common for federal regimes to establish certain national minimum standards regarding individual rights, but permit sub-national units to provide greater protection above this minimum standard⁹⁷. Furthermore, the rules regarding sub-national constitutional space need not be the same for all sub-national units.

⁹¹ Id, at p. 5.

⁹² Id

⁹³ Ronald L. Watts, *States, Provinces, Lander, and Cantons: International Variety Among Sub-national Constitutions*, at p. 954

⁹⁴ Id

⁹⁵ Brazil is a good example of this. Its national constitution provides many particulars regarding legislative and executive structure and procedure. (In supra note 78, at p.10)

⁹⁶ The Austrian Constitution, for example, expressly provides that states may “not impose more stringent conditions for suffrage and electoral eligibility than the electoral regulations for the House of Representatives.” BUNDES-VERFASSUNGSGESETZ [B-VG] [Constitution] Art. 95; see Robert F. Williams, *Comparative State Constitutional Law: A Research Agenda on Sub-national Constitutions in Federal Systems*, in *law in motion*, at p. 339

⁹⁷ Donald L. Horowitz, *The Many Uses of Federalism*, 2007, at 959 (discussing asymmetrical federalism). India provides a classic example of an asymmetrical sub national constitutional federal system because it permits only one state, Kashmir, to adopt a written constitution. See INDIA CONST. Arts. 168-212 . see also Daniel J. Elazar, *State Constitutional Design in the United States and other Federal Systems*, 12 PUBLIUS 1, 1982, at p 9.

Asymmetrical federal arrangements can tailor sub-national constitutional space to particular sub-national units⁹⁸. The purpose here is not to catalogue those variations but simply to note that sub-national constitutional space must permit sub-national units some discretion regarding fundamental content⁹⁹.

A federal system that establishes sub-national government institutions and does not permit Sub-national units to alter or limit those institutions in any way does not provide for sub-national constitutionalism. All of the fourteen federal systems currently permitted sub-national units to adopt their constitutions,¹⁰⁰ and gives them some degree of discretion regarding fundamental contents¹⁰¹.

2.4.5.1.2 Entrenchment and Supremacy

Some form of entrenchment is necessary to distinguish sub-national constitutions from legislation. This is implicit in the use of a written instrument to structure and limit government authority¹⁰².

A definitional component of constitutionalism is that sovereignty resides with the people and that government representatives are agents subject to the trust agreement created by the people¹⁰³. The consequence of this is that the trust agreement must be entrenched beyond the ordinary authority of government officials. In order to constrain the regular activities of government officials, the trust agreement must be changeable only by special and more

⁹⁸ Thomas m. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union, 8thed, 1927, at P. 91-96. see also Frank P. Grad, The State Constitution: Its Function and Form for Our Time, 54 VA. L. REV, 1968, at P.928

⁹⁹ Those fourteen systems are: Argentina, Australia, Austria, Brazil, Ethiopia, Germany, Iraq, Malaysia, Mexico, Russia, South Africa, Switzerland, the United States, and Venezuela. See John Dinan Patterns of Sub-national Constitutionalism in Federal Countries, 39 RUTGERS L. J, 2008, at 839-840.

¹⁰⁰ Some systems, such as South Africa, permit sub national units only minimal “space” regarding sub-national constitutions. See Donald S. Lutz, The United States Constitution as an Incomplete Text, ANNALS 23, 1982, at p.496

¹⁰¹ Aaron-Andrew P. Bruhl, Using Statutes to Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause, 19 J.L. & POL, 2003, at p. 345,

¹⁰² Philip Bobbitt, Constitutional Interpretation,199 , at p. 3-5

¹⁰³ John O. Mc Ginnis & Michael B. Rapp port, Symmetric Entrenchment: A Constitutional and Normative Theory, 89 VA. L. REV. 2003, at p.385.

arduous procedures¹⁰⁴. A corollary of this is that constitutional law must be supreme¹⁰⁵. Ordinary legislation or any other form of law that contradicts the constitution must be invalid. Although sub-national power is always contingent upon the overarching national constitution, the decision to allow sub-national units some discretion in structuring and limiting that power implies that a suitable instrument is available for the task.

To the degree that federal regimes allow sub-national units to structure their delegated power by use of a sub-national constitution, the constitution must be entrenched and supreme. Sub-national constitutions must be entrenched beyond the ordinary authority of the government officials and institutions that they constitute. If sub-national constitutions are not entrenched and supreme, they cease to be effective restraints on sub-national authority, and consequently, cease to be constitutions¹⁰⁶.

Again, mechanisms for entrenchment may vary. Some federal regimes impose universal top-down entrenchment standards¹⁰⁷. Other regimes may simply protect the sub-national units' rights to develop their own entrenchment mechanisms¹⁰⁸. Whatever the rules, the point is that sub-national constitutions must be insulated from the ordinary political process, so that the organs of government they establish are not entitled to change their own powers in the ordinary course of their official duties.

2.4.5.1.3 Community Endorsement

¹⁰⁴ Constitutionalism is necessarily connected with the rule of law, which requires that government itself be subject to law. The supremacy of constitutional law is designed to realize this ideal. See Harvey Wheeler, *The Foundations of Constitutionalism*, 8 *LOY. L.A. L. REV.* 1975, p. 507-508

¹⁰⁵ Austria's arrangement is an example. See *BUNDES-VERFASSUNGSGESETZ [B-VG] [Constitution] Art. 99(2)* ("A State constitutional law can be passed only in the presence of half the members of the State Parliament and with a two thirds majority of the votes cast"). South Africa's national constitution also provides a universal entrenchment standard. *S. AFR. CONST.* 1996 § 142.

¹⁰⁶ Jonathan L. Marshfield, *Models of Sub-national Constitutionalism*, *PENN STATE LAW REVIEW* [VOL. 115:4], 2011, AT P.1162

¹⁰⁷ The U.S. is a good example of this. The U.S. Supreme Court has traditionally defended the authority of the states to determine their own institutional arrangements. See *Sweezy v. New Hampshire*, 354 U.S. 1957 at p. 234, 256

¹⁰⁸ *Supra* note 53, at p. 26, ("No sub-national constitution is completely uncontrolled. Sub-national constitutions therefore draw on the authority of the people organized nationally, as well as the authority of the people of the sub-national community.")

Sub-national constitutions are derivative of both internal and external political communities.¹⁰⁹ This is true regarding the content of sub-national constitutions as well as their democratic legitimacy. As an external presence, the national political community defines the substantive space within which a sub-national community can move when constituting itself. It determines, for example, what individual rights a sub-national community can constitutionalize, and may impose some limitations on how sub-national units design government institutions. Thus, sub-national constitutions derive in part from the authority and preferences of the national community and in part from the authority and preferences of their corresponding sub-national communities.¹¹⁰

By granting sub-national communities some discretion regarding how sub-national power will be organized and limited, a federal regime inevitably vests sub-national communities with a degree of self-governance¹¹¹.

Sub-national constitutions are, by definition, intended to reflect some degree of local input regarding the structure of sub-national authority. A federal regime that does not allow for sub-national input regarding the structuring of sub-national authority does not allow for genuine sub-national constitutionalism. One can imagine, for example, a national authority that crafts particularized constitutions for sub-national units without any direct input from the sub-national community. Under the description of sub-national constitutionalism proposed here, those documents would not qualify as sub-national constitutions because they are entirely derivative of the national community. Although they are “constitutional” in the sense that they structure sub-national authority, they are not “sub-national” because they do not derive any content or portion of their legitimacy from the input or endorsement of their respective sub-national communities¹¹².

Community endorsement may or may not involve direct popular input from sub-national communities. Representative input may suffice so long as the relevant officials represent the particular interests of the sub-national community. However, line drawing is especially hard

¹⁰⁹ Supra note 101, at p.1163

¹¹⁰ Andy Smith & Paul Heywood, *Regional Government in France and Spain*, 2000, at p.22-30. And also See G. Alan Tarr, *Sub-national Constitutions and Minority Rights :A Perspective on Canadian Provincial Constitutionalism*, 40 RUTGERS L. J. 2009, at p.771-773

¹¹¹ Id at 22-30.

¹¹² Supra note 104, at p.1164

in this regard. Some federal regimes organize sub-national governments by enacting “**regional autonomy statutes**” for sub-national units¹¹³. These statutes are ultimately approved by national institutions, which may include representatives from the affected sub-national unit¹¹⁴. Unless those representatives are given exceptional authority regarding those statutes by means of some sort of region based veto for example it would seem that simply casting a vote in the national body does not amount to a satisfactory level of local input and these statutes would not qualify as genuine or at least pure sub-national constitutions¹¹⁵.

CHAPTER THREE

FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS

3.1 Introduction

Human rights are something that pertains to all human beings at all times in all places irrespective of cultural or economic differences. These rights are characterized by their universality and inalienability. These rights cannot be divested from the person by a human action. They are “the birthright of all human beings.”¹¹⁶

Fundamental human rights are not created by legal norms but are given guarantees by human rights law.¹¹⁷ Historically, it was the Universal Declaration of Human Rights (here after UDHR) that set the trend for serious deliberation on the issue of respect for human rights at a

¹¹³ Supra note 100, at p. 27

¹¹⁴ Id

¹¹⁵ Id

¹¹⁶ Marek Piechowiak, What Are Human Rights? The Concept of Human Rights and their Extra-Legal Justifications, in Raija Hanski and Markku suksi(eds), An Introduction to the International Protection of Human Rights, 2nd Revised Edition, Institute for Human Rights, Abo Akademi University, Turku/ Abo, 1999, at p. 5.(in Abera, at p. 43)

¹¹⁷ Id

global level.¹¹⁸ According to Arts 1 and 2 of the UDHR all human beings are equal in dignity and rights. Thus, everyone is at liberty to enjoy all the rights and freedoms set forth in the declaration without distinction of any kind; such as race, color, sex, language, religion, political, or other opinion, national or social origin, property, birth or other status. However, Scholars classified Human Rights into different categories for various purposes, especially for academic purpose; as “Classic and Social Rights, Civil, Political, Economic, Social and Cultural Rights, Fundamental and Basic rights and others such as, freedoms, civil liberties, individual and collective rights, first, second and third generation rights.”

Although human rights have been classified into different types, it is important to note that international human rights law stresses that all human rights are universal, indivisible and interrelated.¹¹⁹ The indivisibility of human rights implies that no right is more important than any other. Nevertheless, within the UN, an extensive standards have been developed which particularly since the 1960s have been laid down in numerous conventions, declarations and resolutions and which bring already recognised rights and matters of policy that affect human development into the sphere of human rights. Due to the concern that a broad definition of human rights may lead to the notion of ‘violation of human rights’ losing some of its significance has generated a need to distinguish a separate group within the broad category of human rights.

Another approach is to distinguish a number of ‘**basic rights**’, which should be given absolute priority in national and international policy. These include all the rights which concern people’s primary material and non-material needs. If these are not provided, no human being can lead a dignified existence. Hence, the idea of basic rights originated from the need to protect the individual against the arbitrary use of state power. Attention was therefore, initially focused on those rights which oblige governments to refrain from certain actions.

Fundamental rights include; the right to life, the right to a minimum level of security, the inviolability of the person, freedom from slavery and servitude, and freedom from torture, unlawful deprivation of liberty, discrimination or in equality and other acts which impinge on human dignity. They also include freedom of thought, conscience and religion, as well as the right to suitable nutrition, clothing, shelter and medical care, and other essentials crucial to

¹¹⁸ U. N General Assembly Resolution 217 A (III) 10 December 1948.

¹¹⁹ Vienna Declaration and Programme of Action (1993), Para. 5

physical and mental health. Mention should also be made of so called participation rights. For instance; the right to participate in public life through elections which is also a political right or to take part in cultural life. These participation rights are generally considered to belong to the category of fundamental rights, being essential preconditions for the protection of all kinds of basic human rights.

The obligation is imposed up on Each State Party to the ICCPR to undertake to take the necessary steps in accordance with its constitutional process; i.e. to adopt such laws or other measures as may be necessary to give effect to these rights¹²⁰. Being member to the ICCPR, Ethiopia has recognized all the fundamental rights by the 1995 FDRE Constitution. The Constitution aimed to build ‘a political community founded on the rule of law and capable of ensuring a lasting peace, guaranteeing a democratic order’¹²¹ putting an end to inequality, dictatorship and repression. It aspires for a future based on the full respect of individual and people’s fundamental freedoms and rights, and living together on the basis of equality and without any sexual, religious or cultural discrimination¹²². It is further promised to have a transparent and accountable government.¹²³

One third of the FDRE Constitution provisions deals with fundamental rights and freedoms. The importance given to these rights and freedoms is further illustrated in the interpretation requirement that has to conform to international standards of human rights¹²⁴ but also by imposing an extra stringent amendment requirement than the other provisions in the Constitution¹²⁵. Despite the principle of indivisibility of rights, the Constitution has categorized fundamental rights and freedoms into human rights¹²⁶ and democratic rights.¹²⁷

¹²⁰ Art. 2(2) of the ICCPR

¹²¹ Preamble of the 1995 Ethiopian Constitution

¹²² Id, Art, 25

¹²³ Id, Art. 12

¹²⁴ Id, Art.13(2)

¹²⁵ Id, Art. 105. And See also Fasil Nahum, *Constitution for a Nation of Nations: The Ethiopian Prospect* , The Red Sea Press, Inc., Asmara,1997, at p.109.

¹²⁶ Id, Articles 14–28

¹²⁷ Id, Articles 29-44. For a deeper analysis of the reasons and arguments regarding this classification, see Gedion Timothewos, ‘Freedom of Expression in Ethiopia: The Jurisprudential Dearth’, 4(2) *Mizan Law Review* ,2010, at p.207-213

Article 10 of the Constitution creates the impression that human rights are those emanates from the nature of mankind and democratic rights as those inherent in democracies.¹²⁸

The preparatory work of the Constitution moreover suggests that human rights are those rights that a person is entitled merely because he or she is a human being and democratic rights are those conferred only on citizens.¹²⁹ The Constitution clearly limits the application of a right to Ethiopians whenever it deems necessary regarding each right.¹³⁰ Moreover, limiting the application of rights to citizens will be inconsistent with international human rights instruments adopted by Ethiopia. The ICCPR for instance applies to all persons within the territory or jurisdiction of ratifying states.¹³¹ Hence, no substantive distinction should be made merely on the ground of whether a right appears under the ‘human rights’ or ‘democratic rights’ section. From this point of view, we can say that, all rights provided under chapter three of the FDRE Constitution are fundamental rights.

For the sake of this paper, among all the fundamental rights, let us analyze the Sovereignty right and Right to Self-determination, Right to Equality, Right to Political Participation or Electoral Right (Right to elect and to be elected) and related rights under FDRE Constitution comparing with that of Oromiya and Benishangul-Gumuz Sub-national states constitutions to pore over whether the latters are compatible with the former or not.

3.2 Sovereignty Right and Right to Self-determination

3.2.1 Sovereignty Right

The doctrine of sovereignty originated in Europe at the time when modern nation-states emerged around the fifteenth century. During the middle age, a multitude of authorities; princes, aristocrats, local kings and the church wielded power until they were engulfed by the

¹²⁸ SA Yeshaneh ‘The justiciability of human rights in the Federal Democratic Republic of Ethiopia’ African Human Rights Law Journal, 2008, at p.275 &276.

¹²⁹ See Minutes of the Discussion on the Draft Constitution at the Council of Representatives, May 1994. See also T. Regassa “Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia”, 3(2) Mizan Law Review 287, 2009, at p.303

¹³⁰ Adem Kassie Abebe, Human Rights Under The Ethiopian Constitution: A Descriptive Overview, Mizan Law Review Vol. 5 No.1, Spring 2011, at p.57

¹³¹ Art 2(1) of ICCPR.

nation-state. The then Kings, as a rulers of nation-state, managed to establish their supremacy with the help of doctrine of sovereignty¹³².

In modern sense; Sovereignty is one of the fundamental and legal concepts having different dimensions: *External and Internal; Legal and Political*¹³³. For the purpose of this paper let us see only the external and internal sovereignty giving the high emphasis to internal sovereignty.

External sovereignty; as the name implies, is concerned with the status of a country in international arena i.e. ability to deal with other states independently. The concept embodies the idea of national independence and self-government.¹³⁴ As for its importance, **Hey wood** pointed out, “*Only if a nation is sovereign are its people capable of fashioning their own destiny in accordance with their particular needs and interests*”¹³⁵. To ask a nation to surrender its sovereignty is tantamount asking its people to give up their freedom.¹³⁶

Internal sovereignty; which is the main objective of this part of the paper refers to the possession of supreme authority over the internal affairs of a state. That means the possessor of internal sovereignty has the final decision making power.

In the constitution of Most of the sates of the world the holder of internal sovereignty is the people i.e. peoples are sovereign. All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only and is instituted solely for the good of the whole.¹³⁷ However, in Ethiopian case, the sovereign is Nation, Nationality and Peoples of Ethiopia as provided under the preamble and Article 8¹³⁸ of the FDRE constitution. At regional level or under regional constitutions, the Sovereignty right belongs to indigenus or the majority ethnic groups of the respective regional states¹³⁹.

3.2.2 Right to Self-determination

¹³² Tadese Melaku, Introduction to constitutional law, volume I, 2012, at p.65.

¹³³ Id

¹³⁴ Andrew Heywood, political ideas and concepts: An introduction, 1994, at p.55, (In Tadese Melaku, at P.66)

¹³⁵ Id

¹³⁶ Id

¹³⁷ Article 2 of the North Carolina State Constitution

¹³⁸ All sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia.

¹³⁹ See for example Article 8 of Oromiya and Afar and Article 9 of Somali Regional States Constitutions.

The right to self-determination is an integral part of human rights law¹⁴⁰. It was first enshrined in the Charter of the United Nations for all peoples. However, it has been the subject of extensive debate and controversy. Both the content of the right as well as who can assert it continue to evolve in international law. According to the International Covenant on Civil and Political Rights (ICCPR), all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.¹⁴¹ As provided in the Covenant, the exercise of the right to self-determination of peoples is not restricted to those who are under alien rule in its scope of application. The term "all peoples" in addition to peoples under colonial or alien rule should also include those under occupation, indigenous peoples and other communities who satisfy the criteria generally accepted for determining the existence of a people. The provision does not hinder ethnic groups within a political community from legitimately invoking the right when that becomes necessary.¹⁴²

The African Charter on Human and Peoples' Rights also recognizes all peoples, whether colonized or oppressed as right holders of the right to self-determination.¹⁴³

The rights to self-determination have internal and external aspects.¹⁴⁴ The external aspect of self-determination is concerned with the international status of a people¹⁴⁵. It refers to the right to decide on the political status of a people and its place in the international community in relation to other states. This right includes the right to separate from the existing state of which the group concerned is a part and to set up a new independent state. The internal aspect of the right to self-determination relates to "the internal state structure as well as to certain legal regulations to accommodate the population diversity of a state in a more optimal way."¹⁴⁶ In its essence, the right to internal self-determination means the right of the whole population of a state to decide the form of government and the personality of the rulers. It

¹⁴⁰ Abera Dagafa, *The Scope of Rights of National Minorities under the Constitution of Federal Democratic Republic of Ethiopia*, Series on Ethiopian Constitutional Law, vol. 1, Addis AAU Printing Press, Ababa University, 2008, at p.64

¹⁴¹ Art. 1 of the ICCPR

¹⁴² *Supra* note 140, at p.65

¹⁴³ African Charter of Human and Peoples' Rights, 1981

¹⁴⁴ Antonio Casesse, *Self-Determination of Peoples: A Legal Appraisal*, Cambridge, 1995, at p.96.

¹⁴⁵ K. Henrard and S. Smis, *A Regained Interest in the Right of Self-Determination*, *Journal of African Law*, No. 1, 2000, at p.26 (In Abera, at p.66)

¹⁴⁶ *Supra* note 120, at p.67

means the right of an ethnic, linguistic or religious group to participate in decision-making at the state level. In its broader sense, internal self-determination may as well relate to the right of the whole people of a country to choose its own government and make the necessary participation in the decision process of the state, which of course should include members of minorities.¹⁴⁷ Because of this concept, many national groups interpret their basic rights to self-determination as a right to independent statehood, which they in turn interpret as a right to state of their own, a state which belongs to their people. However, the right of national groups to exercise self-determination should be considered as a package of privileges to which each national group is entitled in its main geographical location normally within the state that coincides with its home land. This package of rights should mainly contain powers and liberties to practice their culture independently and to administer sub-national parts of their lives within this culture and rights to guarantee their fair representation in the government institutions and the symbol of the state.¹⁴⁸

The right to self-determination is given further extension under FDRE constitution by including provisions of unconditional rights even to secede.¹⁴⁹ The right to secession is also part and parcel of the right to self-determination of nations regardless of their numerical, historical and political status.¹⁵⁰ The only limitation to nations' right to self-government is that all regional or local organs should discharge their duties and exercise their rights within the framework of democratic principles, rule of law and in accordance with the mandatory rules and spirits of FDRE Constitution¹⁵¹. Until now, there are only nine Regional States¹⁵² and two City States for nearly around eighty nations in the country. But, the door is not closed for every nation to establish its regional state in the future.¹⁵³

Article 39 of the FDRE constitution grants under the denominator of the right to self-determination, an extensive right to all Ethnic groups.¹⁵⁴ These rights comprise Language

¹⁴⁷ Supra note 145

¹⁴⁸ Chaim Gans, *The Limits of Nationalism*, Cambridge University Press, 2003, at p.67

¹⁴⁹ Art. 39 of FDRE Constitution

¹⁵⁰ Id

¹⁵¹ Id. Art.50(2)(a)

¹⁵² Id, Art.47(1)

¹⁵³ Id, Art. 47(2)

¹⁵⁴ Christophe Vander Beken, *Constitutional Diversity in Ethiopia: Comparative Analysis of Ethiopia's Regional Constitutions*, at p.27

rights and cultural rights, Political Participation rights, the right to territorial autonomy and even the right of secession.

The federal constitution grants a right to self determination to all nations, nationalities and peoples (ethnic groups) of Ethiopia. But, the regional constitutions on the other hand limited this right to selected number of ethnic groups¹⁵⁵ by considering only the territorial aspects of the right (territorial autonomy and secession) neglecting its non-territorial or group specific parts of the right (cultural, linguistic and equitable representation rights) that provided under sub article 2 and 3 of article 39 which all nation, nationality and peoples including minorities or non-indigenous as named in Benishangul-Gumuz regional state Constitution in any regions are entitled to claim.

The Oromiya, Afar, Harar and Somali constitutions reserves the right to self determination for the Oromo, Afar, Harari and Somali people respectively¹⁵⁶. The Amhara constitution obviously grants a right to self determination to the Amhara, but extends this right to include Agew, Himra, Awi and Oromo ethnic groups. In the same fashion to that of Amharas', the Tigray constitution does not exclusively reserve the right to self determination to only the Tigrayans, but includes the Irob and Kunama Communities as well¹⁵⁷. The Benishangul-Gumuz and Gambella Constitution grant the right to self-determinations exclusively to the ethnic communities indigenous to the region: the Berta, Gumuz, Shinasha, Mao and Komo in Benishangul-Gumuz and the Nuer, Anuak, Megenger, Upo and Komo in Gambella¹⁵⁸. Finally, the Constitution of the Southern region stipulates that only the nation, nationalities, and peoples of the region have a right to self determination.¹⁵⁹

3.2.2.1 The Right to Self-rule or Self-government

The rights to self-government are the basic parts of the fundamental rights of minority groups. It also includes powers and liberties that allow members of national groups to control their culture and substantial parts of their lives within its framework¹⁶⁰. The right to

¹⁵⁵ Id at p.28

¹⁵⁶ See Art. 39 of Oromiya, Art.37 of Afar and Art. 39 Harari Regional States Constitutions.

¹⁵⁷ See Art. 39 of Amhara, Art. 39 of Tigray Regional States Constitutions.

¹⁵⁸ See Art. 39 of Benishangul-Gumuz, Art. 39 of Gambella Regional States Constitutions.

¹⁵⁹ See Art. 39 of Southern Nation, Nationalities and Peoples Regional State Constitution.

¹⁶⁰ Sisay Mangistu, The Right of National Minorities Under Amhara Region Constitution, The National Human Rights System in Ethiopia, Human Rights Law Series Vol.V,2011,at p.160.

self-government as an element of the right to self-determination exists for all nations or the makers of the FDRE Constitution.¹⁶¹ It is limited self-determination in areas of political and economic affairs at sub-governmental level. Each nation of Ethiopia has the right to full measure of self-government which consists of the right to establish institutions of government in territory they inhabit and equitable representation at both federal and state government level.¹⁶² For instance, Nationality administrations¹⁶³ found in Amhara region are established in their specific areas by the 2001 revised constitution of Amhara region in order to administer themselves as well as exercise their self-rule rights in their respective territories. In other words, the constitution of the region stipulated that “there is hereby established, a nationality administration in those geographic areas of the national regional state inhabited by the Himra, Awi and Oromo peoples, pursuant to the provision of Article 39(6) Article 45(2) of the State constitution”¹⁶⁴

Following the constitutional guarantee, nationality administrations established their own nationality councils in their respective territories in order to exercise their legitimate political power and thereby to administer themselves. In the same fashion an ethnic groups those didn't get the status of national administration (territorial right) can exercise their constitutionally guaranteed self-rule right by having guaranteed representation with the holders of territorial rights at regional as well as at federal level as per article 39(3) of FDRE Constitution which in fact systematically denied under article named by self-determination right in almost all sub-national constitutions.

3.2.2.2 Right to Autonomy

Minorities claim to autonomy and to self-government are exchange ably used as both signify internal self-determination and it is difficult to trace any meaningful difference between them.¹⁶⁵ However, in its scope and application, autonomy may be categorized into personal

¹⁶¹ Art.39(1) of FDRE Constitution

¹⁶² Id. Arts.39(3)& 47(2)

¹⁶³ Nationality Administrations are constitutionally recognized territorial administrations composed of historic national minorities including Agawos (both Gojjam and Wollo), Argoba and Oromo nationality.(in Siay Mangistu, supra note 153)

¹⁶⁴ Article 73(1) of the Amhara National Regional State revised Constitution of 2001

¹⁶⁵ Supra note 125, at p.22-29.

or cultural autonomy and territorial autonomy.¹⁶⁶Cultural or personal autonomy applies to territorially dispersed members of a minority group whereas territorial autonomy applies to a defined part of a territory irrespective of differences amongst population.¹⁶⁷

Minority population groups demand independence in areas of economic, cultural and political affairs so as to preserve their separate identity and order on resources within their territory. The right to autonomy is not confined only to territorially concentrated minority groups since dispersed minority groups also claim personal or cultural autonomy.¹⁶⁸ Normally, autonomy may be demanded when groups or individuals want to run their socio-economic and political affairs without interference of the central authority of the majority provided they comply with the federal law which demands uniformity in areas of fundamental human rights, democratic principle and rule of law. Giving autonomy for oppressed or discriminated groups minimizes the ethnic antagonism. Nonetheless, indigenous minorities require territorial autonomy as they want to preserve their separate identity and to control affairs and resources within their territory without interference from the center¹⁶⁹.

In Ethiopia; at the federal level, all nations, nationalities and peoples of the country are treated as equal and obviously all are indigenous. However, at the regional level there are the concepts of created endogenous and non-endogenous groups. At this juncture it is important to distinguish between endogenous and exogenous ethnic groups. Endogenous or indigenous minorities are those ethnic groups that have traditionally lived in the territory of the region; while exogenous or non- indigenous minorities are those ethnic groups that have migrated to the region in the recent part and are indigenous in other region; could also termed internal migrants. Endogenous minorities have a right to have a territory of their own inside the region and to representation in the regional institutions. Exogenous minorities do not have such specific protection and can only claim universal rights.¹⁷⁰ For instance, Oromo/Kamise,

¹⁶⁶ Gnanapala Welhengama, *Minorities' Claims: From Autonomy to Secession*, Ashgate Publishing Company, Aldershot, 2000, at p.166-67

¹⁶⁷ Id , at p.102

¹⁶⁸ Id, at p.105

¹⁶⁹ Supra note, 146,at p.75-77

¹⁷⁰ Christopher Van der Beken, *Ethiopia: Constitutional Protection of Ethnic Minorities at the Regional Level*, at p. 125.

Himra/Agaw and Hawi, Agaw nationality of Amhara region, Mao and Komo ethnic groups in Benishangul-Gumuz (which account less than 1% of regional population) and many ethnic groups in SNNPR are guaranteed constitutional right to self-determination and also constitutionally guaranteed representation in regional institution like legislative and constitutional interpretation institution, despite their number due to fact that they are endogenous.

However, though diversity is evident in all the states, no state dared to expressly deal with the rights of non-indigenous minorities (the non-territorial or group specific rights) in its constitution and also no regional administrative or institutional mechanism are designed to allow them exercise their group specific rights, despite the fact that they are numerically larger than many ethnic groups (endogenous) in the region. The best example is the number of Amhara, Tigre and Oromo in Benishangul-Gumuz regions.

3.2.2.3 Linguistic and Cultural Rights

3.2.2.3.1 Linguistic Rights

Language is an indispensable attribute of human race not only because it is “a medium of communication but also it is a source of pride, self-esteem and identity in the sense that it is a defining characteristic of human society”.¹⁷¹ It plays valuable role for diplomatic co-existence and social life of human beings. Language is an intrinsic element of identity of human person. That is why Fishman states that “ethnic identity becomes impoverished without the linguistic dimension.”¹⁷² Moreover, language is an indispensable tool of social organization, which makes it a matter of public interest capable of being employed for influencing access to power.

A state cannot remain language neutral as it is impossible to run the government without having one or more working language/s. If the state arbitrarily chose one or very few working languages in multi-lingual states, it creates unnecessary discrimination being an obstacle to an

¹⁷¹ Tasaku Tsunoda, Language Establishment and Language Revitalization, Moutonde Gruyter, 2005, at p.141 cited in Yared Legeses Article on “Linguistic Regimes in Multinational Federations :The Ethiopian Experience in a Comparative perspective”, Issues of Federalism in Ethiopia: Towards an Inventory Ethiopian Constitutional Law Series Vol.2, at p.126

¹⁷² Joshua Fishman, Language and Ethnicity, quoted by Rodriguez, at P.141 Quoted from Joshua Fishman’s Language and Ethnicity, by Cristina M. Rodriguez, in Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States, 36 Harvard Civil Rights-Civil Liberties Law Review, 134 (2001), at p.141. (in Abera, supra note 142 at p.54)

access to employment and education opportunities for those groups whose language fails to get the status of working language. Moreover, if not wisely chosen, a choice of language may directly affect the political power structure of the state since “native speakers of the official language are more likely to reach the higher echelons of the state machinery.”¹⁷³

Not only neglecting the languages but also states may deliberately undermine the language of minorities to make them feel inferior to the linguistic group. Minority groups whose language is neglected may feel that they are excluded and they can hardly preserve their distinct identity and jeopardize their opportunity to equally participate in political, social and economic affairs. That is why in multi-lingual states, ‘it is difficult to the state to remain language neutral in its contacts with the public.’¹⁷⁴ If a single language is selected arbitrarily as an official language, “a government is automatically creating a distinction on the ground of language in its allocation of resources, services and benefits, simultaneously creating various levels of difficulty for individuals having different primary language.”¹⁷⁵ Regarding this, Mr. Abera Degafa in his master’s thesis stated that, in any multilingual State, a language policy should take into account the competing claims of the existing linguistic groups in the State. As much as possible, such a State is required to decide wisely which language or languages it uses in political, judicial and educational institutions. For those who are non-native speakers of the chosen language competing with native speakers in all spheres of life is not simple. States would obviously want to have a linguistically homogenous society in order to create national unity.¹⁷⁶ Different countries are using different approaches. For instance, in India two languages, Hindi and English are recognized as official languages of the federal government¹⁷⁷ while in Switzerland; Germany, French and Italy languages are recognized as federal official languages.¹⁷⁸

¹⁷³ Mart Rannut, *The Common Language Problem* in Miklos Kontra, Robert Philipson and et al, (eds.) *Language: A Right and a Resource*, Central European University Press, Budapest, 1999, at p. 103 (Id, in Abera)

¹⁷⁴ Id

¹⁷⁵ Fernand de Varennes, *Language, Minorities and Human Rights*, Martinus Nijhoff Publishers, The Hague, 1996, at p.141(in Abera at p.55)

¹⁷⁶ Id

¹⁷⁷ Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative study*, Revised 2nd ed, Forum of Federation, 2007, at p.196

¹⁷⁸ Id, p.207

There is no one ethnic group that constitutes 50% in the federation of Ethiopia though Oromo constitutes the largest group. As far as the ethnic constitution of each state none of the nine states and the city states are homogeneous. In fact the Oromo, Amhara, Tigray, Somali and Afar people dominate in their respective regions with significant numbers of minorities in each. In SNNP, Gambella, and Benishangul Gumuz regions, the range may vary from 4 to 50 minority nationalities in which there is no dominant ethnic group.

The FDRE constitution, under Art.5 (1) and (2), states that all Ethiopian languages enjoy equal state recognition and Amharic is the working language of the federal government but does not spell the official language for communication between the federal government and the states although as a matter of practice Amharic is maintained.

The ethno-linguistic groups demand for cultural preservation and distinctiveness by vesting the mandate to determine the working language of their respective state by the state legislatures.¹⁷⁹ This opens the way for the states to adopt their own working languages.

Looking at the practical records of the regional states three different approaches seem discernible. First, some states have adopted their own majority language as the working language of their respective regional administrations. Amhara, Tigray, Oromiya, Afar, and Somali fall in to this category¹⁸⁰. Other states which do not have a majority ethnic group SNNP, Benishangul-Gumuz and Gambela regions have chosen Amharic as their respective working languages¹⁸¹. The third trend is the one adopted by the state of the Harari Regional State, where Harari and ‘Afaan Oromo’ have been chosen as working languages¹⁸². What is particularly interesting in this development is its significance in portraying how sub-regional political actors may opt to deal with language issue under the general constitutional framework.¹⁸³

In addition to selecting Amharic as the only working language of federal government, the FDRE Constitution gave discretion for sub-national states to select their own working language/s and in its article 39(2) also it gave right to right to speak, to write and to develop

¹⁷⁹ Art 5(3), FDRE Constitution

¹⁸⁰ See Arts.5 of Amhara, Tigray, Oromiya, Afar, and Art. 6 of Somali Regional States Constitutions

¹⁸¹ See Art.5 of SNNP and Art.6 of Benishangul-Gumuz and Gambela Regional States

¹⁸² See Art.6 of Harari Regional States

¹⁸³ Supra note 176, at p. 65-66.

its own language to every Nation, Nationality and Peoples Ethiopia, irrespective of their number and where they are in the country. But the regional states, only selecting their working language/s (the languages of the majority ethnic group in the region or in region versed with very diverse ethnic groups, the language seems neutral and accessible to all, for that case, 'Amharic') and left without at least recognizing the right to right to speak, to write and to develop its own language of minorities or indigenous ethnic groups.

3.2.2.3.2 Cultural Rights

The right to retain one's separate identity of a population group can be meaningful only when the group exercises, practices and develops its cultural assets in addition to its own language. A minority group can make its cultural, traditional and customary values everlasting and cross-generational only through practice. Nonetheless, in order to adequately maintain and develop, the group needs various facilities such as established and adequately financed institutions and public protection. Disincentive to linguistic and cultural rights of a population groups are considered to be a restraint to recognition of distinct identity of the group. That is why Art. 27 of ICCPR states that cultural minorities are entitled to recognition and protection of their right to enjoy their own culture in community with other members of the group.

As to the contents of cultural rights; customs, morals, traditions, rituals, types of housing, wearing, eating habits, manufacture of object of art, the cultivation of music, the establishment of cultural organizations, the publication of literatures in the minority language may be mentioned.¹⁸⁴ Designing a curriculum that reflects the tradition and customary practices of the group is important to develop the culture. "Educating the following generations, whether by setting up separate schools or by the corresponding respect for the culture of minorities in public schools" play significant role for the preservation of the identity of the population group.¹⁸⁵ As much as possible in multi-cultural states, cultural pluralism should be promoted by adopting accommodative educational and cultural policies and strategies if not it exacerbate conflict. Hence, national culture should

¹⁸⁴ M. Nowak, UN Covenant on civil and Political Rights: ICCPR Commentary, Kehl, Engel, 1993, at p.500-501

¹⁸⁵ UN, General Comment No.23, Art.27, Human Right Committee, UN, Doc. CCPR /C/ 21/ Rev.1 /Add.5 (1994), Para. 50

not be equated to the culture of one group. In fact, cultural groups need to be guaranteed the right to learn and write and perpetuate their own right history and tradition by their own language. If the numerical size, resource and consciousness of cultural minorities justifies “they must have at judicial, social and cultural institutions adequate spaces which allow preserving and developing its distinct characteristics under the same conditions as the majority.”¹⁸⁶

Therefore, equality should be bestowed to the minority group only when they are in an environment comparable to those of the majority population¹⁸⁷ though they require beyond equal treatment owing to their vulnerable nature. Since they can hardly exert an influence on the majority preferences, they remain dominated unless preferential treatment in areas of social, political, economic, cultural and religious affairs extended to them¹⁸⁸. Affirmative action should be taken to put members of minorities in equal footing with members of majorities.¹⁸⁹

“In plural states in which coercive assimilation is the major goal; national, ethnic, cultural and linguistic minorities are compelled to “shed their uniqueness or identity and integrate with the rest of society”¹⁹⁰ though it rarely succeeds in bringing the intended national unity.

States should refrain from depriving members of minorities from enjoying their culture in order to destroy their distinctiveness, rather museums, libraries, place of workshop of cultural groups should be respected.¹⁹¹ In light of this, Nowak maintains that any measure that puts at risk “the way of life and culture of a minority such as large scale expropriation of minority lands for commercial purposes, constitute a violation of Art. 27.”¹⁹² Thus, in plural state cultural minorities should have the opportunity to practice, develop, promote and educate their generation their culture, and states should facilitate by extending preferential

¹⁸⁶ Geof Gilbert, Religious Minorities and their Rights: A problem of Approach, International Journal on Minority and Group Rights, 2(1997), at P. 113 (in Abera at p.60)

¹⁸⁷ Id

¹⁸⁸ Gudmunder Alfredsson, Minority Rights and New World Order, in Donna Gomien (ed.), Broadening the frontiers of Human Rights, 1993, at P.62

¹⁸⁹ Abera, supra note 183, at p.63

¹⁹⁰ Spiliopopulou Akermark, Justification of Minority Protection in International Law, Kluwer Law International, The Hague, 1997, at P.60

¹⁹¹ The Convention on the Prevention and Punishment of the Crime of Genocide, General Assembly Resolution, UNGAR 260 A(III) (1948)

¹⁹² Supra note 178, at P.501

treatments depending on consciousness of the minority group and economic viability of the state in which minorities reside.

As per the obligation imposed by ICCR on the member states, the FDRE Constitution in article 39(2) equally recognized right to express, to develop and to promote its culture of every Nation, Nationality and People of Ethiopia. Nevertheless, all the regional constitutions did give no places for the cultural rights of minorities or exogenous ethnic groups.

3.3 Right to Equality

As Rabinder Singh QC has noted, *“The idea that all human beings are equal is a very recent notion. Article 1 of the Universal Declaration of Human Rights (UDHR) of 1948 proudly proclaims that all human beings are born free and equal in dignity and rights. Not only born free, as Rousseau had said..., but equal. And not, as the American Declaration of Independence had asserted, only (white) men but all human beings.”*¹⁹³ [Bracketed words and italics added].

In fact the first two articles of the UDHR are entirely devoted to the principle of equality. The second Article provides the original articulation of the modern formulation of anti-discrimination. It is effectively reproduced in the 1950 European Convention on Human Rights (ECHR) and has inserted itself, in a modified form, into domestic anti discrimination legislation.¹⁹⁴ In its day, this was a major step forward, pushing the notion of equality from the Enlightenment principle that all laws must be applied equally (equality before the law) to the assertion that states must use the law to root out discrimination. However, discrimination, as such, is only one aspect of the human rights concept of equality.

As Rabinder Singh also commented in the same article, *“in many ways the most important word in the European Convention on Human Rights is ‘everyone’. Most of the substantive articles of the Convention begin with the word ‘everyone’. The real challenge is to take that word seriously and accept that it means what it says.”* [Italics added]

¹⁹³ Rabinder Singh, ‘Equality: the neglected virtue’, EHRLR, 2004, at p. 141

¹⁹⁴ “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground, such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” ECHR, Article 14.

The right to equality and non-discrimination are relevant and essential elements of individual and minority groups. It is why ICCPR¹⁹⁵ has recognized minority rights to equality and effective protection against any form of discrimination based on contingencies such as “race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹⁹⁶ While the right to equality and non discrimination applies to all human races, minority groups deserve special and ‘extra-protection’ because of their defenseless position in liberal democracy as compared to the majority.

Minority groups claim “collective rights and collective equality” in addition to “adequate protection to the right to individual equality”¹⁹⁷ among all citizens in the state. Moreover, individual equality sought in plural state may backfire unless due regard is given to collective rights since exclusion of particular group or denying **linguistic, cultural or participatory** rights in the guise of liberal individualistic democracy kills the fundamental principles like universality and non-discrimination for which the individual human rights protection strives to achieve.

The 1995 FDRE Constitution have recognized right to equality under article 25 without any reservation and the sub-national constitutions also recognized the same word by word. But, “collective rights and collective equality” of Minority groups in addition to “adequate protection to the right to individual equality” is not clearly but, tacitly recognized under FDRE and absolutely not under almost all regional states constitutions¹⁹⁸.

3.4 Right to Political Participation

The right to political participation allows for a great variety of forms of government. There are many constitutional alternatives in terms of the degree of centralization of state powers or elections and the separation of powers among the organs responsible for the exercise of those

¹⁹⁵ Art.26 of ICCPR

¹⁹⁶ Id

¹⁹⁷ Ivo Duchacek, Comparative Federalism: The Territorial Dimension of Politics, cited in Duchacek, 1970, at p. 97-99

¹⁹⁸ A close readings of article 25 together with the preamble, article 8 and 39 of the FDRE Constitution give as a hint as the group or inter group equality is recognized among national majorities and minorities ethnic groups in addition to individual equality. And to the contrary sub-national Constitutions recognized only individual equality irrespective of the existence of the groups (minorities and exogenous) in their region.

powers. Nonetheless, a democratic structure is an essential element for the establishment of a political society where human rights can be fully realized.¹⁹⁹

Participation is highly of the Public participation; that stands for a broad concept, which involves the whole conduct of public affairs. It relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers covering all aspects of public administration and the formulation and implementation of policy at international, national, regional and local levels.

3.4.1 Electoral Right (Right to Elect and to be Elected)

Everyone has the right to take part in the government of their country and shall have an equal opportunity to become a candidate for election. The criteria for participation in government shall be determined in accordance with national constitutions and laws and shall not be inconsistent with the State's international obligations.²⁰⁰ Formal constitutional or statutory recognition of a citizen's right to vote and to run for public office, is common to democratic states and plays both a substantive and procedural confidence building role. These rights are often subject to certain qualifications insofar as most states make them subject to citizenship, age and residency requirements.²⁰¹

The legal framework must ensure that every citizen above a certain age has the right of suffrage and that every person who has the right of suffrage is allowed to exercise that right in a non-discriminatory manner on the basis of equal treatment before the law. No discrimination on account of race, colour, sex, language, religion, political or other opinion, association with a national minority, property, birth or other status should be allowed to deprive an otherwise eligible citizen of the right to vote or the right to contest an election.²⁰²

Art. 25 of ICCPR thus, provides for the right and opportunity of every citizen "to take part in

¹⁹⁹ Inter-American Court of Human Rights, The Word 'Laws' in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86, 9 May 1986, Series A N° 6, Para. 32; also Judicial Guarantees in States of Emergency (Articles 27(2), 25, and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87, 6 October 1987, Series A N° 9, Para. 24.

²⁰⁰ The Inter-Parliamentary Council at its 154th Session (Paris, 26 March 1994), Declaration On Criteria For Free And Fair Elections, at P.VIII

²⁰¹ International Institute for Democracy and Electoral Assistance (International IDEA) 2002, International Electoral Standards Guidelines for reviewing, the legal framework of elections, at p.33 and see also Art. 38 of FDRE Constitution

²⁰² Id , IDEA

the conduct of public affairs, directly or through freely chosen representatives, to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors” and “to have access on general terms of equality, to public service in his/her country, without any of the distinctions and unreasonable restrictions.”²⁰³

Persuant to an international obligation imposed as per article 2 of the ICCPR on member states, Ethiopia recognized the right to elect and to be elected to all citizens without any discrimination. Literally art 38 the FDRE constitution says that “Every Ethiopian national, without any discrimination based on colour, race, nation, nationality, sex, language, religion, political or other opinion or other status, has the rights: to take part in the conduct of public affairs, directly and through freely chosen representatives; to vote and to be elected at periodic elections to any office at any level of government; elections shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors. However, the electoral law of Ethiopia Proclamation No. 532/2007, a proclamation to Amend the Electoral Law of Ethiopia under Article 45(1b) and the amended electoral law proc No. 111/95 under article 38(1b) have limited this right by making the working language of the regional state a criteria to run for election²⁰⁴.

The same to that of FDRE constitution, several regional constitutions grant Ethiopian citizens the right to vote and to be elected without any discrimination based on inter alia ethnic identity. Non-endogeneous people cannot be excluded from the election process.²⁰⁵ But, the oromiya regional state constitution to the contrary used language criteria to elect or to be elected²⁰⁶ as per electoral laws²⁰⁷.

Amazingly, this right does not even incorporated in the Benishangul-Gumuz, Gambella and Afar regional state constitutions.

3.4.2 Right to Representation

²⁰³ Art.25 of ICCPR.

²⁰⁴ “Any Ethiopian shall be eligible for candidature, where he is versed in the working language of the Regional State or the area of his intended candidature”.

²⁰⁵ Christophe Vander Beken, *Constitutional Diversity in Ethiopia: Comparative Analysis of Ethiopia’s Regional Constitutions*, at p.27

²⁰⁶ Art. 33 cum Art. 38 of Oromiya Constitution

²⁰⁷ Ethiopian Electoral Law Proc No. 111/1995 and The Electoral Law Amendment Proc No.532/2007

It is agreed by many writers that no legal guarantee of human rights can be effective unless the minority group has its own share in the political fate of the country. To this end it is necessary to recognize to the minority nationalities a proportional possibility of having their word in the destiny of their country through what is called proportional representation²⁰⁸.

Representation aims at preventing the majority from depriving a minority of its proportional share in the legislative, administrative and judicial bodies so that the minority's presence at different levels of decision making will be guaranteed²⁰⁹. Moreover, the equitable representation of minorities will create harmony and peaceful relation among nationalities and strengthens the unity of the country which they inhabit. The representation of minorities may be effected both at the center and in the regional legislatures or alternatively. For instance, in India for Scheduled Casts and Tribes and for Anglo Indians, in Nigeria for special interests and communities and in Trinidad for the opposition minority groups, the right to representation in the second chamber of central legislature²¹⁰.

In Ethiopia, some minority nationalities are entitled to representation both in the center (in the House of People's Representatives and in the House of Federation) and in their respective regional councils. Federal institutions, such as executive and judiciary should be adequately established in the regions so as to impartially solve the problems among ethnic group and minority groups while the both houses of the federation and of Peoples representative, civil service, courts reflect as much as possible the proportional ethnic composition of Ethnic minorities. In Switzerland, at the federal level the language minorities are fairly represented in the Federal Council, the Federal Assembly and the Federal Court without introducing the quota system.

There are also few other countries which recognize the right to effective parliamentary representation of minorities at the Constitutional level. In this connection, mention can be made of the practice of some East European countries where a number of minorities are found. Accordingly, Art. 34 of the Slovak constitution, Art. 68 of the Hungarian constitution,

²⁰⁸ Duchacek, I.D. Comparative Federalism: The Territorial Dimensions of Politics. New York: Holt, Rine hast and Winston Inc, 1970, at p. 101

²⁰⁹ Id

²¹⁰ Ronald L. Watts, New Federations: Experiment in the Commonwealth. N.P: Claredon Press, 1976, at p.157

Art. 6 of the constitution of the Czech Republic, Art. 64 of the Slovenian constitution; secure to all of their minorities, irrespective of their size, a right to representation in parliament. This imposes on the state parties an obligation to ensure the proper representation of their respective minorities. When we see the practice of India, which is more like to Ethiopia, it is a home of diverse nationalities, protection of the right of minorities against intolerant majorities, the 1950 constitution in its Art. 16 and 335 assured to the Indian minorities a quota of seats in the parliament. For instance, for the representation of the Indian untouchable minorities, seventy-five seats out of the total five hundred are reserved. Besides, so as to ensure the observance of the representation and other right of minorities or, in other words, to see the safeguards given to the minorities are observed and did not remain just as paper safeguards, the framers of the 1950 constitution of India thought that some sort of mechanism be provided. For this purpose, therefore, Art 338(1) provides for the establishment of a vigilance or watch group in different constitute states so that defects or drawbacks in the protection of the minorities could be brought to the notice of the government and the legislature.

Coming to Ethiopia, members of the minority nationalities would not regard Ethiopia as their country if they do not have an equal position and an active role in decision making on all public affairs. For this reason, therefore, the Federal Democratic Republic of Ethiopia (FDRE) constitution has created a conducive atmosphere so as to enable minority nationalities to participate in decision making on public affairs directly and through their representatives in the organs of government not only in the questions relating to their special interests as members of minority nationalities, but also on all matters affecting a country as a whole. Accordingly, the Constitution guarantees the right of each nation, nationality and peoples, including the minority's equitable representation in regional and national governments in Article 39(3). The regional self-government in which the minority nationalities are to be represented ought to be found in the regional state, zone or Woreda self-government.

In addition to guaranteeing the right of minority nationality to be represented in the Woreda, Zone or regional state council, the constitution has created a suitable condition for these nationalities so as to enable them to be represented in the center. Accordingly, Article 54(2) provides for the special representation of minority nationalities in the House of People's

Representatives. To this end, the FDRE Constitution, in Article 54(3) provides for the reservation of the minimum of twenty seats out of the total five hundred fifty for these nationalities.

Furthermore, as already stated, the constitution stipulates that each nation, nationality and people has a right to representation in the House of Federation. As per this provision, therefore, minority nationalities are entitled to representation in the Federal Council as well. But, no sub-national states constitution in Ethiopia recognized the right to representation of minority ethnic groups in their region.

CHAPTER FOUR

THE GENERAL OVERVIEW OF FDRE AND SUB-NATIONAL STATES CONSTITUTIONS

4.1 Introduction

Ethiopia adopted federal system since 1995 with the coming into force of the constitution of Federal Democratic Republic of Ethiopia. The country adopted the federal system with a view to accommodate the high degree of ethnic and religious diversity with more than 80 languages and 200 vernaculars spoken in the country.

The Constitution of Federal Democratic Republic of Ethiopia under article 50(1) states that the Federation is comprised of nine member states and federal government. In addition to the Federal constitution, each of the constituent states of the Ethiopian federation has its own constitution. Accordingly, all of the nine states in Ethiopia have adopted their own constitutions. Most of them had it in force since 1995 although only the state of Afar formally adopted its constitution in 1998. Then after, from 2001 onwards, all the regional constitution has been amended. The fact that they have their own constitution is not only in line with the principle of self-rule inherent in federalism, but also had a root in the federal constitution itself which explicitly recognized the right of the regional states to make and implement their own constitution. Thus, according to Article 52(2)(b) of the federal constitution; sub-national states acquired the power to enact and execute their constitution and other laws.

Although the states have already had the experience of having to make and execute laws in their own territory during the pre-constitutional times of the Transitional Period, they came to enjoy establishing their own constitution only after the adoption of the federal constitution and they did accordingly.

4.2 The Federal Democratic Republic of Ethiopia (FDRE) Constitution

The Federal Constitution is a compact document made up of a total of 106 articles divided into 11 chapters. As a legal document, it is a well-organized document with an enviable degree of simplicity and clarity.²¹¹ It is the legal document that constituted the federation. From its preamble, we note that it is a compact agreed up on among the “nations, nationalities, and peoples” of Ethiopia. It is thus, a solemn contract, treaty, even a vow, among these groups who reconstituted Ethiopia into a federation of various ethno-linguistic

²¹¹ Supra note 8, at p.2

groups that aspire to build “one economic community” based on a “common destiny” born out of a shared past.²¹²

From the preambles, one can glean such principles with far reaching consequences as the principle of the salience of self-determination, the inviolability of human rights, the sacredness of the principle of inter-personal and inter-group equality and the primacy of the need to build a democratic order based on the principle of the rule of law for the sake of a sustainable peace. Apart from these, the constitution postulates five basic principles as fundamental pillars of the constitutional order. These principles are that of Sovereignty of Nations, Nationalities and Peoples, Constitutional Supremacy and Constitutionalism, Sanctity of Human Rights, Secularism and of Transparency and Accountability of Government.²¹³

Under chapter three²¹⁴, the Constitution provides for a catalogue of fundamental rights and freedoms. About 31 kinds of rights are recognized and granted a constitutional guarantee. The provisions of this chapter are entrenched, i.e., they are protected from easy (and often unilateral) tinkering by making the amendment procedure rather rigid.²¹⁵

The Constitution establishes a parliamentary system of government with a formally (weak) bicameral legislature at the federal level.²¹⁶ The lower house is the supreme legislator and the supreme political organ.²¹⁷ The upper house has little legislative role; instead it has interpretive and adjudicatory powers.²¹⁸ It is a house in which nations, nationalities and peoples (indirectly states) are represented in proportion to their numbers.²¹⁹

²¹² Paragraphs 3-5 of the preamble of the FDRE Constitution

²¹³ See arts 8-12 FDRE Constitution for these principles

²¹⁴ Chapter three, the chapter that can be taken as Ethiopia’s Bill of Rights chapter, extends from art 13 to 44 in which all the traditional civil and political rights, economic, social and cultural rights, as well as the rights to peace, development, and environment are enshrined

²¹⁵ According to art 105(1) of the FDRE Constitution, chapter three can be amended only through the consent of all the nine state legislatures and the 2/3rd majority vote of the Federal Houses (i.e., the House of peoples’ Representatives and of the House of the Federation).

²¹⁶ Art 53 of the FDRE Constitution.

²¹⁷ Arts 54-55 of the FDRE Constitution

²¹⁸ Art 62 of the FDRE Constitution

²¹⁹ All nations, nationalities, and peoples are represented by one member having one more additional member for every additional one million. See Art 61 of the FDRE Constitution.

The Constitution establishes an executive made of the Prime Minister, the Council of Ministers and the Ministries.²²⁰ It also provides for a ceremonial executive headed by a President who serves as the non-partisan, non-political Head of State.²²¹ Furthermore, it provides for a three-tiered court system at federal and state level.²²²

A Constitutional Inquiry Council with an advisory power (to send recommendations on constitutional interpretation) that assists the House of the Federation is also provided for.²²³ Furthermore, the Constitution envisaged the establishment of other Constitutional institutions such as the Human Rights Commission²²⁴, the Institution of the Ombudsman²²⁵, the National Electoral Board²²⁶, the office of the Auditor General²²⁷ and the Census Commission²²⁸.

The constitution also set the criteria and procedure of its amendment which seems very complex in cases of amendment to the human rights chapter of the constitution which can be introduced only when all state legislatures approve the proposed amendment and when the HPR and the HOF, each voting on its own, approve the proposed amendment with a two-thirds majority vote.²²⁹ Other provisions can be amended if six of the nine states approve the proposed amendment and if the joint session of the HOF and HPR approves the amendment with a two-thirds majority vote.²³⁰

Inter-governmental relations (i.e., the relationships between the federal government and the states) are fairly regulated by the federal constitution). The constitution explicitly lists down the federal powers, the state powers, concurrent powers, and leaves residual powers to the states²³¹ The principle of mutual respect between federal and state governments is explicitly

²²⁰ Art. 72 of the FDRE Constitution

²²¹ Id, Arts.69-71

²²² Id,Arts.78-79

²²³ Id,Arts.82-84

²²⁴ Id, Art. 55(14)

²²⁵ Id, Art. 55(15)

²²⁶ Id, Art. 101

²²⁷ Id, Art. 102

²²⁸ Id, Art. 103

²²⁹ Id, Art.105(1)

²³⁰ Id, Art.105(2)

²³¹ Id,Arts.51-52

stated²³². Moreover, the constitution lists down the policy objectives and directive principles that guide government policies, decisions, and activities²³³. Thus, the directives that guide the foreign affairs, defense, political, social, cultural, and environmental policies of the country are specified therein.

4.3 Sub-National States Constitutions in Ethiopia

Each of the nine member states has their own constitution: **In size**; most of these constitutions are very compact, clear and precise. Most of them, in their old version (i.e., before most of them were revised in 2001), were shorter than the federal constitution. After the revision in 2001, most have come to have a longer text than the one that had been in operation until then.

In form; both in the legal or political vocabulary used and in the drafting techniques and styles, there was similarity not only between the state constitutions and the federal constitution but also among the state constitutions themselves. The usual pattern is that the preamble comes first, to be followed by general provisions, to be further followed by provisions pertaining to basic principles, human rights, state organs (Legislature, Executive, Judiciary), local government, policy objectives, amendment, etc.

In function, the state constitutions in Ethiopia are not much different from their equivalents in other federal system. It is generally established that the function of state constitutions is; to allocate power among state organs and power centers, to limit powers of government and to guarantee protection for rights of citizens. On top of these general functions, the state constitutions serve as a symbol of local or sub-national sovereignty. Moreover, they also regulate and guide the behavior of state governments. Mostly state constitutions have also served to reaffirm state powers enumerated in the federal constitution²³⁴ and to further articulate them in a way that concretely fits the local situation.

Further, State constitutions have also helped to make a clear division of powers between state governments and local governments.

²³² Id.,Art.100

²³³ Id, Arts 85-92

²³⁴ Id,Art.52

The contents of all the old versions and the revised sub national-constitutions are almost similar and also closely resemble to their counterpart federal constitution. In their preambles, almost all the regional Constitutions tried to recognize only the ethnic group/s which they consider as indigenous or owner of the region and also gave only to them the right to self-determination which is territorial in nature²³⁵. In addition, all of them have incorporated in their chapter two and three the fundamental principle of Constitution (Sovereignty of Nations, Nationalities and Peoples, Constitutional Supremacy and Constitutionalism, Sanctity of Human Rights, Secularism and Transparency and Accountability of Government) and Fundamental Rights and Freedoms (from Right to Life to Environmental Rights) respectively in the same fashion to that of FDRE Constitution. The inviolability of human rights, the sacredness of the principle of inter-personal equality²³⁶ and the primacy of the need to build a democratic order based on the principle of the rule of law for the sake of a sustainable peace are also stipulated in them in the same manner to FDRE Constitution.

What interesting is that, after the revision of 2001, there started for some differences to be seen among the state constitutions. The difference can be explained by the fact that the constitution designers have been taking more and more of the specific local situations into account as they rewrote their constitutions. However, almost all constitutions deal with the powers and organizational set up of the local governments (Zones, Wereda, and Special Wereda, etc) after restating the stipulations of the federal government regarding the powers of the state governments. The provisions on state and local government powers are more detailed and extensive than the federal constitution although one cannot gainsay the fact that even the latter does explicitly recognize local government at the Wereda level.

²³⁵ For instance, the owner of the region in Oromiya, Afar, Somali, Benishangul-Gumuz and Gambella Regional States Constitutions are; Oromo; Afar; Somali; (Berta, Gumuz, Shinasha, Mao, Komo,) and (Anyuak, Nuer, Majenger, Upo and Komo) respectively, irrespective of other resident citizens in these regions.

²³⁶ There is no concept of inter-group in regional state constitution as the constitutions highly preachers of the territorial rights they seems developed only to serve the territorial right holders only. One can see this from their preambles and provision about right to self-determination which ought to include non-territorial rights (group specific rights such as right to speak, to write and to develop its own language; to express, to develop and to promote its culture; and to preserve its history) and to equitable representation in state and Federal governments of any ethnic groups in the regions. But, systematically left unrecognized contrary to FDRE Constitution

Thus, one can easily gather that, among others, the legislative, executive and judicial powers of the local government are stated with a degree of detail and comprehensiveness in all state constitutions.

All the state constitutions in Ethiopia are generally rigid. They have a complex mode of formal amendment. (Perhaps this will induce informal amendment mechanisms, which tends to develop through a practice that may deviate from, or ignore the specific details of a constitutional provision). For instance, all the regional state constitution shall only amend their chapter three (Fundamental Human Rights and Freedoms) pursuant to the provisions of Art.105 of the federal constitution²³⁷. And the provisions outside chapter two and three of the regional state constitutions may be amended: Upon approval of the proposed amendment by more than half of the wereda councils found in the Regional State; or Upon approval of the proposed amendment by two-thirds of members of the Nationality Councils in the Regional State; Upon approval of the same by the three-fourth of the members the regional Council²³⁸.

Only in SNNPRS the council has become bicameral thereby creating an analog of the HOF within the state²³⁹ in which the second house, called “House of Nationalities”(HON) is composed of members representing ethnic groups albeit unevenly and its major task is constitutional interpretation. In other states, a separate institution, called “**Constitutional Interpretation Commission**” (CIC), has been constitutionally established²⁴⁰. In all of the states these interpretive institutions are assisted by the Constitutional Inquiry Council of the states.

As a result of the revision of the regional state constitutions by 2001; another layer of local government is recognized. Normally, the Wereda government was the level of government that existed next to the state government. After the revision, the existence of zonal government, an intermediary between state and Wereda government was recognized. This

²³⁷ See Art.112 Oromiaya, Art. 118(1) of Amhara, Art.119 (1) of Benishangul-Gumuz, Art.110 (1) of Afar, Art.121 (1) of Gambella Constitutions etc.

²³⁸ Art. 118(2) of Amhara Constitution

²³⁹ Art.58 of SNNP,

²⁴⁰ Art.67 of Oromiya, Art, 71 of Benishangul, Art. 70 of Amhara, Art.72 of Gmbella, Art. 71 of Somali, Art. 70 of Afar and Art.73 of Harari regional states constitutions.

level of government is especially important in the heterogeneous states such as SNNPRS to contain the intra-state inter-ethnic competition with regard to self-rule at the local level.

State constitutions' closeness to the local has forced the issue of minorities upon them. Although the protection of minorities is enunciated clearly and boldly in the federal constitution (for example in Article 39 but also in various parts throughout the constitution), it has become gradually clear that the state constitutions can be the locus of innovation by drawing out the specific concrete methods and approaches to handling inter ethnic competitions and the consequent tensions. While all ethnic groups, whether minorities or otherwise, are granted the right to self-determination (ranging from local self-rule to the right of state formation and even secession) under the federal constitution, it is in the state constitutions that the procedures for exercising these rights are clearly laid down.²⁴¹

4.4 Sub-National Constitutional Spaces in Ethiopia

The states in Ethiopia are listed in Art.47 (1) of the FDRE constitution and they are nine in numbers, namely: the state of Tigray, Afar, Amhara, Oromiya, Benishangul- Gumuz, SNNPR, Gambella and Harari.

The federal constitution leaves the regions with considerable constitutional spaces to have their constitution²⁴², to design their institutions and local governments that best advances self-government. The regional constitution provides institutional framework and the power of local government within the provided constitutional space. Each region has its executive, legislative and judiciary branches of government structure. Each region, except Gambella people's region which lacks zonal category and Harari region which lacks zonal and wereda category, has three Sub-administrative divisions: zone, wereda/districts and kebele. In Oromiya, Afar, Somali and Tigray regional states sub- administrative division are simply drew for the purpose of administration without having another implication, while in multi-ethnic SNNPRS, some zonal administrative boundary corresponds to the ethnically

²⁴¹ The creation of the category of "Zones" as a form of local government and "Special Wereda" for minority ethnic groups in the SNNPRS; and of the "Administrative Unit of Nationalities" in Amhara state for purposes of ensuring minority self-rule in the state are only examples of matters over which state constitutions could help articulate in a manner that is relevant to the immediate context.(It is also hoped that some of the issues that have come to the attention of the interpretive institutions of the federal constitution over the years can be heard in the interpretive institutions of the states.

²⁴² Art.52(2)(b) FDRE Constitution

inhabited areas, while other zones do not reflect such correspondence. Amhara regional state have also established the special wereda administrative division to satisfy the self-rule rights of indigenous minorities of the region in addition to the former three sub-administrative divisions.

Using for granted constitutional spaces, some regions come-up with new administrative structure such as special weredas and additional administration of nationalities. For example, the Southern region is administratively divided into 13 zones and 8 special wereda²⁴³. Administrative border of some of these special weredas correspond to ethnically inhabited areas, while other special weredas contain more than one ethnic group.²⁴⁴ In the Gambella region a separate administration of nationality has been established for the Nuer, Anuak and Majenger ethnic groups. The establishment of additional administration of nationalities is not possible, in Gambella since the Gambella constitution is explicitly limit the establishment of these entities to the Nuer, Anuak and Majenger. Contrary to all, the Benishangul- Gumuz regional state is administratively divided into three non- ethnic zones (Asosa, Metekel and Kemashi) and two special wereda (Pawe and Mao-Como) the latter of which establish for the small Mao and Como ethnic groups.²⁴⁵ Further details concerning the administrative levels of the administration of nationalities as designed by the 2002 constitution is elaborated by proclamation No 73/2008. “The Benishangul-Gumuz regional state Council of Nationalities and their Offices of Organization Powers and functions and Internal Working Procedure Determination Proclamation No- 73/2008.” The proclamation provides for the establishment of five Nationality Administrations one for each of five indigenous ethnic groups.²⁴⁶ No nationality administration is established to accommodate ethnic diversity in Oromiya Constitution rather than the four structures established for

²⁴³ The 13 Zones of the SNNPR are: Gurage, Hadiya, Kembata, Timbaro ,Sidama,Gedeo, Debub Omo, Keffa,Shekka, Benchi Maji,Silte, Wolayita,Gamo Gofa and Dawro and the 8 special woredas are: Yem, Derasho, Amaro, Burji, Konso, Alaba, Konta and Basketo

²⁴⁴ Tokuma Daba, *the Legal and Practical Protection of the Rights of Minorities in Self Administering Nations of Ethiopia: The Case of Oromiya*. Thesis Submitted to Addis Ababa University Faculty of Law Graduate Program in Partial Fulfillment of the Requirements for the Masters Degree (LL.M) in Constitutional and Public Laws, 2010: pp; 79-81.

²⁴⁵ Christophe Vander Beken, *Federalism at the Regional Level? Unity in Diversity in Ethiopia's Multi-Ethnic Regions*, at p 126

²⁴⁶ Article 3(2) of The Benishangul - Gumuz Nationality Administrations Establishment proclamation No 73/2008, Lissane Hig Gazeta, November 1, 2008

administrative purpose only having in mind that the ethnic community in Oromiya is only Oromo.

CHAPTER FIVE

THE COMPATIBILITY OF OROMIYA AND BENISHANGUL-GUMUZ REGIONAL STATE CONSTITUTIONS WITH FDRE CONSTITUTION

5.1 Introduction

Ethiopia has formally joined the federal country list with the promulgation of 1995 constitution. However, the room cleaning job was started immediately after the collapse of dergue regime in 1991. Indeed, in the post-1991 periods, territorial division took place in two periods. During the Transitional Government Period (1991-1995), fourteen regions were created on ethno-linguistic basis.²⁴⁷ These significant paradigm shifts have terminated the century old unitary and highly centralized governance system. And it laid down a path to a federal system in Ethiopia. The second phase of territorial division came in to being with the Federal Constitution of 1995. Consequently, the states in Ethiopia are listed in Art.47 (1) of the FDRE constitution. According to this article there are nine states provided, namely: the State of Tigray, Afar, Amhara, Oromiya, Somali, Benishangul- Gumuz, Southern Nations, Nationalities and Peoples Region, Gambella and Harari.²⁴⁸ Most of these states are ethnically heterogeneous although in most of them there are dominant ethnic groups after whom the states are often named²⁴⁹. Moreover, the FDRE constitution allocates significant powers and responsibilities to the regional governments.²⁵⁰ Among powers provided for regions is the power to adopt their own constitution. It's provided in Article 52(2) (b) of federal constitution that the regions shall have their own constitution. It is within this constitutional space that the regions of Ethiopia come up with their own constitution immediately after the promulgation of federal constitution. For their making, all of them depended on the state legislatures. The answer as to why state legislatures adopt a constitution is found in Article 50(5) of federal constitution, which gives mandate of constitutional making for the state council. Thus, the

²⁴⁷ Transitional Charter of Ethiopia, 1992

²⁴⁸ Art. 47(1) of FDRE Constitution

²⁴⁹ Amhara, Oromiya, Somali, Afar and Tigray Regional states respectively. But, in all we have diverse peoples.

²⁵⁰ Art.52 of FDRE Constitution

mandate to make the constitution is rooted in the provisions of the federal constitution that antedate the state constitutions.²⁵¹

As indicated above, State constitutions are adopted immediately after the adoption of federal constitution in 1995. However, they came to be revised some years later (started in 2001) with an intention of ensuring more separation of power, ensuring good governance and also so as to consider regional objective realities.²⁵² To put them in order of their revision; the constitution of Amhara, Oromiya, Tigray and SNNPR in 2001, the constitution of Afar, Benishangul-Gumuz, Somali in 2002, constitution of Gambella in 2003 and that of Harari in 2004.

Basic scopes of State constitutions are restricted by the federal constitution; this is due to the supremacy clause provided in Article 9 of the FDRE constitution. With regards to human rights too, the human rights protected by the federal constitution have to be respected by the regions. Indeed, states are bind by the federal constitutions no to go below the standard provided by it.

The fundamental rights and freedoms are provided in chapter three of the federal constitution. The same chapter of the Oromiya and Benishangul Gumuz also lists fundamental rights and freedoms. The concerned regional provisions more or less repeated the fundamental principles of the federal constitution and are thus, practically copies of Chapter two of the federal constitution. In favour of this, Tsegaye Regassa argued that, “the human rights provisions of most state constitutions are also similar, sometimes even identical to that of federal constitution.²⁵³” The only human rights provision that cannot be found in the regional constitutions is the provision on nationality rights (Art.33 of the federal constitution), simply because it is the exclusive power of the federal government to determine matters relating to nationality.

As indicated in the above chapters, this study analyzes the compatibility of two regional state constitutions, Oromiya and Benishangul-Gumuz in comparison with the federal one, by selecting some provisions of fundamental rights. The selected fundamental rights provisions

²⁵¹ Id, Art.50(5)

²⁵² Preamble of Revised Regional Constitutions

²⁵³ Tsegaye Ragasa, Sub-National Constitutions In Ethiopia: Towards Entrenching Constitutionalism at State Level, Mizan Law Review Vol. 3 No.1, March 2009, at p.54

for this analysis are: *The Preamble, Sovereignty Right and Self- Determination Right, Right to Equality, and Electoral Right (Right to elect and to be elected).*

5.2 The Preamble, Sovereignty Right and Right to Self-determination

The Preamble of the FDRE Constitution states that “We the Nations, Nationalities and Peoples of Ethiopia” strongly committed, in full and free exercise our rights to self-determination, to building a political community founding on the rule of law and capable of ensuring a lasting peace, guaranteeing a democratic order and advancing our economic and social development; firmly convinced that the fulfillment of this objective requires full respect of individual and people's fundamental freedoms and rights to live together on the basis of equality and without any sexual, religious or cultural discrimination; Further convinced that by continuing to live with our rich and proud cultural legacies in territories we have long inhabited, have through continuous interaction on various levels and forms of life, built up common interests and have also contributed to the emergence of a common outlook; Fully cognizant that our common destiny can best be served by rectifying historically unjust relationships and by further promoting our shared interests; Convinced that to live as one economic community is necessary in order to create sustainable and mutually supportive conditions for ensuring respect for our rights and freedoms and for the collective promotion of our interests; determined to consolidate, as a lasting legacy, the peace and prospect of a democracy order with our struggles and sacrifices have brought; Have therefore adopted, this Constitution through representatives we have duly elected for this purpose as an instrument that, binds us in a mutual commitment to fulfill the objectives and the principles set forth above.²⁵⁴

FDRE Constitution equally bestowed the Sovereignty and self-determination right to all Nations, Nationalities and Peoples of Ethiopia under Article 8 and 39 respectively. Pursuant to Article 8 of the federal Constitution; all sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia. Since, the Constitution is an expression of their sovereignty; their sovereignty shall be expressed through their representatives elected in accordance with this Constitution and through their direct democratic participation. The right to self-determination of nations, nationalities and peoples as conceived by Article 39 of the

²⁵⁴ The Preamble of the 1995 of FDRE Constitution

Ethiopian constitution, comprises the right to speak, write and to develop its own language; to develop and promote its own culture; and to preserve its history; the right to a full measure of self-government, which is composed of two elements: the right to establish institutions of government in the territory that it inhabits(territorial) and the right to equitable representation in state and federal governments(non-territorial). Furthermore, the right to self-determination includes the right to secession which is unconditionally guaranteed for nations, nationalities and peoples of Ethiopia when the need to depart from the federation/union/ is arise.

International law, focusing on universal rights, judged that the protection of these rights guaranteed the protection of ethnic minorities as well. It became, however, clear that the effective protection of ethnic minorities required more than a mere protection of universal rights; it required states to adopt specific minority rights as well. Consequently, despite its focus on universal rights, international law relatively early paid attention to the rights of ethnic minorities. In this context, Article 27 of the International Covenant on Civil and Political Rights grants ethnic minorities **language rights and cultural rights**; the same rights are also incorporated in the first component of the Ethiopian right to self-determination. The third component, the right of ethnic groups to be represented in state and federal governments, corresponds to the participation rights included in the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities from 1992. The second component of the Ethiopian right to self-determination, i.e. the right to territorial autonomy, is not granted in international law, except in the specific case of indigenous peoples. However, Mr. Vender Beken in his PhD thesis argued that the right to autonomy of ethnic minorities can be based on the right to self-determination.

Therefore, the 1995 FDRE Constitution having fully recognizing the diversity and the equality of Nations, Nationalities and Peoples and committed to ensure self-determination, democratic order, peace, rule of law and planed to improve economic and social development. In addition, the Constitution aimed to realize the lasting legacy struggles and sacrifices to develop peace and democratic order.

The Preamble Oromiya Constitution, started by saying “We the Oromo People: Cognizant of the fact that, enormous sacrifices is paid, with other nation, nationalities and peoples to overthrow repressive government; convinced to build federal system; believing that achieving

economic development, lasting peace and developed democracy is needed....”²⁵⁵. The preamble of the Oromiya constitution is similar to the federal constitution in that it deals with the issues of democracy, development, lasting peace and the commitment to establish federal political system. However, unlike the federal constitution which starts with the statement: We Nations, Nationalities and Peoples, the Oromiya constitution starts with; we the Oromo people. The differences observed here is that, having the very objective of accommodating diversities, the FDRE constitution recognized all the Nations, Nationalities and peoples of Ethiopia; while the constitution of Oromiya acknowledges the Oromo people only. What should be noted here is that, in the Oromiya region, the Oromo constitute about 88% of the region’s population.²⁵⁶ Of course, this implies an overwhelming numerical dominance of the Oromo, but on the other hand this also means that the region is characterized by an important presence of other ethnic groups²⁵⁷ which the Oromiya constitution acknowledges their presence in the region²⁵⁸.

Though whether the public discussion was held on the making of Oromiya Constitution or not is not clearly known, looking at the preamble of the same one can understand that the discussion on the draft Oromiya Constitution is held by Oromo people only and adopted for the same irrespective of other ethnic groups²⁵⁹. To this end, Since the Constitution is considered as the reflection of the ‘free will and consent’ of the nationalities or the framers of the Constitution and is also ‘a political contract’ between the people and the government²⁶⁰; as per the preamble of Oromiya Constitution, the parties to the contract are only the Oromo people and Oromiya Regional state government. Therefore, only the Oromo people are entitled to claim what the constitution promised for which tacitly oppose the objectives of

²⁵⁵ The Preamble of f the 2001 Revised Constitution of the Oromiya Regional State

²⁵⁶ Summary and Statistical Report of the 2007 Population and Housing Census, Addis Ababa, FDRE Population Census Commission, 2008.

²⁵⁷ The Oromiya constitution itself recognized the existence of other non-Oromo Ethnic groups in Oromiya indirectly under art. 2, Saying that “Oromiya region is un interrupted territory inhabited by the people of the Oromo Nation and *other people who made choice to live in the region*” and 9 “ *Residents of the region*.....have the duty to insure the observance of this constitution and to obey it.”

²⁵⁸ See Art. 2 of Oromiya Regional State Constitution, 2001

²⁵⁹ Cumulative Reading of Line One of the First Paragraph with Line One of the 5th Paragraph of the Oromiya Constitution “ *We the Oromo People:.....Have therefore, after a thorough discussion ...*”

²⁶⁰ See Ye Ethiopia Hige Mengist Gubae Kale Gubae v. 4 Hidar 14-20, 1987 E.C. (Minutes of the Constitutional Assembly, November 1994) discussions on Articles 59, 61 and 62.

FDRE constitution (recognition of diversity and the realization of unity). Besides, Article 8 of the Oromiya constitution stipulates: “Sovereign power in the region resides in the people of the Oromo Nation” Here again, the federal constitution, unlike the Oromiya, in Article 8 states that, “All Sovereign Power resides in the hands of Nations, Nationalities and Peoples....” Furthermore, as the right to self- determination is an extension of the sovereignty of the people, it is worth mentioning at this point. In this regards, Article 39 of FDRE constitution talks about Rights of Nations, Nationalities and Peoples. The right to culture, language, representation, self-government and including the right to secede from the federation of every Nation, Nationality and People in Ethiopia are also incorporated in this article. Under this article, the Nation, Nationality and People are defined in common as “*a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory.*”²⁶¹ [Bold and Italics wording is added]

Having synonym elements of the definition with Article 39(5) FDRE Constitution, Article 39(6) of the Oromiya Constitution defined the people of Oromo nation as “*those people who speak the Oromo Language, who believe in their common Oromo identity, who share a large measure of a common culture as Oromo’s and who predominantly inhabit a contiguous territory of the region.*” Defining in this way, the Constitution recognizes both subjective and objective markers of the concept Oromo people. As objective markers language, culture and identifiable predominantly contiguous territory are required; whereas, believing in common identity of Oromo is provided as subjective marker. Of course, this provision defines merely the majority in the region. On the other hand, those who speak the Oromo Language or ‘*Afan Oromo*’ and share common culture with the Oromo may not constitute Oromo by operation of the Oromiya Constitution as they may not believe in their common Oromo identity though it is difficult to prove as it is a state of mind. Therefore, it is possible for a person who is not non-Oromo who speaks Oromo Language to identify himself as an Oromo if he wishes. Hence, in Oromiya more weight is given to the objective components of the definition of the people of Oromo as the practice intends to assimilate non-Oromo’s who accept the political agenda of the ruling party; the Oromo People Democratic Organization (OPDO). The practice finds its

²⁶¹ Art. 39(5) of FDRE constitution

basis in Article 33 of the Oromiya Constitution which states that “any Ethiopian resident in the region and who speaks the working language of the region has the right to be elected or employed to any public office in the region.” In light of this, instead of group specific rights, individual rights to participation are more visible and guaranteed. The nomination of members of legislative, executive, judiciary and the civil service in this region operates more or less in line with Art.33 of the constitution.

Except the general principles of human rights, such as the right to equality and non-discrimination among Ethiopian citizen, in the region, it is difficult to find clear Constitutional provision that accords protection to non-territorial minority groups at any administrative hierarchy. In light of the FDRE Constitution there is no minority nationality in Oromiya though in practice members of the dominant ethnic group in other regions remain minorities in Oromiya.

The right to cultural autonomy as group specific right of dispersed minority groups in both the FDRE Constitution and the Constitution of Oromiya has been given insignificant attention. It is clear that more emphasis is given to territorially defined groups. There is an international and national trend that considers dispersed ethnic minority groups in each region which have somewhere else their own home region or local government where in they constitute dominant group cannot claim group specific rights in the region in which they reside in a dispersed manner. Similarly, the rights to cultural autonomy as group specific right of ethnic groups who inhabit in Oromiya are not explicitly recognized in the constitution of Oromiya. But, practically, for that of Amhara minority groups, there are certain indications in which they are exercising the traits of the right to cultural autonomy as their children can learn by their mother tongue, have certain share on Oromiya TV and Radio Program and has established their own private primary schools which deliver primary education by their language. Moreover, though informal, more or less Amharic is used in courts and other administrative institutions for oral communication. In fact, cultural centers, libraries theatre cinemas are rarely found even for the majority in the region.

One may argue that the Oromiya Constitution when it excludes the minorities by stating “we the Oromo people ...” is complying with the definition of nation, nationality and people as per art 39(5) of the FDRE constitution which reads, nation, nationality and people means ‘a group of people who have or share large measure of a common culture or similar customs,

mutual intelligibility of language, belief in a common or related identities, a common psychological makeup and who inhabit an identifiable, predominantly contiguous territory. Owing to this, the constitution confers the right to territorial self-determination only to Nations, Nationalities and Peoples of Ethiopia. Ethnic minorities in the region are not entitled to claim the status of nation, nationalities and peoples. Because; they do not meet the requirement of “inhabiting identifiable predominantly contiguous territory”. One can further argue that, from practical point of view also, it is difficult to recognize and grant the right to territorial autonomy to the minorities as there could be as many as 80 ethnic groups living in this region. Still the possibility of implementing proportional representation and cultural autonomy as a group specific right of ethnic minority groups is important for minorities since it makes them decide their own destiny without jeopardizing the rights of the majority group according to Article 39(2&3) of the FDRE Constitution. Nevertheless, the Oromiya Constitution under Article 39(2&3), rather than giving this group specific right for ethnic minority groups in the region, it again gave for Oromo people the right already given for Nation, Nationalities and Peoples of Ethiopia including Oromo’s under FDRE Constitution in the federal or union government.²⁶² To this end, as per the FDRE Constitution, they are ethnic minority groups in Oromiya who ought to have this right under Oromiya Constitution since the majority nationality in the region in all aspect is the Oromo people. Therefore, granting right to fair representation for Oromo in Oromiya constitution is irrelevant and redundant²⁶³. Because, it’s already exhausted in federal constitution.

The right to secession which is an external self-determination is provided in the Constitution of Oromiya too. Since this right is purely territorial (the right, which only the ethnic groups who predominantly inhabited in contiguous territory of Oromiya Regional State or Oromo is granted), ethnic minority groups in Oromiya are not entitled to this right. Even for Oromo people Art.39 (4) of the constitution of Oromiya made the implementation of this right

²⁶² Under Article 39(3) of the FDRE Constitution Every Nation, Nationality and People in Ethiopia has already got the right to equitable representation in state and Federal governments. The Oromiya Constitution also under Article 39(3) grants the right to equitable representation in Federal Administrative structures.

²⁶³ Because, this right is already given for Oromo People under Article 39(3)of FDRE Constitution

conditional²⁶⁴ which is unconditional rights of nations under Art. 39(1) the FDRE Constitution though the later prevails.

In nutshell, textually speaking the Oromiya constitution didn't provide any provision for the exercise of group specific rights to non-Oromo's living in the region. And ironically, it can be argued that the regional constitution is equal to the Oromo people as far as group and group specific rights are concerned.

With regards to Benishangul-Gumuz Regional State Constitution, similar to Oromiya and Federal constitutions, the preamble stipulate about the relevance of democracy, peace, development and commitment to establish federal political system. The regional constitution preamble starts by stating that; "We Nations and Peoples of the Benishangul-Gumuz region...." here it seems similar to the federal constitution as nations and peoples are stated. However, a look at Article 2 of the constitution of Benishangul-Gumuz explicitly differentiates between indigenous and other peoples in which criteria of categorization are not clearly put. Despite the acknowledgement to other people living in the region; Article 2 of the constitution classifies Berta, Gumuz, Shinasha, Mao and Komo as '*Owner of the Region*'. Though inter-regional migration is clearly reflected in the ethnic composition of nations and peoples in Benishangul-Gumuz Region, there are limited evidences which show that peoples who occupy the land or territory of Benishangul-Gumuz region out of the five ethnic groups above are really exogenous. Presumably, though the non-indigenous ethnic groups', ones up on a time moved to Benishangul-Gumuz region they have occupied the land (ironically vacant land) which make the argument that they have taken others land (indigenous peoples' land) difficult to prove. Besides, some facts and evidences show as the Oromo nation in Benishangul-Gumuz regional state are already there almost equal in time range to the peoples the constitution named indigenous (they are the original holder of the land they inhabited).²⁶⁵ To this end, as to me, from the very initial point, the classifications as indigenous and non-indigenous between these peoples not convincing.

²⁶⁴ The people of the Oromo Nation shall exercise their right to self-determination, including secession, where they are convinced that the rights mentioned under sub-Articles (1), (2) and (3) of Article 39 Oromiya Constitution (i.e. the other aspects of the right to self-determination: language rights and cultural rights, political participation rights, self-government) have been suspended or encroached upon.

²⁶⁵ No evidence in history shows that the Oromo, Amhara or others in the regions occupied the land previously occupied by the said indigenous groups or the owner of the region in Benishangul- Gumuz Constitution language/Berta, Shinasha, Gumuz, Mao And Como/

On the other hand, the fact on ground shows that none of the five ethnic groups those got the status of indignity has a numerical majority: the three most numerous among the groups are the Berta (25.1% of the population), the Gumuz (23.3%) and the Shinasha (7%). The Mao and Komo each count for less than 1% of the population. Striking is the large number of Amhara (22.1%) and Oromo (12.8%) in the region. But, the significant parts of the community residing in the regional states are not constitutionally guaranteed to exercise group specific and group rights.

Unlike, the federal constitution, the constitution of Benishangul-Gumuz, creates hierarchy between ethnic groups and only guaranteed sovereignty right and the right to self-determination to the five endogenous ethnic groups. The impression exists, that the non-endogenous groups do not have a right to their own Administration of Nationalities²⁶⁶ (territorial autonomy), which could be accepted; since the groups are territorially dispersed and presumably have exhausted their right to territorial administration. But, their group specific rights must be recognized and respected by Benishangul-Gumuz Constitution and regional state government just as provided under article 39(2&3) of the FDRE constitution. These group specific rights, such as right to speak, to write and to develop its own language; to develop and promote its own culture; and to preserve its history and the right to equitable representation in state government of non-endogenous ethnic groups are systematically denied in Benishangul-Gumuz Constitution. Article 39(2&3) of the Benishangul-Gumuz Constitution, granting the right to equitable representation in Federal government of indigenous ethnic groups of Benishangul-Gumuz that already exhausted by FDRE constitution, rather than granting this right to equitable representation of non-indigenous ethnic groups in regional administrative units. However, the fact in the region shows that, though they are not constitutionally guaranteed and politically neglected, since the language of the regional government is Amharic and the non-indigenous groups are comparatively at better position in educated and skilled man power, the civil servant at the regional level is almost fully occupied by them.

Furthermore, Article 39 of the Benishangul-Gumuz constitution like that of Oromiya, provided the right to secession under conditional circumstances, which go in opposition to the

²⁶⁶ Christopher Vander Beken, Ethiopia: Constitutional Protection of Ethnic Minorities at the Regional Level, Ghent University, African Focus, Vol. 20, Nr. 1-2, 2007, at p.131.

federal constitution, which guaranteed nations, nationalities and peoples unconditional right to secession in Art.39(1). The fact that the two regions put conditional right to secession might make them similar; but there are still differences even amongst the two constitutions. As indicated above, the Oromiya region is dominated by the Oromo (88% of the population) and as the council too is obviously dominated by the Oromo; it is easy to exercise the right. However, in multi- ethnic regions like the Benishangul-Gumuz, constitutionally speaking, it is not easy for them to get the approval of the council, as the council is multi-ethnic (if the remaining ethnic groups vote against the claims by one of the indigenous groups). In nutshell, the fact that the federal constitution is supreme will make the conditionality of the secession provided null and void, but equally important to note that the current political circumstances of the country do not appreciate the question of secession at all, which make the exercise of this provision unthinkable.

Generally, the constitution of Benishangul-Gumuz has strengthened the position of the indigenous ethnic groups of the region by exclusively providing right to self- determination to them. In this regard, Vander Beken argued that, the right of the ethnic groups to their own territorial entities (the Administration of Nationalities), is not appropriate for the situation in Benishangul-Gumuz. Because, they lack territorial concentration, the ethnic groups of Benishangul-Gumuz cannot exercise their right to self-rule through the creation of ethnic based territorial administrative entities (the Administration of Nationalities).

5.3 Right to Equality and Electoral Right

5.3.1. Right to Equality

Although the fundamental purpose of human rights is the protection and development of the individual (individual rights), some of these rights are exercised by people in groups (collective rights) in addition to by individuals. Freedom of association and assembly, freedom of religion and, more especially, the freedom to form or join a trade union, fall into this category.

The collective element is even more evident when human rights are linked specifically to a membership of a certain group, such as the right of members of ethnic and cultural minorities to preserve their own language and culture. One must make a distinction between two types

of rights, which are usually called collective rights: individual rights enjoyed in association with others and the rights of a collective.

The most notable example of a collective human right is the right to self-determination, which is regarded as being vested in peoples rather than in individuals (see Articles 1 of the ICCPR and ICESCR). The recognition of the right to self-determination as a human right is grounded in the fact that it is seen as a necessary precondition for the development of the individual. It is generally accepted that collective rights may not infringe a universally accepted individual rights²⁶⁷. However, the situation in societies characterized by cultural, social or racial diversity is rendered much more complex where there is group based inequality. Therefore, it is necessary to create equality of condition so that citizens with differing backgrounds are equipped to compete successfully with one another. This is a crucial tool of nation-building in culturally and socially heterogeneous societies.²⁶⁸

The right to equality is needed in multi-ethnic state so as to distribute ethno-national justice among ethnic groups beside among individuals. Multination federalism has promoted equality between majority and minority groups, which Will kymilcka, said “**inter-group equality**”.²⁶⁹ By equality here he mean “non-domination”²⁷⁰, such that one group is not systematically vulnerable to the domination of another group. Multination federalism has helped create greater economic equality between majority and minority; greater equality of political influence, so that minorities are not continually out voted on all issues and greater equality in the social and cultural fields, as reflected for example in reduced levels of prejudice and discrimination and greater mutual respect between groups²⁷¹. Besides, Duchacek argued that, the Minority groups claim “collective rights and collective equality”

²⁶⁷ Right to Equality, Right to elect and to be elected and Freedom of Movement are some very important individual rights which can also be claimed by group, (especially of minorities’) having nature of group right conditionally.

²⁶⁸ R.Watts and R.Chattopadhyaya, *Unity in Diversity, Learning from Each Other: Building on and Accommodating Diversities*, 2008, at p.25.

²⁶⁹ Will Kymlicka, *Federalism and Secession: At Home and Abroad*, *Canadian Journal of Law and Jurisprudence* Vol. XIII, No.2 ,July 2000, at p.213

²⁷⁰ Id

²⁷¹ Id

in addition to “adequate protection to the right to individual equality”²⁷² among all citizens of a country. Moreover, individual equality sought in plural state may backfire unless due regard is given to collective rights, since exclusion of particular group or denying linguistic, cultural or participatory rights in the guise of liberal individualistic democracy kills the fundamental principles like universality and non-discrimination for which the individual human rights protection strives to achieve.

The FDRE Constitution assumes an obligation to respect and promote the right of citizens and nations and rule of law. Article 25 of the constitution is provided that: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall guarantee to all persons equal and effective protection without discrimination on grounds of race, nation, nationality, or other social origin, colour, sex, language, religion, political or other opinion, property, birth or other status. However, the right to equality in multi ethnic federations including Ethiopia are not limited to only individual persons, it also include groups to accommodate the diversity between difference identities on basis of equality. The minorities must be equally or equitably treated with majority groups in every aspect of democratic participation. In this respect, since the right to equality is also of group right, the right to equality recognized under FDRE Constitution shall be interpreted widely to include the groups in order to accommodate the diversities. In FDRE constitution both the individual and group equality is recognized actually under the same provision taking into account the general principle and objective of democratic federations. Obviously when we talk of equality what comes to every one’s mind is individual equality, from the literal reading of Article 25 of FDRE Constitution that begins as “*All persons are equal.....*” but it tacitly include the groups, if we interpret this very provision in line with the objective “*Accommodating the ethnic diversity between Nation, Nationality and Peoples Ethiopia*” and the full text of the constitution.

When we look at the preamble of the FDRE constitution, beginning by phrase “We Nation, Nationality and Peoples of Ethiopia...” illustratively listed the objectives of the Constitution which all are the group objectives of Nation, Nationality and peoples. In addition, under paragraph two, the constitution says “firmly convinced that the fulfillment of this objective

²⁷² Ivo Duchacek, Comparative Federalism: The Territorial Dimension of Politics, cited in Duchacek(1970), at p. 97-99

requires full respect of individual and peoples' fundamental freedoms and rights, to live together on the basis of equality and without any sexual, religious or cultural discrimination”²⁷³.

For the success of the objectives provided under its preamble, the constitution granting the territorial right to self-determination in addition to universal rights for Nation, Nationality and Peoples of Ethiopia within the contiguous territory they predominantly inhabit. Together with this, it has also recognized the non-territorial rights for the minority ethnic groups as provided under article 39(2&3) to protect them from the majority tyranny of the major ethnic groups ‘the owner of the state or indigenous’, extending for every Nation, Nationality and People in Ethiopia the right to speak, to write and to develop its own language; to express, to develop and to promote its culture; and to preserve its history and to equitably represented²⁷⁴ in state and Federal governments.

Another aspect under which the right to equality of Nation, Nationality and Peoples guaranteed under FDRE Constitution is the selection system of members of the House of federation. The FDRE Constitution is considered as the reflection of the ‘free will and consent’ of the nationalities. It is, in the words of the framers, ‘constitution is a political contract’ and therefore only the authors that are the nationalities should be the ones to be vested with the power of interpreting the Constitution²⁷⁵. To this effect, the House of Federation composed of representatives of Nations, Nationalities and Peoples is expressly granted the power to review the constitutionality of laws. Each nationality has at least one member and each nationality is represented by one additional representative for each one million of its population.²⁷⁶ In this case though the number of ethnic group matters to have additional representative, no recognized nationality will left unrepresented at least by one member. Therefore, I can say that all Nations, Nationalities and Peoples of Ethiopia have equal right to be represented by one member in HoF due to their mere existence in the federation. Beyond one member, following the objective criteria number of the members of

²⁷³ See Paragraph one and two of FDRE Constitution

²⁷⁴ This shows the representation rights of Nation, Nationality and Peoples for House of Peoples Representative and House of Federation as provided under Articles 54(3) and 61 of the FDRE Constitution respectively.

²⁷⁵ Aseffa Fiseha(Dr.), Constitutional Adjudication In Ethiopia: Exploring the Experience of the House of Federation (HoF) Mizan Law Review Vol. 1 no.1, June 2007, at p.10

²⁷⁶ Art. 61(1 &2) of FDRE Constitution

each Nations, Nationalities and Peoples in HoF will equitably increase. Thus, all including minority ethnic groups can have at least a say on its fate at the time of constitutional interpretation.

Literally, both the Oromiya and Benishangul-Gumuz Regional states Constitutions have recognized right to equality in almost the same way to that of FDRE Constitution. But, due to lack of guaranteed constitutional protection of group specific rights of minority ethnic groups residing in the regions they indirectly deviated from the FDRE Constitution, which have its own implications as far as minority protection is concerned. So, let us see them one by one having in mind what has been raised above.

The dispersed nature of ethnic diversity in Oromiya made it difficult to extend territorial based protection to non-Oromo ethnic minorities. However, as far as equality and non-discrimination is concerned the Oromiya constitution, plainly look press worthy. It has repeated the same provisions of the federal constitution without even changing a single word under its Article 25. But, as has been raised above, the right to equality is not limited to individuals by its nature in multi-ethnic federation. It's also groups right having a name 'inter-group equality'. Though FDRE Constitution recognizing this right as "right to equality between nation, nationality and peoples of Ethiopia" and also tried to protect minority ethnic groups extending them the right to guaranteed and equitable representation in addition to obviously for granted individual right to equality, the Oromiya Constitution favours only the equality between individuals not between groups. When we look at the Oromiya Constitution it emphasis that only the Oromo people is entitled to exercise all the rights included in the constitution (both group and group specific rights) in addition to universal individual rights. This can be observed from the close looking at the full text of the constitution starting from the preamble. In its preamble, the constitution stating that "we the Oromo people...." Show as if only the Oromo people are the sole makers of the constitution and simultaneously, since the constitution is the pact between the people and the government, it's also only the Oromo's who can claim the same. However, there are numerous other non-Oromo's ethnic groups leaving in the region which the Constitution itself under articles 2(1) and 9(2) recognized their existence those ought to be included in the making of the constitution and be part of the preamble so as to be empowered to claim rights provided in the same but left un touched. Thus, where the Constitution is not in position to protect the rights of other ethnic groups

(actually minorities) within the Oromo dominant ethnic group; it's difficult to imagine the existence of right to enter-group equality in the regional state specially; between the majority Oromo and another minority ethnic groups. The evidences for this are seen in the preamble, Article 8 and Article 39 of the Oromiya Constitution under which only the Oromo peoples are the makers and claimers of the Constitution and the sole holders of the sovereignty right and right to self-determination which includes in it non-territorial group specific rights contrary to that of FDRE constitution under which all Nation, Nationality and Peoples of Ethiopia are equally the makers and claimers of the Constitution, the holder sovereignty and self-determination rights in the territory they inhabited for so long and also entitled to claim non-territorial group specific rights such as right to speak, to write and to develop its own language; to express, to develop and to promote its culture; to preserve its history and to equitable representation in state and Federal governments where they constitute minority nationality or they are non-indigenous in the area they have inhabited²⁷⁷.

The composition of Constitutional interpretation Commission (CIC) that empowered to decide on any Constitutional dispute in Oromiya, have also posed another problem on to inter-group equality right between the majority Oromo people and the constitutionally neglected minorities in the region. The members of the Commission are the representatives nominated from each district. Since the districts are devised for administrative purpose depending on territoriality principle, the territorial rights in Oromiya is reserved to only Oromo. All non-Oromo ethnic minorities in the regions are therefore, denied the right to at least equitably or fairly represented in Constitutional interpretation Commission. If the constitutional dispute is raised on the interests of these non-Oromo minority ethnic groups; it's therefore an Oromo who decides on their fate contrary to the principle of representation

²⁷⁷ The FDRE Constitution equally or equitably treated all the Nation, Nationality and Peoples to accommodate the existing diversity for the successful accomplishment of its very objective; "building one political community founded on the rule of law and capable of ensuring a lasting peace, guaranteeing a democratic order and advancing economic and social development", while the Oromiya Constitution seems discriminatory and ignorant of the existing ethnic diversity in the region talking as if only the Oromo people is residing in Oromiya contradicting its Article 2(1) and 9(2) under which the existence of non-Oromo ethnic groups in Oromiya regional state are recognized and the FDRE Constitution that requires full respect of individual and people's fundamental freedoms and rights, to live together on the basis of equality' and without any sexual, religious or cultural discrimination to fulfill the objectives raised above in this paragraph.

under which all the known ethnic groups ought to be represented by at least one member, save the exception that will increase their members in the house²⁷⁸.

The constitution of Benishangul- Gumuz Regional State also similarly provided the right to equality as per the two constitutions above in its Article 26. In the previous discussion it is indicated that, the Benishangul- Gumuz entitled the right to self- determination only for the endogenous people (Berta, Gumuz, Shinasha, Mao and Komo). But, rights like the right to equality and non-discriminations are very important and essential rights particularly, for the protection of significant non-endogenous groups in the regional states.

The Benishangul-Gumuz regional state is a home for more than five ethnic groups in addition to those named indigenous by the Constitution²⁷⁹. But, regarding accommodation of diversity in respecting inter-equality right between these ethnic groups, the constitution seems self-contradicting and inconsistency with FDRE Constitution. In the preamble, it begins ‘We the Nation and peoples of Benishangul-Gumuz region, in the region we have established together on the basis of equality.....’²⁸⁰ from this, it’s clearly understood able that the Benishangul-Gumuz Regional State is established by all of its resident on the basis of equality irrespective of any other difference. Article 8 of the constitution also strengthens this position by granting the sovereignty right to all the people of the region. In this respect it seems that all the people of Benishangul-Gumuz region are equally the makers and claimers of the constitution irrespective of any additional criteria. But, the constitution starting demarcation between Berta, Shinasha, Gumuz, Mao and Komo and other resident peoples of the region in paragraph four of its preamble and in Article 2 clearly stipulated as the sole owner of the region are the Berta, Shinasha, Gumuz, Mao and Komo ethnic groups. This systematically shifts the concept of inter-ethnic equality between the nations and peoples of Benishangul-Gumuz coming with new concepts, that is ‘indigenous and non-indigenous’ ethnic groups of the region which makes only the indigenous the holder of territorial rights. Actually, this is intentionally done to grant the so called indigenous ethnic groups’ territorial-autonomy over the region as per article 39(5) of the FDRE Constitution having in mind that others’, the so called non-indigenous ethnic groups were migrated to the region in the near past and they

²⁷⁸ Supra note 30 (Art. 61(1&2))

²⁷⁹ Art.2of the Benishangul-Gumuz Constitution

²⁸⁰ Id, Paragraph 1of the preamble

have another region from where they have departed to move to Benishangul- Gumuz and their right to territorial-autonomy(right self-determination including secession) is already exhausted there in FDRE Constitution.

Together with the exhaustion of this right for those who deserves (indigenous ethnic group in contexts of Benishangul-Gumuz) the FDRE Constitution grants non-territorial group specific rights, such as, right to speak, to write and to develop its own language; to express, to develop and to promote its culture, preserve its history and right to guaranteed representation in state and federal governments to all nation, nationalities and peoples of Ethiopia in Article 39(2 &3). However, the Benishangul-Gumuz Constitution rather than granting this right to non-indigenous, it has systematically granted only for the indigenous ethnic group again.

The composition of Constitutional interpretation Commission (CIC) that empowered to decide on the constitutionality issue when there is Constitutional dispute or question of Constitutional interpretation in Benishangul-Gumuz region is composed of four members from each indigenous ethnic group and they are twenty members in general exclusive of non-indigenous ethnic groups which covers nearly half of the population of the region or three numerous ethnic groups those ought to be represented. This deviates from Article 8 of the Benishangul-Gumuz itself and from Article 8 cum Article 61 of the FDRE Constitution under which the Nation and Peoples of Benishangul-Gumuz Nationality are sovereign and Nation, Nationality and peoples of Ethiopia are also sovereign right holder and are equitably represented in HoF to interpret the Constitution (their political document or the pact) between them and the government respectively. Due to this, when the issue of constitutional interpretation take place regarding even the interests of non-indigenous ethnic groups; only indigenous ethnic groups are constitutionally empowered to determine the constitutionality of laws or any decisions on behalf of non-indigenous.

This way the Benishangul- Gumuz constitution, denying the non-territorial groups specific right guaranteed by FDRE Constitution to any ethnic groups, specially to non-indigenous or minorities in its region, violates right to inter-group equality tacitly stipulated in Article 25 of the FDRE Constitution.

5.3.2. Right to Elect and to be Elected

Today, it is generally accepted that human and civil rights are crucial issues to modern humanity and closely allied to the idea of human rights are the related notions of democracy or representative government. Hardly anybody today, will deny, like Hitler and Mussolini did, the validity and need for human rights and representative government. The cry of the American revolutionists, in the war against Britain, that there will be “no taxation without representation” has passed into popular human political folklore.²⁸¹

The right to participate is central to the nurturing of a democratic system of governance as well as to the evolution of appropriate human rights systems. Article 25 of the International Covenant on Civil and Political Rights, for instance guarantees everyone the right to take part in public affairs and to vote or be voted for. In addition, Article 13(1) of the African Charter on Human and Peoples' Rights states "Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives."²⁸²

As indicated above, one of the fundamental rights of every citizen in a democratic political system is the right to take an equal part in the government, or the right to participate meaningfully in the decision-making process of the system which governs him. Hence, one of the ways of examining the respect for human rights in any particular society is to analyze the extent of participation by the people in its decision-making process. And it is important to stress here that effective participation means much more than the casting of a vote once every five years to elect the President or a Member of Parliament or a local government councilor. Meaningful participation means having a decisive influence and control over the political, social and economic institutions which determine the citizen's way of life.

Incorporating the internationally recognized bench mark in it, the FDRE constitution also in Article 38 states that; every Ethiopian national, without any discrimination based on colour, race, nation, nationality, sex, language, religion, political or other opinion or other status, has the following rights: to take part in the conduct of public affairs, directly and through freely chosen representatives; to vote if attain eligible years of age; to vote and to be elected at periodic elections to any office at any level of government.

²⁸¹ K K Prah, Multi Party Democracy and Its Relevance in Africa, at.p 2.

²⁸² Brendalyn P. Ambrose, Democratization and the Protection of Human Rights in Africa: Problem and Prospects, London, Praeger Press, 1995, at p.44.

From the literal looking of provisions of international conventions and almost all democratic constitutions including FDREs', the right to elect and to be elected are solely seen as an individual right, but in fact not; specially, in multi-cultural and or multi-ethnic societies like that of ours. Because, in multi-ethnic societies these rights have implications on the groups (ethnic groups in this case) in addition to individuals due to the political competition which may necessitate the power sharing system between all ethnic groups in order not to be dominated by one or some ethnic groups. For this reason, the members of any ethnic group need to be provided with the right to elect or cast a vote and also the competitors themselves have to be provided with right to be elected and hold an office so as to enable them protect the interests of the ethnic groups (they belongs to). This is to mean that, the right to elect or to be elected including right to guaranteed representation also have their basis in the right to equality of peoples or Nation, Nationality and Peoples in federations' versed with diverse community. This idea is further supported when we observe together with the preamble, article 8 and 39 of the FDRE Constitution. In the preamble, articles 8 and 39 of FDRE Constitution; it's declared that, the common destiny of rectifying historically unjust relationships, the sovereignty right and the right to self-determination of Nation, Nationality and Peoples which includes the right to establish institutions of government in the territory they inhabits and to **'equitable representation'** in state and Federal governments. Other part of the FDRE Constitution that strengthens this position is also article 54, under which the election scheme of Members of the House of Peoples' Representatives is ordered to **'reserve 20 seats for minority Nationalities and Peoples'** on the basis of population and special representation without forcing them to directly participate in election process with majority Nationalities and peoples.

These provisions have a tendency of pushing every right including right to elect and to be elected towards the groups in addition to the individuals. Above all, the constitution stipulates no extra requirement except nationality and age which is therefore, ethnic and or linguistic neutral. Hence, Everyone has the right to take part in the government of their country and shall have an equal opportunity to become a candidate for election. Further, criteria for participation in government shall be determined in accordance with laws which shall not be

inconsistent with the Federal Constitution and the country's international obligations.²⁸³ But, the electoral law of Ethiopia, Proclamation No. 532/2007, a proclamation to amend the electoral law of Ethiopia under Article 45(1b), the amended electoral law proc No. 111/95 under article 38(1b) take the working language of the Regional State as a criteria to elect and to run for election or to be elected.

As argued elsewhere, the major challenge in terms of accommodating non-indigenous internal minorities is attributable to a political practice that gives more weight to collective rights and frustrates claims based on individual rights. For example, there are cases where the language issue has often been used to block non-indigenous internal minorities from exercising their individual rights to participate in the political institutions of the regional states. More specifically, in some regions, individuals that do not speak the working language of the region are barred from contesting elections. As a result, the political participation of non-indigenous or internal minorities in state administration has been largely curtailed. This contradicts article 38 of the federal constitution, which declares the right of every Ethiopian national to take part in the conduct of public affairs, including right to vote and to be elected at periodic elections, without any discrimination based on nation, nationality, language, religion or other status to any office at any level of government including region.

Art. 38 of the Oromiya regional state constitution stipulates that: every resident of the region, without any discrimination based on colour, race, nation, nationality, sex, language, religion, political or other opinion has the right and opportunity: to take part in the conduct of public affairs, directly and through freely chosen representatives and has the right to elect; to be elected under the condition that the candidate has to speak regional working language '*Afan Oromo*' referring article 33 of the Constitution of Oromiya which guarantees the right to equality and non-discrimination entitling every Ethiopian citizen to assume political authority and to be employed in every sector provided she/he speaks the working language of the region. From the literal reading of the Oromiya Constitution, we can understand that, citizens with others' identity cannot be denied the right to move to the Oromiya region and neither can they be denied the right to vote and to be elected to federal as well as regional parliament,

²⁸³ The Inter-Parliamentary Council at its 154th Session (Paris, 26 March 1994), Declaration On Criteria For Free And Fair Elections, at P.VIII

but there are conditions put that they have to be versed with Afan Oromo language to be elected, which is not the case in the FDRE constitution.

The Benishangul-Gumuz regional state constitution does not even incorporate the provision regarding right to elect or to be elected of citizens or residents of the region. But, Article, 54 of the constitution indirectly indicates the existence of this right. Pursuant to this article, ‘the members of the state council shall be elected by the People for a term of five years on the basis of universal suffrage and by direct, free and fair elections held by secret ballot and the number of members of the state council shall be determined on the basis of the number of population. Mao and Komo nations are guaranteed special representation by the constitution’.

Though there is indication as to the existence of electoral right from the above article, due to the direct non-existence of the provision about electoral rights in the constitution, it’s not easy to know the real holder of the right (to elect or to be elected) in the region, whether all the resident of the region holds this rights as per the FDRE Constitution or there is a division as per the division made by the Benishangul-Gumuz Constitution between indigenous and non-indigenous ethnic groups. However, from the constitutional interpretation given by HoF during the 2000 election campaign on which the candidates from non-indigenous ethnic groups are excluded from the election process in Benishangul-Gumuz regional state in the name of not knowing the vernacular of the area of candidature, especially of indigenous ethnic-groups, one can again understand as the working language of the regional state is the needed criteria to participate in election process.

In fact, the right of individuals that belong to non-indigenous internal minorities to stand for election was at the centre of a case that was brought before the House of Federation, the second chamber of the Ethiopian parliament that has the unique responsibility of interpreting the constitution and ruling on the constitutionality of laws. In that case, three Amharic-speaking individuals belonging to non-indigenous internal minorities wanted to stand for the 2000 state legislature election in Benishangul-Gumuz regional state. A decision of the National Electoral Board (NEB) denied the individuals the right to stand for election on the ground that they could not communicate in any of the four indigenous languages spoken in the region. The decision of the NEB was later reversed by the House of Federation. Although the decision of the House affirmed the right of the individuals to contest the election, it has not confirmed the right of individuals to stand for an election irrespective of their linguistic

ability. The House rejected the decision of the NEB on the basis that the individuals can speak the working language of the region, which happens to be Amharic, and do not necessarily have to speak the languages of any of the indigenous groups. It held, however, that the electoral law that makes the right to stand for an election dependent on the ability to speak the working language of the region is constitutional. This represents a legal endorsement of the political practice that denies individuals that belong to non-indigenous and or internal minorities the right to exercise their political rights²⁸⁴ due to not knowing the working language of the regional state which most probably the language of majority (indigenous) ethnic group in cases of Oromiya other regional states²⁸⁵ those have similar ethnic composition and language policy and Amharic in cases of Benishangul-Gumuz and other regional states²⁸⁶ selected Amharic as their working language.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.1 Conclusion

Constitutions play a special role in federal systems. It is a hand work of men but it does not create a way to anyone to deviate from. Thus, a constitution is the ultimate instrument to provide a frame work that can facilitate the co-existence of all socially constituted entities ranging from the small size to the political community at large. In 1991, following the collapse of military rule, Ethiopia established a federal system creating largely ethnic-based territorial units. Its framers claimed that they have found a formula to achieve ethnic and regional autonomy, maintaining the state as a political unit. The initial process of federalization lasted four years, and was formalized in a new constitution in 1995.

In most federal system, it is not only federal constitution that includes everything. Rather sub-national governments are also allowed to have their own constitution. Exceptions are federations like Nigeria, India, South Africa and Belgium. The Ethiopian federal system allows all the nine regions (as provided in Art. 47(1) of federal constitution) to adopt their

²⁸⁴ Yonatan Tesfaye and Christophe Vander Beken, Ethnic federalism and internal minorities: The legal protection of internal minorities in Ethiopia, *African Journal of International and Comparative Law* 21.1 (2013): at p.32–49, Edinburgh University Press.

²⁸⁵ see the constitution of Afar, Somali, Tigray, Amhara regional states

²⁸⁶ see the constitution of SNNP, Gambella, Regional states

own regional constitutions, notwithstanding the supremacy of the Federal Constitution. The regions power to adopt their constitution is clearly stipulated in Article 52/2/b of the federal constitution. Regions make use of this power and their constitution mainly sets the state governments and their organs, provides powers and functions of local government and also provides chapters on human right and policy objectives. Accordingly, the regional states of Oromiya and Benishangul-Gumuz adopted their own constitution, which latter amended in 2001 and 2002 respectively.

This chapter provides the conclusion of the analysis of compatibility of federal constitution with the revised constitutions of Oromiya and Benishangul- Gumuz and some feasible recommendations.

To start with the preamble, the two regional constitutions seems compatible with the federal constitutions as it includes: democracy, peace and development. But, there are also differences as for instance, the preamble of Oromiya constitution starts with ‘We the Oromo people...’ while the federal constitutions starts with the ‘We Nations, Nationalities and Peoples of Ethiopia...’ This show as the Oromiya Constitution is the pact between only Oromo people and Oromiya regional state which by strong reason entitled only Oromo people the makers and claimers of the Oromiya Constitution. While, the FDRE Constitution is the pact between Nations, Nationalities and peoples of Ethiopia and FDRE government which entitled all Nations, Nationalities and peoples of Ethiopia are equally the makers and claimers of the FDRE Constitution.

With regards to sovereignty and self- determination rights; while the federal constitutions emphasized Nations, Nationalities and Peoples²⁸⁷, the two regional constitutions talks about the Oromo people and indigenus ethnic groups only²⁸⁸. Accordingly, the cultural rights, language rights and representation rights are not given for the minority or non-indigenus ethnic groups living in the two regional states. Besides, the regional constitutions conditional rights for self-determination are incompatible with the federal constitution.

The FDRE and both Oromiya and Benishangul-Gumuz Regional state Constitutions literally expressed right to equality in the same manner. “All persons are equal before the law and are

²⁸⁷ Article 8 of FDRE constitution

²⁸⁸ Article 8 and 9 of Oromiya and Benishangul Constitution respectively

entitled without any discrimination to the equal protection of the law”. In this respect, the law shall guarantee to all persons equal and effective protection without discrimination on grounds of race, nation, nationality, or other social origin, colour, sex, language, religion, political or other opinion, property, birth or other status. However, according to Will kymilcka and Duchacek argument, the right to equality is not limited among only individuals; there should also be the right of equality among ethnic groups beside among individuals. As per these scholars argument, multination federalism has promoted equality between majority and minority groups, which said “**inter-group equality**”.²⁸⁹ Under which the Minority groups en able to claim “collective rights and collective equality” in addition to “adequate protection to the right to individual equality”²⁹⁰ among all citizens in the state.

The right to equality in multi ethnic federations including Ethiopia are also not limited to only among individual persons, it also include inter-group or inter-ethnic equality in our case to accommodate the diversity between difference identities on basis of equality. The minorities must be equally or equitably treated with majority groups in every aspect of democratic participation. In this respect, the right to equality is in FDRE Constitution also inclusive of group right between Nation, Nationality and Peoples of Ethiopia in addition to individual right. However, both Oromiya and Benishangul-Gumuz regional states Constitutions having only considering the right to equality among individuals, left without recognizing group equality among resident ethnic groups/citizens (inter-group equality between Oromo and minority ethnic groups in cases of Oromiya and inter-group equality between indigenous and non-indigenous ethnic groups in case of Benishangul-Gumuz respectively) in their regions, denying them the non-territorial groups specific right guaranteed by FDRE Constitution to any ethnic groups, specially non-indigenous or minorities in their region.

The right to participate is central to the nurturing of a democratic system of governance as well as to the evolution of appropriate human rights systems. Article 25 of the International Covenant on Civil and Political Rights, for instance guarantees everyone the right to take part in public affairs and to vote or be voted for. In addition, Article 13(1) of the African Charter

²⁸⁹ Supra note 268

²⁹⁰ Supra note 271

on Human and Peoples' Rights states "Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives."²⁹¹

The FDRE constitution also in Article 38 recognized the rights of every Ethiopian national, without any discrimination based on colour, race, nation, nationality, sex, language, religion, political or other opinion or other status, to take part in the conduct of public affairs, directly and through freely chosen representatives; to vote if attain eligible years of age; to vote and to be elected at periodic elections to any office at any level of government. This right is not clearly provided in the regional constitution of Benishangul- Gumuz. But, article, 54 of the constitution indirectly indicates the existence of this right.

The Oromiya Constitution, electoral law of Ethiopia, Proclamation No. 532/2007, a proclamation to amend the electoral law of Ethiopia under Article 45(1b), the amended electoral law proc No. 111/95 under article 38(1b) and the decision by HoF on Benishangul- Gumuz region Cases determine the working language of the Regional State as a criteria to run for election or to be elected unlike the federal constitution that make open the right to be elected for all nationals/ citizens without any extra criteria except age.

6.2 Recommendations

The above analysis has shown that the regional constitutions of Ethiopia are not mere copies of the federal constitution. It is true that the federal constitution constitutes the framework within which the regional constitutions have to be designed. Yet this framework has certainly not exhausted the discretionary powers of the regions to make constitutions that reflect the specific features of their respective societies. For instance, although the human rights catalogues included in the regional constitutions are very similar to the human rights protected by the federal constitution, notable differences have been observed.

The main concern of the Oromiya and Benishangul- Gumuz constitutions are empowering indigenous ethnic groups, Oromo in Oromiya cases, Berta, Shinasha, Gumuz, Mao and Komo in Benishangul- Gumuz regional State. These ethnic groups are entitled to exercise the right to territorial autonomy in which they determine their destiny by having their own institutions and governments. Besides, they left without recognizing non-territorial group

²⁹¹ Supra note 282

specific rights granted by FDRE constitution under Article 39(2&3) the minority or non-indigenous ethnic groups of their regions. The researcher therefore recommends the following possible solutions:

- As broadly discussed in the analysis part, Ethiopian federal system emphasized territorial approach to protect ethnic groups, at both federal and regional levels. Lack of protection in the form of non-territorial autonomy means, that non-indigenous ethnic group or internal minorities, who are often ‘too dispersed or few in numbers’ to exercise territorial autonomy are denied a say in matters that are relevant to them. Indeed, the problems of minorities are more acute at the regional levels including Oromiya and Benishangul-Gumuz. For this reason, All the regional state Constitution including Oromiya and Benishangul-Gumuz region’s shall recognize the right of each dispersed minority or non-indigenous ethnic groups to preserve their distinct identity by practicing their culture, tradition and learning in their languages. In this regard due to difficulty of delivering these rights to all the minority groups in the region (issue of pragmatism and practicality), specific and objective criteria (like numbers) have to be set, as well as the practice of cultural and language rights have to be in a more coordinated manner with the indigenous communities.
- Inter-group equality between the majority and minority ethnic group within the two regional states shall be respected and get constitutional guarantee to strike the balance between the majority and minority ethnic groups right to representation in the regional and Wereda councils and in the Regional Constitutional Interpretation Commission for the successful accomplishment of the objective of creating one economic community which requires full respect of individual and people's fundamental freedoms and rights, to live together on the basis of equality and without any sexual, religious or cultural discrimination as provided in the preamble of the FDRE Constitution.
- The right to political participation of territorially dispersed minorities or non- indigenous ethnic groups at regional level must get constitutional guarantee.

Due to the main portion of political participation it grasps, the right to elect and to be elected of minorities or non-indigenous ethnic groups must equally or equitably recognized and respected with that of majorities or indigenous ethnic groups of the

regional states irrespective of any criteria save the age and nationality as provided in article 38 of the FDRE Constitution.

Together with this, the right to equitable representation of minorities or non-indigenous ethnic groups in regional state governments of Oromiya and Benishangul-Gumuz shall obtain constitutional credit as per Article 39(2&3) the FDRE Constitution.

- For those ethnic minority groups around the borders of these regions it is better to strengthen the horizontal intergovernmental cooperation with the bordering regions; thus, ethnic minorities residing around the border of the region can practice their culture with their dominant members in the other region.
- Common understandings have to be reached and promoted regarding the relevance of both group rights and individual rights. It should not be seen in a way of prioritizing one right to another, rather a balance between the rights (group and individual rights) have to be sought in order to ensure both inter- group and inter- individual equalities.

BIBLIOGRAPHY

1. BOOKS AND JOURNALS

Abbink Jon, *New Configuration of Ethiopian Ethnicity: The Challenges of the South, Northeast African Studies*, 1998

Adem Kassie, *Human Rights under the Ethiopian Constitution: A Descriptive Overview*, Mizan Law Review Vol. 5 No.1, Spring (2011).

Abera Dagafa, *The Scope of Rights of National Minorities under the Constitution of Federal Democratic Republic of Ethiopia, Series on Ethiopian Constitutional Law*, Vol. 1, Addis AAU Printing Press, Ababa University, 2008

Andrew Heywood, *Political Ideas and Concepts: An introduction*, 1994, cited in Tadesse Melaku (2012)

Asefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia*: A Comparative study, Revised 2nd ed, Forum of Federation, (2007).

Aseffa Fiseha (Dr.), *Constitutional Adjudication In Ethiopia: Exploring the Experience of the House of Federation (HoF)*, Mizan Law Review Vol. 1 no.1, june (2007)

Alan Tarr, *Explaining Sub-national Constitutional Space*, Penn State Law Review

Alemante G. Selassie, Ethnic *Federalism: Promise and Pitfalls for Africa*, The Yale Journal of International Law, (2003).

Alan Tarr, Sub-national Constitutional Space: An Agenda for Research, 2007

Antonio Casesse, *Self-Determination of Peoples: A Legal Appraisal*, Cambridge, 1995

Black's Law Dictionary, Ninth Edition, West Publishing Co. Thomson business group, United States of America, 2004

Beale and Andrew, *Essential Constitutional Law, 2nd ed*, Cavendish Publishing Limited co, Sydney, 1997

Brendalyn P. Ambrose, *Democratization and the Protection of Human Rights in Africa: Problem and Prospects*, London, Praeger Press, 1995

Chaim Gans, *The Limits of Nationalism*, Cambridge University Press, 2003

Cheryl Saunders, "*The Relationship between National and Sub-national Constitutions*," Seminar Report: Sub-national Constitutional Governance, (1999).

Christophe vander Beken, *Contitutional Diversity in Ethiopia: Comparative Analysis of Ethiopia's Regional Constitutions*

Christopher Van der Beken, *Constitutional Protection of Ethnic Minorities at the Regional Level*, Ghent University, African Focus, Vol. 20, Nr. 1-2, (2007).

CN Paul & C Clapham, *Ethiopian Constitutional Development*: A Source book, Addis Abeba University Press, 1972.

Daniel J. Elazar, *State Constitutional Design in the United States and other Federal Systems*, 12 PUBLIUS 1, 1982.

Donald S. Lutz, *The United States Constitution as Incomplete Text*, 1988.

Donald S. Lutz, *From Covenant to Constitution in American Political Thought*, 1980.

Duchacek Ivo, *Comparative Federalism: The Territorial Dimension of Politics*, cited in Duchacek (1970),

Elazar, Daniel J. *Federalism and Political Integration, Israel*: Turtle dove Publishing, 1979

Elazar, Daniel J. *From Biblical Covenant to Modern Federalism*: The Federal Theology

Frank P. Grad, *The State Constitution: Its Function and Form for our Time*, 54 VA. L. REV. (1968)

Fasil Nahum, *Constitution for a Nation of Nations: The Ethiopian Prospect*, The Red Sea Press, Inc., Asmara, 1997

Fitzpatrick Joan., *Human Rights Protection for Refugees, Asylum-Seekers, and Internally Displaced Persons, A Guide to International Mechanisms and Procedures*, New York, USA, Transnational Publishers Inc, 2002.

Gedion Timothewos, *Freedom of Expression in Ethiopia: The Jurisprudential Dearth*, 4(2) Mizan Law Review,(2010)

Gnanapala Welhengama, *Minorities' Claims: From Autonomy to Secession*, Ashgate Publishing Company, Aldershot, 2000

Horowitz, *The Many Uses of Federalism*, 2007

Inter-Parliamentary Council at its 154th Session, *Declaration on Criteria for Free and Fair Elections*, Paris, 26 March 1994

International Institute for Democracy and Electoral Assistance (International IDEA) 2002 International Electoral Standards Guidelines for reviewing, the legal framework of elections.

James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 2003

James A. Gardner, *In Search of Sub-National Constitutionalism*, Paper for Seventh World Congress, (2007).

John Dinan *Patterns of Subnational Constitutionalism in Federal Countries*, 39 RUTGERS L. J., 2008.

Jon Elster, *Forces and Mechanisms in The Constitution Making Process*, Duke Law Journal, (1995).

K. Henrard and S. Smis, *A Regained Interest in the Right of Self-Determination*, Journal of African Law, No. 1, (2000).

K K Prah, *Multi Party Democracy and Its Relevance in Africa.*

M. Nowak, *UN Covenant on civil and Political Rights: ICCPR Commentary*, Kehl, Engel, 1993

Okoth W. Ogendo, *A quest for Constitutional Government, in African Perspective on Governance*, 2000

Patricia Popelier, *The need for Sub-national constitutions in federal theory and practice; The Belgian case*

Postema Gerald., *Racism and the law: the legacy and lessons of Plessey*, Oxford University Press 1997

Riker, William H. Federalism: *Origin, Operation, and Significance, Boston; Toronto: Little Brown and Company*, 1964,

Ronald L. Watts, *Comparing Federal Systems* 3rd ed, 2008

Robert F. Williams and G.AllanTarr, *Sub national constitutional space: A view from the states, provinces, Regions, Lander, and Cantons, in Federalism, Sub national Constitutions, and Minority Rights*, 2004

R. Watts and R. Chattopadhyaya, *Unity in Diversity, Learning from Each Other: Building on and Accommodating Diversities*, 2008,

Sisay Mangistu, *The Right of National Minorities Under Amhara Region Constitution, The National Human Rights System in Ethiopia*, Human Rights Law Series Vol.V, (2011).

Spiliopoulou Akermak, *Justification of Minority Protection in International Law*, Kluwer Law International, The Hague, (1997)

Stephen Tierney, *Constitutional Law and National Pluralism*, 2004,

Thomas m. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, 8th ed, 1927

Tokuma Daba, *The Legal and Practical Protection of the Rights of Minorities in Self Administering Nations of Ethiopia: The Case of Oromia*. Thesis Submitted to Addis Ababa University Faculty of Law Graduate Program in Partial Fulfillment of the Requirements for the Masters Degree (LL.M) in Constitutional and Public Laws, 2010

Tsegaye Regassa, *State Constitutions in Federal Ethiopia: A Preliminary Observation*, A Summary for the Bellagio Conference, (2004)

Tsegaye Regassa, “*Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia*”, 3(2) Mizan Law Review ,(2009)

Tsegaye Regassa, *Sub-National Constitution: Towards Entrenching Constitutionalism at State level*, Mizan Law Review, Vol. 13, No. 1, (2009)

Walter Murphy, *Constitutions, Constitutionalism, and Democracy, in Constitutionalism and Democracy: Transition in the Contemporary World*, 1993

Williams R.F. and Alan Tarr, *Sub-national Constitutional Space: A View from the States, Provinces, Regions, Lander, and Cantons*, 2004.

Will Kymlicka, *Federalism and Secession: At Home and Abroad*, Canadian Journal of Law and Jurisprudence Vol. XIII, No.2, July (2000)

Wondwossen Demissie, *Legitimacy of sub national constitutions in the Ethiopian federation: the case of Amhara regional government constitution*, LLM thesis Submitted to the Addis Ababa University, 2010

Yonatan Tesfaye, *Institutional Recognition and Accommodation of Ethnic Diversity: Federalism in South Africa and Ethiopia*, Ph.D. dissertation, University of the Western Cape , June 9, 2008

Yonatan Tesfaye and Christophe Van Der Beken, *Ethnic federalism and internal minorities: The legal protection of internal minorities in Ethiopia*, African Journal of International and Comparative Law 21.1 (2013): Edinburgh University Press

Yonas Girma, *Implication of Ethiopian Federalism on the Right to Freedom of Movement and Residence: Critical Analysis of the Law and the Practice*, A Thesis Submitted to Addis Ababa University College of Law and Governance Presented in Partial Fulfillment of the requirements for Masters of Constitutional and Public Law, March 2013

Ye Ethiopian Hige Mengist Gubae Kale Gubae, V.4 Hidar 14-20, 1987 E.C. (Minute of the Constitutional Assembly, November 1994, Discussion on Article 59, 61 and 62).

2. NATIONAL AND SUB-NATIONAL CONSTITUTIONS AND PROCLAMATIONS

2.1. LAWS NATIONAL AND SUB-NATIONAL CONSTITUTIONS

The *Constitution of the People’s Democratic Republic of Ethiopia (PDRE)*, Adopted on 22 February 1987 GC

The *Transitional Period Charter of Ethiopia*, Negarit Gazetta, 50th year, 1991, No.1.

The *Constitution of the Federal Democratic Republic of Ethiopia*, Federal Negarit Gazetta, 1st Year, Proclamation No.1/1995, Addis Ababa, 21 August 1995.

Proclamation No.7/1992, *Proclamation to provide for the Establishment of the national Regional Self-Governments*, Negarit Gazeta, 51st year, No.2, 4th January 1992

Proclamation No 111/1995, *A Proclamation to Make the Electoral Law of Ethiopia*

Conform to the Constitution of the Federal Democratic Republic of Ethiopia, Negarit

Gazetta, 54th Year, No.9, 23rd February 1995

Proclamation No. 46/2001, *Enforcement Proclamation of the Revised Constitution of 2001 of the Oromia National Regional State*, Megeleta Oromia, Finfine, July 12th 2000.

Proclamation No. 35/2001, *A proclamation to Ratify the Revised Constitution, 2001, of the Southern Nations, Nationalities and Peoples*, 12th Day of November 2001.

Proclamation No. 59/2001- *The Revised Constitution of the Amhara National Regional State, Approval Proclamation*, Zikre Hig, 7th Bahir Dar 5th November 2001.

Proclamation No. 59/2001, *The Revised Constitution of Tigray National Regional State, Negarit Gazeta Tigray*, 10th Year No.2, Makelle, 16th of November 2001..

The Revised Constitution of Benishangul Gumuz Regional State, 2002, Assosa

The Revised Constitution of Somali Regional State, 2002, Samara

The Revised Constitution Gambella Regional State, 2003, Gambella

The Revised Constitution Harari Regional State, 2004, Harar

2.2. PROCLAMATIONS

A Proclamation to Provide For Consolidation of the House of Federation and Definition of Its Powers and Responsibilities Proclamation No.251/2001, Federal Negarit Gazeta, 7th Year No.41, Addis Ababa -6th July,2001.

Proclamation No, 532/2007, *A Proclamation to Amend the Electoral Law of Ethiopia*, Negarit

Gazetta,13th Year No. 54 Addis Ababa 25th June. 2007

The Beshangul - Gumuz Nationality Administrations Establishment proclamation,Proclamation No 73/2008, Lissane Hig Gazeta, November 1, 2008

3. INTERNATIONAL LAWS AND FOREIGN CONSTITUTIONS

3.1. INTERNATIONAL LAWS

African Charter of Human and Peoples' Rights, 1981.

International Covenant for Civil and Political Rights (ICCPR), UN GA Res.2200A (XXI)
(1966)

International Covenant on Economic, Social and Cultural Rights (ICESC), UN GA Res. 2200A
(XXI)(1966)

The Convention on the Prevention and Punishment of the Crime of Genocide, General Assembly
Resolution, UNGAR 260 A(III) (1948)

U. N General Assembly Resolution 217 A (III) 10 December 1948.

UN, General Comment No.23, Art.27, Human Right Committee, UN, Doc. CCPR /C/ 21/
Rev.1 /Add.5 (1994)

Vienna Declaration and Programme of Action on Human Rights, UN Doc. A/CONF.157/23, 12
July (1993).

3.2. FOREIGN CONSTITUTIONS

Basic Law of Federal Republic of Germany

Canadian Constitution Act

Constitution of Czech Republic

Hungarian constitution

Indian Constitution

Nigerian Constitution

South African Constitution

Slovak constitution

Switzerland Constitution

Swiss Constitution

U.S Constitution