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COLLEGE OF LAW AND GOVERNANCE STUDIES
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**THE 2018 TRANSITION OF ETHIOPIA TOWARDS
CONSTITUTIONALISM: OPPORTUNITIES AND CHALLENGES**

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The 2018 Transition of Ethiopia towards Constitutionalism: Challenges and Opportunities

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DECLARATION

I, Mihiret Dereje Tiruneh, hereby declare that the thesis entitled '*The 2018 Transition of Ethiopia towards Constitutionalism: Challenges and Opportunities*' is my own work and it has not been submitted for any degree or examination in any other university. I also pledge that all the sources I have used or quoted in any form are duly acknowledged.

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Table of Contents

ACKNOWLEDGMENT	i
Table of Contents.....	ii
LIST OF ACRONYMS.....	iv
KEY WORDS.....	v
Abstract	vi
CHAPTER ONE	1
INTRODUCTION	1
1.1 The Research Background and Problem.....	1
1.2 Literature Review	2
1.3 Research Objectives	4
1.3.1 General Objective	4
1.3.2 Specific Objectives	4
1.4 Research Questions.....	4
1.5 Significances of the Study	4
1.6 Scope of the study	5
1.7 Limitations of the Study	5
1.8 Research Methodology	5
1.9 Thesis Organization.....	5
CHAPTER TWO	6
POLITICAL TRANSITION AND CONSTITUTIONALISM IN PERSPECTIVES	6
2.1 Political Transition	6
2.1.1 Patterns and Characteristics of Political transition	8
2.2 Constitutionalism during Political Transition	11
2.2.1 Functions of Constitution in Transitions	14
2.2.2 Rule of Law Shortfalls in Transition	16
2.2.3 Transitional Justice	19
2.2.4 Election	22
2.2.5 Factors that Contribute to and Impede Political Transition.....	24
CHAPTER THREE.....	27
OPPORTUNITIES AND CHALLENGES OF CONSTITUTIONALISM IN THE 2018 TRANSITION OF ETHIOPIA.....	27
3.1 Historical Perspective of Political Transitions in Ethiopia	27
3.2 Transitions and Constitutionalism.....	29

3.3 Features of the 2018 Transition of Ethiopia.....	31
3.4 The Opportunities and Challenges of the 2018 Transition towards Constitutionalism	36
3.4.1 The Opportunities of the 2018 Transition of Ethiopia.....	36
3.4.1.1 Free Media.....	37
3.4.1.2 Gender Equality	38
3.4.1.3 Political Participation.....	39
3.4.1.4 Accountability	40
3.4.1.5 Institution Building.....	42
3.4.2 The Challenges of the 2018 Transition of Ethiopia	43
3.4.2.1 Internal Displacement.....	43
3.4.2.2 Gross Violation of Rights	44
3.4.2.3 Peace and Security	45
3.4.2.4 Law Reform	45
3.5 Periodic Election	46
3.6 Transitional justice	48
CHAPTER FOUR.....	49
CONCLUSION AND RECOMMENDATION	49
4.1 Conclusion	49
4.2 Recommendation.....	51
Bibliography	52

LIST OF ACRONYMS

FDRE	Federal Democratic Republic of Ethiopia
TPLF	Tigray Liberation Front
ANDM	Amhara National Democratic Movement
OPDO	Oromo People Democratic Organization
ADP	Amhara Democratic Party
ODO	Oromo Democratic Party
ONLF	Ogaden National Liberation Front
OLF	Oromo Liberation Front
EPRP	Ethiopian People Revolutionary Party
AESM	All Ethiopians Socialist Movement
ESAT	Ethiopian Satellite Television
OMN	Oromo Media Network
HoF	House of Federation
HPR	House of Peoples Representatives
CPJ	Committee to Protect Journalists

KEY WORDS

Constitutionalism

Transition

Reform

Abstract

This thesis aims at addressing questions such as what is political transition, what is constitutionalism and what is the nexus between transition and constitutionalism. It answers whether there is political transition in Ethiopia in 2018 and addresses the challenges and opportunities of the 2018 transition towards constitutionalism. Apart from theoretical explications, the discussion is backed up by examination of the practical scenario of the country. Moreover, in addition to a discussion on the theoretical aspect of transition and constitutionalism, the thesis examines how transitions should be governed for successful democratization.

After discussing all the above issues, the author argues that, in 2018 a reform type political transition has taken place in Ethiopia. The reform brought both opportunities and challenges towards ensuring constitutionalism. The author recommends the government should go forward in the positive beginnings and take legal action against the unwanted outcomes of the transition to ensure constitutionalism.

CHAPTER ONE

INTRODUCTION

1.1 The Research Background and Problem

In the late 1980's and 1990's many countries have undergone political transition. A transition is a time span between one political regime and another or the intermediate phase that begins with the dissolution of an old regime and ends with the establishment of a new one.¹

Since the monarchical system, Ethiopia undertook two transitions. The first transition has taken place by the *Derge* and the second one was the transition by the EPRDF and different opposition parties which took over power from the military regime. Though the country hosted significant transitions, it is yet to build democratic system. For the past three decades, under the leadership of EPRDF, human right violation, abuse of power, non-adherence to the rule of law and so many incidents contrary to the constitutional guaranteed principles have been encountered.

Currently, Ethiopia is experiencing a reform type transition by reform oriented ruling party members. Since the formation of FDRE, TPLF has been the dominant ruling party in the EPRDF. Due to so many protests in different parts of the country and the internal divergence of the ruling party, in 2018 the reformist soft liners took the federal power; as a result the country is experiencing another political transition. Following the coming of the reform oriented leaders, different incidents have taken place which can both flourish and negatively affect constitutionalism. The return of exiled political groups, opening of the media, the release of jailed journalists and political prisoners, and the emergence of private media can be mentioned as some of the measures taken in this period. These measures have a pivotal role to foster constitutionalism. On the other hand massive human right violations, displacement, non-adherence to the justice system, selective prosecution and interstate tension has been encountered.

The power shift from hardliners to the reformist soft liners promised ensuring constitutionalism. Some of the measures also manifest the zeal of the reformists to democratize the country contrary to what has taken place in the last three decades. On the other side owing to the nature of the transition and the deeply rooted authoritarian system, massive human rights violation and lawlessness observed. These phenomena go against the

¹ Sujian Guo & Gary Alex Stradiotto, 'Democratic transitions: Modes and Outcomes', (Routledge New York 2014), 1

constitution and the reform agenda. The nature of the transition, its final outcome, rule of law, human rights violations, the measures taken regarding opposition political parties and journalists, the widened space for media and so many related occurrences capture the attention of lawyers, politicians, and people in the academic circle, national and international community.

The author, being part of the academic community, is interested to deal with the unique feature of the 2018 transition and the opportunities and challenges it brought in terms of ensuring constitutionalism and the potential threats for the possible failure of the transition.

Although so many literatures are being written regarding the political transition in this period, a few of them tried to address the issue of constitutionalism. With a view to fill this gap, this thesis evaluates the opportunities and the challenges the 2018 transition has brought in terms of ensuring constitutionalism.

1.2 Literature Review

In the context of Ethiopia, there are only handful scholarly writings on the subject of transitions. To be specific, “The Lost Opportunity for Ethiopia: The Failure to Move toward Democratic Governance”² Theodore M. Vestal; analyzes the events of the five years period that led to the rise of the Derg and the following revolutionary changes and the missed opportunities to bring about peaceful change in Ethiopia’s governance. “Ethiopia’s Dilemma: Missed Chances from the 1960s to the Present”³ by Donald N. Levine; He reflect upon the five opportunities that were mishandled, the abortive coup of December 1960; the ferment of 1974; the regime change of 1991; the Eritrean war of 1998; and the May 2005 national election. “Ethiopian Transition: Democratization or New-Authoritarianism”⁴ written by Marina Ottaway deals with why the transition from the *Derge* to EPRDF failed to democratize the country. “Ethiopia’s Extended Transition”⁵ written by John W. Harbeson,

² Theodore M. Vestal, “*The Lost Opportunity for Ethiopia: The Failure to Move toward Democratic Governance*” (International Journal of African Development 2013)

³ Donald N. Levine, “*Ethiopia’s Dilemma: Missed Chances from the 1960s to the Present*”, (International Journal of African Development) <http://scholarworks.wmich.edu/ijad>. Accessed on 10/11/2019

⁴ Marina Ottaway, ‘*The Ethiopian Transition: Democratization or New Authoritarianism?*’, (Michigan state University Press 1995)

⁵ John W. Harbeson, “*Ethiopia’s Extended Transition*”, (The Johns Hopkins University Press 2005) Journal of Democracy

talks about the 2005 election of Ethiopia; the emergency of strong opposition parties, how EPRDF won the election and the hope to democratization.

“Reflections on Expanding Ethiopia’s Democratic Space Aspirations, Opportunities, Choices”⁶ written by Mohamed Salih and others. It is a reflection on expanding the democratic space by three authors towards the changes after the coming of the new Prime Minister Abiy Ahmed. It discussed the reasons for the change, the opportunities and the choices the government needs to make towards ensuring democracy.

“Closing the Transition: The May 1995 Elections in Ethiopia”⁷ written by Terrence Lyons, discusses as the transition from *Derg* began with the inclusion of different groups but ended with dominant one single party EPRDF. And in particular on transitional justice aspect beside journal articles written by Jima Dilbo Denbel entitled, ‘Transitional Justice in the Context of Ethiopia’⁸ discusses how Ethiopia dealt with the transitional justice system after the 1991 transition and suggested as the country should have followed holistic and inclusive transitional justice approach for the past human right violations.

‘Accountability for crimes of the past and Challenges of criminal prosecution: the case of Ethiopia’⁹ written by Dadimos Haile, ‘The Ethiopian red terror trials: Transitional Justice Challenged’¹⁰ by Kjetil Tronvoll and ‘Apology and trial: The case of Red terror trials in Ethiopia’¹¹ written by Girmachew Alemu. It deals with the red terror trial and argues as prosecution should be taken as transitional justice system without neglecting the apology of former regime officials should not be disregarded. A book by Alebachew Birhanu Enyew on titled ‘Transitional Justice and the Creation of a Human Rights Culture in Ethiopia’¹², which deals with different approaches of transitional justice system and how Ethiopia deals with the past human right abuses and the challenge faced to create human right culture.

However, the author of this thesis is convinced that these works do not fully address the objectives this paper aims to achieve, the opportunities and the challenges of the 2018

⁶ Mohamed Salih, Andreas Eshete and Samuel Assefa, ‘Reflections on Expanding Ethiopia’s Democratic Space Aspirations, Opportunities, Choices’, (Friedrich-Ebert-Stiftung Addis Ababa 2018)

⁷ Terrence Lyons, ‘Closing the Transition: The May 1995 Elections in Ethiopia’, (the Journal of Modern African Studies 1996)

⁸ Jima Dilbo Denbel, ‘Transitional Justice in the Context of Ethiopia’, (International Letters of Social and Humanistic Sciences 2013)

⁹ Dadimos Haile, ‘Accountability for crimes of the past and Challenges of criminal prosecution: the case of Ethiopia’, (2000), Leuven University press, Belgium.

¹⁰ Kjetil Tronvoll, ‘The Ethiopian red terror trials: Transitional Justice Challenged’, African Issues.

¹¹ Girmachew Alemu, ‘Apology and trial: The case of Red terror trials in Ethiopia’, (African Human rights Law Journal 2006)

¹² Alebachew Birhanu Enyew, ‘Transitional Justice and the Creation of a Human Rights Culture in Ethiopia’, (University of Oslo 2008)

transition of Ethiopia in terms of ensuring constitutionalism. None of the works tried to determine constitutionalism during political transitions. Moreover, these works were written before the 2018 political transition of Ethiopia except the two. Therefore, the author believes that there should be further research.

1.3 Research Objectives

1.3.1 General Objective

The main objective of this thesis is to examine opportunities and challenges the 2018 transition of Ethiopia brought towards ensuring constitutionalism.

1.3.2 Specific Objectives

The following are the specific objectives of the thesis. These are:

- I. Exploring the relation between transition and constitutionalism.
- II. Examining the opportunities and challenges brought by the 2018 transition of Ethiopia in terms of realizing constitutionalism.

1.4 Research Questions

The following are the research questions of this thesis:

- I. What is the relation between political transition and constitutionalism?
- II. What are the opportunities and the challenges of constitutionalism in the 2018 transition of Ethiopia?

1.5 Significances of the Study

The thesis has the following main significances:

- I. This thesis shades a light as to how political transitions should be understood.
- II. Since this paper determines the existence or otherwise of political transition in Ethiopia during 2018, it will mention possible potential opportunities and challenges towards ensuring constitutionalism.

1.6 Scope of the study

The scope of this thesis is delimited to the 2018 transition of Ethiopia mainly focusing on the opportunities and the challenges it brought towards constitutionalism.

1.7 Limitations of the Study

The major problem that the author faces is in relation to literature. Although there are some works on the general notion of Constitutionalism and political transitions in Ethiopia's in different times, the writings on the opportunities and challenges of constitutionalism in 2018 transition of Ethiopia are very limited.

1.8 Research Methodology

The research will employ a combination of different approaches. Based on the research objectives and questions both doctrinal and qualitative data will be accessed. In order to deal with the theoretical issues of constitutionalism and transition doctrinal approach is employed. The primary source of data includes the FDRE constitution and other relevant Ethiopian laws. Secondary source includes relevant books, articles, documents, journals, working paper, reports and websites of relevant international and regional institutions, etc.

Moreover, the study will involve qualitative method and gathering the primary data is possible through questionnaire. As far as the participants are concerned, based on random sampling method judges, public prosecutors, lawyers and legal researchers working in all regions of the country are selected as informants. Therefore, the researcher distributed questionnaires to the selected respondents regarding the opportunities and challenges the 2018 transition brought towards ensuring constitutionalism.

1.9 Thesis Organization

This thesis has four chapters. The first chapter sets out the context of the study. The second chapter looks into a thumbnail sketch of the political transition and constitutionalism. It tries to put it in perspective. Subsequently, the third chapter, having the second chapter as a background, explicates the opportunities and the challenges of constitutionalism in the 2018 transition of Ethiopia. Finally, the fourth chapter provides a conclusion and recommendations. The size of the thesis will be within the limit of 18,000 words including the footnotes and references.

CHAPTER TWO

POLITICAL TRANSITION AND CONSTITUTIONALISM IN PERSPECTIVES

Transition and constitutionalism are interrelated. Usually the constitutional canon is challenged by the transitional constitutionalism and the later changes the basic constitutional principles. Accordingly this chapter intends to put the political transition and constitutionalism in perspectives.

2.1 Political Transition

Political transitions have occurred in various regions around the globe such as Southern Europe, Latin America, Africa, East and Southeast Asia, Eastern Europe and the Middle East.¹³

The traditional doctrine of political transition is the shift from authoritarian regime to a democratic one.¹⁴ Mainly the aim of political transition is democratizing a system by changing the political regime.¹⁵ Yet the political transition may not bring about the intended democratic system; rather a political hybrid, something in between an authoritarian regime and a fully democratic system.¹⁶ It may also end with the consolidation of the authoritarian system.

Different scholars define transition in different ways. For some it is fundamentally a shift of power; others argue it is about a new state (state building); for others it is democratisation and redistribution of political power; while others are concerned about a new value system and state-society relations, of which human rights are a definitive element.¹⁷

For some scholars, political transition is just a shift from one regime to another regardless of its effect on democratizing the system. Transition refers to the intermediate phase that begins with the dissolution of an old regime and ends with the establishment of a new one.¹⁸

¹³ Sujian Guo and Gary Alex Stradiotto, *Democratic transitions: Modes and Outcomes*, [2016] 1 JCPS

¹⁴ Ingrid Nifosi, *A New conceptual Framework For Political Transition: A Case-Study On Rwanda*, [2005] 74 L'AFRIQUE DES GRANDS LACS.ANNUAIRE <http://www.ua.ac.be/objs/00111827.pdf>. accessed On 30/03/2019 8:08 pm

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Dirk Kotzé, 'Constitutionalism and Democratic Transitions: Lessons from South Africa', [2006] 83 FUP

¹⁸ Sujian Guo & Gary Alex Stradiotto, (n 13) 2

O'Donnell and Schmitter define transition as the interval between one political regime and another and is the installation of a new regime, whatever its type or nature is.¹⁹ They also define transition, as the introduction of dissolution of an authoritarian regime and the installation of some form of democracy or the return to some authoritarian rule or the emergency of a revolutionary alternative.²⁰ Or it can be expressed as the intermediate phase which starts from the adjournment of the old regime and ends with the establishment of the new one irrespective of liberalizing or democratizing the given state. This means transition doesn't necessarily result in democratization but there could be a probability of shifting to another authoritarian regime.

Scholars like Thomas Carothers, referred political transition doctrine as «transition paradigm»; any country shifting away from an authoritarian regime toward democracy is a country in transition.²¹ Similarly, democratic transitions consist of two simultaneous but to some extent autonomous processes: a process of dissolution of the authoritarian regime and a process of emergence of democratic institutions.²² This means political transition is a shift from authoritarian regime to a democratic one and the process presupposes democratizing the system.

States undergoing transition process may not end up in democratization. There will be a probability of transiting to another authoritarian regime or in between to authoritarian rule and a consolidated democracy or prolonged transition, which is termed as “gray zone”.²³ The “gray zone” is a political limbo in between an authoritarian regime and a consolidate democracy.²⁴ In countries under “gray zone” characterized by limited political space for the opposition parties, an independent civil society, regular elections alongside a low level of political participation beyond voting, elections of uncertain legitimacy, poor performance by the state, and frequent abuse of the law by governmental officials.²⁵

The transitional period is often associated with crafting economic models and institutional arrangements both of which could become patterns and norms that are difficult to change later.²⁶ Successful transitions encourage political stability, the rule of law and protected

¹⁹ O'Donnell, Guillermo and Philippe Schmitter. *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies*, (JHUP, Baltimore 1986) 6

²⁰ Ibid

²¹ Thomas Carothers, 'End of transition Paradigm', (JHUP, 2002) 6

²² Sujian Guo & Gary Alex Stradiotto, (n 13) 2

²³ Thomas Carothers, (n 21) 9

²⁴ Ingrid Nifosi, (n 14)

²⁵ Ibid

²⁶ Sujian Guo & Gary Alex Stradiotto, (n 13) 1

property rights, transitions marred by the suppression of competition will lead to political instability and likely a reversion to authoritarianism.²⁷

The transitional process involves different groups. It typically arises from warfare or internal social conflict, the main ways through which discontent for a given political regime erupts or is channelled into.²⁸ The actors of political transition are the ruling group and the opposition forces, although others, such as the international community or opposition groups residing abroad may play a significant role.²⁹

In general, having in mind the political oblivion of “gray zone” it is possible to conclude that political transition is the process of progressing from one regime to another regime despite the outcome of democratization.

2.1.1 Patterns and Characteristics of Political transition

Transition is a process. Different political actors have different attitudes toward the process of democratization.³⁰ Those who favour democracy from the government and opposition groups are called reformers or democratisers and democratic moderators, respectively.³¹ Those who are against the democracy in both the government and the opposition groups are called the stand patters and radical extremists, respectively.³² The relationship between the reformers and the stand patters in the government side and the moderators and the extremists on the opposition side has impact on the transition.³³ Transformation only occurs if the reformers are stronger than the stand patters and if the moderators are stronger than the radical extremists.³⁴ Though there is no one formula fits all mode or others best experience for transitions³⁵, states undergo transitions through different modes but two basic patterns.³⁶ The two patterns are transition from above and transition from below.³⁷ Transitions from above occurs when the

²⁷ Ibid 2

²⁸ Ingrid Nifosi, (n 14)

²⁹ Ibid. pg 81

³⁰ Samuel P.Huntington, ‘The Third Wave: Democratization in the Late Twentieth Century’, (Oklahoma 1991) 122

³¹ Ibid

³² Ibid

³³ Ibid 124

³⁴ Ibid

³⁵ Anna Louise Strachan,” Factors affecting success or failure of political transitions”, (2017)

<https://assets.publishing.service.gov.uk/media/5a7040e2ed915d265c511f60/250-Factors-affecting-success-or-failure-of-political-transitions.pdf>. Accssed On 27/02/19 1:35 pm

³⁶ Sahr John Kpundeh, (ed),*Democratization in Africa: African views, African voices*, (NRC Washington DC 1992)14

³⁷ Ibid

incumbents respond to the actual political crisis by initiating democratic reforms and transitions from below occurs when there is rising pressures from the people resulting in national conferences, popular revolutions, coups d'état, or pact formations, all with the goal of moving toward a more democratic society.³⁸

The “transition paradigm” points to three sequential phases on which, more often than not, democratization appears to build: opening, break-through and consolidation.³⁹ The opening stage is a period of democratic ferment and political liberalization in which cracks appear in the ruling dictatorial regime, with the most prominent fault line being that between hardliners and soft-liners.⁴⁰ There follows the breakthrough, the collapse of the regime and the establishment of a new democratic system with the coming to power of a new government through national elections and the establishment of a democratic institutional structure, often through the promulgation of a new constitution.⁴¹ Finally consolidation comes, in which democratic forms are transformed into democratic substance through the reform of state institutions, the regularization of elections, the strengthening of civil society, and the overall habituation of the society to the new democratic rules.⁴²

Transitions can be violent where there is overthrowing of the regime or peaceful when it is incumbent led transition or cooperative transitions or pacted transition which presupposes the negotiation of the incumbents and the opposition forces.⁴³ Both peaceful and negotiated or cooperative transitions are qualified by removing or reforming the existing regime and replace it with something more democratic and are characterized by a duality of purpose to remove or reform the existing regime and replace it with something more democratic.⁴⁴ In peaceful transitions powerful incumbents negotiate a democratic opening, they may attempt to use their leverage to design electoral rules that benefit them the most under a democratic system and that favours their continued rule.⁴⁵ On the other hand cooperative transition is where opposition groups unite in their quest for democracy and incumbents are willing to work with opposition groups, where institutions are inclusive and adapted for competition.⁴⁶

³⁸ Ibid

³⁹ Thomas Carothers, (n 21) 7

⁴⁰ Ibid

⁴¹ Ibid

⁴² Ibid

⁴³ Sujian Guo & Gary Alex Stradiotto, (n 13) 2

⁴⁴ Ibid

⁴⁵ Ibid 3,4

⁴⁶ Ibid 4

Transitions can also be rupture, negotiated transitions or transformation.⁴⁷ A rupture occurs when the authoritarian regime weakens to the point of crumble and the opposition takes over power whereas a negotiated transition occurs when the regime and opposition negotiate arrangements for a democratic transition.⁴⁸ On the other hand transformation is where the incumbent authoritarian leaders try to transform their regime into a democracy inaugurating and directing the process of democratization, slowly guiding political change that culminates in free elections.⁴⁹

Others classify transition as reform, compromise and overthrow.⁵⁰ In the case of reform the old government direct the transition to democracy and end the authoritarian regime.⁵¹ In reform the old government may go even further: it may not only trigger the transition but put an end to the authoritarian regime and establish a new democracy.⁵² A compromise transition can be takes place when the ruling government and the opposition parties matched together and deal with the leading of the country.⁵³ Compromise presupposes the mutual understanding of the ruling regime and the oppositions as they need each other for the best interest of the country. The overthrow transition is when the opposition parties take down the old regime.⁵⁴ During the overthrow transition the new government has a wider discretion in directing the country.

For Samuel P. Huntington transitions can be classified as transformation or reform, transplacement or raptform and replacement or rapture.⁵⁵ In transformation, those in power in authoritarian regime take the lead in ending the authoritarian rule and bring democratic system.⁵⁶ In transplacement democracy resulted by the joint action of the government and opposition through explicit or implicit negotiation.⁵⁷ Replacement is when the opposition political parties overthrow or collapses the government.⁵⁸

Others distinguish three types of transition: transitions by abandonment of power, where the regime has no control over the process of change due to the force of the popular opposition

⁴⁷ Gábor Halmai, *Transitional justice, transitional constitutionalism and constitutional culture*, (EEPH Northampton 2018) 372,373

⁴⁸ Ibid

⁴⁹ Ibid

⁵⁰ Ingrid Nifosi, (n 14)

⁵¹ Ibid

⁵² Ibid

⁵³ Ibid

⁵⁴ Ibid

⁵⁵ Samuel P.Huntington, (n 30) 114

⁵⁶ Ibid 124

⁵⁷ Ibid 113

⁵⁸ Ibid 142

movements; transitions by transfer of power where the regime has a tenuous control over the modalities of change due to the relative importance of the opposition movements; transitions by transaction, where entirely initiated and controlled by the regime in view of the absence of significant opposition movements within civil society.⁵⁹

Even though the scholars use different wording all of them have same ideas to the modalities of political transitions. Whatever name is given transition resulted either with the downfall of the existing government or within the existing government or with the mutual agreement between the government and opposition political parties. Thus, countries experienced transition carry out one of the above mentioned types of transition.

Whatever mode or pattern of transition a state followed, it had impact on the quality and lasting of democracy. Among the above mentioned modes, for O'Donnell and Schmitter pacts are desirable and enhance the probability that the process will lead to a viable political democracy.⁶⁰ Cooperative transitions result in higher average levels of democracy and have the lowest reversion rate, they also last longer, so quite favourable to democratic success.⁶¹ Samuel P.Huntington also suggested as a consensual or transplacement transition favours democratic consolidation and has been valuable tools in managing transitions.⁶²

2.2 Constitutionalism during Political Transition

Having a constitutional provision that can promote constitutionalism and practicing constitutionalism are two distinct issues. The mere fact of having a constitution can't imply constitutionalism. The fundamental idea behind constitutionalism is to ensure the applicability of the constitution. It must provide a solid base for the rule of law, democracy and good governance. Constitutionalism is not just as the positive law of written constitutions but the set of fundamental legal and political norms and practices that are constitutive of the polity.⁶³

To put it in a nut shell constitutionalism is that sovereignty resides with the people and that government representatives are agents subject to the trust agreement created by the people.⁶⁴ It comprises both ideas that a government should be limited in a way that protects citizens

⁵⁹ Diane Ethier, (ed) 'Processes of Transition and Democratic Consolidation: Theoretical Indicators', (MPL London 1990) 8

⁶⁰ O'Donnell and others. (n 19) 39

⁶¹ Sujian Guo & Gary Alex Stradiotto, (n 13) 9

⁶² Samuel P.Huntington, (n 30) 276

⁶³ Ruti G. Teitel, *Globalizing transitional justice, Contemporary Essay*, (OUP, Oxford 2014) 181

⁶⁴ Jonathan L. Marshfield, "Models of Subnational Constitutionalism", (Penn State Law Review 2011) 1162

from arbitrary rule and such a government should be able to operate efficiently in a way that it can be obliged to operate within its constitutional limitations.⁶⁵ Accordingly constitutionalism rests on two pillars: one is limiting the power of the government and the other is the power of the citizens to force the government to operate within these limitations.⁶⁶ It seeks to prevent arbitrary government.⁶⁷

The contemporary concept of constitutionalism are based on these elements; the recognition and protection of fundamental rights and freedoms, the separation of powers, an independent judiciary, the review of the constitutionality of laws, the control of the amendment of the constitution and institutions that support democracy.⁶⁸ Constitutionalism literally means a government who lives up to the words of the constitution. The above mentioned elements of constitutionalism are the structural or institutional requirements of constitutionalism. The presence and institutionalization of these elements do not necessarily guarantee constitutionalism; yet, their presence makes the prospects for constitutionalism better.⁶⁹

Countries in political transition adopt different approaches to the existing constitutional arrangements. Transitional constitutionalism does not restrict itself to situations in which a completely new constitution is enacted.⁷⁰ Sometimes transitions might occur without any modifications in the wording of the constitution.⁷¹ Some countries like Romania, Czech Republic, the Baltic States, Mongolia, and the Philippines made a new constitution immediately after the transition.⁷² Others like South Africa, Poland and Thailand enacted a new constitution in much later time.⁷³ On the other hand, countries like Hungary, Argentina, South Korea, Taiwan and Indonesia maintained the old constitution with many revisions.⁷⁴ For those with a new document after the transition, they either had a new text pretty much the same as the old one or had some political deals preceding the text.⁷⁵ More importantly, many

⁶⁵ Charles Manga Fombad, "Constitutional Reforms and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects", (Buffalo law review) 1013-1014, <https://www.researchgate.net/publication/265493847> accessed on 19/12/2019 11:51 am

⁶⁶ Ibid 1014

⁶⁷ Veronica Federico, 'The Role of Constitutionalism as Mechanism of Building Consensus. The South African case, (FUP Firenze 2006) 48

⁶⁸ Charles Manga Fombad, (n 65)1014

⁶⁹ Ibid

⁷⁰ Harald Eberhard , Konrad Lachmayer , Gerhard Thallinger, 'Approaching Transitional Constitutionalism', (Australia 2007) 11

⁷¹ Ibid 12

⁷² Jiunn-Rong Yeh and Wen-Chen Chang , 'The Changing Landscape of Modern Constitutionalism: Transitional Perspective', (NTULR 2009) 150

⁷³ Ibid.

⁷⁴ Ibid

⁷⁵ Ibid 151

transitional democracies have a written constitution that was by and large consistent with basic constitutional principles.⁷⁶

As constitutionalism is the triggering factor of transition, it also plays a unique role in facilitating the move to a more liberal regime and transitions demonstrate how constitutionalism reinforces democracy.⁷⁷ For a political transition to be successful all actors of the transition and the nation at large is required to act according to the already established constitutional system of the country. Some degree of normative commitment to constitutionalism in general and to the specific rules and procedures of the country's constitutional system in particular, on a behavioural and attitudinal level is required in order to have a successfully consolidated constitutional system.⁷⁸

The established understanding of constitutionalism mainly focuses on limiting the power of the government and demanding the government to act accordingly. Yet constitutionalism during transitions or transitional constitutionalism is quite different from the conventional constitutionalism. Transitional Constitutionalism analyses and aims to systematize the implication of constitutional law in transitional processes and examines the effects of transitions on the constitutional orders of States.⁷⁹ It eases the political change by reconciling divided understandings of the relation of law and politics⁸⁰ and not necessarily limited to the collapse of a state and the rise of another State.⁸¹ Ruti Teitel claims that the content of the modern day constitutionalism is a systematic response to the wrongs of the prior regime, and thus it is being shaped through developments in transitional justice.⁸²

Reconciling the concept of constitutionalism and transition remains to be the dilemma. The dilemma is in relation to decision making; decisions by the political organ contrary to the law making organ or the judiciary. Theories insist that democratic transitions involve social, political and legal transformations, which have unprecedented, sui generis aspects; hence the ordinary institutions and predicates about law simply do not apply.⁸³ These transformations

⁷⁶ Ibid 152

⁷⁷ Ruti G. Teitel, *Constitutional Justice, in Transitional Justice*, (OUP Oxford 2000) 210

⁷⁸ Gábor Halmai, (n 47) 373

⁷⁹ Harald Eberhard, Konrad Lachmayer & Gerhard Thallinger, (eds) "Approaching Transitional Constitutionalism", (Austria 2007) 11

⁸⁰ Gábor Halmai (n 47)

⁸¹ Harald Eberhard, and others (eds) (n 79)

⁸² Ruti Teitel, *Transitional Justice and Transformation of Constitutionalism, in Comparative Constitutional Law*, (OUP, Oxford 2014) 182

⁸³ Gábor Halmai (n 47) 378

may give rise to a new variety of constitutionalism, which Ruti Teitel terms “constitutionalism of transition”.⁸⁴

Since transitional periods are periods of political flux there always will be a tension between constitutionalism and political transition. Transitional constitutionalism usually challenges the constitutional canon and can essentially change basic constitutional principles, it is essential that the main elements of the canon and the basic traditional constitutional principles are known to both the state actors and the addressees of their actions.⁸⁵

The role of constitutionalism during political transitions is usually guided by the two main perspectives; the realist theory and the idealist theory.⁸⁶ In the realist view, constitutions in periods of political change are thought simply to reflect the prevailing balance of political power and, therefore, are epiphenomenal with, and arise by virtue of, the provenance of the political change. On the other hand for idealists political change is related with the change of the constitution. Constitutionalism helps as a mechanism for conflict prevention during political transitions and consolidation.⁸⁷

For transitions to successfully result in consolidated constitutional systems, some degree of normative commitment to constitutionalism in general and to the specific rules and procedures of the country’s constitutional system in particular, on a behavioural and attitudinal level is required.⁸⁸

2.2.1 Functions of Constitution in Transitions

Constitutions during democratic transition are expected to serve functions that depart from traditional understandings which are primarily on limiting government power and protecting fundamental rights.⁸⁹ During political transitions intense conflicts in interests, values, norms, and priorities abound, and thus any solid, final constitutional solutions may be too far away to get materialized as well adopting a new constitution also demand new consensus to develop.⁹⁰ As a result, transitional constitutionalism presents itself in many significant ways in defiant to traditional functions of constitutions.⁹¹

⁸⁴ Ibid

⁸⁵ Ibid

⁸⁶ Ruti G. Teitel, *Constitutional Justice, in Transitional Justice*, (OUP Oxford 2000) 192

⁸⁷ Veronica Federico, (n 67) 50

⁸⁸ Ruti G. Teitel, “*Constitutional Justice, in Transitional Justice*”, Oxford University Press, 2000, Pg 373.

⁸⁹ Jiunn-Rong Yeh and Wen-Chen Chang ,(n 72) 162

⁹⁰ Ibid 150

⁹¹ Ibid

Transitional constitutionalism may play a guiding role and serve as a strong mechanism to help form political consensus and transform social values.⁹² By doing so, functions of the constitution would shift clearly from constraining government powers to leading reform agendas or even reconstructing social structures or substituting violent revolution, and facilitating social integration.⁹³

One of the functions of the constitution during transitions is managing reform agenda.⁹⁴ In a transitional moment, calls for reform are demanded from every corner of the society and agendas needs to be set.⁹⁵ When a political trust is weakened, setting the reform agendas in the constitution helps to fix trust issue.⁹⁶ Once reform agendas are set in the constitution, it becomes capable of managing transitional agendas and resumes a binding status at a constitutional level.⁹⁷

In a time of transition, the relationship between revolutions and constitutions becomes issue of great concern.⁹⁸ Calls for revolution would run high when existing institutions fail and the more capable existing institutions deal with transitions, the less likely democratizing politics would turn revolutionary.⁹⁹ Transitional constitutionalism that presents in ways apart from traditional understandings of constitutions proves to facilitate transitional processes in peaceful ways by substituting violent revolution.¹⁰⁰

The traditional understanding of constitutionalism focuses on limiting the power of the government and giving protection to fundamental rights. But constitutionalism during transitional periods has distinct function which can challenge the principles of constitutionalism like rule of law, protection of fundamental rights and maintaining law and order.

⁹² Ibid 149

⁹³ Ibid 162

⁹⁴ Ibid 163

⁹⁵ Ibid

⁹⁶ Ibid

⁹⁷ Ibid

⁹⁸ Ibid 164

⁹⁹ Ibid

¹⁰⁰ Ibid

2.2.2 Rule of Law Shortfalls in Transition

No society can claim to be free or democratic without strict adherence to the rule of law.¹⁰¹ The rule of law is fundamental to the existence of a free society. To maintain the rule of law, accountability for transgressions against the law is mandatory.¹⁰² The nexus between rule of law and punishment becomes all the more apparent when crimes are committed on a massive scale or by political leaders, accountability for which is a fundamental tenet of the rule of law.¹⁰³ Holding violators accountable for their crimes, communicates all members of society that law's authority is superior to that of individuals and that no prerogatives attach to individuals merely because of status or position.¹⁰⁴

The fate of conventionally understood concept of rule of law is endangered in transitional times. States in transition backslide from the application of rule of law not to compromise the transition. The main challenges to rule of law during transitional periods will be; whether or not the succeeding regime devote itself to cleaning up the messes during or after time of trouble and whether or not it deviate from the rule of law in the process of restoring rule of law¹⁰⁵.

Whether the constitution resulted from forceful transition or continued after the negotiation; transitional constitutions differ in function from the constitution in consolidated democracy. Transitional constitutions serve as an agent to the political shifts from authoritarian rule and construct a bridge of liberalizing political change.¹⁰⁶ They are not simply revolution-stoppers, but they also play a role in constructing the transition.¹⁰⁷ As such, many transitional constitutions are both backward and forward oriented: they have to deal with some important unfinished business related to the unwholesome preceding regime.¹⁰⁸ This goes against the principle of non-retrospectivity, one of the most treasured principles of the rule of law.¹⁰⁹ Others are deliberately 'transitory': they are meant to pave the way to more stable

¹⁰¹ Boraine, Alexander L. "Transitional justice: a holistic interpretation"(Addis Ababa University Addis Ababa 2006) 3

¹⁰² Ibid 1

¹⁰³ Pdraig McAuliffe, 'Transitional Justice and the Rule of Law: The Perfect Couple or Awkward Bedfellows?', (HJRL 2010) 128

¹⁰⁴ Stephan Landsman, 'Alternative Responses to Serious Human Rights Abuses: Of Prosecutions and Truth Commissions', (Duke University school of Law 1996) 83

¹⁰⁵ Martin P. Golding, 'Transitional Regimes and the Rule of Law' (Blackwell Publishers Ltd 1996) 388

¹⁰⁶ Ruti G. Teitel, *Transitional justice*, (OUP New York 2000) 197,198

¹⁰⁷ Ibid 198

¹⁰⁸ Wojciech Sadurski, "*Transitional Constitutionalism Versus the Rule of Law?*", (Hague J Rule Law,T.M.C. Asser Press 2016) 5

¹⁰⁹ Ibid 5, 6

documents.¹¹⁰ As such, they undermine the principle of legal stability which is seen, by the proponents of the rule of law, as an important condition of legal certainty.¹¹¹

Ordinarily, the rule of law means regularity, stability, and adherence to settled law. The question is to what extent are periods of transformation compatible with commitment to the rule of law? In such periods, what does the rule of law mean?¹¹² When there are politically controversial areas; where the value of legal change is in tension with the value of adherence to the continual principle of settled legal precedent, then there arises the rule-of-law dilemma.¹¹³

Scholars entertain different view on the nexus between the conventional rule of law and transitional constitutionalism. According to Ruti Teitel, there are two competing ideas regarding the relationship between law and political transition.¹¹⁴ The first is the realist argument that constitution in transition is epiphenomenal, where transitional responses are the product of political or institutional constraints.¹¹⁵ The second is the idealist position that legal responses to the crimes of the past are necessary for liberalizing change, a much broader political mission than the rule of law.¹¹⁶ She argues as, justice in the aftermath of war or repressive rule is paradoxical, extraordinary and constructivist, it is alternately constituted by, and constructive of the transition.¹¹⁷ Ruti also asserts that, in the normal circumstance law provides order and Stability but in extraordinary periods of political violence, law maintains order even as it enables transformation and legal responses generate a unique paradigm of transformative law. Accordingly, in transition, the ordinary intuitions and predicates about law simply do not apply. This means accountability for violation of law is maintained as long as it helps the transition process. Instead of a full scale trial alternative mechanisms will be arranged. Among the alternatives, full continuity with the prior legal regime, discontinuity, selective discontinuities, and moving outside the law altogether can be applied for the prevalence of rule of law in transitions.¹¹⁸ Thus from Ruti's argument it is possible to conclude that, law is dependent on the political and historical context and the established concept of rule of law will be in deficit in transitional times unless it helps the democratization process.

¹¹⁰ Ibid 6

¹¹¹ Ibid

¹¹² Ruti G.Teitel, (n 106) 11

¹¹³ Ibid

¹¹⁴ Ibid 6

¹¹⁵ Ibid 192

¹¹⁶ Ibid

¹¹⁷ Ruti G.Teitel, 'Rule of law in transition ,Transitional justice', (Oxford university Press New York 2000) 6

¹¹⁸ Ruti G.Teitel, (n 106) 13,14

Similarly, Padraig McAuliffe argues as, adherence to the strict legality impairs the achievement of certain goals that benefit the transition.¹¹⁹ He also asserts that the experience of transitional justice in many post-conflict states has often been partly contradictory to what is ordinarily understood as the rule of law.¹²⁰ The reasons are, firstly, post-conflict conditions are such that substantial or even minimal accountability would threaten the transition by fuelling revanchism from elements of the prior regime, and so criminal justice is either compromised or abandoned outright.¹²¹ The second is that when criminal justice is pursued, other consequentialist goals linked to the reconstruction of a liberal political identity such as rehabilitation and deterrence take precedence over the pure fair trial paradigm that demonstrates the generality of law and applicability of national judicial institutions.¹²²

On the other hand Hart Fuller claims that the principle of the rule of law governing transitional decision making should proceed just as it would in ordinary times with full continuity of the written law.¹²³ Hart, argued that adherence to the rule of law included recognition of the preceding law as valid, even when immoral, should retain legal force and be followed by the successor courts until such time as it is replaced.¹²⁴ For positivists like Hart Fuller, full continuity with the prior legal regime is justified by the need to restore belief in the procedural regularity that was deemed missing in the prior repressive regime; the meta rule of law value is due process, understood as regularity in procedures and adherence to settled law.¹²⁵

Perspectives from the development and rule of law reconstruction found that ‘surprisingly under analysed’ impact of transitional justice on the rule of law in the long-term.¹²⁶ Revising the ordinary principles of justice even in the pursuit of the most laudable transitional imperatives will return rule of law issues such as bolstering the legitimacy of national justice systems, the exemplary purpose of de-politicized trials and equality before the law which were obscured and underplayed in earlier transitional justice discourse to the pre transition scenario.¹²⁷

In conclusion, there are two opposite stands to the established principle of rule of law in political transition. One is, strict adherence to the rule of law during transitions will hinder

¹¹⁹ Padraig McAuliffe, (n 103) 130

¹²⁰ Ibid 129

¹²¹ Ibid

¹²² Ibid

¹²³ Ruti G. Teitel, (n 117) 13

¹²⁴ Ibid

¹²⁵ Ibid 14

¹²⁶ Ibid 131

¹²⁷ Ibid

the transition process so strict application of rule of law should not be expected. Whereas the other side argue as since compromising the rule of law instigates the transition, strict adherence to the conventional rule of law and legal continuity must be maintained.

2.2.3 Transitional Justice

The UN Secretary General articulated concept of transitional justice as “processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”¹²⁸ It is also defined as set of practices, mechanisms and concerns that arise following a period of conflict, civil strife and repression, and that are aimed at confronting and dealing with past violations of human rights and humanitarian law¹²⁹. Transitional justice is a pre-condition for establishing a rule of law-based society after conflict or repression, and that transitional justice and the rule of law are mutually-reinforcing phenomena.¹³⁰ Transitional justice can be the legal and administrative process carried out after a political transition for the purpose of addressing the wrongdoings of the previous regime.¹³¹ In contexts of political upheaval, transitional jurisprudence comprises a partial and non-ideal conception of justice: provisional and limited forms of constitutions, sanctions, reparations, purges, and histories.¹³² During such time law’s function is to boost the construction of political change thus transitional legal manifestations are more vividly affected by political values.¹³³ Transitional justice might be concerned with the politics and principles of memory. For a new democratic government, and equally, if not more so, for its citizenry, the essential questions are what to remember of the past, how to define the past, what to ‘do’ about the past, and how all these matters affect both the present and the future of society.¹³⁴

128 U.N. Secretary General, “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies”, (23 August 2004) 4, U.N. Doc. S/2004/616

129 Naomi Roht-Arriaza and Javier Marizcuena (eds.), *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*, (Cambridge University Press, 2006) 1

130 Padraig McAuliffe, (n 103) 127.

131 Jon Elster, *Memory and Transitional Justice*, (Colombia University 2007) 1

132 Ruti G. Teitel, (n 106) 215

133 Ibid

134 Gábor Halmai, ‘ *The role of constitutionalism in the transitional justice process in central Europe*’, 9

Transitional justice incorporates different mechanisms aimed beyond simple accountability concerned for its impact on victims, perpetrators and society as a whole.¹³⁵ These diversified mechanisms include reparation, truth telling, rehabilitation and socially integrative shaming. Traditionally it is believed as trials are the most favourable response to past atrocities because they draw the brightest line between past repression and future legitimate rule.¹³⁶ Yet the future legitimate rule will not be obtained only through trials but through political messages the trials conveyed about the nature of the prior and current regimes. Though it might be reflected in different ways state in transition has obligations. These possible obligations are:¹³⁷

1. to do justice, that is to prosecute and punish the perpetrators of abuses when those abuses can be determined to have been criminal in nature;
2. to grant victims the right to know the truth; this implies the ability to investigate any and all aspects of a violation that still remain shrouded in secrecy and to disclose this truth to the victims of justice, to their relatives, and to the society as a whole;
3. to grant reparations to victims in a manner that recognizes their worth and their dignity as human beings; monetary compensation in appropriate amounts is certainly a part of this duty, but the obligation should also be conceived as including nonmonetary gestures that expresses recognition of the harm done to them and an apology in the name of society;
4. States are obliged to see to it that those who have committed the crimes while serving in any capacity in the armed or security forces of the state should not be allowed to continue on the rolls of reconstituted, democratic law-enforcement or security-related bodies.

Nevertheless prosecution may not always bring the desired result for the transitional justice and not every obligation is fulfilled by the state. According to Samuel P.Huntington, depending on the mode of the transition prosecution is not always recommendable. He suggested the following guidelines to be followed for transitional justice dealing with authoritarian crimes:¹³⁸

- a. If replacement (revolution) occurred and it is morally and politically desirable, prosecute the leaders of the authoritarian regime promptly (within one year

¹³⁵ Padraig McAuliffe, (n 103) 131

¹³⁶ Ibid 136

¹³⁷ Gábor Halmai, (n 134) 9

¹³⁸ Samuel P.Huntington, (n 30) 231

coming into power) while making clear that you will not prosecute middle- and lower-ranking officials.

- b. If transformation or transplacement occurred, do not attempt to prosecute authoritarian officials for human rights violations, because the political costs of such an effort will outweigh any moral gains.
- c. Recognize that on the issue of “prosecute and punish vs. forgive and forget”, each alternative presents grave problems and that the least unsatisfactory course may well be: do not prosecute, do not punish, do not forgive, and above all, do not forget.

One of the legitimate grounds for not prosecuting is, if the security forces under the control of, or loyal to the previous regime may be so powerful that any attempt to prosecute them or their political allies could lead to events dangerous to the transition.¹³⁹ Another reason can be, if the state is facing with insuperable practical difficulties that make it impossible to punish: absence of evidence, a dysfunctional criminal justice system, economic crisis, enormous amount of time to prepare.¹⁴⁰

According to the mode of the transition countries employ different kinds of transitional justice mechanism. For instance, the rupture type of transitions, such as the ones in East Germany and Czechoslovakia, are much more likely to use all kinds of transitional justice approaches, while in negotiated transitions, such as the Hungarian or the Polish, the old regimes retain sufficient power to avoid punishment of members of the former regime, even though other ways of dealing with the past are not excluded.¹⁴¹ But whatever legal choices of transitional justice a state may or may not choose for dealing with the past, in one form or another, it is at least a moral if not necessarily a constitutional or international obligation of every state that claims to be governed by the rule of law.¹⁴²

With regard to restitution and retribution some argue against it and conclude that one should target everybody or nobody, and because it is impossible to reach everybody, nobody should be punished and nobody compensated.¹⁴³ While advocates of transitional justice assert that, transitional justice offers other benefits, including promoting reconciliation and psychological healing, fostering respect for human rights and the rule of law and helping establish

¹³⁹ Gábor Halmai, (n 134) 9

¹⁴⁰ Ibid

¹⁴¹ Gábor Halmai, (n 47) 373

¹⁴² Oskar N.T. Thoms, James Ron and Roland Paris, ‘State-Level Effects of Transitional Justice: What Do We Know?’, (Oxford University Press 2010) 329.

¹⁴³ Ibid

conditions for a peaceful and democratically governed country.¹⁴⁴ others challenged these claims, arguing that ‘digging up the past’ and identifying perpetrators can trigger renewed conflict by sharpening societal divisions or provoking backlash. Some also argue that the prospect of transitional justice may reduce the chances of negotiating peace settlements in the first instance, particularly in cases where powerful actors capable of blocking such settlements fear punishment for past actions.¹⁴⁵

In conclusion, transitional justice should not be treated like an abused leeway for the crimes committed during and before the transitional period. Taking in to consideration the political, economic, legal and social aspect and development of a given state a different mechanism is needed to serve justice. That mechanism is transitional justice. It should not be a way of evading accountability. Rather transgressors hold accountable and victims’ compensated for past abuses. But this process is conducted in a different manner from the traditional legal process.

2.2.4 Election

Election is the mechanism through which democracy operates and is the life of democracy as well as the death of dictatorship or authoritarian rule. It is through election that the desired democratic system could come true. So every actor of the state is needed to operate in a way to make the democratic system real. Yet it is inevitable to face some challenges which could hinder the election process. The challenge may result from the nature of the transition process itself, from the ruling regime or the opposition parties.

During transition the ruling government would employ three mechanisms which could secure its victory.¹⁴⁶ The first mechanism is manipulation of election timing. Timing of the election has significant effect on the result of the election. If the election is earlier, it will serve the advantage of the ruling regime because the ruling government is well organized and commanded the public attention and if the election is to be held delayed it will serve to the advantage of the opposition parties because they could mobilize their supporters, get organized and appeal to the public.¹⁴⁷ In transitional periods different countries had various experiences of election. In some countries opposition parties in transition supported for the delayed election like Brazil and Romania while in Polish negotiated on the round table with

¹⁴⁴ Ibid

¹⁴⁵ Ibid 330

¹⁴⁶ Samuel P. Huntington, (n 30) 182

¹⁴⁷ Ibid

the ruling party for early election.¹⁴⁸ The rational of these government and opposition position for the timing of the election is pretty clear: opposition groups would benefit from more time to prepare for the election.

The second factor is manipulation of election procedure or rigged election; the ruling government establishes an electoral system which is favourable to the ruling party by lots of harassing and intimidating the opposition and by employing government resource in the campaign.¹⁴⁹ Any of the government's tactics are to ensure the victory of the government. Among the tactics which render the election rigged is enacting government favourable electoral laws. Brazilian government could be taken as an example for a regular amendment of electoral law from 1974 to 1984 hoping to stop the growing power of opposition parties.¹⁵⁰ If the above two devices didn't suffice, governments would go with theft and fraud.¹⁵¹ Since governments steal in a nonobvious way everyone knew the election was stolen but no one could prove it.¹⁵² All these three ways defeated the purpose of having election.

In transitional periods it is expected to confront with social unrest or conflict. As the aim of the transition is democratizing the system, election is one way of doing so. When it is not a conducive environment to conduct election and though it is conducted the demanded result of democratizing the system could be difficult to attain. In such kind of scenario negotiation on the extension of the national election by the government and the opposition parties would be made.¹⁵³

In the process of democratizing the system it is the government who takes the lion share. Democracy is what necessitates the transition. So every actor of the system should work hand in hand to make an effective democratized system. If the situation demands so the political actors need to agree on the extension of the election. Without an enabling environment democratizing the system will remain a mere dream.

¹⁴⁸ Ibid 183,184

¹⁴⁹ Ibid 183

¹⁵⁰ Ibid

¹⁵¹ Ibid

¹⁵² Ibid

¹⁵³ Ibid 182,183

2.2.5 Factors that Contribute to and Impede Political Transition

Owing to the diverse nature of the countries experience in political transition, there can be no one formula fits for all. But the nature of the transition¹⁵⁴ and the character of the leaders¹⁵⁵ who shaped the transition will have a significant role for the transition to be successful or fail. The dominance of prodemocracy groups both in the ruling and opposition groups helps the success of the transition.¹⁵⁶

The interactions between those who support or oppose the democratization process with in the ruling and opposition party and with one another determine the outcome of the transition.¹⁵⁷ For a successful reform or transformation transitions; the government should be stronger than the opposition, the reformist groups should be stronger than the stand patters and opposition moderators should be stronger than the radical extremists.¹⁵⁸ In a transplacement or negotiated transition; the interaction is between the ruling party reformists and opposition moderators with insignificant power differences, as long as both can challenge the antidemocrats in their own line, the success of the transition is inevitable.¹⁵⁹ In case of replacement or rapture transition; the strong power of opposition moderators than the radical extremists and the ruling party will result in successful transition.¹⁶⁰

In order to ensure the success of transition, those who took power had to take the following measures;¹⁶¹

- Create civil order and end violence, while ensuring that all security and intelligence forces would be subject to control by the new civilian authorities.
- Inspire domestic trust and gain international legitimacy through developing inclusive and fair electoral procedures.
- Assure that those who took office would be well prepared, technically and politically, for their new governing responsibilities.

¹⁵⁴ Ibid 124

¹⁵⁵ Abraham F. Lowenthal and Sergio Bitar, *'From Authoritarian rule toward Democratic Governance: Learning from political leaders'*, (Johns Hopkins University Press Baltimore 2015) 16

¹⁵⁶ Samuel P. Huntington, (n 30) 123

¹⁵⁷ Ibid 124

¹⁵⁸ Ibid

¹⁵⁹ Ibid

¹⁶⁰ Ibid

¹⁶¹ Abraham F. Lowenthal and Sergio Bitar, (n 155) 21,22

- Balance the need for bureaucratic, technocratic, security and judicial expertise against the aim to curb the influence of the previous regime.
- Balance responding victims of human rights violations perpetrated by the previous regime and holding perpetrators accountable while preserving the loyalty of security forces.
- Establish or protect the autonomy and authority of independent judiciaries and independent media that could hold the rulers and others accountable.
- Achieve economic growth, increased employment, and control inflation, while improving the provision of services and increasing public expenditures to meet the needs of the poor.
- Stabilizing and institutionalizing the emerging democracy through the participation of civil society organizations.
- Promote inclusion and the need for helpful of visions¹⁶²
- Creating and protecting space for dialogue among opposition groups and between opposition and government leaders¹⁶³

Among the recent transitions the two North African countries Tunisia and Egypt can't be left unmentioned; the former succeeded while the later failed. After the fall of President Ben Ali in January 2011, civil society and state machineries stand together to re-establish institutions and guide the transition through parliamentary elections.¹⁶⁴ The election conducted by transitional authorities and commissions was an important step towards an 'organised political life'.¹⁶⁵ Despite the push for change one of the challenges was, the first transitional government personnel were those who were under the ministerial position during Ben Ali's administration.¹⁶⁶ Civil societies also contributed a lot for the success of the transition.¹⁶⁷ The creation of new "consensus gathering" institutions was key in overcoming crises experienced during the transition.¹⁶⁸

¹⁶² Ibid 26

¹⁶³ Ibid 28

¹⁶⁴ Anna Louise Strachan , '*Factors affecting success or Failure of transitions*' , Helpdesk reports to UK Department for International Development (2017), 8
<https://assets.publishing.service.gov.uk/media/5a7040e2ed915d265c511f60/250-Factors-affecting-success-or-failure-of-political-transitions.pdf>. accessed on 27/02/19 1:35 pm

¹⁶⁵ Ibid

¹⁶⁶ Ibid

¹⁶⁷ Ibid

¹⁶⁸ Ibid

Similarly Egypt also passed through transitional process following the fall of former Egyptian President Hosni Mubarak in 2011.¹⁶⁹ The military were ‘tacitly entrusted’ with the survival of the authoritarian regime. Morsi, the successor of President Hosni Mubarak was removed from power in a coup d’état in 2013 following popular opposition against his rule and succeeded by General Abdel Fattah al-Sisi, who remains in power, marking a return to military rule.¹⁷⁰ The military’s dominance in Egypt can be attributed to their prevention of any viable civilian alternatives from emerging.¹⁷¹ The failure of Egypt’s transition assumed to be resulted from lack of general consensus among the elites on the rules of the transition, absence of procedure that allowed people to express their will early without having all matters settled by backroom deals,¹⁷² undemocratic behaviour of the opposition groups¹⁷³ and the past authoritarian legacy.¹⁷⁴ Egypt’s experience gives a lesson as decisions about election timing, sequence, and rules have a large impact on political outcomes and as these decisions themselves are the outcomes of a deep political process.¹⁷⁵

¹⁶⁹ Ibid

¹⁷⁰ Ibid

¹⁷¹ Ibid

¹⁷² Nathan J. Brown, *Egypt’s Failed Democracy*, (Johns Hopkins University Press 2013) 46

¹⁷³ Ibid 51

¹⁷⁴ Ibid

¹⁷⁵ Ibid 55,56

CHAPTER THREE

OPPORTUNITIES AND CHALLENGES OF CONSTITUTIONALISM IN THE 2018 TRANSITION OF ETHIOPIA

In the political and legal history of Ethiopia, the country experienced a couple of political transitions with the aim of democratizing the country. Yet none of the transitions were able to succeed in achieving the desired result. Thus, this chapter will discuss the historical perspective of Ethiopian transitions, the unique feature of the 2018 transition, constitutionalism in the later transition and the possible opportunities and challenges.

3.1 Historical Perspective of Political Transitions in Ethiopia

In 1974 economic poverty and political suppression led to mass uprisings of different sections of the society against the rule of Emperor Haile Selassie I. The popular movement primarily carried out by students, peasants and workers led to the break-down of the monarchical regime. During the revolution the military under the name of *Derg*¹⁷⁶ seized power in 1974. The *Derg* soon established itself as a permanent and irrevocable self-perpetuating government, rejecting all calls for civilian rule.¹⁷⁷ In November 1974, the *Derg* executed 60 officials of the former imperial government without a due process of law.¹⁷⁸ This event marked the beginning of 17 years of state-sponsored terror and violence against the people of Ethiopia.¹⁷⁹ The time from 1975 to 1991, was characterised by the most atrocious human rights violations.¹⁸⁰ The regime continued the massacre of the young generation under the campaign of Red Terror.¹⁸¹ During the campaign of Red Terror, the *Derg* officially killed a generation that had no resort to the rule of law and resulted in summary executions, arbitrary detentions, disappearances and torture.¹⁸² At the end of 17 years of brutal human

¹⁷⁶ '*Derege*' means a council or a committee in Geez language. This name assumed by a committee of 120 commissioned and non-commissioned low-rank officers of the air force, police force and the territorial army.

¹⁷⁷ Girmachew Alemu Anime, Apology and trials: the case of the red terror trial in Ethiopia, (African Human rights law journal 2006) 65 <https://www.researchgate.net/publication/315710917>. Accessed on 07/08/2012 5:43 am

¹⁷⁸ Ibid.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ Ibid 66.

¹⁸² Ibid.

rights violations marked by terror and violence, the *Derg* was finally overthrown on 28 May 1991 by the Ethiopian People's Revolutionary Democratic Front (EPRDF).¹⁸³

Since 1991, Ethiopia has been governed by the Ethiopian People's Revolutionary Democratic Front (EPRDF), a coalition of four political organizations joined together during the liberation struggle against the defunct regime of Mengistu Hail Meriam. In 1991, Ethiopia experienced the political transition from the authoritarian military-socialist regime of Mengistu Haile Meriam to the Transitional Government of Ethiopia. The aim of the transition then was to ensure; the breakdown of repressive institutions, to redress regional prejudices, to protect the right of citizens and establish a government accountable to the people.¹⁸⁴ The transition ended with newly elected government, Federal Democratic Republic of Ethiopia in 1995. Yet the chance of democratization was unlikely owing to three reasons.¹⁸⁵ The first one is, following the overthrow of Mengistu Hailemariam the leadership focused on retaining power than democratizing the country.¹⁸⁶ The second reason was unfavourable conditions for a democratic transformation in the country.¹⁸⁷ Thirdly, the emphasis on democratization as a purely formal process that characterized those last few years may in fact decrease the longer term prospects for democratic transition.¹⁸⁸ The 1974 revolution transformed what was almost a medieval empire into a centralized dictatorship, and the 1991 transition led to a federal state structure. Both these moments of transitions have brought about a radical ideological and institutional change in the form and institutional structure of the state.

Concerning democratization and development, Donald Levine calls a “structural opening” or “missed opportunities” for transformative political change.¹⁸⁹ These missed opportunities according to him were: the abortive coup of December 1960; the ferment of 1974 revolution; the regime change of 1991; the Ethio-Eritrean war of 1998; and the May 2005 national election. All of these moments were opportunities for democratic change. Instead they were turned into “missed opportunities” that led to an escalation of violence as a sole means of effecting social change.¹⁹⁰

¹⁸³ Ibid 67.

¹⁸⁴ Mohamed Salih, (n 6) 10.

¹⁸⁵ Marina Ottaway, *The Ethiopian Transition: Democratization or New Authoritarianism?* ,(Michigan State University Press 1995) 68, <http://www.jstor.org/stable/41931114>. Accessed on 12/09/2019 2:45 am

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Donald N. Levine, (n 3)

¹⁹⁰ Ibid 6,8.

Due to civil unrest since 2014 Prime Minister Hailemariam Dessalegn resigned and in April 2018, Prime Minister Abiy Ahmed came to power.¹⁹¹ The air was filled with optimism and euphoria, once again. Everyone was hoping to a bright future, and most Ethiopians thought that the 27 years of deprivation of basic political rights had finally come to an end.¹⁹²

The political transition history of Ethiopia characterized by a violent and forceful replacement of the existing regimes. *Dereg* overthrow the Emperor and EPRDF forcefully overthrow the *Dereg* regime. The current political scenario is quite unique from the earlier ones.

3.2 Transitions and Constitutionalism

Transitions target the democratization of the political system or building a constitutional culture. When we say constitutional culture it means living according to the words of the constitution or constitutionalism. Constitutionalism literally means a government who lives up to the words of the constitution. Separation of powers, rule of law, judicial independence/autonomy, human rights, and separation of state and political parties, free media, and others are the structural/institutional requirements of constitutionalism.

During the rule of Emperor *Haile Selassie I*, in terms of system of government, Ethiopia became a strongly centralized state without room for the autonomy of ethnic groups. The political power was not open and competitive. There was one group who believed to be chosen by God to rule while the others are subjected to be ruled.¹⁹³ There was no real sense of separation of power and check and balance. There was no right of self-administration. Everything was under the control of the strong central government. The two constitutions which was promulgated during the imperial period and bestowed as a gift of the emperor were not a means to limit the power of the government. Rather, it was a means to give guarantee for succession of the throne and avoid all possible opponents.¹⁹⁴ Furthermore, having the above unique nature of the emperor's regime for the stronger reason there was no recognition of a multiparty system and even the concept political party for that matter.

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ See, Article 3 of the 1931 of the 1931 constitution and Article 2 of the 1955 the revised constitution. This may be why both the imperial regime constitutions considers the then people of the country as subjects than citizens.

¹⁹⁴ See, article 4 of the 1931 constitution and article 3 of the 1955 the constitution

Though the country had two constitutions during the Emperor, the then constitutions came into picture only to strengthen the power of the government we cannot talk about constitutionalism during the regime of the imperial period.

Following successive up risings of the students, taxi drivers and peasants, the *Derg* finally took the ultimate political power in 1974. Upon assuming the power, the *Derg* regime had abolished the right to divine rule; the Ethiopian Orthodox Church lost its formal active participation in the affairs of the state.¹⁹⁵ Though the Solomonic dynasty has ceased to exist upon the coming of the military to power, it was not possible to say that the political power was open to all. During the early 1974 there were several political parties with a socialist ideology.¹⁹⁶ However, after the lapse of sometime the regime became an enemy of any kind of political parties and started killing their members and prominent leaders under its campaign called red terror.¹⁹⁷ The regime could be also remembered in Ethiopian history as the period of lawlessness, a period where the principle of rule of law was at its lowest stage. There were many summary executions.¹⁹⁸ Apart from this, there was no also real sense of separation of power and checks and balance during this regime.

Having Separation of powers, rule of law, judicial independence, human rights, and separation of state and political parties, free media, and others as institutional requirements of constitutionalism it is absolutely impossible to say that there was constitutionalism during the *Derg* regime.

In May 1991 a coalition of ethnically inspired liberation movements removed the *Derg* regime. The new rulers under the guidance of the EPRDF announced a radically different nation and state building policy. The recognition of Ethiopia's multi-ethnicity became the central tenet of the new regime's policies.

The regime unequivocally provided an ethnic based federal system of government. Thus, the various nation, nationalities and peoples of the modern Ethiopia have the right to self-administration up to secession.¹⁹⁹

¹⁹⁵ See, article 46(2) of the 1987 constitution.

¹⁹⁶ EPRP and AESM

¹⁹⁷ Firew Kebede Tiba, The Mengistu Genocide Trial in Ethiopia, (*Journal of International Criminal Justice* 2007) 516.

¹⁹⁸ At this point we can remember the Nov. 23, 1974 extra-judicial killing of the prominent leaders of the former monarchical regimes.

¹⁹⁹ FDRE Constitution, Federal Negarit Gazzet no.1/1995, article 39(2).

Akin the *Derg* regime, under the EPRDF regime, state and religions are separate. The other dramatic change of the EPRDF regime is its party system. The regime for the first time in the country's history, at least on paper, explicitly provided a multi-party system.²⁰⁰ Hence, unlike its predecessors, we can say that during the existing regime political office is open for everyone. Lastly, we need to appreciate that the power of government is separated into individual branches. Moreover, though its adequacy and effectiveness is arguable, under the current regime there is also a system of Checks and Balances.

Had constitutionalism could be seen only from the perspective of having only a beautiful constitutional provision; there is no doubt that the current regime would be a front runner. It is better in terms of including most accepted constitutional provisions. But, in terms of living up the requirements of the principles there is still a problem. Hence, it is not possible to say that constitutionalism is ascertained in the current regime.

Even though all the three regimes promised to democratize the country, all of them failed and we reached at where we are today. Still praying for the real democratic system, a system in which constitutionalism is ascertained.

3.3 Features of the 2018 Transition of Ethiopia

After the down fall of the *Derg* regime the country is under the rule ship of EPRDF with the dominant party TPLF. The regime has been criticized for human right abuses, economic and political inequality, ethnic and political instability. The regime strengthened its authoritarian rule through repressive laws like anti-terrorism, media and charities and society's laws and fraudulent election. Following the introduction of the idea of Addis Ababa master plan, civil disobedience and unrest break out widely across the country, especially at the two significant regions Amhara and Oromia regional states. EPRDF responded through forceful measures and declared a state of emergency from October 2016 to August 2017 and conducted deep renewal of the party but could not prevent a second outbreak of protests in February 2018 and another state of emergency declared aiming to restore peace and security.

Though the government declared state of emergency, the country has been under de facto state of emergency for a long time.²⁰¹ Since the imposition of the emergency, the government

²⁰⁰ Ibid Article 54.

²⁰¹ Elizabeth Fraser & Anuradha Mittal, '*Ethiopia's State of Emergency Authorizing Oppression*', <https://www.oaklandinstitute.org/blog/ethiopias-state-emergency-authorizing-oppression>. Accessed on 07/12/2019

has used arbitrary force and carried out arrests and abuses against journalists, bloggers, opposition and perceived opposition politicians, protesters and academics.²⁰² Though the state of emergency has helped the government to stabilize the country, the anger and resentment on the part of the population continued to increase.²⁰³

Although the ruling party employed various mechanisms to suppress the here and there political unrest, the mechanisms were insufficient to bring the desired result. Due to so many protests owing to economic and political inequality in different parts of the country and the internal divergence of the ruling party, in 2018 the reformist soft liners took the federal power; as a result the country is experiencing a political transition initiated from the ruling party, EPRDF. Federal power shifted from TPLF; the dominant ruling party since the formation of EPRDF, to ODP.

The last resort left was to take action by the incumbents to transform the system and respond to the popular demand of the people, by reforming the ruling party itself. However the reform didn't get the blessings of all members of the ruling party. At the same time nobody can be certain about the real motive of the reformist soft liners regarding the reform; either the reform is aimed at sustaining their power or out of a genuine thought of democratizing the system.

The issue whether the country is undergoing in political transition continues to be debatable. Some allege as there is no political transition²⁰⁴, while others argue in favour of political transition keeping their differences on the mode or type of the transition²⁰⁵. The traditional understanding of political transition used to limit itself to revolution or the transition from authoritarian regime to a democratic one by overthrowing the previous one in a forceful way.²⁰⁶ However this traditional definition of political transition is changed to another broader concept. On the contemporary understanding of political transition, political transition can be manifested in one of the three ways; reform, compromise and overthrow.²⁰⁷

²⁰² BTI, '2018 Country Report Ethiopia', [2018] 4, <https://www.bti-project.org/en/reports/country-reports/detail/itc/ETH/> accessed on 17/12/19 10:31 am

²⁰³ Ibid 4.

²⁰⁴ Ezekiel Gebissa, 'IN-DEPTH ANALYSIS: MANAGING POLITICAL TRANSITION IN ETHIOPIA: THE CHOICE FACTOR', *Addis Standard* (Addis Ababa 17 October 2018), <http://www.addisstandard.com/in-depth-analysis-managing-political-transition-in-ethiopia-the-choice-factor/> accessed on 6/12/2019

²⁰⁵ Mukerrem Miftah, 'OP:ED: ETHIOPIA IN TRANSITION IS FACING CRITICAL CHALLENGES' *Addis Standard*, (Addis Ababa 5 November 2018), <http://addisstandard.com/oped-ethiopia-in-transition-and-critical-challenges/>, accessed on 5/12/19

²⁰⁶ See n 14 above.

²⁰⁷ See n 43, 47, 50, 55 and 59 above.

Of the many ways political transition takes place, the Ethiopian recent experience by no means could be different.

Among those who argue as there is no political transition some assert as political transition is distinct from reform. The present political reforms in Ethiopia can be distinguished from political transition in that; the reform don't aim at removing the state institutions created by the EPRDF rather to reform within the scope of the current political developments.²⁰⁸ Since it does not satisfy the 'full thrust of a full-fledged process' it can't be taken as political transition.²⁰⁹ As long as the EPRDF and ruling coalition is still in power and bring positive changes to the current regime, it impossible to say there is transition in the manner the EPRDF removed the *Derg* regime in 1991.²¹⁰

Similarly those who argue against the transition assert that Ethiopia doesn't conduct any mode of transition. Their reasons are; firstly, no transition through replacement since there is no change of government and EPRDF is still in power; secondly, there is no negotiation or compromise on the terms of the transition between the ruling party and the opposition parties and lastly, though the new leaders of EPRDF who are in charge of the reform are in power, the manner in which they come to power is after the ruling party exhausted all of its options to stay in power and since the change is resulted by popular struggle of *Qerro*,²¹¹ in such kind of situations it is not possible to say there is the need of reforming the system by the incumbent leaders.²¹² Yet the one who pleads this argument denies the fact that the soft liner incumbents played a significant role and tries to give all the praises only to the participants of the civil disobedience.

On the other hand those who argue in favour of the political transition agree on the transition but have different stands on the mode of the transition. Some say the current political transition of Ethiopia is transition by compromise or it is the result of the negotiation of the ruling political party EPRDF and the opposition political parties.²¹³ Looking to the conventional meaning of compromise transition, transition takes place when the ruling government and the opposition parties matched together and deal with the leading of the country.²¹⁴ Those who argue for compromise transition in Ethiopia failed to specify the manner in which the ruling party and opposition political parties come to a negotiated terms

²⁰⁸ Mohamed Salih, (n 6) 10.

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ *Qerro* means young in the Oromo language.

²¹² Ezekiel Gebissa, (n 203)

²¹³ Mukerrem Miftah, (n 205)

²¹⁴ Ingrid Nifosi, (n 14)

regarding the leading of the country. In the absence of the negotiation between these two parties it is hardly possible to say there is a compromised transition.

Some others also agree on the fact that the country is undergoing a transitional period yet deviate on the mode. Ethiopia is undergoing reform oriented transitional period by the reform oriented leaders among the ruling party itself while the EPRDF regime is still in power.²¹⁵ These reform oriented new leaders have taken the responsibility to lead the political transition period without forming a transitional government comprising of all oppositions political parties or stakeholders despite a call for such.²¹⁶

From the data I collected majority²¹⁷ of the respondents agree in favour of reform transition while others²¹⁸ argue as there is no transition since the ruling party is still in power but recognize as reform actions are taken.

The civil unrest necessitated the transition to a democratic system and manifested the popular demand for an inclusive political system, fair representation, economic equality, accountability and the rule of law. In addition to the civil disobedience, the internal divergence within the ruling party EPRDF exposed by the publicly siding of the then ANDM and OPDO with the protestors' demand; provoked the current political transition. The vote against the second State of emergency which was declared on February 2018 by the significant numbers of EPRDF parliament members manifested the erosion of the long-standing party culture of democratic centralism.

The seriousness of the challenge within the party is also attested on the selection process of the new party chairperson and Prime Minister following the resignation of the chairperson of the party and Prime Minister Hailemariam Dessalegne.²¹⁹ Up on the election of the new Prime Minister Abiy Ahmed, his not winning full support of EPRDF witnessed the objective divergence among the members of the ruling party itself.²²⁰

On his inauguration speech and in different scenarios, Prime Minister Abiy Ahmed promised to democratize the political system. His speeches were evident of the divergent attitude the

²¹⁵ Muluken Gebeyaw, "Ethiopia: what should be done for a successful political transition?", <https://kichuu.com/political-reform-in-ethiopia/>, accessed on 10/12/19

²¹⁶ Ibid.

²¹⁷ 9 out of 15 respondents.

²¹⁸ 4 out of 15 respondents.

²¹⁹ Dan Gottlieb, "Ethiopia 2018: The Transition of Power and its Implications", Africa Research Program, volume 4 no. 3, September 24/2018. <https://dayan.org/content/ethiopia-2018-transition-power-and-its-implications>. Accessed on 16/12/19

²²⁰ G. Teressa, 'ANALYSIS: DEMOCRATIC TRANSITION IN ABIY'S ETHIOPIA: MANAGING THE BAD, THE GOOD AND THE TROUBLING', <http://addisstandard.com/analysis-democratic-transition-in-abiy-ethiopia-managing-the-bad-the-good-and-the-troubling/> Accessed on 24/02/2019

party members towards democracy and also marked the implicit demand of transition and it was the result of the struggle between the soft liners and the hard liners of the party. For instance Prime Minister Abiy Ahmed's speech to the parliament on June 18, 2018; labelling the human right violation acts of the government as a terrorist act and apologizing on behalf of the government signifies the antagonism between the members of the ruling party towards democracy.

The author of this paper is with the view that Ethiopia is passing through political transition, a reform type transition. Transition is a shift from authoritarian rule to democratic system. The measures taken following the coming of the new Prime Minister like releasing political prisoners, opening the space for private Medias, inviting opposition political parties for dialogue and announcement to revise repressive laws was a new move by the ruling party EPRDF and contrary to its old habit. After the coming to power of the reformist leadership the dominant and one of the constituting parties of EPRDF, TPLF step down from key leading posts, like defence and security, revenue and customs authority and foreign relations. The hard liners or those who economically and politically benefited from the earlier scenario urge to maintain power at the cost of the popular demand, but replaced by the soft liners or to those who demanded the political reform. As a result since the election of the new leadership in the year 2018, Ethiopia's path towards democracy is brought to a significant level.²²¹

Coming to the front line of the soft liners introduces the process and great zeal of democratizing the country and end the authoritarian rule. Only the reformists are in charge of the transition and shaping the nature of the new democracy without having any negotiations with the opposition political parties.

In transformation or reform, those in power play a pivotal role in transiting the system to democracy.²²² For instance in Brazil and Spain the democratization process was initiated from the regime or was "liberalization from above".²²³ Similarly, those who are prodemocracy in the ruling party EPRDF, initiated the democratization process.

In conclusion, the changes following the step down of the previous dominant party TPLF and groups of the ruling party opposing the democratization process from federal power and the coming of reformist prodemocracy groups are evident for the reform transition. Here the role of the civil disobedience couldn't be denied and took the lion share for the actualization of the current political transition.

²²¹ Mohamed Salih, (n 6) Foreword

²²² Samuel P.Huntington, (n 30) 125

²²³ Ibid.

3.4 The Opportunities and Challenges of the 2018 Transition towards Constitutionalism

Following this transition so many incidents occurred contrary to the established constitutional principles and so many improvements were made by the government to foster the democratic system. For instance the return of exiled political parties and journalists, release of journalists and political prisoners and emergence of private media to enhance freedom of expression can be taken as good moves. On the other hand human right violation, internal displacement,²²⁴ non adherence to the constitutionally established justice system, selective prosecution and interstate tension has been encountered.

According to the data i have collected respondents²²⁵ appreciates the measures taken by the government such as; freedom of expression, free political participation, freedom of association, gender inclusivity, the release of jailed journalists and political prisoners as an opportunity towards ensuring constitutionalism. Similarly, the respondents²²⁶ view the violation of human rights, internal displacement, unlawful arrest, non-adherence to the rule of law, lack of peace and security and the government's negligence to correct these threats as a challenge towards ensuring constitutionalism.

Thus, the opportunities and the challenges for constitutionalism following the transition will be discussed.

3.4.1 The Opportunities of the 2018 Transition of Ethiopia

Many agree that the transition brought so many opportunities for the actualization of constitutionalism. For instance Mohamed Salih expressed the change by saying:

*“In the wake of protracted public protests and a change in the leadership of EPRDF, there are signs, warmly and widely welcomed, of a turn to a more open and freer political space, among them: the release of imprisoned dissident journalists and leaders of the political opposition, a relaxation of restrictions on public expression, decriminalization of opposition parties, and a public commitment to honour human rights.”*²²⁷

²²⁴ Internal Displacement Monitoring Centre, <http://www.internaldisplacement.org/countries/ethiopia> accessed on 16/12/19

²²⁵ Random sampled respondents.

²²⁶ Ibid.

²²⁷ Mohamed Salih,(n 6) 42

Especially in relation to constitutionally guaranteed fundamental human and democratic rights, the transition brought significant changes. Owing to these changes the culture of constitutionalism is expected to flourish. Among the changes which provide opportunity for constitutionalism the following can be mentioned.

3.4.1.1 Free Media

In a democratic system the media provide information about the operation of the government, are voice for the voiceless and serve as a form of public discussion and debate.²²⁸ Having these advantages in mind the FDRE constitution guaranteed freedom of expression stating as:

*“Freedom of press and other media and freedom of other artistic creativity is guaranteed. Freedom of press shall specifically include prohibition of any form of censorship and access to information of public interest.”*²²⁹

Yet the country was known for its repression of the freedom of expression and prosecution of journalists. According to CPJ Ethiopia has been among the top listed countries for censorship²³⁰, jailing of the journalists²³¹ and high number of exiled journalists²³². Yet in 2018 CPJ wrote “Allowing Ethiopians access these news outlets is a positive sign that Prime Minister Abiy Ahmed is committed to delivering his promise to end Ethiopia’s censorship of the independent press” following the unblocking of 260 sites and the release of prisoned journalists.²³³ On April 4, 2019 Reporters without Borders wrote that “In the past year, Ethiopia has gone from being one of Africa’s biggest jailers of journalist, to being a country where journalists can now fulfil their role as a fourth estate and criticize the government without immediately being imprisoned.”²³⁴ CPJ also wrote that Ethiopia, which was one of the most censored countries in the world and one of the worst jailers of journalists in the sub Saharan Africa, has gone through dramatic reforms under the new leadership. In 2018 for the first time in 14 years CPJ recorded no journalist behind bars in its annual census.²³⁵ And the

²²⁸ Mohamed Salih, (n 6) 2

²²⁹ FDRE Constitution, Federal Negarit Gazzet no.1/1995, Article 29(3)

²³⁰ CPJ, ‘The 2015 list of 10 Most Censored Countries, Attacks on the press’, (Report) <https://cpj.org/2015/04/10-most-censored-countries.php>. Accessed on 9/12/19

²³¹ CPJ, ‘Two Ethiopian radio journalists convicted of terror charges’, (Report) <https://cpj.org/2016/12/two-ethiopian-radio-journalists-convicted-on-terror.php> accessed on 9/12/19

²³² CPJ, ‘Mission Journal: Ethiopian journalists must choose between being locked up or locked out’, (Report) <https://cpj.org/blog/2014/12/mission-journal-in-ethiopia-journalists-must-choose.php>. Accessed on 9/12/2019

²³³ CPJ, ‘Ethiopia allows access to over 260 blocked websites’, (Report) , <https://cpj.org/2018/06/ethiopia-allows-access-to-over-260-blocked-websites.php> accessed on 9/12/19

²³⁴ CPJ, ‘New Era for Ethiopian Journalists’, (Report), <https://rsf.org/en/news/new-era-ethiopia-journalists> accessed on 9/12/2019

²³⁵ CPJ, ‘250 Journalists imprisoned’, (Report) https://cpj.org/data/reports.php?status=Imprisoned&start_year=2018&end_year=2018&group_by=location accessed on 9/12/19

country ended its block of over 260 websites and ban on media outlets forced to work in exile.

Following the reform many private media outlets started opening. Journalists were released from prison, banned media outlets such as ESAT and OMN and others returned home. print Media emerge abundantly. Some of the written Medias like *Fitih*²³⁶ and *Ethiopia*²³⁷ are owned by the former prisoned journalists Temesgen Desalegne and Eskinder Nega respectively. Unrestricted freedom of expression creates a space for opposition political parties, gender equality activists, media organizations and journalists and legal associations to operate freely and within the remits of the constitutional and myriad of legal instruments, directives, regulations, and policies.²³⁸ This new sunrise in the political reality has created an enabling environment for civic engagement that should be nurtured and consolidated.

From the perspective of constitutionalism, it is mainly the duty of the government to ensure the application of the constitution. As such the release of prisoned journalists, the unblocking of several websites and dropping the charge of accused Medias and journalists is the sign of ensuring the application of the constitutionally guaranteed right i.e. freedom of expression. Since the bigger picture is creating a constitutional culture, issues related such as what kind of Medias are essential for the contemporary situation needs to be addressed. Thus, though there is good progress regarding the freedom of expression, still there is a lot to do in the transition to ascertain freedom of expression to the fullest sense.

3.4.1.2 Gender Equality

The FRDE Constitution recognized the rights of women under Article 35. Women have the right to equally participate and compete with men on the bases of equality in the political, economical, social and private and public lives.²³⁹ They also have the right to be consulted in the policy making process of the country.²⁴⁰ Though we have a Constitution with very beautiful wording for women rights and the majority number of the population, women are underrepresented in decision making positions and political involvement. However, with the coming to power of the new reformist leadership, the government introduced gender equality at a significant level by appointing women to take half of the ministerial role in the cabinet.

²³⁶ The name of private magazine the equivalent English meaning is Justice.

²³⁷ The name of private magazine.

²³⁸ Mohamed Salih,(n 6) 33

²³⁹ FDRE Constitution, Federal Negarit Gazzet NO.1/1995, Article 35(3)

²⁴⁰ Ibid Article 35(6).

The appointment of Ms. Sahlework Zewde the first Ethiopian President, Meaza Ashenafi the first woman President of the Federal Supreme Court, Birtukan Mideksa the chairperson of electoral board of Ethiopia, Muferiat Kamil the first women minister of the newly established Ministry of Peace and Kiriya Ebrahim the first women chairperson of the House of Federation witnessed the great political commitment to the practice of the constitutional principles of the rights of women. Some believed as these appointments will make a difference in Ethiopian women lives and gender equality.²⁴¹ Others argue as though some women come to the higher level of political decision making power, it doesn't bring a change to the majority Ethiopian women.²⁴²

Nevertheless women are coming to the front line of the political and decision making arena signed as gender equality; there remains a lot to ascertain the participation of women in the middle and lower decision making levels.

3.4.1.3 Political Participation

Constitutionalism is building a political culture in which the free political participation of citizens for the democratization of the country can be ascertained. The mere existence of the written constitution cannot actualize the application of the words of the constitution.

After the fall of the *Dereg* regime EPRDF, the ruling party is known for its political domination. The political domination is manifested in the domination of different democratic institutions like the parliament, electoral board, courts, security and defence. It is also evident that the ruling party stretched its hands to non-governmental institutions through oppressive laws like Charities and Societies proclamation, Anti-terrorism law and Media law. It is also known that government tightened the political space after the 2005 election owing to the significant gain of the opposition political parties. Despite being in power for the last three decades, the party keeps to “won” 100% seat of the parliament. Though there have been periodic elections the result were predetermined since the democratic institutions were under the ruling party. Intimidations, killing and unlawful arrest of the opposition political parties and those who have expressed dissenting opinion against the government have been the day today life. The constitution recognizes the freedom of expression²⁴³, the right to assembly²⁴⁴

²⁴¹ 11 out of 15 respondents.

²⁴² 4 out of 15 respondents.

²⁴³ Ibid Article 29

²⁴⁴ Ibid Article 30

and freedom of association²⁴⁵. However there were plenty restrictions on the pretext of security of the country by the oppressive laws aimed at protecting the interest of the ruling party and those in power. Due to the harassment, intimidation, charges of terrorism and unlawful arrest many opposition political party members forced to live in exile.

Constitutionalism demands the full engagement and genuine commitment of the government, to respect the constitution and assure it is respected. Banning political parties and jailing those who dared to criticise the government goes against the constitutionally protected right to make a free political participation. Following the reform, many political parties are unbanned like ONLF, OLF and *Arbegnoche Ginbot 7*, jailed political prisoners are freed and exiled political groups are welcomed, the notorious crime investigation unit in Addis Ababa *Maekelawi* was closed. Opposition political parties at home started to freely participate in the politics of the country. These changes witnessed the country is in the progress of ascertaining constitutionalism and can be taken as an opportunity to create a constitutional culture.

3.4.1.4 Accountability

Criminalizing law offenders is one means of ascertaining constitutionalism and duty of the government. The prosecution of criminals is provided under the FDRE constitution and other substantive laws. In relation to human rights, prosecution of right violators is among the duties of the government.

For the last three decades citizens were tortured, killed, mutilated, and subjected to forced disappearance and many human right abuses.²⁴⁶ *Maekelawi*, federal crimes investigation centre; is well known for huge human right violation and torture against arrested and accused persons. Prime Minister Abiy Ahmed also gave recognition to act of torturing, putting people in dark rooms, and mutilation of prisoners as government's act of terrorism and apologized on behalf of the government.²⁴⁷

²⁴⁵ Ibid Article 31

²⁴⁶ ETHIOPIA 2018 HUMAN RIGHTS REPORT, <https://www.state.gov/wp-content/uploads/2019/03/Ethiopia-2018.pdf>, Accessed on June 20/2019.

²⁴⁷ Prime Minister Abiy Ahmed's speech given to the parliament on June 18, 2018.

After the reform, over 36 high government officials were arrested suspected for torture and corruption.²⁴⁸ Holding accountable past human right violators is taken as an opportunity towards constitutionalism. Yet different groups of the society criticize the prosecution process. The grounds for the criticism are selective prosecution of violators and government's political agenda behind the prosecution. Equality before the law is a constitutional principle.²⁴⁹ Everyone is entitled to equal treatment irrespective of any differences including political or other opinion.²⁵⁰ However, many²⁵¹ argue as the selective prosecution bases opposition against the current political reform. They²⁵² assert as the reason for the arrested people is their political opposition to the new leadership while the majority of human right violators and corrupters are living freely owing to their full support to the reform. From the new Reconciliation Commission law²⁵³, it is evident that the new leadership is underestimating the people's need for justice and accountability and deprioritizing victims' rights; against fostering accountability and peace and security.²⁵⁴ So the prosecution process didn't aim to the adherence of rule of law rather achieving political agenda by distorting justice. On the other hand some argue in favour of the selective prosecution.²⁵⁵ Their justifications are, due to the massive participation of human right offenders and corruption criminals the prosecution cost exceeds beyond the country's economic capacity. In order to avoid economic and political conspiracy and not to compromise the transition; it is preferable to prosecute the main participants and those in charge of giving the order.

Even though both are competing ideas, especially in periods of transition; prosecuting law offenders should be taken as one of the good opportunity the transition brought towards constitutionalism.

²⁴⁸ Amnesty International, 'Ethiopia: Arrest of dozens of security officials a first step towards accountability', (Report) (12 November 2018) <https://www.amnesty.org/en/latest/news/2018/11/ethiopia-arrest-of-dozens-of-security-officials-a-first-step-towards-accountability/> . accessed on 16/12/19

²⁴⁹ FDRE Constitution, Federal Negarit Gazzet no.1/1995, Article 25

²⁵⁰ Ibid.

²⁵¹ 11 out of 15 respondents.

²⁵² Ibid.

²⁵³ A Proclamation to Establish Reconciliation Commission, Federal Negarit Gazette no.1102/2018

²⁵⁴ Haben Fecadu , 'Make Justice a Priority in Ethiopia's Transition', (26 April 2019), Retrieved from <https://www.amnesty.org/en/latest/campaigns/2019/04/make-justice-a-priority-in-ethiopias-transition/> accessed on 16/12/19

²⁵⁵ 4 out of 15 respondents.

3.4.1.5 Institution Building

Inclusive and participatory institutions are the manifestations of a democratic system. It is through these governmental institutions both violations and observance of constitutional principles is undertaken. When the governmental system becomes undemocratic, selection of institution personnel bases itself on several grounds different from merit based criteria. Before the 2018 transition, it was evident that our institutions were highly dominated by one ethnic group members; especially foreign affair, security and financial institutions. Yet, following the reform federal institutions become open every group of the society.²⁵⁶

In the process of institution building replacing the former personnel is mandatory. Ethiopia being in transition changed the leadership of institutions such as, Federal Supreme Court, National Electoral Board, Ethiopian Human Right Commission and etc.

From the data I collected, majority²⁵⁷ of the respondents appreciate the move towards building all inclusive and participatory institutions and the change to the personnel of oppressive institutions. However, some²⁵⁸ argue as there is domination of one ethnic group in certain institutions and from the highest to the lowest government structure both at the federal and state level the ruling one are members of EPRDF who have been the major human right abusers. Thus it is difficult to say the institutions are changed to be participatory and inclusive and they²⁵⁹ express their concern not to get in to vicious circle.

To recap, democratic system is a system where every group gets a chance and access to participate in the decision making process as long as there is no competency issue. Transitions also demand the replacement of oppressive institutions personnel to gain back the public trust. In institution building the government needs to pay attention not to get back in to the previous circle.

²⁵⁶ Yoseph Badwaza, 'Reform in Ethiopia: Turning Promise into Progress', <https://docs.house.gov/meetings/FA/FA16/20180912/108670/HHRG-115-FA16-Wstate-BadwazaY-20180912-U2.pdf>. Accessed on January 19/2019

²⁵⁷ 10 out of 15 respondents.

²⁵⁸ 5 out of 15 respondents.

²⁵⁹ Ibid.

3.4.2 The Challenges of the 2018 Transition of Ethiopia

Though the 2018 transition brought many opportunities towards ensuring constitutionalism, it is not left unchallenged. Plenty of incidents occurred threatening the process of democratization. Mainly the challenges related to human rights, peace and security and adherence to the rule of law. Some of the main challenges are discussed as follow.

3.4.2.1 Internal Displacement

Since the reformist leadership took office, issues related to land access and questions of identity and administrative boundaries become reasons for conflicts.²⁶⁰ Ethnic conflict provoked by the radical extremists; with the support of armed groups and in some instances by government security forces,²⁶¹ a significant number of people displaced from their homes. About 2.9 million displacements related with ethnic conflict were recorded in 2018, the highest number recorded worldwide.²⁶² The conflict between the Oromo and Gedeo ethnic groups considered to be one of the worst displacement crises internationally, with displaced people more than 1.3 million.²⁶³

Pursuant to the FDRE constitution every Ethiopian citizen is entitled to the right to liberty of movement and freedom to choose his/ her residence.²⁶⁴ The government is under obligation to respect and enforce human rights including the freedom of movement.²⁶⁵ Yet, many people displaced from their homes owing to their ethnic background; their freedom of movement restricted and unable to get the necessary remedy.²⁶⁶ Different groups and people demand the

²⁶⁰ Felix Horne, 'Ethiopia's Transition to Democracy Has Hit a Rough Patch. It Needs Support From Abroad', <https://www.hrw.org/news/2019/04/08/ethiopias-transition-democracy-has-hit-rough-patch-it-needs-support-abroad>, accessed on 16/12/19

²⁶¹ James Jeffrey, 'Briefing five challenges Ethiopia's Abiy facing', The New Humanitarian, <https://www.thenewhumanitarian.org/analysis/2019/10/16/Abiy-Ethiopia-Eritrea-Nobel-peace-Tigray> accessed on 16/12/19

²⁶² Internal Displacement Monitoring Centre, <http://www.internaldisplacement.org/countries/ethiopia> accessed on 16/12/19

²⁶³ Haben Fecadu, (n 237)

²⁶⁴ FDRE Constitution, Federal Negarit Gazzet no.1/1995, Article 32(1)

²⁶⁵ Ibid Article 13(1)

²⁶⁶ Felix Horne, (n 238)

government to take action and calm ethnic tension and violence.²⁶⁷ Otherwise it continues to be a threat against the desired democratization and its process.

3.4.2.2 Human Right Violations

Following the reform violation of rights like the right to life, the right to security, the right to privacy and the right to property becomes a day to day life. The violation is caused by informal armed groups, government security forces and unarmed youngsters.

In relation to ethnic issues many people lost their lives inhumanly,²⁶⁸ women are raped, property burned and destroyed.²⁶⁹ These incidents were occurred by informal armed groups and youngsters.

Human right violations committed also by the government security forces. Five people killed by security forces during the demonstration in the capital Addis Ababa.²⁷⁰ The unlawful detention in the capital, Addis Ababa is another incident. The Addis Ababa police commission announced the arrest of 1204 people for participating in violence. The commission also announced as the arrested people were at *Sendafa* and will be send to *Tolay* for further indoctrination. The arrest was arbitrary and without order of the court.

The tarnished image of some elements of the security and intelligence forces and the emergence of allegations of torture and human rights abuses became consistent reminders and source of fear of the return of these forces to their old ways.²⁷¹ As the charges were not substantiated, the mass arrest and indoctrination of over a thousand youth accused of participating in violence in the capital was a grim reminder of past abusive practices.²⁷²

These human right abuses become a threat to the process of democratizing the system.

²⁶⁷ International Crisis Group, 'Managing Ethiopia's unsettled transition', (Report) <https://www.crisisgroup.org/africa/horn-africa/ethiopia/269-managing-ethiopias-unsettled-transition> accessed on 16/12/19

²⁶⁸ Engidu Woldie, 'Ethiopia: Arrest in mob killing of innocent man in Shashemene' <https://ethsat.com/2018/08/ethiopia-arrest-in-mob-killing-of-innocent-man-in-shashemene/>. Accessed on January 04/2019

²⁶⁹ Human rights watch, 'world report 2019', (Report), <https://www.hrw.org/world-report/2019/country-chapters/ethiopia> on 16/12/19

²⁷⁰ Ibid.

²⁷¹ Mohamed Salih, (n 6) 32

²⁷² Ibid.

3.4.2.3 Peace and Security

Peace and security are the essential things a society could demand. During political transitions intense conflicts in interests, values, norms, and priorities abound.²⁷³ Violence is inevitable during political transitions. The violence could involve physical violence to persons and property distraction.²⁷⁴

Following the coming to power of Prime Minister Abiy Ahmed, the exiled opposition groups are returned home. Among the returned opposition forces some remain to be armed and get control of certain parts of the country.²⁷⁵ In these areas security issues and tension is observed. Border disputes between the Amhara and Tigray peoples are deteriorating, specifically the Amhara's claim to the Wolkait and Raya territories.²⁷⁶ The Amhara and Oromo groups, though previously allied to oust the TPLF, are now squabbling over government appointments and land disputes.²⁷⁷ Inter region high ways has been blocked by the local youngsters and the government security forces. As a result inter region transportation services were interrupted. People who live in regions out of their respective ethnic region are under pressure and when the situations are worsen; they are forced to get a refugee in the nearby churches. According to the data I collected, due to inter-state conflict and ethnic conflicts citizens are afraid of traveling to other cities using vehicles, parents are afraid of to send their children to the universities and university students are forced to return home by the fear of attack.

The security issue brought fear and frustration to those who were supporters of the transition. Unless the government takes action to security issues it continues to be a threat to the transition.

3.4.2.4 Law Reform

The EPRDF regime has been criticized for the oppressive laws, like anti-terrorism law, media law and charities and societies laws. These all together prohibit civil societies work on human rights and democracy issues and restrict the ability of independent media to operate. Through

²⁷³ Jiunn-Rong Yeh and Wen-Chen Chang ,(n 72) 150

²⁷⁴ Samuel P. Huntington, (n 30) 192

²⁷⁵ Giovanni Faleg, 'Resetting Ethiopia: will the country heal or fail?', <https://www.iss.europa.eu/content/resetting-ethiopia>, Accessed on 17/12/19

²⁷⁶ Ibid.

²⁷⁷ Ibid.

these laws so many people were jailed and lost their freedom. And these laws were the manifestation of the authoritative nature of the regime. After the coming to power of the new leadership, the government set up a law and justice Advisory Council under the office of the Attorney General.²⁷⁸ The Council, composed of 13 independent legal professionals, is entrusted with examining restrictive laws and developing recommendations for comprehensive revisions including amendments to the laws and restructuring of institutions.²⁷⁹ The Advisory Council and the different working groups within it have so far done a remarkable job of holding several public forums to solicit feedback from stakeholders on proposed changes to these laws.²⁸⁰

However, these restrictive laws are still active and the law reform is not completed. As a result citizens are being criminalized and under arrest owing to these laws. The transition demands the law reform similar to the other reform activities.

3.5 Periodic Election

Election is a way of weakening and ending authoritarian regime or a vehicle and goal of democratization.²⁸¹ Election is not only the life of democracy but also the death of authoritarian regimes.²⁸²

For elections to result to a democratic system; the electoral process and the pre electoral process should be conducive both for the ruling party and opposition groups. In transitions the timing of the election could significantly affect its outcome. For a successful election, all the competing parties need to get reasonable time to get organized and introduce their policies. When early election is conducted since the government is the one who would organize the election; could easily get the public attention unlike the opposition political parties. On the other hand, later election benefits the opposition political parties to publicize their agendas and mobilize their supporters.

Though Ethiopia has been conducting elections since 1995, none of it was competitive like the 2005 election. After the 2018 transition, the government pronounced as every necessary scenario is prepared and election will be held in 2020. Majority ²⁸³ of the respondents'

²⁷⁸ Yoseph Badwaza, (n 256)

²⁷⁹ Ibid.

²⁸⁰ Ibid

²⁸¹ Samuel P. Huntington, (n 30) 174.

²⁸² Ibid.

²⁸³ 11 out of 15 respondents.

demand the delay of the election owing to security issue while others²⁸⁴ insist as the election needs to be conducted on the stated time. Those who demand delayed election argue as there is a limited time and security issue for the opposition political parties to publicize their agendas and mobilize their supporters. Owing to security issues some of the political parties are limited to the centre. According to the data I collected majority of the respondents are with a view of the delayed election because of the security issue in some parts of the country, while the rest argue for the timely election. The timing of the election continues to be the point of debate among the opposition political parties too.

The constitution sets the five year term, fixed time for the election to be conducted.²⁸⁵ This fixed time is subjected to change by Constitutional amendment or up on the approval of two-third majority vote of the joint session of HoF and HPR and two- third vote of the Councils of the member States of the Federation.²⁸⁶ The last election was conducted in 2014, thus the time is due for the next election. As the constitution being the supreme law of the land, its application should be ascertained irrespective of any circumstance.²⁸⁷ Having these constitutional principles; thinking about the periodic election with the existing security issue and the time left for opposition parties to get organized, creates a dilemma. In such kind of situations it is necessary to look in to the underlying principle or purpose of constitutionalism and specifically periodic election.

Election is one means of shifting from undemocratic system to a democratic one.²⁸⁸ Election demands a favourable environment to result to a democratic system otherwise it will return back to the same undemocratic system. In countries of transition like ours it is expected to host conflict and violence, which can be a great threat to the election process. If security issue is not resolved timely, it is highly doubtful to conduct a free election. In a condition where the necessary scenario is not satisfied, conducting election may not result to democracy. So dealing with this dilemma needs the sober negotiation of the ruling party and opposition groups.²⁸⁹ The negotiation might go to the extent of amending the constitution which demands the willingness of the ruling party.

Thus, since the very purpose of election is shifting to a democratic system, every scenario to make a free election needs to be in conformity with this purpose. The timing of the election demands an exhaustive discussion by the political actors.

²⁸⁴ 4 out of 15 respondents.

²⁸⁵ FDRE constitution Article 54(1)

²⁸⁶ Ibid Article 105(2)

²⁸⁷ Ibid Article 9(1)

²⁸⁸ See n 271 above.

²⁸⁹ See n 153 above

2.6 Transitional justice

Transitional justice is one of the main issues of countries in transition. Transitional justice deals with the justice mechanism a country would employ to address past human right abuses. After the fall of the *Dereg* regime the transitional government established a special prosecutor's office to deal with human right violations by the former government officials by the selected prosecution model. The mandate given to the special prosecutor office was to bring to justice those who are responsible for human right violations and corruption. The rationale behind the prosecution model was bringing the perpetrators to trial so as to educate the people and make offenders aware of their grave offences to prevent recurrence of fascist rule of the previous government.²⁹⁰

Following the coming to power of the reformist leadership, past human right violations continues to be exposed. Every group of the society prayed for justice. The government announced the detention of few suspected government officials for human right violation.²⁹¹ Yet, the selection mechanism remains to be controversial.

Different types of transitional justice mechanisms have been suggested by professionals. According to the data I collected majority²⁹² of the respondents vowed for holistic approach of transitional justice system. That means retribution, reparation of victims, truth and reconciliation. While others²⁹³ favour prosecution.

As a country we have a history of prosecuting past human right offenders with the aim of not to repeat same mistake. Yet, let the other group of the society but; the ones who were in power and enacted and implemented the prosecution during the transitional period in 1992 did not learn from the prosecution of *Dereg* officials. And they were the ones to participate in the human right abuses for the last 27 years. We have tried the prosecution model with the "victor's justice" mentality and we do not get profit from that. Thus, all inclusive transitional justice mechanism would be a better transitional justice mechanism.

²⁹⁰ The preamble of the proclamation establishing the office of the special prosecutor, proclamation No. 22/92

²⁹¹ Aminesty Internaional (n 243).

²⁹² 8 out of 15 respondents.

²⁹³ 7 out of 15 respondents.

CHAPTER FOUR

CONCLUSION AND RECOMMENDATION

4.1 Conclusion

Transition is a process of democratizing a political system, a shift from undemocratic regime to a democratic one. So many countries around the world takes place transitions in different modes according to the context of the country. Accordingly there are different modes of political transition. Of these modes of transitions reform is one of them. Political transition has a direct link with constitutionalism. Constitutionalism is manifested in rule of law, economic and political participatory system, human right, separation of power and autonomous institutions. The need for constitutionalism is the triggering factor of transitions. Owing to the transitional nature, the conventional understanding of constitutionalism, rule of law and justice is subjected to compromise. Compromising the elements of constitutionalism is aimed at the successful transition.

In Ethiopia, due to human right abuses, none adherence to the rule of law, economic and political exclusions civil unrest and upheaval was observed in the past three years. As a result of the civil disobedience and the ruling party internal divergence; Ethiopia is experiencing political transition, a reform transition.

Following the transition different incidents occurred towards ensuring constitutionalism and as threats to constitutionalism. Among the opportunities free media, the freedom to political participations, the return and unbanning of exiled political groups and media, the release of jailed journalists and political groups can be mentioned. On the other hand massive human right violations like internal displacement, killing, property distraction, issues related with peace and security, unlawful arrest was occurred as a threat to the constitutionalism. Taking in to consideration the transitional nature and the expected different kinds of conflicts; it is reasonable to tolerate or adopt different kind of justice system and mechanism of ensuring rule of law. Yet, the practical scenario is different from what is expected from transitional periods. The government is not responding satisfactorily to the violent acts, to the massive human right violations, to the threats against the peace and security of the nation at large.

This thesis concluded that, though Ethiopia is going through a reform transition and owing to the nature of the transition at large conflict and lawlessness are expected to some extent. And

the justice system shouldn't be like the normal justice system, rule of law should be treated in a different way as it goes in line with serving the transition. But, since ensuring law and order is the mandate of the government, the government is expected to take action against human right violators and criminals in general.

The author finds that, unless the government takes action its silence towards violence and tyranny could be a significant threat to the process and result of the national election and to the subsequent process of constitutionalism.

4.2 Recommendation

In Ethiopia, the constitution is the supreme law of the land.²⁹⁴ Accordingly, all citizens, state organs, political organizations, other associations as well as their officials have the duty to ensure observance of the Constitution and to obey it.²⁹⁵ It is evident as transitional periods are characterized by some sort of conflict which could contravene with the constitutional principles and the law enforcement mechanisms could not be the usual ways. Furthermore transitions are the process of democratizing the nation which is in line with the very purpose of the constitution. Though conflicts are expected in the transitional periods the government is under obligation to ensure the observance of the constitution. Therefore, this author believes that without neglecting the nature of transitional periods and its consequences, the constitutionally guaranteed rights and peace and security of the country should be maintained, the government is also expected to ensure the observance of the constitution. Accordingly, the author urges the following recommendations:

- I. The government should establish a system of accountability for serious human rights abuses over the past 27 years and since the introduction of the 2018 transition. This could entail mechanisms like prosecution, truth and reconciliation, reparation of victims and give opportunities to air their grievances.
- II. The government should establish a mechanism to prevent and minimize ethnic based conflicts through legal frame work such as a law which regulates hate speech and violent act against particular ethnic.
- III. Restrictive laws such as anti-terrorism law and media law should be reformed timely.
- IV. Ensure peace and security by disarming illegally armed groups.
- V. Creating a nation-wide constitutional culture through the participation of all state actors; ruling party, opposition parties, activists, civil societies and academic institutions.

²⁹⁴ FDRE Constitution, cited above at note 22, Art. 9(1).

²⁹⁵ Ibid Article 9(2)

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