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***Title- Legitimacy of sub national constitutions in the
Ethiopian federation: the case of Amhara regional
government constitution***

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Abstract

In Ethiopia, sub national constitutions are almost forgotten. But the experiment of the federation is futile without their proper consideration. All sub national governments have their own respective constitutions. However, having a document is clearly different from the tendency of constitutionalism. Constitutionalism on the other hand requires a good constitution. A good constitution is the one that suited a given national or sub national government. A good constitution is good for the people concerned. It is the property of the people so that they feel bound by it and promise to protect it. A good constitution has to be a legitimate document.

This study aimed at assessing the legitimacy of the constitution of the regional government of Amhara, which constitutes one of the sub national units in the Ethiopian federation. Accordingly, the first chapter talks about the introduction and states the problem to be studied briefly. The second chapter describes some theoretical backgrounds that surround constitution, its making, contents, the federal structure, sub national constitutions, and the context we have in Ethiopia. The final and the main chapter hold the assessments and judgments of legitimacy of the Amhara regional government constitution. The assessment focuses on the theoretical frameworks of legitimacy that are the final basis for the perception by the people. Accordingly, this chapter examines the constitution by virtue of some principles: legality, substance, consent, contract, acceptance, and the making process.

Finally, the study gave a general conclusion that is based on the aggregate judgments of each principle and managed to offer some possible recommendations.

Chapter one

1.1 Background of the study

The success of American constitutional experiment is due in no small part to the fact that the constitution of the United States is not the only constitution in the United States. There are 50 other constitutions.

(John Kincaid, 1988)

There has clearly been a change from the 19th c attitude that government functions are primarily regulatory, that its function is to set the rules of the game and to enforce them so that they are not broken, but to stay aloof otherwise from the activities of the people.

(Frank P. Grad, 1968)

It is common in a federal set up that the states have their own constitutions in order to deal with specific conditions they should meet in day to day activities of the people concerned. Federal constitutions in most cases are brief documents with few detailed provisions and are almost immune to change. In this respect, it is certain that the federal constitution is clearly unable to exploit the issues that must be raised. And it is illogical to expect the federal constitution to raise issues which are not commonly agreed by the people of all the federated states.

Since the beginning of the federal experimentation, there are nine sub national constitutions and two federally chartered cities in Ethiopia. Including the federal constitution it means that we have ten constitutions and two charters that are part of the constitutional experiment of Ethiopia. As it is true in America the constitutional experiment of Ethiopia is worth less without the proper consideration of sub national constitutions if the federation itself is to be maintained. In fact the federal experiment has counted only 19 years with only 15 years since it was established constitutionally. It can be said that much is not expected at this time since to know

whether the federal experiment itself is working takes a time more than this. At the same time it will be a rubbish job to stay aloof of criticizing and working of the constitutional experiment. Working on sub national constitutions takes more than a half share of contribution to the effectiveness of the constitutional and federal experimentation.

Sub national constitutions are referred as instruments of the government.¹ They are important mechanisms for allowing and exercising the right to self governance. This is especially true in our country where group rights take precedence over individual rights. Group rights are overly protected and the federal constitution itself is the out come of those groups concerned. Self determination and self governance of these groups are best practiced and maintained by having their own constitutions.

Sub national constitutions also allow citizens to institutionalize their choice of conceptions of justice and quality of life. There exists a considerable freedom to make genuine constitutional choices about how to govern themselves.² In this case it is understandable that there is remarkable difference in choice, interest and understanding between the people of a given country. Their constitution means an expression of their own choices, interests and understanding about themselves.

Sub national governments have primary and front line responsibility for protecting the rights of greatest concerns to citizens.³ They have a direct involvement over what the people are acting in their day to day activities. Popular control, most of the time direct democracy accompanies the working of the governments. There fore, constitutions are manifestations by which the government realizes its efforts.

Above all sub national constitutions are agents for development and modernization. Society is not static, it is dynamic. What ever change visited by the society has to be institutionalized by the higher law which is a constitution. Peculiarities are to be selected and manifested in the concerned sub national constitution. Accordingly sub

¹ Frank P. Grad, *the state constitution: its function and form for our time*, Virginia law review, vol. 54, no. 5 (1968).

² John Kincaid, *state constitutions in the federal system*, Annals of the American academy of political and social science, vol. 496 (1988).

³ Ibid.

national constitutions are documents by which social, economic, and political realities are institutionalized among other things.

One of the main differences between the federal constitution and sub national constitutions is that the former is the manifestation of social, economic, and political realities of the general public through the federal government. In most cases the federal constitution is resistant to change. While the later singles out a specific group or groups of people, they change with the changing needs of that specific group or groups of people.

There fore, sub national constitutions have to be scrutinized. Their effectiveness has to be checked. They need to be questioned whether they are roads to the achievement we all are waiting to see. It is one of the issues that is very essential but almost forgotten and needs to be well researched.

Accordingly, claiming the legitimacy of sub national constitutions is a primary concern since a tendency to obey and respect emanates from its legitimacy. For the purpose of narrowing the claim, this study aims at the assessment of the legitimacy of the constitution of the regional government of Amhara, which is one of the constituent units of the Ethiopian federation. In effect, how ever, the assessment regarding the Amhara constitution works for the other regional constitutions. The main reason for this is that there exists a fundamental similarity between all regional constitutions except the fact that the nomenclature differs. In fact minor differences are never undermined. Those minor differences, as I think, do not of themselves preclude the following assessment from being a representative of all.

1.2 Statement of the problem

Sub national constitutions in Ethiopian federation are almost untouched issues. But, at the same time, they are claimed to be agents of modernization, democracy, effective self government and development. This in fact is not to belittle other functions that they are assumed to serve. It is always common to have gubernatorial, human right provisions in every constitution one way or the other and also it is common to establish the organs of government (separation of power) by the constitution irrespective of whether it is a federal or sub national constitution.

Federal constitutions do the same but sub national constitutions do more than that. The roles of sub national governments are changing towards giving services, transforming the society politically and economically. Modernizing and democratizing every activity in the process of realizing their self governing aspect have become to be the tasks of sub national governments. There fore, sub national constitutions are instruments to achieve all these purposes.

Beginning from asking their legitimacy is the fundamental task of this study. As regards legitimacy, the big problem is that people do not obey and protect the constitution if they do not believe they have to be bound by it. In order to be bound by it, they have to attach themselves either in the making process or in the product itself. People also have to feel okay as to the contents for them to be bound by such a product. The related problem is examining the source of sub national constitutions. In addition to finding out who made sub national constitutions, it is important to discover the traditions of constitutional making. The relationship of sub national constitutions with the federal constitution has to be answered. There fore legitimacy is a prime facial for the effectiveness of a given constitution and it is essential to find out the legitimacy of sub national constitutions.

1.3 The research questions

Keeping the general problems that are stated in the statement of the problem in mind, the study focuses on the following vital questions.

- ❖ What is the general trend of sub national constitutions?
- ❖ What is legitimacy?
- ❖ What are sources of legitimacy?
- ❖ What is the relevance of legitimacy theories for the constitution of the regional government of Amhara?
- ❖ What is the relation ship between constitution making and legitimacy?
- ❖ Is the constitution of the regional government of Amhara in Ethiopia legitimate?
- ❖ And what is the implication of legitimacy?

Even if it is unlikely to exhaust all the questions that are to be answered by the study, these are some on which the study is striving to find out.

1.4 Objective of the study

The main objective of the transaction is to check the sub national constitution of the Amhara regional government in the Ethiopian federation as to whether it is legitimate. For this to happen, the study will explore theories for assessing legitimacy. It will use those theories to the assessment of the constitution of the regional government of Amhara. Besides, the most important matter is to question the making process of sub national constitutions in Ethiopia, the Amhara in particular. In addition, what are the contents embodied in them will be looked over. In every issue that is to be explored offshoots like self government, democratization process, modernization and the development process are areas whose connections inevitably determine the outcomes. Accordingly, it will be the objective to canvass across the provisions and try to explain whether these values are incorporated. More over it is essentially important to study the relation ship between those values and the sub national constitutions. In the process terminologies will be defined, explained. Besides, it is the aim to canvass what is there in the developed systems and try to make a benefit out of it. It is true that discovering different systems is as essential as studying ones own. Through comparative assessment, it is important to view our experiment in the side of the developed and even failed.

Finally it is also to look over the out come and contribute ideas and experiences in a form of recommendations and suggestions.

1.5 Significance of the study

As stated above, sub national constitutions are an instruments of the government. An instrument is a tool by which its tasks are to be performed.⁴ So it is one of the manifold significances of the study that it gauges the legitimacy of this instrument. Legitimacy is a precondition to obey and to protect. There are a lot of reasons by which people obey and disobey the law. The study will accordingly determine the legitimacy of the Amhara sub national constitution. If the out come goes in the affirmative, it is necessary to examine the sources of their legitimacy. If in the otherwise, exploring the reasons behind offers a great significance.

As a matter of fact there is no literature written as regards sub national constitutions and their legitimacy, except Tsegaye Regassa who wrote some concerns of sub national constitutions. His literature focused on the overall structure of sub national constitutions and respective constitutionalism. However, to the best of my knowledge, there is no single literature written on legitimacy of sub national constitutions in Ethiopian federation, let alone legitimacy of the regional constitution of Amhara.⁵

Last but not least, it must be kept in mind that this will provoke further researches to be conducted. In this country sub national constitutions are almost forgotten. By flirting issues, beginning to do will make others do more. In precise terms the study will open the closed door towards sub national constitutions.

1.6 Scope of the study

⁴ Frank, *supra* note 1.

⁵ Tsegaye Regassa, *sub national constitutions in Ethiopia: towards entrenching constitutionalism at state level*, 3 mizan law review, (2009).

The constitution of the Amhara regional government in Ethiopia is the main subject in the transaction. When it comes to the federal constitution, it is not going to be a holistic thing. Rather, parts of concerns that one way or the other influences the main theme of the study (the constitution of Amhara) will be in the domain. As regards the main subject, every existed provision is not to be explored. Parts will be selected and analyzed on the basis of the research questions. When necessary, drawing some comparative experience is inevitable.

1.7 Methodology

There exists a question, a great question for that matter, that what is the best way to establish the question of legitimacy. It is true that first hand information is to be gathered from qualitative kind of research. In this study, how ever, what I will do is to try to identify theoretical frame works that will warrant the basis of perception by the people. There fore, this study uses theoretical frame works to assess legitimacy of the Amhara regional government constitution. Again using comparison when necessary is one of the methods. To do so, the legal frame work regarding the issues will be explored. In order to be effective, literatures and data found in a form of books, articles, journals, researches and reports are essential inputs to the study. In deed the list is not exhaustive.

Limitation of the study

This transaction has manifold limitations which in effect may have a chance to reduce the effectiveness of the study. Accordingly, the study is limited by; first, time. Time scarcity crucially interferes in the study in terms of collecting the necessary data, analyzing any available data and reviewing the work done. Second, the study is limited by finance. Financial capacity is an indispensable component in conducting researches. However, there is limited financial capacity that can influence the whole process of the study. Finally, if mention is necessary, the study is limited by the fact that there only little written materials available and accessible. Therefore, readers should take in to consideration of the above limitations.

Chapter two

Constitutions in general

2.1 Definition and nature of a constitution

H.W.O.Okoth Ogendo clearly stated that ‘there is no single or authoritative definition of what a constitution is...’⁶ Definitions always poses problems, create difficulties. Every scholar attempts his own partisan interest of a certain value. Factual, philosophical, or theological reflections vary. Thus Okoth Ogendo suggested the following phenomena that can be as much a constitution as a document which bears the nomenclature. A constitution may be called as a single constitutive act.⁷ Another writer adds ‘to constitute means to make up, order, or form; thus a nation’s constitution should pattern a political system’.⁸ A constitution may also mean a fundamental norm, value, or moral principle. Words may be said that it is a set of common aspirations or expectations, or a social and economic programme. Finally, it may mean that it is an important juridical fact.⁹ The later addition seems to equate a constitution with a legal document in a sense that it is a set of rights and freedoms the violation of which can be remedied through a court of law. A constitution, in effect, is the collection of all the above phenomena.

What ever its definition, no society is with out a constitution even though not every constitution is adequate for the society to which it applies.¹⁰

Making a constitution offers a great opportunity to design a mechanism for righting past wrongs. It also offers a ‘hope to compose the atmosphere in which the politics of the future will be conducted’. This is because a constitution once established is something of an ‘immovable object’. Endurance and rigidity is makes a constitution all alive for a longer period of time. Future generations are

⁶ Okoth W. Ogendo, A quest for Constitutional Government, in African Perspective on Governance (2000).

⁷ Id.

⁸ Walter Murphy, *Constitutions, Constitutionalism, and Democracy, in Constitutionalism and Democracy: Transition in the Contemporary World* (1993).

⁹ Ogendo, supra note 6.

¹⁰ Id.

bound by it. Constitution also equips future generations a wise and effective politics imagining the problems that will be faced by them.¹¹

Various mechanisms can be assumed to prepare future generations to be bound by a constitution. Primarily, constitution has a symbolic value. By establishing reverence on the part of the society it seeks to claim a sort of 'social cohesion' which needs the constitutional order to endure. Second, it can serve as a source of security and philosophical identity. Several disagreeing groups with diverse interests deliberate for harmony and consistency. Finally, a constitution can allocate a constitutive power that shapes and reshapes social and political reality. In effect, it affects the relationship between founding and future generations.¹²

The fact that constitution binds future generation receives many criticisms.

Readers impose their own meanings and understandings. Words can suggest a variety of meanings. Language evolves, new meanings replace old ones.¹³ What society could think values of founding generations (some times generations of some hundred years ago) could govern values of modern time's society? Remedies can be found in terms of amendment and interpretation. Every constitution provides for its own amendment by which a constitution gets its modernity. True also with interpretations, by which words in the constitution are adapted to their current dimensions.

Functions of a constitution- Yet, not to cover all what it serves. What a constitution serve may appear to explain what it is.

As a charter for government: an authoritative constitutional text sketches the modes of government operations. Mechanism of holding power, manner of operation, and power divisions are controlled.¹⁴

As a guardian of fundamental rights: it proclaims rights the so called *fundamental*. What is more important, how ever, is the extent of

¹¹ Laurence H. Tribe and Thomas k. Landry, *reflections on constitution making*, 8Am.U.Int'l L&Pol'y Y (1993).

¹² Id.

¹³ Walter, *supra* note 8.

¹⁴ Id.

constitutionalism. It must properly limit the authority of the government against those rights.¹⁵

As a covenant, symbol, and aspiration: a covenant by which groups of peoples or individuals agree to transform themselves into a nation. By showing a solemn reverence to the constitution, the people will make it a holy symbol, just like a civil religion. As an aspiration a constitution sets an objective of what a nation would like to become.¹⁶

On the other hand, constitution may serve as a *sham* or *cosmetic* rather than *reality*. In this case what it does is to *deceive*.¹⁷ Such a constitution will turn out to be a façade constitution.

Constitutions can be written or unwritten. Countries with written constitutions also operate through unwritten ‘constitutional conventions’. What distinguishes a written constitution from other legal texts, in general terms, appears to be its amending procedure. A constitution has a (some times) very stringent amendment. Other legal texts simply require a formal law making process.¹⁸

2.2 The making of a constitution

Constitution making, in the words of Jon Elster, “tends to occur in waves”. These ‘waves’ are in turn characterized by their specific historical and environmental contexts that induced the making of the constitution. Accordingly, the first wave started in late eighteenth century when American states (the early states that existed before the appearance of the federal government), United States, France and Poland wrote their constitution.¹⁹ The second wave occurred in the wake of 1848, around the time when revolutions broke out in Europe. Many of the small German and Italy states had constitutions at this time, which in fact replaced later by other constitutions. The next wave came in to picture after the First World War the end of which resulted in Poland and Czechoslovakia having a constitution.

¹⁵ Ibid.

¹⁶ Id.

¹⁷ Id.

¹⁸ Jon Elster, *Forces and mechanisms in the constitution making process*, 45Duke Law Journal (1995).

¹⁹ Id.

The completion of the Second World War also resulted in writing of new constitutions to those war defeated countries under the auspices of victory forces. Japan, Germany and Italy are beneficiaries of this wave. The fifth wave occurred in connection with the break up of the French and British colonial empires. Countries that were once colonized have come up with new constitutions modeled on those of the former colonial powers. Next wave broke out in connection with the fall of the dictatorships in southern Europe in the mid-1970s. Portugal, Greece, and Spain adopted their constitution in this wave. And finally the fall of communism in 1989 has resulted in the adoption of new constitutions by the former communist countries in eastern and central Europe.²⁰

In addition to the above constitution making waves provided by Jon Elster, a new wave has emerged in the closing decades of the twentieth century. Scholars described this emerging trend as “new constitutionalism” to which the South African recent constitution making offers itself as particular example.²¹ New constitutionalism seems to redefine the long tradition of constitution making. The redefinition is centered up on the mechanism of making a constitution. Traditional constitution making, as explained by Vivien Hart, is based on ‘expert constitution making’.²² Even the very model of all democratic constitutions, that almost all constitutional scholars hails as a revered document, the constitution of the united states, has been made in the process of, in the words of Sam brook, ‘elite-driven enterprise’.²³ New constitutionalism, there fore, shifts this tradition to a new sphere of ‘democratic participation’.²⁴ In this case the concept of democracy is being employed in the constitution making process. As will be more explained later, this democratic constitution making has everything to do with the final out come of the process (this is true especially in terms of legitimacy of the document).

²⁰ Ibid.

²¹ Sam Brooke, Constitution making and immutable principles, M.A. Thesis, (2005).

²² Vivian Hart, *democratic constitution making*, united states institute of peace special report 107 (2003).

²³ Sam, supra note 21.

²⁴ Hart, supra note 22.

As stated above, these constitution making waves have a number of circumstances that induced to occur. Constitutions can follow social and economic crisis as in the case of American and French constitutions. Constitutions also come after a revolution. The 1848 German constitution is typical example. Region collapse and a fear of region collapse may, on the other hand, induce constitution making. The making of new constitutions in Eastern Europe in early 1990s and the French constitution of 1958 are results of region collapse and fear of collapse. A defeat in war and a desire for reconstruction after war constitutes another dimension. Germany's defeat in the two world wars followed with new constitutions. Creation of new states brings new constitutions, as in Poland and Czechoslovakia after First World War. Liberation from colonial rule, as when united states after 1776 and many third world countries after the Second World War, may result in adopting new constitution.²⁵

In recent times constitutional making may also be induced by the desire to democratization of a given system. That seems the reason scholars are recommending a participatory and democratic constitution making.

"A constitution is a consistent and comprehensive answer on how people should live together in a society."²⁶ Hence the making is a fundamental task to a society. Completion of the final document called 'constitution' comes after inevitable inputs with out which the document may present itself questionable. A brief account of these inputs is discussed below.

The process - from the very initiation of making drafts to the final ratification and implementation, constitution making must pass *a process* of making. The process of a constitution making, as Julius O Ihonvbere described, is 'critical to the strength, acceptability and legitimacy of the final document'.²⁷ In fact it may seem only if the constitution is strong enough in addressing the negotiations

²⁵ Elster, supra note 18

²⁶ Asgeir S. Eriksen, *Liberal Constitution Making*, (2005)

²⁷ Julius O. Ihonvbere, *How to Make an Undemocratic Constitution: The Nigerian Example*, 21third world quarterly (2000).

between competing values, and accepted so as to be bound by it that it can claim obedience. So, '*how the constitution is made*, as well as what it says, matters'.²⁸

A different set of argument can be raised against the importance of the process. This line of argument explains that process is important but not all important. American constitutional scholars, Laurence H. Tribe and Thomas K. Landry, well remarked that 'just remember that processes are not established for their own sake; there is constitutional marrow with in the bones of procedure'.²⁹ And their argument can qualify well especially in terms of the making process American constitution. It is well said that their constitution is made by some noted political elites, wealth and white groups and those having close relations with them. Much of the process has proven it self secret. Different groups and individuals including those of women, slaves and poor citizens were fairly excluded.

Indeed, the final document turns out to be the great constitution despite the flaws in the making process. There fore, process is not all important to produce the great document. Yet, it is debatable, in modern times that the American process would be considered as a good approach, in fact regardless of the out come.³⁰

Substance or content - Very much heated debate surrounds this part of the constitution. One common ground represents the fact, if at all it is a fact, that a constitution must include the climax agreed reactions of the society. Must also contain a must be answered reflections and aspirations. I will be back on a separate topic in brief.

Structure - The design of institutions that well meet the needs of a nation is of central concern to constitutional drafters. Constitutions need to establish fundamental institutions of the society. We also expect a description of organizing governmental powers. The question, therefore, is what types of institutions should have to be targeted. How governmental power and institutions should be structured? Answers are nation specific. Institutions that meet the needs must be visible in the constitution. Many times the visibility of institutions is a grand concern, for instance, in divided societies constitutions must manage conflicts,

²⁸ Hart, supra note 22.

²⁹ Laurence & Thomas, supra note 11.

³⁰ Sam, supra note 21.

accommodate diversity, and foster unity in diversity through competent created institutions (may be federalism like many, consociation, second chambers, intergovernmental institutions). As regards homogenous nations, institutions that foster cooperation, modern public service benefits, and democratic institutions (like media) need to be visible enough.

Here again Laurence and Thomas present their hesitation. Structure is important but not all important. They claim that many of the present institutional structures in United States are not visible in the constitution. Political parties are grand examples.³¹ Does this mean structure in fact is not all important? Yes, it is true in American democracy and constitutional system. Third world regimes and transitional democracies may say no. The level democracy and toleration plays a crucial role. What is so important may appear unimportant to South Africa or Switzerland.

Compromise and negotiations - ‘creating constitution involves making choices under constraints.’ Mechanisms must be considered by which the goals and motives of an individual and group constitution maker aggregated in to collective choices.³² There always are competing demands and the making must make a choice between those demands. These competing demands, before turning in to collective choices must pass through negotiations and compromise. It must be the fact that unanimity in values is not expected, should not be expected either. Parties, whom the issues concern, should be able to engage in democratic deliberations. Unlike the United States constitution making, whose compromise results are said to be not all important, all concerned stake holders need to be picture in the constitution.³³ It is important to make alternatives provided by Laurence and Thomas. The two scholars rather suggest what is important is pre commitment to a constitutional democracy and government.³⁴ In fact, this is always true. A country can fairly produce a great document based on a committed desire to have and to be bound by the final document. American citizens are

³¹ Laurence&Thomas, supra note 11.

³² Elster, supra note 18.

³³ Laurence & Thomas, supra note 11.

³⁴ Id.

committed to be bound by constitutional principles and their ramifications. In addition to inputs that the constitution needs to be a great document, nations must also engage in pre commitments to the final document to be produced.

2.3 Substance (content) of a constitution

“How the constitution is made, as well as *what it says*, matters.”³⁵ Besides creating a document called constitution, drafters are substantially engaged in determining what it should include. As far as a constitution should say what it needs to say, in order to be legitimate based on its content,³⁶ deciding the nature of such substantive contents is a daunting task.

On one thing substance is likely to have a substantial influence on shaping the lives and behaviors of people to whom it is made. Besides they tend to affirm the constitution as their own despite their remarkable disagreements.³⁷ The question remains to be how can a constitution claim allegiance of every citizen? Can it be possible to include all individual necessities in the document?

Principles and doctrines - A constitution must provide for principles and doctrines by which the relationship between governmental activities and peoples shall be governed. These principles and doctrines may also reflect agreed manifestations of the society and constitutional negotiations. Historical background, value appreciation, and the terms of future aspirations happen to shape the theory of principles and doctrines. The United States *great* constitution for instance is a holder of different principles and doctrines. These includes liberty, equality, private property, separation of powers, checks and balances, popular sovereignty, representative government, supremacy of the constitution and supremacy of the law. In addition, even if little disagreement among scholars tends to obscure their status, judicial review and federalism are part of the constitutional principles and doctrines.³⁸

³⁵ Hart, supra note 22.

³⁶ Frank I. Michelman, *is the constitution a contract for legitimacy?*, 8Review of constitutional studies (2003).

³⁷ Laurence & Thomas, supra note 11.

³⁸ J.A.Rickard & James H. McCrocklin, *our national constitution: origin, development, and meaning* (2d.ed, 1957).

Looking at the Ethiopian constitution also gives as the following principles. Sovereignty of the people (in fact of nations, nationalities and peoples), supremacy of the constitution, the inviolability and in alienability of human and democratic rights, separation of state and religion (secularism), and accountability of the government are those found in the constitution. Additions are possible. Federalism, representative government, separation of powers can be added to the list.³⁹

Political theories - Inclusion of any theory, be it democratic theory, or constitutionalist theory, Marxism (a socialist thinking), is indispensable.⁴⁰ In the past, political actors have made a choice to follow a version of fascism and Marxism. It also is a possible that they may be haunted by them again. Any version of political theory is hovering around the governing atmosphere.

Human rights provisions – proclaiming a set of rights as human, democratic, and fundamental as well as putting them beyond the easy reach of the government seems the remarkable task of a given constitution. It is hardly possible to find a constitution that is silent on human rights. Merely proclaiming does not suffice. Mechanisms should also be created to limit the government from unduly and unnecessarily restricting and violating the rights. In these modern times, together with the pervasiveness of democracy, governments, in most cases, are gauged against their behavior towards human rights. Not only are governments required to restrict themselves from encroaching over the human rights, but also are required to protect against encroachments by third parties.

Structure of the institutions - constitutions should also include the picture of social, political and economic institutions. Establishments of similar democratic institutions such as media, political parties, and civil society are equally important. In a federal country an institution that governs intergovernmental relations seems inevitable. Manner of organization and implementation must also be properly depicted.

³⁹ Ethiopian constitution art. 1, 8-12.

⁴⁰ Walter, supra note 8.

Policy objectives - Every society has goals, objectives, and ends as well. A constitution, therefore, is required to state social, economic, cultural, and political objectives that it has to reflect up on and shine a sense of inspiration towards achieving these objectives.

A set of objectives for instance can be found in Ethiopian constitution. As regards external relations, the constitution is destined to the protection of national interest and sovereignty of the country. Economically, to ensure equal distribution of wealth that allows for some affirmative measures. As a social objective, to provide all Ethiopians access to public health, education, clean water, housing, food and social security. Politically, to promote and support people's self rule at all levels.⁴¹

By stating such objectives a constitution unites and inspires the people of a given nation.

Constitution, in fact, is not limited to the above inclusions. It also never mean what is not included is excluded. Nor can it eliminate differences. But it can orchestrate, manage and absorb conflicts and differences. Principles must be stated broadly so that it will be inclusive and preferably open-ended body of substantive ideals. The constitutional experiment must be so 'embracing and enfolding' so as to promise that recognition in individual cases will never be foreclosed in the future.⁴² Accordingly, a constitution must be able to include *other documents* which are worthy of being fundamental to claim constitutional status. These include the so called "organic laws", and documents that Sam brook called them as "immutable principles".⁴³ Some countries like United States bestowed any laws or treaties, made under the authority of United States, the status of supremacy.⁴⁴ Constitutions are also supposed to include *practices and interpretations* in to the system. It must be taken in to consideration that some practices are misleading and violates the constitutional system. So practices are legitimate passing a test of congruence with the document and tradition.

⁴¹ Ethiopian constitution art. 85-92.

⁴² Laurence & Thomas, supra note 11.

⁴³ Sam, supra note 21.

⁴⁴ Rickard & James, supra note 38.

Similarly, though constitutional interpretations may seem to appear disputable, they claim to be part of the canon of the larger constitution.⁴⁵

To conclude, what to include in the constitution is a serious business of drafters. There is no minimum set of principles that defines the content of a ‘model’ constitution.⁴⁶ No crude set of inclusions are available. Background history and future aspirations of a given nation greatly influence what a nation will include. The creation of a federal set up greatly influences the content of a constitution of a given country. The following will show how constitutional choices are influenced by adopting the structure of federalism.

2.4 The federal set up

Federalism, like constitution, seems to have triggered scholarly debates about its definition. In this respect, Ronald L. Watts distinguishes between federalism as a normative idea and as a descriptive category of political institutions. He clarifies three terms: “federalism”, “federal political institutions”, and “federations”.⁴⁷ “Federal-ism” refers the normative aspect in that it advocates a multi-tiered government combining elements of shared rule and regional self rule. The value presumed here is the validity of combining unity in diversity. It accommodates, preserves, and promotes distinct identities within the larger political union.

- “Federal political systems” is used as a descriptive term that refers to a broad category of political system in which there are two or more levels of government combining elements of shared rule and self rule. Shared rule encompasses a collaborative partnership through a common government. Regional self government, on the other hand recognizes autonomy for the governments of constituent units. Thus federal political systems are descriptive manifestations of the value of federalism as a normative term. Daniel Elazar listed categories that fit this category.

Unions, constitutionally decentralized unions, federations,
Confederations, federacies, associate statehoods, condominiums,

⁴⁵ Walter, *supra* note 8.

⁴⁶ Ogendo, *supra* note 6.

⁴⁷ Ronald L. Watts, comparing federal systems (3d.ed, 2008).

leagues, and joint functional authorities.⁴⁸

- “Federations” refers a particular species in which neither the federal nor the constituent units of government are constitutionally subordinate to the other. Each tier of the government has its own sovereign authority that it attains and derives from the constitution. Separate legislative, executive, and judicial institutions exist that keeps each level in harmony with its citizens. In effect, federations are specific forms of federal political system.

Indicating that federalism is indeterminate in its meaning, how ever, Alemante G. Selassie provides for the two essential attributes of federal systems which, in effect, embodied Ronald Watt’s explanation. First, political power is require to be structurally dispersed among various centers of authority. And second, this dispersed power must be guaranteed and legitimated by the constitution.⁴⁹ Essential feature of federal system, there fore, are *diversity* and *unity*. A society needs to manifest its distinctive character but also needs to maintain its belongingness to a certain union. Federal systems provide a political system that will allow diversity and unity go together by respecting the self rule aspect of diversity with in the common government structure.

Almost 40 percent of the world population is under the umbrella of federations. Various reasons are provided for the increasing international trend of following federal norms. First, modern developments produced greater pressures on larger political organizations. A desire to make governments more responsive to individual citizens triggered the need for small, self governing political units. Second, by virtue of increasing global economy people desire to be both global consumers and local citizens. This trend is termed as “glocalization”. Third, the spread of market based economies and changes in technology create conducive conditions to support for federal idea. Fourth, increasing public attention has been given to the principle of “subsidiarity”, a concept that refers higher political

⁴⁸ Daniel J. Elazar, quoted in Ronald Watts, id.

⁴⁹ Alemante G. Selassie, *ethnic federalism: its promises and pit falls in Africa*, 28yale J. int’l.L (2003) .

bodies receive tasks only that cannot be accomplished by lower political bodies. Further more, the resilience of classic federations for a very long period of time, and the fact that most federal countries placed top in terms of economic welfare, respect for rights and quality of life.⁵⁰

As stated above, a constitution is required to provide for political systems and institutions. It is the constitution that provide for the federal system. The respective mandate of the two tiers of governments, and their structure has to be pictured in the constitution. Accordingly, many federations share some common structural characteristics. Ronald watts provided for the following.

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

There are many variables by which constitutional frame work of federalism is to be structured. In fact, framers have to deal with several factual, historical, and basic manifestations of a given federal character for a given country. Just like

⁵⁰ Watts, supra note 47.

writing constitutions, designing federalism involves a difficult task. Equally difficult is the manner of constitutional entrenchment of the federal design. Institutional and legal frame works for manifesting distinctions as well as institutions and legal frame works for maintaining the unity has to be carefully designed. In this respect Richard Simeon has explained basic constitutional agendas that are important in designing a federal arrangement.

- *The number and character of the constituent units*- very difficult task involves the creation of constituent units. Constituent units must be created, for that matter, in such a way as to comport with distinctiveness. In this instance large numbers and small numbers pose a threat to stability.⁵¹ What is required is the optimal number of constituent units in order as far as possible to avoid the dangers of the two extremes. Moreover, division of power is more inline with the size, resource and capacity of constituent units to be created. The drawing of border lines should also be the constitutional agenda with respect to constituent units.⁵²
- *The division of power*- the crucial issue is which one should dominate: the center or constituent units. Some federations like India seem to favor consolidating the central government so that the constitution allocates more and important power to the center. On the other hand, federations like the United States favor more power to the constituent units to create strong and competitive sub national units. Manner of listing powers is also at stake. Whether separate federal and provincial lists are required? Whether concurrent list is required? Again whether each level has the mandate to legislate, implement and interpret? Finally, whether symmetrical or asymmetrical distribution of power is required? All these should be on the constitutional agenda.⁵³ The answer to all the above questions has its own implications of influencing the federation one way or the other.

⁵¹ Ibid.

⁵² Richard Simeon, *constitutional design and change in federal systems: issues and questions*, 39publius: the journal of federalism (2009).

⁵³ Id.

- *Fiscal arrangements*- it is always true allocation of powers without a means to implement the same is meaning less. Governments must be well equipped with the means of generating revenues that addresses their responsibility. The mismatch between revenues and responsibilities (fiscal imbalances) should be best resolved by the constitution. What kind of institutional means should there be to rectify fiscal imbalances incase it happened is the similar agenda.⁵⁴
- *Intergovernmental relations*- as it is true (and can even be inferred from constitutional arrangements) shared and overlapping responsibilities are characteristics of federal systems. Institutional mechanisms that best resolve conflicts and promote coordination inline with the stability of the federation are indispensable.
- *Representation at the center*- federalism is characterized not only by self rule, but also by a great tendency of shared rule. Shared rule aspect requires the representation diversities at the centre. Federal second chambers in many of the cases serve this purpose. The agenda also requires dispensation of the manner and condition of representation.
- *A judicial umpire*- authorities differ, constitutional arrangements vary, what is common, how ever, is that federal systems require an institution that umpires disagreements that arise inside the federation. Judicial review as in case of United States, constitutional court as in case of South Africa are main forms of umpires of the federation.⁵⁵ Sometimes it can also be possible to prefer political organizations like the case in Ethiopia that conferred the power to the second chamber of the federal legislature that in fact lacks law making power.

Even if the establishment varies from federation to federation, these are main constitutional agendas that a constitution that assumes to establish federation needs to deal with.

⁵⁴ Ibid.

⁵⁵ Id.

Choices vary as should be. There are many variables; Richard Simeon calls them as *contextual factors*, which countries should take in to consideration while designing federalism in the constitution. Historical legacies, the nature of society and demography, and the broader political system must be properly considered before making decisions in any respect.⁵⁶

2.5 Sub national constitutions

In most cases the concept of sub national constitution resembles the fact that they are below the federal constitution in a power level. Such facts tend to undermine the value of sub national constitutions in a federal system. However, the relationship of national and sub national constitutions in a federal system should be interdependent. As one author clearly argues the federal constitution is a manifestation of the federal competence and sub national constitution is manifestation of the sub national competence. There should be nothing that puts one below or above the other.⁵⁷

Sub national governments are results of federal arrangements. There exists a remarkable difference between sub national governments by virtue of federal arrangements and decentralization in a unitary government. The later is based on the idea that power is being conferred to lower units under the auspices and discretion of central governments.⁵⁸ Whereas, the former encompasses a formal constitutional allocation of powers between the centre and constituent units.

Constitutions govern governments. Logically speaking, therefore, sub national constitutions govern sub national governments. The distinctive condition is that sub national constitutions only apply to the respective sub national citizens. In the words of James A. Gardner

At the same time, it has become commonplace for autonomous, democratically self governing populations to adopt rules and principles for their own collective self-

⁵⁶ Ibid.

⁵⁷ G. Alan Tarr, sub national constitutional space: an agenda for research, paper prepared for delivery at the world congress of the international association of constitutional law, (2007).

⁵⁸ Alemante, supra note 49.

governance in the form of a constitution. As a result, the spread of federalism has, perhaps predictably, been accompanied by a proliferation of sub national constitutions.⁵⁹

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

The characterization of sub national units as political communities, however, suggests that they must have constitutions of some kind as well, although it does not necessarily prescribe the form they should take.⁶⁰

The form that sub national constitutions should take is commanded by the national constitution or simply will be left to the discretion of the sub national units. No sub national constitution is left free without being referred by the national constitution. Generally speaking, we can discern two forms (if not three for that matter) of sub national constitutions in terms of their relations with the national constitutions. Here the national constitution is serving as a mother document.

❖ *(Relatively) controlled* sub national constitutions- these forms of sub national constitutions are characterized by stringent regulations in the national constitutions. Types of governments, institutions which should be created, even sometimes amendment procedures and conditions are strictly controlled by the national constitution. A case in point is the Australian sub national constitutions, whose freedom is restricted by the national constitution. There is a case that the federal parliament and legislature or the national amendment procedure applies to sub national constitutions.⁶¹

⁵⁹ James A. Gardner, in search of sub national constitutionalism, paper for seventh world congress, international association of constitutional law (2007).

⁶⁰ Cheryl Saunders, the relation ship between national and sub national constitutions, in seminal report: sub national constitutional governance (1999).

⁶¹ Id.

- ❖ *(Relatively) free* sub national constitutions - in these cases sub national populations are free to determine the fundamental characteristics of their respective constitutions. Some times these sub national constitutions are required by the federal constitution not to be inconsistent with some grand principles. However, the requirements do not have the effect of influencing the general constitution making options available to them. United States sub national constitution can be categorized in this line. The states are required to respect the federal arrangement and republican government systems.

It is essentially the case that no distinction of conceptions can be made between sub national and national constitutions. As stated above, the only distinction lies in the fact that sub national constitution applies to the respective sub national citizens and national constitutions apply to the country as a whole. In effect, what is provided above as regards to constitutions in general applies to sub national constitutions as well.

2.6 Some comparative perspectives

Sub national constitutions vary across federations. This in most cases may be due to the level of control by the national constitutions. Or, it may be due to the political, social, and economic contexts and traditions of a given country. As it is the case that the federal arrangements vary by virtue history, political realities, and social compositions (and others discussed above), the same is true that sub national constitutions vary in their design.

John Dinan has made a remarkable comparative assessment of sub national constitutional design in federal countries. Accordingly, he used 12 federations for comparison. Variables were: constitutional amendment and revision procedures, opportunities for direct democratic participation, choice of presidential or parliamentary system, and the adoption of bicameralism versus unicameralism.

In terms of amendment and revision, John Dinan found that, sub national constitutions consistently departed from their national counterparts. They provide for an easier and an alternative amendment and revision procedures as well as mechanisms. Although parallelism is sometimes the case, the same is true as regards providing opportunities for direct democracies. Sub national constitutions

are best at direct democracies. It is also similar with regard to the adoption of bicameralism versus unicameralism. On the other hand, sub national constitutions exhibited a significant degree of parallelism to the national constitution in terms of choices between presidential and parliamentary forms of governments.⁶²

In general terms it can be said that many sub national constitutions in federal countries departed from the national constitutions in crucial matters. But this never is the case always. In order to generalize, comprehensive comparison needs to be conducted. The purpose here is to indicate that sub national constitutional designs vary across federations.

2.7 The Ethiopian context

Apart from the claims for the existence of earlier defacto federation,⁶³ the current constitution of Ethiopia has officially declared that the country is federal. Pursuant to the constitution, the Ethiopian state is called as the *federal democratic republic of Ethiopia*. It is the federal constitution that established the federation. As can be witnessed from other federal constitutions, the Ethiopian federal constitution provides for division of powers between the federal and regional governments. It established two federal houses; the house of people's representatives and the house of federation. More over, it provided for an umpiring organ (a political organ, the house of federations). More importantly, it created the constituent units of the federation. Accordingly, there are nine constituent units, one federal capital (Addis Ababa), and one federal district (dire dawa). These nine constituent units are Afar, Amhara, Oromia, Tigray, Benishangul-Gumuz, Gambella, Harari, Somalia, and Southern Nations Nationalities and Peoples.

Structured in such a manner, how ever, the Ethiopian federation has its distinct characters. The first is the inclusion in the constitution of the controversial issue of secession. Another is the fact that the second federal house (the house of the

⁶² John Dinan, patterns of sub national constitution making in federal countries, paper for seventh world congress, international association of constitutional law (2007).

⁶³ Assefa Fiseha is the main advocator of this opinion. For more detail see his book. Assefa Fiseha, federalism and accommodation of diversity in Ethiopia: a comparative study, (2nd.ed. 2008).

federation) is non law making organ. The composition and the power of this house is a related feature.⁶⁴

By allocating powers between the two tiers of governments, the federal constitution gives the mandate to the regional governments to enact and execute their own *constitutions* and other laws. To this effect, all regional governments have made their constitutions immediately up on the coming in to force of the federal constitution. Most of them have been amended in between 2000 and 2001. In many contexts all regional constitutions fundamentally resemble the federal constitution.⁶⁵ The regional government of Amhara, being one of the constituent units, has its constitution as amended in 2001. In the following chapter the legitimacy of this constitution will be assessed, which is the main purpose of this study.

⁶⁴ Solomon Nigussie, fiscal federalism in the Ethiopian ethnic based federal system, (2008) .

⁶⁵ Tsegaye, supra note 5.

Chapter three

Legitimacy of sub national constitutions in Ethiopia

3.1 Sources of legitimacy

3.1.1 The general overview

Legitimacy as a concept

“If we must obey perforce, there is no need to obey because we ought; and if we are not forced to obey, we are under no obligation to do so.”⁶⁶

This idea is interestingly articulated by Jean Jacques Rousseau in his famous book of *The Social Contract*. Rousseau is arguing that the very existence of force never creates a right simply because “force is a physical power”. He failed to see the moral effects that force can have. He keeps on arguing that “to yield to force is an act of necessity, not of will-at the most, an act of prudence. In what sense can it be a duty?” and there fore he concludes that “we are obliged to obey only legitimate powers.”⁶⁷

Then the question is what this legitimate power is; what is legitimacy? Legitimacy is a term and a concept that is hardly defined. Sometimes the concept itself is so elusive as to deter scholars from dealing with it. I do not intend to define legitimacy. Rather I will try to show how scholars engage themselves in such a blurred concept.

One author defined legitimacy as the compatibility between the results of governmental output and with the value patterns of the relevant system. This definition has, as others, a political meaning.⁶⁸

More interestingly, another author relates the concept of legitimacy with that of obedience. The fact that a certain thing is illegitimate is a claim that it is not

⁶⁶ Jean Jacques Rousseau, the social contract, (1762).

⁶⁷ Id.

⁶⁸ Peter G. Stillman, *the concept of legitimacy*, 1 polity, (1974).

entitled, as a moral matter, to a full measure of obedience. In his essay the author devoted to show that legitimacy is a concept that manifests obedience.⁶⁹

Again another author described legitimacy through three kinds of legitimacy. These include moral, legal, and sociological legitimacy. Moral legitimacy assumes a certain rule, law, or action is legitimate if it is within the bounds of reasonable moral agreements. Legal legitimacy assumes legal justness as a matter of law. Sociological legitimacy, on the other hand is based on general acceptance by the population as morally binding. In all the three kinds of legitimacy, the author asserts that, legitimacy and obedience are closely related. The result of being illegitimate brings the fact that it (a law, decision, or a system) should not be obeyed.⁷⁰

Alan Hyde described how Max Weber explained legitimacy. Accordingly, legitimacy, for Weber, is a state of widespread belief that an order is exemplary or obligatory. As distinct from custom or self interest, this belief appears to be the reason for any action.⁷¹ In effect, this action seems a result of the judgment of the belief whether to follow or not to follow a certain path of social order.

In addition, another scholar notes that Weber has three principles of legitimation by which the basis of legitimacy can be established. In fact these principles emanate from the relationship between command and obedience; the rationale of obedience to a certain command. As such Max Weber tries to define legitimacy. The first principle rests on traditional grounds. In this sense commands are legitimate on the basis of the sanctity of immemorial traditions in such a way that it is in accordance with custom. Sanctity of tradition, convention and personal relation of power holder to a power subject characterize this principle.⁷²

Second, command is legitimate based on charismatic domination. Charismatic domination exists when the power subject submits because of the belief in the extraordinary quality of the power holder. Such charismatic domination may be manifested through the attributes of a person, group, or norm. The third one is identified as 'rational' or 'legal' basis of legitimacy. Here authority or command is

⁶⁹ David A Strauss, *legitimacy and obedience*, 118 Harvard law review, (2005).

⁷⁰ Richard H. Fallon, *legitimacy and the constitution*, 118 Harvard law review, (2005).

⁷¹ Alan Hyde, *the concept of legitimation in the sociology of law*, Wis. Law review, (1983).

⁷² Craig Matheson, *Weber and the classification of forms of legitimacy*, 38 the British journal of sociology, (1987).

legitimate up on the belief that it is based on rationally established rules. In short, this principle of legitimation is a basic ground force in the relation ship between legality and legitimacy. As I will be dealing with it in detail, laws are legitimate if they are enacted, and the enactment is legitimate if it conforms to the laws prescribing the procedures to be followed.⁷³ (This is how legality becomes the main ground for legitimacy.)

Five other bases of legitimacy are identified by the same author, the first being the sacredness of the authority according to which command is legitimate because the power holder is sacred or the norms which prescribe command and obedience are sacred. Expertise is also which states that the power holder possesses knowledge, specifically of technical knowledge, to exercise power and this makes the power holder the best. The third one is popular legitimacy. In this sense command is legitimate because it received popular approval. This extends to the extent that there is a convention or a contract for legitimacy. Command can also be legitimate by virtue of the personal relations of the power holder with the power subject. Here, the power subject is in close relations with the power holder and submits and admits to remain loyal. Finally, the personal quality of the power holder serves as a basis of legitimacy. Power holders may possess some kind of leadership qualities because of their personal factors. There fore power subjects feel a sense of duty towards the power holder.⁷⁴

All the above justifications of legitimacy seem interconnected and some times it is difficult to distinguish one among the others.⁷⁵ What is more important is legitimacy is a judgment of relationships between the power holder and its subjects. It can thus be recognized that it is a wider and more sensitive of all the issues. For our purpose legitimacy may simply be defined as a state of being 'respect worthy' so as to claim a duty of obedience. Frank Michelman used similar terminology in defining legitimacy. He claimed that legitimacy accompanies a state of respect

⁷³ Ibid.

⁷⁴ Id.

⁷⁵ For an elaborate discussion see Craig Matheson, Weber and the classification of forms of legitimacy, id.

worthiness of the totality of the government system.⁷⁶ It is by reducing the totality to constitutional system (in fact as being one element in the totality of the government) that I am using similar terminologies.

Leaving aside the question of what a constitution is, it is a (legitimate) question to ask why we are obedient to a constitution. After all, are we duty bound to obey a constitution? Even believing that we are duty bound to obey a constitution, where the hell do we think the source of this obedience is? These are some of the general questions that should be raised in relation to legitimacy of a constitution.

In order to narrow the claim, I will stick to legitimacy of Ethiopian sub national constitutions. Are citizens of a given region in Ethiopia bound to obey their respective constitution? To narrow more, I will ask is the constitution of the regional government of Amhara legitimate? If the answer is in the affirmative, the question remains to be why and how? I will then try to explore the theoretical frame works that may finally approve or disapprove my original question; are sub national constitutions in Ethiopia legitimate?⁷⁷ Let me start with a hypothetical ground of justification. Suppose a person called *Mr. Egele*. Being a resident of the Amhara region in Ethiopia, what would he reply if he is asked of the same question? He may say my regional constitution is legitimate. What would he answer to the question why? He may say because it simply is a constitution. Or, because it is made by such and such an institution that is worthy of being obeyed. He may also say that it is because I, as an individual, am the owner (sharing the common ownership by all the residents of the region). Or, he may say because the people of the region made it there fore he submits as being part of the *people*. Among other things he may also say that because it contains what I want. A lot of different replies can be made by such a person. When we assume all the inhabitants of the region, it seems out of control. How ever, what will we have as an aggregate? What will we have as a ground?

⁷⁶ Michelman, *supra* note 36.

⁷⁷ Legitimacy also is established by perception. The real judgment of legitimacy lies in how people perceive a constitution or a system. What conditions exist to warrant such a perception is my core attempt instead. *For more see* Randy E. Barnett, constitutional legitimacy, 103 Columbia law review, (2003).

3.1.2 The principle of legality towards legitimacy

3.1.2.1 The proceduralist approach

It, many times, seems that legality means legitimacy. Even if the two are distinct in their conceptual frame works, legality (legal validity of laws) appears to reinforce legitimacy. What is legality?

As many writers propound it in detail, legality involves the idea that the validity of laws is acquired by virtue of their enactments after fulfilling the procedural requirements of their making. If such is the case, there fore, the law is legitimate. Hence, legality and legitimacy are closely related in a sense that the very existence of legality proves legitimacy. One writer remarks that:

*Laws are legitimate if they have been enacted, and the enactment is legitimate if it has occurred in conformity with the laws prescribing the procedures to be followed.*⁷⁸

It is a question, for that matter a very interesting question that how a constitution can get its legality to be legitimate. After all, can a constitution be legitimate by fulfilling procedural requirements? If so, then, what procedural requirements? Such questions are interesting because on one hand a constitution is a higher norm under which other laws are subordinate. More over, it establishes procedures for other laws.

How ever, the situation is different when it comes to sub national constitutions. It can be possible that sub national constitutions establish their legal validity by fulfilling procedural requirements or prescriptions laid down by the national constitution. As I have tried to indicate in the previous chapter, there is no sub national constitution, in a federation, whose establishment is left free. National constitutions either provide detail procedures, or minimum requirements that sub national constitutions should comply with. In addition, national constitutions may

⁷⁸ Craig, supra note 72.

utter that sub national governments will have their constitutions leaving procedural details for them, but require them to be consistent with some fundamental principles. It all depends on the creation, operation, and establishment of the federation. It all depends on the national constitution.

I will try to assess the existence of legal validity of Amhara sub national constitution. Examining the federal constitution of Ethiopia as to what it says of sub national constitutions is inevitable.

I am very curious of two provisions in the federal constitution. In general terms, under the title of powers and functions of states, article 52 (2) (b) of the federal constitution stipulates that the state shall have the power to:

Enact and execute the state constitution and other laws.

Again article 50 (5) specifically stipulates that:

The state council has the power to legislate on matters falling under state jurisdiction. [Consistent with the provisions of this constitution, the council has power to draft, adopt and amend the state constitution.]

What we can understand from these cumulative provisions is that sub national constitutions in Ethiopian federation have legal requirements to follow in order to attain their legal validity, and then their *legitimacy*. These requirements are:

- It is the state council, and the state council only, that has the power to *draft*, *adopt*, and *amend* sub national constitutions. In the strictest sense, there is nothing that obliges state councils to participate the citizenry. At best state councils may allow participation by their benevolent willingness. At worst they can avoid any participation.
- The drafting, adoption, and amendment of sub national constitutions must be *consistent* with the federal constitution. Entrance of any inconsistent provision with that of the federal constitution is impermissible. Sub national constitutions can not limit the scope of rights proclaimed in the federal document. Nor can they provide conditions that may have the capacity to limit rights. But they may have more favorable lists of rights (despite some counter arguments that may be filed against this claim).

Only fulfilling the above requirements make sub national constitutions to be legally valid. It seems the case that all sub national constitutions have complied with the first requirement. All are made by and in fact being amended by the state council (which is the legislature).⁷⁹ The preamble of all sub national constitutions declares that they are made (and amended) by the state council. To this effect the preamble of Amhara regional constitution stipulates that the regional council (which is the legislative organ of the regional government) approved the text with an undivided vote, after having thoroughly deliberated up on and deeply examined its specific articles in a regular session of the regional council.⁸⁰ No doubt it fulfills legality in this sense since it is made by the regional legislature.

On the other hand, checking whether it is consistent with the federal constitution requires of a detailed analysis. One thing, how ever, seems clear. Almost all sub national constitutions are very much close, in form and content, to the federal constitution, just not to say they are direct verbatim copy of it.⁸¹ This, in effect reduces the difficulty of assessing. I do not want to go over detailed assessments, but raise some concerns. Self determination including secession is an unconditional right given by the federal constitution to nations, nationalities and peoples. Should there be any provision about this right in any of sub national constitutions; it must be consistent with the unconditional nature of the right. How ever we have inconsistencies, for instance as it is the case in the constitution of the regional state of Benishangul Gumuz and Gambella as well, that the regional constitution of Amhara provided for conditional requirements. Self determination including secession has become conditional. It is conditional in a sense that the right is to be exercised if the regional state believes that some listed rights are suspended, denied

⁷⁹ Some concerns may be raised here. In their preamble sub national constitutions proclaim either “we the people of...” or “we nations and nationalities...” it may be argued that the people, or nations and nationalities concerned did not participate in the making. There fore, the preamble is misleading. Constitutions, in our case, are made in the way of ordinary law making process. Why not other laws proclaim the same?

⁸⁰ The last paragraph of the preamble states the same. It is approved on 5th of November 2001. This one is an amended text. The original text was adopted on 22nd of June 1995 by the similar process by the same organ.

⁸¹ Close scrutiny of the constitution reveals that they are in fact direct copies of the federal constitution. Some times it can also be assumed that there is no difference between any of the sub national constitution and the federal constitution, except the fact that nomenclature differ. (Sub national constitutions bear the name of the concerned region.)

and not fully implemented. In fact the rights in question are ‘federal characters’ of a true federation in form and in operation. Accordingly, conditional requirements are when the people of the national regional state are of the opinion that the following rights are suspended, abrogated, or abridged:

1. the right to preserve its own national identity and strive towards its due respect, maintain, enrich and care for its legacy and history as well as utilize and enhance its own language, assert its own culture, develop and promote same:
2. the right, with in the geographical limit of its territory, to the final determination of its own affairs, exercise self government as well as enjoy an effective participation in the system of the federal government in a freer, non discriminatory, appropriate, fair and equitable means of representation:
3. the right of the peoples self government shall include those rights to establish governmental institutions of administrative purposes with in the geographical area of its inhabitation as well as obtain an equitable representation in the administrative arrangement of the federal government.

Further more, it must establish that these violations could not have been rectified with in the unity. As such this constitution introduced a condition for exercising the right to which the federal constitution attached no precondition at all.⁸² In this case I can be able to say that the constitution failed to fulfill the requirement of non inconsistency. In effect it is not legally valid; hence its legality is failed. If legality means fulfilling procedural requirements, failing to envisage one will be against the principle of legality. And if legality is a ground for legitimacy, such a procedural failure is sufficient to claim illegitimacy. Accordingly, its legitimacy will fail in this respect as well so long as we allow ourselves to attach legality to legitimacy. Some others whose provision does not provide for such inconsistency may survive this danger.

⁸² As a matter of fact these conditional requirements are other causes of inconsistencies with in their respective provisions. On one hand they declare the right to be unconditional on the other hand they provide for conditions in sub articles. It may be said those are not preconditions at all. But what are they?

“Is legality legitimate?”⁸³ My big concern here is whether it is okay to establish legitimacy through legality. Must not laws, to be fully legitimate, conform to substantive requirements in addition to procedural safeguards?

In democratic state laws must not only be procedurally okay, but also are required to comply with substantive values of the society. Laws should be morally justified.⁸⁴ Then legitimacy requires attainment of certain goals, and the insurance of certain determinate values through laws. Alexander P. d’Entreves asks the following question.

*Are we prepared to make of legality a fetish, there by reducing legitimacy to the mere respect of the rules of the game, with out any concern for the game itself, what ever its stake and what ever its consequences?*⁸⁵

I think this is a very indispensable question on the face of today’s variant notions of legality in the modern world.⁸⁶ A mere aspect of establishing legitimacy through legality, there fore, remains questionable.

In this sense sub national constitutions should not only be done in a procedurally correct manner (which the Amhara regional constitution, for that matter, failed to achieve). But they must also fulfill substantive requirements by which deeply involved societal values can be manifested. Assessing substantive justifications, in our case, requires much to do which I will try to deal with in the next section.

Let me come to another concern. A question can be asked, in the same context, that why sub national governments are obliged to fulfill procedural requirements of the federal constitution. One way of answering the same question is that they are obliged because it is the supreme law. More importantly, they are obliged because it is a legitimate document to be obeyed. But to examine this assertion I will borrow an argument from Randy E. Barnett. He has two ways of legitimating a constitution. First, it is through unanimous consent. In the absence of such unanimous consent

⁸³ This question is directly adapted from David Dyzenhaus, the legality of legitimacy, 46 the university of Toronto law journal, (1996).

⁸⁴ Wojciech Sadursky, *law’s legitimacy and democracy plus*, 26 oxford journal of legal studies, (2006).

⁸⁵ Alexander P. d’Entreves, *legality and legitimacy*, 16 the review of metaphysics, (1963).

⁸⁶ Id.

then a constitution is legitimate if it establishes a law making process that provide good reasons to think that a law restricting rights is necessary to protect the rights of others with out improperly infringing the rights of those whose liberty is being restricted.⁸⁷ If I enter this argument in to the federal constitution, the following will result. The federal constitution orders sub national constitutions to be made by state councils. In effect it restricts the general public from acting in the making of their constitution. As I have argued above, state councils at best allow participation when they need, and at worst avoid total participation. The right of the concerned regional people to make their constitution is at the mercy of their legislatures.⁸⁸ On the other hand, the notion of ‘democratic participation’ breeds a logical conclusion that participating in constitution making is happening to be a right more than being a matter of opinion. It is stipulated under Universal declaration of human rights especially in ICCPR that every citizen has the right to participate in the conduct of public affairs. United Nations court of human rights has stated in one of its decisions that constitution making constitute public affairs. Further more the general comment of United Nations human rights court declares that ‘citizens also participate directly in the conduct of public affairs when they choose or change their constitutions. All these especially the general comments expand the democratic participation beyond the act of voting. Modes of participation include electoral decision making, referendum, assemblies, accountable representation, public debate and dialogue, and the like.⁸⁹

Generally, the conclusion seems that participating in the constitution making is a right that is gaining momentum in an international declarations and covenants with which countries should avoid any inconsistency.

According to Randy Barnett’s argument a constitution that restricts such a right with out reasons of protecting other rights and improperly restricts preexisted rights

⁸⁷ Randy E. Barnett, *constitutional legitimacy*, 103 Columbia law review, (2003).

⁸⁸ After all it was the people that should direct (and restrict if they think fit) the legislature. Here it can be said that the legislature is representative of the people. (State councils are representatives of the concerned state peoples.) How ever, I am afraid such is the case when it comes to constitution making. Randy argues that constitution is legitimate up on receiving unanimous consent. How can this consent be obtained unless by willful submission and participation in the making? See Randy, *id.*

⁸⁹ Hart, *supra* note 22.

is never legitimate. The same is true with our federal constitution. What in the world could be a reason to restrict our sub national citizens from participating in their constitution making? Nothing! Therefore, the federal constitution faces the danger of legitimacy (in fact based on Randy's argument), and in effect any other things that follow it (including sub national constitutions) shares the danger of legitimacy as well.

3.1.2.2 Positivism and anti positivism

Legal theories provide ideological choices for any given legal system. Major legal systems in the world are influenced by theories of law that one way or another affect the nature of law and its application. Positivism preaches the application of laws as written, nothing more.

As Alexander d' Entreves remarked, it is Austin who first released a positivist manifesto.

*"The existence of a law is one thing; its merit or demerit another. Whether it be or be not is one inquiry, whether it be or be not conformable to an assumed standard is another inquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it may vary from the text, by which we regulate our approbation or disapprobation."*⁹⁰

Legal positivism deeply advocates that lawyers pass any judgment on the content of the law, a conception of legality as a matter of form, but not of substance. This is further propounded by the following sentence.

It is as if the lawyer would say: let the legislature take up on himself to decide up on all major issues; let him make the basic choices in matters of policy; all I am concerned with is to ascertain whether this particular rule, this particular

⁹⁰ Alexander, supra note 85.

*decision is correct, whether it is law, no matter if I like or dislike it.*⁹¹

Being one of the major legal systems in the world, continental legal system assumes a strong connection with legal positivism. In the continental legal system law is primarily the expression of the deliberate act of the law giving (the legislature). The test of legitimacy is based up on aspects of ‘formalism’, and hence characterized by “ethical neutrality”. The notion of “legality is thus of itself a token of legitimacy”.⁹² On the other hand common law legal system is characterized by judge made laws and the precedent approach. A wider concept of rule of law is at the heart of the legal tradition. There fore the test of legitimacy is grounded on this wider and morally appropriate value.⁹³

In general terms continental legal traditions are influenced by legal positivism, while the reverse is true with common law legal traditions. Surely the Ethiopian legal system has a very strong connection with continental legal system. In fact the current trend towards common law traditions is never undermined. With this in mind, we can argue strongly that legitimacy may be tested in terms of legality. However, the above assessment of legality of Ethiopian sub national constitutions towards their legitimacy is crucially important.

Again Alexander d’Entreves remarks that law should, in the sense of common law tradition, be continuous and a purposeful process. More over, there should be a general agreement in a given society about basic values which that society attempts to preserve and enforce.⁹⁴

⁹¹ Ibid.

⁹² Id.

⁹³ Id.

⁹⁴ Id.

3.1.3 Establishing legitimacy through the contents of a constitution

3.1.3.1 Fulfilling substantive morality and normative values

“How the constitution is made, as well as *what it says*, matters.”⁹⁵ In the previous chapter I have tried to describe what a constitution is supposed to contain, but in formal sense. In addition to what formally is required of a constitution, it may be assumed that substantive requirements are necessary in order to obtain the respect worthiness of the document. I have indicated that a constitution should contain at least principles and doctrines, political theories, list of rights in what ever name they appear (usually in the name of human, democratic, civil and political rights), structure of institutions and policy objectives. Any body can think of more on the face of contextual differences and requirements of a given country as well as the values and choices of a given society.

The content of a constitution – frank Michelman calls it *content based* – is one way of claiming the legitimacy of a constitution.⁹⁶ What substantive value can help to legitimate a constitution?

Substantive values, in most cases, are to be obtained in the efforts of listing human, democratic, and political rights as well. These are named, in general terms, as “substantive constitution”.⁹⁷ It seems possible that institutions and their structure well decided. It also seems possible that the type of government and its operation can be settled well. Determination of rights, how ever, is fairly controversial. We never expect a constitution to be all inclusive. At the same token we never refer to a constitution to enforce all what we as an individual need. And we need it to be legitimate to gain our obedience. We need it to hold and contain our values and norms to have such an effect. Can constitutions in general and Ethiopian sub national constitutions in particular be legitimate by virtue of what they say and they should say? Can we establish the legitimacy of the Amhara regional constitution through its content?

⁹⁵ Hart, supra note 22.

⁹⁶ Michelman, supra note 36.

⁹⁷ Id.

Establishing respect worthiness of a constitution through its substantive values accompanies a clear contradictory ideology with the principle of legality. Here laws – constitutions – are assumed to be legitimate not only based on respecting their manner of enactment, but also based on the rightness, justness, moral justification of what they profess. Here laws – constitutions – themselves and what they ought to be are the same; constitutions are legitimate because they have what they ought to have in a given circumstance.

A democratic state, Wojciech Sadurski tells us that should not only enact laws but also make sure they comply with substantive values as the property of the population concerned.⁹⁸

It is only a ‘good constitution’ that satisfies such a claim. A good constitution is the one that must include all major, currently prevailing judicial constructions and applications of its clauses. In a liberal conception of legitimacy this is hardly possible. No constitution will be such a quality.⁹⁹ For different reasons:

- It is only one constitution that will be in force in a given country in a given time. Liberally speaking, value differences are unmanageable in a single constitution.
- Reasonable disagreements are bound to exist. A constitution hardly comprehends such reasonable disagreements.¹⁰⁰
- A constitution is an open ended. There are other mechanisms for a constitution to be good.

To be good, there fore, constitutions must provide for some kind of adaptation mechanism. This may be in the form of either judicial review or constitutional court with the virtues of constitutionalism.¹⁰¹

To come to Amhara regional constitution, it must be asked that what substantive values could legitimate it. The core idea here should be that regional differences are inevitable. Each sub national constitution must effectively cover distinctive objectives and goals that regional governments together with societies attempt to

⁹⁸ Sadurski, *supra* note 84.

⁹⁹ Michelman, *supra* note 36.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

achieve. What sub national constitutions are for if not they provide for detailed development programmes and schemes? What sub national constitutions are for if not they provide for direct democracies for the citizenry to engage in the day to day activities of their government? By the same token, must not sub national constitutions provide for specific rights that should only apply to the respective regional population? A case in point is the constitution of the state of Virginia in United States that recognized the right to hunt and fishing.¹⁰² Similarly the constitution of the state of California recognizes and protects the right to fishing.¹⁰³ Our sub national constitutions, I can for sure say, are direct copies of the federal constitution. What is proclaimed in the federal constitution appeared to be the contents of every sub national constitutions. Not only are homogeneity exist between the federal and sub national constitutions, but also among themselves. All this is not to undermine the existence of minor differences between them.¹⁰⁴ But I am deeply interested in claiming that there seems no peculiar right or value professed by any sub national constitution. Does that mean there is no peculiarity that needs constitutional protection among them? What if a citizen who is the inhabitant of Oromia region asserts that *Gada* system should have been incorporated in the constitution of Oromia in as much detail as necessary?¹⁰⁵ Can we wholeheartedly argue the practice is worthless to be mentioned in the constitution? Do coffee producers and sellers not need special protection by their respective regional constitutions? It is hardly possible to exhaust all such issues in this way. The concern is – I argue – there were much more values which are distinctive to any of the regions that should have been – if necessary deeply – incorporated in the respective sub national constitutions.

¹⁰² Constitution of Virginia, article xi section 4.

¹⁰³ Constitution of California, article 1 section 25.

¹⁰⁴ They are different from the federal constitution by providing local governments, which is their responsibility. In addition, difference is visible in terms of divisions and institutional mechanisms to accommodate the same.

¹⁰⁵ I would not deny that *Gada* system for instance can be protected because the Oromia constitution recognizes religious and traditional institutions. What I am arguing, how ever, is it should have been specifically incorporated. The people who practice the system want to see what they are proud of practicing has been given protection by the regions higher law in a separate provision.

The fact that sub national constitutions give the same protection as the federal constitution does puts the efficacy and legitimacy of sub national constitutions in danger. This fact renders them useless as they may seem.

Larger and smaller political organizations, Ronald Watts argued, could not resist the pressure derived from modern developments in transportation, social communication, technology, and industrial organization. The idea of federalism has proven its relevance by the same fact.¹⁰⁶ That moderate political organizations should be created and be able to cope up with such modernizations, and take up the responsibility is virtually important. In addition, democracy requires a complex form of government for a sizable country with diversified population that would best represent *regional sensitivities* and *sensibilities* in an intimate way. Federalism is the answer that fits the same.¹⁰⁷ John Kincaid also argued that sub national constitutions, in a federal system are beehives of activity. They are objects of change and reform. They help to diffuse conflicts. And they involve important choices about such basic matters as human rights the structure and scope of government power, the behavior of state authorities, taxing and spending, budget, local government, voting, land and water use, intrastate commerce. More over, they are hosts of public services, education, welfare, health care, housing, and roads and highways. Sub national constitutions further allow citizens to institutionalize conception of justice and quality of life. More importantly sub national governments have primary and front line responsibility for protecting the rights of greatest concern to citizens which are life, liberty, and property. In the words of Kincaid:

*It is state government that deals with murderers, muggers, rapists, prostitutes, careless physicians, barking dogs, traffic lights, divorces, occupational licensing, civil suits, and so on.*¹⁰⁸

¹⁰⁶ Watts, supra note 47.

¹⁰⁷ Ralph Lawrence, where there is political will, there might be a way: sub national constitutions and the birth of democracy in South Africa, in seminar report: sub national constitutional governance, (1999).

¹⁰⁸ Kincaid, supra note 2.

The attitudes towards governments have been changed from simply law maker and enforcer to direct involvement with the day to day activities of the people.¹⁰⁹

Having constitutional allocation of powers in mind, the constitution of the regional government of Amhara should have been a response to all the above claims. However, the constitution is no more than a copy of the federal document. There is no peculiar provision that responds to peculiar issues of the region. Would this mean the region has no peculiarity? In terms of public services it provided nothing more than claiming that the people of the region have the rights. But it should have incorporated detailed aspects of the provision of public services. The rights are once recognized by the federal constitution as well. What is the use of restating them unless to provide modes, structures and systems of rendering public services? One man, or groups of men, or more than thousands of men who catch fishes in water bodies of the region may worry about the right to fish. The constitution has to (had to) provide the same. Infrastructures like roads, telecommunications, electricity, health care institutions, and education institutions were worthy of detail explanations by the constitution. The story never ends this way. Chances of direct democracy are overshadowed by representative democracy. But as it may seem true, sub national governance is an interesting spot for direct democracy. One of the true virtues of democratic government is that the people have the power to instruct the government and their representatives.¹¹⁰ This can be done through election. More than that, it can be done through direct democracy in sub national governance. A case in point is the state constitution of California. First of all it stipulates that all power is inherent to the people. Then it clearly stipulates that the original power to initiate laws including constitutional amendments and to reject or accept any proposal belongs to the people.¹¹¹ Lacking such a power, it obviously is difficult to make sure that the people of the region are sovereign. Government by the people loses its virtue. Further more voting and tax receive only a provisional highlight. The same is true for tourism which is the main source of the region and can reduce

¹⁰⁹ Frank, *supra* note 1.

¹¹⁰ Constitution of California article 1 section 3.

¹¹¹ *Id.*, article 2 section 8.

the unemployed population. All these were worthy of being included in detail so as to include the manner of enforcement and implementation.

In order to give a general remark, the following generalities can be observed.

- In terms of services the constitution had to provide a good deal of detail as regards tourism sector, health sector, education sector, and similar infrastructures which the regional government has to deal with.
- In terms of democracy the constitution had to provide a mechanism for citizens to take participation in policy and law making processes. This is to indicate that a kind of direct democracy is comparatively possible but the constitution, in effect, failed to provide. More over, the behavior of state officials is hardly controlled.
- Taxation is a big issue as far as performance of the regional government is concerned. But the manner and structure of taxation in the region given a very little attention by the constitution.
- The constitution stated nothing about the regional cultural heritage of dispute resolution mechanisms and living together models. It is essential to recognize such life choices as the society is dependent up on.

How could one, whose constitution lacks all the above merits, legitimate and feel obedient to it?

One may be tempted to ask why all these should be included in the constitution in detail, but ordinary legislations can take care of such things. One good answer to such a claim is that the nature of a constitution is a guarantee for the contents included in it. If we say a certain document is a constitution, it is never easy to be amended as ordinary legislations. Rigidity is one of the virtues of a constitution. So when I require of the Amhhara regional constitution to incorporate the above concerns, I am claiming that those concerns should be beyond the easy reach of government to amend and re amend as it likes. They must not be given one day and taken away the other day. That is what a government does through ordinary legislations. In effect, I am arguing that those concerns must not be subjected to ordinary legislations.

In this connection, a concern should be raised as to how those issues will systematically be incorporated, if we ever assume to give effect to constitutions. Constitutional interpretation is a mandated mechanism. However, what type of institution should hold such a power of interpreting the constitution is full of disputes. Peculiar enough, the federal constitution chose the house of federation. Peculiar reasons accompany the choice.

What about sub national constitutions? How should they be interpreted and by whom should they be interpreted? Sub national constitutions are not obliged to choose similar structure with that of the federal constitution simply because they can copy. I see no problem if the constitution of Amhara regional government is to be interpreted by the supreme court of the region. (One ground to deny may be that the court is incompetent for the purpose. We know that the constitution, in fact all, is made by the regional legislature. Then who is competent?) On one hand the constitution is made by the legislature and one may claim that there is no difference between any other formal laws and it. On the other, there will be no stake that will be put in to risk if the court seizes the power. As I believe, the court will give it meanings, breath life in to it. What is important here is that effective interpretation is crucially important to adapt the constitution to changing circumstances, and to include what was left, through interpretation. Most sub national constitutions claimed to be interpreted by a constitutional commission and some are by their second chamber. They are assisted by the respective constitutional inquiry council (similar structure with the federal constitution). The Amhara regional constitution established a constitutional interpretation commission for the purpose whose members are composed of representatives from every nationality and woreda council found in the region. Whether sub national constitutional interpretation is effective or not is yet to be seen. Let alone sub national constitutions, the federal constitution has entertained only rare cases. I am saying that due to different reasons there is no indication, to the best of my knowledge, that sub national constitutional cases are entertained.

3.1.3.2 Constitution as a moving target

It is a question that a constitution is simply the text or some thing more than that. In the former case a constitution is textual only and this is termed as ‘protestant’ approach. The later assumes the constitution and its possible interpretations and it is more than a text. In what is termed as ‘catholic’ understanding of the constitution, interpretations and official practices assertion can also be included in it.¹¹² Therefore what stand does a given constitution holds is to be inferred from the ideology we attached to it.

Constitution, I have indicated, never exhaust all issues to the present societies and it is assumed to govern the future generation as well. In this sense constitution is not static, but it is a moving object. If such is the case, being a protestant is against the legitimacy of a constitution since constitutions are not full. Possibly people will find it does not match their condition. Every constitution has open ended provisions. Catholic understanding of a constitution, on the other hand, provides the flexibility of it by virtue of interpretation. In catholic understanding constitutions are never determined therefore we are unable to judge legitimacy through their content. The current contents do not tell us about the future.¹¹³ Only because constitution is a moving target people not only disagree about the content, but they also disagree how to interpret the constitution in the future because no body knows what a future holds.¹¹⁴

Either way proves against legitimacy. In both cases the constitution will be too thin or too thick. If it is too thick, then it will not be able to command the assent of every one because it is likely that some people will find the constitution does not match their minimum conditions of legitimacy. If it is too thin, people will not know what they are consenting to.¹¹⁵

An alternative idea is proposed by Jack M. Balkin. He proposed that judgments of legitimacy are grounded in faith about the future in addition to what the current contents provide. He stressed faith in the future as grounds of legitimacy in a sense

¹¹² Frank I. Michelman, *faith and obligation, or what makes sandy sweat?* 38 Tulsa law review, (2002-2003).

¹¹³ Id.

¹¹⁴ Id.

¹¹⁵ Id.

that legitimacy requires members of the community have faith that the system will remain sufficiently acceptable for them. Even more optimistically they need to have faith that things will get better in the future.¹¹⁶ It is a matter of a given community to judge whether it has that faith or not. This suggestion seems to be warranted by the aggregation of multiple perceptions of faith each individual may reflect.

As a matter of conclusion, I have tried to indicate that establishing the legitimacy of a constitution through its contents suffers from troubles. Hardly is it possible to be effective in achieving legitimacy especially on the face of failures to include what it ought, as in the case of Amhara sub national constitution. It faces the difficulty of being legitimate.

¹¹⁶ Jack M. Balkin, *respect-worthy: Frank Michelman and the legitimate constitution*, 39 Tulsa law review, (2004).

3.1.4 Legitimizing a constitution by virtue of its authors and subjects

Very close relation ship is observed between consent and contract. Contracts are never enforceable if they are found to have been lacking consent. In other words contracts can not be formed with out consent. But here for the sake of emphasis I want to state them separately. This will help me to consider consenting to a constitution with out establishing that it is a contract.

3.1.4.1 Is a constitution a contract that binds all?

If one ever assumes a constitution is a contract, one must decide the parties to such a contract. If it is a contract, then between who? Several contractual relationships can be assumed. A constitution may be a contract between the people of a country. It may also be a contract between the government and the people. Finally, contractual relationships may be assumed between the makers and the people, if at all makers are not the people.

A contract and a constitution

A contract is freely chosen obligation.¹¹⁷ It is freely chosen because parties to a contract have the right not enter such an obligation. In effect contractual agreements are preconditioned by consent of the parties. This is an established legal rule and fact in law of contracts that govern private relationships. The Ethiopian civil code stipulates to the effect that no valid contract shall exist unless parties give their consent that is sustainable at law. It is dependent on consent of the contracting parties. Not only are parties required to give their consent, but the consent must also be sustainable at law. That means the consent must be free from defects. Consent must be free from mistake, deceit, or duress.¹¹⁸ And it is the existence of such consent that makes the contract legally binding. The showing or the existence of consent is sufficient to obtain the enforcement. Consent looks for the manifestation of intention and concerns with the issue of individual will and autonomy.¹¹⁹

¹¹⁷ Randy E. Barnett, *a consent theory of contract*, 86 Columbia law review, (1986).

¹¹⁸ The civil code of Ethiopia article 1678, 1679, and 1696 – 1707.

¹¹⁹ Randy Barnett, *supra* note 87.

How ever, one who claims constitutions are contracts (it does not matter between who) can not easily settle all the issues. Randy E. Barnett identifies similarities between contracts and constitution. Accordingly, both involve the use of writings to communicate a discernible meaning that is supposed to remain the same until it is properly changed. Meanings can be established both from expressed and implied intentions. With this similarity in mind, how ever, constitutions are not and can not be founded on unanimous consent unlike contracts to which all parties must manifest their assent. More over, contracts provide relationships based on private law, while constitutions are created to provide public law that binds those who are not consented. Further more, contracts are designed to last for a relatively limited length of time, where as constitutions are expected to last indefinitely.¹²⁰

There fore, it is hardly possible to conclude that constitutions are contractual arguments. Even if constitutions seem like contracts, they are not the one.¹²¹ More importantly, they are not contracts, because they lack unanimous consent of all the persons on whom they are imposed.

Having said the above let me turn to the regional constitution of Amhara whether it can be a contract or not. If it is, between whom and on what terms of agreement, should also be solved on the move. Before that it is crucially important to make one point clear. Pursuant to the federal constitution, regional constitutions should be done by regional legislatures. Legislatures are there to promulgate laws that are necessary for the performance of the government. When the regional council of Amhara promulgates laws which are of ordinary (as should they be), their preamble never says that *we the people of Amhara*.... Again when a constitution is made by a given legislature, it means that it is made based on ordinary law making procedure. It must not claim to have been done by *the people of Amhara* which in fact is not. There fore what the constitution claims, as it is made by the people of Amhara region, is misleading.

Between who?

¹²⁰ Randy E. Barnett, *the misconceived assumption about constitutional assumptions*, 103 north western university law review, (2009).

¹²¹ Michelman, *supra* note 36.

Just to borrow from Michelman, let us assume that everyone in the region is required to come to a certain place in which he/she is provided with the copy of the constitution and asked to sign a contract. The question is what base would he/she has to sign it?¹²²

If the constitution of Amhara regional government is going to be a contract, it must be between: the people, or the government and the people, or the makers and the people. What ever the case may be, people can never be a party to a constitutional contract because the terms of a constitution, as one writer remarked, do not deal with citizens as contracting parties. The text contains descriptions of, and orders to, governmental entities and not of citizens. It does not specify any consideration which each citizen must furnish.¹²³ In effect the constitution binds only the government itself.¹²⁴ More importantly, citizens can be opposing parties to a constitutional contract. They must be one party who need to make contracts with another party. There fore, the people of Amhara region are not contracting parties to a constitution. The same is true as regards the other ways of forming contracts. One thing, how ever, may be established that legislatures are representatives of the people and the people (being represented) entered in to a contract with the government. Because we do not live in the world of direct democracy we give our consent when we vote for and elect our law makers. This does not work. Consider a candidate we voted for was defeated. Also consider a candidate we voted for votes against but the part he voted against is passed. Again consider people who abstain from voting altogether due to what ever reason in general and because they did not have a chance in particular.¹²⁵ How one can be bound by the decision made by a candidate that he never voted for? How one can be bound by a decision made by his candidate but voted against that decision? How can those who abstain be bound by what ever decision is made? Especially when they did not have the chance to vote, how can people be bound? These are the concerns that collapse the consent theory

¹²² Frank Michelman, *supra* note 112.

¹²³ Malla Pollack , *dampening the illegitimacy of the united states government: reframing the constitution from contract to promise*, Idaho law review, (2005).

¹²⁴ Randy Barnett, *supra* note 117.

¹²⁵ Randy Barnett, *supra* note 87.

through representatives whose effect can be summarized by the following sentences by the words of Randy E. Barnett.

- ✓ *If we vote for a candidate and he wins, we have consented to the laws he votes for, but we have also consented to the laws he votes against.*
- ✓ *If we vote against a candidate and he wins, we have consented to the laws he votes for or against.*
- ✓ *And if we do not vote at all, we have consented to the outcome of the process, what ever it may be.*¹²⁶

These facts give us the conclusion that consent through representation never works even in case of the constitution of Amhara regional government. We can not say that the people of Amhara regional government have consented when one of the three situations that collapse the representation theory appears to accompany the voting process. Sure it does. We never expect all people to unanimously vote for the representatives that made the constitution. Unanimity can never be achieved in constitutional decisions. And at the same time we are looking for unanimous consent by the people to establish the constitution as a contract. This happens to be a problem because the constitution is claiming to have been made by the people where as it is a fact that it is made by the law makers. ‘*We the people of the Amhara national regional state...*’ is therefore a “fiction”. The assent is more problematic because a lot of people could be assumed not to have been given a chance to vote for or against any candidate who made the decision on the constitution. Many people in the region live in rural areas where infrastructures are lacking. Most could not be reached to help them vote, at the time when they should vote for or against a candidate, some ten and fifteen years before. It can be assumed that only those who can be reached have been given the chance while it remains a fact that more than half of the people are rural based inhabitants. This is very true on the face of the poverty trap that the region and the country in general had faced (is facing and continues to face for some time to come).

¹²⁶ Ibid.

As we saw above, the constitution being a contract can not be assumed. It has to face the above challenges and it never passes the challenge. Even if we assume it is a contract, we could not determine the boundaries of the terms of agreements.

Contractual agreements can be expressed or implied. This is because words most of the time are indeterminate and may hold facts that are implied. When it is implied there must be meeting of mind between the parties that such implication is possible to be inferred. Constitutions also carry a lot of provisions that hold meanings that can be implied from the expressed words. But in order to enforce those implied meanings, we could not get what is implied by every party to a constitutional contract. Assuming that people are parties by what ever means, it is hard to decide what is implied by every individual. Meeting of every individual mind is unachievable.¹²⁷ Let me raise an example. I have tried to indicate above that the constitution of Amhara provided pre conditions to exercise the right of self determination including secession. Various meanings can be implied from the provision. It may mean that the right is conditional even in case of the federal constitution since no one can be seceded with out a good cause. It may also mean that the right is conditional as regards the region what ever the federal constitution may say. One can say that those in any case are not preconditions but simply procedural requirements. In this case how can we decide which one is assumed by the words of the constitution? The meaning we choose to have been assumed by the constitution must be anticipated by the parties, in this case the people. But we can not reach a conclusion. There is no meeting of mind.

To conclude, in general terms, constitutions are not contracts, and can never be contracts. Reasons can be summarized as follows.

- ❖ Because the contract under consideration is one that would bind the contractors coercion against others and accept it against themselves.¹²⁸
- Constitutions are violent and use coercive power to bind those who are not consented.¹²⁹

¹²⁷ Randy Barnett, *supra* note 117.

¹²⁸ Michelman, *supra* note 112.

¹²⁹ Malla Pollack, *supra* note 123.

- ❖ Since constitutions do not exhaust all issues meanings can not be determined easily. And even through interpretation and construction, meanings are elusive because we do not know what the future brings. People or any party to a contract can not rationally accept the obligation with out first having judged what the terms of the agreements are.¹³⁰
- ❖ Constitutions can never establish unanimous consent of the people. It is impractical and improbable.

There fore constitutions are not contracts. The constitution of Amhara regional government is not a contract.

3.1.4.2 Can we establish consent for obedience?

What way do we give our consent to a constitution, to be bound by it? The theory of consent is deeply propounded by John Locke. His classic famous book of *two treatise of government* is devoted to show that there is no divinity and descendant political power. But political powers are established by the consent of men uniting together for a common good of their own. Governments run their business based on the consent of the governed.¹³¹ Consent to be bound by a constitution is influenced by the lockean principle of the consent of the governed. The problem in modern times is how a political system secures the consent of the governed. When we claim the legitimacy of the constitution based on the consent of those against whom the document is imposed, the problem is how the constitution secures the consent of the people.

One way to secure such consent is, as stated above, through election. With their inherent defects elections are best mechanisms to reflect our choices, to give our consents to what ever those, who we elect, decides.¹³² Since it is impossible, on the face human beings commanding and inevitable disagreements, to have unanimous votes for any candidates, as John Locke also argues, the majority decision will prevail. Here comes the problem with consent. Those who are not consented will

¹³⁰ Michelman, supra note 112.

¹³¹ John Locke, *two treatise of government*, (1823) .

¹³² James A. Gardner, *consent, legitimacy and elections: implementing popular sovereignty under the lockean constitution*, university of Pittsburgh law review, (1990-1991) .

be bound by coercion. Is not this some kind of majority tyranny?¹³³ I have stated why this is so and I shall not repeat them here, but some points. When a person votes for a given candidate and he fails to win, or when a voted for candidate wins but voted against a given decision, is he not, by choosing to vote, consented to the outcome of the election, whatever it may be? Yes, he may be. But there are those who vote not because they consent to the outcome of an election, but they vote because they want to influence the result so that it is not as unfavorable to them as it might otherwise be. Voters may not always be interested in what the candidate may act in his office. In true elections voting influences choices and decisions even if the candidate we vote for fails.¹³⁴

Again in terms of those who abstain from voting, it can be said that they had the option to vote and they cannot complain. We must always remember that if consent is an expression of willingness to go along with something, it must also be possible to express unwillingness. '*I do not consent*' must be expressed and be responded with.¹³⁵ One issue that is very much clear with respect to the people of Amhara regional government, or any other people in the country, is that they are unaware of governmental and political activities of the country. Most of the people are illiterate, they cannot read, understand, and rationally decide. They have limited knowledge of political activities, legal systems, and constitutional practices and so on. I dare say that most voters do not have the knowledge. How one can votes, consents and decides when he does not know? After all, how the consent can be viable? Consent theory has to resolve such issues with a great concern.

Other way to secure consent is residency. This is a "love it or leave it" version of consent. It presupposes that if you do not love the constitution, then leave the country. The idea is that by a mere fact of your presence in the country, you are bound by the constitution of that country. By deciding to live or remain in the country you are consenting.¹³⁶ What a puzzle for the people of a country like Ethiopia!

¹³³ Randy Barnett, *supra* note 87.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

How ever, great thanks to the federal system the people of Amhara may choose to leave the regional government if they hate the constitution. They may migrate to Oromia region, or Tigray, or to one of the other regions. No one knows what they feel about the constitution of the regions of which they are migrating to. But there are many problems in this regard. Language, culture and job opportunities are the crux of the problems attached to those choices. It is indeed a great problem in a country like Ethiopia where divisions based on language, identity, and culture are deep. And where it is not simple to accommodate such divisions. Let us assume, there fore, that all other regions are not satisfactory to the person who decided to leave Amhara region. Where would he go? Leave the country? Even if he is supposed to leave the region, who would require or ask him to leave?

Answering the last question gets us in to a “circular argument”.¹³⁷ Because those who demand the person to leave the region based on the justification of not consenting must have the initial authority to demand him. And it is that authority which is at issue. It is the constitution which entitles that authority which is at issue. A decision to stay can not be a source of their authority; neither can it be consent to a constitution. After all, remaining in the region is ambiguous.¹³⁸ It may not mean one is consenting. One may remain in the region because he only speaks Amharic, or because he has interesting job in the region. Or, in a deepest sense, he may not have the capacity and the desire to afford the cost of leaving. In any way, there fore, residence does not warrant that a person consents to a constitution. The other way of securing consent is acceptance, either expressly or tacitly, of the constitution.

3.1.4.3 Acceptance of the constitution and legitimacy

Acceptance can be manifested in two ways: expressly and tacitly. When it is express we no more tend to examine it. But when it is tacit problems can be envisaged. So, this part of discussion recognizes a willful express acceptance of the constitution as binding. We can, then, have consent that also makes any contractual agreements sustainable at law. How and when tacit acceptance becomes valid, if at all it is assumed to be valid?

¹³⁷ Ibid.

¹³⁸ Id.

First it is important to distinguish between acceptance that is tacit and rule of recognition.¹³⁹ Rule of recognition as propounded by different authors is a recognition that is given as to the existence of a legal regime. In our case rule of recognition works to claim that the constitution in fact exists. But the existence of a constitution does not mean that it is legitimate. However, it first needs to be recognized. Acceptance as a source of legitimacy envisages the fact that the dominant or core fraction of the society accepts the constitution as binding.¹⁴⁰ The manner of acceptance is not express. It is tacit because the people did not revolt, or because they would have left the country had they hated the constitution, or because simply they vow to the constitution since they have no choice.

One writer has provided that the people should accept and assumed to have accepted the constitution system because the constitution, rather than being a contract, is a promise. The promise is that the legal regime and the governmental activity will remain in the bounds of the constitution. According to this writer the people are not expected to know the contents of the constitution to accept it based on what it promises.¹⁴¹

The fact that the dominant or core fraction of the society is assumed to have accepted the constitution is acquiescence. Even acquiescence most of the time involves unwillingness. Therefore, I favor the argument that such acquiescence is essential to recognize the existence of the constitution but it is not enough to obtain the legitimacy of it. One clear reason is that acquiescence is not and can not be unanimous consent.¹⁴²

The people of Amhara regional government, sharing similar political make up with the rest of the people, are unaware of the legal and constitutional system. If any person in Ethiopia knows the existence any constitution, it should be the federal constitution. Even the federal constitution is well known only by some (higher) politicians, lawyers, and other affiliated scholars. Regional constitutions receive no attention at all. Though empirical research is necessary to prove the same, I dare say

¹³⁹ Ibid.

¹⁴⁰ Michelman, *supra* note 36.

¹⁴¹ Malla Pollack, *supra* note 123.

¹⁴² Randy Barnett, *supra* note 87.

that most people in Amhara region do not know the existence of the regional constitution, they do not understand it if they know its existence. So, can we validly claim tacit consent is given to the constitution? The people are silent because they do not know the existence. They are silent because they do not understand what it means, if they know. Not only should they know its existence, but, I think, they should understand what it says. What if most of the people came to understand that what is unconditional right by the federal constitution, which is supreme, has become conditional by their regional constitution? It is the fundamental right that kept them with in the union.¹⁴³ It is the very reason people have fought for against a very repressive regime. Simply because the people did not complain or reject the constitution, when they cannot, acquiescence or tacit acceptance should never amount to consenting to a constitution.

There fore, such reasons are clearly against acquiescence in the case of Amhara regional constitution. We cannot prove the people have accepted the document. Hence, we cannot reduce *zero or very little* acceptance to legitimacy.

¹⁴³ Some arguments are raised to the effect that most nations, nationalities and peoples are with in the federation because their right to self determination including secession is recognized and respected. *For more see* Assefa Fiseha: federalism and the accommodation of diversity in Ethiopia: a comparative study (2007).

3.1.5 Constitution making process and legitimacy

How the constitution is made equally matters with what it says. The making process has become the essential element for the legitimacy of the final document.¹⁴⁴ As the Nigerian writer remarked, the constitution making process is “critical to the strength and, *acceptability and legitimacy* of the final product”. In addition he tried to distinguish a process led and imposed constitution. Both have their own consequences that an imposed constitution will fail “to serve as compacts for managing a democratic system”. It will lack legitimacy even if it appears to be a legal document.¹⁴⁵ None of these, however, is to deny the success of some imposed constitution as in the case of Germany, Japan and the same. They have their reasons behind.¹⁴⁶ There are two approaches of how a constitution is to be made: traditional approach, and a new trend of making called ‘new constitutionalism’.

3.1.5.1 The traditional approach

According to this approach, a constitution is an act of completion resulted from a negotiation by appropriate representatives. It is perceived as concluded, signed and observed.¹⁴⁷ As Vivien Hart and others well explained, it is the making of the United States constitution that marked the beginning of traditional approach. As to them the United States constitution is made by a hand picked elite group to provide with settlement of conflicts and inaugurating a new regime of powers and rights. The final document is a final settlement or a social contract in which basic political definitions, principles and processes are agreed, as is a commitment to abide by them. Sam Brooke characterized the making of the United States constitution as “a very elite-driven enterprise, focusing far more on stability than on such things as human rights, or even participatory democracy”. He well remarked that it is debatable whether the United States approach, regardless of the outcome, is considered to be a good approach in modern times. Nevertheless, the constitution of

¹⁴⁴ Hart, *supra* note 22.

¹⁴⁵ Julius, *supra* note 27.

¹⁴⁶ Yash Ghai and Guido Galli, *Constitution building processes and democratization*, international institute for democracy and electoral assistance, (2006).

¹⁴⁷ Tesfatsion Medhanie, *constitution making, legitimacy and regional integration: an approach to Eritrea’s predicament and relations with Ethiopia*, DIIPER research serious, working paper no 9, (2008).

United States and others that share similar making processes have created a very stable democracy and constitutional system.¹⁴⁸ It is not without truth, therefore, that some argue the making process is important, but not all important.¹⁴⁹ However, the statement by Sam Brooke, that “it is debatable whether the United States process would be considered a good approach”, on the face modern democratic practices and sovereignty of the people, is worth considered. Traditional process is accompanied by secrecy and non participatory negotiations by some elite representatives. There has been considerable distrust of the direct engagement of the people and about their ignorance of the purpose, form and structure of state power, despite the fact that the people are sovereign.¹⁵⁰

3.1.5.2 New constitutionalism, the modern approach; democratic constitution making

“Often, if engagement of the people is desired, the only alternative is their direct participation, in slums, villages and small towns.”¹⁵¹

The world changes over time. The last two decades brought a new approach towards constitution making which centered up on democratic participation, sovereignty of the people, and acceptability of the document. They call it ‘new constitutionalism’.

New constitutionalism is based on the idea that the constitution must have the support of the people for it to be legitimate. If it is not legitimate in such a way, there is no assurance that it will finally be accepted and internalized. Achieving this kind of legitimacy requires the application of the ideas of democracy in order to properly involve the people in the constitution making process.¹⁵² In addition, some authors, referring it as ‘conversational constitutionalism’, characterize this approach as a perception of ‘a continuing conversation between the elites of a given society and the population’, as it is carried on by all the stakeholders. It is a conversation in

¹⁴⁸ Sam, supra note 21.

¹⁴⁹ Laurence & Thomas, supra note 11.

¹⁵⁰ Yash and Guido, supra note 146.

¹⁵¹ Id.

¹⁵² Sam, supra note 21.

continuity with time and is ‘open to new entrants and issues’ to provide ‘a workable formula that will be sustainable rather than assuredly stable’.¹⁵³

According to this new paradigm, Vivien Hart describes, the elite made constitution will lack the crucial cultural element of legitimacy because the process, not the final document is flawed. This is because legitimacy is justified by participation of the people. Yash and Guido argue that if people have participated, they are more likely to be committed to it, even if they do not understand the process and their participation ceremonial.¹⁵⁴

New constitutionalism, in effect, aspires to limit the appearance of *incumbent/occupier* dominance. Dominance of the process by incumbent party or government, and other actors participating in the making, de-legitimize, and breed distrust over, the constitution.¹⁵⁵

It is true that a democratic constitution is no longer simply an establishment of democratic governance. Democratic participation is no longer simply a process of casting votes and elects representatives, and decides by referendum when necessary. It requires a constitution that is made in a democratic process. The constitution needs to reflect the needs and priorities of the people, not simply through democratic representation, but by directly participating and involving the population. Through commonly shared authorship, such a claim of participation cultivates a sense and belief of “ownership” over the document.¹⁵⁶ A document resulted from such a process is worthy of reverence, shield against violators, and commitment up to death by the people. The reason is simple, because the people are the owner of the constitution. People should make their own constitution as a right and as a moral command because the people, always, are sovereign powers.

The process

¹⁵³ Tesfatsion, supra note 147.

¹⁵⁴ They raised an interesting example of the South African people carrying the constitution with their pocket as their guards against officials that violate their rights. Yash and Guido, supra note 146.

¹⁵⁵ Tesfatsion, supra note 147.

¹⁵⁶ Hart, supra note 22.

In general terms the components of the making process can be summarized as follows.¹⁵⁷

- Agreeing on a broad set of principles and goals. Principles and goals are the ground works for the making of the main constitution. Sam Brooke calls them as ‘immutable principles’ which the main constitution making enterprise should be bound to observe.¹⁵⁸
- Agreeing on institutions and procedures for making the constitution. This involves the choice of who should be in charge of the whole process of the making. As will be discussed, the making requires the involvement of different process that should be followed. People should decide which institutions best for the purpose. Constituent assemblies, legislatures, constitutional commission are among those that may require consideration. Besides, the procedure to be followed by such an institution requires pre making settlement.
- Preparing people for consultation by providing civic education on the process, country’s constitutional history, and constitutional options. This is very essential especially on those countries where democracy is a novel concept.¹⁵⁹ Identification of stake holders is worth mentioning.
- Consulting people (including, where relevant, Diaspora). When consulting people, the mode of consultation is as important as the consultation itself. It must be done so hard to reach all necessary stake holders, what ever it takes. The consultation must transcend ceremonial values and people, more than voting, require having their own inputs in the document.
- Consulting experts. Persons and necessary institutions must involve with their constructive additions to the document.
- Informing the process of comparative experience. It is inevitable that comparative experience benefits the process and the outcome. The question, how ever, is when, what, and how the experience should be considered.

¹⁵⁷ The summary is provided by Yash Ghai, the role of constituent assemblies in constitution making, institute for democracy and electoral assistance.

¹⁵⁸ Sam, supra note 21.

¹⁵⁹ Id.

- Analysis of opinions. The people's views must be integrated in the constitution, which is why consultation is necessary. Only consulting and listening to them is insufficient unless their views are taken seriously.¹⁶⁰ Care must be taken not to misrepresent any fact communicated by the people.
- Preparing a draft constitution. After consultation of experts and the people in general, the organ responsible to prepare a draft document must come up with a document that reflects the consulted choices and analyzed facts.
- Public discussion of the draft constitution. The draft is a kind of show that the constitution may have such and such substances. The people must also be given a chance to examine whether their ideas are well analyzed and included in the draft. Accordingly, the draft paper must be printed in newspapers in enough quantities and should be made available to all people free of charge. Necessary period of time must also be allocated.¹⁶¹
- Preparing the final version. This follows the correction, if any, of mistakes and errors, or misrepresentation of facts in the draft.
- Enactment in to law of the final version. Manner and procedure of enactment should in the first place be decided. Who shall have the final authority to decide on the document is the crux of enacting the constitution.
- Enactment may require referendum, parliamentary decisions or any other mechanism. If referendum, so that must be conducted. Referendum should be mandatory because at the end the constitution is for the people and the people should not be bound by the decisions of the other organs, but themselves. It is also one way of checking the process and the content of the final document.¹⁶²
- Bringing in to force and implementing the constitution. Bringing in to force is a matter because some constitutions which are finalized have never come in to force. The case in point is the Eritrean constitution that requires the

¹⁶⁰ Louis Aucoin & Kibreab Habtemichael, the consultation process, presented in conference on constitutional development, (2001).

¹⁶¹ Julius, supra note 27.

¹⁶² Asgeir, supra note 26.

assent of the president to come in to force but ever hesitated to do so. Implementation includes the dissemination of the constitution after it is finally made. It must be available to all. Civic education is necessary to continue a constitutional conversation. In fact the Nigerian writer remarks the importance of an independent institution that is responsible for civic education.¹⁶³

When deeply discussed, the above components of the process are crucial at every stage of the process and involves a commitment towards fulfilling requirements mandated by the component of every process.

Some concepts require a little clarification. Who will be in charge of all the above process is a crucial question to a constitution making. I am afraid any defect in the process can be tolerated as far as we are conducting a democratic constitution making. Some choose to have a constitutional commission; others give the mandate to an ordinary legislature. But to some, legislatures are never appropriate organs. The most common organ for the purpose is constituent assembly. Things are never easy with regard to constituent assembly as well.

Constituent assemblies are best choices due to different reasons. But the most common reason is that there will be no other legitimate organ for the purpose. At large, a constituent assembly is regarded as ‘the gathering of the nation’. In turn, how ever, the strength and legitimacy of the constituent assembly lies in its inclusiveness. Members of a constituent assembly must be elected through general election. The election system must be representative of all that need to be included (in effect all the people).¹⁶⁴

As Jon Elster observed, constituent assemblies may have up stream and down stream constraints. In case of up stream constraints, the assembly will be required to follow procedures and substantive limits. Downstream constraints are characterized by requirement of ratification by an organ other than the assembly.¹⁶⁵ How ever, constituent assemblies should not be subjected to up stream constraints. Instead they should directly be elected by the population and freely engage in the process.

¹⁶³ Julius, *supra* note 27.

¹⁶⁴ Yash Ghai, *supra* note 157. Asgeir, *supra* note 26.

¹⁶⁵ Elster, *supra* note 18.

In addition, the existing legislature should not have any central role in the process and ratification of the constitution.¹⁶⁶ Therefore, legislatures are not appropriate organs in the constitution making process. Neither should they be allowed to influence, one way or the other, the responsibility of the assembly.

The other point is referendum. It should be mandatory. Even though the people elect constituent assemblies, it is not the decision of the assembly that should finally be ratified. Referendum is the final way of controlling the work of the assembly. In this regard downstream constraints are legitimate. The final say should belong to the people concerned.¹⁶⁷

As regards the process, Sam Brooke stated three basic factors that mark the success of the process. First, as it should be, there must be social inclusion in the process. In this respect Sam is being curious about the genuineness of the inclusiveness. Second, freedom of speech and expression must be ensured, without which participation itself proves nothing. Finally, there must be a general security that preserves the freedom of speech and expression, as well as inclusiveness. Without the existence of such security effective participation is far from being achieved, that in effect influences the success of the process.¹⁶⁸

Finally, if need be, mention is necessary to what one author called “the paradox of democracy”. The paradox signifies the idea that the present generation is to be bound only by the present decisions. The generation of the past can not decide constitutional settlements of the present as well as the future generation.¹⁶⁹ Fortunate enough, to day, however, the constitution making of Ethiopia as well as all the regional governments awaits the coming of another generation to deal with the paradox of democracy. The paradox of democracy in Ethiopia is a question reserved for tomorrow, not for today.

¹⁶⁶ Asgeir, *supra* note 26.

¹⁶⁷ *Id.* Sam, *supra* note 21.

¹⁶⁸ Sam, *supra* note 21.

¹⁶⁹ Asgeir, *supra* note 26.

3.1.5.3 The making of the Amhara regional government constitution

The federal constitution

I have described above that the federal constitution greatly matters in the making of sub national constitutions. Apart from observing the formal and substantive division of power, sub national constitutions are required to fulfill two procedural requirements. First they have to be made by the state legislature. Second, they have to remain consistent with the words of the federal constitution.

Again, I have described that the constitution of Amhara regional government is made by the council (which is the legislature). It is by virtue of the federal constitution that the constitution is made by the regional council. However, I have indicated also, this procedural requirement ordering that sub national constitutions have to be made by the regional council has the capacity to exclude participation of the people. In wider sense, it is against the emerging international right of the people to participate and make their own constitution. With this idea in mind it is important to examine the making process of the Amhara regional constitution in order to assess its legitimacy.

Complying the process

Constitutions, in order to be fully legitimate and acceptable, must be made fulfilling the requirements of the above process I have described. Whether the making of the constitution of the Amhara regional government complied with all of the process requires me to raise some substantial issues in the process.

Constituent assembly is crucially necessary to be in charge of the whole process of constitution making. The members of the assembly need to be directly elected by the people through general election. Legislatures, at any cost, should stay away from the process. If at all they should involve, they must not be given the central role in the process.¹⁷⁰ Jon Elster observed that as far as any institution is allowed to involve in the making process, the constitution finally is influenced by the personal and institutional interests of those involved.¹⁷¹ Moreover, the composition of the legislature is simply a result of majority democracy. It is inevitable in a majority

¹⁷⁰ Ibid.

¹⁷¹ Elster, *supra* note 18.

democracy that substantial number of people will be out of politics. Constitution making, on the other hand, must involve the whole people, not only the majority. In effect, constituent assembly is the gathering of a nation.¹⁷²

Contrary to the above assertion, the constitution of the regional government of Amhara is made by the legislature. No constituent assembly was established for the purpose, but only the regional council (the legislature). The problem is two fold. On one hand, the main source of the problem is the federal constitution. On the other, it in effect is made by the legislature only.

Consultation is the other big issue in the making process. Consultation involves gross participation of the people to make their own inputs in the outcome of the document. After all, the constitution is to be made for the people, and they should do it so. However, Tsegaye Regassa argues that it is clear that not many people and stake holders are made part of the drafting, deliberation and adoption process.¹⁷³

Most, if not all, of the people are excluded from the making process. Consultation and participation by the people is never a secret. Every body would have known had there been a sort of public participation. The main idea behind democratic participation in the constitution making is that the people should take control of the constitution making. That is not what happened in our case. I insist that only very little people know the existence of the constitution, let alone to claim that the whole people have participated.

Constitutions are for the people. Final authority to decide on the document should be reserved to the people. Therefore, constitutions must be ratified by referendum. As indicated above, referendum is the main mechanism by which the people check the whole process and the final document. Contrary to this idea, the constitution of the regional government of Amhara has been adopted by the regional council. Even the people are excluded from ratifying their constitutions.

In general, without going details of the process, the making process of the Amhara people constitution has failed on vital accounts. Participation, constituent assembly, referendum, and other components of the process have never been observed. In

¹⁷² Asgeir, supra note 26.

¹⁷³ Tsegaye, supra note 5.

conclusion, I have taken consideration of what Tsegaya remarked. ‘Most of them (the regional constitutions) might have probably been drafted and adopted under the supervision of one dominant political party of the states.’¹⁷⁴ Here the crisis group report is worth mentioning. Every day politics in Ethiopia, under the Ethiopian people revolutionary democratic front, is marked by top-down policy making.

*Popular participation is restricted, decisions are monopolized
by the de facto one-party state, and there is little local room
for deviating from federally fixed policy priorities.*¹⁷⁵

There fore, the constitution of the people of Amhara might have been made under such circumstances. If such is the case, the result will be what Tesfatsion Medhanie remarked as ‘de-legitimizing of the constitution’. No party or interest should have a dominant voice. The appearance of incumbent/occupier dominance must be limited. In the absence the constitution will loose its legitimate value.¹⁷⁶

¹⁷⁴ Ibid.

¹⁷⁵ International crisis group, Ethiopia: ethnic federalism and its discontents, Africa report no 153, (2009).

¹⁷⁶ Tesfatsion, supra note 147.

Conclusion and recommendations

Conclusion

The above study has assessed the legitimacy of the constitution of the regional government of the people of Amhara in the Ethiopian federation. In this study legitimacy of the constitution is assessed based on theoretical frame works that in effect have the capacity, one way or the other, to influence the perception of the people concerned. Accordingly, the principle of legality is one way to establish legitimacy. Legality assumes that laws (constitutions) are valid and legitimate if they are made in a procedurally correct manner. Content is the other mechanism in a sense that the people will inevitably feel bound by the constitution if they found it to include what it should depending on the circumstances of the case. Further more, it is provided that a constitution can be a legitimate document based on the principle of contract, consent, and acceptance. Finally, a great concern is shown to establish the legitimacy of the constitution by its making process. From the above assessment the following conclusions can be drawn.

First, if legality means, as it is, fulfilling procedural requirements, then it is sufficient that a constitution making fails to satisfy a given procedure. Again, if legitimacy is to be established by legality, then a constitution will fail by failing to satisfy a given procedure. There fore, as I have provided above, I concluded that the constitution of the regional government of the people of Amhara fails to be legitimate by virtue of legality.

Second, even if it seems difficult to determine all peculiar substances that should be included in the constitution, it is difficult to maintain that it included what it ought to. A couple pf reasons here. First, the document fundamentally resembles the federal as well as other regional constitutions. Second, in some instances it did not include some concerns of the region. It is difficult for the constitution to escape the danger though it seems hard to conclude it is illegitimate in this concern.

Third, a constitution can not be a contract. Neither can one establish consent and acceptance towards the constitution. It is true on the face of the chances for political

awareness and participation by the people of the region. There fore, the constitution falls short of legitimacy through consent, contract, and acceptance.

Finally, the making process and a constitution are strongly connected. For that matter, a constitution legitimated by its making process may satisfy many of the above theories. But the constitution could not comply with some fundamental procedures like the requirements of constituent assembly, referendum, the absence of the legislature, and civic education.

Generally, therefore, the constitution of the regional government of the people of Amhara falls short of being a legitimate document. With this general conclusion in mind, the following recommendations are worthy of consideration.

Recommendations

1. The constitution needs to be revisited. However, the region does not require to begin from the scratch, it can work on the present text as a ground. In the remaking process the appropriate components of the process have to be observed. Generally speaking, the making can be divided into three. The pre making part involves making the people alert about the constitution system and their role in the making process. The main making involves all the processes the components of which are dealt above. With democratic constitution making the document will be produced. Finally after the document is written it necessarily has to reach the people. The people must be able to understand its words and meanings so as to abide by it. The making should not assume consent. Acceptance itself is connected to consent. Therefore, democratic constitution making rectifies such problems. If people participate, they feel they gave their consent and they will accept its respect worthiness.
2. Public education is indispensable. The people of the region need to be aware of the constitutional experiment of the region. They have to know the benefit of the constitution (and having a constitution) and the role they should have in the constitutional system.
3. In connection with the above, regional constitutions in general the constitution of Amhara region in particular have to receive proper scholarly attention from law schools, political institutions, and organizations that work on constitutional development and democracy. Much is expected from the government of the region in this respect. It has to promote and fund researches and scholarly literatures that should be necessary.
4. Constitutionally created independent institution is important. This will review the constitution periodically, and conduct researches when changing circumstances require. It can be a constitutional review commission. Or it can be a commission that study concerns of

constitutional development in the region. What ever its nomenclature may be the purpose is to make the region stay focused on the constitutional experiment.

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