

WHEN CONSTITUTION LACKS LEGITIMACY IN THE MAKING: THE  
CASE OF ETHIOPIA

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MASTER OF LAW IN CONSTITUTION AND PUBLIC LAW

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### **Abstract**

*As O. Okoth-Ogendo, a constitutional author, pointed out in his bold terms, a constitution is: “A power map” upon which the framers may delineate a whole set of concerns which may range all the way from an application of the Hobbesian concept of ‘the covenant’, to an authoritative affirmation of the basis of social, moral, political or cultural existence including the ideals towards which the policy is expected to strive.” Hence constitutional-making, is a process which “involves, inter alia, making choices as to which one of those concerns should appear on that map.*

*Thus, how this choices made, would necessarily affect some positively and others negatively -- depending on how they involved on the making of the choice. Unlike the traditional constitutional making which used to consider the constitution as an act of “completion,” modern constitutional making focus on participatory and conversational “new constitutionalism.” Today there is such a virtual consensus that a constitution should be made democratically. The understanding now prevails that constitutional process is democratic; as long as it is participatory and all-inclusive in each stage preceding the final document.*

*Constitution-making as it involves “essentially the distribution of power,” the way constitutions made, as well as its substance, is of crucial importance in the political and governance transitions of every polity. Particularly for polities in short of national consensus, the participation of all the political, ethnic and socio-economic groups in this power distribution agenda fosters and strengthens in all of them the awareness that they are part of the same polity. It endorses and sustains their feeling of “sense of commonality” i.e. “the sociological claim of ‘We’ that defines a people.” This legitimacy ---- the sense of “We” minimizes the threat to the political stability. Accordingly, if it is properly organized, given adequate attention and resources, constitution-making can therefore transform societies from the worst to the better, otherwise to a continued unrest. These are among the lessons that are drawn from an ongoing study that has been conducted over the past several years by the United States Institute of Peace on constitution making, peace building, and national reconciliation. Through an examination of 17 case studies of constitution-making processes around the world, which have occurred over the course of the last 25 years, focusing primarily on post-conflict transitions, the study attempts to assess the constitution-making process for its potential for conflict resolution and prevention as well as for the maintenance of stable peace. To date, this review by a wide range of experts strongly suggests a basic message perhaps more so than at any previous time in history, the processes by which constitutions are made matters.*

*The question, however, is what if nations have failed to ensure democratic constitution in time of the making. What should be the position the political actors need to hold in curing this defect of the constitution?*

*Coming to the experience in Ethiopia, those figurative political actors to whom I interviewed believe our Constitution has come with no due and proper consultation with the whole stake holders. As a result, they labeled the constitution as EPRDF’s party program, which they believe it had dominated the whole constitutional-making process. In consequence of this, they don’t show a commitment to the constitution and the political institutions established within the constitutional framework. Furthermore, while some have stated “constitutional change” as one aspiration in their political struggle, others listed dozen of provisions for constitutional amendment including those which defined the present Constitution. Rebel fronts and those groups branded as illegal actors are also among the prominent groups which aspire for*

*constitutional change. This is even true of among oppositions that are now acting on home politics. While constitution is supposed to be an everlasting document, at least to a considerable time, the Ethiopian constitution has such a clear of danger of turnover. As long as the EPRDF, the only party which believe the constitution is democratic, will not rule the country forever; it is inevitable the constitution will be changed with a change of the existing government. Particularly in countries like Ethiopia where political affiliation is directly related with ethnic lines, it is hardly a constitution to live generation after generation. Such kind of stance, the writer argue, would rather make the democratic process to remain in catch.*

## **Ellipsis**

|       |   |
|-------|---|
| AAPO  | All Amaharan People's Organization                |
| AEUP  | All Ethiopian Unity Party                         |
| ALF   | Afar Liberation Front                             |
| ANDM  | Amhara National Democratic Movement               |
| COEDF | Coalition of Ethiopian Democratic Force           |
| COR   | Council of Representative                         |
| CUD   | Coalition for Unity and Democracy                 |
| EDAG  | Ethiopian Democratic Action Group                 |
| EDC   | Ethiopian Democratic Coalition                    |
| EDL   | Ethiopian Democratic League                       |
| EDO   | Ethiopian National Democratic Organization        |
| EDU   | Ethiopian Democratic Union                        |
| ENDO  | Ethiopian National Democratic Organization        |
| ENDP  | Ethiopian National Democratic Party (ENDP, UNDP)  |
| EPDM  | Ethiopian People's Democratic Movement            |
| EPLF  | Eritrean People's Liberation Front                |
| EPRDF | Ethiopian people's Revolutionary Democratic Front |
| EPRP  | Ethiopian People's Revolutionary Party            |

### III

|        |  |
|--------|--|
| GPDO   | The Gedeo People's Democratic Organization       |
| GPLF   | Gambella People's Liberation Front,              |
| IFLO   | The Islamic Front for the Liberation of Oromia   |
| IFLO   | Islamic Front for the Liberation of Oromia,      |
| MEISON | All Ethiopian Socialist Movement (AESM)          |
| NEC    | National Election Commission                     |
| OALM   | The Oromo Abo Liberation Movement                |
| OLF    | Oromo Liberation Front                           |
| ONC    | Oromo National Congress                          |
| ONLF   | Ogaden National Liberation Front                 |
| OPDO   | Oromo Peoples Democratic Organization            |
| SEPDC  | Southern Ethiopian people's Democratic Coalition |
| SEPDC  | South Ethiopian People's Democratic Coalition    |
| SLF    | Sidama Liberation Front                          |
| TGE,   | Transitional Government of Ethiopia              |
| TPDM   | Tigray People's Democratic Movement              |
| TPLF   | Tigray People's Liberation Front                 |
| UEDF   | Union of Ethiopian Democratic Forces             |
| UEDP   | United Ethiopian Democratic Party–Medhin Party   |
| UOPLF  | United Oromo People's Liberation Front           |

## IV

WPE Workers Party of Ethiopia

WSLF Western Somalia Liberation Front

Lists of Annex

Lists of parties, organizations and personalities attended the July conference

A Document describing the constitutional preferences of the people

Members of the Constituent Assembly

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## CHAPTER ONE

### INTRODUCTION

#### 1.1. BACKGROUND OF THE STUDY

As O. Okoth-Ogendo pointed out in his bold terms, a constitution is:

*“A power map” upon which the framers may delineate a whole set of concerns which may range all the way from an application of the Hobbesian concept of ‘the covenant’, to an authoritative affirmation of the basis of social, moral, political or cultural existence including the ideals towards which the policy is expected to strive.” Hence constitutional-making, is a process which “involves, inter alia, making choices as to which one of those concerns should appear on that map.”<sup>1</sup>*

Thus, how these choices made, would necessarily affect some positively and others negatively depending on how they involved on the making of the choice. Unlike the traditional constitutional making which consider the constitution as an act of “completion,” modern constitutional making focus on participatory and conversational “new constitutionalism.”<sup>2</sup> Today there is a virtual consensus that a constitution should be made democratically. The understanding now prevails that constitutional process is democratic; only if it is participatory and all-inclusive in each stage preceding the final document.

Constitution-making as it involves “*essentially the distribution of power,*” the way constitutions made, as well as its substance, is of crucial importance in the political and governance transitions of every polity. Particularly in polities in short of national consensus, the participation of all the political, ethnic and socio-economic groups in this power distribution agenda fosters and

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<sup>1</sup>H.W.O. Oketho Ogendo constitution without constitutionalism: reflection on an African political paradox in State and constitutionalism an African debate on democracy, Issa G. Shivji (ed), Published by South Africa, political economy (SAPES) trust, 1<sup>st</sup> edition, 1991 at 13.

<sup>2</sup>Vivian Hart, Democratic Constitution-Making, U.S. Institute of Peace, Special Report No. 107, July 2003, available at <http://www.usip.org/pubs/speciaheports/sr107.html>, consulted on September 18, 2010

strengthens in all of them the awareness that they are part of the same polity. It endorses and sustains the people's "sense of commonality" i.e. "*the sociological claim of 'We' that defines a people.*"<sup>3</sup> This legitimacy ---- the sense of "We" minimizes the threat to the political stability. Accordingly constitution-making, if it is properly organized, given adequate attention and resources, can transform societies from the worst to the better and if not, to a continued unrest. These are among the lessons that emerged from an ongoing study that has been conducted over the past several years by the United States Institute of Peace on constitution making, peace building, and national reconciliation. Through an examination of 17 case studies of constitution-making processes around the world, which have occurred over the course of the last 25 years, focusing primarily on post-conflict transitions, the study attempts to assess the constitution-making process for its potential for conflict resolution and prevention as well as for the maintenance of stable peace.<sup>4</sup> To date, this review by a wide range of experts strongly suggests a basic message perhaps more so than at any previous time in history, the processes by which constitutions are made matters.<sup>5</sup>

The question, however, is what if nations have failed to ensure democratic constitution in time of the making. Constitutional making is a process which never ends. Legitimacy, hence, is also which nations gradually build in the course of implementing the constitution itself by employing different positive measures.<sup>6</sup> While this has been the case, some bodies, who consider the existing Ethiopian constitution as if it came through a faulty process rather opted a zero-sum stance against the constitution.<sup>7</sup> Others, on the other hand, engaged on the political competition with less commitment and feeling of disadvantages. The view on the making of the constitution yet remained a point of difference among actors in the political process.

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<sup>3</sup>Tesfatsion Medhanie. Constitution-making, Legitimacy and Regional Integration: an Approach to Eritrea's Predicament and relations with Ethiopia, Diiper research series working paper No.9 at 8-9.available at [http://vbn.aau.dk/fbspretrieve/16138517/DIIPER\\_wp\\_9.pdf](http://vbn.aau.dk/fbspretrieve/16138517/DIIPER_wp_9.pdf) consulted on April 21, 2010.

<sup>4</sup> Hart supra note 2.

<sup>5</sup> *Id.*

<sup>6</sup>Tsegaye Regassa (ed), Issues of federalism in Ethiopia: towards an inventory, in Ethiopian constitutional law series, Vol. 2, AAU printing press, Addis Ababa,2009, at 23.

<sup>7</sup>Lidtu Ayalew, *Midelot: the role of the third alternative in Ethiopian politics* (Amharic) progress printing, Addis Ababa, 2009, at 28-32. See also Negede Gobeze constitution, election and democracy in Ethiopia, ASEOP publisher, America, 2004, at 77-89, at 116-127.

## **1.2. STATEMENT OF THE PROBLEM**

A constitution is a document meant to regulate generation after generation so as to create a stable political process. Changing the constitution on the aftermath of each government would by itself undermine the supremacy and very purpose of the Constitution. This is what African constitutional history witnessed and made Constitutions to remain a toothless dog.

Coming to the Ethiopian constitution, many argue the Constitution has come with no due and proper consultation with the whole stake holders. As a result, they often seemed labeling the constitution as EPRDF's party program, which dominated the whole constitutional-making process. In consequence of this, they don't show a commitment to the whole institutions established within the constitutional framework. Furthermore, while some have stated "constitutional change" as one aspiration in their political struggle, others listed dozen of provisions for constitutional amendment including those which defined the present Constitution. Rebel fronts and those groups branded as illegal actors are also among the prominent groups which aspire for constitutional change. This is even true of among oppositions that are now acting on home politics. UEDF a coalition of three known parties in 2005 election, for instance, claimed for the reconstitution of the country enclosing the whole groups which alleged to have a normative claim on politics of the country. CUD, the vibrant opposition, by then was also amid at building a new political order through National Unity Provisional government. Other actors which don't believe on constitutional change are not also clear between amendment and constitutional change. As long as the EPRDF, the only party which believe the constitution is democratic, will not rule the country forever; it is inevitable the constitution will be changed. Such kind of stance, the writer argue, would rather make the democratic process to remain in catch. Particularly in countries like Ethiopia where political affiliation is directly related with ethnic lines, it is hardly a constitution to live generation after generation. If there is a trend to change the constitution with a change of government, there will necessarily be a culture of affiliating the constitution with government and also a demand for new constitution. This in turn would force the country's journey to democracy to often begin from the scratch.

### **1.3. RESEARCH QUESTION**

The research question includes:

Q.1. Whether the process which created the constitution was flawed?

Q.2. How actors view the constitution, shaped their struggle and impact the democratic process?

Q.3. And what recommendation can be forwarded for redemptive measure, if any?

### **1.4. OBJECTIVE OF THE STUDY**

Constitutional legitimacy is at the core of the system which sought for constitutionalism. For the constitution which people have sense of ownership, they have too a sense of obligation to be bound by it and safeguarded it. However, the reverse is true in the absence of such feeling of ownership and belongingness. Besides, developing consensus, at least, on key issues of the constitution is very essential for the continuation of democratization endeavors in the country. The study hence shows the relevance of having/developing a sense of ownership on constitution by actors on whose hands the countries destiny falls.

Ethiopia, since the time of the first constitution has had different constitutions representing each government administered the country. However, in spite of this constitutional change with a change of governments, the country couldn't yet show a magnificent change in all walks of life. The study, therefore, questions the similar position hold by those bodies, that consider the constitution as illegitimate, and pinpoint constructive measures for a steady constitutional order.

### **1.5. SIGNIFICANCE OF THE STUDY**

The fact that there are handful, if any after all, researches on the subject has made many, particularly, law students foreign to the history of the making of their constitution. The thesis, therefore, on this regard would serve as a prominent reference for readers interested on the subject. Constitution making is all about redefinition of state by creating a new identity for the nations. Given the poor documentation culture in the country, this thesis would also play a role in recording this prominent nation's history. Moreover, as the issue is yet unexplored, the thesis would have also an inspiration role for others to engage in an in-depth study on the subject.

## **1.6. SCOPE OF THE STUDY**

As the title might suggest, in assessing the legitimacy of the constitution, the study is limited to reviewing the process which brings it. Although the content criterion is also crucial in measuring legitimacy, it is beyond the reach of this study to deal on each part of the constitution to explore their legitimacy. Different provisions of the constitution, however, are raised in justifying the legitimacy or illegitimacy of the process.

Besides, it is within the scope of this study to deal with the crisis and stability, the country might avoid and gain in or not developing a culture of ownership on the text.

## **1.7. RESEARCH METHODOLOGY**

This research paper, methodologically, basis on both theoretical and practical analysis. For the theoretical insights a literature survey both from primary and secondary materials including books, journals, articles and others is used. With that, what measures the legitimacy of a certain constitutional-making and also how our constitution was made is dealt. Secondary sources, therefore, are rich in my area of concern and hence, are consulted.

For the rest part of the study, which needs the views of stake holders, primary data shall be collected from the same. In doing so, unstructured interview with political parties, which have the potential to mobilize the larger public both in the opposition and the ruling side, is employed. The key informants, therefore, is selected for their potential to make a political influence.

## **1.8. LIMITATION**

In studying this thesis the writer has faced various limitations. The first is related with finding proper documentation as regards every single action taken in time of the making of the constitution. This in turn obliged the writer to face time, money and bureaucracy constraints to find individuals who have been part of the process. Also, it has to be clear that while some persons who used to have an active role in the making of the constitution are not alive, some others are not at home.

The fact that the law library internet room doesn't have special time for graduate students has forced all of us to wait turns along with other students of the law school.

Besides, the fact that the study fund was not provided in due time also obliged the writer to accomplish the study with financial constraints.

### **1.9. ORGANIZATION OF THE PAPER**

The paper is structured in to four chapters. The first chapter sketches out issues to be addressed and the methodology to be used. On the other hand, while the second chapter conceptualizes what constitute a democratic constitutional-making, the third chapter studies the making of the 1994 constitution in Ethiopia. The last chapter, at last, addressed the views of actors and how it impacted the democratic process.

## **CHAPTER TWO**

### **ESTABLISHING AN ETHOS OF CONSTITUTION: WHAT COUNTS FOR A LEGITIMATE CONSTITUTION**

#### **2.1. CONSTITUTION, DEMOCRATIZATION AND CONSTITUTION-MAKING**

Constitutional history dictates, the origin of written constitution dates back to the late 18 century in America, and then in French, following the revolution.<sup>8</sup> Since the period was the time when peoples were struggling for liberation against autocratic governance, constitution was

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<sup>8</sup>Negede Gobeze, constitution, election and democracy in Ethiopia (Amharic). ASEOP publisher, America, 2004, at 59-60.

limited only to limit the government and stipulate people's right.<sup>9</sup> Later, after it began to be adopted by different polities; it started to take different meanings depending on the ideology and tradition of the polity where it was developed and grown. Hence, though the America model, due to its pre-eminence in originating the concept of modern constitutionalism and its cross-boundary<sup>10</sup>, is often taken to be the only way of understanding constitution, it is yet proper to understand a constitution as it is perceived in different cultural and ideological contexts. Such changes in meaning, purpose and forms of constitution should also be viewed as part of constitutional development. Accordingly, different ways of understanding a constitution emerged such as, constitution as a frame of government and protection of right, as modern adaptation of ancient traditional practices, constitution as revolutionary manifesto, as a code and political idea.<sup>11</sup>

Constitution as a frame of government and protection of rights is the original US model. The model took the pioneer in level of its transplantation in different parts of the world.<sup>12</sup> Almost all modern polities' constitution, including Ethiopia, took the form of US model. Ugo mattei, a constitutional comparativist, describe the constitution of Ethiopia as it followed the rhetoric part of the structure, and many of the categories of the American model.<sup>13</sup> This model maintains the idea that a constitution is or should be meant to lay the frame work of the government: the basic institution, structure and mechanisms through which the polity can function properly and democratically. Also as a protector of citizens it audacious certain rights to be superficial and attach mechanisms for their enforcement. Constitutions in this model are designed in way to answer the changing demands of the generation; hence there is no need to abrogate the whole

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<sup>9</sup>*Id.*

<sup>10</sup>Ugo mattie, *The New Ethiopian Constitution: First Thoughts on Ethnical Federalism and the Reception of Western Institutions*, 1995, no page number available, available at <http://www.jus.unitn.it/cardozo/review/Constitutional/Mattei2.html>, consulted on September 18, 2010.

<sup>11</sup>Dainel J. Elazar, *constitution-making: The Pre-eminently political act*, no page number, available at <http://www.jcpa.org/dje/articles/const-intro-93.htm> consulted on September 18,2010.

<sup>12</sup>Mattie Supra note 10.

<sup>13</sup>*Id.*; see also Ugo mattie, *Patterns of African Constitution in the Making*, *Cardozo law Bulletin*, no page available, available at <http://www.jus.unitn.it/Cardozo/Review/Constitutional/Mattei-1999/Patterns.html>, consulted on September, 18, 2010. Gobeze, however, assert the revolutionary nature of the Ethiopian constitution, due to the fact that policies like, land, are included in it. See Gobeze supra note 8 at 137-140.

constitution in the aftermath of each generation. Yet this does not mean amendment is not justified.

The constitution as revolutionary manifesto, which is often named interchangeably with the socialist model, is both developed and grown within socialist/communist ideology. It is known that the communist ideology is centered on the struggle for the liberation of the working class from the rich oppressors. Constitution in socialist ideology, therefore, is a plan of action or instrument towards liberating the specific group i.e. the working class. It is a document which describe rights, responsibilities and powers of those to whom the constitution is targeted and those who take the lead in realizing this ideals of the constitution. In relation to its being a program, such constitution will only have the age of the polity which developed the program.

Constitution as modern adaptation of an ancient tradition represent those countries which only have unwritten constitutional convention like Britain, Israel and New Zealand. In these nations constitution is a collection of fundamental rules developed through time marking the adaptation of the great tradition to changed circumstances. These polities have a deep rooted commitment to the ancient and continuing constitutional tradition developed in their history, religion or both. Constitution as a code and political idea is also another way of understanding constitutional adaptation in a different polity.

However, in spite of their differences in forms, purpose and meanings, constitutions share similar features, in that they are power maps<sup>14</sup>, reflect realities of power distribution, are fundamental laws which set fundamental issues of the polity<sup>15</sup> and, are, which have stringent amendment procedure as opposed to regular laws.<sup>16</sup>

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<sup>14</sup>Elazar supra note 11 citing Ivo Duchacek, *Power Maps: Comparative Politics of Constitutions*, Santa Barbara, Calif.: A.B.C.-Clio, 1973.; see also H.W.O. Oketho *Ogendo constitution without constitutionalism: reflection on an African political paradox in state and constitutionalism in African debate on democracy*, Issa G. Shivji (ed), Published by South Africa, political economy ( SAPES) Trust, 1<sup>st</sup> edition, 1991 at 13.

<sup>15</sup>Jon Elster, *Forces and mechanisms in the constitution making process*, *Duke Law Journal*, Vol. 45, 1995 at 366, available at <http://links.jstor.org/sici?sici=0012-7086%28199511%293%3A45%3A2%3C364%3AFAMITC%3E2.0.CO%3B2-A>, consulted on August 03, 2010, He described, however, in some countries like in France and Hungary fundamental laws like electoral rules are not set in the constitution, while in some others it is stated only in a general terms.

<sup>16</sup>Exceptionally in New Zealand, only ordinary legislative efforts are required to amend the constitution. See *Id.*

## **Democracy, constitution and constitution-making**

Unless we need a majority tyrant, we may describe democracy as majoritarian rule.<sup>17</sup> If we demand a more stable and all-inclusive polity, democracy should mean more than the simple terms of a majoritarian rule. Scholars often, therefore, have stated limitation on simple terms of democracy. Aleksander Peczenik, for instance, provided a broader meaning of democracy: political representation of the interest of citizens, majority rule, participation of citizens in politics, freedom of opinion, protection of human and political rights, legal certainty, and division of power and responsibility of those who are in power.<sup>18</sup> Also the political scientist Robert Dahl pointed out certain criteria: voting equality at decisive stage, effective participation, enlightened understanding, final control of the agenda and inclusiveness for a democracy not to create majority tyrant.<sup>19</sup> In spite of the difference in length of lists of criteria presented by different scholars, there is a common understanding that in democracy rights to be protected, the majority to act only within the prescribed rules, legal certainty and an all-inclusive political environment. Thus, democracy should be understood as regime capable of building political community in harmony.

Constitution and democracy are often inseparable ideals, as the latter is unthinkable without the presence of the former. One may dare to disprove this truth mentioning the strength of democracy in those nations which only have constitutional convention. Primarily, it is unfair to assert that countries in short of written and packed constitution are without constitution. As it is attempted to describe earlier, constitutions may take different forms depending on the Juridico-political realities of nations where it is developed. Yet, all nations' possess a document which they referred it as a higher law, which set fundamental matters and can only be changed with relatively stringent amendment rules. In Israel, for instance, after decision not to have constitution in a coded way is made, fundamental laws constitutionalizing its legislative, executive and judicial organs, the presidency, the state lands, civil-military relations, and the

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<sup>17</sup>William Piotrowski(ed), Commentary introduction: Democracy and constitution: one without the other, Connecticut law review, Vol. 37, No. 4 at 852.

<sup>18</sup>Aleksander Peczenik(ed), Why constitution? What constitution? Constraint in majority rule in why the constitution matter, at 18-19, Niclas Berggren et.eds, 2002.

<sup>19</sup>Mats Lundstrom, The moral standing of democracy, in why constitution matter page 72, Niclas Berggren et.eds, 2002.

status of Jerusalem have been enacted since the early 1950s.<sup>20</sup> Israel's Declaration of Independence (a covenantal document) has also been given quasi-constitutional status by the courts in lieu of a formal bill of rights, since it specifies the basic principles of the regime, though yet there exist unsettled issues such as the status and powers of local government or controversial ones such as a bill of rights.<sup>21</sup> These laws a part from regulating more fundamental norms; most of them contain a provision that they cannot be modified during a state of emergency.<sup>22</sup> Thus, it is unrealistic to reach to a conclusion that these countries have ensured democracy without rules, as a constitution is nothing else but a collection of fundamental rules. Whether constitution has often ensured democracy in history is another valid and practical question. Although country specific arguments for the failure of each constitution might be raised, democracy also requires a commitment to be faithful to the constitution. Since it is the constitution which establishes and protects democratic principles, it is important to respect and endure the constitution so that democracy also does. One way or another constitution plays a democratic function in many ways. As a fundamental law of the country it provides the frame work so as to ensure smooth operation of political system by channeling the expression of politics through a prescribed rules and institution, it establish peaceful means for change of government, it solidify the political community by affirming common values, and also by declaring equality of all groups to participate and take advantage in all forms

Constitution making on the other turn is a crucial moment where we choose a constitution to be either instrument of democracy or discrimination, inequality, social unrest, a legalized dictatorship or others which define undemocratic polity.<sup>23</sup> To use Sajo's interesting typology in describing how important the process which created the constitution is or as it may leave whatever mark on the polity to come, he stated: "*if one is born with the aid of forceps, the*

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<sup>20</sup>Elzare supra note 11; see also Elster supra note 15 at 366.

<sup>21</sup>Elzare supra note 11.

<sup>22</sup>Elster supra note 15 at 373.

<sup>23</sup>Many constitutions in the world enacted either by the will of dictatorial regimes, military regimes, in colonial administration or in all undemocratic polities constitution had had, rather, a discriminatory function or has caused social unrest. The 1990 Nepal constitution, for instance, which was made under the control of the king, had discriminatory phrases against some social groups in Nepal. As a result, it caused the Maoist internal insurgents and war which took for more than 10 years. Ethiopia's pervious constitution had also created a legalized dictatorship and fascism. In Kenya too, a colonial constitution has instigated social unrest demanding its alteration. To the reverse modern constitutions which are being created democratically allowing genuine participation of all groups is being seen creating stability, solidarity and peace. The more outstanding example for the latter is the South African constitution.

*surgical marks remain. Owing to the mothers alcoholism or syphilis, the infant may need to undergo a long period treatment, generally lasting impact.*"<sup>24</sup> In constitution making also both the process that we prefer to use and the substance we choose the constitution to hold is very important in the fate of the future polity. A constitution, which is made by participation of all groups or made possessing the finger print of all, is likely to create a more stable and democratic polity. The 1990's Nepal and the South African constitution are right instances where constitutions resulted on social unrests and social cohesions respectively. On the other hand, as Gahi rightly pointed out, many internal conflicts usually revolve on the structure and identity of the state and also on the distribution of power, which at one point, at least are constitutional disputes.<sup>25</sup> Accordingly, the resolution of this dispute often starts from changing the constitution which delimited the structure or issue of power distribution which has been contested. Constitution making, therefore, marks the beginning of new relation on the basis of mutual understanding of what led to instability also guaranteeing the interest of those at stake. This mutual understanding, peaceful resolution of conflicts and recognition of all groups, on the other hand, develop mutual trust among political factions in any political negotiation and fosters democratic culture which is the beginning of constitutionalism.

Ensuring democracy also depend on the kind of democratic institution we opt our constitution to hold. Constitution crafters must make difficult institutional choices that will have far-reaching consequences for governance. The form of government (whether parliamentary or presidential), unitary or federal structure, judicial review, choice of electoral system, and creation of horizontal accountability are all crucial in shaping the behaviors of political players.<sup>26</sup> Institutions not only can affect the quality of democratic governance but also can lend themselves to certain policy outcomes. Skilful and conscious constitutional making adapts institutions to local circumstance,

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<sup>24</sup>Andra's Sajo Limiting government: An introduction to constitutionalism, Budapest and New York: Central European University press, 1999 at 18.

<sup>25</sup>Yashi Gahi, The Role of Constituent Assemblies in Constitution Making, Institute for Democracy and Electoral Assistance (IDEA), at 2, available at, <http://www.un.org.np/uploads/peacemissions/20060811042036.pdf>, consulted on July 22,2010.

<sup>26</sup>See generally Liphart, A, parliamentary versus presidential government, oxford university press, (1992); Lane, J. E , S. Ersson, The new institutional politics :performance and outcomes , London and new York: routledge, (2000); see also Scheder, A.,Diamond , and M. F. Plattner, The self restraining state: Power and accountability in new democracies, Boulder: Lynne Rienner,(1999),They mentioned, for instance, agencies like, anti corruption commission, ombudsman offices, election commission, human right commission and high audit institution. They also cautions against the applicability of similar institutions for different socio-political and cultural contexts.

which is easier if the process is genuinely inclusive. This in turn asserts the fact that the process and the content choices go hand in hand.

## **2.2 CONSTITUTION– MAKING: THE CHANGED PERCEPTION**

A far- reaching change to fundamental political rule, citizen’s interest for a more democratic and accountable governance and international pressures sought for more democratic new credentials in today’s polity. Accordingly, constitution making has long become a regular occurrence in all corners of our modern world. More than half of 200 national constitutions in existence today are less than 25 years old.<sup>27</sup> In the last decade alone, roughly 70 emerging democracies have completely re-written or substantially altered their constitution.<sup>28</sup> 1990 to 2000 only 17 African countries, 14 Latin American countries, and nearly all post communist Eastern Europe and former Soviet Union has altered their constitution.<sup>29</sup> There are also many which currently changed their constitution such as Kenya, Nepal, Sri Lanka, Iraq Bosnia Herzegovina, and Bolivia. Turkish and Madagascar are also among nation which very recently changed their constitution.<sup>30</sup> This drastic and emerging activity not only reveals the increasing importance and purpose of constitutions but also born a new epoch to the conception and practice of constitution making.

In previous times constitution making was considered as an act of completion or a document written to the public. In spite of the famous word “we the people” the process that created the United States constitution was clearly a very elite-driven enterprise.<sup>31</sup> The Constitution was not

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<sup>27</sup>Vivien Hart, Democratic Constitution–Making, United State Institute of Peace special report 107, July 2003, at 2 available <http://www.usip.org/resources/democratic-constitution-making>, consulted on may 18, 2010.

<sup>28</sup>Björn Dressel, Strengthening Governance through Constitutional Reform, ADB, A Quarterly Publication Capacity Development and Governance Division Regional and Sustainable Development Department Issue 13, 2005, at 1, available at <http://www.adb.org/documents/periodicals/gb/GovernanceBrief13.pdf> consulted on September 07, 2010. According to a latest estimate, on the other hand, some 4 or 5 constitution will be changed, 10 to 15 will be amended and 20 or so proposal for revision will be under consideration, see Zachary Elkins, Tom Ginsburg and Justin Blount, Does the process of constitution- making matter?, Ann. Rev. Law soc.sci, 2009, at 2002.

<sup>29</sup>Gahi supra note 25 at 1.

<sup>30</sup>Constitutional change in Turkish actually resulted from Turkish request for membership to European Union, which accused Turkish constitution as authoritarian.

<sup>31</sup>Randy E. Barnett, constitutional legitimacy. Columbia law review Vol. 103 No.1, 2003, at 123, available at <http://www.jstor.org/stable/1123704>, consulted on November, 2009.

approved by a unanimous vote or even by a majority of all persons in the country at the time. It was approved by a majority delegates to the conventions in each state. These delegates were elected by a majority of those who voted for delegates in the convention. Though voting requirements varied with local jurisdictions, in no place were women, blacks and poor white men.<sup>32</sup> The American constitution, which is the originator of the traditional constitution making and which endured for more than 200 years was, therefore, made only by a wealthy and property holding white males.

Besides, the delegates in Philadelphia convention were sent only to correct the defects of the articles of the confederation.<sup>33</sup> The delegates then contrary to their primary mission reached to a decision to formulate a new constitution without consulting their respective state congress.<sup>34</sup>

Moreover Madison, who chaired the convention and had his own note<sup>35</sup>, had strong assent for the process to be made officially.<sup>36</sup> Publicity, he argued, would have afterwards require delegates to maintain their ground, whereas by secret discussion no man felt himself obliged to retain his opinions any longer than he was satisfied of their propriety and truth and was open to the force of argument. He said secrecy enabled members to change their mind when they are persuaded by truth. Thus, secrecy was the principle in Philadelphia. The process that created the United States rather gives emphasis for stability and rationality of the document than for democratic principles like participation. This was also what characterizes the traditional constitution making in other parts of the world: French, Russia Germany, Japan and others. Apart from this, the Japanese and German constitution making was dominated by the external occupants' i.e. allied powers. Japanese constitution which is still in work was written by two dozens of Americans during

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<sup>32</sup>*Id.*; Sajo supra note 24 at 19; Hart supra note 27 at 4; see also Zachary Elkins, Tom Ginsburg and Justin Blount, The citizens as a founder: Public participation in constitutional approval, Temple law review, Vol. 81 No.2, 2008, at, 361, available at <http://heinonline.org> accessed on September 7, 2010. In line with this there is a belief that American democracy was created only by 4% of the population, because only 4 % of them were only eligible to vote.

<sup>33</sup>Sajo supra note 24 at 18.

<sup>34</sup>*Id.* at 19.

<sup>35</sup>Ghai supra note 25 at 30.

<sup>36</sup>*Id.*; Elster supra note 15 at 384; see also Sajo supra note 24 at 17-23.

Japan's post war occupation, virtually with no public consultation.<sup>37</sup> By February 1946, the occupation's government section had prepared a rough draft, the so-called MacArthur Draft, which reflected General Douglas MacArthur's personal philosophies.<sup>38</sup> The Germany's constitution making had also similar story.<sup>39</sup>

The modern day polity, however, has declared a new and unprecedented era to constitution making. Designing a constitution behind a closed door like what has been before 200 years, whatever purpose argued to had, is not only an outdated tradition but also is undemocratic.<sup>40</sup> In today's polity a democratic constitution is no longer the one which only aspire to create democracy but also which is created democratically.<sup>41</sup> There is an emerging notion that constitution themselves to be designed based on the norms/principles of democracy. The new constitutionalism, therefore, borrows from the ideals of democracy, to ensure that the populace is involved in the process to create the document. It is now connected with the concept of popular sovereignty which is the founding pillar of democracy. As long as sovereignty is to reside on the people, the people must also be able to fix the powers and responsibilities of their representative in a democracy.<sup>42</sup>

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<sup>37</sup>Alicia L. Bannon, Designing a constitution–Drafting process lesson from Kenya, the Yale law journal, at 1843, available at <http://www.constitutionnet.org/files/Bannon%20kenya.pdf>, consulted on September 03,2010; see also Janice Matsumura, Dale M. Hellegers's we, the Japanese People: World War II and the Origins of the Japanese Constitution, The International History Review, Vol. 24, No. 4, 2002, at. 939-942(book review); see also Zachary Elkins, Tom Ginsburg and Justin Blount supra note 32 at 365. The book described, a small group of American bureaucrats (particularly MACARTHUR), 1946, working for the occupation authorities drafted the initial text in a little under a week.

<sup>38</sup>Hellegers particularly argue the clauses like prohibiting war and deleting the prohibition against amending the constitution are among the provisions of the constitution influenced by MacArthur's personal philosophy. See *Id.*

<sup>39</sup>Elster Supra note 15 at 364-365.

<sup>40</sup>Robert A. Dahl, how democratic is the American constitutions 2001, at 15-20. He noted that American constitution when judged by later generation has democratic short comings; see also Sanford Levinson, our undemocratic constitution: where the constitution goes wrong and how we the people can correct it, New York: oxford university press, 2006 at 9; see also Hart super note 27 at 4. He, however argue, whether the democratic nature of the traditional constitution making is to be measured on the level of endurance or stability, its acceptability that offers a workable framework for efficient government no modern constitution is equivalent to constitutions like the US, Germany and Japan which was made on secret meetings or/and by foreign occupants; see also Sajo supra note 24 at 21.

<sup>41</sup>Hart supra note 27 at 3- 4.

<sup>42</sup>Zachary Elkins, Tom Ginsburg and Justin Blount supra note 32 at, 363.

## 2.3. CREATING A LEGITIMATE CONSTITUTION: WHAT COUNTS FOR LEGITIMATE PROCESS

Constitutional legitimacy is the legal, moral and social tolerability of the document by all who are ruled by it.<sup>43</sup> A constitution enjoys legitimacy when the public regards it as justified, appropriate, or otherwise deserving the support for reasons beyond fear of sanctions or more hope for personal rewards.<sup>44</sup> Bilgin, also argues legitimacy of a constitution requires a genuine social acceptance, where the relevant public reverses and honors both the political intention, expression behind the constitution and legal forms and foundational institutions instituted by the constitution.<sup>45</sup> It is which create a sense of ownership or which create a feeling up on the people that the document should be obeyed or it is respect-worthiness as Balkin put it precisely.<sup>46</sup> Legitimacy in general requires the acceptability of the process-content analysis. Not only the process need to be participatory, the values, principles rules and institutions adopted must be the one which command respect and loyalty of the public. Yet, it is also valid to argue that the acceptability of the process is capable of justifying the substance. Because, If the text is the product of the genuine deliberation of all groups; there couldn't be any legitimate reason to question the validity of the content.

Unlike the traditional approaches which used to view constitutions as an act of completion, the new constitutionalism focuses on participatory constitution-making or conversational constitutionalism. The new approach is characterized by transparency and broad-based public participation.<sup>47</sup> As a result, the legitimacy of the constitutional process and the constitution itself is measured by the degree to which the process is participatory, open, democratic, socially inclusive, transparent, peaceful, faithful, and where those who adopt the constitution are

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<sup>43</sup>Tsegaye Regassa (ed), Issues of federalism in Ethiopia: towards an inventory, in Ethiopian constitutional law series, Vol. 2, AAU printing press, Addis Ababa at 20 -23; see also generally E. Barnett supra note 31.

<sup>44</sup>Richard H. Fallon Jr, legitimacy and the constitution, Harvard law review Vol. 118 No. 6, 2005, at 1795, available at <http://www.jstor.org/stable/4093285> consulted on September 18, 2010.

<sup>45</sup>Tsegaye Regassa on the making and legitimacy of the Ethiopian constitution: towards bridging the gap between constitutional design and constitutional practice, 2010, Afrika focus, Vol.23 at 97 citing Bilgin, M democratic legitimacy and constitutions, paper presented at the annual meetings of the law and society association, TBA, Berlin, Germany, July 2007, unpublished manuscript.

<sup>46</sup>Jack M. Balkin, Respect worthy: Frank Michelman and the legitimate constitution, Tulsa Law review Vol. 39, 2004, at 486 available at <http://www.yale.edu/lawweb/jbalkin/articles/respectworthy1.pdf>, consulted on April 26, 2010.

<sup>47</sup>*Id.*

democratically elected. Developing legitimate constitution, thus, requires different but equally important courses of actions.<sup>48</sup> Establishing all inclusive Interim arrangements, democratic representation in both bodies which draft and adopts the text, a genuine deliberation of the process embracing all factions, and empowering a neutral and proper body to oversight the process are all at the heart of a legitimate process.

### **2.3.1. ESTABLISHING INTERIM ARRANGEMENTS**

What gradually emerged from Spain between 1975 and 1977 to South Africa between 1991 and 1996 and now to Nepal, constitutional change has often involved interim constitutions.<sup>49</sup> Interim arrangements also known as transitional governance occurs at hinges between the past supposed to be repressive regime and future stable and all inclusive state. Interim arrangements are institutional bridges to peace, stability and for a permanent democratic institution, although this couldn't work for Somalia, which seems stuck with a series of virtually permanent "transitional government."<sup>50</sup> Interim arrangement includes interim constitution or equivalent and a government formed under it.

As the main purpose of having such an arrangement is to have some authority in place while decisions are being made about the character of a more permanent and participatory government, interim arrangements are often a result of inter elite negotiations than direct popular participation.<sup>51</sup> Allowing elite's participation in the formation of the arrangement is essential as it provides actors with information that is likely to give them a competitive advantage under the

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<sup>48</sup>Kritz Neil, Constitution-Making Process: Lessons for Iraq, Congressional Testimony presented to the senate committees June, 2003, available at [www.usip.org/.../constitution-making-peace\\_building-and-national-reconciliation](http://www.usip.org/.../constitution-making-peace_building-and-national-reconciliation), consulted on April 01, 2010. Based on the emerging demands and practices on constitution making, the commonwealth and United State Institute of Peace have developed a guide line for a democratic constitution making. To mention some: allowing the public to involve effectively participate and inform them the process in each stage, Allowing civil societies to have effective contribution, Limit the dominance of one group, design a truly representative mechanism to adopt the final document. See for instance, Widner, Jennifer, Constitution writing and conflict resolution, 2005, The Round Table, Vol. 94, No. 381 at 503-504, available at <http://dx.doi.org/10.1080/00358530500243542>, consulted on September 21, 2010.

<sup>49</sup>Andrew Arato, post-Sovereign Constitution-Making and Its Pathology in Iraq, New York Law school Law Review, Vol. 51, 2006/7, at 539.

<sup>50</sup>Karen Guttieri and Jessica Piombo(ed), Interim governments: institutional bridges to peace and democracy, United State Institute of Peace press, Washington Dc, 2007, at 3.

<sup>51</sup> Neil, supra note 48, no page available.

permanent regime. Those who involved in the interim arrangement have the potential to tilt the rules of the game. Thus, interim arrangements should demand a broader representation and effective participation of all groups which allege to have a normative claim. In spite of who take the initiation, all actors should have given equal bargaining power in the determination of both the procedure and substance of the permanent regime to come. In South Africa, the ANC, which took the lead in combating apartheid, had an interest for an independent elected assembly to draft the constitution. However, the NP and other smaller parties representing minority constituencies feared that an elected assembly would negate the purpose of negotiations and result in majority rule without constitutional safeguards to protect effective minority participation in political decision-making. This dispute was eventually addressed through the formula of first holding a multi-party constitutional conference where all parties, irrespective of the size of their constituency could participate as equals to decide core constitutional principles and the structure of a transitional government. Then the public would elect the parties to form a power-sharing transitional government and the delegates to an assembly that would draft the final Constitution. The multi-party conference was called the Convention for a Democratic South Africa (CODESA) and, after that forum collapsed, the Multi-party Negotiating Process (MPNP). These formally constituted mechanisms became increasingly open to public scrutiny, creating the precedent for the transparent and consultative constitutional drafting process. This helped to provide widespread public legitimacy for the process to create what has become known as the 'new South Africa'. Yet there were some parties like PAC, AZAPO and the Freedom Alliance which boycott both the negotiation and the election for the constitutional assembly, despite various efforts to secure their presence.

Interim arrangements are usually meant to<sup>52</sup>: (1) to clearly demarcate a break from the past and to immediately remove those elements that are clearly objectionable or repressive.; (2) Clarify the basic legal rules and governmental structures during the interim period, allowing society to move forward with a minimum of disorder.; (3) And most importantly to set down constitutional principles and guide lines for a legitimate constitutional process.

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<sup>52</sup>*Id.*; see also Gahi *supra* note 25, at 13.

The establishment of a transitional arrangement, primarily, is to reveal that the former despotic state, which calls for a new constitutional order, does not have any more a legal and moral reason to stay. This in turn has the advantage of establishing a level playing field as the country embarks on deliberate process of restructuring the state and determining rules for access to it; building trust among former foes, and ensuring that there is no regression to conflict or oppression. It thus helps all groups to have equal bargaining power in mapping the new state. This is true of almost all constitution- making, as it often involves a situation of rebuilding the state in a new way or otherwise in decisive issues because the previous regime is either not all inclusive, democratic, or needed a new social order.

Since constitutions are almost often made in times of crises (a time when the existing arrangement have been shown to be illegitimate),<sup>53</sup> some degree of peace and stability have been tried to be established in all interim arrangements. Peace and stability are the corner stone of a legitimate process. Without this, other efforts for inclusion of all segment groups or effective public participation, enforcement of the agreed principles and generally the smooth operation of the process will not escape to remain rhetoric.<sup>54</sup> Making sure that the country is not in state of siege and the situation is where individual can exercise their freedoms, therefore, has to be the primary task of interim arrangements. Yet, a mere stipulation of desires to create peace doesn't suffice, particularly, in transition period. There should also be an effective consensually created enforcing mechanism and a commitment to realize on the part of those all concerned. For instance, there has to be a court though not strong, at least neutral and a legally constituted national army or police force. In Ethiopia for instance a turbulent security situation hampered the process. Because, there were no a legally established national army and police force.<sup>55</sup>

Most importantly interim documents have the advantage of providing constitutional principles and considerable detail on how the process is to be conducted, ruling on such questions as the creation of a constitutional commission, the election of the constituent assembly and other

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<sup>53</sup>Donald L.Horowitz, constitution- making: a process filled with constraint, constitutional studies Vol.12 No.1, 2006, at 8, available at <http://heinonline.org>, consulted on September 18, 2010.

<sup>54</sup>Anderw Arto, Interim imposition, ethics and international affair, Vol. 18, No, 3, 2004 at 25-50. He also described the importance of interim arrangement to create a more space and time for participatory and deliberative constitution making.

<sup>55</sup>Jamal Benomar, Constitution - making after conflict: Lesson for Iraq, Journal of democracy Vol.15 No. 2, 2004, at 83.

relevant issues of the process.<sup>56</sup> These principles and procedures are often a product of a negotiated deal among political factions representing the interest of the people they are struggling for. The provision of these principles has a multifaceted advantage. Primarily, it allows political factions to publicly announce and commit for their plan to the future polity. Secondly, it provides some insurance to those who undertake the constitution making experience. Thirdly, constitutional principles provide assurances for the end-result—while unknown—can at least be guided in a particular direction. This assurance can be of particular importance in countries where democracy and elections are new, and where the political parties have never faced open elections, and thus do not have a strong sense of how they will fare in elections for a constitutional assembly. More importantly, since these rules are a product of negotiations, they may also limit majority tyranny. As a result, it would inhibit or at least limit the possibility of producing a majoritarian constitution.

The most robust experience both in terms of having unprecedented negotiations by almost all political parties,<sup>57</sup> and creating a little constitution which provide in considerable detail the procedure and basic constitutional principles is the south African interim constitution. The constitution provided thirty-four principles which regulate the final document and other governing rules including the rule for election of constituent assembly. The constitution was also conscious in providing institution which chains the hands of parties in time of their sane. It has empowered the court to check the conformity of the final text with the stated principles. In others there were also other forms of enforcement mechanisms.<sup>58</sup>

The South African interim document was intended to last for only two years, during which time a new constitution would be drawn up by representative constitutional assembly. Constitution served as the governing constitution, mandating that South Africa be ruled by consociational power-sharing Government of National Unity (GNU). After the ANC won elections in May

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<sup>56</sup>Arato supra note 49 at 539-540.

<sup>57</sup>Gahi supra note 25 at 13-17.

<sup>58</sup>See the discussion on infra section 5 of this chapter.

1994, Mandela led the GNU. Yet, other parties that had received more than five percent of the vote were represented in the coalition.<sup>59</sup>

In others too, in spite of differences in terms of specifying a number of principles, providing enforcement mechanisms and other specifications, interim documents have always been there preceding the final document having more or less similar function. The Ethiopian transitional charter had also similar function though it lacks detailed provision on the procedure and substance of the new constitution. In some other countries, interim documents took other forms. In Rwanda, Cambodia (the Paris Agreement) and Burundi (Arusha Agreement that was adopted in 2000) for example, basic stability was provided through a peace agreement.<sup>60</sup> In Poland a series of constitutional amendments served this purpose, and the most important among them, that of October 17, 1992, was referred to as the small constitution.

In others, like Eritrea also took a different form. In Eritrea there wasn't any other party other than EPLF to negotiate about the future polity. What was rather done, in 1993, the provisional government charged itself with "preparing and laying the foundation for a democratic system of governments."<sup>61</sup>

### **2.3.2. POPULARIZING THE PROCESS: PUBLIC PARTICIPATION**

As Madison considered the difference between a system founded on the legislatures only, and one founded on the people, to be true difference between a league or treaty and a constitution."<sup>62</sup> Though there are many differences in terms of law and constitution making, one of the important elements is people's involvement. While a treaty lacks direct people involvement constitution making depends on public involvement.

Public involvement in constitution making has long begun to be given different explanation.

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<sup>59</sup>Sam Brooke, Constitutional making and immutable principles, at 31-33, available at <http://fletcher.tufts.edu/research/2005/Brooke3.pdf>, consulted on March 9, 2010.

<sup>60</sup>*Id.* at 31-33.

<sup>61</sup>*Id.* at 42.

<sup>62</sup>Catherine Drinker Bowen, *Miracle at Philadelphia, The story of the Constitutional Convention May to September 1787*, Warren E. Burger under who shall ratify?, The people or the states?, *An Atlantic Monthly Press Book*, First edition, 1996, at 229.

Popular sovereignty is the deriving notion behind nations struggle for democracy. In fact, it is the most common provision, therefore, which has been construed as the universal value of world constitutions and of modern democracy. Most constitutions of the world also declared the primacy of popular sovereignty and that ultimate power resides with "the people".<sup>63</sup> Modern constitutions, more importantly, regarded the people not only up on whom sovereignty resides but also the source of the constitution itself. Hence, if sovereignty is indeed vested in and flows from the people they should also be able to determine how it should be delegated and exercised. The emphasis on popular sovereignty is pragmatic reasons for popular participation.<sup>64</sup> Until people are not given the power to choose the nature of government and the society they prefer to live in, it is meaningless to talk about sovereignty of people.<sup>65</sup> The concept of sovereignty and participatory democracy, thus, are so much linked with one another. In fact, participatory democracy has now been accepted as the quaint-essential of genuine democracy<sup>66</sup>

Besides to this, participation has now begun to be considered as a right under international law. This has been explained on Canadian Case, *Marshall v Canada*, where the leaders of the Mikmaq tribal society brought a complaint against the Canadian government alleging that the government, by excluding them from directly participating in a series of constitutional conferences, had infringed their right to take part in the conduct of public affairs of their country, contrary to article 25(a) of ICCPR, to which Canada is a state party.<sup>67</sup> The UNCHR in 1991 after five years of its submission ruled that participation in constitutional conferences constituted a conduct of public affairs.<sup>68</sup> In reinforcing this decision, the UNCHR in one of its general comments issued on July 12, 1996, has stated right to participate on public affair under art 25

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<sup>63</sup> Katz Elai, On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment, 1996, 29 *Colum. J.L. & Soc. Probs.* 251, 1.

<sup>64</sup>Yashi Gahi and Guido Galli, constitution building process and democratization: lesson learned at 240, available at

<http://www.idea.int/news/upload/Nepal%20-%20workshop%20paper%20-%20Yash%20Ghai.pdf> consulted on July 22, 2010.

<sup>65</sup>Alok Pokharel, Participatory Constitution Making and its significances, available at: <http://ssrn.com/abstract=1567046>, consulted on September 07, 2010.

<sup>66</sup>Baral Lok Raj, Participatory Democracy, Concept and Context, Nepal: Quest for participatory Democracy, Lok Raj Baral (ed), Adroit Publishers 2006, at 18.

<sup>67</sup>Hart supra 27 at 5-7, Pokharel, supra note 65 at 44. UNHCR in its decision also said, the manner of participation is, however, a matter left to member states. Accordingly, the decision was passed in favor of the Canadian government. Note that UNHCR heard such individual complaints based on Optional Protocol I to the ICCPR.

<sup>68</sup>*Id.*

also includes citizen's right to directly participate to choose or change their constitution. Thus, the General Comment in so doing explicitly expand the scope of democratic participation beyond the act of voting.

More than anything else, public participation in modern constitutional-making is so important because it enhances the legitimacy of the constitution.<sup>69</sup> The question of legitimacy of the constitution is concerned with how to make a constitution command the loyalty and confidence of the people. A constitution should be generally understood by the people and acceptable to them. A constitution cannot hope to command the loyalty, respect, and confidence of the people otherwise. To achieve popular involvement in Constitution-making certain requirements have to be satisfied. Primarily, particularly in countries where democracy is a novel concept, educating the populace must often precede other tasks. The education campaign may generally have two elements. First, the population must be educated about the role that they will play in the formulation of the new constitution. Then, the populace must also be informed about how democracy and constitutional supremacy works in general, and more specifically, about the possible considerations available to them in forming the constitution. This task is not necessarily easy, but as many African experience revealed, it is possible even in societies where the literacy rate is quite low. This public education process permits the public to be consulted on what shape the constitution should take. Their views on such things as the form of government (i.e., a monarchy, parliament, or presidency), the vertical sharing of power (i.e., a unitary state or a federal state), minority issues (i.e., indigenous languages or minority inclusion in politics), and other general concerns should be taken into account.

This task is often coordinated by the constitutional commission, either appointed or elected, to draft the constitution and submit it together with the public opinion to constituent assembly or to the body which ratifies the final draft. It is a mistake to attempt to short-circuit this process. For example, in some cases, commissions have tried to conduct civic education and popular consultation all in one phase. It is strongly urged that these generally be treated as two distinct phases of the process. The public education phase provides an important vehicle to broadly disseminate information regarding the constitution and the constitutional process, and

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<sup>69</sup>Ghai and Galli supra note 64 at 241.

information on the basic themes that should inform the new constitutional framework. However, the synthesis of the results of the popular consultation and incorporation into the constitutional draft has been a challenge in certain cases, and requires proper planning. In East Timor, for example, the constituent assembly focused on a draft prepared by the dominant political party that ignored the results of the popular consultation.<sup>70</sup>

Secondly, the public consultation, on the other hand, need to be all inclusive and extensive. Consultation must not be limited to the elite or principal power dealers, but all classes of society must be afforded the opportunity to participate. Ordinary people must be empowered to make effective contributions to the debate and they must be provided with the necessary and extensive channels to participate. The South African experience for instance took three forms: the community liaison, the media liaison and advertising. The community liaison involve face to face with members of the constituent assembly. This direct argumentation has augmented people's sense of ownership on the process. In the media campaign, on the other hand, the assembly has used both print and electronic Media. Using all these channels, the assembly has managed extensive civic education and expressed the importance of the process. Advertising liaison on its turn increased the people's awareness using different media including billboards. The advertisement was also exceptional experience in using ear and eye catching phraseology like the famous one "*you've made your mark now have your say.*" Besides, the assembly also used information technology to disseminate the ongoing process through home pages.

More importantly both the awareness raising and consultation campaigns shouldn't fall in short of physical and language proximity. There has to be as much effort as possible to avoid language barriers to reach all segment groups on the language they understand the discussion. Generally, the process need to be accessible (both physically and technically), open and transparent to the public.

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<sup>70</sup>Nail supra note 48.

### 2.3.3. DEMOCRATIC REPRESENTATION

In addition to direct public participation, democratic representation in the body that receives the commission draft is crucial for the legitimacy of the document.<sup>71</sup> This is often in a constituent assembly that debates and revises the commission draft and adopts the constitution. A broadly representative constituent assembly is more likely to adopt a constitution which is characterized as legitimate and to establish a political system which will prove to be stable. When there is broad democratic representation, there is a greater likelihood that all aggrieved parties will have an opportunity to express their views on key constitutional issues of importance to them, and perhaps more importantly, there is a greater likelihood that their views will be taken into consideration in the drafting of the final document.

The question, therefore, is how a democratic representation in this body would be ensured? Frequently a great deal of thought is given to the choice of the electoral systems which will govern democratic representation. Accordingly, it has been suggested by many that proportional representation kind of electoral system is the prominent system to ensure democratic representation in the constituent assembly.<sup>72</sup> Proportional representation is preferred because it has a capacity to produce a greater convergence between the preference of the voters and the representation in the assembly. South African constitution-making which is often mentioned as norm setter for democratic constitution-making has, for instance, used proportional representation.<sup>73</sup> Doing so avoid the risk of making the constitution, which is meant to cure the

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<sup>71</sup>There is a different trend in empowering the body which prepares the draft. In Philadelphia, French, India recently in East Timor, Iraq, and Cambodia unusually it was the constituent assembly which draft the constitution. However, in others there is a trend to appoint a committee or a commission, who are usually a group of expertise or experienced persons, which prepares the draft leaving the approval for the constituent assembly (as in Germany, Ethiopia, Uganda, Kenya, Nepal and Afghanistan), see Ghai supra note 25 at 27.

<sup>72</sup>In spite of the various advantages the majority system provide in the ordinary law making, election to the constituent assembly should follow PR as it has been the case in south Africa and other countries. He also suggested that the assembly to be a unicameral. *Id.* at 395; Gobeze supra note 8 at 79-78; see also Gahi supra note 25 at 23.

<sup>73</sup>Arto supra note 49; see also Neil supra note 48.

evils of democracy, the will of the majority. Constitution making in as much as possible should be based on consensus or extra-ordinary high vote.<sup>74</sup>

Also, there are different forms of making the final document true: ratification by referendum. This is also another sound means of assuring legitimacy for the text, as long as the process is free of any deceptions.<sup>75</sup> Scholars like Ghai, however, argue as long as there is a fully representative constituent assembly, referendum is not necessary.<sup>76</sup> He argues referendum has a risk of complicating matters and producing fresh division in society. And as a result, he said, referendum also undermines the negotiation and consultation previously made.

#### **2.3.4. HAVING AN INDEPENDENT COURT TO OVERSEE THE CONSTITUTIONAL-PROCESS.**

In South Africa, Poland, and Hungary, for example, it was the Constitutional Court which played an oversight role in connection with the constitution-making process.<sup>77</sup> This role was particularly important in the South African context, where the interim constitution also endowed the Constitutional Court with the jurisdiction to determine whether the final draft of the permanent constitution complied with the principles set out in the interim agreement.<sup>78</sup> One draft was actually rejected by the court because some incompatibly with the principles stated in the interim constitution by parties was identified. This in turn has developed a sense of confidence on the process and assured the conformity of the document with what was agreed by all parties representing the interest of the whole people. The Kenyan High Court for instance had played similar function, in spite of the stipulation of this role in review act (which served as

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<sup>74</sup>In East Timor the election of the Constituent Assembly provided one party with clear majority so that it had no possibility to compromise in its proposal and others had no possibility to negotiate. See Gahi supra note 25 at 17.

<sup>75</sup>Yashi Gahi, the Constitution Reform Process: Comparative Perspectives, paper presented at "Towards Inclusive and Participatory Constitution Making, 3-5 August, 2004, at 6, available <http://www.idea.int/news/upload/Nepal%20-%20workshop%20paper%20-%20Yash%20Ghai.pdf> consulted on July 22, 2010.

<sup>76</sup>*Id.* In spite of this argument many nations, however, used referendum as means of adopting their constitution.

<sup>77</sup>Neil Supra note 48.

<sup>78</sup>Apart from this, any interested party can sue to have the Court declare parts of the constitutional draft unconstitutional, and the Court can issue guidelines to the Assembly concerning the forms of redrafting. As such the constitutional court had a power even to control the constituent assembly because all of its constitutional proposals had to pass the courts scrutiny. See Arato supra note 49 at, 542; see also Neil supra note 48.

guiding rule for the constitutional change). When it has been difficult for the parliamentary opponents and proponents of the draft constitution to move forward entering in to a bitter negotiation, the High Court issued a ruling that any new draft ultimately needed to be ratified through national referendum.<sup>79</sup> Accordingly, the parliament amended the review act in response to the court's ruling, adding a provision for referendum subsequent to parliament's ratification of the draft.<sup>80</sup>

This role can also be played by other body. In situations where establishing Constitutional Court is impossible and the peace accord is brokered by international actors, in spite of the issue of sovereignty, the final document can be certified by international actors. This was the case in Namibia, Iraq and other states where international actors were involved due to different reason.<sup>81</sup> Where these bodies are Multi-National Institution like UN and there is no way a single country would influence the process, the oversight role may be made properly. However, if it is an individual state, that undertakes this function, it is inevitable the process will fall under the scrutiny of the interest of the individual state.

Apart from these, allowing civil societies to play a constructive role in the making of a legitimate constitution is necessary. Civil Societies will have a role in articulating the awareness raising campaigns and motivating and keeping the public involved throughout the process.

#### **2.4. WHETHER THE PROCESS WHICH CREATED THE CONSTITUTION DETERMINE THE FATE OF THE POLITY**

Constitution making is a sensitive moment subject to manipulation. Whoever in charge of the process will inevitably shape the outcome based on its own interest. Given this scenario, a critical choice as to who should craft and adopt the document is critical for its institutional purpose. Now a day, hence, a due regard is being given for the process as much for the content. Many studies have witnessed, the process, today, have become as important as the outcome to

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<sup>79</sup>Bannon supra note 37 at 1838.

<sup>80</sup>The people then rejected the draft through a national referendum. See *Id.* at 1841.

<sup>81</sup>Brooke Supra note 59 at 40.

define the destiny of the polity.<sup>82</sup> Constitution making itself has now become part of peace process in conflict ridden nations. In some nations conflicts themselves have rooted their cause on the constitution itself. Many groups in Nepal, particularly, the Maoists insurgents had a claim that the constitution is undemocratic and discriminatory.<sup>83</sup> The peace accord therefore started with a negotiation to redefine Nepal by a making a new all inclusive constitution. Since all conflicts are at one point constitutional dispute, constitution making is important for a triumph of peace and stability.<sup>84</sup> Through an examination of 17 case studies of constitution-making processes around the world which have occurred over the course of the last 25 years, focusing primarily on post-conflict transitions, the study by United State Institute of Peace,<sup>85</sup> attempts to assess the constitution-making process for its potential for conflict resolution and prevention as well as for the maintenance of stable peace.<sup>86</sup>

It has been said by many that constitutionalism in Africa failed among many other reasons; it is because of the nonattendance of democratic culture and politically conscious citizen who would police the act of their government. Participatory constitution making is capable of indoctrinating democratic habit, skill and values such as tolerance, trust and efficiency, which these in turn have a potential to trickle up to develop a self sustaining democratic institution critical for constitutionalism.<sup>87</sup> More than anything else it equips citizen with the required moral consciousness and information to evaluate their government and enhance trust among actors for other political partnership and negotiation. Participatory constitution making is also capable to

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<sup>82</sup>Kirsti Samuel, post constitution pace-building and constitution- making, *Chicago Journal of International law*, at 1-10; Vivan Hart, *Constitution-making and the transformation of Conflict, pace and change*, Vol.26, No.2, April 2001, at 153-154; see generally Jaspre de Raadt, *contested constitution, legitimacy of constitution-making and constitutional conflict in central Europe, Eastern European politics and societies*, Vol.23 No.3, 2009, SAGE, publication, available at <http://www.eep.sagepub.com/content/23/3/315.refs.html.consulted>, on September,6,2010. While partially he shares the process matter, he said, on the study area constitutional disputes were caused by ambiguous words of the constitution rather than the non-inclusivity of the process. Yet, he failed to show why these ambiguous words happen in time of making.

<sup>83</sup>See generally Mahendra Lawoti, *Constitution as a Source of Exclusion: An Overview of the 1990 Constitution in Inclusive and Participatory Constitution Making*, Hari P. Bhattarai (ed) available at [http://www.nesac.org.np/main/pdf/democratic\\_constitution\\_maintext.pdf](http://www.nesac.org.np/main/pdf/democratic_constitution_maintext.pdf), consulted on July 22, 2010.

<sup>84</sup>The Maoist insurgents in Nepal following an agreement for constitutional reform have declared that they have renounced war. See *Id.*

<sup>85</sup>United State Institute of Peace is an independent non-partisan Federal Institution established in 1984 by Congress to promote the prevention, management and peaceful resolution of international conflict.

<sup>86</sup>Neil supra notes 48.

<sup>87</sup>Zachary Elkins, Tom Ginsburg and Justin Blount supra note 32 at 367-370.

create a stable document.<sup>88</sup> For one thing, if the process genuinely involved and articulated the interest of all groups, there would be a lesser demand for re-negotiation for new one. Ethno-political groups are more likely to protest than rebel, minimizing internal violence. Participation not only aggregate pre-existing preferences, it is also an opportunity to generate new ideas and institutions. The resulting policies thus would be high quality, appropriate to circumstance and congruent with citizen's preferences.

Many constitutions which are developed with high public participation have shown having a more elective offices and constraint on the executive.<sup>89</sup> Democracy is subsequently stronger, and constraints on chief executive are found greater, in the constitutional design where peoples were actively involved.

## **CHAPTER THREE**

### **THE MAKING OF THE NEW ETHIOPIAN CONSTITUTION**

#### **3.1. ON THE EVE OF THE MAKING OF THE CONSTITUTION**

Extreme centralization earlier during the reign of the emperor and later the 17 year's military administration instigates independence and irredentist insurgents throughout the country. EPLF, TPLF and EPDM in the north and OLF, ONF and WSLF in the south and south east part of the country were among the major factions which waged armed struggle against the government. Particularly the Eretria liberation front, which started its revolt since the time of the emperor, had been the veteran insurgent group in wrestling Derg's military administration. Later, at the later part of 1970's although with different purposes, small Tigryan elite (the TPLF), which used to

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<sup>88</sup>*Id.*

<sup>89</sup>John M. Carey, Does it matter how a constitution is created, prepared for the conference on exporting democracy: what democracies can do and cannot do, university of Texas, April 20-21, 2007. In his study he used 67 constitution made from 1990-2005; See Zachary Elkins, Tom Ginsburg and Justin Blount, *supra* note 28 at 219; see also Zachary Elkins, Tom Ginsburg and Justin Blount *supra* note 32 at 381.

have not more than 10,000 soldiers also joined the struggle in the North against the military rule.<sup>90</sup> In April 1988 a strong TPLF (now with an estimated 25,000 soldiers) united forces with the EPLF and began to co-ordinate their military operations. This strategy proved effective and in 1989 the TPLF was able to move southwards from its northern base in Tigray to Wollo and Shoa. Its guerrilla efforts were supported by the EPLF which saw these areas as an important buffer zone between Eritrea and central Ethiopia, and consequently provided training and arms to TPLF fighters. The passage of time and victory in the field broadened the goal of the force to encompass the liberation and administration of the country beyond what it was originally aimed. The TPLF which used to struggle for the liberation of Tigray, hence, determined to join Ethiopian People's Democratic Movement (EPDM) now ANDM, the other northern insurgent. Accordingly, in the early 1989, on the eve of its victory, TPLF established EPRDF comprising only of these two parties.<sup>91</sup> EPDM was organized in 1978 through 1980 by those defectors of EPRP who fled to Tigray either to tail struggle from there, if TPLF would provide them support or if not to flee to Sudan.<sup>92</sup> The defectors, however, supported with all material facilitation by the TPLF force to tail on the struggle against the center.<sup>93</sup> OPDO, which join EPRDF in 1990, was formed on the same year constituting Oromo prisoners of war held by the TPLF and EPLF forces and who had at one time or another joined the EPDM.<sup>94</sup> OPDO as manifested from the time of its establishment had no substantial contribution on the struggle against the ruin of *Derg*.

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<sup>90</sup>As opposed to EPLF, which originally fought for independence from Ethiopian colonization, the TPLF had only this plan as a last resort: if the demand for power sharing at the center was impossible. See Sandara Fullerton Joireman, opposition politics and ethnicity in Ethiopia: We Will All Go down together, the Journal of modern African studies, Vol.35, No. 3, 1997, at 392, available at <http://www.jstor.org/stable/161748>, consulted on October, 2010. There is also an argument that EPLF's struggle at the earlier time was even only opposing the broke up of the Eritrean federation. It was only later that EPLF's agenda was changed to a colonial thesis. See Lidetu Ayalew, *Midelot: the role of the third alternative in Ethiopian politics* (Amharic) progress publishing, Addis Ababa, 2009 at 311-312.

<sup>91</sup>The official establishment of EPRDF, however, postponed for a while with the hope to enclose others. See Sarah Vaughan, The Addis Ababa Transitional conference of July 1991: its origin, history and significance an occasional papers No. 51, center for African studies Edinburgh University, 1994, at 5, available at [http://www.cas.ed.ac.uk/data/assets/pdf\\_file/0013/27301/No\\_051TheAddis\\_AbabaTransitional\\_Conferenc\\_eof\\_July1991-.pdf](http://www.cas.ed.ac.uk/data/assets/pdf_file/0013/27301/No_051TheAddis_AbabaTransitional_Conferenc_eof_July1991-.pdf), consulted on October 19, 2010.

<sup>92</sup>*Id.* at 6.

<sup>93</sup>*Id.* she also mentioned quoting an interview with *Birket Simon* (official of ANDM) that TPLF provided them a logistical support without any interference on their party's internal affair.

<sup>94</sup>*Id.*; see also Ayalew supra note 90 at 313.

The other ethnic front which weakened the military government from the other corner of the country was the Oromo liberation front (OLF). OLF was established 1973 to exercise the Oromo people's right to national self-determination.<sup>95</sup> OLF started scattered guerrilla type of struggle against the *Derg* in the western, southern and eastern parts of Ethiopia. It has been said, the *Derg* government and the OLF engaged in an informal and secret negotiations through the *Meison*, whose top leaders were Oromo elites and who allied with the *Derg* at the early years of the revolution. However, these negotiations were not fruitful and were discontinued when *Meison* itself was cleansed by the *Derg*.<sup>96</sup> Some sources suggest OLF, although not significant, had gained military success against *Derg* around *Wellega* in the final years of the war.<sup>97</sup> The Western Somalia liberation front (WSLF) was also the other ethnic front which challenged the government at the eastern part of the country. The WSLF was created in the first half of the 1975 and continued its movement by getting support from Somalia.<sup>98</sup> The WSLF served as an instrument for Somalia's expansionist policy in its attempt to annex the Ogaden province of Ethiopia, particularly starting from February 1977. By exploiting the *Derg* government's internal problems and its battles with other secessionist rebel fronts Somalia encouraged the WSLF to launch an uprising and supported it with arms and logistics. In 1978, Somalia directly invaded the Ogaden area and other eastern parts of the country; after few months of fighting, however, the invading army of Somalia and its collaborator, the WSLF, were crushed by the *Derg*.<sup>99</sup>

The combined forces of these major ethnic rebels, the withdrawal of Soviet support and repeated famine has all weakened *Derg's* military power, which used to be called the huge in the horn of Africa. This in turn has simplified the burden of TPLF/EPRDF, which used to be well armed, strengthened in all terms and also get supported by US to reach first and occupy governmental power at the center.

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<sup>95</sup>Wondwosen Teshome B, Ethiopian opposition political parties and rebel fronts: past and present, International Journal of human rights and social science Vol. 4 No.1, 2009, at 61-62, available at <http://www.waset.org/journals/ijhss/v4/v4-1-9.pdf> consulted on October 11, 2010.

<sup>96</sup>*Id.* citing Merera Gudina, Ethiopia: competing Ethnic Nationalism and the Quest for Democracy, 1960-2000, Addis Ababa: chamber printing press, 2003 at 86.

<sup>97</sup>Vaughan, supra note 91 at 32.

<sup>98</sup>*Id.* at 106.

<sup>99</sup>Teshome supra note 95.

### 3.2. THE PATH TO THE MAKING OF THE CONSTITUTION

Ethiopia since the first written constitution had had three constitution: the 1931, 1955 and 1978. The 1931 and 1955 revised constitutions were just grants to the people of Ethiopia by the kindness of the emperor. There weren't any public consultation preceding the approval of the constitution. In spite of its lack of moral, legal and skill credibility to represent the public; the then parliament had undergone deliberation and agreed on the terms of the constitution.<sup>100</sup> The military government subsequent to its long time military provisional rule had also managed to prepare a constitution on the eve of its defeat. Although it was dominated by the military government, the process which crated this constitution had tried to involve the public. The constitutional commission had even collected 500,000 submissions from among 25,000 public consultation meetings.<sup>101</sup> Including this submission the constitution was approved by national referendum. Of the total 14,035,718 people who had registered to vote 96% had went to ballots. Of which while 81% voted in favor, 18% rejected the bill and the rest 1% of the votes were declared invalid due to mistaken use of voting cards. One way or the other, if constitution is intended to be a document enjoying a wide degree of popular acceptance which in turn helps to convey legitimacy on the public authority, then none of the Ethiopian Constitutions to date come remotely close to meeting of this specification.<sup>102</sup>

The fact that the previous constitutions were which simply handed to the public, the articulation of a new political wave i.e. a policy of ethnic self-administration and a claim that *Derg's* constitution didn't provide even for basic democratic rights and freedoms<sup>103</sup> pressed for a new participatory and all inclusive constitution. Projection of a democratic or a participatory constitution is a result of an interrelated activity preceding the final text. Particularly in post conflict state reconstitution a legitimate process considers various decisions taken at each stage

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<sup>100</sup>See the preamble of the 1955 revised Ethiopian constitution.

<sup>101</sup>Gobbeze Negede, constitution, election and democracy in Ethiopia(Amharic), ASEOP, publisher, America 2004, at 98. See also Asemlash Beyene, The nationality question, secession and constitutionalism: the case of Ethiopia in state and constitutionalism an African debate on democracy, Issa G.Shivji(ed), published by African political economy series (SAPES) Trust, 1<sup>st</sup> edition, 1991 at 138.

<sup>102</sup>Christopher Clapham, Constitutions and Governance in Ethiopian Political History in Constitutionalism: Reflections and Recommendations, Symposium on the Making of the New Ethiopian Constitution (Addis Ababa: Inter Africa Group, 1993) at 29.

<sup>103</sup> Kiflle wedajo at 135.

before the promulgation of the real document. Thus, how the interim arrangement is constituted, how bodies to draft and adopt the constitution are composed of and other such related issues necessarily determine the outcome.

### **3. 2. 1. THE FORMATION OF THE TRANSITIONAL GOVERNMENT**

As the author managed to describe in the previous chapter, Transitional governance, if managed properly, has the advantage of transforming a state from war-torn or authoritarian situation to a new broadly representative and democratic regime. Transitional governance is the turning point where the fate of the future polity is determined. The quest for permanent democratic change in Ethiopia was begun with the adoption of the provisional Charter which gave birth to the Transitional government. The Transitional government was established at the Peace and Democracy Conference convened early in July 1991 having a legislative Council and an Executive with all the legal and political power for the duration of the Transitional governance. Issues like how, when and by whom the Transitional Governance established and were governed are vital elements one should look in to in weighing whether the Transitional governance had rightly served its purpose. These are the points this part ponder.

#### **A. THE LONDON PEACE TALK**

When the weakening of the center had been sure; basic issues like who should mobilize the formation of the Transitional Government, who should participate in power sharing, and in what proportions should each group be represented in Transitional Governance was a contentious issue among the major liberation front's, particularly, between the EPRDF and OLF. EPRDF, which considered itself as prominent player in the ruin of the *Derg* regime, while proposed the formation of the government to take in to account the extent of the role each factions played in expelling the dictatorial regime, OLF demand for the establishment of a United Nation sponsored interim administration for smooth and fair operation of the Transitional Governance.<sup>104</sup> The US brokered deal hence held among the prominent factions: EPRDF, EPLF and OLF in London in

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<sup>104</sup>*Id.* at 133.

may 27 1991 on the issues of the formation of the Transitional Government. The US assistance Secretary of State for Africa Herman Cohen, who chaired the meeting in London, announced at the conclusion of the talks that the EPRDF would occupy the center for the sake of peace and stability at the capital, lead the Interim Government in Addis Ababa, and hold a National Conference including all existing political and ethnic organizations in the country, afterwards form a Coalition Government.<sup>105</sup> Sarah quoting an interview with *Seyuom Mesfin* mentioned that the mediators in London had rather proposed for a Transitional Government which was to be fully controlled by the EPRDF rather than a broad based Coalition Transitional Government. Due to the EPRDF's strategy for democratization, however, he said, EPRDF insisted on Coalition Transitional Government.<sup>106</sup> The talk therefore ended embarking on the convening of an all inclusive Conference so as to establish a Coalition Transitional Government.

The US initiated talk was first planned to involve only the Government, TPLF and EPLF. Later, however, because EPLF and TPLF urged for OLF's participation; OLF also become part of the pace talk in London. There is however an argument whether the government delegation had physically attend the Conference. To state Herman Cohen's report of the meeting:

*“On the 27<sup>th</sup>, acting president Tesfaye Gebre-Kidan told us the Ethiopian army had virtually disintegrated, and that he and senior government officials were extremely concerned about their ability to provide for law and order. The acting president said that the government intended to broadcast a call for a unilateral cease fire and an appeal to the citizens of Addis to accept the EPRDF when they entered the capital. The EPRDF decided to move forward in to the city that night. The United State strongly agreed with the decision, because the EPRDF was now left as the only disciplined force capable of keeping order in the capital. At that point the Addis regime effectively ceased to exist and their delegation in London dropped out of the talks. The final part of the London meeting thus began with the United State no longer in a mediation role between the government and the insurgents, but in a de facto advisory role for the three opposition groups about to inherit all military and political power. Our London meeting thus ended without*

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<sup>105</sup>Alex de Wall Ethiopia: Transition to What, world policy Journal, Vol.9 No.4, 1992 at 719-720, available at <http://www.jstor.org/stable/40209278>, consulted on October, 20, 2010.

<sup>106</sup>Vaughan supra note 91 at 33.

*the appointment of transitional government as we had envisaged.” (US Assistance Secretary of State for African Affairs, Herman Cohen, statement on 18 June 1991)<sup>107</sup>*

Other authors, contrary, stated the government delegation walked out of the Talk because they discovered the pre-existing US’s plan to remove them from power.<sup>108</sup> The OLF, on the other hand, also maintained its presence, left the Peace Talk with the feeling that the US and EPRDF had made an agreement prior to the Talks in London. The OLF had already been excluded since the London Conference earlier in 1991, which had anointed the EPRDF as the de facto successor regime to the crumbling Mengistu government.<sup>109</sup> Former president, Dr Negasso Gidada mentioning email confirmation from Lencho Letta (who attended the Conference representing OLF) told the writer that OLF had attended the conference only as observer.<sup>110</sup> Therefore, OLF hadn’t had an active role in fixing the rules of the game for the Transitional Governance.

Subsequently, TPLF along with its coalition allies lead the Provisional Government, which lasted for a month, promising to call a Conference on Peace and Democracy in accordance with the London Peace accord involving all parties which fought the *Derg* and others which hadn’t had a prior existence. The Conference as scheduled by the London Talk held on July 1 to 5 in 1991. The Conference’s major objective was: establishing Transitional Period Charter, which would serve for the duration of the Transitional period, forming Transitional government, and the acknowledgement of Eritrea’s right to self-determination.<sup>111</sup> The Conference was believed to be the recipient of the 3<sup>rd</sup> TPLF’s Congress and the subsequent TPLF elaborated program for smooth and peaceful transition of power and which latter adopted by the newly created EPRDF.<sup>112</sup>

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<sup>107</sup>*Id.*

<sup>108</sup>Alemantee G. Selassie, Ethiopia: problems and prospects for Democracy, college of William and Mary Law Scholl scholarship Repository Faculty Publications paper 87, 1992 at 212-213.

<sup>109</sup>*Id.*; see also John W Harbeson, Ethiopia’s Extended Transition, Journal of Democracy, Vol. 16, No 4, 2005 at 148, available <http://scholarship.law.wm/facpubs/87>, consulted on September,18,2010.

<sup>110</sup>Interview with Dr Negasso Giadad, former president of the Federal Republic of Ethiopia and now a member to Unity for Democracy and Justice party, (November 08, 2010), Addis Ababa.

<sup>111</sup>Teshome supra note 95 at 64; see also Wedajo supra note 103 at 134.

<sup>112</sup>The EPRDF’s peaceful transitional program used to include: establishment of provisional government constituting various parties, rehabilitation of victims of war, establishment of a process to create a new constitution based on principle of ethnic-self determination and federalism, liquidation of Eritrea’s crisis by recognizing de facto political control of the territory and arranging referendum for its final destiny; see also

## **B. THE PARTICIPANTS OF THE CONFERENCE: WHETHER IT WAS ALL-INCLUSIVE**

The Conference was attended by 27 political and ethnic organizations which both contributed to the demise of *Derg* and others which were created for the sake of the Conference.<sup>113</sup> In some other literature the number of parties participated in the Conference is extended to 31.<sup>114</sup> Apart from OLF and EPRDF ethnic based member organization, organizations which claim to represent nationality interest take the lion share of the participant's number in the Conference. While some of them like, Afar Liberation Front, Ogaden Liberation Front, the Gambella People's Liberation Front, the Islamic Front For The Liberation of Oromia, the Oromo Abo Liberation Movement, the Sidama Liberation Front, the Western Somali Liberation Front, and the United Oromo People's Liberation Front were liberation fronts' which had a prior existence, others were those which didn't possess a pre-existed history and membership.<sup>115</sup> Due to EPRDF's announcement that any social or nationality groups as long as they managed to organize themselves and publicize their programs could join the Conference, various groups without a serious articulation of their program, political experience and garnering considerable public support from their respective nationalities appear over night claiming to represent nationalities interest in the conference.<sup>116</sup> Some argue apart from EPRDF's effort to boost its legitimacy, the creation of these parties had no any multi-party function both in confronting and providing an alternative view against EPRDF's policy.<sup>117</sup> Given the country's one party dominated history, however, EPRDF's effort to call for the formulation of new nationality parties was a fortunate but also a no alternative decision for EPRDF. EPRDF other than calling them to involve

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James C.N. Paul, the reconstitution of Ethiopia: 1991-1994 A Procedural history based on the paper presented for the constitutional commission, at 13.

<sup>113</sup>Wedajo supra note 103 at 134.

<sup>114</sup>Teshome supra note 95 at 64, for instance, stated 27 participants. Others like Assefa, stated 31 participants. See Assefa Fiseha, *Federalism: accommodation of diversity in Ethiopia: a comparative study*, revised edition Nijmegen; Wolf legal publisher, 2007 at 63. The participants were 27 but seats for four parties, listed in the annex, were reserved. It is only counting all these seats that we can excel the participants' number to 31. See the Annex for a precise understanding of the case.

<sup>115</sup> Vaughan supra note 91 at 43.

<sup>116</sup>Adere, the Gurage, the Hadiya, the Issa and Gurgura, the Kembetta, the Omotic and the Welaita people were those who represented in the conference. See *Id.*

<sup>117</sup>Merera Gudina, *Ethiopia: A Transition without Democracy*, at 5 available at <http://www.oromopeoplescongress.org/docs/ethiopia-transition-without-democracy-Merera.pdf>, consulted on August 6, 2010. See also *Id.* at 48 quoting an interview with Mesfin Weldemariam.

wouldn't have had other measure which it would take to make these parties tough oppositions. Rather the point lies on the boundary these parties required to organize to be part of the Conference and seats allocated to them. Whether it was the EPRDF, which after all, had to limit nationality as a base for the organization of parties to participate in the Conference and only nationality is rather a critical point one should look in to. Moreover, in spite of the technical and practical capacity of these newly created parties, it is also important to take notice of those considerable numbers of nationalities who were not represented humanly.

Apart from this, EPRDF's member organization participated in the Conference was also suspected of being TPLF's spawned off-shoot organization created as an attempt to expel rival parties representing similar ethnic groups. In theory, the OPDO and APDM both created by TPLF in 1990 and 1988, respectively, are the Oromo and Amhara wings of the EPRDF party, respectively. However, many argue it is the OLF and not the OPDO, which is said to be created by EPRDF as last resort when it becomes difficult to work with OLF, which is a more legitimate organizations representing the Oromo people.<sup>118</sup> OPDO appears to lack not only legitimacy to represent the Oromo peoples but also educational and political skill both to articulate the interest of the people and to run a transparent and accountable administration in the region.<sup>119</sup> Others also dismiss EPDM's claim to speak for the Amharas. Instead it was the AAPO,<sup>120</sup> which was created after the Conference had a credible position to voice for Amhara's.<sup>121</sup> As Harbeson noted, the prominent Amharas' attended the Conference only on their individual capacity, though the major party formed to represent Amhara interest came in to being only after the Conference.<sup>122</sup> Thus, the Amhara communities lacked an organized voice at this crucial Conference to press their

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<sup>118</sup>Merera Gudina, Ethnicity, democratization and decentralization in Ethiopia the case of Oromia, *Estern African social science research review*, Vol. 23, No.1, 2007, at 92, available at <http://muse.jhu.edu/journals/eas/summary/v023/23.1gudina.html>, consulted on August 6, 2010; see also. Walle Engedayehu, Ethiopia: Democracy and the Politics of Ethnicity, *African Today*, Vol.40, No. 2, 1993, at 44, available at <http://www.jstor.org/stable/4186904> consulted on October 11, 2010.

<sup>119</sup>Gudina supra note 118 at 94.

<sup>120</sup>APPO was established in January 1992 to dray the cray's of Amharan people who have been massacring in different parts of the country following EPRDF's ethnic politics. This party didn't participate in any of the transitional process denouncing the legitimacy of the transitional government. This party still believed to exist in United State and Sweden. See Fullerton supra note 90 at 395.

<sup>121</sup>Engedayehu, supra note 118.

<sup>122</sup>John W. Harbeson, Election and democratization in post Mengistu Ethiopia, in *Post conflict Elections, Democratization, and International Assistance*, edited by Krishna Kumar, Lynne Rienner Publisher, united state of America, 1998, at 116.

prevalent oppositions to the EPRDF's vision of the post-imperial Ethiopia state.<sup>123</sup> The Amhars used to have a serious stance against the restructuring of the country on the bases of ethnicity. Articulating ethnicity as political instrument, they believe, was against the interest of Amharas' who consider themselves beyond an ethnic group. This has been a difficult task, for instance, for AAPO to convince Amhara elites to organize themselves along ethnic lines.<sup>124</sup>

Moreover looking in to the nature and history of parties participated in the Conference it becomes clear that most of them including the EPRDF were ethnic based faction thereby reflecting the domination of EPRDF's will and absence of accommodation of various views in Ethiopian politics.<sup>125</sup> This view seems to hold truth as many of strong multi- ethnic factions were not part of the Conference. The Coalition of Ethiopian Democratic force (COEDF), comprising EPRP, MEISON, EDU and Tigray people's democratic movement (TPDM), which formed in April 1991, did not participated the July Conference. The Conference excluded this group because some say; it was because EPRDF invited only those factions which renounced armed struggle to seize political power and COEDF was unwilling for the same;<sup>126</sup> others on the other hand, speak COEDF was excluded because it was a multi-ethnic party which was not in accord with the EPRDF's aspiration for the new Ethiopia;<sup>127</sup> there are also others who assert COEDF's exclusion was a deliberate exercise of EPRDF because COEDF, in a democratic deliberation and with long year political experience and articulated program, had a potential to win the hearts of Ethiopians than EPRDF.<sup>128</sup> In spite of which reason caused COEDF's removal from the process; Ethiopia couldn't enjoy a comprehensive transition. The participation of this major parties with

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<sup>123</sup>*Id.*

<sup>124</sup>Teshome supra note 95 at 63; AAPO's leader was even reluctant to admit the establishment of an ethnically organized party. AAPO's intention and entire party program was not to remain an ethnic based party; it was only to avoid the subjugation and killings of Amharan peoples that the party originally appears to be an ethnic party. Interview with Mamushet Amare, General Secretary of All Ethiopian Unity party (former AAPO), (November 04, 2010).

<sup>125</sup>Vaughan, supra note 91 at 64.

<sup>126</sup>Addis Alem Balema, *Economic development and democracy in Ethiopia*, Rotterdam, and Erasmus University press, 2003 at 11. Please note that, EDU which used to be one of the partners of the coalition however later joined the Conference. It is also to be recalled that COEDF' exclusion from London Conference was its lack of armed force. See G. Selassie, supra note 108 at 213.

<sup>127</sup>Merera Gudina, *Ethiopia: Competing Ethnic Nationalism and the Quest for Democracy, 1960-2000*, Shaker Publishing: PhD thesis, 2003 at 87.

<sup>128</sup>Paul H. Brietzke, "Leap in the Dark" Federalism and self determination in the new constitution, *Journal of African Law*, Vol.39 No.1, 1995, at 42, available at <http://www.jstor.org/stable/745605>, consulted on September 18, 2010.

articulated political program, experience and also skill would have had served as sound transition to deliberative democracy in the country. Many believe the efforts to democratize the political system would have had a positive meaning for Ethiopia had the oppositions groups been allowed to compete uninhibited , by and free from, the threat of political intimidation and harassment in all political activities.<sup>129</sup> Workers Party (WPE) and the monarchist force were also the other groups which were legally banned from any of the transitional process.<sup>130</sup> Proclamation No. 64/1993 to provide for the Electoral Law of Ethiopia and Proclamation No.3/1991 to establish the Procedure for Peaceful Demonstration and Public meeting were among laws which banned the organization (WPE) and its members, soldiers and members of the security from any of the transitional political process. While issue of justice is an independent point which needs legal treatment, WPE and its member's exclusion from the redefinition process has also undermined the inclusivity of the transition.

EDU (the Ethiopian Democratic Union lead by Mengesha Seyoum due to US pressure), ENDO (a Coalition of three US based party and which was determined for peaceful transition), Islamic group based in Los Angeles, were the only exiled multi-ethnic parties which joined the Conference.<sup>131</sup>

As an attempt to boost its acceptance the Conference was open for some International Organizations and University delegates. EPLF had also attended the Conference as an observer.<sup>132</sup> Some part of the Conference also broadcasted through the National Television to make the process open for public scrutiny.

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<sup>129</sup>*Id.*

<sup>130</sup>Although the argument for their exclusion is their lack of willingness to renounce war, none of COEDF, WEP and Monarchist force declared war and they weren't in a position to execute their war-like intention. The exclusion of WEP made the transition to be non-peaceful; because peaceful transition, which EPRDF intended to had, usually involve the previous regime. See G. Selassie Supra note 108 at 219.

<sup>131</sup>Vaughan, supra note 91 at 42.

<sup>132</sup>EPLF's attendance of the Conference as observer rather than as a participant assures the fact that Eretria's case was already determined on closed door meetings of EPRDF and EPLF. The Conference had only the purpose of acknowledging the pre determined decision. See also the annex for better look of the participant's position in the Conference.

### C.THE ALLOCATION OF SEATS, MANNER OF THE CONFERENCE AND OTHER ISSUES

The seats on the Conference were fixed according to the encoded off the record negotiations made by EPRDF, EPLF and OLF in Asmara few days before the Conference.<sup>133</sup> Accordingly, while thirty four and twelve seats reserved for EPRDF and OLF respectively the remaining 43 devolved amongst the rest spawned off-shoot ethnic organizations. Although the basis for the allocation of the seat remains somewhat mystery, the supposed factors involved include: group's contribution to the overthrow of the *Derg*, the size of forces that they currently have mobilized, and the size of population the faction claims to speak for were among the points considered in fixing the seats.<sup>134</sup> The Conference which was dominated by EPRDF 32 and OLF 12 seats couldn't level the playing ground for a new political system to take root in the country. Other parties which didn't have had role in ousting *Derg* were not given considerable place in the redefinition of their future home.<sup>135</sup> Participation of these groups in the Conference was apparently viewed as deeds of kindness by major war fronts, which considered themselves legitimate for the political position, rather than a right of each nation to determine the fate of their future home. As such, without a considerable time and shallow debate the conference, which used to be chaired by Meles Zenawi, ended with the establishment of Interim Government and the Interim Constitution (Transitional Charter). The agendas for the Conference, the preparation of the draft Charter and the seats to participant were all formerly arranged by EPRDF and also with OLF's later consultation.<sup>136</sup> EPRDF's draft Charter couldn't also reach to the participants before the Conference for their critical comment and sound debate; it was only on the time of the Conference that the participant managed to understand and comment on the theme of the Charter.<sup>137</sup> There was also an instance where the participant from Addis Ababa University mentioned that they didn't even know the Conference was called for promulgation of

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<sup>133</sup>Wedajo supra note 103 at 134.

<sup>134</sup>G. Selassie Supra note 108 at 214 quoting Berhanu Nega, some observation on Ethiopian transition to Democratic politics 2 IMBYLTA 16, 1991.

<sup>135</sup>See the annex for the number of seats allocated to each party in council of representative.

<sup>136</sup>G. Selassie supra note 108 at 219; see also Terrence Lyons, Closing the Transition: The May 1995 election of Ethiopia, Journal of Modern African studies, Vol. 34 No.1, 1996 at 123, available at <http://www.jstor.org/stable/161741> consulted on October 20, 2010.

<sup>137</sup> *Id.*

the Transitional Charter.<sup>138</sup> Given the facts mentioned earlier, the Conference was which EPRDF unilaterally determined the right to political participation of Ethiopian people. The Conference was rather EPRDF's party where all other participants acted as guests.

These all in turn question to what extent the Charter was a product of consensus, expressing the fundamental and deliberative agreement of the participating groups to move toward a transitional democracy. In relation with these, various opposition groups often seemed delegitimizing the Interim Arrangement. Major oppositionist such as the COEDF and APPO and others claimed for a new Conference embracing all factions.<sup>139</sup> They tried to increase their influence over the transition by participating in a series of meetings and working to build a coalition that united the major forces outside the EPRDF's transitional framework. In March 1993 an opposition meeting in Paris issued a statement that condemned the TGE.<sup>140</sup> Among the participants were leaders from the Southern Coalition, chaired by Beyene Peteros, which had retained their seats in the Council of Representatives after the 1992 elections, and when most refused to dismember themselves from the Paris declaration, they were expelled from the Council.<sup>141</sup> The oppositions tried again to increase their leverage and find means to reform the Transition by holding a 'Peace and Reconciliation Conference' in Addis Ababa in December 1993.<sup>142</sup> The TGE declined the proceedings and arrested some dissident leaders who tried to attend. Another opposition strategy

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<sup>138</sup> Vaughan, *supra* note 91 at 50; see also Mamushet Amare, *supra* note 124.

<sup>139</sup> Yet there are some authors who firmly assert, the TGE was the most legitimate and democratic government that the country had had in its entire history. It manifested a clear case of power sharing among major contenders. EPRDF leaders and those who took part in the Conference all witnessed that they and their organizations held detailed discussions on the draft text of the Charter during the period preceding the Conference. The TGE was able to represent the major factions and the then existing contending views. Thus, The Ethiopian government was more narrowly based and had less legitimacy in 1994 than in 1991. See Fissaha *supra* note 114 at 69-70; see also Marin Ottawa, "the Ethiopian transition: democratization or new Authoritarianism?" *North East African Studies*, Vol. 2 No.3,1995 at 73.

<sup>140</sup> Lyons, *supra* note 136 at 129.

<sup>141</sup> Southern collation is coalition formed on the eve of 1992 election comprising parties which had a seat in council of representative including Guraghe, Kembata, Hadiya, Wolita, Sidama, Kaffa, Omo, Yem, Gedeo and Burji. See Engedayehu, *supra* note 118 at 47.

<sup>142</sup> 31 more other parties did consented to form the Coalition of Alternative Force for Peace and Democracy considering the existed TGE as non-inclusive, despite their inability to have a cohesive political platform. See Fullerton *supra* note 90 at 400.

focused on appealing to the West, particularly the United States, to use its influence to convince the TGE to engage in talks with the goal of forming a new Transitional Government that would include all political parties before the next elections. In February 1994 a number of Ethiopian opposition groups met with former President Jimmy Carter in Atlanta to explore opportunities for another round talk. The initiative failed, however, when Meles Zenawi's TGE refused Carter's offer to mediate.

Only by opening the arena to all actors on equal footing that the transitional process could acquire an impression of social contract, which in turn is essential to a democratic and legitimate constitution- making agenda.

More fundamental was the exclusion of major societal groups: association of women, youth, students, professional associations, peasant association, workers association, representative of the disabled and other sort of societal groups.<sup>143</sup> Had these groups been involved, it would have made the Conference lively and boost its credibility.

In spite of issues related with its inclusiveness; the Conference was ended establishing an Interim Government comprising Council of Representative, an Executive and a Judiciary. The Council of Representative has had 87 seats; where each of the allies of the Coalition of EPRDF secured 10 seats and two seats were reserved to another member of EPRDF mainly constituting former officers and which later dissolved. In total, EPRDF secured 32. OLF, on the other hand, ensured 12 out of the total 87 seats. While the remaining 37 seats allotted for the rest of the parties participated in the Conference, six seats were also reserved for some parties which didn't appear in the Conference. These were Agaw People's Democratic Movement (1), Yem National Movement,(1), kaffa People's Democratic Union(2), Gedoo People's Democratic Organization(1), and Burji People's Democratic Organization(1).<sup>144</sup>

Why and how only for these later groups the Conference reserved Council seat without their presence is far from clear for the writer. Besides, whether 87 seats was adequate considering the various groups which need to be represented in the drawing of the new political map of the

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<sup>143</sup>G, sellasie supra note at 108 219.

<sup>144</sup>See the annex; see also Fissaha supra note 114 at 64.

country<sup>145</sup> and whether the Council should have been open for other late comers who didn't take part in the Conference was an important issue which needs to be debated. As regards the Charter, it is stated in lucid terms; it didn't open the door for the late comers. EPRDF, apart from seating the rules of the game, which in other cases act as single cohesive party both politically, ideologically and organizationally, has made itself advantages in terms of enlarging its seats in Council by splitting itself to a three different party.

The Interim Government was also made to possess a Prime Minister and a President with the highest executive power. The cabinet of the government were dominated by EPRDF. The EPRDF, for instance, controlled the leading political position including the President, the Prime Minister, the National Defense and Foreign Minister while OLF retained three lesser Ministerial positions.<sup>146</sup> In spite of their insignificant political role, various groups represented the Oromo people in the transitional process.<sup>147</sup>

The Conference also agreed on the modalities of the transitional process to last two years. In the mean time, elections for Local Regional Government were to be held, a Constitutional Commission to be established, and general elections for the election of members of the Constituent Assembly and of the new National Assembly was scheduled; thereby ending the Transition.

### **3.3. THE TRANSITIONAL CHARTER AND ITS ENFORCEMENT MECHANISMS: TOWARDS THE MAKING OF THE CONSTITUTION**

The Charter has composed of Five Parts and Twenty Articles. It has recognized unrestricted human rights as envisaged by the UN Declaration of December 1948; the freedom of conscience, expression, association and the right to engage in unrestricted political activity; the right of nations/nationalities and peoples to self determination including and up to secession; the establishment of national, regional and local councils for the purposes of self-rule and

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<sup>145</sup>It was the EPRDF which insisted seats for the Council not to exceed 87. See G. Sellasies supra note 108 at 219.

<sup>146</sup>Lyons, supra note 136 at 123.

<sup>147</sup>Although in different organizational capacity, Oromo peoples were represented by four parties or 25 seat out of 87. See the annex for better look.

administration, among others. The Charter has also provided for the structure and composition of the TGE (Part Three, Articles 6 & 7) whereby it confirmed the establishment of the Council of Representatives and the Council of Ministers as the central organs of the Ethiopian state for the period of Transition.

The making of the Ethiopian Constitution had its beginnings in the Transitional Charter. As a way to the making of the Constitution the Charter tried to level the playing field first by establishing an Interim Government which play a government role to the period of the transition and recognized human and political rights and freedoms crucial to the deliberative constitution making. More importantly the Charter has laid specific provisions as regards who and how the constitution to be drafted and ratified. Accordingly, the Charter envisaged for the establishment of a Constitutional Commission which draft and a Constituent Assembly which adopts the constitution. It was the Council that the Charter empowered to establish the Commission and thereby to fix the number, manner of selection and also its mandate. The Council was also empowered to adopt the draft constitution which was to be presented for public discussion. The Charter was not yet explicit as the South African little (interim) constitution, for instance, which enclosed 34 principles in laying a detailed constitutional principles and rules for the making of the constitution. The Charter couldn't even determine the electoral rule for the election of the members of the Constituent Assembly. What rather did was; it simply refers to the electoral rule the draft constitution might adopt. While draft constitutions are more of expertise opinion and does not have a legal status; the Charter reference of the electoral rule to the draft constitution was an offhand decision.

The Charter, on the other hand, had failed to design a system or to establish a body to play an oversight role. Although the Conference proposed for group of lawyers to undertake this role, the EPRDF participants rejected the idea arguing the Charter is a political document and hence it only needs a political supervision.<sup>148</sup> Therefore, as opposed to the South African experience where the court made to play such a crucial role, the Charter didn't leave any single responsibility for the courts or any other body to play this role in the constitutional process.

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<sup>148</sup>Vaughan supra note 91 at 50

### 3.4. THE 1992 ELECTION AND THE COLLAPSE OF THE TRANSITIONAL COALITION GOVERNANCE

In continuations of the Transitional Charter's provision for the election of local and regional election, the Council of Representative enacts various laws such as proclamation for the establishment Electoral Commission to supervise the electoral process and a proclamation for the structuring of Regional and Local Governments on the basis of ethnicity on the way to ensure nationalities self-administration. Accordingly, 14 Regional Governments were created with all political and administrative powers. The Electoral Commission, on the other hand, created Electoral Committees at Zonal, district and kebele level to administer the June 1992 election. The June 1992 election was monitored by 240 joint International Observers from twenty countries and the Organization of African Unity and the United Nations.<sup>149</sup>

With this inconsequential preparation and unproven election experience in the country's history the TGE determined to undertake the election on June in 1992.<sup>150</sup>

*The high expectations for post conflict elections are unfortunately accompanied by a conspicuous weakness of essential preconditions for success. The severity and duration of the violent conflict, and the devastation caused by it, most war-torn and authoritarian past societies lack the political climate, social and economic stability, institutional infrastructure, and even political will to mount successful elections. Despite the signing of a peace accord, post conflict societies are hardly at peace. They remain highly fragmented, polarized, and prone to violence. Deep political cleavages between the warring groups have not yet been bridged, nor have the various factions come to share a genuine commitment to democracy and reconciliation. The political institutions that are essential for competitive elections are either nonexistent or extremely fragile in many post conflict societies. Practically, countries which prolonged with authoritarian regimes thus lacked independent political parties. Often, the politico-military groups that fought the war found it difficult to transform themselves into democratic parties. The law-and-order situation also tends to remain unsatisfactory. Because of poor security, the political parties find it difficult to travel and mount election campaigns in areas formerly under*

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<sup>149</sup>Harbeson supra note 122 at 124; see also Brietzke supra note 128 at 21.

<sup>150</sup>This election was held intending to pave the way for regional administration along ethnic lines.

*the control of their opponents. In addition, an independent press is invariably extremely weak in post conflict societies, if it exists at all. In most cases, the number of newspapers and periodicals is small, and their readership is limited to urban literate classes.*<sup>151</sup>

The 1992 and the following election in Ethiopia weren't an exception to this observation of post conflict election. The 1992 election was believed to be flawed because of the magnificent inadequacy of competitive participation, overwhelming logistical hurdles, and lack of civic education or else democratic culture both on the part of the parties and the electorate.<sup>152</sup> Besides, the fact that TGE was dominated by EPRDF; enabled it to recruit EPRDF loyal election administrators who can easily manipulate the election process in its own favor. Charges from opposition parties and reports from International Observers established that the TGE and the NEC favored the EPRDF in conducting the elections.<sup>153</sup> The ruling coalition's cadres controlled kebelles in nearly every constituency and, in the absence of functioning independent election committees, this allowed them to determine when and to whom voter registration materials were to be distributed. EPRDF recruited national army, on the other hand, left opposition parties vulnerable to intimidation, violence, and fraud. The leaders of the OLF, for instance, protested that they were being prevented from fully participating in the electoral process, and many of their supporters and/or workers were being forcibly detained without explanation.<sup>154</sup> Although a police and security forces were established by proc. No.8 and 9/1992, none of these proclamations defined the clear distinction between the civilian police and state defense force function.<sup>155</sup> This omission in effect left the EPRDF army to take on both roles and thereby intimidating oppositions alien to EPRDF'S political preferences.<sup>156</sup> Other opposition parties like AAPO did mention that the Transitional regime impeded their ability to compete effectively because of its control over the national media, and its better organizational apparatus in the

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<sup>151</sup>Krishna Kumar(ed) Post conflict Elections & International Assistance in Post conflict Elections, Democratization, and International Assistance, Lynne Reiner Publisher, United State of America 1998 at 7-8.

<sup>152</sup>Harbeson supra note 122 at 125-126; see also John M. Cohen, Transition towards democracy and governance in post Mengistu Ethiopia, Harvard Institute for International Development, Harvard University, Development Discussion Papers No. 493, 1994 at 18-20, available at <http://www.cid.harvard.edu/hiid/493.pdf> consulted on October 19, 2010.

<sup>153</sup>Engedayehu supra note 118 at 43.

<sup>154</sup>National Democratic Institute for International Affairs, and the African American Institute an evaluation of the June 21, 1992 Election in Ethiopia, Washington DC, 1992, at 31.

<sup>155</sup>Harbeson supra note 122 at 118

<sup>156</sup>*Id.*

countryside. Some actually had predicted that EPRDF, by the fact of its control of the military, social economic and political institution of the Transitional government, would have gain pre-election advantage over its oppositions.<sup>157</sup>

This imbalance encouraged many parties particularly those unprepared or hesitant about participation to seek to discredit rather than strengthen the electoral process. On 17 June, after the Council of Representatives rejected a petition from the OLF and 17 other parties requesting a postponement, OLF officials announced their party's withdrawal from the elections and subsequently from the TGE. Likewise, other groups including the All Amharan people's organization (AAPO), The Islamic Front for the Liberation of Oromia (IFLO), The Gedeo People's democratic organization (GPDO), and a coalition known as the Ethiopian Democratic Action group (EDAG) all boycotted the election.<sup>158</sup> By voting day on 21 June, only the EPRDF and SEPDC, a coalition of various ethnically organized groups and which lacks unity to offer a strong alternative, appeared on the ballot in most areas.<sup>159</sup> These all made the election, as Merera put it, totally an EPRDF affair.<sup>160</sup> The lack of choice made the formalities of voting largely irrelevant and the outcome foreordained. In the end, the EPRDF won 1,108 of 1,147 regional assembly seats (96.6 percent).<sup>161</sup> The TGE insisted that the elections represented a significant step towards the establishment of a democratic political order', and that they were a remarkable success'. Elections, however, are about choice. The consensus of international observers was that the conditions under which open political competition could take place did not exist in most of Ethiopia. Instead of working to sustain the initial broad coalition and implicit pact behind the July 1991 National Conference, the EPRDF backed its ethnic affiliates and created a single party dominant political system.

EPRDF which had to act, on the one hand, as the leading component of the TGE, to operate as a neutral umpire in the electoral process, interested only in facilitating popular involvement and

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<sup>157</sup>Engedayehu supra note 118 at 43; see also Brietzke supra note 128 at 21.

<sup>158</sup>EDAG is a coalition of five multi-ethnic parties consisting of such as EDU (Ethiopian Democratic Union), EDC (Ethiopian Democratic Coalition), EDO, (Ethiopian National Democratic Organization) and ENDO (Ethiopian National Democratic Organization). See Engedayehu at 39 and 46.

<sup>159</sup>*Id.* at 47.

<sup>160</sup>Gudina supra note 118 at 94 quoting The NDI/AAI 1992 election observers report.

<sup>161</sup>Lyons supra note 136 at 127.

free choice without constraint, on the other hand, as a political contender seeking victory for its affiliated parties failed to manage this contradictory responsibility in a modest way. Thus, the 1992 regional elections had failed to provide the transitional regime with a genuine popular mandate and discredited the way to ensure participatory constitution-making.<sup>162</sup>

### **3.5. THE ESTABLISHMENT OF THE CONSTITUTIONAL COMMISSION AND THE DRAFTING OF THE CONSTITUTION**

It is the Charter which first foresees the establishment of the Constitutional Commission. The Charter maintained the Constitutional Commission to be formed by the Council of Representatives (here in after COR) to draft the constitution and submit it back to the COR for its endorsement pending its ratification by Constitutional Assembly to be elected on the national election not later than two and half years.<sup>163</sup> The COR later enacts a proclamation No.24/1992 for the establishment of the Constitutional Commission for a detailed description of its power, responsibility and the manner of its membership. The Commission was accountable to the COR and made to consist a General Assembly, Executive Committee and other Committees as appropriate. The General Assembly was organized comprising 29 member of an equal vote, including 7 members from the Council of Representatives, and 7 members of political organizations. With the intention to provide a diverse opinion; the Commission had involved professional and interest groups but with limited space. These includes 3 members from Trade Unions, 3 members from the Chamber of Commerce, 2 members from the Ethiopian Lawyers Association, 2 members from the Ethiopian Teachers' Association, 2 members from the Ethiopian Health Professionals' Association; and 3 women representatives.<sup>164</sup> Other social groups and professional association, however, were not provided with this opportunity.

As kifile wedajo, the chairman of the Commission stated; in determining the Commission's membership a due attention was given to ensure the presence of parties which didn't get seat in the Council. In continuation of this effort the Council following an official call in public media has allowed parties outside the Council to be members of the Commission. Thus, he argued the

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<sup>162</sup>Heberon supra note 122 at 111.

<sup>163</sup>Transitional Period Charter, No. 1/1992, Negarit Gazata, July 7, 1991, Art 10 and 11.

<sup>164</sup>Proclamation to provide for the establishment of Constitutional Commission No. 24/1992, Negarit Gazeta , 51<sup>st</sup> year, No.20 August, 1992, Art 7(1) and (2).

issue of under representation in the Council was redressed by the inclusion of these parties and by enlarging the range of ethnic and interest groups representation. Of the total members of the Commission, seven were parties from Council members while the other seven from non-Council political parties and the rest from popular, professional and interest groups.<sup>165</sup> Later, however, two parties: *Moa Anbessa* which was struggling for the restoration of the empire and Ethiopian National Unity Party withdraw from the Commission for reason not clear for the writer.<sup>166</sup>

Some authors offended the composition of the Commission as it was filled by mostly of individuals handpicked more for their loyalty to EPRDF than for their expertise.<sup>167</sup> The constitution drafters have been given clear instructions, as guidelines, to lead them to the writing of a document, which serves the designs of TPLF. While this is difficult to prove, at least in glimpse view of the composition of members of the Commission, this seems far from truth. Although that would also raise a question, apart from representatives from the rest EPRDF allies there was not any single Commission member representing TPLF.<sup>168</sup>

Among the powers and duties of the Constitutional Commission were: (1) to promote public discussions about constitutional issues through the media, educational institutions, seminars or symposiums, or other appropriate bodies; (2) to organize the necessary forums and facilities to present the draft constitution for public discussion; (3) to communicate comments received on the draft from various sources to the COR; (4) to receive the comments on the approved draft from regional and wereda councils; and (5) to publicize and distribute to the public the draft constitution after its approval by the COR.<sup>169</sup>

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<sup>165</sup>Wedajo supra note 103 at 136.

<sup>166</sup>Yehig mingest yemarkek hidet ena yeager akef weyeyet wetet,, Tikemet, 1987 E.C prepared by the Constitutional Commission at 3-4.

<sup>167</sup>Desta Damtew, Aborted Ethiopian democracy: major blunders and feasible solutions available at [http://www.fettan.com/Documents/Aborted\\_Ethiopian\\_Democracy\\_DestaD.pdf](http://www.fettan.com/Documents/Aborted_Ethiopian_Democracy_DestaD.pdf) consulted on July 22, 2010.

<sup>168</sup>Parties represented from the council includes: Ethiopia democratic union, Ethiopian people's democratic Movement, Ethiopian national democratic organization, Oromo people's Democratic organization, Harere National League, Keffa people's Democratic Unity organization and *Ye Isa ena gurgura nesant ginbar*. While parties represented outside the council include: Southern Ethiopian People's Democratic front, Ethiopian national unity party, Forum 84 organization, Ethiopian Islamic Movement, *Moa Anbessa* Southern Ethiopia people's Union and Ethiopian democratic Movement League. See Yhige mingst yamarkek hidet supra note 166 at 3-4.

<sup>169</sup>The proclamation for the establishment of the Constitutional Commission, supra note 75 Art 5.

With this legal sanction the Constitutional Commission began its work in March 1993; around 10 months before the TGE supposed to terminate and one and half year before the completion of FDRE constitution.<sup>170</sup> The Commission began its work in March 1993 after eight months of its establishment in August 20 1992 due to the political negotiation to bring OLF on board, as the chairman described.<sup>171</sup> Between then and the release of the draft in May 1994, the Commission met regularly two afternoons a week,<sup>172</sup> though one review states that attendance was poor for reasons not wholly understood.<sup>173</sup> The Commission established three Committees to deal on specific issue of the constitution, the human right, the government structure, and other issues which didn't fall in either of the two. The Commission was made to be assisted by team of six lawyers, which provide all the committees with expert opinion throughout the preparation of the draft. The Commission as way to prepare the draft tried to share other countries experience. This was done through inviting foreign experts to consult the Commission members and participating on symposiums arranged by Inter Africa Group which was funded by various NGOs.<sup>174</sup> The Commission as way to made people part of the process employed two mechanisms through which it can gather their views.<sup>175</sup> The first were by arranging different Conferences for various groups like the elders representing various nationalities, religious leaders and organization, with women groups, journalists, with political and civic organizations, with professional associations, and scholars and with regional Committees conducting constitution related discussions. On the other hand, the Commission prepares a paper describing the various constitutional choices to be discussed by neighborhood inhabitants in 22,320 kebele's throughout Ethiopia. Questioners where the people can locate their constitutional preferences were also distributed in all this kebele's. Critics of the booklet claimed that it did not present general ideas on constitutionalism

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<sup>170</sup>Cohen Supra note 151 at 6; see also the minutes of the commission Vol. 1, the date of the first commission's meeting.

<sup>171</sup>Wedajo supra note 103 at 136.

<sup>172</sup>*Id.* at 136.

<sup>173</sup>Cohen, supra note 170 quoting Harbeson, Ethiopia's Democratic transition.

<sup>174</sup>Inter Africa Group was the prominent partner of the Transitional Government, including its assistance in making the constitution. IAG was suspected of being EPRDF'S affiliated NGO, although it defended that providing assistance to TGE does not mean that it is EPRDF'S party instrument. Most notable funders for IAG were SIDA, CIDA, ODI, GTZ, The Netherlands, the Ford Foundation, and Oxfam. See Cohen supra note 151 at 18.

<sup>175</sup>James C.N, Paul, human right and the structure of security forces in constitutional orders: the case of Ethiopia William and Mary Bill of rights Journal Vol.3 No.1, 1994 at 240-42; see also Wedajo Supra note 103 at 137-138.

and democracy, but was rather an expression of the ERPDF's ethnic policy and strong civics lesson in the primacy of the ethnic groups in the proposed constitution.<sup>176</sup> The booklet was tried to be interpreted in various languages although not in all languages spoken in Ethiopia, due to reasons related with the development of the languages itself, lack of skilled manpower and financial limitations. Although the discussion was arranged based on the structure created and administered by ERPDF representatives based on the 1992 election, the discussion was made to be chaired by the choice of the public. The questionnaires after filled, sealed and signed by participants were sent back to the Commission for its consideration of the people's constitutional preferences. The crowd however was very less.<sup>177</sup> Even in Addis Ababa as Major Admasee Zeleke (an independent member in Constituent Assembly) expressed some instances; while in a district where 17,000 peoples resides only 119 peoples participated, in other district where 5,000 peoples resides only 32 of them attended the Conference.<sup>178</sup> The exact number of people participating in these meetings is controversial; some claim that only five percent of the population took part while others argue not more than 30 percent of the citizenry participated throughout the nation.<sup>179</sup> As recorded in the minutes of the Commission, the Commission has approved that 13 million people have been participated in the conference.<sup>180</sup>

As it was observed in constitution making experience of many emerging democracies public consultation has always been preceded by an in depth civic education. This has been very important exercise particularly in third world nations where literacy is quite low. Civic education should be designed to crystallize the need for a new constitution and must make people feel part of the process of constitutional development. It must be capable of raising awareness about the constitution-making process and constitutional issues to stimulate useful submissions. The Ethiopian experience, however, shows that the Commission undertake with less commitment and

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<sup>176</sup>Aalen Lovise Ethnic Federalism in a Dominant Party State: The Ethiopian Experience 1991-2000, Chr. Michelsen Institute Development Studies and Human Rights, report R 2002:2, available at Web/URL:<http://www.cmi.no>, consulted on November, 01, 2010, at 42.

<sup>177</sup>Interview with Negaso supra note 110, he mentioned as a good instance the gatherings where he used to be a moderator on some places around wellega area.

<sup>178</sup>The Minutes of the Constituent Assembly, Vol. 1, October 27, 1995 at 3.(available at House of Peoples Representative Library).

<sup>179</sup>Lovise supra note 176.

<sup>180</sup>The minutes of the Constitutional Commission Vol. II on its 70th meeting.(available at House of Federation documentation)

tight time. The Commission only without a meaningful civic education campaign that it went to request the public to locate their constitutional preferences. It had been actually little attempt to educate the public using different print and electronic medias although it couldn't meaningfully reach the rural society which constitute the largest number of the population. Given high illiteracy rate and inhibited debating culture the discussion was ended with no viable submission. On most of the choices presented on the questioner all peoples across the whole regions located almost exactly similar constitutional choices. For instances, almost hundred percent of the participant in all region supported self- determination including and up to independence, First Past - the Post electoral systems, parliamentary governmental system and on other such crucial constitutional issues (see the annex for the rest of the public views). This in turn raises a doubt whether the people had been really clear with what it means, for instance, self-determination including and up to secession or First Past-the post electoral system.

*There was little meaningful public participatory debate, especially debate focused on devolution versus ethnic federalism, let alone sovereignty or self-determination. [...], opposition parties withdrew. Instead of debating the content of the constitution, they denounced the legitimacy of the whole project. Just as the EPRDF controlled the Constitutional Commission's work, so it controlled the election, and then the deliberations, of the Constitutional Assembly.<sup>181</sup>*

It was following this public discussion and collection of the questioner the Commission went to drafting of the constitution. The entire Commission meeting was open for the public and press. It was also recorded by its own staff. The meeting often used to end with no serious confrontation among the members. It was only on two issues; on issues of self determination including independence and land ownership that the members unable to converge their positions and later sent it to the Council for final decision. Although the chairman always played a leadership role to pass decisions on consensus, EPRDF<sup>182</sup>sponsored views, however, used to win always.<sup>183</sup>

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<sup>181</sup>Tsegaye Regassa, the making and legitimacy of the Ethiopian constitution: towards bridging the gap between constitutional design and constitutional practice, *Afrika focus*, Vol. 23, No.1, 2010 at 103 citing James C.N. Paul *Ethnicity and the New Constitutional Orders of Ethiopia and Eritrea*. In: *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-ethnic States*, Yash Ghai (ed.), and Cambridge: Cambridge University Press, 2000.

<sup>182</sup>Most members of the commission were elected by the EPRDF controlled council of representative. Other members were also joining the commission by close scrutiny or approval of the council. See Wedajo supra note 103 at 135.

Informal lobbying and negotiations were also part of the process.<sup>184</sup>The Constitutional Commission completed the draft Constitution on May 13<sup>th</sup> at its 88<sup>th</sup> Regular Session and submitted it to the Council through President Meles Zenawi. After the Council's discussion which lasted for almost a month adopted the draft by leaving the Commission's contentious issue to be determined by the Constitutional Assembly, there by ending the drafting stage. The Commission on the other hand couldn't hand the draft to the public in its totality in a form which is accessible to the mass. It was only a few glimpses of it, most notably through a news letter named as "*transitional government of Ethiopia Constitutional Commission Newsletter*" that the draft presented to the public.<sup>185</sup> This may be in sharp contrast to the South African experience where thousands of the draft copies were distributed in various languages to the public so as to make them able to check whether their views are really considered.

The fact that the task of drafting the constitution was accompanied with the steady withdrawal of many radical oppositions, a very tight time and less commitment to undertake a considerable awareness raising campaigns and garner an articulated public views and the extra-ordinary infrastructure difficulties to reach rural inhabitants has inhibited an all-embracing constitutional drafting process. The draft except on some contentious issues, which was pended for the Constituent Assembly, was approved in one month period with no considerable hurdle in the council.

### **3.6. THE ELECTION OF THE CONSTITUENT ASSEMBLY**

On 5 June 1994, the Ethiopian people went to the polls in the first national election in history to choose a Constituent Assembly a body charged with considering, modifying, and ratifying a draft constitution. Except with a considerable potency in administration capacity TGE was still vacant. Opposition parties which left the TGE earlier in 1992 and others which later joined their path like the Southern Coalition, Ethiopian National Democratic Party (ENDP), and other smaller parties left the people without choice.<sup>186</sup> The European Union, while noting the technical progress that had been made, concluded that, for whatever reasons, the main opposition parties

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<sup>183</sup>Regassa supra note 181 at 102.

<sup>184</sup>*Id.*

<sup>185</sup>Cohen, supra note 151 at 7.

<sup>186</sup>Fullerton Supra note 90 at 402.

didn't participate and it was therefore, for the most part, EPRDF dominated election.<sup>187</sup> Eventually 39 parties participated in the election, although many of them were already under the umbrella of EPRDF and didn't represent opposition to TGE.<sup>188</sup>

Out of the total eligible voters numbering about 23 million, nearly 15 million (64.5 per cent) registered to vote and 13,187,000 (87.7 per cent) of those registered went to the polls.<sup>189</sup> Of 1,440 candidates 937 were independent who had no explicit party affiliation and 534 party candidates from 39 political organizations.<sup>190</sup> Foreign observers from US, Europe, Asia and international agencies like the UNDP were fielded to monitor the elections; 448 observers 'elected' by the people have also been engaged in the enterprise.<sup>191</sup> EPRDF posses an overwhelming majority by garbing 539 seat out of the total 557 only leaving 18 for independent and other parties candidate. As result, the situation raised a doubt whether the elected members of the Assembly would satisfactorily represent the range of Ethiopian opinions on the constitution.<sup>192</sup> Owing to the absence of political space for peaceful involvement of opposition groups having alternative views in the process of formulating the constitution on the one hand, the strong presence of the EPRDF in all the major political institutions of the system, and the overwhelming representation of the EPRDF in the Constituent Assembly, on the other hand, one can, therefore, logically deduce that the organizational positions of the incumbent are entirely incorporated in the constitution.<sup>193</sup> This was viewed in the Assembly's insistence to adopt right to self-determination and up to independence which had been viewed as EPRDF's organizational stance and was pronounced earlier in the determination of Eritrea's destiny.<sup>194</sup>

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<sup>187</sup> Lyons, supra note 136 at 130.

<sup>188</sup>John Young, Regionalism and Democracy in Ethiopia, *third World Quarterly*, Vol. 19, No. 2, 1998, at 195, available at <http://www.jstor.org/stable/3993156>, consulted on October 27, 2010.

<sup>189</sup>Kassahun Berhanu, Ethiopia Elects a Constituent Assembly, *Review of African Political Economy*, Vol. 22, No 63, 1995, at 131-132 available at <http://www.jstor.org/stable/4006284>, consulted on April 21, 2010.

<sup>190</sup>Lyons, supra note 187.

<sup>191</sup>Berhanu Supra note 189 at 134.

<sup>192</sup>Fullerton, supra note 186.

<sup>193</sup>Ethnicity as basis for self determination including secession, which is the basic ideal of the constitution, for instance, was at the center of TPLF party program. See Ayalewe supra note 90 at 312. See also Gudina supra note 118 at 8.

<sup>194</sup>Gudina supra note 194.

The situation further exacerbated by the electoral system employed for the election of the Assembly. Although the Charter stated the Assembly to be elected as per the electoral system to be provided on the draft constitution, the Council later enacted an electoral law which clearly outlined the electoral system. Proclamation No.64/1993 for the establishment of an electoral board under Art 15 (6) said *only a single representative shall be elected from a constituency* realizing the employment of First Past-the Post electoral system for the election of the Assembly. The same proclamation, however, described the possibility of changing the electoral system up on the recommendation of the Constitutional Commission and the Council's approval. The Commission didn't, however, recommended for new electoral system rather than simply re-affirming the pervious system in the draft constitution as well. The election of the Assembly hence assumed the majoritarian (the first-past - the post) electoral system as provided earlier on the electoral law. This in effect resulted on a majoritarian Constituent Assembly and automatically a majoritarian constitution.

*A constitution is not an ordinary law ratified by a majority vote of the party which establishes the government. Rather it is a consensus creation among the various political and interest groups. Who should draft the constitution is not my issue of importance; "it is not also my problem whether Meles Zenawi (president) prepares the draft in his own home and put forward for us. What I do rather care is who to ratify the draft whoever sketches out." The constitution has to be ratified by the Assembly which is to be elected on the basis of free and fair election and where candidates are represented on the basis of the votes they earn in the election. The Assembly should be like a photograph which is painted with plenty of colors. It should be able to involve various political and interest groups representing the whole peoples of the country.*<sup>195</sup>(Translation mine)

This is to envy that Assemblies mandated for constitutional ratification should always be elected through the proportional electoral system which provides seats for all groups in proportion to the vote they receive in election and thereby avoiding the domination of one particular group. Others also argue, in spite of the various advantages the majority system provide in the ordinary law making, election to the Constituent Assembly should follow

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<sup>195</sup> Gobbeze supra note 101 at 80.

proportional system as it has been the case in South Africa and other countries.<sup>196</sup> The 1994 Constitutional Assembly in Ethiopia hence couldn't escape to be an EPRDF Assembly which only submitted 18 seats out of the total 557.<sup>197</sup> And, therefore, the Assembly played rubber-stump function to the majority (EPRDF) party preference.

### 3.7. THE ADOPTION OF THE CONSTITUTION

The Constituent Assembly assembled in 28 October 1994 to consider the draft and adopt. The Assembly established different committees to deal with various issues of the draft like what the Commission did. The Assembly met for two full days of a week extended for two months. The debate in assembly, as many has asserted, was often took party lines.<sup>198</sup> Independent members although seen to present an alternative views, EPRDF due to its extra-ordinary majority often counterfeit the arguments.<sup>199</sup> The party discipline with in EPRDF's also tied members of EPRDF not to reflect a different view foreign to their party's preference.<sup>200</sup> The Assembly eventually, with a rushed and shallow debate adopted the draft without any significant substantive changes on the draft.

The fact that the TGE had left some groups, which used to have a normative claim on Ethiopian politics, the fact that the rules of the game for the TGE was not established by the equal, full and effective participation of all groups which make up the TGE, the fact that TGE was followed by a steady withdrawal of all oppositions to EPRDF in all crucial moments leading to the drafting and adoption of constitution,<sup>201</sup> and lack of neutral and relatively strong political institution on

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<sup>196</sup>Jon Elster, Forces and mechanism in the constitution-making process, Duke Law Journal, Vol. 45. No.2 at 395 available at

<http://links.jstor.org/sici?sici=0012-7086%28199511%293%3A45%3A2%3C364%3AFAMITC%3E2.0.CO%3B2-A>, consulted on August 2, 2010.

<sup>197</sup>Lovise supra note 87 at 7.

<sup>198</sup>Wedajo supra note 103 at 140. There was always a confrontation in EPRDF following the assembly's meeting and always come with predetermined party decision for the meeting of the assembly. Also an interview with Negaso supra notes 110.

<sup>199</sup>Wedajo supra note 198; see also Lyons supra note 136 at 130; also interview with Negaso, supra note 110. He mentioned, for instance, Major Admase Zelek a vibrant independent member of the council.

<sup>200</sup>*Id.*

<sup>201</sup>12 OLF seats, the seats of members of the southern coalition were all vacant since 1993. Thus, the transitional government had reached to the position where one can safely assert that the TGE was collapsed. Besides, other several Multi-ethnic parties had declined the election for the Constituent Assembly. In general terms, the Transitional governance was ended with a single party domination.

the way to creating the new constitution would certainly unconstructively affect the process of creating a legitimate constitution. It is not hence debatable at least to say the process which created the 1994 constitution is hardly the reflection of all factions representing the diverse views of the people. Many authors also ascertained this truth in their own words.

Ugo matti in revealing the non- participatory process of the making of the constitution said for instance:

*None of the political and ethnic groups which make opposition to EPRDF had participated in the constitutional making. All oppositions most importantly those representing the Amhara and Oromo which constitute 38 and 35% of the total population respectively withdraw from the electoral competition. The new constitution is therefore supported politically and ethnically only by Tigryan minority which counts less than 10% of the population.*<sup>202</sup>

Merera Gudina on the other hand summarized in his own words:

*The 1991 Charter, the regionalization policy of 1992, the 1994 national constitution and the various policy initiatives were all authorized by the ruling party that lacks a popular mandate in the eyes of the Oromo people. To put differently the TPLF leaders in their lust for the hegemony of power have transplanted the basic tenets of the political program of their own organization to the charter, later to the national constitution.*<sup>203</sup>

Mohammed Hassen has also expressed his view on the constitution saying: *The new constitution was “produced by one organization and its partners. It lost legitimacy even before it was ratified.”*<sup>204</sup>

Dr Negasso Gidada, former OPDO member, President of Federal Democratic Republic of Ethiopia and Chairman of the Constituent Assembly in various media and now to the writer has

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<sup>202</sup>Ugo Mattei, *The New Ethiopian Constitution: First Thoughts on Ethnical Federalism and the Reception of Western Institutions*, 1995, no page available, available at <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/levinson0107.htm> consulted September 18, 2010.

<sup>203</sup>Gudina supra note 117 at 96.

<sup>204</sup>Mohammed Hassen 'Ethiopia: Missed opportunities for peaceful democratic process' in Kidane Mengisteab and Daddieh, Cyril (ed.), *State building and democratization in Africa*. Westport: Praeger, 1999.

expressed his regrets for what he spoke in the closing ceremony of the Assembly affirming the “*constitutional process from the preparation of the draft to the election of the Constituent Assembly has been democratic, the Assembly is a democratic forum where representative of all nations, nationalities and peoples and where varied views in the country were represented.*” This was, he said, clearly wrong and I dear to apologize Ethiopian people for what I did wrongly.<sup>205</sup>

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<sup>205</sup>Interview with Negasso supra note 110.

## CHAPTER FOUR

### VIEWS OF ACTORS ON THE CONSTITUTION AND ITS IMPACT ON THEIR DEMOCRATIC STRUGGLE

Democracy is a political system which provides institutional opportunities for changing the governing officials and is a social mechanism which permits the largest possible part of the population to influence major decisions by choosing among contenders for political offices i.e. through political parties.<sup>206</sup> Democracy is all about choices. Parties offer viable choices for the public in a periodic election. Besides, parties play a watch-dog role against the powers of the incumbent conferred to it in a democracy. The friction between the governing and the opposition helps for democratic norms and rules to emerge and grow. Thus, political parties are key institution where democracy is unthinkable save in terms of their presence. Ethiopia's democratization and party development have passed three different eras: the no-party imperial rule, the one-party authoritarian military rule and now the multi-party EPRDF rule. In spite of the regime's declaration of multi-party democracy, for one or another reason, many claim, Ethiopian people couldn't yet benefit from the proclaimed multi-party function. We couldn't yet able to see multiplicity of views apart from the views of the muscular ruling party which controlled power for almost two decades. It was only the EPRDF which has been presenting itself for election without contestants. None of the pre-existed and viable opposition parties, which were able to provide sound political choices in countries journey to democracy, joined the political competitions in Ethiopia. Others also seemed always prone to reject competition than allowing themselves to confront the democratic process.

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<sup>206</sup> Seymour Martin Lipset, the indispensability of parties, Journal of democracy, Vol.11 No.1, 2000 at 1.

#### 4.1. TYPES OF OPPOSITION AND PATTERN OF THEIR PLACEMENT

In studying opposition's views towards the existing constitutional frame work it is important to have, at least, a glimpse view of the pattern and alignment of parties acting as opposition to EPRDF. Based on the pattern of their struggle, alignment or their party program we can broadly categorize the existing oppositions to EPRDF in to four: in- exiled oppositions, rebel fronts that are conducting armed struggle, loyal oppositions which preferred peaceful struggle legally registering as oppositions and those which are phony oppositions.

Oppositions in exile are those oppositions which predated EPRDF and deliberately excluded from the countries politics by EPRDF since the transitional period. Opposition in exiled includes those former members of WPE and which one way or another had been involved in the *Derg* regime at different capacity. These groups while some of them are living in USA as opposition some others have joined various parties active now in Ethiopian politics.<sup>207</sup> Others which formed the vigorous exiled oppositions are those former EPRP, *Mesion*, *Malerid* and the *Echat*. These groups are active in organizing and sponsoring home oppositions in finance and material.<sup>208</sup> In consequence of this they even had a role in influencing decision of oppositions active in home politics. One good instance is in 2005 election where CUD determined to boycott the parliament following the alleged election fraud.<sup>209</sup> Its top officials are now living in different parts of world. These groups still believe they would back home and establish a new political order for Ethiopia.<sup>210</sup>

The second oppositions are rebel fronts which preferred gun to realize their respective political purposes. These groups include those rebel fronts which fought for democracy and those struggling for independence. EPPF (Ethiopian People's Patriotic Front) and also currently *Ginbot Sebat*, which is a newly emerged rebel front, opted for armed struggle following the alleged rigging of 2005 election are among the rebel fronts which are fighting for democracy. Both groups believe democracy without expelling the incumbent is unthinkable in Ethiopia. The rest

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<sup>207</sup>Wondwosen B. Teshome Ethiopian opposition, political parties and rebel fronts: past and present, International Journal of human rights and social science Vol. 4 No.1, 2009, at 64, available at <http://www.waset.org/journals/ijhss/v4/v4-1-9.pdf> consulted on October 11, 2010.

<sup>208</sup>Lidetu Ayalew, *Midelot: the role of the third alternative in Ethiopian politics* (Amharic) progress publishing, Addis Ababa, 2009, 150-152.

<sup>209</sup>*Id.* at 152.

<sup>210</sup>*Id.* at 156.

which are struggling for secession include Oromo liberation Front (OLF) Ogaden National Liberation Front (ONLF), Islamic Front for the Liberation of Oromia (IFLO), Sidama Liberation Front (SLF) and Western Somali Liberation Front (WSLF). These secessionist groups were involved in the Transitional Coalition but later went to armed struggle and hence are branded as illegal actors. These groups are now believed to have changed their agenda to self-determination.<sup>211</sup>

The third opposition, on the other hand, are those formally registered home opposition organizing themselves either in an ethnic or in multi-ethnic bases and which has been participating in election. Currently there are about 91 parties acting as loyal oppositions.<sup>212</sup> This category of “loyal opposition” in Ethiopia is very flawed, because as we have seen in the last two decades, today’s loyal opposition could be “illegal” or “illegitimate” opposition tomorrow. The best examples in this regard are the OLF, ALF (Afar Liberation Front) and the ONLF. At present, even loyal oppositions such as the OFDM (Oromo Federalist Democratic Movement) and the OPC (Oromo People’s Congress) are accused by the government of secretly collaborating with the outlawed OLF.<sup>213</sup>

The final group of parties is those categorized as phony or fake oppositions. Phony parties represent those parties which allegedly created by EPRDF and hence don’t constitute a genuine oppositions. Also it is hardly possible to prove their existence, as they aren’t blatant on this capacity, many authors and oppositions identify some factions as phony.<sup>214</sup>

#### **4.2. OPPOSITION’S VIEWS AND THEIR STRUGGLE AROUND THE CONSTITUTION**

A constitution, at least in principle, is created or supposed to be created to protect the interest of the whole peoples of the county. Accordingly, constitution is not a document over which groups

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<sup>211</sup>OLF for instance since 2004, has renounced its agenda for secession. See Allen Lovies Aalen Lovise Ethnic Federalism in a Dominant Party State: The Ethiopian Experience 1991-2000, Chr. Michelsen Institute Development Studies and Human Rights, report R 2002:2, available at Web/URL:<http://www.cmi.no>, consulted on November, 01, 2010 at 42. Also an interview with Dr Nigasso Gidada, former president of the Federal Republic of Ethiopia and now a member to Unity for Democracy and Justice, (November 08, 2010) Addis Ababa, Ethiopia.

<sup>212</sup>Yet, due to different reasons their number is expected to diminish to 69. Interview with Tesfaye Mingsha, General Sectary of the Election Board of Ethiopia, (Nov 13, 2010), Addis Ababa.

<sup>213</sup>Teshome supra note 207

<sup>214</sup>*Id.* at 66.

claim an exclusive ownership or from which they detach themselves. Constitutions has to be a document over which actors able to create a national consensus at least on key issues or on the basis of it which actors reflect their political dissents or to which they struggle for its implementation. In Ethiopia, however, the constitution is yet remained a point of difference among actors. The document is which oppositions associate it with EPRDF and which EPRDF show a sense of having an exclusive ownership on it. In consequence of this, the constitution has become a document which oppositions struggle for its eradication.

All vibrant opposition to whom the author interviewed share the idea that the constitution was made in faulty process where oppositions which used to assume considerable number of peoples representation was not allowed to involve and as a result is the reflection of EPRDF's party program. This view, hence, has influenced party's struggle on the constitution. For the Union of Ethiopian Democratic Forces (UEDF) a coalition comprising the Oromo peoples National congress, and the Southern People's Democratic coalition along with a wide range of small and exile-based parties, the existing constitution, as stipulated in their party program, is which was drafted by handful forces and ratified by a body elected in situation where seven million people deprived of their political right and a body elected in unfair and fraudulent election.<sup>215</sup> The constitution, as a result, is a reflection of the ideological, economical and social program of the ruling party. The constitution, besides, is the one which promote rule of men than rule of law. Moreover, the fact that the constitution is also fenced with rigid amendment provisions thereby depriving people's right to amend constitution is among the various claims this party had. Accordingly, the party proposed for the re-constitution of the country by establishing a Transitional Government which, apart from performing regular governmental duties, prepares multi-party and publicly honored democratic constitution.

Coalition for Unity and Democracy (CUD), a successor of the biggest coalition comprising various parties and vigorous oppositions in 2005 election, in its 2010 election manifesto described the existing constitution as "TPLF" constitution which didn't express the will of Ethiopian peoples.<sup>216</sup> Accordingly, it listed dozen of constitutional provisions for amendment

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<sup>215</sup>United Ethiopian Democratic Forces, alternative action plan, April, 2005 Addis Ababa at 76-103. Also Interview with Alemu Foyera General Secretary of UEDF (October 2, 2010), Addis Ababa.

<sup>216</sup>CUD 2010 election manifest at 2-4. Also interview with Mergga Ayana, vice president of CUD, (October 28, 2010.) Addis Ababa.

following seize of power, though it is not cognizant of how that could be possible given the very rigid amendment provision.

United Ethiopian Democratic Forces-Medhin, Unity for Democracy and Justice (UDJ) and All Ethiopian Unity party (AEUP) are among those which believe the constitution had come with faulty process and which as a result contained irrelevant provisions for the countries socio-economic and political problems.<sup>217</sup> They do however agree opting to denounce the established constitutional order is zero-sum game stance which defined the country's constitutional history for long. UEDF-Medhin, in particular, believe once the constitution begins to be the countries governing law, all actors in the country need to respect and be abide by it. These groups as way to cure the defects the constitution had in its making have proposed amendment for dozens of provisions including article 39 and related, that make up the FDRE constitution. While they are asked how they would do this, given the rigid amendment provision; they respond they would do it through referendum.<sup>218</sup> Two important points which actors aren't clear with are worth mentioning here. The first thing is whether amending the basic ideal which created the constitution to be the nations, nationalities and peoples of Ethiopia would still equate amendment. The constitution as provided in the preamble is the nations, nationalities and peoples of Ethiopia. Thus, changing article 39 and related provision of the constitution is renouncing the constitution to be any more the ownership of nations, nationalities and peoples of Ethiopia. This in turn rather signifies constitutional change than amendment. The second point is the fact that they insisted on referendum as means of amendment. Applying referendum can only be termed as amendment if it is already constitutionally acknowledged as one form of amendment. However, in the absence of clear constitutional recognition of referendum, actors plan to use referendum would technically amount to constitutional change.

The rebel fronts which preferred armed struggle and those opposition in exiled, on the other hand, are among those which totally ignore the established constitutional order. For them the constitution is a copy of EPRDF party program which monopolized the constitution making agenda. They often seemed labeling the constitution as undemocratic and which invite anybody who come to power to remain dictator. They all rejected the present Ethiopian constitution

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<sup>217</sup>Interview with Mamushet Amare, General Secretary of AEUP and Mushe Semu, General Secretary of UEDF-Medhine, (November 05, 2010). Also interview with Negaso Gidada supra note 211.

<sup>218</sup>*Id.*; also interview with Alemu Foyera, supra note 215.

calming that they hadn't participated in the making of it.<sup>219</sup> Therefore, none of these rebel fronts have the interest to join the political competition within the existing constitutional order.<sup>220</sup> Thus, they are still threats for the constitution and constitutional order.

EPRDF, on the other hand, say, the constitution is a covenant entered by the whole nations, nationalities and peoples of Ethiopia based on their free will and expression. EPRDF apart from its governmental duty to protect the constitutional order is extremely alert in defending the constitution. This position of EPRDF strengthened opposition association of the constitution with EPRDF. While in democratic struggle it is also possible for parties to oppose the constitution and the constitutional order, any attempt by oppositions to oppose or disregard the constitution is enough for the government to tag them as illegal actors. The constitutional order in Ethiopia seems maintained by the EPRDF military force rather than actor's sense of ownership and belongingness. While this might be possible for some time; no one can be sure of the creation of mighty oppositions capable of demising EPRDF military force and automatically the constitutional order.

#### **4.3. ACTORS DISSENT TO WORK WITH IN THE ESTABLISHED CONSTITUTIONAL FRAMEWORK AND ITS CONSEQUENCE IN THE MULTI-PARTY DEMOCRACY**

Actor's opposition to the new constitutional framework surfaced early on its way to become the country's constitution. A number of opposition groups which were in exile, the All-Amhara Peoples Organization (AAPO) and others which had a seat in the TGE became frustrated and increasingly vociferous to what has been done by the EPRDF dominated TGE. Some leaders tried to increase their influence over the transition by participating in a series of meetings and working to build a coalition that united the major forces outside the EPRDF's transitional framework. As it is described in the earlier chapter, the March 1993 meeting in Paris<sup>221</sup> and the

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<sup>219</sup>Allen Lovies Aalen Lovise Ethnic Federalism in a Dominant Party State: The Ethiopian Experience 1991-2000, Chr. Michelsen Institute Development Studies and Human Rights, report R 2002:2, available at Web/URL:<http://www.cmi.no>, consulted on November, 01, 2010, at 42.

<sup>220</sup>May be the current negotiation of the government with partial members of ONLF and WSLF is an initiation for this rebel fronts to admit the constitutional frame work.

<sup>221</sup>Terrence Lyons, Closing the Transition: The May 1995 election of Ethiopia, Journal of Modern African studies, Vol. 34 No.1, 1996 at 129, available at, <http://www.jstor.org/stable/161741> consulted on October 20, 2010.

Peace and Reconciliation Conference in Addis Ababa in December 1993<sup>222</sup> was among the prominent meetings where oppositions expressed their dissent against the TGE. In February 1994 a number of Ethiopian opposition groups, on the other hand, met with former President Jimmy Carter in Atlanta to explore opportunities for other round talks. The initiative, however, faltered, when the TGE declined Carter's offer to mediate. The oppositions therefore insist on boycotts for the election of the Constituent Assembly. In February 1995 following the promulgation of the constitution, on the other hand, the Congressional Task Force on Ethiopia, consisting of Representatives Harry Johnston and Alcee Hastings, Ambassador David Shinn, and former Assistant Secretary of State Herman Cohen, brought leaders from the major opposition movements to Washington, as well as a special envoy from the TGE to bring back opposition to the country's politics. While the government insisted oppositions to admit the constitutional framework already in place as a precondition for participation, oppositions refused to accept the constitutional framework on which they had not participated.<sup>223</sup> The Southern Coalition although started talks with the TGE, accepting the constitution, it ultimately ended without an agreement and the Southern Coalition decided not to participate in the first National Constitution based election. Besides, the All Amharan People's Organization, Oromo Liberation Front, the Coalition of Alternative Force for Peace and Democracy in Ethiopia, which is formed following the 1993 peace and reconciliation conference comprising major contending groups, and the Coalition of Ethiopian Democratic Force all refused to compete the 1995 election acknowledging the established constitutional framework within which they didn't involve. Thus, only 58 parties, mostly EPRDF components and 960 independents competed in the election. The next election was not also an exception to the usual overwhelming EPRDF's victory allegedly competing with itself. It was only in 2005 election that a remarkable beginning to a multi-party democracy twinkles for the first time in Ethiopia. CUD (a Coalition of Unity and Democracy) the largest opposition alliance composed most of a newly emerged opposition of the All Ethiopian Unity Party, Rainbow Ethiopia, the United Ethiopia Democracy party–Medhin Party and the Ethiopian Democratic League on the one hand, and UEDF (Union of Ethiopian Democratic Coalition) comprising the Oromo National Congress and the Southern Ethiopian

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<sup>222</sup>Sandara Fullerton Joireman, opposition politics and ethnicity in Ethiopia: We Will All Go down together, the Journal of modern African studies, Vol.35, No. 3, 1997, at 400, available at <http://www.jstor.org/stable/161748>, consulted on October, 2010.

<sup>223</sup>Supra note 221 at 131.

People's Democratic Coalition and OFDM (Oromo Federalist Democratic Movement), on the other hand, were able to provide a viable choice against EPRDF to the people of Ethiopia. However, the alleged subsequent election frauds, intransigence, polarizing accusations, violent demonstration, boycotts, and criminalization of dissent rather take the system back to what has been before. EPRDF again left without opposition in the political competition of the country. EPRDF is still leading a de facto one party state. Although several other reasons now days can be mentioned, the fact that the process of drawing the political map failed to be all-inclusive has yet left opposition with a feeling of disadvantages. As a result, while some of them are still totally reluctant others are always prone to ignore democratic competition. Participation of opposition which aggregates societal interest is indispensable for the democratization process. No nation in history has been able to ensure democracy save in terms of vigorous oppositions capable of presenting an alternative choice against the one who are in power. This also relates with people's right to be ruled by their own choices. Ethiopian people, however, deprived of this right due to non-participation of vibrant opposition which had a larger representation.

## CONCLUSION

Constitution making is a crucial moment where nations choose a constitution to be either instrument of democracy or discrimination, inequality, social unrest, a legalized dictatorship or others which defines undemocratic polity. The way constitutions are made necessarily leaves marks on the future polity. If constitutions are made involving all segments of interests with serious and genuine articulation of the situation the country has long been lived; it will create a polity where actors are committed to live in and safeguard it. The reverse is, however, true in a polity where constitutions are made excluding factions who allege to have normative claim on the countries politics. In Ethiopia, constitutions had never been the product of negotiation of factions and the people. The new constitution, although it is incomparable with its predecessors, had yet failed to be all-inclusive. The whole constitutional making process was in short of multiplicity of views. The Transitional Charter, which makes up the interim governance and laid important rule to the constitutional process, was drafted by handful EPRDF members. It was also approved by EPRDF dominated Conference where EPRDF used to possess the larger seats based on prior furtive meetings not yet clear how. All vibrant oppositions including WPE which had had an articulated political career and considerable public support was deliberately excluded from the scene. The rest of the participants, on the other hand, which were tiny ethnic groups and created only for the sake of the Conference were not in position to provide both viable choices and compete the giant EPRDF political preferences. The Conference also principally symbolized the views in line with EPRDF ethnic policy.

While constitutions can fully be drafted even by expertise or a single group; it should necessarily consult the public and be approved by publicly praised organ involving all interest groups. The making of the new constitution, however, was in short of this prerequisite. The Constitutional Commission although attempted to consult the public; it was with no adequate civic education where more than 85% the population used to be illiterate; where the crowds were very minimal and with shy culture to express one's political opinions in public gatherings. Besides, the draft was not offered for public for discussion in its full text with proper meanness. More importantly, the constitution was approved by a Constituent Assembly elected by the First-Past the Post electoral system and where EPRDF won 539 seats out of the total 557. The Constituent Assembly, hence, played rather rubber- stamp function to EPRDF party program. This is clearly demonstrated on the content of the constitution as existed now. Self-determination on the bases of ethnicity, which make up the basic ideal of the constitution, and the land policy are among the predominant provisions which TPLF, in particular, had been fighting for. Besides, the absence of an independent organ to watch dog the process and in existence of a considerable peace and stability also degraded the legitimacy of the process.

The fact of exclusion of all factions representing the diverse views and interests endured the constitution with foes which struggle for its eradication. The constitution is, therefore, in a threat. It is rather survived by EPRDF military forces rather than actors feeling of ownership to the text. Besides, the fact of EPRDF's domination and manipulation of the process has forced opposition to associate the constitution with EPRDF. As result, while some are struggling for constitutional change others, on the other hand, proposed dozen of provision for constitutional amendment which almost amount to constitutional revision (i.e. defined as fundamental constitutional change or replacement). They also demanded referendum, which is a non constitutional means, to amend (as they call it)/revise the provisions they proposed. Moreover, the feeling of annoyance oppositions developed as result of the exclusion from the process has stayed the people for long out of multi-party democracy.

## RECOMMENDATION

*Constitutional design is synonym with walking on eggs  
It can be done, but only with great skill and discretion.*<sup>224</sup>

Constitutions are always made in time when the existing arrangement have been shown illegitimate as in Eastern Europe, ineffective as in the United States or both as Indonesia or discriminatory and non-inclusive as in Nepal, South Africa and many other nations. Constitutional designs are, hence, always headed by instability, turmoil, distrust international pressure and a rushed time or are made in time when there are no purely constitutional moments. Accordingly, some need to equate constitution making with walking on eggs. Walking on eggs without breaking it is out of human knowledge and reality. Constitutional design is also similar. Creating an ideal and defect free constitution is humanly unattainable. In constitutional design ensuring original legitimacy is, therefore, blemished and perfection is not the reality.

This was also what today's democratic nation constitutional-design experienced. As it is described before, the making of an elderly constitution aging more than 200 hundred years was made behind a closed door by few hands that were sent for other mission. In terms of content the US constitution was also the worst which couldn't ensure equality of men with no regard to sex, color, and material wealth. Thus, Americans' which often mentioned synonym with democracy

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<sup>224</sup>Donald L. Horowitz constitution-making a process filled with constraints, Const. Stud. Vol. 12 No.1, 2006-2007, at 8 available at <http://heinonline.orgline.org>, consulted on September 18, 2010.

even started democracy with faulty constitution. None of the American presidents who came to power did, however, tempt to start from the scratch crushing the whole constitutional order. American democratic process was rather focused on curing the defects of the elderly constitution depending on the needs of the generation. American constitution, therefore, enjoyed long term legitimacy through different remedial measures taken in different times. It was only since 1920's and 1960s that women and blacks respectively were able to throw a stone in their own country politics. It was by the autonomous and life time independent court/ judges that American constitution begun to represent the whole American citizens.

Japanese constitution had also similar story. The Japan post war constitution most awfully was made by occupation personnel without any input from the Japanese people. Following the post World War II, politically influential Americans at the time believed that greater popular sovereignty would prevent the reassertion of Japanese militarism; they allowed two dozen of war personnel to draft a new constitution and as such created the Japanese constitution.<sup>225</sup> It is only with minor revisions made by Japanese government officials, who came to power and virtually with no public participations that Japanese constitution capable to derive legitimacy through time. The same problem goes to the basic law of Germany which was a product of the allied power than the will of the whole Germany as existed today. It was only through redemptive measures and democratic order that these constitutions able to secure authority before their respective nations.

As legitimacy can be ensured originally, exceptionally, like what has been done in South Africa; it may also fail latter due to lack of fidelity to what has been agreed in the text. Besides, whatever relative perfection constitution enjoys in time of making, it can't naturally answer the changing demands of generation to come. Constitution making is, hence, a process which never ends. Enclosing new provisions responsive to the demands of the generation and voiding the outdated one is a never ending activity. Thus, absence of original legitimacy shall not always lead to the revocation of the whole constitutional order which force countries to remain in vicious circle situation. Oppositions in Ethiopia should also take cognizance of this conception. A zero-sum stance against the constitution shall not be the first alternative these actors need to hold. For one thing, it has nothing to assist the continuation of the democratic process. For the

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<sup>225</sup> Janice Matsumura, Dale M. Hellegers's *we, the Japanese People: World War II and the Origins of the Japanese Constitution*, *The International History Review*, Vol. 24, No. 4, 2002, at. 939-942 (book review)

other, it has to be clear that 1/3 of the constitution is about internationally recognized or else protected rights and freedoms which Ethiopia pledged to realize. Opting to oust the constitution also automatically result in ousting this internationally protected rights cable of enabling democracy, if they are realized in their full scale.

Oppositions need also to take notice of that amending the corner stone of the constitution on the basis of their party ideology is technically equivalent to reconstitution of the country, which, according to the author, is a making and breaking exercise.

Unlike the experience in other nations, the fact that the constitution is with very tight amendment provision and political body to interpret the constitution make redemption on our constitution almost impossible. As a result, the author believes, it is the ruling party which has a responsibility to do more tasks than anyone else in creating feeling of ownership on the constitution and the constitutional order.

1. The first thing is to change its excessive control against opposition as regards the constitution and stop a thief and police game. Acting as an opposition shall not be regarded as a mistake. Opposition is at the core of the democratization process. Without oppositions it is hardly feasible to dream democratic and free nation. EPRDF's view and treatment of opposition may strengthen or create new groups discontent on the constitution and constitutional order.

2. Opening the door for all groups who felt disregarded by the constitution and leveling the playing field for free democratic competition is necessary. The recent EPRDF's effort to bring back ONLF to the political arena is a good start towards bringing the rest contenders of the system. Also a genuine commitment to establish democratic institutions and undertake democratic election is among the crucial positive measures which can validate the discontents of opposition on the constitution. The eve of the 2005 election, for instance, was an exceptional experience which had almost a healing effect.

3. It is also on the shoulder of the ruling party to differentiate decisions which it made in its capacity as a party and government.

4. It is also important if EPRDF before it leaves office to consider the amending provisions of the constitution together with the whole actors so as to allow future constitutional redemptions. Otherwise, the existing rigid amendment provisions would by itself invite oppositions' to unconstitutional means against the established constitutional order. It is also important for

EPRDF to take notice that constitutions cannot naturally respond to all demands of subsequent generations. The choices once made do not necessarily remain sound for all time. With changes taking place in the society, new concerns may emerge or some of the concerns not highlighted may appear to be more important. Thus, it is important constitution to be accompanied with feasible amendment provisions taking the socio-political realities of nations.

5. Also rising generation's awareness on the constitution and constitutional order with open discussion and arguments is very crucial in creating new political society protective and respectful to the constitution.

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