

Addis Ababa University

School of Law

Graduate Studies

**LEGISLATIVE CONSTITUTIONALITY OF THE FEDERAL PARLIAMENT
ON MATTERS UNCOVERED UNDER THE FDRE CONSTITUTION: BASED
ON EMPIRICAL APPRAISAL OF LAWS**

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ADDIS ABABA, ETHIOPIA

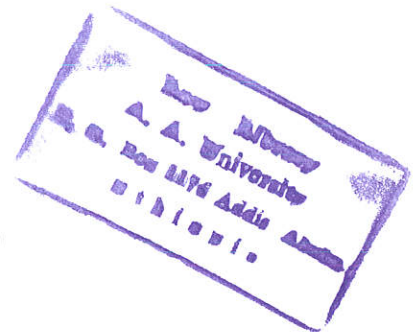
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A THESIS

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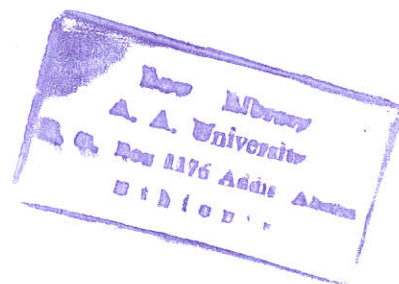
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Abstract

Looking in retrospection the modalities adopted under the FDRE Constitution in establishing lawmaking authority appears defective in two fundamental aspects. The feature of constrained parliamentary systems, which primarily focuses on strong judicial independence to offset the odds of separation of power i.e. the fusion of executive and legislative organs, does not exist in the constitution. The idea of parliamentary supremacy in constrained system is locked between the supremacy of the constitution and the valid enforceable limitations upon lawmaking. It constrains the exercise of power through strong judiciary with its exclusive checks to defend the constitution and enforce the basic principles which mostly are dubbed as entrenchment, justiciability and supremacy. The other essential defect goes to the manner employed in the division of legislative power between the federal and regional governments. In this respect unlike most of the constitutions of federations that leave reserve clause upon the states while the federal government holding only enumerated powers, the FDRE constitution is short of elastic clause that generally allows lawmaking authority upon the federal government. Often dubbed as implied power doctrine, such elastic clauses is necessary in federations to constitutionalize in order to render the federal laws legitimate in the event it becomes compulsory to exercise a particular matter which does not belong in its enumerated jurisdictions. Nevertheless, regardless of the lacuna and without unequivocal constitutional authority the HPR had practically jumped in such areas via several legislations. The empirical examination of certain laws in force indicate a number of matters which need constitutional backs are simply left to the federal government to determine via ordinary laws. Besides, the legislative exercise is not only uneasy to enact in the form of parliamentary laws but also no extraordinary procedure has been followed. The practice evidently was reinforced the HPR authority can rightly goes beyond the text of the constitution to confer additional competencies upon itself with no threat on its constitutionality or the parliament is the maker and breaker of the institutions for which the constitution entrenches. The specific legislations tabled for empirical appraisal have significantly shaped the exercise of political power both qua constitutions in their scope and in lieu of the constitution in terms of the matters engulfed on the substance of federal powers. In this particular foci those laws regarding the head of states of the republic, systems of federal intervention into the regions, intergovernmental relations (IGR), competency of the second chamber, federal power over the

autonomy of the city of Addis Ababa, and functional independence of the judicial organ etc can remarkably be high lightened as the points of contest. The legislations mentioned with their other kin exclusively stands on Art 55(1) qua constitutional source of authority to mark legislative legitimacy on the part of the parliament. Unfortunately if it is not to help as a safe passage to bond the acts to conform to the constitution, the examined laws tell different context both in scope and content. Neither the specific authority can be attached with the enumerated jurisdiction of the federal government nor the constitution puts an inference on the possibility to provide legal frameworks in the sense they actual appear now. At times they resemble restrictive lawmaking tendencies rather than the underlying principle for a more protective approach during enforcement. In fact it is not a surprise the varieties of these legislations would have welcomed serious constitutionality tests for if it had been in other jurisdictions who adopt strong independent constitutional adjudicative organ. Otherwise it would have faced ostensible recourses for valid constitutional amendment so long as the laws had brought something new to the actual text of the constitution.

Chapter One

Introduction

1.1. Background of the Study

It is about more than a decade and half since the FDRE Constitution came into force. It is also evident that since then Ethiopia has already opted for parliamentary system as a form of government and federal set up as state structure, upon the promulgation of the FDRE constitution.¹ It brought, inter alia, the recognition and entrenchment of bill of rights which almost embraces all generational rights²; stipulated the supremacy of the constitution; incorporated certain jural postulate of the constitutional order it sought to establish³; dedicated itself to the protection of the 'nations, nationalities and peoples' through ensuring their rights to self-determination including secession and the object of creating one economic and political community through the established federation of its own version. The preamble avows also to the principles of rule of law and principles of democratic state.⁴ Taken together these constitute the new grund norm established under the federal constitution along with the constitutions of the nine Regional States of the federation to make up the Ethiopian constitutional law albeit the generality of what all such mean to us.⁵

The constitution further enumerates the competencies of the federal government as well as the specific authorities of each organ. However, with respect to the powers and function Regional States governments the constitution adopts the residual system of power division.⁶ In fact, it also included certain framework and concurrent powers shared between the two tiers of governments

¹ ETH CONST. art 1, 45, 46, and 50 Thus, there are two layers of governments having their own legislative, executive and judicial bodies.

² Id. Chapter Three of the FDRE Constitution which is dubbed as 'Fundamental Human Rights and Freedoms' Art 13-44 where we can shortly refer them as the 'bill of rights'.

³ Id. Chapter Two of the FDRE Constitution which is dubbed as 'Basic Values of the Constitution' Art 8-12, namely, the principles of popular sovereignty; constitutional supremacy; sanctity of human rights; secularism; and, lastly of accountability and transparency of government conducts.

⁴ Id. preamble and Art 39

⁵ The nine Regional States which make up the federation according to Art 47 are: Afar, Amhara, Tigray, Oromiya, Somali, Gambella, Benishangul- Gumuz, Harari and the Southern Nations, Nationalities and Peoples. There are also two autonomous city administrations which have comparable jurisdictions like the regions save their accountability to the federal government. These are the Cities of Addis Ababa, which is constitutionally recognized as per Art 49, and Dire Dawa, which the constitution neither makes mention of it nor contemplates the possibility of establishing new federal city.

⁶ ETH CONST art.50 cum art 51 and art. 52(1) on the residual clause

on certain matters specified thereof.⁷ In so doing, in acute terms it stressed that both layers should respect the jurisdiction of others in the event they exercise their respective constitutional competencies.⁸ In other words, any act of encroachment on the competencies of each is constitutionally considered to be unconstitutional and against the established federal principle as well. In addition, both the federal and Regional States governments are obliged to exercise their powers so granted within the bounds of the constitution as its primary focus.⁹ Meaning, it is a duty on both layers to enforce and respect the constitution which, *inter alia*, guarantees the fundamental human rights and freedoms of citizens; the basic values of the constitution; the state structure and the supremacy of the constitution could be mentioned as the pillars regulating the activities as such. It is, thus, the expectation of the constitution that either layer won't exercise their powers in such a way as to defeat the purposes of the constitution in any way. Put it simply, any act, decision or practices and more specifically legislations appropriately enacted by the law-making organs if it carries with itself matters defying the constitution are ultimately illegitimate and therefore unconstitutional.

In the contemporary world the parliament is understood as the custodian of democratic values and the legitimacy of parliament is based on the will of the people. Parliament's right to legislate is delegated by the people where the constitution is only the instrument where such delegation is recognized and its scope of authority is limited in different mechanisms.¹⁰ Making law is often considered to be the major task of legislature after all; the term 'legislature' itself suggests a body that makes law. Thus, the constitution through enumerating the powers and functions of the parliament ensures the will of the people by granting certain matters within its scope while prohibiting certain other matters out of its activities. In such, a manner the idea of limited government comes into picture with respect to enacting laws.¹¹ However, this does not mean that limited government or a constitutional government in the broad sense would be ensured by only limiting law making power since one notes several other factors that should be taken into consideration.

⁷ Id, art 13 (1), 52(2) art 55 (5), (6), cum art 98

⁸ Id. art 50(8)

⁹ Id, art 51 (1) cum art 52 (2a)

¹⁰ DAVID BEETHAM, *PARLIAMENT AND DEMOCRACY IN THE 21ST C: A GUIDE TO GOOD PRACTICE* 5-6 , (Genève: IPU, 2006)

¹¹ Id.

Nevertheless, in systems where there are two separate lawmaking organs, like in federal arrangements, with distinct competencies, the power of legislations should be taken seriously.¹² That's why the second chamber, in fact unitary states as well may have, which serves as the representative of states is cited as the salient feature of federalism. In such systems the second chamber plays two crucial roles concerning lawmaking activities. On the one hand it advances the interests of subnational governments through participating in legislative process that generally affects the federation. On the other hand it serves as one channel of check on federal lawmaking power owing the representation mechanism allows the subnational units to maintain certain power balance. In short, lawmaking powers is relatively uncontrolled or the freedom to pass laws is easier in unicameral than in bicameral parliaments.

It is also equally important to focus lawmaking power in parliamentary forms of government. Basically, the system itself allows the fusion of legislative and executive organs and thus the power to make laws needs special attention. Here again due to the fusion just mentioned both the process and passing laws is much easier than other forms of government. Hence, in such systems it is evident that there should be an independent and impartial body which scrutinizes and controls laws enacted by the legislature in order to ensure whether they are consistent with certain principles of the constitution and whether they are exercised within their power limits. In fact, such bodies which holds the final authority to test or decide the constitutionality of laws varies from states to states ranging from the regular judicial courts, for example USA, to the separate constitutional courts, like Germany, or a political body like the Ethiopian models. So much so far it is with such understanding we are going to explore the constitutional design and practices of the making of laws in the Ethiopian context.

However, being as it may, it is not the object of the thesis to examine how far the legislatures at the regional level are exercising their powers in line with the constitutional space or any constitutional principles envisaged under the FDRE Constitution. Rather, the vantage point

¹² CHECKS AND BALANCES IN A SINGLE CHAMBER PARLIAMENTS: A COMPARATIVE STUDY 38, (The Constitutional Unit, School of Public Policy, London, February 1998) and see also Edward R. Rakhimkulov, 'THE RELATIVE PROS AND CONS OF THE SECOND CHAMBER IN COMPARISON' 25 (both are available at www.spea.indiana.edu/pdp/anayeses/research%publications/bicameralism-ER.htm.)

would be the federal legislature and its lawmaking powers as depicted in the constitution vis-à-vis those matters uncovered under the constitution but are actively applied in practice. In using the term 'uncovered under the constitution', it is employed to mean two fundamental constitutional issues. On the one hand, it means those matters 'necessary and proper for or incidental with' the execution of other powers expressly enumerated as federal competencies and, on the other hand, it refers to those matters which are not granted explicitly as forming to the general powers of the federal government to assume legislative authority.¹³

In fact, it must be noted that these uncovered matters in no way mean to suggest or imply matters of state autonomy under the residuary clause. Hence, it only takes those constitutional issues related to have relevance with the powers of the federal government and its practices of legislations. In such senses, the first issue relates to implied powers of the federal government, and thus legislations, whereas the second issue relates to matter of federal competencies with implied limitations on exercising law-making powers. Thus, it canvasses the division of powers and articulates whether implied powers are recognized as part forming the general or particular powers expressed as the subject of the federal legislature to constitutionally exercise.¹⁴ It is of equal importance to emphasize as to whether there are implied limitations on the federal powers in general and as to how the legislative practices are bound with such line of ideas. Broadly stated, the subject matter invites curious appreciation of the tests of constitutionality, as it is often contended, or the tests of validity or more specifically the tests of legitimacy of such kinds of laws in the sense of exercising powers towards the purposes or ends enshrined in the constitution. So much so, it is the thrust of the subject of the thesis to seek bridging the gap through making close observation on the particular design applied in the making of the constitution and the constitutional practice emphasizing the federal legislative powers and functions which holds the highest power in the constitutional arrangement.

¹³ For discussions on 'implied powers' and its constitutional relevance to the enumerated powers in federal arrangement; see generally, W. F. Dodd, *Implied Powers and Implied Limitations in Constitutional Law*, 29(2) *Yale L. J.*, 137-162, 141(1919)

¹⁴ WALTER MURPHY & JOSEPH TANENHAUS, *COMPARATIVE CONSTITUTIONAL LAW: CASES AND COMMENTARIES* 164, (St. Martin's Press, New York, 1997). Thus, it is central to federal division of powers in the constitution to clearly incorporate provisions with respect to the kind, extent, standards, and who determine the exercise of implied powers.

In so doing, the paper generally approaches through the constitutional issues of limited government, separation of powers, and constitutionalism, despite the overlaps in conceptual distinctions one to another, to vastly canvass lawmaking power in the Ethiopian constitutional context. Meaning, it underscore the basic notions whether the constitutional framework available as designed are in favor of or against to fostering them collectively in the practice. Also, it seeks to identify promises or pitfalls headed for achieving democracy in a manner the constitution depicts about as well as the fundamental pillars of rule of law in the sense of an accepted value to ensure the object of constitutional government strictly speaking. Therefore, the scope of the topic is only limited to the extent of legislative practices at the federal level. In such respect, it appraises different laws; often their constitutionality is points of contention, on the ground of implied powers and implied limitations in the manner proposed above. In fact, it could not be denied the fact that the issue as such touches a wide variety laws which govern various affairs of national importance and also application across the federation. If a certain categories of laws are distinguished to make sense, one may find the following as crucial though by no means it serves as illustrative lists but conveniences sought to deal with the matter.

Thus, it includes: laws pertaining to rights and freedoms of citizens in general; laws pertaining to the organs of the federal government which embraces also the administrative agencies established through it or the extension and diminution of institutions powers; laws with respect to the division of powers in particular to the federal governments powers referred in general terms on the established federal arrangement; laws related with fiscal federalism; and, laws on matters generally not envisaged during constitutional design but its federal relevance is undisputable. Nevertheless, owing the complexities of issues involved and the wide range of issues it cover, a further diminution of scope is necessary to exclude the first and the fourth issues. It is evident that the clear understanding and examination of laws regarding the bill of rights and other political rights or freedoms requires separately undergoing extensive and comprehensive studies. The same holds true concerning fiscal federalism matters. However, it can be said that through making a thorough inquires on the study of the remaining cluster of issues it would hinge us draw certain implications on the two excluded when one make nexus in one way or another.

1.2. Statement of the Problem

The legislative branch of government carries out various crucial responsibilities in a given political system. In fact, in states that have a written constitution the powers and function of the legislature will be enumerated in clear and understandable terms. It is with such essence that the essential common feature of legislatures of modern democracies, that is to say popular sovereignty, where representing popular will comes to be possible.¹⁵ In other words, the people, with whom sovereignty lies, participate in decision making through the representatives they elect in a free and fair election.

It has to be noted that the phrase ‘parliaments of democracies’ is construed to those that represent the will of the people with its true essence whereas parliaments in non-democratic systems cannot live up to the principle of popular sovereignty. Of course, the non-democratic nature of parliaments might be manifested in many ways.¹⁶ On the one hand, the absence of free and fair election in the election of representative is the most rampant of such. On the other hand, there can also be other institutional, legal and procedural problems that make parliament undemocratic. Though parliaments are construed in different nature, however, they remained as influential institution to affect the overall socio-economic and political developments of the state concerned. In this regard, albeit the variance from states to states, it is evident that parliaments are expected to have the powers and functions encompassing the following activities. These includes, inter alia, lawmaking; approval of taxation and expenditure; oversight of the actions, policies and personnel of the executive; ratification of international treaties and monitoring of treaty bodies; debating issues of national and international moment; educational and awareness creation; hearing and redressing grievances; and, approving or participating in constitutional changes.¹⁷

Therefore, parliaments are vested with activities that affect the lives of members of the society, whether in private or in public, so profoundly. Each of the above activities is so fundamental in

¹⁵ Beetham, *supra* note 10 at 5, and see also Walter Bagehot, The English Constitution: The Cabinet, in PARLIAMENTARY VERSUS PRESIDENTIAL GOVERNMENT, 70(Arend Lijphart ed., 1992)

¹⁶ Getachew Assefa, Parliamentary Oversight and Constitutionalism in Ethiopia: An Appraisal, in. INSTITUTIONALIZING CONSTITUTIONALISM AND THE RULE OF LAW: TOWARDS A CONSTITUTIONAL PRACTICE IN ETHIOPIA 153, (Assefa F. & Getachew A. ed., 2010) Vol.3 ETH. CONST.L. SERS.

¹⁷ Id, at 154-55

its own right that each has far reaching implications for the state concerned. To put it differently, these tasks of parliament affect the whole fabrics of governance of the state. Thus, parliaments must undertake these functions effectively, not only in the sense of efficient organizations of government business, but also of doing so in a way that serves the needs of all sections of societies.¹⁸ However, one would note that the aforementioned roles of legislatures might differ from state to state. Thus, it should be emphasized at this stage that the forms of government, whether it is parliamentary or presidential system, is a determining force on what specific roles is going to be undertaken. It is also equally important to note the variety one would get in states with federal or quassi federal arrangement as opposed to unitary as legislative function is constitutionally divided.

Accordingly, the constitutional mechanism adopted in vesting powers of law making and also other roles along with the appropriate ways of limiting the exercise of power definitely varies from states to states. But, it must be remarked that parliamentary power, even in country like Britain who elevates parliamentary sovereignty as opposed to the popular notion, is not free to exercise whatever it deems necessary or it deems fit.¹⁹ Hence, as we are going to look into there are constraints that limit its law making competencies whether expressly or impliedly stated. Hence, our focus is solely devoted to law making competencies of parliaments as the other functions enumerated above are vast enough to discuss within the scope of the thesis. However, it does not mean that they are totally excluded from the scope of the thesis since there are laws derived from such other functions which would have certain relevance for our general theme.

When one comes to the FDRE Constitution regarding the power of the federal government legislative body, at a glance it seems the constitution takes side of bicameralism, by establishing the House of Peoples Representatives (here in after the HPR or the federal legislature) and the

¹⁸ Michael L. Mezey, The Functions of Legislatures in the Third World, 8(4) J. LEGS STUD. 512(1983)

¹⁹ ALISON YOUNG, PARLIAMENTARY SOVEREIGNTY AND THE HUMAN RIGHT ACT 15, (Hart Publishing, 2009). Hence, among others, the nature of the notion itself along with other factors make the power of parliament both confined and limited. See also MICHAEL STEWART, THE BRITISH APPROACH TO POLITICS 112-19, (1964) so as to understand the history and development of parliament and its powers. In fact, it must be noted that the notion itself is broad enough to include the Queen, House of Commons and House of Lords acting together rather than alone. In other words, both internal and external reasons serve as limits to their powers where at the same time each bodies checks the other in the practice due to the kind of function they hold.

House of Federation (here in after the HOF) as the federal parliament.²⁰ However, the latter is devoid of or has little legislative role as the supreme legislative body is vested on the HPR by virtue of Art 55.²¹ As mentioned before, thus, the constitution provides the highest federal authority is upon the HPR and as stated it adopts parliamentary forms of government. Thus, the HPR remains the sole legislative organ and making the federal government with unicameral parliament with respect to lawmaking powers conferred upon it.

The constitution has enumerated the powers and functions of the legislature in two ways. On the one hand it grants exclusive legislative competency of the HPR through broadly listing under Art 55.²² On the other hand it bestows implicit law making powers over all matters allocated to the federal government in the constitution.²³ In fact, it can also be said that the HPR had legislative competencies on areas of shared powers either in the forms of concurrent or framework legislations on matters that the Federal and Regional States governments are both allocated constitutionally.²⁴ One may still add to the law making category other powers that derive either from the nature of other functions the House is constitutionally conferred and matters that derive from international treaties ratified by Ethiopia though the subject matter they contain is not contemplated under the FDRE Constitution.²⁵

Hence, the HPR exercises its legislative roles not only on matters that fall under expressly enumerated jurisdiction but also on all other matters that fall into the federal government jurisdiction. Though it is not difficult to ascertain laws enacted on the first category, nevertheless, those laws enacted on the second category are a bit challenging as it requires

²⁰ ETH CONST., Art 53

²¹ The powers and function of the HOF is rather different, inter alia, which has final power to interpret issues involving constitutional disputes. See for the details Art 62 and also Proclamation No. 251/2001 which is well cited mostly as a contested law on its constitutionality.

²² Id. On matters specifically enumerated as the HPR law making competencies are the lists from sub (2) to sub (19) of Art 55.

²³ Id. Art 55(1)

²⁴ Though there is no clear principle that regulates the exercise of law making power shared between the states and the federal, however, it is implicit that both share different matters either in the form of concurrent or framework powers in the constitution. Nevertheless, the federal parliament has exhaustively filled such areas through different laws leaving insignificant space for the states. See for more, Assefa Fiseha, Theory versus Practice in the Implementation of Ethiopia's Ethnic Federalism, in ETHNIC FEDERALISM THE ETHIOPIAN EXPERIENCE IN COMPARATIVE PERSPECTIVE 131-157, (David Turton ed., East African Studies, Addis Ababa University Press, Addis Ababa, 2006)

²⁵ ETH CONST., art 55(12) cum Art 9(4) and also see the definition of law making power under Art 49 of the HPR internal regulation. Regulation No. 3/2006, 'Rules of Procedure and Members Code of Conduct of the HPR'

demarcating what is given or not given to the federal government. However, the constitution is silent about those matters that are necessary or incidental or supplementary for the federal government to exercise or execute other powers vested under the constitution.²⁶ It is apparent that the constitution except for matters of enacting civil laws, it never makes mention of the implied powers in such senses.²⁷

Thus, two options might be possible for arguing the constitutional stance on the issue. First, one should take Art 55(1) broadly to include such aspect and thus one should read the whole text of the constitution in order to make sure the federal government as a whole is empowered or not. Second, one might suggest that the constitution has never devised such a mechanism at all since the alleged provision only becomes tenable on matters the federal government is explicitly granted. Hence, in the second line of thought the power of legislation does not imply the implied powers of the federal government as the constitution nowhere confers such powers on the latter. In fact, such matters should not involve the powers and functions of Regional States rather on matters of federal jurisdiction. Can the federal legislature legitimately enact legislations on matters of such kind? It is equally important to note also those matters the constitution is silent about despite one might consider of federal significance.²⁸ Is the federal legislature prohibited to exercise on such situations, too? What will be the effect if it happened to legislate? Does the constitution put limits on the competency of the federal legislature? These are crucial question one must confront in discussing issues of legislative constitutional legitimacy of the federal legislature whenever one alleges or contends the constitutionality of its laws. In fact, there are no explicit constitutional constraints that serve as parameter to test whether there is legislative encroachment or not on matters the constitution is silent about. It is, therefore, the thrust of the

²⁶ For making a comparison on the issue, see for instance the Constitutions of the following countries which confers a generality clauses on their parliaments either in the forms of 'necessary and proper to execute or implement other powers granted to the federal government', 'matters incidental to the execution of any power vested by the constitution', 'a matter that is reasonably necessary for or incidental to effectively exercise those vested powers', 'any matter incidental or supplementary to its power' or even as in the form of exceptional clause stating 'other duties and powers may be given by law to the legislature'....Art I sect 8(18) of the USA, Sect 51(39) of the Australian, Sec 42 of the R. S. Africa, Art 11(4) of Federal Republic of Nigerian and Art 173(2) (3) of the Swiss Constitutions respectively.

²⁷ In fact, it can be argued that the HPR has general powers with respect to constitutional order and other functions which either is given to either organ of the federal government or upon it other than law making functions. Thus, its law making capacity on such matters can be taken as implications of implied powers.

²⁸ For instance one can simply ask whether the institution and the scope of powers in relation to intergovernmental relations are covered under the constitution.

topic to focus on what such silence mean to the constitution in general and law making competency of the federal legislature in particular. In this regard it must be noted that all constitutions may have silences, but where there is as much silence as the text, limited government is at risk.²⁹ Thus, lets briefly delve into discussions on implied powers of legislative organs and add certain points about why granting such powers is so vital along with why limitations on the exercise of it is necessary evil. In such a manner it will help to understand how our constitutional arrangement is designed and to draw implications how serious the issues are for constitutional law development in Ethiopia.

Implied powers are simply those matters that are incidental to other powers and functions expressly granted in the constitution. It also covers those powers where the express matter grants are stipulated or defined in general terms where their full-fledged meanings require detailed legislations.³⁰ Or, even it might be a power that could be inferred either through the combinations of different provisions or through reading the whole text of the constitution. Besides, it is evident that constitutions could not cover every single item where at the same time cannot definitely foresee the future since they are drafted by humans. Thus, implied powers are constitutional tools to make the constitution as perpetual as possible to enable the government to adapt with changing circumstances without the need to change the words of the constitution. In other words, it ensures the continuity of the established order through empowering the government to respond to the dynamics of political, social, legal or economical contexts whether in the domestic or in the international level.³¹ However, such powers should not be considered as to mean giving absolute powers to the government. It is only within the objects and purposes of the constitution that implied powers could be understood. In other words, the government is not allowed to make use of such power for some end than what the constitution contemplates.

²⁹ Giovanni Sartori, Constitutionalism: A Preliminary Discussion, 66 American Political Science Review, 853-64 (1962) "whatever else the constitution may be, it is based on the idea that there must be limits to the exercise of power". In other words, according to such line of assumption, whatever the political arrangement is, or whether there is a written or not written constitutional document the state has, it can be considered as a constitutional state. What ultimately matters is whether and to what degree, the government is restricted in the exercise of arbitrary power. In short, a constitution must be viewed as a form of limit to government power or simply as a frame of government." See also Ruth Gavison, What Belongs in a Constitution?, 13 Constitutional Political Economy, 90 (2002)

³⁰ Dodd, *supra* note 13, and Murphy & Tanenhaus, *supra* note 14, it will be helpful for general consideration of implied powers in constitutional law.

³¹ Dodd, *supra* note 13 at 142, which stresses that, the object of the constitution remains the same.

In short, implied powers are the means to achieve the ends of granted power as enumerated expressly either in details or in general terms.³² But, the exercise of such power must be clearly incorporated in the constitution where also the grounds when the government could be allowed to avail itself.³³ Put it differently, they are not the kind of powers which will be asserted any time whenever the government considers fit. Thus, there are different grounds which require the fulfillment of certain specified conditions that varies from countries to countries. In short, the mere fact that the constitution grants implied powers does not mean that they can be exercised freely. It is inevitable to imagine certain limits as to how the exercise of such power would be in the event of practices. Stated otherwise, just same with other powers are not without limits, implied powers are constrained under the constitution within certain limits. Even it is said that express powers should be interpreted broadly so as to enable the government as opposed to implied ones which requires strict interpretation.³⁴ This is because sometimes they might be used for different purposes than granted in the constitution either through constructive or destructive mechanisms. Hence, expressly the constitution itself serves as the ultimate limitation alongside with other principles and rules incorporated thereof.³⁵ On the other hand, there are also implied limitations on implied powers.³⁶ The latter ranges from the existence of a particular context, purpose sought for the end, appropriate timelines, or the need to justify which are inherent on the grant of the power itself. In countries of federal arrangement, implied powers are more stringent to exercise as the division of power is inherently constraining ground to avoid the possible encroachments of either the federal upon state jurisdiction or vice versa.

Thus, when we say implied legislative power we mean that the power to enact valid and constitutional laws on matters impliedly granted for the government of different form to legitimately act upon it. In other words, in exercising implied law making powers, legislatures

³² It is interesting to refer to the most accepted justification of Chief J. Marshal, who was the great figure of the US Supreme Court in resolving various constitutional issues still applicable in US political and legal spheres, who brought the doctrine of appropriate means to legitimate ends in deciding the controversies in the 1819 case of '**McCulloch v. Marry land**'. Murphy & Tanenhaus, *supra* note 14 at 168.

³³ Madison was the first who succinctly argued the necessity of incorporating implied powers of the federal government and the justifications on the great risk it would result the constitution and other basic things had the constitution is silent about it during the constitutional convention time. The Federalist No. 44, in THE FEDERALIST PAPERS 252-54 (Clinton Rossister eds. 1957).

³⁴ Dodd, *supra* note 13 at 150-52.

³⁵ Id.

³⁶ For the discussion on the notions of 'express and implied' constraint models see generally, GEOFFREY R. STONE, et.al, CONSTITUTIONAL LAW 233-256 (4th ed., 2001).

are greatly limited in the ways we mentioned earlier. Besides, it has to be noted that the far-reaching consequences of not limiting law making power in general should be more seriously emphasized in cases of implied powers. For one thing, it opens a door for powers to be used arbitrarily or for some other ends than it is granted. For another, it would be used as instruments of tyranny by governments so as to pursue their own ends masking the constitution.³⁷ Above all, if there are no limitations on laws enacted to give effect to implied powers, the constitution itself is at stake in one way or another.³⁸ It is simply understandable to envisage the possible threats on the effects it has upon liberty of citizens or bill of rights in general, upon the principle of separation of power through legally taking away or accumulating the powers and functions of a particular institution to another in different forms, upon the political and democratic exercises of freedom through legal instruments, and especially upon eroding the autonomy of states to make them subservient to the federal government using laws to encroach the constitutional provinces of the former.³⁹ In a nut shell, if implied powers is supposed for a government to assume, the constitution should determine the grounds of exercise and the limitations with definite, clear, specific, and limited terms to bind the law making competencies on the matter. It would be futile to establish a government constitutionally limited had implied law making unrestricted and limited government at stake.

The FDRE Constitution, as we said hitherto, though it specified the law making powers of the federal parliament, it does not clearly stipulate whether the latter is empowered with such powers. However, the HPR have legislated different legislations which might otherwise be considered as implied powers or inferences of the federal jurisdiction as inherently that falls within its scope. That seems the reason why the parliament cites Art 55(1) more often when it

³⁷ The classical political philosophy vastly have laid foundations, notable ones John Locke and Montesquieu, on the necessity of limiting government and particularly the legislative branch mainly to avoid tyranny and protect liberty of citizens.

³⁸ Madison, *supra* note 33.

³⁹ See generally the following studies to assert the fears exacerbating its effects in different constitutional contexts either in risking constitutionalism, separation of power and limited government. T.R.S ALLAN, CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW, 1-5 (2001); RONALD DWORKIN, A MATTER OF PRINCIPLE 9-25 (1985); and also CONSTITUTIONAL THEORY xix (WOJCIECH SADURSKI ed., 2nd series, 2005), for depth analysis of the matters and how such could constrain legislative powers. See also, J. DE WAAL, I. CURRIE, & G. ERASMUS, THE BILL OF RIGHTS HANDBOOK, 7-11 (Landowne: Juta & Co. Ltd, 4th ed., 2001) and Jurgen Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles' 29 J. POL. THEORY 766-81 (2001). From the perspective of the kind of forms of government and the immediate effects on the issue see generally, and in particular Douglas V. Verney, Parliamentary Government vs. Presidential Government, in PARLIAMENTARY VERSUS PRESIDENTIAL GOVERNMENT, 46-47 Lijphart ed., *supra* note 15.

indicates the constitutional source of authority to legislate albeit the asserted provision covers matters different than such.⁴⁰ In most of such laws either they contain certain matters that make its power disputable or otherwise the entire legislation had been contested though none of them get the risk of being declared unconstitutional. At times, there is no even a claim brought to test the competencies, constitutionality's, or even their legitimate ends. Sadly enough, the absence of a second chamber that exercises legislative functions and the absence of strong, independent and neutral body to control and scrutinize the HPR's laws, makes the situation practically dangerous. Thus, the thesis uncovers those constitutional issues regarding implied powers and implied limitations available in the laws enacted since the establishment of the parliament as per the constitution in force. However, attempts will be made to only appraise those different issues as stated in the scope in more systematic and categorical approaches.

1.3. Objectives of the Study

As depicted under the statement of problem and the background sections of the proposal the thesis basically focuses on the constitutional design of federal law making power and the legislative practices observed since the coming into force of the FDRE Constitution. Hence, in undertaking this particular study the paper will have two crucial objectives.

Generally, owing to the aforementioned rationales to check the constitutional legitimacy of the HPR legislative power on matters not granted or implied law making of the federal government in the constitution with a view of drawing an immediate implication it brings in our constitutional law development.

In doing so, it specifically aims to explore critically different laws enacted with respect to the institutions of federal government and the operation of the federal arrangement. Owing these the paper devotes itself to particularly emphasize the following constitutional issues in order to make appraisal of law making practices:

⁴⁰ See generally the following laws or proclamations: with regard to the Charters Federal City Administration of both Addis Ababa and Dire Dawa; to provide & consolidate the power and functions of the House of Federations; on the Office of the President of the FDRE Government and also subsequent amendments; Rules of Procedure of the HPR; Systems of Federal Intervention; powers and function of the Executive Organ of the Federal Government as amended in 2010, on the powers and functions of Ministry of Federal Affairs; civil society law, antiterrorism law, etc. One should not that it is not all the provisions of such laws which makes it contentious, nevertheless, there are certain elements of the laws which either was not covered under the constitution or totally incompatible with it.

- To analyze whether an implied power is recognized under the FDRE Constitution, if so what available mechanism and parameters are there to exercise within the scope of its competencies;
- To closely look into the constitutional principles or rules in exercising implied law making powers;
- To scrutinize to what extent the residual powers of Regional States is respected along with certain shared powers when the federal legislature exercises such powers;
- To evaluate whether there are controlling and regulating mechanisms and institutional frameworks upon the federal legislature in exercising implied powers;
- To examine the constitutionality of different enacted legislations whether it goes in line with or against the bounds of constitutional division of power; and
- To observe whether the experiences of other countries have anything to lend us on fostering limited government on the basis of our trends in enforcing the established political order.

1.4. Research Questions

The scope of the research questions touches different sets of issues as casted hitherto. The questions will be supplementary to the objectives stated above where the researcher aspires to achieve in undertaking this particular study. Besides, it would shed a light as possible interface, either directly or indirectly, as a significance of the study in the topic to be explored. Hence, the following can be considered as the research question of the study.

- Does the FDRE Constitution empower the House of Peoples Representatives an implied power of legislation? Where could one trace the sources of authority of the legislature on matters uncovered under the constitution?
- How could implied powers be determined whether it is matters of federal competencies or otherwise? Who is authorized to determine whether a particular power falls into implied powers or not?
- Are there any constitutional limitations, whether express or implied ones, upon the federal legislature when exercising matters it considered impliedly granted?
- Do the federal legislature authorized to pass legislations on such matters it finds necessary without any justifiable grounds or prerequisites? Are there issues of context,

purpose, or scope where the HPR obliged to comply with during legislation of such nature?

- What does the practice by the HPR tell us about the power of implied legislation?
- What would it look like the constitutionality tests of such powers?
- What constitutional mechanism are there to control the federal government from encroaching upon Regional governments autonomy through different laws?
- What lesson could we draw from the constitutional design and legislative practices at the federal level in terms of separation of powers and limited government?

1.5. Significances of the Study

It is not uncommon to hear in most of our political discussion or debates in our political system that the enactment of most legislation are seen with close suspicion of eyes or at times with sense of disdain about its constitutionality. It has been more than fifteen years since the promulgation of the FDRE Constitution which staggeringly had welcomed hot divergence from both sides who are proponents and opponents with what it established a new constitutional order in Ethiopia.⁴¹ There still remains however daunting constitutional issues to work out.

Most of the studies in our constitutional law have focused on issues embodied in the text of the constitution or the practice there with. Though there are various works in connection with the constitutionality of different legislation enacted by the federal parliament since its establishment, however, they do share similar missing grounds in their findings. It can be said; only few in number works, almost rarely perspectives had espoused comprehensively dealing from the purview of implied powers and the limitations thereof as the FDRE Constitution never contemplated about that.⁴² For instance, in both Assefa and Solomon assertion, despite the absence of clear constitution authority, it is inevitable for the federal government practically might be forced to exercise due to the nature of division of power opted in the constitution. It is hardly possible to find studies which squarely examined issues pertaining to those matters uncovered under the constitution, the fact that the federal legislative organ is constitutionally

⁴¹ Most often studies have paid numerous focuses on the federal arrangement, esp. ethnic based nature, fiscal matters, bill of rights and so forth.

⁴² Those studies that paid incidental catch rather scanty as to the nature and implications of implied legislative power under the FDRE Constitution can be found in the works of two Ethiopian writers. See ASSEFA FISEHA, *FEDERALISM AND ACCOMMODATION OF DIVERSITY IN ETHIOPIA: A COMPARATIVE STUDY* (Rev. ed., 2007) 293, his article *supra* note 24 at 139-42; and SOLOMON NEGUSSIE, *FISCAL FEDERALISM IN ETHIOPIAN ETHNIC-BASED FEDERAL SYSTEM* 68 (Netherlands: Wolf Legal Publishers (2006).

unlimited in terms of its powers and functions of legislation, and also lack of implied legislative power which one may find in other countries constitution. That is why most of the contested laws enacted by the HPR have gained controversial sights often with the lenses of un/constitutionality rather than sights of competency and jurisdiction as envisaged in the constitution. Sadly enough on matters of proper constitutional province, whenever it is legislated by the HPR, studies have lost curious examination from the essence of legitimacy and source of constitutional authority on its power to legislate. Neither there are categorical analysis and devised mechanism as to what matter overrides which constitutional provision or principle save the arguments emphasizing purposes of constitution and legitimate expectation of the public.⁴³

In fact, most of the queries of the contest have relied on begging the purposes of legislations (ratio d'cendie so to say) or the immediate consequences it sought to bring about. The quintessence of the surrounding worries have been alluded to the ruling EPRDF⁴⁴ dominated party system, which is viewed as threat to the basic values of constitutionalism either in ensuring the free enjoyments of fundamental rights or in limiting the power of government on the ground, and the rubber stamp parliament which have been controlled by the former since the coming into force of the FDRE Constitution.⁴⁵ Put differently the trend of one party rule in control of government power for more than two decades and its parallel outcome as sole determining force on the country's overall fate might have casted a bad signpost on the trust and confidence of the public.⁴⁶ This in turn had brought with it the sense of watertight laws where one could not have the opportunity to challenge before an impartial and independent constitutional adjudicative

⁴³ It would be unfair to forget the interesting analysis recently published on the fiscal federalism even if it goes out of the scope of this paper. But it definitely tells the paradox on the text of the constitution and in practice. See generally Taddese Lencho, Income Tax Assignment under the Ethiopian Constitution: Issues to Worry About, 4(1) MIZAN LAW REV. 31(2010)

⁴⁴ The ruling party EPRDF is a coalition of four major parties – Tigray Peoples' Liberation Front (TPLF), Amhara National Democratic Movement (ANDM), Oromo People's Democratic Organization (OPDO), and Southern Ethiopian Peoples' Democratic Front (SEPDF). These parties operate in the four major regions of the federation, including the capital, Addis Ababa. In addition, the EPRDF has its affiliates in all the other regions – the Afar People's Democratic Organization in Afar Regional State, the Somali People's Democratic League (SPDL) in Somali Regional State; the Gambella Peoples' Democratic Front (GPDL) in Gambella Regional State, the Benishangul-Gumuz Peoples' Democratic Unity Front (BGPDU) in Benishangul-Gumuz Regional State, and the Harari National League (HNL) in Harari Regional State; see Assefa, *supra* note 24 at 156-155.

⁴⁵ The recent 2010 election result where EPRDF took control of about 99.6 % seat of the HPR is a clear example.

⁴⁶ Turton, *supra* note 24, among several other similar studies, can indicate the compressive understanding on the one party dominance threats to several constitutional and federal issues in Ethiopia stressing that it would be out of control had the EPRDF leaves power. See, for in depth and exclusive study, LOUISE AALEN, ETHNIC FEDERALISM IN A DOMINANT PARTY STATE: THE ETHIOPIAN EXPERIENCE 1991-2000 (Chr. Michelsen Institute, 2002)

body as the competent organ, HOF, is also another area of the contest altogether. Above all the trend and practice of the judiciary, which either relinquished its power to exercise review of constitutionality of legislation or continuously weakened by the legislature with ouster clauses causing it to lose most of its inherent jurisdiction to the executive tribunals, is not also an organ to legitimately expect redress in situations like that.⁴⁷ It is with such meager constitutional scenarios that one would be in a position to find controversial views from different groups whenever a particular law is contested.

The upshot of all such understandings is to take for granted the whole constitutional fabrics as comprehensive in its design and to assume whatever the legislature has been exercising conforms to the constitutional mandate it is made for. Hence, it is the crux of the paper to canvass an alternative platform through putting issues in perspective and category. In so doing, it marshals an empirical appraisal of different legislations bridging the gap between constitutional design and practice in predating matters uncovered under the constitution and implied legislative powers in properly exercising its ambits.⁴⁸ Accordingly, it fills the gap and dearth of a study on the area besides articulating those issues worth requiring inquiries for further analysis and constitutional reforms on the grounds, limits and mechanisms of control on implied legislative powers of the federal government.

1.6. Research Methodology

The methodology that will be used vastly depends on qualitative research methods. Thus, both primary and secondary data will be employed in the paper to the extent possible to cover broad based issues. Interviews with different stakeholders would take the lion share. It will also endeavor to consult different political parties to reflect what their view about the matter. The research will also attempt to look at different documents like consulting, inter alia, minutes of the constitutional assembly, debates at the constitutional adoption, minutes of the HPR on various enacted laws since its inception, and other guiding instrument on the legislative functions process at the federal level. It is also at the heart of the methods to try to employ tools of case analysis

⁴⁷ See Assefa Fiseha, The Concept of separation of Powers and its Impacts on the Role of the Judiciary in Ethiopia; in Assefa F. & Getachew A. eds., *supra* note 16, though he argued from the angle of separation of power add also he never mentioned from the perspective the constitutional silence on these particular matters.

⁴⁸ See the different laws mentioned at note 40

and legal analysis with respect to the matter that is going to be explored. The paper will make use of literature reviews in a more systematic way as describe herein below.

Hence, survey of literatures, legal analysis and comparative study in the field will be made in undertaking the research. In doing so, the paper will try to employ mostly the 'normative/prescriptive approach' i.e. aiming to discover how those framed issues or research questions should be entertained. Partly of course an attempt will be made to adopt 'conceptual analysis' i.e. aiming to discover the substances of concepts relevant to the general or specific objectives of the research topic. However, despite the inclusion to certain matters found necessary to support or build the above two approach; at times the research will attempt to adopt a 'descriptive approach' with obviously limited ways. It is self evident that the more descriptive way the topic becomes, the more it resembles political science rather than constitutional law. Hence, it will try in utmost efforts to avoid such approach as it has no significant contribution to those articulated and designed research questions and objectives as it ought to be achieved at last.

1.7. Limitation of the Study

The scope of the thesis is limited only to empirical study on legislative practices observed on federal laws that questions of constitutional source of authority sheers contest. In this respect there are certain points worthy of mentioning where the undertaking of this study found as limitations. The fact that amount of money allotted as a research grant was too little and inadequate to cover the various costs of the study as expected. This has led somehow the efforts to undergo extensive plan intended to be compromised and minimizing the comprehensive results the research offers to benefit. In addition, due to such facts the paper is forced to drop primary data collection method regarding the practice in some instances which might have been a plus in making the study full-fledged. This is particularly true when it comes to failure to include the practices and views of sample regional states on the subject matters that directly concern them. Secondly, the dearth of previous researches done on the areas of legislative power in the context of Ethiopia had also a bit influence for the paper to mostly on foreign literatures and the experiences of other countries. Finally, the writer had encountered some negative undesirable responses from among concerned government bodies in an attempt to have their respective view about the matter. In some cases it even strikes doubt when one faces confrontation or arrogances from those peoples in charge and when they tell you the issue is not

worth to study as such or implicit interrogation put as to why special interest urged the undertaking of the research. It is also intriguing to see simple ignorance or lack of the necessary knowledge in the area they are working. At times, there was instances cooperation from the concerned officials being difficult to obtain with either prolonged fixing of dates or none at all. It is really frustrating and discouraging.

1.8. Organization of the Paper

So much so, on account of the general backdrops as embodied in the introductory part, the body of the paper is classified in three main chapters and each with several sections and subsections. In what follows a brief description are in order concerning the organization of the paper.

The discussion on the first chapter hinges conceptual framework on the legislative power within constitutional government threshold. In doing so, it underscores basically lawmaking in the context of political systems where federalism and parliamentary form of government hallmarks special attention. There follows the central issue that profound appreciation of implied power and its distinct place in law-making under comparative constitutional law. The first chapter closes its discussion by accentuating the constraints on lawmaking power from the foci of constitutional government in the contemporary understandings.

The second chapter of the paper draws particular attention to the FDRE Constitution and the mechanism adopted on legislative power. Thus, after setting sorts of interface on the 'making of the constitution', it dwells as to what form the constitution adopts to establish parliamentary government and law-making power in general. Then follows the overall presentations on legislative power division and analyses the approach of exclusiveness used with respect to federal competencies. It ends underpinning the HPRs law-making and closely examines the constitution from the angle of implied power recipe as well as from other constitutional concepts in the field.

The last chapter, which in fact is the central point of the paper, vastly covers ranges of matters constitutionally left unanswered under the FDRE Constitution. Accordingly, robust endeavors to put issues in perspective on the basis of empirical survey of legislation and in depth appraisal are at the heart of the discussion throughout the part. In so doing, it broadly categorizes issues that

frequent invocation and inferences are banal to the exercise of implied federal powers of legislations from twofold perspective. In the first, it covers those laws regarding constitutionally established organs and the legislative source of authority over institutions from various counts. In the second, it extends to laws involving the federal arrangement and concerning the regional states in accordance with the constitution and the practice. The third chapter ends with drawing special attention on the implications of extra constitutional factors bulwarking federal law-making authority and envisages the trends observed in practice in a bid to explain the empirical analysis beforehand. The paper then finalizes through couple of ideas that could serve as findings of the study. Thus, there are conclusion and recommendation turn by turn.



Chapter Two

Scope of Legislative Authorities and Constraints on the Lawmaking

2.1. Introductory Remarks

Studies on the legislative power ordinarily seek to describe and analyze the role of the legislative institutions within the broader political system. That's why many of the people who have framed or interpreted modern constitutions have been fascinated by the idea of splitting up political power a government generally should be provided with and particularly focusing as to how its law-making institution must be organized.⁴⁹ At the core of this idea is the conviction that to protect individual liberty not only should governmental authority be diffused among the separate institutions but the ideal- if not the only logical- division is among legislative, executive, and judicial organs of government. The roots of this notion run deep in Western political philosophy, but Montesquieu is usually credited for its modern popularity.⁵⁰ The fact that his description of eighteenth century British government as a shining example of separation of powers was grossly inaccurate-as even James Madison acknowledged in lauding the doctrine as "the sacred maxim of free government"⁵¹- has apparently done no more to dim the concept appeal than has the inability of framers of constitutions to fit its pure theory to their institutional network.⁵²

The appeal of separation of powers transcends even the inability of its proponents to answer two fundamental questions: first, whether the trichotomy of legislative, executive, and judicial powers forms an all-inclusive characterization of political power; and second, whether one can produce operational definitions of legislative, executive, and judicial power that are mutually exclusive.⁵³ It is with such relative conceptual complexity that the paper employs law-making powers to be gleaned out in contexts that further set hurdles the close understanding of the

⁴⁹ 'Political power' is understood as the power vested in a person or body of persons exercising any functions of the states; or the capacity to influence the activities of the body politic. BRYAN GARNER, BLACK'S LAW DICTIONARY, 1179 (WEST GROUP PUB CO., ST PAUL, MINNESOTA, 7th ed., 1999) Here in after referred as Blacks Law. See for interesting discussion on contemporary conception of political power, Franz Neumann, On the Approaches to the Study of Political Power, in THE DEMOCRATIC AND THE AUTHORITARIAN STATE: COLLECTION OF ESSAYS IN POLITICAL AND LEGAL THEORY 3-21 (Herbert Marcuse eds. Free Press Ltd. USA, 1964).

⁵⁰ In fact Locke was the first who espoused the modern idea of separation of power albeit in a different fashion.

⁵¹ Madison, THE FEDERALIST NO 47, *supra* note 35.

⁵² Murphy & Tanenhaus, *supra* note 14 at 101.

⁵³ Id.

political power of legislative bodies in different political systems under the contemporary constitutional government arrangements.⁵⁴

Within the wide diversity of states and the multiplicity of constitutions which define them, a few basic functions are common; indeed, it is arguable that such functions must be performed in some way in any political society.⁵⁵ It is important to keep distinct the functions which governments perform from the institutions which perform these functions and both of these distinct from the type of the system or constitutions which arranges the institutions alongside their relationships in exercising respective political power.⁵⁶ This is among the essential things one must keep in mind in an attempt to discuss and identify issues that we frequently encounter with political power of the legislative organ. That further ignites us to draw the particular functions of legislatures from the general functions both the state and its government provide regardless of the difference in terms of distinctiveness of political systems. In fact, this commonness stems from the classic threefold distinction i.e. the legislative, executive, and judicial government bodies that center three distinct functions collectively constitute the political power a government holds over the governed. From this general understanding it follows to maintain the three distinct aspects to make up one inescapable fact, namely, government decides

⁵⁴ In the field of constitutional law there are two common modes of understanding the division of governmental powers. First, the Montesquieuian model of separation of power which basically emphasizes upon the distribution of power among the three branches of government. Thus, it can be noted as the horizontal power division. Second, the modes of power division in countries that follow federalism which constitutionally divides the three political powers between two government units, namely federal and state governments. It is mostly described as the vertical power division.

⁵⁵ Gavison, *supra* note 28 at 90.

⁵⁶ Generally, the functions of constitutions in the context of modern political societies, in one way or another, stand to canvass the following fundamental elements. These are: 1) Defining way of life: the moral values, major principles and definition of justice, considered amenable to political definition, toward which a society is aiming; 2) Creating and/or defining the people: the clear floor establishing what comprises the community which is so directed; 3) Defining the political institutions: the process of collective decision making, designed to be instrumental in achieving the way of life- in other words defining a form of government; 4) Defining the regime, the public, and citizenship: that articulates the manner and the extent of clear cut relationship and the flow of legitimate expectation of each other's interest; 5) Establishing the basis for the authority of the regime: the making of government, its source of authority, identity and legitimacy in the course of operation; 6) Distributing political power and structuring conflict to aid in its management: the kind of arrangement it establishes for the function of governmental machinery such as the organs of government, upholding matters of 'who, what and how' with their independence and interrelatedness, and diffusing the diverse interests and locating the mechanisms of handling them in the event of disputes; and 7) Limits political power i.e. government: owing to the kind of purposes it sets out to the government, it puts forth the constraint on what the government can do and cannot do in its operation so as to avoid tyranny of power holders and to preserve the protection of basic rights of the power addressees. These elements are partly taken from Donald Lutz, *The Purpose of American State Constitutions*, 12(1) *PUBLIUS* 27-44 (Winter, 1982).

i.e. that is what it means to have power itself.⁵⁷ Stated otherwise, the most basic function of the state is one of the decision-making which would normally manifest itself through the direct exercise of the three organs independently or indirectly through government when they act collectively in actualizing the political power of the state as a whole.

Thus, it is amongst the object of the chapter to solely focus on the decision-making power of the legislative body as one and crucial reflection of the political power a government holds. In order to do so, it begins with the assumption that the source of authority of political powers and its legitimate exercise must arise from a particular general and superior instrument that establishes the government and allocates respective spheres of power or decision-making functions upon its institutions.⁵⁸ It also add on the premise that the constitution, holding for a moment what meanings and purposes we should ascribe to it, is one of such instrument and the only form to organize the political powers of the state. Further it carries additional assumption that the decision-making power acquired from such impersonal instrument of a constitution is both authoritative and non-authoritative given the fact that its exercise is confined within the scope of the instrument.⁵⁹ In other words, as the exercise of the executive and judicial power requires a preexisting legal authority, the decision-making function, often described as legislative function, expressed in the exercise of enacting binding laws similarly requires the existence of a predefining, generally applicable and certain source of authority superior to it.⁶⁰ That's why we must consider the decision-making function of the legislative body as entailing authoritative nature expressed as part of its law-making power.

In fact, it is important to note that decisions, whether having a general or particular purposes and effects, in terms of political power must be made mostly in an authoritative way as long as certain elements are complied. The instrument that organizes the institution and its authority, the legislature and its law-making power in our case, must generally prescribe as to how the process and system of decision-making should follow. It thus determines at least three basic things while

⁵⁷ Neumann, *supra* note 49, BEAU BRESLIN, FROM WORDS TO WORLDS: EXPLORING CONSTITUTIONAL FUNCTIONALITY (The Johns Hopkins University Press, 2009 rev ed., 1966)

⁵⁸ Gavison, *supra* note, and Sartori, *supra* note,

⁵⁹ Breslin, *supra* note 57 at

⁶⁰ VICKI JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW, 214 (2ND ED. FOUNDATION PRESS, NEW YORK, 2006)

entrusting such power.⁶¹ These are: 'who will make these decisions', 'how it will be made', and 'which decisions can or cannot in fact be made' where lying at the heart of the questions that need to be answered under the instrument. It is evident that the three crucial decision-making variables, in short the 'who, how and what' of these political power, considerably vary across polities and the kind of political system dominant in a given state.

Hence, the chapter to canvass the lawmaking power of legislatures within the context of these three variables. In doing so, as suggested earlier, it puts in place to examine the questions while underscoring constitutions, as widely understood today, are primarily meant to gauge both authoritative and otherwise decision-making functions in more discernible terms. Accordingly, the underpinnings of our examination on the law-making authority within the variables is put in the essence of comparative study to comprehend the following issues and thus firmly establish what legislative power covers under constitutional government system.

Owing the aforementioned backdrops, the ongoing discussion in the chapter generally aims to cover the following issues in order. These are: describing legislative bodies in the contemporary context, discerning the identity of legislature within the context of forms of government, articulating the role of legislative bodies, examining the nature of lawmaking power within the realm of contemporary political systems and finally its distinctiveness from federalism point of view. However, issues related to the limitation of law-making authority are going to be vastly discussed in the last section of the chapter after succinctly marshaling the peculiar place of implied power in comparative constitutional law for sake of convenience as well as avoiding conceptual redundancy.

2.2. Legislative Power

In modern government the importance of the legislative function has greatly increased in proportion to the rising tide of democracy. Legislator, as we understands it today, in fact, is a comparatively recent development. In earlier political society there was no distinction between legislative and executive business. The government declared what laws were necessary and carried them into effect. However, the modern conception of legislation, which results from the

⁶¹ GWENDOLEN M. CARTER & JOHN H. HERZ, GOVERNMENT AND POLITICS IN THE 20TH C, 22-30 (FREDERICK PRAEGER INC. NEW YORK, 1961)

growing political consciousness of the mass of the people (the demos as the ancient Greeks call it) in whose collective interest most laws are now passed, has given the legislative organ a new democratic significance.⁶²

It is banal to find various notions to identify the legislative branch of the government. However, the usage of terminologies like 'legislature' or 'parliament' has quite different meanings in the language of political theories.⁶³ Likewise it has great deal of implication in understanding the idea of who really exercises the political power of legislative authority regardless of the variance in the kind of political systems in a given state. A discussion of modern legislatures⁶⁴, therefore, involves a study of the methods by which they are elected, of the nature and powers of either the bicameral or unicameral legislative organ, and of the direct popular checks, employed in certain states on legislative actions.⁶⁵ It is also important to remember the role of source of authority, the constitutional allocation of power and functions and the legitimacy of government are, inter alia, the basics with respect to legislative powers and legislatures.

⁶² C. F. STRONG, MODERN CONSTITUTIONS: AN INTRODUCTION TO THE COMPARATIVE STUDY OF THEIR HISTORY AND EXISTING FORM 171-2 (Sedgwick & Jackson Ltd. London, 1966)

⁶³ In the English language at least there is no single term that encompasses both these words. The word "parliament" originally comes from the British Parliament. Other words are sometimes used: Assembly, Congress, or as Riksdagen and Stortinget in the Scandinavian languages and so forth. See D. M. OLSON, DEMOCRATIC LEGISLATIVE INSTITUTIONS: A COMPARATIVE VIEW, 3-4. (1994)

⁶⁴ Strong, *supra* note 62 at 8-9. The terminologies of "legislature" and "parliament" are often used interchangeably. The notion of a "legislature" is thus located firmly in the classical view of a separation of powers between legislature, executive and judiciary. This distinguishes law-making both from the business of government and from the interpretation, adjudication and enforcement. A "parliament", on the other hand, does legislate but in contemporary politics are also something much more than a legislature. In the constitutional structure of "parliamentary government" that characterizes most European states, as well as "European-style" modern democracies such as Australia, Canada and New Zealand, the executive is constitutionally responsible to the legislature. It follows from such analysis, thus, the matter whether or not the executive is responsible to the law-making body lies at the heart of the distinction between a "legislature" and a "parliament". It is also banal to identify other languages like 'parliamentary government' and 'parliamentary democracy'. Some scholars point out that parliamentary elections are in essence about choosing governments, not law-makers. In this paper the term "parliament" and "legislature" are used interchangeably as generic terms for the elected representative body. In short the general term 'legislative body' would be apt to refer. See generally: JEFFREY GOLDSWORTHY, PARLIAMENTARY SOVEREIGNTY: CONTEMPORARY DEBATES, CAMBRIDGE UNV. PRESS, 2010) and also, Bruce Ackerman, The New Separation of Powers, (113) HAR. L. REV. 633(2000).

⁶⁵ THOMAS FLEINER AND LIDIJA FLEINER, CONSTITUTIONAL DEMOCRACY IN A MULTICULTURAL AND GLOBALIZED WORLD 390 (2009, SPRINGER-VERLAG BERLIN HEIDELBERG ENGLISH TRANSLATION BY KATY LE ROY) In other terms one must first the particular political system established in a given state alongside the composition i.e. the election and representation systems, kinds of the legislative organs i.e. whether there is bicameral or unicameral houses with the respective powers entrusted and the purposes they render, and the distribution of powers with the other organs of government vis a vis the check and balances that exist in exercising powers; are inevitable tools to understand the legislative actions and bodies found in the contemporary states.

Generally, legislatures are crucial to achieving the democratic potential embodied in free and fair elections. While legislatures are central to democracy, they tend to inherit a position of weakness relative to the executive. Legislatures fulfill a number of important functions in a democracy: they represent people and groups, reflecting and bringing their needs, aspirations, problems, concerns, and priorities to the policymaking and policy-amending process; they make laws, the rules that govern a nation; and they practice oversight, assuring that laws and programs are carried out legally, effectively, and according to legislative intent. The representation function is fundamental, for it shapes the democratic character of the other two functions.⁶⁶

Legislatures can legislate and conduct oversight, but without effective mechanisms of representation, they cannot be democratic, and are not likely to act in the interest of society as a whole. Scholars in the field of comparative constitutional law have identified a plethora of purposes and functions that legislatures fulfill. In a nut shell, the basic functions: representation, lawmaking, oversight and budgetary appropriations.⁶⁷ In present time laws are considered as the main source of almost all national legal systems. That's why it is common to hear that laws are the main source of legitimacy that covers overall political, socio-economic and development activities of the countries. In acts of the legislative bodies the 'people's will' is transferred into the 'will of the state'.⁶⁸ Whether they are the result of a certain political compromise of different social and political interests, at any rate laws are assertive of the legitimacy of the system of government in a given state.

As comparative studies reveal the powers of the legislatures to control the other branches vary significantly from systems to systems. But still, it is plausible to assert that legislative function is the great and overruling power in every free government.⁶⁹ The functions of legislative bodies increases with the growing complexity of modern society and with its consequent demands upon

⁶⁶ Strong, *supra* note 62 at 9. (To some extent, representation is an end in itself. If the legislature is truly representative, its decisions are given social legitimacy, enhancing political stability. However, representation clearly supports the other two legislative functions as well: an open, representative body will make laws that are more broadly accepted in content and process, and will also be more effective in its oversight of government programs.) see, Fleiner & Fleiner, *supra* note 65 at 409, Beetham, *supra* note 10

⁶⁷ Carter & Herz, *supra* note 61 at 91

⁶⁸ Fleiner & Fleiner, *supra* note 65 at 390

⁶⁹ *Id.* at 9

the law making authority for the purpose of achieving social good.⁷⁰ In all states this pressure is brought indirectly to bear upon the action of the legislature by the very nature of society, in some more directly by the constitutional powers of the people to initiate legislation or to approve or disapprove it after its passage through parliament.⁷¹

2.3. Lawmaking Power in the Context of Political Systems

When people are asked what legislatures do, the most common and immediate response is: 'they make laws'. In practice, this simple statement encompasses a wide range of activities. Most legislatures have ample lawmaking authority in theory, under their national constitution, charter, or other foundational documents or traditions. In practice, though, broad ideas must be turned into specific proposals that can be analyzed, deliberated, and then drafted into formal legislation.

As noted in the previous sections the law-making power marks the legislative organ as its primary job of government regardless of the difference in the established forms of government. Accordingly, the enactment of legislations, whether the bill is brought by the executive or itself, urges us to pose certain question in so far as the legal force of such acts are concerned. Among other things, the following are deemed to have quintessential value with respect to the later analysis on the concept. These are: where do legislatures get the source of authority to enact; what effects would it carry in the exercise; what extent they are free enough to enjoy such authority; and finally, are there any mechanisms of control as to the contents of laws during the exercise owing the multi dimensional legal obligation it imposes upon either the other organs, the public at large or any part of the society.⁷² In fact, at the face value the questions might catch only theoretical relevance. However, when we take law-making power seriously and associate that with the practical world where laws apparently affect every walk of life, then the literal questions turns as equally fundamental as the very idea of why we need a law-maker at all. Hence, briefly the above questions can be categorized into three crucial modes. The issues pertaining to the source of authority of legislation is the primary determinant matter to deal with.

⁷⁰ Franz Neumann, *The Changes in the Function of Law in Modern Society*, in Marcuse ed., *supra* note 49 at 22-69 (The social good though broad and complex to give a particular meaning however it partly represents the 'common good' of states in the earlier times and partly the 'constitution' of the constitutional states as far as the purposes and functions of governments is concerned. One might relate with the classical political philosophies that significantly shaped the meanings, the contents, the manners of making and the purposes of law, the legislature and its power of law making accordingly, to our contemporary understanding of political power and government.)

⁷¹ Strong, *supra* note 62 at 9

⁷² Fleiner & Fleiner, *supra* note 65 at 354

Then, the issues pertaining to scope of authorities and the content of acts of legislation come into scene.

In order to address these issues separately, we need to underscore first law-making power itself in the light of the general idea of constitutional government. In doing so, the proper role of legislators (government in the broad sense) within the context of democracy bears at least two underlying assumptions.⁷³ On the one hand, since the legislative body is primarily representatives of the electorate, i.e. the demos, then the laws enacted are the sole reflection of the latter owes the ideas attached under popular government.⁷⁴ In which case these merely gives the demos reflective laws i.e. the channel through which their interests, opinions, aspirations or ethos are communicated. Thus, ultimately the legitimacy, obligatory and governability nature of the acts of legislature derive its base from such channel of communication.⁷⁵

On the other hand, in order for the popular government idea to work in full-fledged manners, there should exist generally established rule regarding the 'what, when and how' the delegated lawmaking authority could be exercised. This is so because as empirical evidences suggest power naturally tends to be abused or used for ends never contemplated, the idea of both popular and limited government would be at stake.⁷⁶ Particularly, this occurs when the 'would be demos reflective laws' are used to advance the interests of the few. Put differently, what safeguards are due to avoid means of manipulations and above all tyranny which can be brought under the pretext of laws is the appropriate focus.

Hence, the question begs the lists of activities the law-making organ could make or unmake through the legislation it imposes on the demos. Here comes the proper province of constitutions and constitutional governments.

⁷³ Walter Murphy, Constitutions, Constitutionalism & Democracy, in CONSTITUTIONALISM & DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD (Douglas Greenberg et al eds., 1993) as extracted in Jackson & Tushnet, *supra* note 60 at 224-25

⁷⁴ Id

⁷⁵ Fleiner & Fleiner, *supra* note 65 at 340

⁷⁶ It is often said that power corrupts and absolute power corrupts absolutely.

In view of these two underlying assertions the question of sources of authorities to legislate automatically relies upon the will of the people and certain establishing superior instrument i.e. the constitution which avails itself beyond the reach of temporal delegates of the people.⁷⁷ In other words, while the will of the people in the sense of representative (democratic) government empowers or legitimizes the acts of legislature, the source of authority is constitutionally prescribed as both enabling (functional) and disabling (dysfunctional) force regarding the exercise of law-making business is concerned. In short, the first adequately responds to the spirit of functional popular government with the wider choice it offers through legislations, and the latter imposes pre-determined and relatively stable modus operandi for the exercise of legislations.⁷⁸ Hence, the source of authority is basically the result of intricate relationships between the ongoing need to provide the maximum possible legitimacy/authority for elected government and the need to balance that permanently through the force of constitutional supremacy.

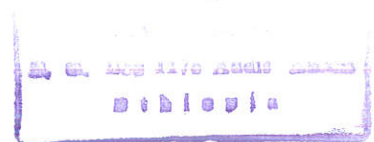
Consequently, in addressing the question in such a manner ultimately helps us to make inferences about the issues raised regarding the scope, content and control of law-making power under constitutional democracy. However, since we have pointed out the variety of political systems, our discussion is limited to two particular instances. First, a focus will be made in general law-making powers and its different forms from the view of parliamentary government. Second, an emphasis is due on federalism and lawmaking power. In facts, this is done so as to sufficiently address the primary object of the thesis regarding the Ethiopian constitution that will be vastly covered in the subsequent chapters.

2.3.1. Lawmaking in Parliamentary Systems

The principle of the separation of powers recognized by modern constitutional states determines the mechanism of the lawmaking and the place of the legislative bodies in it. The principle as noted elsewhere divides the state powers into three branches - the legislative, executive and judicial powers. The legislative power is vested in the legislative bodies. This principle singles out the representative bodies and empowers them to adopt laws. The place of a legislative body in the law-making process depends from the character of the principle of separation of powers

⁷⁷ GERHARD VAN DER SCHYFF, JUDICIAL REVIEW OF LEGISLATION: A COMPARATIVE STUDY OF THE UNITED KINGDOM, THE NETHERLANDS AND SOUTH AFRICA, (2010)

⁷⁸ Fleiner & Fleiner, *supra* note 68 at 354



recognized in a country. The principle of the separation of power has specific features in different countries. It may have firm form or flexible form.⁷⁹

The firm form is typical for the USA. Analyzing the practice of that time the 'fathers – founders' of the American constitution found that a legislative body had dominated position in the republics and it was necessary to limit its powers and balance its activity as a governmental body could establish a tyranny on behalf of people.⁸⁰ The Congress was examined as a possible threat of a democracy, as a possible tyranny. According to this model the main task of the representative body is to adopt laws. The system of the governmental bodies is organized so that the main task of the Congress is to make laws. At the same time each governmental branch has powers to balance other one.

In the countries in which the principle of the separation of powers was recognized in more flexible forms (in countries of parliamentary Europe) the legislative body has been not able to keep the leading position in the lawmaking process.⁸¹ The executive body is not separated from the legislative one as the members of the government may be the members as a rule of the lower chamber of the legislative body. As a result the legislative activity of the parliaments has become under control of the government. In its original form, parliamentary government is majoritarian, or Westminsterian.⁸² The belief in the unfettered rule by the popularly elected majority lies at the heart of the tradition of parliamentary government.⁸³

The Westminster tradition of parliamentary government is at heart a tradition of parliamentary supremacy, with the legislators accountable only to the people. As Verney observes, "the political activities of parliamentary systems have their focal point in parliament. Heads of state, governments, elected representatives, political parties, interest groups, and electorates all acknowledge its supremacy".⁸⁴ However, in modern parliamentary systems, legislatures have

⁷⁹ Burt Neuborne, *Judicial Review and Separation of Powers in France and the US*, 57(3) NYULR363, 364 (1982)

⁸⁰ THE FEDERALIST, NO 47-49 supra note 33 at 268-85

⁸¹ Lijphart, supra note 15 at 25

⁸² AREND LIJPHART, *DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENTS IN TWENTY-ONE COUNTRIES* (New Haven/London: Yale Univ. Press, 1984)

⁸³ This belief, which may today seem naive, was certainly widely held during the democracy debates many European countries experienced around the turn of the century. Goldsworthy, supra note 64

⁸⁴ Verney, supra note 39 at 46

limited responsibility for making laws.⁸⁵ Instead, laws are prepared and drafted by the executive and presented to the legislature for approval. This inevitably means that relatively few laws will emanate from the legislature itself.

But the role parliament plays in the lawmaking process varies from nation to nation, and even in the same parliament over time. We may think of a parliament's law-making role as moving along a continuum.⁸⁶ At one extreme are "rubber stamp" legislatures, which simply endorse decisions made elsewhere. Next are those that actively debate proposals, and have some ability to influence government to make changes to their proposals. Continuing to move right on the continuum, we come to legislatures that make significant amendments to executive proposals, and many of their amendments become law. Some may even introduce legislation. Finally come what are known as "transformative" legislatures. Transformative legislatures may amend nearly all government proposals, and make and pass their own proposals into law.

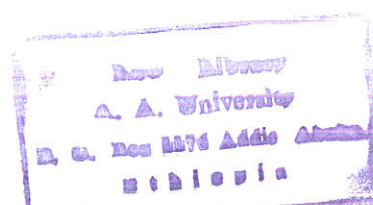
2.3.2. Federalism and Lawmaking Power

The federal systems make both the idea and the process of law-making more complexes. Federalism is one form of a division of power between two governments having an equal autonomous sphere or sovereign authorities. However, what differentiates federalism from other political systems as suggested earlier is the fact that the division of power could only be the outcome of formal constitutional instrument backed by certain mandatory features.⁸⁷ Briefly, at least the arrangement must be entrenched by a written and supreme constitution. From this it follows that independent arbiter i.e. an impartial body that holds the final authority on the meaning of the constitution itself in general and in particular that adjudicates disputes of power

⁸⁵ Olson, *supra* note 63

⁸⁶ UNDP CONCEPT PAPER on 'LEGISLATURES AND GOOD GOVERNANCE', 7/28/2005 (Based on a Paper prepared by John K. Johnson and Robert T. Nakamura for UNDP July 1999) available at <http://magnet.undp.org/Docs/parliaments/Concept%20Paper%20Revised%20MAGNET.htm>. (As last accessed 15/07/2011) The typology is based on the UNDP Concept Paper.

⁸⁷ Professor Ronald Watts has drawn up a list of structural characteristics distinctive to federations: two orders of government, each in direct contact with its citizens; an official, constitutional sharing of legislative and executive powers and a sharing of revenue sources between the two orders of government, to ensure that each has certain sectors of true autonomy; designated representation of distinct regional opinions within federal decision-making institutions, usually guaranteed by the specific structure of the federal Second Chamber; a supreme written constitution that is not unilaterally modifiable but requires the consent of a large proportion of federation members; an arbitration mechanism (in the form of courts or a referendum) to resolve intergovernmental disputes; and, procedures and institutions designed to facilitate intergovernmental collaboration in cases of shared domains or inevitable overlapping of responsibilities. RONALD WATTS, *COMPARING FEDERAL SYSTEMS*, 8 (INST. IGR: QUEEN'S UNIVERSITY) (2ND EDITION 1999)



distribution between the two governments. Thus, the written and supreme constitution along with the rigid amendment procedures i.e. entrenching, and the independent final adjudicative organ i.e. umpiring, characterizes as one of the building rocks of division of power federalism.⁸⁸

The constitution normally divides powers between federal government and the members of federation. Each levels of the governmental power act in the framework described by the constitution. At the same time the problem of uniformity of legislation stands as a rule with differences in competing autonomy albeit in different spheres of law. This depends from the model of the federal state and the division of the powers. The uniform law is elaborated and adopted in different members of federation. Consequently, in the division of legislative powers there are great variations amongst federal systems with regard to the 'form' and 'contents (or scope)' of the functions assigned to each tier of governments. The 'form' of division of powers refers to the techniques of constitutional allocation of powers, where as the 'scope' or 'contents' of legislative powers refers to the substance of the power allocated to each tier of governments.⁸⁹ Accordingly, as we can explain later, the variations are influenced by several factors such as the details or the list of powers assigned, the significance and place of the residual power, the problem of delimiting the scope of the powers between the federal and state governments, and the manner in which the federation is formed (by aggregation or devolution).⁹⁰

From the above discussion we can further draw additional elements upon legislative power. Since lawmaking power is not an end in itself but a means for its exercise depends on what powers and functions is constitutionally vested on either government i.e. aggregate constitutional authority each can take action without any interference by the other, and then likewise legislative power in federation highly depends on what each holds separately.⁹¹

The division of authority between the federal government and the states is one of the hall marks of federations. Central to this question is of course, which authorities are divided between the

⁸⁸ For thorough and comparative analysis on the features of federalism and the existing federations of the world see Fleiner & Fleiner, *supra* note 68

⁸⁹ RONALD WATTS, *NEW FEDERATIONS: EXPERIMENT IN THE COMMON WEALTH*, 173 (Oxford, Clarendon, 1966)

⁹⁰ J. Kriek, *The Theory and Practice of Federalism*, in *FEDERALISM: THE SOLUTION?* 25-26 (D.J. Kriek ed., Pretoria, HSRC Pub. 1992)

⁹¹ IVO DUCHACEK, *COMPARATIVE FEDERALISM: THE TERRITORIAL DIMENSIONS OF POLITICS*, 2nd eds. (Lanham: University Press of America, 1987)

two levels of governments.⁹² For instance in the United States, broadly speaking, the federal system is designed to enable both the federal government and the states to enact law, to execute and adjudicate it. Legislative, executive, judicial and financial powers are allocated based on the idea that there should some correspondence with the scope of legislative, executive, judicial and financial powers. For instance, the 'executive federalism' idea of the German federal system is worth to mention where the federal government only limits itself in legislation and the Landers are constitutionally bound to execute on the basis of the framework set in the federation as a whole. It is considered essential for governments to possess the executive and judicial authority and the financial resources to implement the function within their legislative competence.⁹³

In other federations, however, this may not necessarily be so. While there may be a legislative division, the way the executive and judicial functions are organized differs from the United States approach. Again broadly speaking, these federations resorted to centralized law-making, mainly entrusted to the federal government with a more decentralized executive structure reserved to the states and an integrated judicial system. This is based on the assumption that it is impossible to avoid overlaps and there is a heavy reliance on a large measure of interdependence between the federal government and the states.

As argued earlier federations have devised different mechanisms as to how should the power division has to follow. Besides, the close studies of the constitutions and experiences of different countries in the field of comparative federalism reveal that there is no clear cut recipe how these could be carried out. That's why, as one scholar expounded, it becomes a package deal to speak of federalism in broad constitutional comparative lenses.⁹⁴ In fact, there are also various other questions that should be considered when one speaks of principles of power division of law-making. The following, inter aria, are core ones. These are: the manner in which the powers are to be apportioned, what falls under the federal competencies or the constituent units, what proportion of it should be shared, the delineation where the federal power ends and the units begin or vice versa, etc.

⁹² Cheryl Saunders, *Constitutional Arrangements of Federal Systems*, 25(2) *PUBLIUS* 61 (Spring 1995)

⁹³ *Id.* at 68, *see also* Ronald Watts, *supra* note 89 at 169

⁹⁴ Vicki Jackson, *Comparative Constitutional Federalism and Transnational Judicial Discourse*, (2010) 2 *Int'l J. Const. L.* 91, at 102

That is why it becomes difficult to draw certain uniformly applicable principle not only to existing federations but also to passage of times. For instance, the common criterion used as conventional understanding is the 'national test' mechanisms that serve as crucial tool of power division.⁹⁵ Meaning, basically it serves to decide what matters should be allotted to the federal government alone. Accordingly, matters of national importance normally are conferred upon federal government where as those considered otherwise would either be left to the constituent units or will be shared concurrently. Thus, these tests fundamentally take into account the division of interest between national and local based on the particular relevance it would bring to the society in general.⁹⁶ Hence, it manifests a delicate process that depends on the reasons why the federal arrangement itself is needed. This certainly marks an obvious difference across federations. Nevertheless, matters of defense, foreign affairs, currency, national economy, etc are often makeup the 'national test' criterion most conceivable now a day.⁹⁷ This might be related to understandable reasons the general importance of the interests listed and to the potential difficulty that could occur if the units should manage them separately in its own capacity.

In effect, taken together the lists require uniformity in a great scale so long as the federation is aimed to perpetuate for indefinite future. Regardless of such criterion, it is certainly complex to divide other remaining powers. This can be associated with the following factors. It depends merely on the exigencies of situations which existed at the time of making the federal constitution, the prevailing idea during establishment, the dominant role assigned for the federal government to play as opposed to the States.⁹⁸ It might also be related with the ever competing two forces i.e. demands that support strong national government and that of strong state governments.⁹⁹

From such complexity it is not a surprise to observe a tight tension between the boundaries of each sphere of competencies to influence each other when it comes to practical implementation.

⁹⁵ Watts, *supra* note 89 at 168-169

⁹⁶ K.C. WHEARE, *FEDERAL GOVERNMENT* 4th ed. 79 (Oxford: Oxford University Press, 1963) despite some differences, generally speaking, defense, the functioning of the economy and the monetary system, major taxing powers, foreign trade and foreign affairs have been the domains of the federal government.

⁹⁷ Ibid

⁹⁸ Watts, *supra* note 87 at 20-30

⁹⁹ Duchacek, *supra* note 92 at 91

This is basically due to two crucial reasons that seek to balance both certainties and uncertainties.¹⁰⁰ The first has mainly to do with the nature of power itself. Meaning, power by its nature is not amenable to definite measurement. It rather is an expression of intention than description of reality. The second has to do with circumstances that come along with the passage of time. Meaning, in the world of constant economic, political and technological changes that regulates the dynamics of national interests would directly hinge as to how to construe the original understanding of power. Due to the dynamics power itself would not be immune from alteration with the real changes in circumstances making the division of power hardly possible to establish precise and definite lasting standard on the sphere of competencies the two governments should hold from time to time.

Hence, the constitutional device that is designed to apportion power could not provide lasting solution despite its far reaching advantages. The problem is more blurred by extra constitutional conditions that greatly affect the complexity up on the power division principle which renders the degree of interest once considered of national importance to oscillates and become later significantly of matters of local relevance. There are also cases where the other way round works quite relevant.

Bearing in mind these general accounts, there are three common ways in federations as to how the issue is entertained. These are: exclusive, concurrent, and reserve powers as far as the constitutional mechanism are concerned.¹⁰¹ In this regard, federations exhibit two completely different mechanisms in forming the three forms to take shape in the continuum. At the first edge of the continuum there are those constitutions that enumerates all the powers of the federal government only and leaving the undefined matters to the states.¹⁰² On the other edge of the continuum, there are those that contrarily provide the lists of activities of the states whereas the

¹⁰⁰ Watts, *supra* note 87 at 20-30

¹⁰¹ Saunders, *supra* note 92 at 69-70 (In fact since the object of the paper is not to pay too much attention about such kind of legislative division, the subsequent topic will partly touch the issues when it canvasses 'implied powers and law-making'.)

¹⁰² See *infra* chapter three for detail elaboration of the kind of division of power in the comparative discussion of the FDRE constitution.

undefined matters left for the federal competencies.¹⁰³ One finds, for example, the U.S., Swiss etc, in the former where as India and Canada distinguished as standing on the opposite direction.

In legal parlance, the notion of exclusive power refers to 'the powers for which the federal constitution has created a monopoly which either is in the hands of the federations or of the states. The exercise of such an exclusive power as described in the federal constitution is left entirely to the entity to which it has been attributed'.¹⁰⁴ The division of powers, particularly the allocation of residual powers, can be influenced by two factors. These are the circumstances under which the federation is formed and the specific conditions of the country.¹⁰⁵ This will be dealt in subsequent topic concerning the concepts of implied power and the constitutional forms of incorporating as such across different federations. However, one thing must be mentioned about concurrent matters where both the federal and state governments equally exercise. Concurrent jurisdictions offer several advantages in federal structures. They introduce a degree of flexibility and innovation in the distribution of powers. For instance, the federal government may delay exercising its powers in an area that might eventually call for a strong federal coordination. Concurrent jurisdiction allows state or provincial governments to develop their own policies in the interim. The federal government might also decide to establish national standards in certain areas, leaving the states or provinces to develop services in the manner that best responds to the unique identity of each region. Concurrent jurisdictions also allow a federal government to temporarily occupy a state or provincial jurisdiction when that state or province is unable to deliver a particular service.¹⁰⁶

2.4. Implied Power Doctrine in Constitutional Law

We are familiar with terms like 'express' and 'implied' powers used by those who assume political powers in discharging their constitutional duties. However, the question lies as to what mean in general 'inherent or implied' owing the distribution of power once stipulated within the constitution. How much power fits under the umbrella of 'inherent'?

¹⁰³ Saunders observes, for instance, that the tendency in older federations is to make one list, but that recent federations use a two list systems. He further argues the two-list exclusive power minimizes the risk of power interferences suggesting as the strong merit of the recent trend. See *supra* note 92 at 69

¹⁰⁴ FLORA N. GOUDAPPEL, POWERS AND CONTROL MECHANISMS IN EUROPEAN FEDERAL SYSTEMS, 40 (Gouda Quint, Sanders Institute, 1997)

¹⁰⁵ Watts, *supra* note 87 at 20-30

¹⁰⁶ Id

It is evident that express powers are clearly stated in the text of the constitution; implied powers are those that can be reasonably drawn from express powers. Inherent is sometimes used as synonymous with 'implied'¹⁰⁷ but they differ fundamentally. Inherent power can be defined in this manner: "an authority possessed without its being derived from another or powers over and beyond those explicitly granted in the Constitution or reasonably to be implied from express powers".¹⁰⁸ The purpose of a constitution is to specify and confine governmental powers to protect individual rights and liberties. That objective is undermined by claims of open-ended authorities that are not easily defined or circumscribed.

The assertion of 'inherent' powers ushers in a range of vague and abstruse sources. The term 'inherent' is used to indicate a particular authority that necessarily derives from the nature of the institution, the power itself, or the particular constitutional duty imposed upon, to realize certain matters during the enforcement of the constitution.¹⁰⁹ This basically requires us to go beyond the texts and inquire bulks of question with respect to the nature of that particular power given to that particular organ or a government as a whole in case of federal structures.

The difficulty in understanding inherent power poses serious risks to constitutional government. The claim and exercise of inherent powers move a nation from one of limited powers to boundless and ill-defined authority. The assertion of inherent power in general threatens the doctrine of separated powers and the system of checks and balances.¹¹⁰ Sovereignty moves from the constitutional principles of self-government, popular control, and republican government to the parliament. In such instances, both notions of implied and inherent significantly mold the exercise of actual politics far beyond the languages of the sources. The famous decision of Marshal, in the Marbury v. Madison case, was typical of such scenario where he aggressively interpreted the judicial functions to review executive acts and declare

¹⁰⁷ Implied powers are meant to describe a political power that is not enumerated but nonetheless exists because it is needed to carry out an express power. Black's Law at 1189

¹⁰⁸ Black's Law (1979) at 703. However, that definition is dropped out of the current eighth edition, which contains this definition of inherent power: "a power that necessarily derives from an office, position, or status" Black's Law (2004) at 1208

¹⁰⁹ Louis Fisher, Introduction: Invoking Inherent Powers, 37(1) PRESIDENTIAL STUDIES QUARTERLY 1, (2007)

¹¹⁰ Id at 2

unconstitutional laws of the Congress in violation of the constitution solely basing his argument on 'inherent' power of the judiciary.

Implied powers are generally described with other similar terminologies in the same way as it is attributed with the notion 'inherent' in the political parlance.¹¹¹ This basically is dependent on the contexts one derives from terms either directly written in the text of the constitution or indirectly associated with the practices of law-making powers that seek to respond two fundamental questions.¹¹² As hinted above one distinguishes different terminologies speaking of implied powers that must be worked out here to have the clear picture of the meaning.

Among others, 'resulting',¹¹³ 'incidental',¹¹⁴ or 'ancillary' powers are common in the catalogue of implied powers. This in fact would help us to draw a line from those powers normally stated as 'express', 'enumerated', 'exclusive' or at times 'plenary' in relation with the distribution of constitutional power.

Under this section an attempt will be made to underpin the philosophy of implied power or its general genre in the context of constitutional and political theories. Thus, the discussion starts with exploring the place of implied authority under the broad spectrum of political power in a bid to underscore whether it fits contemporary understanding of constitutional government. It then purports the rationales and functions of the doctrine in terms of different views to set the stages for articulating and identifying the nature and peculiarities of its varieties in constitutional parlance. At the end a precise depiction is underway as to what mechanisms are available in the constitutions of federal countries and to what extent conditions are attached for the exercise of such form of authority upon the federal legislative organ to strike the delicate balance of division of powers and functions in the federation.

¹¹¹ NOEL T. DOWLING & RICHARD A. EDWARD, AMERICAN CONSTITUTIONAL LAW, 2(1954)

¹¹² JESSE CHOPER, LEADING CASES IN CONSTITUTIONAL LAW, 27(2008)

¹¹³ Resulting power, on the other hand, embodies the sense that suggests a political authority derived from the aggregate powers that either expressly or impliedly, or in both ways, granted by a constitution. Blacks Law at 1190

¹¹⁴ Incidental power mostly stands to refer to a political authority that, albeit not expressly granted, must exist because it is necessary to the accomplishment of an express purpose stated in the constitution. It is also known as ancillary powers. Blacks Law at 1189

2.4.1. Implied Power in General and its Purposes

Before delving into the discussion regarding 'implied power' in general and of the legislative organ in particular, it is worth first to address the following issues so as to articulate later the distinct nature of the matter in clear and definite terms. Do legislative power to enact bound within those certain predetermined matter?¹¹⁵ Or, could it legitimately go beyond the scope conferred in the exercise? Still, more precisely, to what extent legislatures exercise their law-making authority in a system that follows constitutional government and operates with the democratic principles of representative government?

The questions basically share certain things in common. It depicts the intricate matters with respect to law-making in a situation that engulfs the demands of the society that bestows upon an elected government i.e. those democratic values on the one hand and the need to subject legislatures to comply with the pre-commitment of constitutional values in exercising only those matters vested upon them under the constitution.¹¹⁶ Here, arguably one could notice a tension between two competing values, namely, of constitutional supremacy and of popular sovereignty.¹¹⁷ Put it simply, the tension between the framers or founders of the constitution i.e. 'the then' and the living demos i.e. 'the now' from whom the government would be constituted within the bound of the constitution.¹¹⁸

The first relates to the idea of establishing limited government whose powers is constitutionally confined within the 'grant and denial' scheme through enumerating certain items as such. In this regard, the legislature is established to enable the government, which is mainly through its laws, to perform those activities specified as granted in general terms by enacting different specific laws from time to time. In such a way it gives accord to legalizing acts of government while backing the limited nature within the predefined, certain and identifiable sources of authorities as granted in the constitution that endures.¹¹⁹ From such it follows that while the constitutional

¹¹⁵ ROBERT J. LIPKIN, CONSTITUTIONAL REVOLUTIONS: PRAGMATISM AND THE ROLE OF JUDICIAL REVIEW IN AMERICAN CONSTITUTIONALISM, 7 (Duke University Press, 2000)

¹¹⁶ Jackson & Tushnet, *supra* note 60 at 223, Dowling & Edward, *supra* note 112 at 2

¹¹⁷ Lipkin, *supra* note 116 at 8, *see also* Habermas *supra* note 39 at 771

¹¹⁸ DAVID STRAUSS, THE LIVING CONSTITUTION, 2 (Oxford Univ Press, 2010)

¹¹⁹ Walter Murphy, Constitutions, Constitutionalism & Democracy, in CONSTITUTIONALISM & DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD (Douglas Greenberg et al eds., 1993) as extracted in Jackson & Tushnet *supra* note 60 at 224-25



supremacy prevails by not trenching upon matters not granted, the system would be considered as running legitimately. In addition, it also entails the public vs. private conduct of life to be regulated with utmost certainties while the mechanism of power exercise relies on established legal and constitutional framework.

The second, however, relates to the particular demands of the living demos whose interest might have significant difference with the change of time. In such a case, the will of the demos as an expression of popular sovereignty in constituting a government of their choice might bring additional tasks to perform than enumerated in the constitution.¹²⁰ Hence, it is the expectation of voters to see their wills reflected by the representative government they have formed and in turn the legislature would give effect the same through enacting different laws. However, it would become difficult to assume the need of the demos fit with the constitutional framers unless such matters are envisaged in the constitution from the very beginnings. Since it would mean to disable the legislature from enacting laws that reflect the current demands of voters from which it gains legitimacy. It also defeats the idea of democratic government if the government is not allowed to be as responsive as possible and owing the fact the constitution is not going to be violated in any ways through legislative acts.¹²¹

Thus, it necessarily requires some forms of constitutional power that permits the self-redressing of the demos and that provides flexibility to the legislature with due respect to those fundamental constitutional values kept intact.¹²² In fact, the prevailing idea that lies at the core of such assumptions stems from the view that acknowledges society is dynamic which in turn carries changes in circumstances or status quo. The later would quite remarkably shapes the activities that the government perform as long as the change in the status quo bring changes in the politics, economic, social and overall affairs of the society. The government of the day, therefore, is oriented, shaped and regulated by various interests contextual and particular to the society.

Nevertheless, the question is that how a legislature operating in such contexts could become capable of responding all such issues without the need to undergo a change in the constitutional

¹²⁰ ERWIN CHERMERINSKY, CONSTITUTIONAL LAW, 102-105(2nd eds, Aspen Publishers, New York, 2005)

¹²¹ Lipkin, *supra* note 116 at 2 and Strauss, *supra* note 119 at 3

¹²² Chemerinsky, *supra* note 121 at 102

instrument? Regardless of the fact that there is possibility of responding through mechanisms of constitutional amendments and interpretation to go with the dynamics of the society, the question ultimately pertains to balance the essence of limited government and democratically responsive legislature that serves two fundamental purposes. On the one hand, it is imperative to establish a government flexible enough in properly addressing the will of the people, and on the other hand it is necessary to form the government that must conform to the constitution and should adhere within the limits of power thereof.¹²³ Hence, we need to establish certain mechanism that entrusts some form of power upon the legislative body that could go with the change in the status quo.

Implied power is one of such mechanism that allows flexibility of governments adapting the dynamics of societal demands and contextual varieties be accommodated without changing the wordings of the constitution.¹²⁴ However, with this backdrop since there are different forms of providing such mechanism in different constitutions as we later observe, the following emphasis is paid to the distinct features and difference with other similar kinds of political powers and also the relevance of constitutionalizing implied law-making power. In nut shell, the following points are considerably the pushing factors why implied authorities should be placed as essential tool in comparative constitutional and political theories.

- ❖ Nature of Constitutions i.e. its nature which requires specifics and details; matters which otherwise is not mentioned but out of which the exercise of other powers granted and the functions of the government itself would become difficult; the government would be in a position to stack if we are going to adhere to the words of the texts only; and discerning from the readings of constructing the essence, purpose and spirits of the constitution might lead so, etc. 'Constitutions, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. Its nature, therefore, requires that not only its great outlines be marked, its important objects designated and the minor ingredients which compose those

¹²³ Dodd, *supra* note 13; Madison, *supra* note 35; and Murphy, *supra* note 14

¹²⁴ Ibid

objects, be deduced from the nature of the objects themselves.¹²⁵ Hence, an implied legislative power saves a constitution from being codified and voluminous instrument.¹²⁶

- ❖ Rights implementation i.e. the fundamental rights and freedoms often are incorporated in many of the written constitutions with a language of precision and comprehensiveness. Hence, governments are required to enforce these constitutional rights through more detailed legislations so as to make the application as realizable as possible. Also, the mechanism of both general and specific restrictions upon the exercise of those rights can only be achieved by legislative acts in order to avoid the danger that basically arise during implementation either by law enforcement agencies or in courts. In such a case, legislatures enjoy wide ranges of choices in giving effect to the protection of constitutionally recognized rights. Implied powers are one of the means that provide appropriate solutions in the realization of rights.¹²⁷
- ❖ Nature of Powers and government: as we reiterated elsewhere powers naturally dependent on circumstances particular to the society. Hence, with the dynamics of societal needs and problems, the exercise of a particular authority by those who are in charge is significantly shaped and determined by the constant changes in status quo. Accordingly, implied legislative authority is the best way to keep such dynamics optimized with mutability of power itself and to avoid stagnancy of governance with the ever increasing functions of government.¹²⁸
- ❖ Democracy: the idea of representative government itself may sometime urge us to opt for self exercise of certain matters which would become relevant to perform to ensure the

¹²⁵ Chemerinsky, *supra* note 121 at 103. In discussing the 'necessary and proper' clause, Marshall deals mainly with two considerations: the requirements of a written constitution and the nature of government. His view of a written constitution may be seen in the classic text from 'McCulloch vs. Maryland' case as the quoted paragraph elucidates.

¹²⁶ Madison seriously considered the absence of such implied or incidental power under the Articles of Confederation caused to establish weak national government and thus must be incorporated under the constitution.

¹²⁷ See for instance in the US there is such implied congress authority called 'appropriate legislation doctrine' that positively builds the means as to how those various rights are accentuated to the ends of safeguarding from government interferences at all levels. It is noted that by virtue of the Fourteenth Amendment Section 5 laid the foundation for such broad application of the doctrine. The provision reads as 'The Congress shall have power to enforce, by appropriate legislation, the provisions ...' Evan H. Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers Source, 53 (5) STANF. L. REV. 1127-1199(2001)

¹²⁸ Once again the words of Marshal in the case mentioned are quite relevant to shape the concept.

wills of the majorities expressed during election. Though the constitution is the reflection in the same way but the later one might not necessarily be envisaged thereof during framing the text, within the bounds of the constitution and resulting from party programmes or policies presented for voters preferences which potentially entitle granting the license to become laws, etc.¹²⁹

- ❖ Federalism: the division of power between the two tiers of governments; it significantly requires practical ways of resolving jurisdiction disputes and possible encroachments during implementation; filling the gaps of difficulties during constitutional design; avoiding the weakening of government power and thus making it viable to provide the services it is established for; and the purpose of creating federal arrangement itself like economy, political, security or military, etc.¹³⁰

2.4.2. Implied Power and Lawmaking

As argued elsewhere there are varieties of political powers entrusted upon government within the constitutional distribution of powers in general. In this regard, the notion 'political power' is used to signify the kind of constitutional power vested in the particular organ of government. In other words, it is meant to have non-restrictive element that at the same time includes and excludes the other organs of government. For instance, when we speak of the political power of the legislature the inclusive meaning applies to convey the broader powers confined to the government in the constitution. In such a case, the legislature performs ranges of functions in authorizing and implementing those activities that fall into the domains of government in general and those specific tasks of the other organs in particular through legislative acts (i.e. mostly laws) that requires legal authority for its constitutionality in practice. On the other hand, the narrower meaning given to the notion basically carries the essence of distinctiveness due to the

¹²⁹ Fleiner & Fleiner, *supra* note 68 at 399 put the essence of democracy in the form of 'one vote, one value' as a precondition for the changing function of the state. Thus, indirectly speaking implied constitutional authorities becomes instrumental for elected governments to easily achieve the interests of the demos without recourse to constitutional changes.

¹³⁰ It is understood that in federations where the states enjoy plenary of power through reserve clause, it is necessary to devise such mechanism in order to avoid the threat of arbitrariness or even tyranny that might come by the states using such grounds to deny federal competencies over the matters an express constitutional authority is scarce to identify. Besides, the national government will be saved by the constitution to execute certain other necessary mandates in the event where the framers have left out a particular matter of general importance or even a matter which never thought before to exist and over times become crucial to the country at large. See Madison's authoritative arguments in the Federalist No. 47 as cited earlier. For more, see Caminker *supra* note 126 at 1186

nature of power or the task performed solely by one organ of the government. In such a case, the power of that particular organ would be the essential part of the government where the others cannot enforce their respective authorities without subjecting themselves to the same. In short, it represents the constitutional authority of each independently exercised to check and control whether the powers of others conforms within its constitutional scope or whether it trenches beyond that. One finds different mechanisms designed in different political systems based on the kind of constitutional arrangement adopted in the state to deal with such specific non-inclusive task. For instance, arguably the idea of judicial review is the kind of political power that asserts idea we ascribed to the second meaning.

Hence, we can classify the notion of political power into two forms.¹³¹ First, it purely exhibits the sovereign power in the sense that the authority of the specific organ is absolute and uncontrolled within its own sphere. The second form, however, canvasses the element of subordinate or delegate political authority. In the first, thus, it refers the ultimate authority vested on one organ, also describe as supreme power, where within its designed limits, its exercise and effective operation don't depend on, and are not subject to, the power of any other.

From this, therefore, it follows that the power cannot be prevented or annulled by any other authority recognized by the same constitutional system that establishes them. For instance, as far as the legislature is within the constitutional scope, it enjoys its supreme law-making authority without being dictated by the others or without others interfering on the type of course of action it should opt. That's why we take the legislature as reflection of sovereignty when it exercises its law-making authorities. Nevertheless, as we have hinted the second notion relates to the kind of power that within its own sphere of operation is subject to relative external control because there exists, *inter alia*, some superior constitutional power that can prevent, restrict, direct or annul its exercise. Thus, the course of action, the modes of operation or even the choices available to perform a particular activity is constrained by the specific authority provided to the other organs. Put it simply, we can summarize the two notions of 'sovereign' and 'delegate' political powers in such a way.¹³² While the first pertains to the free exercise without the need to submit to others so

¹³¹ Neumann, *supra* note 49

¹³² See Blacks Law at 1179 for the meanings of the notions as described in the text.

as to determine, define or limit the powers so granted; the second, to the contrary subject the sovereign authority to be confined within the consent and approval of the others so long as legitimate exercise of constitutional mandate is concerned.

Hence, our primary focus in present topic will be to pay a depth attention to the second notion for the purpose of implied lawmaking authority of the legislative body. This is because the fact that the sovereign or supreme law-making power would not give rise to contest as far as the constitutional express matters is concerned. In fact, this does not mean that it is absolutely free from scrutiny of any form. However, as we are going to observe in later discussions, there are certain matters that in one way or another shape and negatively affect as to how the exercise of those express matters should follow. The primary emphasis accordingly would be to identify the competency of law-making on matters that fall outside of those express constitutional powers. In order to do so we need to determine the scope and source of authorities of legislative power exercised on these grounds. In such line of assumption we face first the idea of implied power in general and its features with respect to other categories of constitutional distribution of power. A more related issue is to articulate whether such power is necessary to provide under the constitution and if so to analyze as to how such should be exercised owing the backdrop of political power in general. Finally, it elucidates the effects of failure to provide the clear cut principle and grounds involving such scheme of law-making power from various perspectives with respect to constitutional government.

2.4.3. Forms of Incorporating Implied Law Making Power in Different Constitutions

Despite the general similarities in the allocation of exclusive powers between the federal government and the states in all federations, there are fundamental variations regarding the scope of federal legislative power. Thus, there is a common understanding in federations to not only restrict the federal government confined with the matters enumerated in the constitution but also at times to enable the functional competencies on matters of national importance even if the original constitution does not locate in the exclusive lists. In particular in order to avoid premature power conflicts arising from silences in the constitution and the claim often might come from the states by virtue of reserve power, both recent and older federations has devised appropriate mechanisms that empowers the capacity of federal governments. It is stressed thus

constitutions are expected to respond either explicitly or implicitly as to how federal adaptability should practically come without the need to go through the formal amendment process.¹³³

We can identify two different models with respect to expanding further such exclusiveness in the form of constitutionalizing implied federal competencies. In the first group we find the constitution of US, Australia and RSA federations incorporating ancillary, incidental or generally implied clauses where the federal government broadens its jurisdictional limit through times in the form of legislation. Unlike this in federations such as the German, Swiss and Indian constitutions enlarge federal power by the incorporation of comprehensive provisions on exclusive federal and concurrent powers. Hence, the following discussions focuses as to how each constitution managed implied law-making authority while also dealing the scope provided by their exclusive lists. In doing so, a brief elaboration will be made about the US system since it lays the conceptual foundations and later the approaches followed in German and Swiss excluding India's since the federal government under its reserve power is short of such deficiencies.

2.4.3.1. The US, Australian and RSA Model

Here with respect to constitutionalizing implied power, the model first adopted in the US and later developed by judicial construction would give us the tool to understand the concept.¹³⁴ In this category the constitution of Australia¹³⁵ and RSA¹³⁶ are reflective of the constitutional level accorded to implied power in the contemporary constitutional law. Thus, the discussion only limits itself to the US model since indirectly others would certainly be described in the same way. However, before delving into the discussion, it is significant to put the provisions of the three constitutions to spark a light on the matter.

¹³³ Madison in the Federalist wrote, rather warns, the serious consequences federations will face in the event such constitutional provisions are non-existent. He further anticipated the crisis national governments inevitably would get into by comparing the experiences of weak governance capacity observed during the union under the Articles of Confederation. See the Federalist No. 47 in general.

¹³⁴ See also the various amendments to the constitution and the congresses power to enact appropriate legislations
¹³⁵ The Australian Federal Constitution (Commonwealth of Australia Constitution Act as finally amended in 2003 on the originally adopted Act of the 9th July 1900.)

¹³⁶ The Constitution of the Republic of South Africa 1996

The United States Constitution enumerates the powers of the federal government. Other sections of the Constitution too grant Congress powers in addition to those mentioned under Article I section 8.¹³⁷ However, under Art 1 section 8 clauses 18, it stipulates as follows:

‘To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.’

The Australian constitution, which establishes two federal houses exercising lawmaking authorities and enumerating the federal power which leaves out the reserve clause to the states of the common wealth, under Section 51 stipulates:

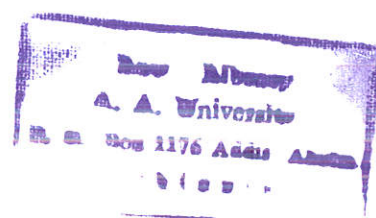
“The Legislative powers of the Parliament it provides that ‘The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to all matters within the federal jurisdiction.’ Moreover, under Clause xxxix of the same it specifically puts implied law-making in such a way: ‘All matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.’ Whereas in Section 52 it further establishes the exclusive powers of the Parliament.”¹³⁸

The most recent South African constitution provides the following general provisions in three forms to the parliament, to the National Assembly and to the Council, under section 44 as respectively follows:

parliament may intervene, by passing legislation in accordance with section 76(1), with regard to a matter falling within a functional area of the province, when it is necessary to maintain national security; to maintain economic unity; to maintain essential national standards; to establish minimum standards required for the rendering of services; or to prevent unreasonable action taken by a province

¹³⁷ See for instance U.S. CONST., Art. III, Art. X sect. 1; Art IV sect. 3 and Amendments XIV, XVI.

¹³⁸ In addition, the Australian Parliament, subject to the Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to: the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes; matters relating to any department of the public service the control of which is by the Constitution transferred to the Executive Government of the Commonwealth; and other matters declared by the Constitution to be within the exclusive power of the Parliament.



which is prejudicial to the interests of another province or to the country as a whole.¹³⁹

In addition, Section 44 (3) provides that:

‘Legislation with regard to a matter that is reasonably necessary for or incidental to, the effective exercise of a power concerning any matter listed in national government is, for all purposes, legislation’¹⁴⁰

As mentioned earlier Congress’s power to make laws for the whole territory of the United States emanates principally from Article I section 8 and this very provision in theory endows Congress, not with all legislative power, but only with the legislative powers enumerated therein. In principle as suggested American federal tradition and the interpretation given by the Supreme Court in various cases, the federal government cannot claim powers not allocated to it by the constitution.¹⁴¹ As one scholar described ‘an act of Congress is invalid unless it is affirmatively authorized under the Constitution while State actions in contrast are valid as a matter of federal constitutional law unless prohibited explicitly or implicitly by the constitution.’¹⁴² In short, this is referred as the doctrine of enumerated powers. The legislative powers of the federal government are defined and such laws are given supremacy under Article VI.¹⁴³ These understandings give us the impression where Congress has limited legislative power and limited in the sense that its power extends only over those enumerated by the constitution. In addition, by virtue of the Tenth Amendment ‘the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people’ makes the doctrine of enumerated federal powers an explicit part of the Constitution.¹⁴⁴

Being this the principle of power division, possible exception further derives from a rather vague clause stated as the ‘necessary and proper clause’. This has been the basis of the doctrine of

¹³⁹ RSA CONST. Section 44 (2). It provides the sphere of government or power division scheme where schedule 4 deals with the national and schedule 5 about the provincial

¹⁴⁰ Section 44 (1) (ii) to pass, in accordance with section 76, legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution to be passed in accordance with section 76. Section 76 provides the legislative process that must be followed for ordinary bills affecting provinces.

¹⁴¹ D.P. Wessels, *The Division of Powers in a Federation*, in Kriek ed., *supra* note 90 at 43- 44

¹⁴² Chemerinsky *supra* note 121 at 104

¹⁴³ Ibid

¹⁴⁴ Ibid

implied powers. According to most scholars in American constitutional law, this remains extremely important as

‘an explicit incorporation within the language of the Constitution of the doctrine of implied powers: the exercise by Congress of power ancillary to an enumerated source of national authority is constitutionally valid, so long as the ancillary power neither conflicts with external limitations such as those of the bill of rights and federalism, nor renders Congress’ power limitless.’¹⁴⁵

This vague clause along with the power for common defense and general welfare, the commerce clause and the meaning given to them by the Supreme Court were instrumental in expanding federal government’s power in the US over the years.¹⁴⁶

The first time an attempt to render a conceivable meaning of the ‘necessary and proper’ clause was when Congress enacted a law establishing, Bank of the United States in the famous case *McCulloch v. Maryland*.¹⁴⁷ The Court unanimously upheld the power of Congress to charter a second bank of the United States. The chief justice, Marshall, constructed the necessary and proper clause and the gist of implied power of Congress as follows: ‘Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution are constitutional.’ In interpreting what is ‘necessary and proper’ in this famous case, Marshall stated it as meant ‘useful and convenient’ rather than ‘absolutely indispensable.’ And he declared that Congress possesses the power, not expressly named, to establish a bank.

Thus the power of the federal government to establish a national monetary and banking system is an implied power arising from the constitutionally enumerated power to levy taxes and to regulate trade. Ever since this was an important ‘channel for the federal government’s

¹⁴⁵ See generally, Choper, *supra* note 113, Murphy & Tanenhaus *supra* note 14, Chemerinsky *supra* note 121. Underlying the extension of the functions of the federal government are implied powers derived not only from the necessary and proper clause but also from three other categories of constitutionally enumerated powers namely war power clause, the commerce clause and the tax and spending clause. For instance, through the war power clause the federal government enters ‘the sphere of scientific knowledge, research and the manufacturing field.’ Wessels, *supra* note 142 at 45

¹⁴⁶ Kenneth R. Thomas, *Federalism, State Sovereignty and the Constitution: Basis and Limits of Congressional Power*, in CONGRESS OF THE UNITED STATES 75-97 (Sela Thomason eds. Nova Science Publishers, Inc. New York, 2009)

¹⁴⁷ *MCCULLOCH V. MARYLAND* as cited earlier

infiltrations of the states' power through the necessary and proper clause,¹⁴⁸ also called elastic clause. In fact, the elastic nature of the clause was extensively used by the Congress during the New Deal period and later where the federal government wipe out vast areas traditionally considered as state autonomy. In effect, there were several instances where the Supreme Court ruled out as unconstitutional and at times sustained as appropriately federal jurisdiction though the controversies on implied authority still runs in American politics and constitutional law.¹⁴⁹

2.4.3.2. The German and Swiss Model

Generally, the Basic Law of Germany like the United States Constitution stipulates that state authority is the rule and federal power the exception. 'Save when otherwise provided or permitted by this Basic Law, the exercise of state powers and the discharge of state functions is a matter for the states'.¹⁵⁰ More specifically the same principle is endorsed on legislative matters. 'The states shall have the right to legislate insofar as the Basic Law does not confer legislative power on the federation.'¹⁵¹ But the granting of authority to the federal government differs significantly from that in the United States. Federal powers in Germany include not only those subjects which have always been federal under the United States Constitution and most of the economic and social matters that were federalized in the United States during the New Deal, but also fields like contract, tort, criminal law which in the US belong to the states.¹⁵² The expressly federal and the comprehensive list of concurrent powers that are potentially subject to federal

¹⁴⁸ Duchacek, *supra* note 92 at 272. Applied to the commerce clause we find the same dilemma as to whether Congress may regulate anything that is related to interstate commerce or that Congress may enact any regulation that assists it in carrying out its commerce regulating power.

¹⁴⁹ Michael P. Zuskert, *Toward Corrective Federalism: The United States Constitution, Federalism and Rights*, in, *FEDERALISM AND RIGHTS*, 75-100 (Katz & Tarr eds., Ellis Katz & Alan Tarr eds., Lanham: Rowman & Littlefield Pub. Inc, Lanham 1997)

¹⁵⁰ Basic Law of the Federal Republic of Germany art 30

¹⁵¹ Basic Law art 70 (1) provides the guiding principles of the division of powers between the Federation and the Länder. It reads as 'the Länder shall have the right to legislate insofar as this Basic Law does not confer legislative power on the Federation.' While sub (2) the division of authority between the Federation and the Länder shall be governed by the provisions of this Basic Law concerning exclusive and concurrent legislative powers. Accordingly, Article 71 the Basic Law maintains the exclusive legislative power of the Federation, 'on matters within the exclusive legislative power of the Federation', whereas the Länder shall have power to legislate only when and to the extent that they are expressly authorized to do so by a federal law.

¹⁵² If one looks at the Basic Law Arts 74 and 75 (concurrent and framework powers) it is not difficult to decipher the departure from the US federal system. Also see David Currie, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* (Chicago: The University of Chicago Press, 1994)

absorption, introduce a departure from the United States style of division of legislative powers.¹⁵³

The legislative areas in which the federal government exercises exclusive powers are enumerated in Article 73. The lists of exclusive federal powers are very much like the list of Congressional powers under Article I section 8 of the United States Constitution but with no necessary and proper clause. Instead there are subsequent provisions providing for a long list of shared powers between the federal and state governments, absent in the United States. The definition of exclusive federal power under Article 71 is very flexible under the Basic Law compared to others. The decisions of the Constitutional Court are of interest because they represent sensitivity towards reserved state autonomy that has been missing from the US Supreme Court for many decades.¹⁵⁴ Perhaps what can be considered as broad implied law-making authority is the situation where the federal government legislates over matters the Lands exercise autonomy alone or concurrently. This is implicitly recognized under Art 72(2) which reads as:

‘the Federation shall have the right to legislate on matters falling within the competencies of the Landers, if and to the extent that the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest.’

The federal government is only expected to prove the fulfillment of any of the three grounds to assume legislative dominance. First, if a particular matter requires the enactment of federal legislation in order to establish equivalent living conditions throughout the federal territory, then the federal parliament is allowed to take away from the Lander legislative competencies.

¹⁵³ Three factors make the German federation unique. These are the exhaustive list of federal and concurrent powers, the Bundesrat's role and the legislative-executive division between the federal government and the states. German federalism assigns legislative power mainly to the federal government whereas the states are in most cases responsible for implementing not only state law but also the bulk of federal law. In short, the law-making function is mainly the role of the Bund (federal government) while the executive function is that of the Länder/states. Hence some prefer to call the German federation executive or functional federalism. See Arthur Benz, 'From Unitary to Asymmetric Federalism: Taking Stock after 50 Years,' 29(4) *PUBLIUS* 56 (1999).

¹⁵⁴ The Television case of 1961 can be cited as one of the decision of the Constitutional Court that preserved and sustained the autonomy of the Lander to legislate under the reserve clause through restrictively construing the federal government's power to regulate. The West German Constitutional Court, in disposing the case, invented the federal principle in such manner: '...all constitutional relationships between the whole state and its members...are governed by the unwritten constitutional principle of the reciprocal obligation...to behave in a pro-federal manner.' See the full text on the decision of the case, Murphy & Tanenhaus, *supra* note 14 at 164

Secondly, whenever the federal government deems a particular aspect within the autonomy of the Lands is necessary to bring economic unity, it can do so through regulatory acts in order to promote national interests. The same applies for the purpose of maintaining legal uniformity in the enforcement of a particular legislation as opposed to what might differently be treated across the Lands in exercising their autonomy. This is generally known as the principle of homogeneity upon which the law-making power of the federal government grows overtime. In addition, the Basic law allows the federal government to hold extra legislative power impliedly to enforce the principle of subsidiarity arising from the European Union.¹⁵⁵ This includes providing adequate protection of rights and matters generally aimed to the better achievement of economic, social and democratic developments in the federation.

The parliament in the Swiss Constitution is relatively similar with what the German system establishes though the kind of power division mostly resembles the US constitution. By virtue of Art 148 the Federal Parliament, subject to the rights of the People and the Cantons, is the highest authority of the Confederation.¹⁵⁶ In this regard, the general principle which the Constitution adopts in dividing legislative power between the federal government and the Cantons is similar to the United States and Germany.¹⁵⁷ Generally, the fields in which the federal government is competent to legislate must be defined in the Constitution and that the federation is able to intervene and legislate in a particular domain only if empowered to do so by the Constitution. Consequently, spheres of activity not mentioned in the constitution are considered to fall within the competence of the cantons.¹⁵⁸

But what is distinct about the Swiss federal constitution is that there is nothing similar to the clause of Article I section 8 of the United States or that of Articles 73 and 74 of the Basic Law. The legislative power of the federal government and the states is found dispersed over various

¹⁵⁵ Basic Law of Germany art 23

¹⁵⁶ Federal Constitution of the Swiss Confederation of 18 April 1999 (as amended until 15 October 2002). The Federal Parliament has two Chambers, the House of Representatives and the Senate which have equal powers.

¹⁵⁷ Id. Article 3 states 'The cantons are sovereign insofar as their sovereignty is not limited by the Federal Constitution; they shall exercise all rights which are not transferred to the Confederation.' Articles 42 and 43 also stipulate that the main task of the confederation is regarding tasks that require uniform regulation while the cantons define their tasks within the framework of their powers.

¹⁵⁸ For more on the Swiss federation see Nicolas Schmitt, *FEDERALISM: THE SWISS EXPERIENCE* (Pretoria: HSRC publishers, 1996) at 41-42

articles throughout the Constitution and it appears very difficult to single out which powers are exclusively federal and which are not. The power of legislation is provided under Art 163 and 164¹⁵⁹ in general and Art 173 specifically enumerates the laws that parliament enacts where providing long lists.

However, the following two points deserves worth consideration. On the one hand, the Federal Parliament shall moreover deal with all subjects that are within the powers of the Confederation, and are not attributed to another federal authority. On the other hand, additional tasks and powers to the Federal Parliament may be assigned by Statute. Besides, different from the Swiss tradition of cantonal sovereignty, the new Constitution has even empowered the federal government to assume tasks that require uniform regulation.¹⁶⁰ The uniform regulation clause therefore can be taken as the equivalent of the implied authority that broadens the scope of federal government overtimes. Taken together these three grounds render the Swiss parliament to enjoy wide range of law-making activities rather than confining itself with those enumerated matters.

2.5. Constitutional Constraints on Lawmaking Power

Once we have made clear that lawmaking power is indispensable for efficacy of government of any kind and also the role legislatures would play on the overall socio-economic and political affairs of the society, we face sets of issues to examine in order to conceptualize how these powers should be exercised. In this regard, it is apt to raise whether there are limits on the competency of lawmaking, why is so special to vest constrain on exercising such functions, and what principles or rules should guide law making activities of legislatures are issues one has to deal with among others.

In dealing with limiting the powers of lawmaking one might come across the vast theoretical literatures as expounded by political philosophers of different centuries. However, it is essential to approach the underlying concepts from the influential works of Locke and Montesquieu as

¹⁵⁹ SWISS CONST. Art 164 stipulates all important provisions establishing rules of law must be enacted in the form of Federal Statutes. These include the fundamental provisions on the exercise of political rights; the restrictions of constitutional rights; the rights and obligations of persons; the circle of tax payers, and the object and the calculation of taxes; the tasks and services of the Confederation; the obligations of the Cantons when implementing and executing federal law; and the organization and the procedure of federal authorities.

¹⁶⁰ SWISS CONST see art 42 Section 2

both have influenced on construing the modern form of separation of power and of limited government. While both succinctly suggest why it is necessary to separate the powers granted to the government, however, they have differences as to what system would be preferable not to mention their rationales too.

The classical understanding on the constraints of legislative power was fundamentally related with two things.¹⁶¹ First it focuses as to how liberty, both political and others, could be preserved. At the same time it depicts as to how mechanisms should be provided either substantively or procedurally to safeguard any violations concerning liberty. Second, though it emanates from the first, basically it focuses on avoiding the tyranny of governments, whether by enacting laws for such end or through other ways, where its object was to limit abuses of power and arbitrariness. In such essence it advocates the principle of separation of powers thereby stressing the idea of limited government. However, the development of different political theories coupled with historical records of despotic or dictatorship nature of governments has transformed the ideas into establishing constitutional governments.

Despite the variance one might find on the modern constitutional theories, at least there is a general understanding that assumes constitutions as the limit of government. In other words, the idea of constitutional government suggests governments power should emanate from a constitution and it should be exercised in accordance with the principles or rules enshrined thereof. For instance, Sartori provides a good starting point for a consideration of the issue 'whatever else the constitution may be, it is based on the idea that there must be limits to the exercise of power'.¹⁶² In other words, whatever the political arrangement is, or whether there is a written or not written constitutional document, it can be considered as a constitutional state. What ultimately matters is whether and to what degree the government is restricted in the exercise of arbitrary power. In short, a constitution must be viewed as a form of limit to government power or simply as a frame of government.¹⁶³

¹⁶¹ BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* (CAMBRIDGE UNIVERSITY PRESS, 2004)

¹⁶² Sartori, *supra* note 29 at 853-64

¹⁶³ For instance, one finds a sharp difference if one compares Sartori's formulation with the legal theory of J. Raz, a 'constitution' in the thick sense should fulfill the following elements. These are: "constitutive of the legal and political structure; written; stable, at least in the aspirations of its makers; superior to all other laws; justiciable, in

Albeit in different approach but in a way which formulates what purposes constitutions should serve, Gavison emphasizes two additional elements.¹⁶⁴ These are: first, 'regime arrangements' i.e. basic institutional structure of government and the power relationship thereof; and second, 'human rights' i.e. the fundamental rights of individuals that requires entrenchment (in the sense of formal documents superior and beyond regular legislatures) and enforcement (in the sense of the mechanisms and institutional framework). Often, this becomes crucial with respect to constraining lawmaking power.

Accordingly, a constitution in parliamentary governments is expected to balance these two purposes. On the one hand, it should constrain the lawmaking power through confining by supremacy clause. On the other hand, it should set to establish strong judiciary which adequately checks the constitutional exercise of power from the fused executive and legislative organs.

In this regard, federalism provides additional mechanisms to solve the problems of unlimited legislative power.¹⁶⁵ What is really important in federal arrangement is that there should be a constitutional mechanism that guides the exercise of powers within respective sphere of influences. In this respect, the delicate division of authorities will be the cause to unlimited government in practice. To offset that a federation normally provides certain manners as to how both layers should make use of their respective authorities. Above all the doctrines of enumerated and implied authorities have clear constrains in practice.

However, the mere interlocking of the sets of aspects does not warrant achieving the end result if it is not a wishful thinking. Consequently, it should be backed by the following three basic principles, among others, for the effective application of the constitution. These are: the principle

order to make invalidation of unconstitutional acts possible; entrenched against ordinary legislative changes; and expressive of a common ideology of the people it seeks around i.e. reflective of basic community values and protective of fundamental rights of individuals per se." Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in *CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS* (Larry Alexander eds., Cambridge Univ. Press, 1998), at 153-54

¹⁶⁴ Gavison, *supra* note 29 at 90

¹⁶⁵ The division of power is primarily a check to both the federal and state lawmaking. Secondly, the fact that the states are represented in the second chamber shows they can further limit the scope of federal legislations on matters that directly affect their interests. Besides, the existence of one supreme constitutional interpreting organ would suffice to say both governments are constrained in terms of legislations.

of constitutional supremacy, justiciability, and entrenchment.¹⁶⁶ Taken together, these ingredients with other normative principles of limited government make up the fundamental 'rule of law' idea.¹⁶⁷ Accordingly, it differentiates the rule of law from 'rule by law' concerning the exercise of law-making power.¹⁶⁸ The latter, sometimes known as 'formal' or 'thin' conception of the rule of law, meaning by this a conception of the rule of law which places no constraints on the content of law and is therefore compatible with great iniquity in the law.¹⁶⁹ By contrast, those who hold to a substantive conception of the rule of law believe that a commitment to the rule of law entails, in addition to the formal checks on power already mentioned, certain substantive moral constraints on the exercise of state power. On the substantive conception of the rule of law, the supremacy of law over will necessarily involves also the supremacy of law over parliamentary will: democratically elected majorities should also be subjected to the law. In effect, the rule of law is seen as a 'higher' law, capable of trumping parliamentary sovereignty – a notion with obvious roots in the natural law tradition. Some, for instance, argue that legislation which seeks to override fundamental human rights, such as the rights to due process, equality and freedom of speech is incompatible with the rule of law.¹⁷⁰

Thus, when we speak of constraints on legislative powers and functions, we have to understand in the sense of establishing a constitutional government dedicated to live up to the ethos of constitutionalism. Otherwise as Sartori rightly pointed out we will be faced with the distinction between three kinds of constitutions which ostensibly elucidate whether legislative branch is in fact constrained or it exercises unfettered power. For him in order to speak of constitutionalism in the sense of achieving the telos, as depicted hitherto, what matters is whether the

¹⁶⁶ De Waal et al, *supra* note 39 at 8

¹⁶⁷ PETER A GERANGELOS, *THE SEPARATION OF POWERS AND LEGISLATIVE INTERFERENCE IN JUDICIAL PROCESS: CONSTITUTIONAL PRINCIPLES AND LIMITATIONS*, (Oxford Univ. Press, 2009) at 29-40

¹⁶⁸ Supremacy of law, Separation of powers, Protection of life, liberty, safety and property of persons, Legal certainty, Equality before the law, and Rule of Law Norms in reality, not just in theory can be taken as the fundamental components of the 'rule of law'. See generally, Suri Ratnapala, *Securing Constitutional Government: The Perpetual Challenge*, *The Independent Review*, 5(vol. VIII, no.1, 2003), at 7-9.

¹⁶⁹ Cheryl Saunders and Katherine Le Roy use the metaphor of 'thin' and 'thick' versions of the rule of law in 'Perspectives on the Rule of Law' in, *THE RULE OF LAW* (C Saunders and K Le Roy eds., 2003) at 5-6.

¹⁷⁰ T. S. Allan, *Constitutional Justice and the Concept of Law*, in *EXPOUNDING THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL THEORY*, 219-244 (Grant Huscroft ed., Cambridge University Press 2008)

constitutional rules or norms are applicable in real life.¹⁷¹ In other words, one would first identify as to how these norms are activated in practice while the operation of the government structure is undergoing. Upon such determinations, those constitutions 'nominal or semantic',¹⁷² 'façade or fake',¹⁷³ and 'pseudo-constitutions',¹⁷⁴ would barely restrain the exercise of lawmaking power in practice.

To be fair, if a constitution is not applied, this is the instance of constitution without a constitutional government. Here is the big paradox with regard to nominal constitution. As stated, in such cases, we are confronted with a government which, by definition, will always govern according to the constitution. Moreover, such 'delinquencies in the application'¹⁷⁵ are apparent features for most of the recent constitution in the late 20th c. In fact, one is not expected to cite countries list to warrant the claim as it is ubiquitous in most of the African, Latin America and Asian nations. However, it is not to mean that such facts should be accepted and/or tolerated in any scale. Undoubtedly, its impact on constitutionalism is a far reaching in the reality. Scholars have tried to make sense of the variety of constitutions throughout the world by assigning various terms to their particular idiosyncrasies. Nathan J. Brown, for example, refers to the type of constitutions governing regimes in Africa and the Middle East as "nonconstitutionalist" in that they may serve the primary purpose of identifying political authority and organizing governmental institutions, but they do not in any way limit governmental power.¹⁷⁶ Nonconstitutionalist constitutions, he insists, are authoritative in the

¹⁷¹ If it is only designed to limit political power and actively implemented in practice to bring the rule of law, then we can speak about constitutionalism. In short, a constitution enforced in such sense fit the proper or garantiste constitution. Sartori, *supra* note 29 at 860

¹⁷² Id. at 861 **Nominal constitutions** basically refers the situation where the very purpose is not limiting governmental power. However, its ontological reality is nothing but the formalization of the existing location of political power for the exclusive benefit of the actual power holders. In effect, it is merely organizational constitution i.e. the collection of rules that appears in its content does not restrain the exercise of power. Staggeringly, nominal constitutions openly describe a system of limitless or unchecked power rather than shielded to be real ones. Thus, we cannot say it symbolizes a 'dead letters', however, the letters are utterly irrelevant as far as the purposes of constitutionalism is concerned.

¹⁷³ 'Façade' takes the appearance of a 'true constitution' technically speaking. What makes them untrue is the fact that they are disregarded in practice in essential ways. We can rather call them 'trap constitutions' as the letters are manifestly dead. Id at 862

¹⁷⁴ Id. At times, there might be a mix-up features in certain systems i.e. partly nominal and partly fake.

¹⁷⁵ The term is taken from Sartori to show those constitutions, though well written and organized, particularly recently adopted constitution but most of their provisions are not activated.

¹⁷⁶ Nathan J. Brown, *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government*, (Albany: SUNY Press, 2001.) as quoted in Breslin, *supra* note 57

truest sense of the word; their provisions are reliable, and the governmental institutions that enforce them rarely violate their terms. It is in such cases legislative power tool of arbitrariness or unlimited form of government.

Chapter Three

Legislative Power Division under the FDRE Constitution vis-à-vis Implied Federal Matters

3.1. Introductory Remarks

After thoroughly going through the 1995 FDRE Constitution, one can submit the fact that a robust recognition of human rights and the special focus to ethnic groups in Ethiopia is one of the pillars that undergird the politico-legal order in general and the existing legal system in particular.¹⁷⁷ However, it should not be a gainsaying to perceive these are bounties of the makers in the constitution. This is due to the fact that, among other things, the country's past was generally filled up with the history of excesses, abuses, atrocities and violation of human rights. The constitutional past of Ethiopia is marked by its rulers' authoritarianism or dictatorship against the rights of both individual citizens and various ethno-linguistic or multi-cultural groups. Due to such forms of systematic oppression and marginalization of group's right, where its effects and symptoms persist even these days in the overall political landscape that influences the public life; thus, our constitutional past was not something to be legitimately proud of. Considering all such status quo in mind, one could safely say, the FDRE constitution though its entire foundation was determined by its precursor the Transitional Charter of 1995¹⁷⁸,

¹⁷⁷ The Federal Democratic Republic of Ethiopia Constitution (1995) is the fourth written constitution in Ethiopia. Its predecessors are the 1931 Imperial Constitution, the 1955 Revised Constitution, and the 1987 Peoples Democratic Republic (PDRE) respectively. The country was ruled without a constitution in two occasions between the periods the first and the fourth. First, in 1974 after the military council (Derg) took over power by ousting the monarchy maintained its dictatorial rule for thirteen solid years based on Proclamation no. 1/74. Second, after the Derg regime came to end in 1991, the country stayed without formal constitution for five years under the Charter of the Transitional Period. One also notes within this period the four constitutions stands under three rulers where the earlier two under during the reign of Emperor Haile Sellassie I, whereas the third during President Mengistu Hailemarriam and the last which is still in force under Prime Minster Meles Zenawi.

¹⁷⁸ After the collapse of the military rule by coup-deita the Transitional Government of Ethiopia (TGE) was established by a Charter after a 'peace conference' was held in Addis Ababa in July 1991. The charter was the product of agreements among the warring fronts; the TPLF, EPLF and OLF to name out the notable actors during the London Conference held in April 1991 shortly before the downfall of Derg, to announce the war was over even if it has connotation avowing the 'peace loving and democratic forces'. The so-called the July 'peace conference' decided the Eritrean people question for independence to be resolved by the referendum under the mandate of UN as coordinator. In fact that was the direct result of the consensus reached during the London Conference which was organized by UK and USA where representatives from TPLF, EPLF, Derg, and others. The Transitional Charter was drafted by the three forces immediately TPLF/EPRDF took control of the capital Addis Ababa in May 1991. The Charter set up institutions and processes to begin restructuring political, economic, and social life in the war-torn nation. Under the Charter, the Transitional Government of Ethiopia (TGE) was established to supervise a transition process culminating in the drafting of a democratic constitution to be ratified by a newly elected National Assembly. See, Paul H. Brietzke, Ethiopia's "Leap in the Dark": Federalism and Self-Determination in the New Constitution, J.AFR.L 39 (1) (1995), THEODORE M. VESTAL, ETHIOPIA: A POST-COLD WAR AFRICAN STATE (1999).

epitomizes a breakthrough with all its tributes in bringing a new legal regime after the downfall of the Military government Derg in 1991. Although it came after prolonged transition which lasted for about four years, the constitution has served as lasting solution for the rooted quest of self-recognition and self-government of various ethno-linguistic groups regardless of their population size.¹⁷⁹

Owing the aforementioned backgrounds about the FDRE constitution, the object of the chapter is exclusively the division of power in general. Under this chapter a closer look will be paid on federal legislative authority and emphasizes as to how implied power is formulated, if any. To do so, under the second section, it briefly touches upon the nature of parliamentary form adopted in the constitution in terms of the powers and functions it exercises while comparing the Ethiopian style fits with other similar forms in terms of its promises to achieve limited government. The third section broadly sets the stage to comprehend the power division in a bid to examine the scope of exclusive federal authority and the respective autonomy of the regions. In what follows it examines the federal lawmaking vi-a-vis implied authority on the basis of certain constitutional provisions that sparks some lights owing the discussions drawn in the previous chapter.

3.2. The Kind of Parliamentary System under the FDRE Constitution

As pointed out from the outset the constitution under Art 45 have established parliamentary form of government. However, when the constitution was formally adopted the parliament is organized in the mode of bicameralism. Thus, the HPR and HOF constitute the federal legislature despite the constitutional mandate vested upon them apparently is different. In fact, the constitution is clear enough as to who holds the genuine authority in the context of parliamentary system. Hence, the HPR not only reflects such genuine parliamentary government in the sense of the supreme authority of the federal government but also the sole legislative body enjoying the enactment of all the federal laws.¹⁸⁰ Accordingly, strictly speaking the constitution establishes unicameral parliament. Though there are certain fiscal matters the HOF exercises alone or jointly as well as partaking in the constitutional amendment, there is no room to pass legislation in the proper sense of the term.

¹⁷⁹ Transitional Government of Ethiopia (TGE) Charter 1991-1995. It established de facto federal system based on ethnic lines which resulted in making up fourteen regional self/national governments and one central government. The Charter, inter alia, brought the right to self-determination of nations, nationalities and peoples including the right to secede from the country.

¹⁸⁰ ETH CONST., Art 50(3) cum Art 55

In the discussion on parliamentary systems we have noted that there are two models in contemporary context with respect to the principle of parliamentary supremacy within constitution governments. The traditional Westminsterian of the UK model in the first camp and those following 'constrained system' of constitutional government are notable.¹⁸¹ While the first assures the idea of parliamentary sovereignty in strict sense, the latter's like Germany, Japan and others European countries have managed to optimally balance the power in the form of parliamentary supremacy with constitutional supremacy.¹⁸² Despite the fact that the HPR is not the sovereign replica as in the UK, the manner employed under the FDRE constitution in forming the parliament is arguably different from the constrained systems itself. In order to assert the claim one only needs to relate the three identified elements explaining what constrained systems of parliamentarianism mean and examine that with the features incorporated under our constitution.

Briefly the three fundamental elements representing constrained systems are: the legislative power limited by a written constitution, the fundamental rights and freedoms of citizens, and the existence of a supreme (constitutional) court that checks its reach.¹⁸³ These three, both in the form and function wise, are the necessary conditions each describing its own ideas thereof. Nevertheless, when looks into the ideas in each of the three, the claim mentioned earlier sounds more plausible to say the FDRE model is superficial. In order to make the assertion a full-fledged one, lets add a few lines explaining what each mean separately and collectively in view of establishing constrained parliament under constitutional democracies.

It is important to note here the fact that the constrained system is the only viable alternative and best form between the two competing values of constitutional democracies where the debate on the presidential and parliamentary systems normally shows. Besides, more than solving the ever-going theoretical controversies on the separation of powers principle, constrained parliamentarianism has proved success empirically as the experience of Germany depicts. It in fact sufficiently provides better responses to the three methodological questions of separating

¹⁸¹ Lijphart, *supra* note 15

¹⁸² Ackerman, *supra* note 64 at 635

¹⁸³ Id at 639-40

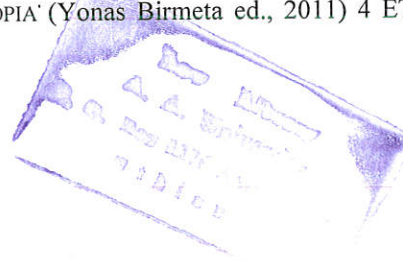
power on behalf of what, why, and how. Accordingly, it embraces values of democracy i.e. popular self-government, professional competencies i.e. relating to the functions of courts and the bureaucratic institutions in charge of implementing the democratic laws, and finally, protection and enforcement of the fundamental rights of citizens in legitimate ways.¹⁸⁴ As such the third element invites curious understanding of the difference between genuine and nominal system where the mere incorporation of fundamental rights in a constitutional clause by no means warrants the constrained nature of parliaments.

Hence, the protection of fundamental freedoms and rights identifies the constrained system for simple reason that the aggregate existence of the other two, namely popular self-government and professional competency, can readily become engines of tyranny. In such a case it not only defeats the legitimate ends of constitutional government but also make hardly possible to defend the values of dual democracies as in the case of the US system. From such it follows, thus, establishing a Supreme Court or Constitutional Court as the highest safeguards of the bills of rights becomes essential component of constrained parliamentarianism. In fact, the idea of a Supreme Court defending the bills of rights from both infringements of parliamentary laws and executive enforcement acts is the necessary tool to resolve the rooted deficits of separation of powers in the Westminster model. The alternative established by constrained parliamentary lawmaking power fills such odds by coordinating the three identifying elements in a manner suitable to effectuate constitutional supremacy. In fact, some scholars call such an arrangement the form of thick sense of rule of law as opposed to the frequently criticized thin sense.¹⁸⁵

In relating the concept to the modes enshrined under the FDRE constitution, one readily push out the issues only paying attention to the design of the text without a bid to examine the practice in enacting laws of various kinds. The following points profoundly strengthen the allegation. For one thing, though chapter three of the constitution is fully dedicated to the constitutional protection of fundamental rights and freedoms, on the other side of the coin it takes away from the judiciary the ultimate means of safeguarding them by entrusting a rather different organ to

¹⁸⁴ Id at 641-43

¹⁸⁵ Adem Kassie, Limiting the Limitations of Human Rights under the FDRE and Regional Constitutions, in *SOME OBSERVATIONS ON SUBNATIONAL CONSTITUTIONS IN ETHIOPIA* (Yonas Birmeta ed., 2011) 4 ETHIO. CONST. L. SER, 60.



dispose constitutional interpretation. Besides, the question of justiciability of rights is readily exposed for legislative determination in large scale.¹⁸⁶ For another, in impairing the judiciary's role as the supreme guardian of the constitutional rights, it went on to leave its functional independence far less strong in checking the laws of the HPR so long as judicial functions are going to be determined through legislative acts.¹⁸⁷ Meaning, there is no constitutional clause for the judiciary to challenge the reach of its powers save the generality of those provisions providing all judicial powers are vested upon courts. Besides, owing the lack of the rules that regulate the interpretation of the text regarding cases and controversies arising from laws, it would be too little for the HOF itself, for which the impartiality and independency of the organ is another contestable subject, to restrain the law-making authorities.

For if we agree our model hardly resembles both the style of constrained parliamentarianism and even that of the relatively weak French hybrid system, consequently, on what account the HPRs constitutional power can strike the balance between the values of constitutional government and functional separation of government organs? Intriguing it would seem the very foundation of popular self-government itself i.e. a government elected democratically, might result in disguise considering two other compelling reasons.

On the one hand, due to the choice adopted in making the electoral system a plurality vote of cast, the laws will mostly serve to reflect the interests of the political parties who won the election. Put simply, the majorities of voters failed to send representation because of the odds of the electoral system would have no recourse in influencing the law-maker nor placed to gain control of alternative mechanism. On the other hand, there is no possible ways to exert any special influence in the decision making process either at the level of the house or generally in governance. From such it follows that both the law-making and executive business will be dominated by the party with the majority seat. In effect, the various interests have no constitutional room for accommodation making popular self-government a marred concept.

¹⁸⁶ Minase Haile, Comparing Human Rights in Two Ethiopian Constitutions: The Emperor's and the "Republic's"—*Cucullus Non Facit Monachum*, 13 *Cardozo J. Int'l & Comp. L.* 1, (2005) at 44-45

¹⁸⁷ See *infra* chapter on the low constitutional level placed on the role of judiciary in Ethiopia and the great deal of legislative interferences in stripping its functional independence to accentuate how far the practice warrants the assertions.

Finally, it is appropriate to ponder whether our style can stand with other federal parliamentary system in view of the aforementioned facts. In fact, even if the constitution provides the supremacy clause to gauge acts of the government to its ambit, we can surmise that it fails to impose viable enforceable limitation upon the parliament. It leaves out the profuse of rights under the risks by ordinary laws. In addition to lack of generally applicable limitation principle, the numerous claw-back clauses and absence of due-process clause marks the unconstrained parliament the constitution has sought.¹⁸⁸ It is concomitant to these that the practice afterwards negatively ushered limited government is in fact at risk. More often the supremacy clause itself is rendered meaningless so long as ordinary legislations can easily trap into changing the entrenched matters without any need to follow the amendment procedure. In such a case, one readily counts the changes in the text of the constitution in fact under the pretext of laws rather than waiting in vain the formal amendments that must be followed.

3.3. Overview on 'Federal vs. State Legislative Power Division' under the FDRE Constitution

As we have thoroughly observed in the previous chapter the kind of power division principle that a constitution allocates between the federal and regional state government takes the following forms in countries with federal arrangements. These are: exclusive, concurrent, and reserve powers according to the traditional power distribution often used by scholars in the comparative federalism. Further, we have outlined that two quite different systems are discernable. Thus, under this section an overall exploration will be made on the kind of power division under the FDRE Constitution on account of other federation's experience. Also, it seeks to discover whether the language the constitution speaks sounds exclusiveness in enumerating the federal competencies or provides the states to avail as such.

It is imperative thus by exploring the constitutional mechanism in general, it sets the stage to ensemble federal lawmaking and the design in terms of upholding the threshold of implied authority doctrine. In this respect despite the fact that the federal arrangement is often remarked as molding ethnicity as the tool of underlying organizing principle, the primary object here does not submerge into such controversies. Rather it views the power division from federalism properly so called. However, this does not mean that the marriage between regional states and

¹⁸⁸ Minase, *supra* note 186

ethnicity, or its offspring ethnicity and politics, has no influence against the power division and the effectiveness in enduring the federation.

Accordingly, the purpose of our concern limits itself on the constitutional design in the light of general understanding, which does not offset the other side of the story to spell out the identity politics, whether unwittingly or not, one easily observe on the ground. Perhaps the more weight one exerts to discourses of constitutional mechanism coined to bring autonomy among the members of the federation and its farsighted aspiration to a common destiny (i.e. simply union), then understanding the constitution better helps to ensure these objectives. Thus, in line of such line of thought it might shed a light to anticipate what the real controversies would look like regarding the choices made by our framers notwithstanding the worries about who comes and goes to power.

Firstly, as we have pointed out earlier, some federations provide the powers of the federal government specifically enumerated; whether broad or in limited ways, and allow the states to exercise residual powers. Secondly, some federations provide different mode that enumerates a long list of exclusive federal and State powers while also putting another catalogue of concurrent matters, and leaving reserve powers to the federal government. The India, Nigeria and Canada constitutions are notable on this category where as the old federations of US, Swiss, Australia and Germany belongs to the former.

The formal distribution powers under the FDRE constitution similarly follows the model adopted by the U.S. Thus, Art 50 (2) both the regional states and the federal government equally have legislative, executive, and judicial powers with the bounds of division contemplated above. One also notes that Art 52 (1) is attuned on the same way as the 10th amendment of the U.S. or Art 30 of the Basic Law of Germany. Reserve powers of the states seem plenary but must be read after making deduction of all the federal powers envisaged elsewhere in the constitution in addition to those enumerated under Art 51. Hence, after making such discount reserve powers does not seem to end as such. This is because the constitution neither has adopted the style of 'necessary and proper clause' as it is in the U.S. nor one finds the style of 'comprehensive list of shared powers' as it is in the case of Germany. However, the close reading of various provisions elsewhere into

the text shows this might not be the case altogether. If that is so, the reserve powers of the states properly speaking couldn't be ascertained easily and also it is hardly possible to the federal government to extend its powers in the absence of such two mechanisms mentioned above. Assefa argues, for example, that:

“owing the constitution is committed more to the self-determination and sovereignty of the constituent units than it is to a centralized federation, thus, the federal government is constitutionally bounded, (in fact if not in practice) to assert the extension of its powers or to exercise certain powers necessary to those enumerated or still to those implied/inherent in the nature of implementation upon the powers so granted in general throughout the text.”¹⁸⁹

Further, there are certain matters which similarly confer power upon both. Since such powers are not clearly articulated, vaguely envisaged, open ended, both in terms of allocating distinct nature and the extent of exercising the powers, it might be a subject of jurisdictional conflict or controversies in the future.

One also notes the fact that if two different political parties take control of government power, then it can be expected to observe such controversies on the ground of constitutional authorities in a greater scale than normally exist between the two layers. This occur when the parties at the regional and federal level have a quite different political ideology which brings in competing economic, political, and social and development policies or programs where both governments designing within the constitutional scope on the basis of Art 51 (2/3) and Art 52 (2).¹⁹⁰ In fact, the situation would be tight when the federal government wants to execute or enforce its national policies within the region while the latter equally implements its own version at the same time. Is there a way-out for the federal government to directly apply its agenda by subjecting or commanding the regional counterparts without recourse to extra constitutional mechanisms? Unlike other federations, there is no federal paramountacy or supremacy principle in the constitution.¹⁹¹ Nor it envisages the essence of executive federalism. In such form of duality or

¹⁸⁹ Assefa, *supra* note 24 at 139

¹⁹⁰ Ulrich Preuss, Comments on the Draft Constitution of Ethiopia by International Legal Experts, (1994) The Inter-Africa Group (unpublished) at 15

¹⁹¹ There are some who argue the principle is implicitly installed. Ibrahim Idris, for instance, defended on the ground of Art 50(8) as typical ordaining rule for federal government to seek preemption over regional states on matters concurrently shared between them. Ibrahim Idris, Powers and Functions of the Federal and Regional Government

parallel competencies, the tendency of creating tense competitive environment instead of cooperative would be more probable. In other words, owing such facts the constitution fails to specify acutely, tensions arising from the constitutional design would escalate and it might even become fertile grounds at best of jurisdictional conflict or at worst of withdrawing from the federal pact.

However, some still maintain that such constitutional allocation and its emphasis grants the federal government wide powers over economic, social, health and education matters.¹⁹² It gives primary responsibility to the same for deciding on major policy directions and standards. Assefa, thus, went on to conclude that the constitution had gone further than the 'necessary and proper clause'. In any case, leaving that as it may, the powers of the federal government including such major areas do not seem to be exhaustive. One only needs to cite Art 52 (2c), for instance, to strengthen the assertion. Here one observes apparent overlap which requires distinct tailoring system to identify the extent of scope and competencies up on each government. It is wise to suggest that 'how to distinguish in practice between these different competencies of the federal and state governments' appears more troubling. More fearlessly, what makes the issue worse would be when the political parties in the control of power are, as underscored earlier, different and do not owe each other similar policies and programmes.

It is more blurring if cross referring comparisons are made to sub national constitutions regarding the all-too-redundant policy directive principles of their respective regional government's objective.¹⁹³ It is both staggering to find the absence of regional context variety which is a kin to the federal text chapter ten and it leaves no clue as to whether what alternative recourses can be made in the event of implementation making the task more challenging. In fact that can only be explained inherently by extra constitutional factors which mainly, both the credit and blame, goes to the dominant one party system. The point is what will happen when states began to utilize their autonomy in genuine federal orientations.

Legislative Organs, at 238-39 (Amharic, translation mine) a paper delivered at the 4th Symposium on Division of Powers under the FDRE Constitution, held on April 9-13, 1991 E.C Debrezeit. The document is available at the archive of the HPR library.

¹⁹² Assefa, *supra* note 24 at 139

¹⁹³ See the 2001 Revised Constitutions of Regional States of Amhara, SNNPR, for mere interfaces.

The regional states in Ethiopia can exercise legislative power over matters the constitution lists as federal jurisdiction.¹⁹⁴ We can easily argue that so long as the constitution does not follow the system of power division which prohibits the state governments from having jurisdiction over certain matters expressly provided thereof.¹⁹⁵ For instance, when a comparison is made with the US constitution which in express terms enumerates certain powers as out of States competencies although there is similar reserve clause, the above assertion is strong enough to justify in our context.

In addition the Congress under the US constitution enjoys exclusive federal legislative competencies on three mostly accepted grounds.¹⁹⁶ First, in the event where the right to exercise the power is made exclusive provision to it, then it could possibly make the states incapable. For instance Art I sec 8 clause 17 envisages the first ground. Second, in the event where one section of the constitution gives express power to Congress while the States are prohibited in another section from acting in similar areas, then it becomes the sole business of the federal law. For instance, while Art I sec 8 clause 5 vests on Congress the power regarding coin, Art I sec 10 clause I prohibits the states on the same subject matter. Finally, in the event where the subject matter is national in scope and requires uniform legislative treatment, then such power amounts to the exclusive competencies of Congress even if one hardly finds an express clause.

On the contrary, for instance, the Indian constitution envisages a quite different approach. By providing the three list techniques as we have seen earlier, it clearly stipulates the powers of the union and the states are exclusive by the very nature of legislative division. In other words, the states cannot claim matters falling under the Unions province or vice versa.

Returning to the mode adopted under the FDRE constitution, there is no similar provisions that prohibits the regional states from claiming those legislative areas confined as federal. Nor the intent of the framers shows firm idea. In fact, it is possible to infer a clue from the generality of

¹⁹⁴ Menberetsehay Tadesse, Division of Power under the FDRE Constitution, (Amharic, translation mine) at 56, a paper delivered at the 4th Symposium on Division of Powers under the FDRE Constitution, held on April 9-13, 1991 E.C Debrezeit.

¹⁹⁵ Ibrahim, *supra* note 191

¹⁹⁶ Kenneth, *supra* note 146

the rule which imposes the duty to respect the powers of each other as per Art 50(8).¹⁹⁷ However, the spirit of the provision is only to keep the balance in terms of what the constitution defines the jurisdiction and thus regulating any interference in the business of the other. This in no case can be considered as a prohibitive clause as noted in the two systems described above. Besides, when one recalls the fact that the constitution has vastly conferred those activities deemed the routine and traditionally performed by states in most federations as federal competencies, then there is no reason to deny the claim.¹⁹⁸

Further the wording of the constitution under Art 51 does not hold the term 'exclusive' in enumerating the sphere of federal competencies. However, the perusal of Art 52(1), the provision that provides the reserve power of the regional states, reveals that the constitution employs notions like 'separately', 'expressly', and 'concurrently' at a time in sorting what the reserved matters mean while Art 99 repeating the first item.¹⁹⁹ At this juncture it is vital to comprehend whether the notions 'separately or expressly' are the substitutes for the essence of exclusiveness dealt earlier. In other words, the identification of these will help us to determine whether Art 51 and other provisions of the text are those definite exclusive federal competencies.

Accordingly, if the notions do offer any meaningful means of solving the issue, it would be appropriate to briefly analyze the definition of each terminology. On the one hand, 'exclusive' is described as 'appertaining to the subject alone, not including, admitting or pertaining to any others; sole; ...or debarring from interference or participation; vested in one person or organ alone'.²⁰⁰ While the impression on the meaning of 'separately' in account of power refers 'individual, distinct, particular, etc'.²⁰¹ Thus, when we closely associate the two definitions, it can be said that the essence is arguably similar. In such sense, the assertion in our context ushers the fact that the FDRE constitution uses the notions in non-distinct way albeit its failure to conform the same under the list of federal matters. It is possible, then, to say Art 52 in using the

¹⁹⁷ See the Brief Description on the FDRE Constitution. The debate among members of the CPR of TGE during the approval of the final draft on the provision implicitly accepts such senses.

¹⁹⁸ Assefa, *supra* note 24 at 140

¹⁹⁹ Legesse Dera, 'The 1994 FDRE Constitution on Legislative Power Distribution: Comparative Study' (AAU LLB Thesis, 1996 unpublished). He contends the language used by referring the Amharic version and treats as though the constitution is leaving a room to equal exercise over those enumerated federal competencies.

²⁰⁰ Blacks law

²⁰¹ Ibid

notion 'separately', regardless of the different meaning it implies in the Amharic version, is basically an implicit acceptance of the principle of federal exclusiveness. Menberetsehay contends that such is not the spirit of the constitution. Instead, he adds, since it does not expressly prohibit then it means states are allowed to exercise some of the powers, and if not entirely, are shared in addition to those listed under Art 52(2).²⁰²

In fact such mechanism of avoiding the term 'exclusive' itself is espoused by certain scholars as the most appropriate and desirable for so many reasons.²⁰³ For one thing, inter alia, it solves the potential danger that might arise than incorporating the terms. This might be the problems of misleading conception where both governments get difficulty to exercise authority over the same matter whenever situations urge the necessity to act or when there happens an overlap exists. For another, using the term might be a bar to claim new power for the federal government in the event when the changes in economy, social or technology demands the need to do so as well as the cases of overlooked matters during the making of constitutions. The latter particularly occurs whenever certain matter of national interests or of general importance to the federation as a whole. These mostly are foreseeable in the reserves scheme where the states actual provinces already make use of it. Hence, in order to overcome such practical hindrances, it is advisable and prudent to omit such languages when constitution enumerates the federal powers. Otherwise what offsets such bizarre is to constitutionalize the implied power doctrine as we have vastly seen in the last chapter.

In this regard the FDRE constitution sides with the aforementioned assertion that considers as the approach to leave out the express mention of the exclusiveness of federal powers. In doing so, the framers whether, wittingly or not, have balanced the two side effects that would have weaken the federal government from discharging its mandates in the practice had the autonomy of regional states strong enough to dominate the reserve field.

Recently, for instance, there was untold internal tension with respect to establishing branch ombudsman office at the regional level. The federal legislation in force, enacted some ten years

²⁰² Memberetsay, *supra* note 194

²⁰³ Duchacek, *supra* note 91, at 21

ago, allows the Ethiopian Ombudsman Institute (EOI) to assume jurisdiction over regional executive bodies so long as administrative violations are concerned.²⁰⁴ However, despite there was no question heard from the regions challenging the constitutionality of the law on such ground, the EOI encountered swift resistance in 2011 from the regions when it tries to step in and establish regional branches. Being this as it may, the EOI however sought to get advisory opinion from experts as well as conducting field studies.²⁰⁵

The expert report has apparently indicated that the federal government cannot constitutionally subject the regions through one central ombudsman office. Instead it remarked that the only possibility is to have parallel institutions, like the anti-corruption commission, each discharging on their respective spheres. Instantly the report also put alternative mechanism, in order to avoid the threat of federal command and control or interferences that endangers the constitutional principle of regional autonomy and popular government, suggesting for the EOI to seek for cooperative institution at the regional level. In return the EOI referred the findings to the HPR so as to provide the legal framework as to how regional branches could come into action and the appropriate relationship that should exist when the regions make their own.²⁰⁶ The lesson that could be drawn from this single reflexive encounter is meticulous where the above tensions are not mere speculations or a surmise. Instead it sparks a light to devise a system that genuinely addresses the delicate power divisions in the constitution alongside the principle that ought to guide the proper wheel of practicing federalism.

3.4. Highlighting HPR's Power vis-à-vis Implied Inferences on 'Just in Case' Constitutional Provisions

Having the thresholds concerning the exclusive federal powers, lets briefly set what such things mean to law-making in general. In order to appraise the extent of HPRs sole legislation power, we need to categorize the kinds of authorities where it could legitimately act upon within the

²⁰⁴ Federal Ombudsman Proclamation No. 211/2000 under Art 4 (2) its scope reads as 'shall also apply to maladministration committed by the executive organs, and officials thereof, of a Regional Government.' The law clearly passes the line of autonomy regional states would enjoy in the constitution. Besides, it indirectly considers the executive organs of the regions part and parcel of federal institution.

²⁰⁵ Four experts have undertaken the field study and submitted a report to the EOI. Thus, the discussion is based on the findings of the report officially archived at the EOI. (on file with the author)

²⁰⁶ EOI accordingly sent a letter to the Legal and Administration Affairs Standing Committee of the HPR written on April 2011 attaching the report and its findings. However, the committee has not yet disclosed its response.

constitution. Thus, the federal lawmaking organ i.e. HPR derives its sources of authority under the constitution in three forms.

3.4.1. Overall Lawmaking Power

The overall matters pertain to the federal government competencies which are elsewhere enumerated in the constitution. It is called 'general power of lawmaking' as per Art 55(1).²⁰⁷ Thus, such kind of laws generally arises from the division of power and requires the federal government to be granted as its constitutional jurisdiction. It is evident that States reserve power and the principle of federalism enshrined under Art 50(8) suffices to suggest as the necessary inferences that regulate the exercise of such kind of power. Nevertheless, legislations that should be embodied under this overall category require us to distinguish not only the lists envisaged under Art 51 but also to depict other federal mandates scattered throughout the text.²⁰⁸ It is nebulous whether this provision is elastic enough for the HPR to address whatever federal matter considered fit or whether it only restrain to those constitutional matter delegated to the federal government. One for instance may squarely point out the scope of Art 55(1) sounds both restrictive and non-restrictive.

Restrictive in the sense that the HPR is, unless the matter belongs to the states, constitutionally entrusted to legislate within the borders of the constitution. Hence, the term federal government in the provision means all the mainstream constitutional bodies established thereof i.e. the HPR, the HOF/CCI, the COM/PM, the Head of State, the Judiciary/Courts, and other independent institutions i.e. electoral board, federal auditor, census commission, human rights commission, ombudsman. It is also tenable to take other executive institutions common elsewhere even if the constitution does not spell them out. These ranges from military, police, justice, education, health, civil service, and finance which carry out the routine traditional role of the government as administrative machineries of the state. Often, such government institutions are invisible in the constitution but influential bodies on the everyday activities of the public and private lives.

²⁰⁷ See for more infra chapter four on the issues that correlate Art 55(1) with different legislations which requires further articulations.

²⁰⁸ The Minute of the 4th Symposium, supra note 204, Minutes of the Constitutional Assembly on the Draft FDRE Constitution; see also Getachew Assefa, Review on Assefa's Book *supra* note, J.ETH.L, at. He strikingly take a stance defending the provision and thus conceding the constitutionality of the law that redefines the powers and functions of the HOF, empowers on the HPR to enact any matters constitutionally entrusted upon the federal government. To refute his weak arguments, see infra chapter that thoroughly examines on constitutional source of authority.



Accordingly, so long as the mainstream ones are concerned the power of lawmaking upon the HPR lies only to descriptive role or enumerating the detailed authorities and creating the necessary institutional and legal frameworks that should exist among them in the discharge of their functions. So much so it cannot take away by law their constitutional authority which is authoritatively defined as powers and functions. In other words, it is only reserved in enacting laws for the practical execution of their mandates without making any legal impediments in their actual exercise. However, regarding the latter institutions, which mostly operate under the executive branch, the HPR power extends from their start to end with respect to the activities they render. This is simply understandable that it is through enabling legislations where their general function primarily depends for the legality and legitimacy of taking public actions within the service area they provide. Meaning, the HPR law determines the scope of their powers and functions in accordance with the nature of public activities particular to the institution.²⁰⁹ While the former mainstreams hold constitutional status and immutability beyond the reach of legislative authority, the latter are mutable and hold legislative consent and legitimacy as a requirement.

Back then to the restrictive sense the provision allows the HPR only to legislate supplementary laws for those entrenched in the constitution whereas it widely assumes competencies including the choices between what is the better regarding the latter groups. Generally, the term federal government should be understood in such restrictive senses.

Secondly, in the non-restrictive sense what happens if a given matter that should be held by the federal government, by necessary and sufficient logical implications, but left out enumerating under the powers and functions of those entrenched institution? Does it mean the HPR should recourse to constitutional amendment to make it incorporated in the general list of the federal government or in the specific list of the institutions it belongs? What if it simply legislate with the ordinary procedure and confer upon the organ it considers fit? Even more, what if in doing so it instead entrusted the matter upon the second institutions mentioned earlier or establish a new

²⁰⁹ See different executive reorganization laws which have been frequently amended several times. For more see proclamation no. 4/1995, 256/2001, 471/2005 and 691/2010 in general to relate as to how the HPR determines and defines the powers and functions of federal executive organs.

one exclusively for such purpose? Hence, it is possible to take Art 55(1) as non-restrictively allowing the legislator as long as the particular matter belongs to the federal. In this regard, it is important to note that some constitutions stipulate specific clause dealing lawmaking authority to such distinct issue.²¹⁰

As we later in chapter four make vast introspection, Art 55(1) is definitely construed in practice to exercise broad and at times overriding manner which ranges from conferring additional authority upon the federal government to the extent of creating its own one barely reads in the constitution. In such circumstances, as we argue later, the provision undoubtedly needs certain specifications and further elaborations to configure its scope. In particular relevance here more weight should be accorded with regard to its limit and authority upon the institutions entrenched in the constitution.²¹¹

Moreover, there are certain elements that urges considerations to check the compatibility of the scope of the provision vis-à-vis other constitutional principles that guides the exercise of political power including lawmaking. Among others, the following clusters of issues are vital to revitalize. First, we need to have a constitutional rule that govern the supposed rational connections that must exist with the enumerated powers of the federal government.²¹² Second, we need also to support the rationality rule to include the necessary legal relationships of the enumerated powers with the other provisions of the constitution which mostly take different forms. In this regard, the content and object of the bill of rights chapter, the basic values chapter, the preamble and the power division principle, and the policy directive principles chapter. It appears that the outlines make up as primary candidate on the issue.²¹³ Third, the reasonable as well as justifiable connection between the general purposes of government as bestowed by the constitution and the implied authority which by default belongs as part of the entrenched institutions inherent competencies.²¹⁴ Last, the legal certainty that comes through constitutional authority upon the institutions and legal uncertainty of an authority that comes from

²¹⁰ See Australian and Swiss constitutions

²¹¹ See Jackson & Tushnet, *supra* note 60 at 214 for the question why constitution should deal with institutions

²¹² Erasmus & De Waal, *supra* note 39 at 12

²¹³ Id

²¹⁴ Jackson & Tushnet *supra* note 60 at 223 and also Chemerinsky *supra* note 120 at 103-105

legislations.²¹⁵ In simple terms, since there is no a principle called legislative entrenchment all what a present law might give can be taken away by future legislator so long as its constitutional back is nil in between. This in fact invites additional point on legal certainty subject.

It is legitimate to expect that by constitutionalizing a given authority it means enduring the particular institution beyond the reach of legislator overrides.²¹⁶ It is also mean shielding the institution through constitutional supremacy.²¹⁷ In short, as constitutions normally devise their own changes through amendment provisions, which often is rigorous and require strict adherence of the procedures, then legal certainty features can only be secured through entrenching the authority or the institution in question. It then puts in the equation legislative overrides and legal uncertainties offset by both supremacy and entrenchment which in turn make the institution from ordinary to supreme authority.

Accordingly, the source of lawmaking that emanates from Art 55(1) needs to establish the aforementioned elements in order to speak of both the restrictive and non-restrictive senses. Nevertheless, it is also tenable to further contemplate other scenarios without refuting these constitutional tools.

On the one hand, in the form of innovative constitutional interpretations Art 55(1) may be used to connote such and such defined elements. In other words, it constructively sets the nexus between the source of lawmaking authority as means i.e. based on pre-existing federal powers, and ensuring the fulfillment of certain predetermined and specified purposes as ends i.e. the emerging constitutional power to act as such.²¹⁸ On the other hand, in the form of undergoing formal amendment to the constitution, it is possible to attach specific conditions for the purpose of lawmaking arising from the provision at stake.

²¹⁵ Choper, *supra* note at 50, as well as the US Supreme Court decision on the 'Lopez v. US' case based its reasoning's on the principle of legal certainty to quash the Congress law which ban holding guns in school areas on the ground of regulating interstate commerce. It held that 'as long as Congressional authority is limited to those enumerated powers... so long as these are interpreted as having judicially enforceable outer limits, congressional legislation under the commerce clause always will engender legal uncertainties.'

²¹⁶ Gavison, *supra* 29 at 93

²¹⁷ *Id* at 91

²¹⁸ The experiences of federations elsewhere could suggest the assertions. See the Television case in German, and the 'Mc Culloch v. Maryland' case for innovative constitutional interpretation sustaining federalism and the constitution.

3.4.2. Specific matters of lawmaking

These relates to the major province of the HPR where the constitution entrusts upon it in two mechanisms. First, as a matter of fact the constitution throughout its text envisages the enactment of enforcing or execution legislation albeit the basic matters are incorporated thereof. In the bill of rights chapter, for instance, there various claw-back clauses attached upon the rights as grounds of limitation which empower the lawmaker to enact enforcing laws.²¹⁹ Second, the constitution under Art 55 enumerates the lawmaking authority of the HPR in specific terms listed down thereof. Accordingly, the unequivocal list of legislation in this category include penal code, labor code, commercial code, land and natural resources laws, and so forth.

3.4.3. Special power of legislation

This is also additional form of federal lawmaking jurisdiction that derives from the nature of other powers and function vested upon the HPR. These special powers are not envisaged in the form of enacting legislation. However it is implicit in the constitution that such powers could be distinguished separately and/or could not be exercised without enacting legislation that requires enforcement. For instance, along with its oversight power inherently acquired from the parliamentary system, it holds the power to make various kinds of legislations with respect to the activities of the executive in general and each higher executive institution in particular. The other matter that can be grouped in the special authority is treaty power and the duty to enforce the constitution.²²⁰ On the one hand, by ratifying a given international treaty, it is evident that the HPR enforces through legislation for domestic application of the law.²²¹ In such a time the treaty might bring additional powers and functions, which either is covered or otherwise under the constitution, upon the federal government that would necessarily require enforcement mechanisms through enacting certain detailed legislations. On the other hand, while discharging its duty to enforce the constitution through legislations, it might be taken as the resulting power mechanism for reasons that the HPR is the supreme authority of the federal government and the

²¹⁹ See chapter three of the FDRE Constitution which contains specific limitations specific to a particular right by stating 'in accordance with the law'. For more on such type of 'claw-back' limitations see De Waal, *supra* note 39.

²²⁰ Art 55(12) of the FDRE constitution bestows the HPR to ratify international agreements based on Art 51(8) where the federal government is only competent to make treaties in general. Besides, Art 9 (4) provides such treaties upon ratification hold legal force throughout Ethiopian territories. It is also found in the HPR lawmaking power lists in explicit terms. See Art 49 (3) of 'The House of Peoples' Representatives Regulation No. 3/2006, 'The House of Peoples' Representatives of The Federal Democratic Republic of Ethiopia Rules of Procedures and Members' Code of Conduct Regulation'

²²¹ For more understanding of the idea on treaty making as additional federal source of power, See *Missouri v. Holland* case in *Murphy & Tanenhaus*, *supra* note 14, at 176

sole legislative organ on the areas the federal powers are constitutionally recognized. The latter, therefore, is noticeable either in dealing with a particular situations or matters of national importance.

3.4.4. Other Federal Matters for Additional Implied Lawmaking

At this juncture it is apt to raise certain constitutional questions in order to fully grasp the nature of federal legislative competencies. The following are the pertinent ones at the fore front. Can we say the first and the third forms of law-making powers fall into the category of implied powers? How the HPR should exercises such powers? Could the scope of it be identified and what available ground constrain the extent of such exercise and with what available mechanism or parameter the laws could justifies on account of their purposes and rationales for enacting laws?²²²

It is underscored that the FDRE constitution does not endorse explicitly implied power in the form other constitutions do so as we have vastly dealt in the previous chapter. However, there are some instances where a derivative rule recognized within the constitution owing the manner and the generality of language employed in putting certain provision.²²³ In this regard, if we relate and compare it with the German and Swiss model, there are cases that outweigh the later line of assumption. Along with the doctrine of resulting power which is vindicated as one form of implied authority, the following elements of the constitution can broadly be considered as forming such implicit entitlement upon the HPR.

The fact that Art 51 contains generally enumerated or broadly stated matters necessarily entail to invoke implied power for its execution. This execution practically relies on the promulgation of specific legislation without which the implementation of the other powers becomes futile. Take for instance the general duty to defend and protect the constitution and the constitutional order. In order to achieve these legitimate ends the federal government needs to use a legal means necessary to rely upon for its legitimate and valid exercise of power. Thus, the federal legislative organ is the only way to secure legality to meet the ends on the basis of different enforcement laws believed to be necessary components and appropriate means towards establishing a

²²² Assefa, *supra* note 24 at 139

²²³ Solomon, *supra* note 42 at 68

constitutional order. In such instances even if one barely finds a constitutional authority dealing with a particular aspect, the absence of express provision are not going to be a bar for the federal government to validly act. Similarly, the power to establish those necessary laws that give effect the political rights and electoral system definitely entitle implied choices that best be explained on same account.

The spirit of the constitution that aspires to 'create one political and economic community' as boldly envisaged in the preamble is another form of such authority. One in fact may relate this as typical prototype of the principle of homogeneity as the Basic Law of Germany says so or the object of preserving more perfect union as in the case of US Constitution where in both senses emphasizing the federal governments mandate to live up to such level of commitments. Evidently, the preamble of the FDRE constitution is laying the underlying principle as to how the federation should be guided. In order to uphold and activate the object of 'creating one economic and political community', it is imperative to use different means amongst which legal tools becomes quite inescapable. In other words, the HPR ensures through laws such broadly articulated ends so long as the situations and the means sought are justifiable. Thus, this can serve as one potential ground for invoking implied authority.

It is also indicative to further accentuate the 'bills of rights' chapter has an implicit form legislative reach. Either in terms of pleasing the constitutional duty to generally enforce the diverse rights or specifically determining the application of rights with a view to provide the mechanism of limitations related to claw-back clauses as contained thereof, the laws that derives to execute as such are in most cases focus of implied authorities regarding the means available. In fact, it is affirmative to take that as impliedly vesting the duty to provide adequate protection of rights through legislations.

Finally, the treaty making power of the federal government is another ground to invoke implicit implied law-making. Here in order to give effect to an international agreement concluded by the federal executive, the HPR ratifies and becomes part of the laws of the country. So long as the legal force of treaties is as equal as other laws, then it is validly enacting even if that particular agreement does not normally exist under its functional category.

Nevertheless, owing to the fact that constitutions in the context of implied power must also attach conditions and grounds for its full-fledged exercise, it is difficult to aforementioned elements alone as sufficient and appropriate. Generally, it should be noted that the mere reference elsewhere in the constitution does not lead to take for granted implied law-making authority endorsement. Instead it indicates the need to muster up on such variances into some form of constitutional reach and to formulate conceivable grounds for its legitimate exercise. This can be made in two ways. It can either be through proper constitutional amendment or in the form of constructive interpretation during constitutional decisions.

To sum up, it is of immense interest in such occasion to keep in mind the constitutional values that must hold in tight the HPR as constraints in exercising activities that rather ostensibly fall under implied power. These are, inter alia, the principle of constitutional supremacy, the duty to respect and enforce constitutional rights and freedoms (i.e. inviolability), the principle of power division and the duty to respect federal arrangement, the democratic principle of popular will, and the duty to comply with the directive principle of general policy objectives.²²⁴ On top of that whenever an implied lawmaking authority is invoked it is internal requirement to comply with the duty to justify and fulfill the criteria for its validity. Thus, the questions of context must be met where alleged legitimate ends are factually necessary to exercise and whether such amounts to appropriate means.

Generally, the HPR performs its lawmaking power on the basis of the rules and procedure entrusted by it. There is no legally available mechanism to consult and secure consent from the regional states whenever the federal government enacts matters of disputable implied authorities. In fact, there is one committee in the house that conducts matters affecting regional affairs. Hence, it is assertive to suggest some provisions might go beyond implied scheme in practice. Two ways of supporting such suggestion can be depicted. For one thing, the constitution entrusts shared powers which inevitably needs distinct qualification as to how such matters are going to be complied in reality. For another, the fact that there is no upper house which either participates

²²⁴ ETH CONST See Arts 9, 13(1), 8, and 86 respectively.

in law-making proper or represents the regional states necessarily ushers certain powers to take seriously.

The following issues are amongst the crucial constitutional matters that might in the future bring a big challenge and controversies in the event when the genuine implementation of the FDRE federal arrangement is sought including the situation where a more federal-state relation in power division becomes a fact than ideal. Its repercussion ahead on implied lawmaking power needs significant articulations in practice. First, the scope of creating one economic community and the respective role of the federal government on civil matters would ignite broad legislative areas. Second, the fact that enacting a commercial code is stated in comprehensive way as well as regulating interstate trade and commerce would be another ground to bring implied federal authorities. Third, the existence of wide overlaps of jurisdiction with respect to formulating overall policies between the federal and regional governments most certainly invoke implied authority regarding both its harmony in scope and its implementation. Finally, the issues of land administration with respect the power to particularly enact regulatory legislations are also another anomaly owing the variety of mechanisms to do so.

Chapter Four

Appraisal on Certain Contested Proclamations: Testing Constitutionality of Legislative Practices

4.1. Introductory Remarks

Unlike other parliamentary systems, the HPR is much more subservient to the executive organ due to various political reasons that characterizes the kind of political power arrangement and the overall atmosphere of the constitutional order currently enforce in the country. Practically, thus, it should not count as a gainsaying to subscribe where almost all legislative proposals and laws are the direct progeny of the executive branch.²²⁵ Whatever that means to issues of legitimate exercise of constitutionally delegated mandate and of the electorate, it does not end being only a rubber-stump parliament. However, it begs millions of doubts as to what degree that contributes on the meagerness of the content and context addressed through legislations passed in different occasions. The fact that there are certain matters that requires careful examination on the law-making authority within such contextual appeal is beyond mere speculation. However, as the empirical appraisal on what follows regarding certain laws would suggest the federal government had at best broadly expanded its powers overtimes or at worst acted beyond its constitutional limits. Often, the grounds mostly gleaned out in such instances have been sought on the basis of the constitutional silence with respect to the exercise of implied or incidental power in general and the fate of those matters of general importance uncovered under the constitution. It has been noted earlier in this paper the FDRE constitution neither takes that serious nor puts a regulatory mechanism to its concern.

Though it is difficult to ascertain whether that derives from lack of foresight in the part of the framers or overlooked due to imprudent constitutional design, the tensions on the ground overwhelmingly reflects between the propensities of federal over empowerment vis-à-vis the fragile experiments of constitutional government. At times the mixed results that could be drawn are ostensibly under contest. While the legislative adaptations observed in entirely filling the loopholes to meet the practical demands through implicit activation of implied form of

²²⁵ Interview with the legal advisor and expert to the Speaker of the House of Peoples Representatives, Ato Mohammed Ahmed (July 2011)

constitutional authority might count as positive experimentation. The fact that adaptations have thoroughly embraced the essence of conferring competencies upon itself either in the form 'those matters necessary and proper' for the exercise of other mandates or 'those matters necessary to create one economic and political community' could be understood as efforts enduring the smooth functioning of the constitution and the operation of well-ordered federation. Whereas in different context the ordinances of such great deal of matters without clear authority through simple ordinary legislation would endanger the constitution and its entrenched values. Stated differently, it creates unnecessary vacuum for legislative encroachments and unduly opens a room for arbitrary power exercises.

Hence, the chapter generally underpins the too often missed outcomes derived from such an approach. In so doing, it relies on the appraisal of certain legislations that are aptly considered to be reflective of the seriousness of the issue under the current political context in Ethiopia. It also hinges on what the practice would resonate to uphold the basic values of the constitution.

4.2. Putting Issues in Perspective

The federal parliament has enacted dozens of legislations that range from entirely in its scope under Art 55 to those merely invoking Arts 55 (1). Leaving aside whether those in the first category in fact meet the requirements of 'law' properly speaking so long as the content of the legislation or the purposes and context are concerned, the second category is the bedrock of our examination.

In this regard, as we can later validly suggest, the HPR avails in many laws Art 55 (1) as a safe passage to escape questions of source of constitutional authority. The frequent usage thus urges us to ask how much power fits Art 55 (1). In other words, so long as the provision in stake is broad enough to fairly take as implied power, it makes the law making carrier full of obstruction and harboring the unlimited sense on the reach of the government power. As a matter of fact as the provision renders the HPR to gain competencies on overall matters the federal government holds in accordance with the constitution. The first thing to make a discount is the provision provides the means to balance the regional autonomy intact under their reserve clause. The other side of the coin gives the impression that the HPR could enact in all matters concerning the federal powers and functions. In which case it presumably gain grounds to act up on all federal

organs and institutions so long as their constitutional authority requires further elaboration during enforcement. Two fundamental contentions are necessary to pose at this point.²²⁶ Does the provision allow the HPR to confer additional authority up on itself? Would the situation be possibly changed if it is upon the federal government as a whole or to a specific organ than enumerated in the constitution?

Hence, it is the right venture to base Art 55(1) as the core constitutional subject in order to bring issues in perspective. In so doing it would become essential to closely examine whether it is possible to take as implied power line or to consider as implicitly permits to legislate on matters uncovered in the constitution despite its general significance. For instance, before going through legislations; the issue of vote of confidence²²⁷; the possibility of cassation over cassation²²⁸; the system of intergovernmental relation (IGR); the ex-president and president of rights and benefits; additional federal seat or city²²⁹; the effect of death or incapacity of the PM in officio²³⁰; and so forth, are not covered in the constitution whether as the federal competencies or as the HPR power lists. Does that mean the legislations in force covering any of such matters become unconstitutional? Otherwise, are there alternative mechanism left to uphold the issue?

In bid to address the issues in empirical terms and put the context in perspective, it employs two general mode of identifying the legislative source of authority. These are those laws regarding the institution of the federal government and those laws regarding the federal arrangement. On account of such broad scheme, it further puts categorically different legislations in each part. Accordingly, among the various pieces, the laws on the HOF and CCI, the judiciary, and the

²²⁶ An attempt to include the views of the HPR on the provision from the concerned bodies was fruitless. Nevertheless, from interviews with Ato Mohamed Ahmed, senior legal advisor to the Speaker of the House, and Ato Tsadik, deputy head of the Legal and Administration Affairs standing committee of the HPR, the writer learned that there is no official descriptive guideline on the scope of the provision. Both in their personal views remarked that the federal government in fact is allowed to enact all national matters.

²²⁷ See, The House of Peoples' Representatives Regulation No. 3/2006 which spells out the issues of vote of confidence and no confidence on the executive organ.

²²⁸ See Proclamation no 454/2005 which established double cassation where the Federal Supreme Court can review the decision of State Supreme Courts regarding any matters and its decision becomes quo law to bind all lower courts in Ethiopia.

²²⁹ See the various federal laws that specifically address Dire Dawa as federal jurisdiction through a charter and also provisional administration government established having autonomy of the city residents in similar way as Addis Ababa. One in this regard notes neither Dire Dawa nor the mechanism to establish federal cities has been mentioned under the FDRE Constitution.

²³⁰ The constitution is simply silent on the point.

president of the republic are selected to substantiate the seriousness of the matter at hand at the level of constitutional bodies that establishes their respective powers and functions. The second category however deals with those laws that either entail centralizing tendencies or lead encroachment over regional states autonomy. Among others, the laws on the MOFA and federal intervention are outlined as elucidating the matter sought.

Despite there are also laws in the first category regarding the federal executive, it is excluded from discussions for many reasons. On the one hand since the executive organ is not exposed for legislative interferences, as opposed to those mentioned institution that relatively undergo direct danger in defending their constitutional autonomy, it reduces conceptual redundancy. On the other hand as parliamentary system by itself renders legislative and executive fusions in governance, then through pondering on other elements it touches the over empowerment of the executive and the alienation of the parliament from lenses of scrutiny. To fill the void thus an endeavor is made to make interface between executive centered laws and the practice. Hence, insightful reflections will be made on the recent constitutional decision that over scores our original hypothesis regarding ouster clause legislations and the judiciary role in wide spectrum. In addition, at the end of the chapter it fully devotes to sort out unveiling the extra constitutional factors surrounding lawmaking in Ethiopia and draws attention on the reader possible explanations upon the implications behind the legislations beforehand.

Nevertheless before delving into the appraisal, it is central to remark that the parliament has voluntarily relinquished its oversight power. Through delegating the non-delegable power of parliament to control, establish and determine executive organization as a whole, in 2008 and later sustained in 2010, the HPR has passed legislation that entrusts upon the Council of Minister's (COM) to exclusively render executive organization without the need to secure consent from the elected representatives.²³¹ In other words, the right to make and break all the executive machinery, including the absolute mandate to alter their powers or functions as well as

²³¹ Art 34 reads as: "The Council of Ministers is hereby empowered, where it finds it necessary, to reorganize the federal government executive organs by issuing regulations for the closure, merger or division of an existing executive organ or for change of its accountability or mandates or for the establishment of a new one." See, "Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 691/2010 and also proclamation No 603/2008 where the provision had been for the first time introduced.

to merge different bodies as it deem fit, is now finally at the hands of the COM. This in fact levels up the discourses on the rubberstamp parliament into some form of authoritarian executive. The defiance of the inherent non-delegation principle, at best in law, would shift the mere political rhetoric's in Ethiopian constitutional law into ostensibly unexpected level. Besides, it may definitely undermine many of the constitutional values including the parliament itself. Perhaps it marks the turn of the words in the text from something into nothing.

4.3. Legislations Regarding Constitutionally Established Institutions: Compromised Powers at Ultimate Legislative Hand

4.3.1. On the President of the Republic

The constitution is silent about the benefits and rights of both a president of the republic in officio and ex officio. In fact the framers have not even given thought about the effects that would come in case something causes the president to terminate before his term office expires. These includes event like death, disability or serious illness, or resignation for whatever reason.²³² Proclamation No.255/2001 entitled as the 'Administration of the President of the FDRE' sets out its objective to two things. These are to provide the legal framework about the rights and benefits necessary to respect for ex-president and to determine the necessary means to regulate and strengthen the constitution of the presidential institution.²³³ In what seem to fill the constitutional loophole concerning the rights and benefits of the Head of the State, the parliament enacted a law that regulates both in-officio and ex-officio matters.²³⁴ However, the question of source of authority was ruled out by merely stating "it has become necessary to specify the implementation of the provisions of Chapter Seven of the Constitution".²³⁵

Bearing in mind such circumstances the fact that the FDRE constitution has not given a clue as to how matters of general importance can be handled begs certain question. Would it be tenable for the federal legislature alone to incorporate such matter through ordinary law? Does not these require and constitute constitutional amendment in order to find binding solutions? Assuming

²³² The same holds true in case of the PM of the FDRE government.

²³³ Proclamation No.255/2001 'A Proclamation to Provide the Administration of the President of the FDRE' see Inter alia- provided as ratio legis under the preamble Paragraph 2

²³⁴ Id. See paragraph 1

²³⁵ Ibid

that the first option is considered apt, what special mechanisms are there to protect from future legislators acts of repeal one of the basic provision or the entire law? Definitely the issues turn different since there is no principle of legislative entrenchment to bind future law makers simply by enacting ordinary legislation. Then what is left is only to recourse to constitutional amendment so long as the matter is left uncovered under the constitution in force and also the source of lawmaking power is beyond its reach to validly act in its formal legislation. The questions posited at the beginning of the section barely fit the size of implied law doctrine.

Nevertheless in 2001 the HPR easily passed a law to that effect without any encounter on the basis of its authority under Art 55(1). For a while leaving the effect and implication of the law, let's put few points on the substance of the 'Administration of the President of the FDRE' proclamation. Five influential elements of the law are worth to concentrate albeit the constitutional milieu is yet unsettled.

First, the preamble stating the practical necessity to enact a law puts two broadly expressed objects. These are to provide the legal framework about the rights and benefits necessary to respect for ex-president and to determine the necessary means to regulate and strengthen the constitution of the presidential institution.²³⁶ Hence, at a glance it ostensibly gives the aroma of filling the constitutional silence and sets the institutional foundation of presidency. However, before making audacious generalization only with such inferences, it is better to go through other provisions so as to then compare whether the objectives are met.

Second, Art 6 of the law touches upon the conditions attached on the presidential candidate. In view of that, a person who may be elected as a president needs to prove that he/she is not affiliated to any political party. In simple understanding the candidate is obliged to not be a member of any political party legally registered in Ethiopia. This in fact seems to impliedly apply before and while running for the presidency as the provision reads: "A president who accepts his candidacy in accordance with Art. 70(2) of the constitution shall be required to prove that he has no affiliation with any political party in the country and serve impartially." Owing such requirements is not mentioned in the constitution, however, what wrong are there if a

²³⁶ Proclamation No.255/2001, see inter alia- provided as ratio legis under the Preamble Paragraph 2

president from the start is a member of a political party?²³⁷ Or, if that happens to create difficulties in his later career, why should not he be given the chance to officially withdraw his membership? After all who knows the political outlook or view one holds but the person himself regardless of membership requirement? Basically, the law clearly put in question the purposes of 'Presidential Oath' under Art 70(5) of the constitution. The objective of the latter provision serves as the ultimate test to bond the candidate in oath to be not only impartial but also to enforce and respect the constitution afterwards. The point is while the constitution is clear in its terms but onerous in action; the proclamation out of a blue needs some form of screening at the door.

Third, the most vague and subjective element appears under Art 7. In order to spark a light for later discussions, let's put the provision as it reads. "The president shall be obliged to keep himself aloof from any partisan political movement during and after his presidency." Thus, either the President or ex – President in this regard is the duty bearers. At its face value just like the above 'no affiliation' concept once again the law is meant to keep the pedal of impartiality. However, when one squarely inspects the requirement of 'partisan political movement', it begs lots of uncertainties. In simple terms, what would it take for a president or an ex- president to be considered as participating in partisan politics? After all, the essential queries like, what is 'partisan politics' in itself and who determines whether a certain act amounts partisan and how it is going to be ascertained, and so forth are entirely left for ambiguous and open-ended interpretations in practice. Does it mean, for instance, all political activities out of the one in charge of governmental power? Does it include attending a meeting in political groups, both the opponent and the ruling camps, while being in officio or ex officio? Does it mean taking a stance completely different from the one hold by the ruling party or giving a press conference concerning a particular political issue? It goes on like that if one seriously speculates the reach of the undefined legislative notion. The issue becomes intriguingly distorted when one recalls at

²³⁷ For instance, the first 'Head of the State of the FDRE' was the member and executive committee of OPDO before and while in the office. The question is what lessons the federal legislature got out of it to legally ban members of political parties to not take part in presidential post. Perhaps, in a diverse country like us it counts as a plus if the legislature had opened the door for accommodating the interests of different groups who might feel underrepresented in the federal government. To be more optimists it would have been a good start had it made the floor open for political pluralism the country is so fond of achieving. In fact, albeit the powers and functions of the president were remarked too often as ceremonials, it would have been possible to provide for power sharing mechanisms.



least it entrusts upon ex-officio president where the motives happen easy to meticulous bad effects as the explanation below reveals.

Fourth, the ex-president is provided by law certain rights and benefits that accrue from serving his term offices.²³⁸ This ranges from being part of the presidential institution (the legislative innovation as established in the law which does not exist in the constitution) as an honour to level up the office and the things he has made for his country to the extent those mentioned in the list. Generally, the government is mandated to provide the expenses of the ex-president means of life including health, safety and security along with his families.²³⁹ However, it is not without condition that these legal entitlements come into reality. There are certain duties an ex-president carries for life with himself. Among others he has the duty to support and defend the Constitution; to keep the secrecy of national affairs and information obtained in office; to refrain from any unethical practices including private businesses and activities which dishonor the Presidential institution; and to be loyal thereto. Failure to keep the obligations would entail some serious consequences as stipulated in the law.

Fifth, the law after imposing the life time obligations of the ex-president it lists out items that would be deemed as breaches. In what can be said as penalties the ex-president ultimately loses all his rights and benefits if he is found in violation of the law or the specific duties he must comply after leaving office.²⁴⁰ However, in order to take these actions the joint decision of the HPR and HOF is necessary. As a result, all the legal entitlements and honours he would normally obtain cease automatically. In the same vein a president who leaves from office before his term through legal actions does not acquire those entitlements from the start.²⁴¹ There is also crucial legislative newness for which the constitution says nothing to its worry. The newness goes to Art 8 of the law which generally provides the mechanism of presidential vacuum that possibly may occur in circumstances which prevent discharging his powers and functions prior to the end of the six year term. The causes of service discontinuities may happen due to illness, death, resignation or due to his conviction. In such occasion the HPR and the HOF shall, by an extra-

²³⁸ Id. See Art 10 to 13

²³⁹ It enumerates the specific rights and benefits under Art 13 (1)

²⁴⁰ By virtue of Art 14 of the proclamation an ex-president may also request by his own initiative the waiver of the entitlements in writing to the HPR.

²⁴¹ See Art 13(2)

ordinary joint session designate an acting president. This clearly marks prudence on the part of the lawmaker in certain ways blocking the potential tensions that would rather arise during such events. However, as we elsewhere pointed out regardless of the framers foresight to explicitly embrace the constitutional way out for vacuum in office, strikingly the same problem of design appears with respect to the PM, the law should not be taken as solving the danger entirely.²⁴² Stated simply, the fact that the constitutional silence should be seen acutely so long as there is no guarantee as to how the ordinary legislation brings the legal force as constitutions do. Hence, it would have been more appropriate if steps were taken to constitutionalize the specific issue than the recourse undertaken to establish legal certainties by ordinary provisions of the law.

At this juncture it is better to turn the headline into consequential constitutional subject matter. In what follows, thus, by a way of retrospection let's meticulously correlate what the law holds with the subsequent development the practice had brought. It is quite valuable to pay in depth review on the background legislative history that signifies the facts on the ground during the enactment. Thus, in a bid to assess the bewilderment of the aforementioned elements of the law, it is both necessary to trace back the time as to how the piece comes into force and thus desirable to follow as what happened afterwards the first president of the republic left office.

The former head of the state, Dr Negasso Gidada²⁴³, finished his term of office in September 28, 1994 E.C (October 8, 2001). In accordance with the constitution meanwhile the second head of state was elected from the HPR. By the time proclamation no. 256/2001 (94 E.C) was enacted on the first annual opening day of the house. In fact, it is pertinent to pose procedural issues whether it was possible to pass a law in such a hurry. According to the procedural law the house may

²⁴² In fact, the constitution envisages in one point the Deputy PM acts on behalf of the PM in the latter 'absence' as per Art 75 (1a). However, owing the fact that the Deputy PM is appointed by the PM just like other ministers and even directly accountable to the PM rather than the COM, on the one hand; the term 'absence' is not broad enough to cover situations of permanent causes of vacuuming the office but merely referring temporary events where the PM is unavailable for reasons connected with his power, like official visits or attending meetings and international conferences, then tensions will be extremely high among government officials during such occasions. Above all the failure to explicitly enumerate causes of term discontinuity, both natural and biological, including situations of voluntary resignation undoubtedly create crisis in governance. Ironically, it seems the framers have in mind that the PM will be immortal at least until his term is over.

²⁴³ Dr Negasso is now the Chairman of one of the opposition political party called 'Unity for Democracy and Justice Party (UDJ)' and also amongst the founder as well as top executive member of the coalition of political parties called MEDREK. Most of the discussions on the issues are based on the interview undertaken with the ex-president on several occasions in the period from June to August 2011.

convene its meeting if there is only an urgent matter.²⁴⁴ Otherwise, it is not possible to enact legislation on its very opening day. Besides, even if there are urgent matters the speaker of the house would be required to announce and call MPs through Media prior to convening the meeting. Nevertheless, the law that was passed basically contains a core constitutional matter. Regardless of both the substance covered in the law and the procedural rule to pass legislation, obviously the bill was prepared while parliament is in its annual recess for two months; there are still certain points to sort out.²⁴⁵ It primarily casts doubts as to the fairness and the effect the law brings when one recalls what exactly happened at the latter period while stressing the fact that adequate time and procedural steps for deliberations in the house have not been followed.

Dr Negasso Gidada still feels discomfort and holds the law as unconstitutional.²⁴⁶ He just even calls the act as illegal since, in his view, things were entirely done behind the curtain. For him thus this might in projection show the other face of the ruling system which he just marked as full of tricks with political conspiracy and secrecy. Equating the event with the so-called 'Siye law', as some often name the anti corruption proclamation which denies the right to bail of the accused, he squarely states they (pointing to the ruling EPRDF) even make a law and legislate to a single individual if they have a thought that as a political foe.²⁴⁷

Returning to the making of the law at least the bill was supposed to be brought before the house and the president sometime prior regardless of urgency if any existed. Sadly enough the newly elected president did not signed the bill due to series health problem and fled abroad for medical treatments on the day of his election.²⁴⁸ He then stayed for three months. In effect even if the newly elected president did not get the chance to sign the law, by default the law gains automatic legal force after fifteen days by virtue of the constitution.²⁴⁹ This all circumstantial background scenes would make one to take appalling hesitations about the object of the law as set out in the preamble and all these hastens in addressing the issues the constitution was supposed to specify

²⁴⁴ ETH CONST Art 58 (4)

²⁴⁵ The then legislative procedure law of the HPR was the case in point. See the repealed proclamation no 14/1996 for the details on the lawmaking process and compare it with the currently in force internal rules and regulation of the HPR.

²⁴⁶ Interview, supra note 243

²⁴⁷ Id

²⁴⁸ The second Head of State of the FDRE Government, who is still in office, is Girma Wolde-Giorgis.

²⁴⁹ ETH CONST Art 58

from the outset.²⁵⁰ In view of such considerations, the provisions of the law regarding the ex-president i.e. Art 7 and 14 are lucidly adjusted to meet a certain purpose beyond what the text stands to say. The following might be helpful to further strength the aforementioned allegations.

When Dr Negasso had registered to run for the parliament during the 2005 national election as independent representative, suddenly all the benefits and the rights have ceased. Interestingly, here while he was escaping the vague legislative insertion called ‘partisan politics’ through alienating himself from being a member of registered political party, by the time it was interpreted in just nonsense way. In addition when he petitioned before the CCI on the constitutionality of the law and the acts, the response was helplessly repressive. The CCI in June of the same year decided that the law does not bring questions of constitutionality.²⁵¹ In the same manner the in July the Federal First Instant Court, where the case was brought claiming the cessation of the rights as illegal, ruled out the issue by interpreting the law in a ridiculous fashions. The decision pointed that ‘even if the term partisan can not apply to situations of running for election, however, since it is inevitable thereafter the representative would engage himself in voting activities of the parliament; it would definitely be taken as partisan politics.’ It is totally a nebulous interpretation but a telling one regarding the prevailing fears as to the effect of the law. In December 1998 E.C the Federal High Court decision, where the ex-president brought an appeal, stating running for a parliament and being a representative amounts to the ‘exercise of those fundamental rights safeguarded by the constitution, electoral law and other ICCPR provisions’ than taken as partisan politics and thus held that the rights and benefits must be maintained.²⁵²

²⁵⁰ The preamble once again is necessary to cite. It puts the purpose of the law in such a manner: ‘it has become necessary to specify the implementation of the provisions of Chapter Seven of the Constitution’ under paragraph one seemingly aimed at withholding the honour and making more respectful in conjunction with the earlier stated legal framework idea. But, the colorable object ends there and yet which in fact is putting the integrity of the institution established by the constitution into its own hand that never even deserved the minimal legislative credit an ordinary law gets under normal circumstances.

²⁵¹ The CCI held that the law doesn’t in any case violate the constitution and particularly the rights in connection with election. Former President, Dr Negasso Gidada v Speaker of the HoF and Speaker of House of Peoples’ Representatives of Federal Democratic Republic of Ethiopia (Decision of CCI of 25 February 2005, Unreported)

²⁵² Contrary to the High Court position, the Federal Supreme Court sustained the First Instance decision and latter the last resort judicial organ Cassation Branch as well confirmed by saying there is no basic error of law in the disposition of the case. The writer did not get the opportunity to refer the cases from the archives of the courts. However, it ascertained from the copies of the decisions during conducting the interviews with the ex-president.

All these facts clearly elucidate as to how the silences of the constitution make the integrity and honour of the ex- president vulnerable. In fact one may argue there is no constitutional clause contravened by the law in question; nevertheless, the HPR has unduly put the constitutional body into its own hands. Besides, the opportunity lost at the CCI to render the meaning of the law and the source of federal lawmaking of authority was a destructive sign on its capacity to interpret the constitution and thus curtail lawmakers. Once again the entire discussion exposes the contention that there is no a constitutional authority vested upon the federal government to arbitrarily make laws to institutions equally created by the constitution in a manner threatening the very existence of it to depend on its own terms and conditions. Perhaps the only appropriate recourse tenable is constitutional amendment in order to prevent such institutions from the danger frequently might come through laws.

4.3.2. The Twin Legislations and the Ongoing Controversies

The two legislations have defined the meaning of 'law' for the purpose of claims of constitutional adjudication before the CCI/HOF so that construing the scope and grounds of legal disputes concerning the constitutionality of a certain legislative acts.²⁵³ Stated otherwise, unlike the constitution which only stipulates that the CCI/HOF assume the original authority over questions of constitutionality arising from primary legislation of both the federal and state law-making organ, these legislations have brought two significant changes on the words and spirits of the constitutional text.²⁵⁴ On the one hand, it restricted the justiciability of constitutional litigation over subsidiary/delegated laws in relation with all matters submitted before the courts of law. On the other hand, it broadened the jurisdiction of the CCI/HOF to entertain cases and controversies allegedly arising out of the constitutionality of all subsidiary/delegated legislations enacted by the executive agencies at various levels. By defining what law mean, thus, the federal legislature has determined the scope of judicial power i.e. of both federal and state courts, where reviewing administrative acts including by-laws is not subject to judicial scrutiny on the basis of constitutionality. Thus, leaving aside the unsettled issue of the constitutionality of this twin legislation itself, it would be reasonable to discuss two core elements regarding the whole rationales behind the laws.

²⁵³ The term 'twin legislation' is used to denote Proclamation No. 250/2001 and Proclamation No. 251/2001 which come into force on a same day. See Art 2(5) of both.

²⁵⁴ There exist several literatures written by many scholars since the inception of the twin legislation arguing both positively and negatively. Thus, it finds sufficient to only limit the discussions on the content of the laws rather than repeating the controversies one could draw from such earlier studies.

Shrouded Source of Authority

Let us just put an elementary question in order to articulate the real controversy. Can the HPR validly assert its constitutional authority to enact laws upon constitutionally established organ? Does defining 'law' only amount to a simple exercise of lawmaking? In attempting to provide an answer to such kind of issues, one not only observe the clear tension between merely enacting legislation but also broadly interpreting the constitution in a way that fits the intent of the legislature both in terms of defining 'law' under Art 2(5) of the twin proclamations and extending the scope of authority vested upon HOF/CCI.

Certainly, Art 2(5) went beyond and interpreted the constitutional provision of Art 84(2). This in essence differently brought the stripping away of judicial power to review administrative laws i.e. like regulations, directives, orders, etc for which the constitution is clear about.²⁵⁵ In fact, regardless of the asserted purposes of the legislations, it has opened a new era of the constitution with respect to the role of the judiciary on the enforcement of the FDRE Constitution. That in turn lies at the desired effect of the definition provided for what 'law' mean in Ethiopia politico-legal fabrics and the consequent outcome thereof on the constitutional values like the application of the bill of rights in the light of its legislative protection and judicial enforcement.²⁵⁶ Besides, as observed later from the practices of various cases disposed by the CCI and courts, it certainly affirms the fears strongly presented among scholars and commentators asserting that the intentions are in no way for good alleging the trend of using the law as a political instrument.

It follows, thus, one could still maintain the fact that there is an outright extension of the constitutional authority of law-making whether that falls in the express or implied power on the part of the HPR. The contention of unconstitutionality of the legislations, restrictively speaking, with respect Art 2(5) outweighs when one seriously questions the rather overlooked ground of the source of authority rationale or its limits thereof assuming if there is any.

Unsettled Constitutional Power of the Judiciary

The second and most commonly raised constitutional issue regarding the twin legislation is the fact that 'who really determines the authority of the judiciary' considering its role in the

²⁵⁵ See generally Assefa Fiseha, The Concept of separation of Powers and its Impacts on the Role of the Judiciary in Ethiopia; in Assefa F. & Getachew A. eds., *supra* note 16

²⁵⁶ Id

adjudication of cases and controversies arising from laws and the constitution? Put simply, albeit the intention of the legislature, which is hardly possible to extract from either the minutes or the legicio-dcendi of the proclamations, begs to question the central issue on the source of authority of the judiciary. Is that the legislature through its various laws? Or, the interpreting body through disposing different constitutional cases i.e. the HOF or courts themselves? Or, is that the constitution which generally stipulates the reach of judicial power? Here there are two competing discernible constitutional values.

On the one hand, the principle of parliamentary supremacy dictates the HPR to assume the final say with respect to overall federal competencies according to the spirit of the constitution. Meaning, its authority to enact laws allows the HPR to hold the ultimate decision-making mandate upon governmental institutions as long as the constitution is not infringed. In view of this fact, merely determining judicial power of courts, for instance, identifying the kind of legal cases and the jurisdiction of courts; through laws is inherent.

On the other hand, the principle of separation of powers and constitutional government normatively envisaged under constitutional supremacy dictates the legislator to respect certain values. Among other things, the laws passed at such level are expected to comply with the institutional and functional independence of constitutionally established organs of government. Meaning, the principle of independence of the judiciary, formally stated, requires the autonomy of courts in disposing legal disputes should not simply be left at the hands of the legislature. This is both for the purpose of the constitution itself and necessarily the compliance with the exercise of inherent functions of courts.

Accordingly, while the former enables the lawmaker to enjoy some extra autonomy asserting its supreme authority over the judiciary through various laws, nevertheless, the latter certainly constrain its laws to abide by the implied limits of not transgressing the reach of judicial functions. Hence, the FDRE constitution allows the judiciary to hold authority over legal disputes arising from the constitutionality of all kinds of laws excluding federal and state proclamations by virtue of Art 84 (2). Leaving aside the more clear Amharic version of the same provision, what is provided under the definition of 'law' by the twin legislations manifestly

explains the transgression by the HPR not only against the constitution but also in ousting judicial functions from the courts. In other words, the view has further taken away the silent principle of judicial review over executive acts to its irrelevant position.

To sum up, the argument referred from the point of view of constitutional authority on the role of the judiciary does not seem to rescue the HPR justification asserting Art 55(1) as the legitimate inference to enact such kind of laws. Strikingly, the content of Art 2(5) of the proclamations has actually weakened the role of the judiciary where the trends in practices observed after the coming into effect of the laws strengthened such contentions. For instance, as later discussions will indicate, the decision rendered by both the CCI and the Supreme Court in the recent *Ashenafi et al* and the ERCA case would clearly represent the aforementioned assertions.²⁵⁷

4.3.3. Mandates of the HOF: Constitutional or Legislative?

As we can easily glean out from the reading of Art 62 of the constitution, the HOF is generally entrusted with certain fundamental powers and functions. Interpreting the constitution, safeguarding the rights of nations and nationalities to self-determination including secession, accommodating ethnic diversity to forge unity with mutual solidarity and equality, serving as a forum to intergovernmental relations among the regional states, and ensuring the equitable fiscal distribution of shared revenue sources among the states at the federal level are amongst the crucial business of the HOF as enshrined in the constitution.

Being this as it may, however, the re-enactment of its constitutional mandates in the form of ordinary legislation begs a couple of doubts upon the institution at all. From the outset why does the HPR want to redefine the powers and functions of another parliamentary organ while the constitution enumerated the same in explicit terms? Assuming that the reach of HOF mandate requires further elaboration or more in order to fit the demands in the real world challenges in the exercise of its constitutional duty, then does it mean that could be solved solely by ordinary legislation than undergoing some form of amendment to the existing constitution?

Needless to say, one vigorously contemplates lots of things from the heading of the proclamation itself. For one thing the term 'to consolidate' alone is just a clear indicative ground to

²⁵⁷ See infra section on the reflection made on *Ashenafi et al v. Federal Revenue and Customs Authority* case

contemplate the very object of the law and its entire purpose behind without even the need to go through the substance of the piece promulgated.²⁵⁸ For another, it casts suspicion with respect to the aforementioned constitutional provision as unsatisfactory in terms of structure and organization or there is something more uncovered without which the HOF would be in a difficult position to achieve its role. This contemplation is necessary assumptions to confront with when one approaches to closely look at the proclamation and its constitutional acceptance in view of the legislative body mutability.

Nevertheless, intriguingly enough the HPR went on far to embrace certain questionable matters one barely refers in the text of the constitution. The following points are significant to put in perspective so as to strongly assert the validity of such allegations and understand the changes made on the rather consolidated powers and functions of the HOF. Hence, let's pay in depth attention to the provisions envisaged under the proclamation and make a comparison with the wording of the constitution alongside its wide range of implications that would be drawn.

First, the combined reading of Art 23 and Art 32(3) of the proclamation provides that the HOF serves as the focal forum in intergovernmental relations between the federal and states government. As we will later relate the role of MOFA in partaking in IGR system, the provision is intended to rewrite Art 62(6) of the constitution which only limits itself with respect to 'striving to find solutions to disputes or misunderstandings arising between or among regional states'.²⁵⁹ In this regard, the constitution is silent about who entertains disputes or misunderstandings that might occur between the federal government and any of the regional state or states. In fact, the same has been stressed as one of the key advantageous by the 'legal and justice administration standing committee' of the house justifying the need to incorporate under the scope of HOF during the making and deliberation of the legislation before the parliament.²⁶⁰ It might be necessary to accept the argument that who else would play such fundamental

²⁵⁸ See the objectives set out in the proclamation.

²⁵⁹ Assefa Fiseha, *The Systems of Intergovernmental Relations in Ethiopia: in Search of Institutions and Guidelines*, 23J.ETH.L. 96-131 He exhaustively addressed the necessary issues on the constitutional status accorded to IGR and the practice observed through three different mechanisms. These are cooperation through policies, formal institutional interaction through MOFA, and the communications via party channel. However, he did not attempt to examine the constitutionality of the law as long as the matter is left out in the constitution.

²⁶⁰ Minutes and Public Deliberation of the HPR June 2001 held prior to the enactment.

constitutional mandate save the HOF while the final authority in deciding over any constitutional dispute is its very establishment purpose.²⁶¹

In addition, owing to the fact that the potential constitutional conflict between the federal and state governments generally emanates from the division of power, it is plausible to justify as the only appropriate organ in terms of ensuring the object of creating one political community within the federation. However, when one recalls the fact that systems of IGR is more than a one time job of solving disputes and misunderstandings, the mere incorporation through legislation would not bring a guarantee in terms of achieving a more sustained and perpetual federal arrangement.²⁶² It is imperative thus systems of IGR and its sound operation requires an ongoing multi-faceted integration between the federal and states governments in the fields of legislative, executive and other governmental functions, the failure to constitutionalize such fundamental mandate is self-defeating. Apparently, with all the benefits systems of IGR offers as we can note from the experience of other old and recent federations in particular to exercising shared powers, there is no possible mechanism to safeguard the legislative additions made from future alterations regarding the same matter. In fact, one can easily allege the assertive fear due to the overwhelming influence the legislature has placed through another legislation which established the MOFA, part of the federal executive bodies, to discharge similar activities would indicate more than telling.²⁶³

Second, the proclamation under Art 19, 20, 21 and 22 extends the powers of the HOF on matters related to determining the identity and self-government status of nationalities other than questions of statehood and secession. Generally, the provisions cover several issues in terms of framing time limits and procedural requirements for bringing such kind of cases before the HOF. Thus, the law stipulates the mechanism where any 'nationality group' can directly petition before the HOF where the respective regional states or the administrative hierarchy has failed to respond to the question of self-government submitted by the group concerned. Certainly, the

²⁶¹ The justification by the 'legal and administration of justice committee' further implicated that disputes are unavoidable in practice and stressed that what matters most is designing appropriate mechanism even if the constitution says nothing about. Besides, they stated the HOF is constitutionally suited as the right body to effectively address the questions of who should adjudicate, the law is only laying the foundation for the efficient implementation of how to process and when adjudication should practically be undertaken.

²⁶² Assefa *supra* note 258

²⁶³ See *infra* section on MOFA for further issues associated with IGR in Ethiopia.

federal legislature was clearly motivated by the famous 'Silte case',²⁶⁴ that welcomed hot debates within the members of the HOF as to how should questions of identity and self-government rights of nationalities be determined within the scope of the constitution. Accordingly, taking lessons from the great challenges due to the constitutional design, the law has addressed these overlooked issues and filled the lacuna in just similar fashions as suggested in facing the real problem during the disposition of the case mentioned. Regardless of these facts, it is vital to make two additional qualifications that needs worth consideration in connection with the scope of authority exercised by the HPR.

On the one hand, while Art 52 (2a) of the constitution assures that determining questions of identity and self-government is under the competencies of the respective regional states, it is not clear as to why the proclamation sets two year time limit upon the regional states. Meaning, it is the essence of the constitution that just gives the regions to determine the form and procedure of disposing such questions and to devise its own mechanisms either in their constitutions or other legal framework. This was in fact the consensus noted both during the deliberation of the draft FDRE Constitution and later at the 'Silte case' within the members of the HOF alleging the autonomy of the regional states should be respected.²⁶⁵ If so, what is the need to set a time frame or why should not it be left for the HOF itself to decide on a case by case basis? This is because the HPR clearly interfered on the constitutional authority of the regional matters and imposed a duty which never existed in the constitution.

On the other hand, had the matter has originated due to the silence of the constitution that urged to provide the ground for determining to the HOF which exclusively entertain cases of nations and nationalities right as a whole, then would not it be appropriate to utilize the recourse to a constitutional amendment than to legislate? For instance, one member of the HOF brought the need to amend the constitution before the attention of the house during the adjudication process of the 'Silte case' though it is unclear as to why the legislature pushed out the issue later on.²⁶⁶ Evidently, there might be an implied authority so long as the HOF is concerned which by

²⁶⁴ See The Silte Case, Journal of Constitutional Decisions, (Amharic) FDRE HOF, Vol. 1 (2008)

²⁶⁵ Minutes of the Draft FDRE constitution held by the Constitutional Assembly of the TGE (1994)

²⁶⁶ This particular idea was raised during the hot debates held among the members of the HOF when they tried to reconcile the constitutional gap and uncertainties as to how the question of self governance can be reached.

derivation entitles the HPR the power to make laws pursuant to Art 55(1) than a call for amending the constitution. The latter reasoning that centrally was at the choices taken by the federal law-maker in just managing the solutions considered appropriate and necessary is easily refutable. As suggested above the only way to do that is by making a constitutional amendment so long as the matter requires the involvement of the regional states than the federal government acting unilaterally. However, the trend shows that through the mechanisms provided to directly trench upon issues of substance and procedure would be self-defeating the constitution and the federal arrangement since it signals the impression that the HPR is entitled to fill constitutional gaps through legislations whenever it found fit. As we have argued earlier in connection with how IGR clause is inserted in ordinary legislation which might be taken away anytime, here again one of the big constitutional source of authority is compromised with the necessity to do so that justifies the circumstances at the time.

Third, Art 9(1) of the proclamation establishes the ‘principle of presumption of the constitutionality’ in the event when it happens that a given laws is contested during undergoing review over any case presented before the CCI/HOF. The principle of constitutional presumption applies for both federal and state laws. In so doing, though the constitution is silent about the issue unlike the system in other countries which incorporate a constitutional clause²⁶⁷, one notes the fact that the federal lawmaking organ is dictating the supreme interpreting organ on how to undergo review on the legislations that comes out of itself. The real controversy that lies behind is not whether the principle should be established but in what form and who must do so. Meaning is that something which falls under legislative reach or part of the rules that the constitution sets within its scope.

Thus, under the pretext of enacting legislation, what is actually done by the HPR would be taken as some sort of undertaking constitutional changes or broadly construing the silence of the constitution. One wonders even could it be possible for the legislature to stipulate such serious

²⁶⁷ See for instance the Basic Law of Germany (under Art 31 stipulates *federal law shall take precedence over Land law*) and the Constitution of RSA contains under section 146- 150 the detailed rule specifying the grounds of possible conflicts. In this respect it entitles the federal preemption rule more widely in general and in particular section 146(2b) provides ‘the national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing norms and standards; frameworks; or national policies’.

constitutional rule which sets free its own laws against potential risk of being viewed as presumably unconstitutional. It is difficult to maintain whether the choices undertaken would be justified in terms of discharging its legislative power unless there is extraordinary but unwritten constitutional authority on the part of the federal legislative.

Fourth, as the close reading of Art 39 to Art 54 would reveal regarding the organizational and structure of the HOF, it purely aggrandized the object of consolidation as claimed at the outset. The provisions went beyond to specific determination on the internal matter of constitutionally established body. Intriguingly, while the constitution speaks different under its Art 64 in relation with the 'rules and procedures of the HOF', the proclamation gives no attention at all. It is vague to note why the framers have failed to leave entirely the subject matter for the HOF to issue its own regulation in accordance with the essence of the constitution.

The blunt impression seemingly conceived to amount as the many of overlooks in the legislation ultimately turns out to be an outright violation of the constitution when it comes to Art 62(10) and (11). No doubt, the latter provisions of the constitution only provides the HOF to issue regulation and determine its 'internal rules and regulation' or 'decide it's organizational and structure' with respect to discharging the various tasks vested throughout the text. Arguably, the constitution is denying the HPR from interfering in the internal business or even directing the HOF through legislation. Besides, in one way or another it is also giving effect to the HOF in order to gain momentum of securing functional and institutional independence. Hence, the manner provided under the proclamation could neither be explained from the point of view of implied legislative authority nor by any other justification so long as the constitution remains unchanged.

The intent of the legislature in fact is a purposeful workout on two different but related accounts. On the one hand, it willfully excluded the same element under Art 3(5) of the proclamation which supposedly was to replicate Art 62(11) while enumerating other constitutional powers and functions of the HOF.²⁶⁸ On the other hand, as we can later discern from a more recent proclamation, it repealed these provision and merged the internal organization of both the CCI

²⁶⁸ ETH CONST., Art 62(1) reads as 'the HOF shall adopt rules of procedure and internal administration.'

and HOF into a single institution called 'secretariat office'.²⁶⁹ Taken together, one easily put the implications as to how the integrity and independency of the HOF as one constitutional organ is weakened and seriously compromised by ordinary legislation.

Last, once again the proclamation engages itself into the internal aspect of the HOF when it sets out the rule on account of measures related to the conducts of members. While Art 49 talks about the possibility of disciplinary measures to be taken against members considered incompetent to represent their respective ethnic group, it affirms the HOF to issue regulation that govern the grounds and effects of such actions. However, Art 50 and Art 51 respectively stress the removal and substitution of a particular member in the event he is found incompetent indirectly indicates the former provision is merely symbolic. This is because of the fact that the law stipulating three different and subjective or ambiguous grounds of removal which the constitution never contemplates, the federal government is creating a rule against the representation of ethnic identities and interests. For instance, a given member of the HOF might be removed solely on the ground of moral incompetency as set out under Art 50(c) or under direct order from the regional state council. The question is do we find any constitutional provision entitling the same or any clue whether such can be determined by the HPR?

4.3.4. Setting the Judicial Independence out of motion via 'Ouster Clause Laws' and the CCI

Earlier in the paper a brief touch is made on the effect of the constitutional design regarding the judicial branch. It is vital to elucidate further as to in practice the principle of judicial independence finally fall into the province of the parliament. In doing so, it explains two central factors that greatly weakened the competencies of courts. The first directly depicts the growing influences through ouster clause laws where the executive acts are becoming short of any viable judicial scrutiny. The second describes the implicit consolidation of such tendencies in the decisions involving constitutional interpretations. The precise explorations limits itself to deal only the kind of relationships between the judiciary and other institutions in order to underscore

²⁶⁹ See Proclamation No. 556/2008, A Proclamation to Provide for the Establishment of the Secretariat of the House of Federation, Art 11 repeals the provisions of the twin legislations regarding the respective organizational structure of both the CCI and HOF and merges into single office called the 'secretariat of the HOF'. Seriously speaking, the recent legislation repealed the constitutional provisions Art 84(4), which speaks the CCI power to organize its own rules and procedures, and Art 62(2), which entrusts the HOF to organize the CCI. However, not only the law impairs the rather fragile institutional independence of the bodies, but also it clearly show clear cases of unconstitutionality.

the clear legislative impact which marginalizes courts from entertaining their inherent jurisdiction over legal disputes.

The constitution ensures, *inter alia*, the independence of the judiciary along with the principle that vests all judicial powers upon courts.²⁷⁰ It also allows the establishment of other legal institution that exceptionally renders judicial functions. That's to say administrative agencies tribunals with the power of adjudication to dispose both administrative and legal disputes in connection with discharging their powers and functions as set out by the laws. However, except for envisaging access to justice rights under Art 37 and the constitutional duty for such agencies to make use of legal procedures, one barely finds the limits on the legislative choices and the respective role of the judiciary in such circumstances. Lucidly, the constitution places the scope and competencies of the judicial organ at the whims of the lawmaker. It swindles without definitely formulating the kind of relationships between the entrenchment and justiciability of the constitutional rights inherently the judiciary ought to guard and the legislative overarching tendencies to alienate itself from viable judicial scrutiny through ouster clause laws. It is palpable to say in turn the more the executive organ enjoys itself a freedom from judicial scrutiny and discretion by ouster clause legislations the limited actions courts would exercise. Simply ouster clause legislations mean making the executive actions non-justiciable thereby stripping-off judicial powers.

Currently, there are bulks of ouster clause legislations that confer finality power to administrative agencies. This ranges from those laws purely incorporating the total denial of access to justice right in the form of judicial review over the decisions of executive agencies to those limiting the right to appeal before courts only in situations where there are problems in interpretation of laws or upon further compliance to the conditions set out in the laws.²⁷¹ In fact, at this juncture the

²⁷⁰ ETH CONST., Art 78

²⁷¹ See generally the following **Ouster Clause Legislations**: 'The Re-enactment of Urban Land Lease Holding', Proclamation No.272/2002, Federal Negarit Gazette 8th year No.19, 2002; 'The Expropriation of Land Holdings for Public Purpose and Payment of Compensation' Proclamation No.455/2005, Federal Negarit Gazette 11th year No.43, 2005; 'The Property Mortgaged or Pledged with Banks', Proclamation, No.97/1998, Federal Negarit Gazette, 4th Year No. 16, 1998; 'Agency for Government Houses Establishment', Proclamation No.555/2007, Federal Negarit Gazette 14th year No.2 2007; 'Charities and Societies', Proclamation No. 621/2009, 15th Year No.25, 13th February, 2009; 'The Establishment of the Ethiopian Revenues and Customs Authority', Proclamation No 587/2008, Federal Negarit Gazette 14th Year No 44.,14th July, 2008; 'Trade Practice and Consumers Protection',

fact that the executive agencies are performing such a broad judicial functions would not be taken as the point of contest under the discussion. Nevertheless, the ever increasing inclination of the legislature to its ally executive institutions to separately dispose legal disputes isolates the judiciary from its inherent and constitutional mandates in many ways. In other words, there is no constitutional mechanism for the judiciary to defend its competencies from being out rightly taken away by the parliament which overtimes puts the executive beyond the constitution and makes courts into a position of insignificance.²⁷² The implications that directly entails are many-fold. These range from degrading the public trust and legitimate expectation on the enforcement of laws to the extent of risking the limited government power there by turning rule of law into rule by law.

In related subject the relationship between the judiciary and the CCI manifests similar stories. Its independence is seriously impaired with the advent of the law that organizes the CCI. The fact that the competencies of courts on disposing legal disputes on the basis of constitutional review is yet unsettled issue.²⁷³ Legally speaking, the constitution only imposes the duty to defer cases before the CCI/HOF after their own consideration of the issues involved.²⁷⁴ Nevertheless, the practice has brought both the impression of the law and the immediate tendencies from the CCI rulings suffice to implicit projection of weakening the constitutional role. Here it is not the object of the topic to cover every issue as most scholarly debates disclose on the role courts ought to do, however, to emphasize the reconsideration of our constitutional stance. Had the constitution clearly articulated the proper interplay between courts and the adjudicating bodies, its functional independence would not have been determined through laws.

Hence, the specific what matters along with when and how the judiciary must seek the help of these bodies necessarily requires further constitutional elaborations. In particular with respect to

Proclamation No 685/2010. 16th Year No. 49 16th August, 2010; and 'Ethiopian Revenues and Customs Authority Workers Administration', Council of Ministers Regulation No. 155/2008

²⁷² See Assefa Fiseha, Constitutional Adjudication,

²⁷³ Until the coming into effect of the two controversial laws, i.e. the twin legislations, the power of judiciary to declare laws as unconstitutional took two forms. In fact, the laws have caught insightful scholarly critic since the moments of enactments. For a concise but comprehensive issues surrounding and the various opinions and arguments forwarded by writers in different times, see in general Getachew Assefa, 'All About Words: Discovering the Intention of the Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation'

24 J. Eth. L. No.2 (2010)

²⁷⁴ ETH CONS, Art 84 see also Art of the proclamation 250/2001

the enforcement of individual rights protected in the constitution as opposed to collective rights seriously needs certain specifications.²⁷⁵ This is basically because the CCI in practice remands cases not only with its approach of ‘no question of constitutionality arises’ banner but also commanding courts as to how they should decide the matter.²⁷⁶ In other words, after thoroughly ruling exhaustive facts of the case, the outcome of later court decision is determined by the CCI. That’s why courts have been observed dismissing or striking off the matter frequently in what seem compliance to the former. In such sense the laws and executive acts take roots rather with confounding allegory. The following reflection thought on 2010 decision of the CCI on ‘Ashenafi Amare et al v. Ethiopian Revenue & Custom Authority (ERCA)’ seriously are the case in point.²⁷⁷

Though there are several issues involved in the reasoning of the CCI, our focus will be on the constitutional jurisprudence employed with respect to lawmaking power vis-à-vis the direct reference to judicial functions. The central issue for the case emanates from two laws regarding ERCA.²⁷⁸ While the proclamation allows the establishment of special legal framework to govern employees working in ERCA, the regulation gives discretion for the Director to dismiss any workers without following legal procedures. In addition, the act of the Director cannot be reviewed by the regular judiciary and also the higher civil service agencies. It is in such sense the Federal Civil Service Agency sought constitutional interpretations before the CCI in order to resolve the appeal brought into its competencies.²⁷⁹ The CCI ruling generally indicates both the

²⁷⁵ This based on an assumption that the HOF/CCI primarily are guardians of the collective rights as sought in the constitution in its concern to ethnic rights which the avant-garde fears the judiciary will be countermajoritarian in its function as well as composition.

²⁷⁶ CUD v. PM Meles case

²⁷⁷ (Decision rendered by CCI Yekatit 15, 2002 Ref. no C/1101/12/2002, upon the complaints brought by the Federal Civil Service Agency Administrative Tribunal Ref no 008301/1/01 on Yekatit 19, 2001.) (On Yekatit 1, 2002 E.C.) The ruling of the CCI- unanimously voted by the CCI members states that the case (issues involved) does not give rise to constitutional interpretation whatsoever. The merit of the case briefly shows that the appellant’s dismissal from work by the respondent on the ground of labor dispute vis-à-vis access to justice and on the reviewability of acts of the ERCA to dismiss workers, before the Civil Service tribunal.

²⁷⁸ The Establishment of the Ethiopian Revenues and Customs Authority’, Proclamation No 587/2008 and Ethiopian Revenues and Customs Authority Workers Administration’, Council of Ministers Regulation No. 155/2008

²⁷⁹ The appellants, Ato Ashenafi Amare et al, claim brought before the Federal Civil Service administrative tribunal is based on Art 37 of the constitution where stating the decision of the Director General of the ERCA regarding dismissal of employees and the procedures followed is in violation of the right of access to justice. The Civil Service Administrative Tribunal, to whom the grievance of the workers was brought, considered two fundamental issues that require constitutional adjudication to dispose the case. On the one hand, Art 37(1) of the constitution stipulates the rights of every individual access to justice (from decision/judgment of any governmental body); on the other hand,

regulation and the proclamation are consistent with the constitution. Besides, the CCI simply remarked at one point:

‘...since the FDRE Constitution adopts parliamentary system, the lawmaker is capable to restrict matters that could be decided by judicial bodies.’²⁸⁰

It is not clear whether it is referring here to the HPR’s power or the COM when it says ‘the legislator is within parliamentary system’. However, since the alleged provision is enacted in the regulation, one notes the CCI is referring COM. The interesting argument upheld in the decision is when it relates the case with lawmaking power. It stated that:

‘...it is common elsewhere that countries allow through their legislations matters of justiciability so that providing what can be decided by court or not. As far as the highest lawmaking organ exercises its power within its constitutional mandate, it can restrict the judicial powers by making matters non justiciable... In short, it should be accepted that though the law narrows the power of the judicial bodies, the lawmaker has the sole power to determine what matters are justiciable. Therefore, the HPR in accordance with these and to the extent of its powers envisaged, it can enact whatever it deems ‘necessary and appropriate’ since it has the power...we in such instances cannot challenge why the parliament did so...’²⁸¹

In others words, what kinds of law is necessary can only be decided by the HPR’s authority. Hence, though there are alternative means to achieve the ends of its power or to ensure a particular purpose, the fact that it chooses one of the means and applies it with the law, the CCI submitted that it is not empowered (i.e. short of its mandate) to check whether such law is proper or not. One wonders as to what the gist of the CCI ruling is inferring about. It is utterly indefensible to accept the reasoning’s made regarding the suggestion of the non reviewability or otherwise limitless nature recognized on the power of lawmaking. Above all, what does it put in the picture when the CCI states, knowingly or not, that such power to check laws enacted by the parliament is out of contest upon constitutionality tests. It is a serious matter that needs curious consideration beyond the notion of presumption of constitutionality and the principles of

the law that establish the ERCA with respect to administration of employee (Regulation No. 155/2008) under its Art 37(2) allows the dismissal of an employee through special manner, stipulates the prohibition of the right to job return of workers upon the decision of any judicial body’s.

²⁸⁰ Id (Translation mine)

²⁸¹ Id (Translation mine)

parliamentary supremacy. Of course, what lessons could be drawn for such rulings is far beyond a claim, they are saying there are no ways to challenge the laws enacted by elected representatives of the people i.e. HPR.

However, what the CCI have missed is the supremacy clause under Art 9 which presumes the laws properly enacted by the parliament would violate the constitution, whether it is a principle or a provision. It is indirectly defeating the constitution at all under the masks of parliamentary supremacy as veiled with sovereignty. Besides, one notes further the opening of a wide door for unlimited government under the guise of formally enacted law had the precedent of quashing parliamentary act are not subject to scrutiny. After all, if the rights of citizens can be taken away by the legislative act without any constrain, the matter of the debate should not be seen in the light of justiciability and access to justice rather to what extent the lawmaker can do so or limited. It must also be checked on the extent such powers can be exercised via delegation of authority to the executive. The CCI assertion gives us the impression that it delivering the message that such power is unlimited. In turn, citizen's rights in general are at the hands of the lawmaker and the judicial authorities can do anything about than to adhere to the decision of the former. It does not seem such is the essence of the constitution when it vests the power upon HOF/CCI out of the regular judiciary. Otherwise one arguably fears the possible threat of the return of the 'old prince with new clothes'. Meaning the constitution then becomes a mere instrument of guarantee with its supremacy clause that could not help to get rid of unconstitutional laws which in turn make the government of law at stake. In the mean time, the 'old prince with new clothes' return recalls the defiance of rule of law and constitutionalism when a government backed by parliamentary supremacy is licensed to act in whatever way it deems necessary.

4.4. Legislations Threatening the Federal Arrangement

4.4.1. Federal Intervention into the Regional States

The 2003 'Systems of Federal Intervention' law can be taken as the most precarious among legislations the HPR ever passed.²⁸² In the future the time when the federal government embarks its action against any regional states in violation of the law might make things complicated or

²⁸² A 'Proclamation to Provide the Systems of Federal Intervention into Regional States' Proclamation No. 359/2003

even the federal arrangement might go on the brink of collapse. Before delving into examination of the constitutionality of the law vis-à-vis the extent of federal implied authority expressed through it, let's spark a light on federal intervention.

Federations elsewhere provide in constitution the strong federal government power in order to cope up and respond promptly against any form of internal threats or act that seriously impairs the established order. In fact, it is underscored that the subnational governments, regardless of their autonomy, within the respective territories hold the primary obligation to ensure the peaceful implementation of the 'maintenance of order, stability and security'. However, in exceptional circumstances when the subnational units become unable to enforce their obligations, the federal government is mandated to exercise its emergency power. The power ranges from the use of force to various other recourses that necessitate the federal government to take action in order to control the extraordinary circumstances. This idea behind such emergency powers directly relates to enforcing the constitutional authority and preserving the federation for the good of the whole. Under the FDRE constitution there are two bifurcations to handle events internally threatening the constitutional order. Hence, it stipulates the federal government takes actions of federal intervention or declares state of emergencies in situations where an actual act or threats affecting the federal arrangement arising from the regional states.²⁸³ Nevertheless, there is no lucid and authoritative parameters that helps to identify the proper role of the federal government in the two occasions. Accordingly, albeit the emergency elaboration legislative acts yet to come, the focus on certain points on the federal intervention law would be insightful.

The legislation in force with the view of implementing such grounds and the effects it would entail as to the system of federal intervention orders. It provides three potential grounds for actions of intervention to come into play alongside which federal organ holds the authority. The grounds of such intervention as envisaged in the legislation could be simply: whenever there are

²⁸³ Compare Art 51 (16) cum Art 93 in general concerning decree of state of emergency vis-à-vis Art 62(9) on federal intervention order.

acts in one of the units which deteriorate security circumstances, violation of human rights or endangering the constitutional order.²⁸⁴

Firstly, it states that 'the PM shall deploy at the request of a state administration, federal defence or police forces or both to arrest a deteriorating security situation within the requesting state when its authorities are unable to control it.'²⁸⁵ The security situation shall be deemed to have been deteriorated where there is an activity that disturbs the peace and safety of the public and the law enforcement agency and the judiciary of the Region are unable to arrest the security problems in accordance with the law.²⁸⁶ Secondly, the HPR shall on its own initiative request a joint session of the HOF and of the HPR to take appropriate measures when state authorities are unable to arrest violations of human rights within their jurisdiction.²⁸⁷ It shall on the basis of the joint decision of the House give directives to the state authorities' concerned.²⁸⁸ This ground of intervention is distinct from the former in the sense that the HPR may take this initiative even when there is no state request.²⁸⁹ Lastly, the HOF shall order federal intervention if any state, in

²⁸⁴ The grounds are envisaged under Arts 51(14), 55(16) and 62(9) of the FDRE Constitution. However, the constitution only uses the term federal intervention for the third ground. It is the HPR which grossly defined the term to include the first two.

²⁸⁵ Id, Art 5 (the cross reading with Art 55(14) of the constitution shows that deploying of federal police force is inserted by the legislature.) The notion 'federal government' in the constitution albeit its generality, the proclamation makes it clear that it is the PM who deploys the federal police force or the defence force to the region. Art 4 Perhaps one might claim the inclusion of such power to the Prime Minister is unconstitutional since it is never envisaged by the constitution. One should note, after all, that he is the commander in-chief of the army per Art 74(1) of the constitution, henceforth, ultimately the matter pertains to his constitutional ambit of power. One also notes as per Art 6 of the same the PM is expected to present periodic reports about the measures taken and the general situation to the HPR though it does not the frequency and duration of such reports

²⁸⁶ Id. Art 3

²⁸⁷ Id, as per Art 7 'an act of violations of human rights' shall be deemed to have been committed where an 'act is committed in a Region in violation of the provision of the human rights stipulated in the Constitution and laws promulgated pursuant to the Constitution, and the law enforcement agency and the judiciary are unable to arrest such violations of human rights.' The law provides certain mechanism that requires compliance before all the actions. This will be undertaken up on the receipt of information by either Human Rights Commission, representative of the region or any person (which possibly includes associations or NGOs working on the area) about the violations. One should also observe that the HPR shall establish an investigating tem who determines whether the human right violation alleged to be committed would lead to issue directive to the respective state or not. See also Art 8-10, see also the equivalent provision in Art 55(16) of the constitution

²⁸⁸ However, it is not clear why a directive should be given had the very ground itself has indicated the inability or failure of the state to deal with the situation. Besides, would it serve any purpose on their law enforcement agency and judiciary if they are unable to act so from the very beginning?

²⁸⁹ Assefa believes that the constitution and the legislation had the impression that the state administration itself could be a suspect, among other things, to engage itself to the violation. See Assefa, *supra* note 24, pp 148-49

violation of the federal constitution endangers the constitutional order.²⁹⁰ It broadly defines the phrase 'constitutional order endangered' as an activity or act carried out by the participation or consent of a regional government in violation of the constitution or the constitutional order. It also enumerates particular instances which will constitute such: armed uprising; resolving conflicts by resorting to non-peaceful means either between regions or ethnic groups; disturbing the peace and security of the federal government; and failure to implement the directive issued by the HPR on the ground of human right violation.

In fact, even if the constitution only speaks about federal intervention actions in the third ground, the HPR justified its rationales on the basis of implied federal power during the deliberation time of the law. It stressed that 'all actions that requires measures to be taken in the event of violations of human rights necessarily involve interventions by federal government...so too for situations that deteriorate security within the regions...thus it is appropriate to use the word intervention in both cases'.²⁹¹ It further argued on the object of the constitution to create one political community and the principle of supremacy as authorizing the federal government to act in such events.²⁹² However, this should not lead us to submit the implied federal power constitutes right assertion since other provisions with respect to the effects begs doubts.

Briefly, the consequences of intervention are severe in the event the HOF orders as such. The federal government is not only limited to use force but also three other federal actions in accordance with the law. These are dissolving the State Council; suspending the highest executive organ of the region²⁹³; and replace it by establishing Provisional Administration accountable to the federal government.²⁹⁴ Besides, the Provisional Administration stays in the region for a period not exceeding two years; however, the House of the Federation may, where necessary, extend the period for not more than six months.

²⁹⁰ See Art 12 of the intervention legislation and also see 'Proclamation to Define and Consolidate the Powers and Functions of the HOF' Proc-no-251/2001, Art 36(2) which gives insight about what endangering constitutional order mean.

²⁹¹ Minutes of Legal and Administrative Affairs Standing Committee of HPR, Open Public Deliberation held in June 18/1995 E.C at 5 and see also Art 2(1) of the law which defines the term 'intervention' covering all the three situations.

²⁹² The Brief Elaboration on the Draft Law of Systems of Federal Intervention into Regions, prepared by Legal and Administrative Affairs Standing Committee of HPR, at 1-2

²⁹³ Proclamation 353/2003 Art 14 (3)

²⁹⁴ Id, Art 14-17 of the intervention legislation for the detail of such effects.

Now it is appropriate to pose certain matters that basically invite solemn constitutional implications. On the one hand, the fact that the grounds are highly similar would open a wide room for the arbitrary federal actions. Certainly this seems to have some overlap with the declaration of the state of emergency. In fact, not all violations of the constitution by a state might endanger the constitutional order or such endangering of the constitutional order may not necessarily constitute enough ground for declaration of a state of emergency as it may be handled by regular enforcement agencies. Despite the fact that the elements that cause the federal action under the proclamation are generally called constituting matters that endanger the constitutional order, apparently making it similar to the condition of a state of emergency, other provisions identifies the particular between the role of the COM and the HOF. However, extreme cases can fit the conditions laid down under Article 93. In such occasions, there could be an overlap between the two federal organs. The law tacitly substitutes the emergency clause of the constitution.²⁹⁵ This can be easily gleaned out from the public deliberation held with experts the then Ministry of Affairs, Ato Abay Tsehaye, replied that:

‘it is possible to apply Art 93 of the constitution and declare region wide state of emergency...however the constitution in such cases does not provide mechanism to oust regional governments...’²⁹⁶

On the other hand, the effect on the autonomy of the regions as showed clearly shows turning the federal arrangement upside down.²⁹⁷ The elected representatives of the states should not be ousted in simple federal order through use of force. It might be argued HPR broadens the scope of federal government authority to interfere on the autonomy of the regions.²⁹⁸ Perhaps it

²⁹⁵ Beyond the common ground on both cases one also contends the law puts no prohibition to actions of federal intervention into two or more regions at the same time. Nevertheless, questions remain unclear whether the effect on the rights of the people. One for instance might argue the non-derogable Art 39 of the constitution becomes derogable as the provisional administration cannot replace the state council making procedurally impossible. In such sense the law unduly gives the federal government to only recourse to federal intervention since those emergency procedures are quite stringent.

²⁹⁶ Minutes on Expert Discussion on the Draft held in June 11, 1995 E.C at 17

²⁹⁷ Ibid, from the participant Hashim Tofic and Tsegaye Asmamaw retorted on this particular point.

²⁹⁸ The Regions by the time were invited to reflect their views there was no attempt to defend the effect of the law on their autonomy. In one point, the representatives from Tigray region only commented on the draft which finally included regarding the relationship between the regional police force and the forces to be deployed. Ibid

resembles, as Assefa skeptically pointed out, to a more centralized federalism than what is normally envisaged in the country.²⁹⁹

4.4.2. On the Ministry of Federal Affairs (MOFA)

Earlier in this chapter we have mentioned that the constitution, unlike other federations, has neither envisaged the system of vertical intergovernmental relations (IGR) nor give us a clue as to the guiding principles and the institution in charge with such authority. It is also underscored that the federal parliament explicitly, by a way of admission, filled the gap in terms of legally bestowing upon the mandates of the HOF in 2001. However, that does not infer the system of IGR was totally absent prior to 2001.³⁰⁰ In this regard, there were two notable attempts during the period.

The former Bureau of Regional Affairs or Kilil Guday Zerf under the PM office had served as the major actor channeling the two way communications that should exist between the federal and regional relations. Nevertheless, the Regional Affairs was vastly with serious shortcomings. Among others, its informal nature greatly caused to look like merely instrument of federal interferences because the players were those executive officials in both levels.³⁰¹ The executive centered feature itself was mainly designed to carry out administrative and technical supports targeting in equipping the 'less developed regions'. The regions considered in need of federal supervision and assistance primarily are the Somali, Afar, Benishangul-Gumuz, and Gambella in general. There was also an institution called 'Federal Board' established to solely provide affirmative action's which implicitly endorse the asymmetric federalism in practice.³⁰²

Together these two constitute federally charged institutions in the de facto IGR mechanism. However, the whole executive machinery was solely undertaken by the party at the centre which channels and influences the activities of regional states through the respective affiliation parties who control power at the regional level.³⁰³ In fact, the party dominance in practice have by far

²⁹⁹ Comparing with the Indian system that allows the president to centralize in such cases, Assefa further contends this might be improperly used by the federal to oust state-based opposition party had they took control of power. Assefa, *supra* note 42 at 142

³⁰⁰ *Id*

³⁰¹ Lovise *supra* note 45

³⁰² See for more COM Regulation No 103/2004 and 128/2006

³⁰³ See generally Lovise *supra* note 45 which thoroughly dealt such findings in the period mentioned.

went to the extent of federal government as king maker as observed by some asserting the over interferences during the period on the ground of capacity building and balancing regional developments.

In 2001 the federal government brought another legislation to formalize the IGR system. The law then established the 'Ministry of Federal Affairs' (MOFA), the substitute of the former, to discharge crucial role in federal-states governance interactions. Leaving for a while the question of constitutional mandate to do so, the establishing proclamation set two broad objectives. These are on the one hand, 'without prejudice to the provisions of Articles 48 and 62(6) of the Constitution to facilitate the resolution of misunderstandings arising between Regions'; and to 'give assistance to the Regions with particular emphasis to the less developed ones'.³⁰⁴ Though the scope of the authority by virtue of this provision was limited, the later developments laid the foundations for its IGR institutional role.

Subsequently, in the years that followed the powers and functions of MOFA have been expanded and its institutional status strengthened by the continuous amendment laws reorganizing the federal executives. Specifically, it is vested with the authority to serve as a focal point in creating good 'federal-regional' relationship and cooperation based on mutual understanding and partnership and thereby strengthen the federal system.³⁰⁵ Recently, MOFA performs wide ranges of functions that include conflict adjudications among ethnic groups in different regions and facilitations among the interaction of religious institutions.³⁰⁶ Basically, the institution actively engages as tools of bringing unity and preserving peaceful coexistence among various groups within the federation in general. Despite the efforts of formalizing the legal and institutional frameworks of IGR system in the part of the HPR, still there are contentions arising from the mechanism and design chosen by the federal government.

³⁰⁴ Proclamation 256/2001 Art 11

³⁰⁵ Proclamation 471/2005 Art 21(6) and see the detailed powers and functions entrusted upon the MOFA which mostly appear broad enough to only make legal framework as the law directly spells out its power over the regional states.

³⁰⁶ See generally for the list of current authorities MOFA holds on the "Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 691/2010" under Art 14 and compare with the former laws.

First, the question of source of constitutional authority must necessarily be worked out. Constitutionally the institution and its role of IGR is apparently a loophole. It begs the question to ask as to where the HPR ascertains the power of lawmaking in view of the fact that the issue generally touches the constitutional division of power and broadly affects the interests of the regions. In fact, its constitutional relevance for the good working of the established federal arrangement along with implementing the constitutional designs (preserving unity with diversity and creating one political community objects). One can argue it's the proper province (and even a constitutional duty) of the federal government to perform such functions. In other words regardless to the absence of explicit provision, it is among the implied authorities of the federal government due to the nature of federalism itself. Nevertheless, how much the institution is constitutionally protected to endure with the federalism and to go with its commitments of ensuring those objectives that demanded its establishment remains uncertain. Apparently the regional states are not represented from the beginning and it is hardly possible to find out whether they have been consulted and given adequate opportunity to participate in designing the institution. Perhaps, it would have better and appropriate if it was done through constitutional amendment.

Secondly, the fact that MOFA is institutionally within the federal executive sheds the IGR system itself is undermined. Generally, all kinds of division of power element that may possibly give rise to dispute and misunderstanding between the regions (vertical and horizontal respectively) are the underlying objective of the institution. Two fundamental constitutional issues are challenging for the authority of the federal legislative in enacting the law and establishing the institution which is under federal executive organization whose accountability is to the COM as per the executive organization hierarchy.³⁰⁷

Thirdly, though the MOFA officially commenced its IGR function in 2001 E.C, it is staggering to maintain the system can really be capable to step in effectively in the federal-state relations. Despite one finds the institution draws generally its crucial role in shared legislative and policy matters from the recent policy framework document, there are various issues that proves otherwise. For instance, there is no a constitutive acts and memorandum of understandings

³⁰⁷ Amazingly, the IGR unit of the MOFA sets out in the objective statement the mission expires by 2012 E.C

concluded with the respective regional states as to how its objectives can be implemented at the regional level.³⁰⁸ This further is exacerbated due to the lack of clear federal policy addressing the matter of legislative IGR either with respect to the HPR scope or within the MOFA. The fact that the party exclusively took control of the process as well as every single activities are determined to flow directly to the institution for its execution at the regional level reduces the system in general as something irrelevant.³⁰⁹

Lastly, it is not easy to differentiate the overlap of jurisdiction with the HOF. This would suffice to observe conflict on the powers and functions of the HOF as sometimes the practice itself have showed.³¹⁰ Besides, while the later is a constitutional body, the MOFA is, as noted hitherto, part of the federal executive machinery, it would be defeating the constitution itself. Hence, it is disputable to presume its representation role for the regional states or nations, nationality and peoples.

To sum up, one notes the source of these all problems lies at the design failure originally. Thus, the federal government alone decides whatever matter it deems fit without even the need to involve and represent the regional states. For accomplishing these tasks the vague Art 55(1) clause has unduly contributed to make laws every matter the HPR elastically hold federal. It is difficult to see whether the federal arrangement would even sustain.

4.5. Extra-Constitutional Practice and its Implication on Lawmaking

In order to cut the constitutional practice observed in the federal lawmaking powers, it would be the half-side of the story to just only look at the laws. Hence, it is inexplicable to unveil the extra constitutional factor that tremendously shaped the outcome of those legislations appraised from behind or at the fore as the case may be. In so doing, it outlines the political climates under

³⁰⁸ Interview with Ato Abebe Habte , senior expert on IGR in the MOFA, July 25, 2011

³⁰⁹ Interview with Ato Ewnetu Bilata, Director General of IGR Unit at the MOFA, he also confirmed that the institution totally lacks autonomy and it's merely serves as endorsing the orders given by the party or even sometimes the PM. He underscored the federal implementation is fragile and more becoming as centralized system.

³¹⁰ Ato Ewnetu mentioned that there are several occasions the HOF confronted as its proper authority is usurped despite things are done behind the scene. He also pointed out so long as the constitution is concerned the HOF's are right but the only lasting solution for both institution is when constitutionally the IGR role and the MOFA is included. Otherwise there is no option to not only speak about the jurisdictional conflict but also the autonomy to protect the institution of IGR within the MOFA.

which the legislations come to force or the guiding political ideology influencing the lawmaking body to that marked the flawed efforts in the constitutionalism.

Most critics concerning the EPRDF regime's point out that fundamental problem lies with its philosophy of 'revolutionary democracy'.³¹¹ They further put these version of democracy is officially presented as an anti-thesis of liberal democracy and its modus operandi based on the Leninist principle of 'democratic centralism'. In effect, both 'revolutionary democracy' and 'democratic centralism' which allow the fusion of party and state that fully negates the separation of powers as well as check and balances. Therefore, it is described that with such political ideologies it is more unlikely to expect the EPRDF can implement the constitution and be democratic government at all.

Democratic centralism basically is a political ideology in socialism. In such socialist party the ideology is often distinguished as strict party discipline principle where key policy issues and governance matter centrally determined.³¹² Meaning those in the central party units, mostly a committee of few elites (elected or otherwise); decide every state affairs that ranges from the kind of laws to the administration. It is often remarked that features like 'downward flow of democracy' system, 'all size fits approach', 'zero sum game or winner take all' mode and so forth inherently epitomize the ideology. Besides, the theory of democratic centralism lays the foundations for authoritarian form of government to flourish as experiences in other countries would tell. The propensity of establishing authoritarian government rises since the strict party discipline idea offsets the political accountability and transparency a limited government needs to fulfill.

The above features of democratic centralism undoubtedly shaped the EPRDF regime albeit the masks presented in its official policy documents formerly as 'revolutionary democracy'³¹³ and

³¹¹ One finds many studies conducted throughout the period starting the making of the FDRE Constitution until recent time allegedly concluding same idea.

³¹² Democracy because all the organs of the party, from lowest to the highest, were elected by the members of the party, and all organs were responsible to their electors; centralism because all policy decisions were taken at the highest level and implemented by lower organs under the supervision of immediately higher organ.

³¹³ The following quote from Vestal's book is incisive: "Revolutionary Democracy, like its predecessor doctrine, dialectical materialism, is an ideology of absolute truth understood correctly only by Meles and his comrades. Small elite of professional revolutionaries, subject to an authoritarian command structure and strict party discipline,

recently as 'developmental state democracy'.³¹⁴ In this regard, one wonders what role the regional states play in such political ideology. Ever since the centre dominate one party rule way the parties at the regional governments, as Merera calls it the PDO's, are sham in bringing the real federal essence of the constitution.³¹⁵ The current contexts where developmental state (a misnomer), make constitutional democracy upside down is also another form of strengthening the dominance of the centre and thus the party in every sphere.³¹⁶ At outer face the issue might seem one of the economic systems that focus on the unlimited role of government, unlike liberal theories, being dominant actor to achieve fastest economic growth rate. Nevertheless, the idea of developmental state with its own features of democracy and assumptions categorically outlined in the longer duration of power a government require to implement its long-term development plan into actions, as a result the real operandi remain political instrument. It is important to cite the much talked five years 'Growth and Transformation Plan' is completely coined with the flavor of developmental state. One also notes the throughout the GTP document the regions, albeit it covered comprehensively the constitutional regional competencies, are reduced into mere administrative units where clearly providing their duties to execute as it is.³¹⁷

anticipate the country's needs and best interests and lead the masses through the oxymoronic theory of "democratic centralism." Under this form of party governance, discussion of a topic ceases once a decision has been taken and orders from the center are binding. In EPRDF practice, centralist tendencies have always overwhelmed the democratic and participatory ones. THEODORE M. VESTAL, *ETHIOPIA: A Post-Cold War African State* (1999) Vestal, *supra* note, at 185

³¹⁴ Jamee K. Moudud and Karl Botchway, *The Search for a New Developmental State*, *International Journal of Political Economy*, vol. 37, no. 3, Fall 2008, pp. 5–26

³¹⁵ Merera Gudina, *Twenty Years of Experimenting With 'Revolutionary Democracy': Elections and Democratization in Ethiopia, 1991-2010* (2011)

³¹⁶ Randall Peerenboom, *Law and Development of Constitutional Democracy: Is China a Problem Case?*, *Annals of the American Academy of Political and Social Science*, Vol. 603, *Law, Society, and Democracy: Comparative Perspectives 192-199* (Jan., 2006)

³¹⁷ GTP *supra* note 246

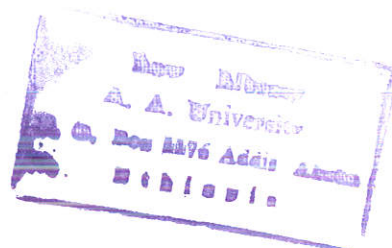
CONCLUSION AND RECOMMENDATIONS

Conclusion

In any contemporary political system the legislative organ role is placed as the most primary determinant actor in shaping the telos of constitutional state. Both the premise of 'credit-taking' and pitfall of 'blame-taking' attributes of a given system lie at the organization and power of the legislative body. The constitutional weight accorded to such authority signifies the ultimate ends with respect to democracy, human rights and freedom and/or the values of constitutionalism. Evidently the normative political or legal vertebrate of 'constitution are supreme' common place sayings quietly starts and ends with actual references to the force of laws that might happen either destructive or constructive to the efforts of establishing the common good. Accordingly, among the political powers, lawmaking and the essence of limited government have clear cut correlations. Meaning if the power of lawmaking is left without viable enforceable limitations then limited government is definitely impaired. So much so the principles encrypted in the parchment of constitutional government dictate lawmaking authority to subscribe to constitutional supremacy, entrenchment and justiciability of basic rights, and the independent judiciary.

In view of this truism constitution serve as the primary tool in putting reliable safeguards to enforce the outlined elements while subjecting the exercise of legislative power. In short, it confines the power through express enumerations and denies the tendencies of absoluteness through the element that persists with the text. It goes without saying; therefore, the same purpose holds true whether federal/unitary state or presidential/parliamentary system. Stated otherwise, if constitution fall short to devise mechanisms appropriate enough to gauge the exercise of political power beyond the reach of ordinary legislations, it is then hardly possible to speak of constitutionalism or its modest rule of law. On the contrary the propensity to cultivate dictatorship/authoritarian regime highly gets ground to flourish in the form of 'rule by law' under the pretext of constitutional authority.

The effects are appalling in many respects. Basically the legislator take the constitution at its own hands and freely determine by law against rights and freedoms fundamental to the citizens at large and undermining the institution that stands to validly impose enforceable limitation upon



the governmental powers. In such circumstances it is very incredible to figure out whether the constitution hold its proper role but those features of 'pseudo' one who often appear to impress in words. At worst its kin 'non-constitutional constitution'.

The FDRE constitution seriously offers such oddity as vastly explicated in the paper.

In similar vein of constitutional designs pertaining to lawmaking, it should not be refuted that constitution ought to balance certain qualified explication. One of such goes to not make a constitution be an absolute bar on the exercise of power effective but simultaneous with expectations of constancy in changing circumstances. Despite the existence of entrenchment requirements that assumes strict adherence to constitutional stipulations, there are situation which urge different scenarios. Formal changes to the constitutional exercise of power would appear unnecessary traps to comply as it makes things over complicated and routine. For many reasons like due to the nature of amenability of power; or the inherent corollary of vesting a particular authority; or the defects of languages generality employed during the making of the constitution; or the inability to comprehensively cover all future changes in status quo; constitutions are generally expected to provide the legal exercise of some political powers. This is without creating vacuum and crisis in governance. The doctrine of implied powers has such underlying assumptions where constitutional framers legitimately expect to respond situations like that in lieu of the extraordinary frequent amendments. The doctrine has enormous significances to uphold social dynamics with power adaptability in terms of latter development in political, economical, technological, and other related state affairs. Besides, it prematurely offsets the dysfunctional danger governments would face by readily conferring constitutional authority for legitimate exercise of law making. However, it does not mean that the appeal to implied authorities (or its genres incidental, inherent, or resulting) are arbitrary score cards. The experience of various constitutions reveals, for all intents and purposes, it contains provision regulating the application of valid implied lawmaking powers. They generally provide the manners, forms and limitations specific to the doctrine.

The following are, inter alias, the common usage in constitutions. Some provide the 'necessary and proper' link between the ascertained authority and the execution of constitutionally vested functions. Some envisage the possible power additions through 'all matters incidental, accidental

The following are, inter alia, the common usage in constitutions. Some provide the 'necessary and proper' link between the ascertained authority and the execution of constitutionally vested functions. Some envisage the possible power additions through 'all matters incidental, accidental or reasonably necessary' to enforce the power constitutionally entrusted upon the government. Still others incorporate conditional provision broad enough to exercise in the form of 'all matters necessary to bring effective good government and rule of law'. Often the typical places of the doctrine become quintessential in federal arrangement owing the feature of entrenched power division which equally entrusts lawmaking power upon both layers of government. The principle of federalism itself require the application of the doctrine albeit the duty to respect each sphere of influence during implementation. Consequently in federation which leave reserve clause upon the state the constitution generally need to incorporate implied federal legislative competencies. Two strong rational are made as the tacit recognition of the principle in federalism.

On the one hand, it grant constitutional legitimacy to the federal government to actively operate and appropriately respond matters of general importance rather than waiting in vain to figure out the specific area in its enumerated power. It thus avoids entrapment and potential conflicts on jurisdiction regarding to the reserve clause. On the other hand, so long as compliances with the rigid amendment process would take long time and would result futile, the absence of implied power clauses make the federal government weak. This brings difficulties in maintaining its autonomy and performing its role according to the constitutional expectations with the passage of time and contexts. It is also tantamount to the states to watch over whether the federal is crossing the reserve line in its lawmaking commands. Hence, federal constitutions envisage certain elastic clause allowing the adaptability of federal government power with the constant changes in status quos. In effect it renders the healthy federal operation that could be guided by sound and predefined principle for the good of the whole. The latter ultimately benefits the stability of the constitution enduring with the federation. The FDRE constitutions here too fall short of putting into effect the specific framework of implied federal authorities.

Nevertheless, in order to block the likelihood of federal encroachment and auxiliary centralizing force over the states original jurisdiction, there are special restraining provisions for valid exercises or to invoke such clauses. The existence of second chamber in the federal legislative

cases it happens thus the stringent fulfillments of means-to-end burden of proof upon the federal lawmaker entail the abuses unlikely.

In general the finding in relation with the context of the FDRE constitution suffices to mention there are anomalies which identify the lawmaking power of the federal government. The constitutional design unpromisingly hurdles several issue left unanswered. owing the fact that constitution have acutely managed to act in response to various preexisting political problems of the country however it fails to benefit from the time it come into force conceding its recentness. Among other things, there was apparent foresight problem on the part of the framers' in establishing a system which ultimately risks the constitution at all. Mostly the manner sought to organize, structure, content and limit political power appears self-defeating as closed inspection at the constitution would reveal. Concerning federal legislative power two grand problems are noticeable profoundly challenging the constitution internally and the constitutional practice externally. The following assertions can show the results drawn upon examination of the constitution and appraising the legislative practices over the past fifteen years. The first directly depicts unconstrained parliamentary system built along with it implications and consequences. The second broadly elucidates the failure that come from articulately incorporating implied lawmaking power vi-a-vis immediate consequence practically causing several unrestrained federal powers.

The FDRE Constitution recognizes the Bill of Rights in bounties but leaves them devoid of any enforceable limitations. Justiciability and due process are unregulated or too much dependent on the legislative commitments. The judiciary's enforcement mechanism of basic rights and its decisive role in scrutinizing the proper exercise of the political organ is minimal or barely inadequate. The staggering point relates to the choices made regarding the kind of parliamentary system. The system creates unicameral legislature with tough power broad enough to generate every matter into a law and feeble judiciary which controls the function both the executive and legislative activities. As the finding discloses, unlike other constrained parliamentarism who keep the balance between separation of power and popular sovereignty from negatively pulling each other, the FDRE mode shrouded the concept of parliamentary sovereignty (not supremacy) on constitutional supremacy. As a result as earlier critics against the English parliament would

tell the HPR is vastly left untrammelled except to change man into woman or vice versa. The implications one can simply draw the constitution leaves the fundamental values of limited government nearly to a level of insignificance. The institutions entrenched in the constitution, along with their distinct role to block the arbitrary exercise of power, are themselves unguarded from possible legislative overrides. In effect despite the provisos of amendment procedure which sounds cumbersome to adhere, the changes in the constitution can easily take place by the legislative acts without formal amendments.

In facts one would wonder as to what is the role of the HOF interpreting mandate. There are two immediate responses that come upon a closer observation. First, as the design indicates the HOF is a political organization either in terms of composition or function which in no way stands to replace the strong judiciary organ we find in constrained systems. Second, the sole purpose of the HOF is mainly tuned with the federal arrangement in line with protecting the rights of ethnic groups. This clearly makes it unsuitable to rightly act as primary body to restrain lawmaking power as far as the matters fall outside of its constitutional object. In fact, it is tenable to support the assertions by retrospect the legislation already imposed upon the HOF. In other words, it is placed in a difficult position even to defend its own provinces let alone other matters.

The fact that the constitution is silent about implied federal lawmaking competencies is the other drastic challenges for both the federal arrangement and the limited government. In fact owing the federal division of power is not an exhaustive enumeration and the inevitable overlap of jurisdiction on matters shared by both federal and regional states sheds some doubts as to what direction the practice would head. Certain matters, to mention like commerce laws, civil laws, overall policy formulations, and land administration laws, etc necessarily entail articulation in terms of the implied power doctrines. On top of that these matters take languages of generality without specification in terms of content and lack of clear elements in terms of scope. The federal competencies are limited or not become a delicate experiment with respect to the issues. It is nebulous whether the competence is within the areas of setting framework legislations or standards and the regions duty to comply. Further the broad notion of 'creating one economic community' itself complicates the extent of assertive implied authority taking in to account the

other matters would incidentally lead such deductions. Thus, the assertions on such ground would not go far as practically it holds as mere justification used by the federal government.

More importantly as the legislative practice repeatedly assert, the HPR has already devised its own form of the doctrine. Art 55(1) is basically the focal point to cast colossal contentions. The provision blurs the ambiguities than the clues to solve the real subject. It is trivial whether what it takes the notions 'federal government' and 'all matter' in the constitution. It harbors whether the extent of the latter notion also includes both implied and enumerated powers of the former notion. There may be lists of alternative scenarios if the provision correlates with the other provision of the constitution. In particular the reserve power of the regional state and the principle of duty to respect their respective constitutional matter would be relevant to not make something good out of it.

The practice to the contrary on the part of the HPR is evidently taking for granted the elasticity of the provision to broadly embrace whatever it deems fit. It seems at times the HPR shelters under Art 55(1) or uses as a safe passage to escape question of source of authority. What makes worse the provision has been serving as supplementary to unrestrictive power to enact on all matters uncovered under the constitution. Those legislations on the latter category, as hindsight appraisal has suggested, are appalling which invites serious doubts to forward. It is possible to make projections that, whether the meaning and essence of the provision covers issues uncovered in the constitution, the federal government may overtime exclusively fill the field with such kind of legislations. However, the issue remains largely controversial as far as the HPR keeps employing it as its constitutional authority. It greatly affects various interests if the constitution had been taken via laws regardless of the silence of the constitution. The particular attention should be given to the implications on legislative constitutionality of those laws enforce both to the constitutionally entrenched authorities and the regional autonomies under the reserve clause. Legally speaking some of such laws have brought changes over the constitution albeit one easily discerns no contradictions. However for reasons particular to the supremacy of the constitution some legislation might be understood as outright unconstitutional.

The vile of greatly stretched legislative power is thus readily defeating both the supremacy and entrenchment clause. Besides, the propensities of alleged encroachments over the rights protected under the constitution, simultaneously making the appropriate institutions feeble through which adequate limitations upon power can be assumed, purely erodes the constitution itself. No less therefore the laws have replaced the constitution in so many ways with the rather unarticulated Art 55(1). The practice itself is fragile in terms of constitutional adjudication arising from laws. It explicitly endorsed untrammelled nature of the parliament. This has also greatly contributed to the approach of no contest over executive acts.

It is beyond doubt that whatever the federal government legislate the practice that came out of the regions ultimately remain unresponsive. This perhaps might be explained in terms of extra constitutional factors rather than defects in design. The odds of one party system and the federal arrangement have entirely fused two most related things. First, affairs of the party and the government are hardly possible to identify. Second, the party at the center fused with the party at their respective region not only merged autonomy but also broke the thin line to identify it as federal arrangement. This would in fact make the whole constitutional experimentation a zero sum game due to failure to keep the hope of heavily-handedly gained legitimacy at the start would have been redeemed. Even for worse it makes the whole project, which ostensibly mirrored the ruling EPRDF party politics, once again a pseudo constitution commitment. The staggering point remains riddle when one squarely finds the avant-garde of the constitution is still in power with such minimal commitments. Thomas Paine was perhaps accurate in his thoughtful quote, 'a constitution must exist independent of the government it creates.'

Recommendations

The finding of the study suggests two broad remarks on account of federal legislative powers. The first generally accentuate to reconsideration of the constitutional design on lawmaking of the HPR under the FDRE Constitution. The second maintains the institutional roles that should be played during constitutional interpretations so as to curtail the scope of lawmaking.

The following three clusters of issues seriously urge to make thorough constitutional amendments or revisions in the first category.

First, it is advisable to clearly incorporate a provision that specifically address implied federal authorities including its predefined and certain applicable elements with respect to the form, conditions and limits upon lawmaking competencies. In this regard, it would be better to articulate Art 55 (1) based on the experiences of other constitutions that have developed their own mode of conferring implied power doctrine in explicit terms. In so doing the constitution will avoid any potential controversies that could arise between the federal and state governments on the basis jurisdictional conflict.

Second, it is necessary to recourse for constitutionalizing those matters uncovered under the FDRE Constitution during the making time which has been embraced in various federal legislations. This certainly pertains to those laws dealing with both the constitutionally entrenched organs and matters concerning the federal arrangement. These are: matters related to the Head of State and ex-Head of State, matters related to judicial functions, matters related to the systems of intergovernmental relations, matters related to the effects of federal intervention actions upon regional states, etc. Incorporating such issues as thoroughly canvassed in the study ensures two distinct constitutional purposes. On the one hand, it helps to achieve the relative perpetuity and independence of the institutions mentioned taking into account the particular role each play in realizing the object of the constitution. On the other hand, it brings legal certainty upon the functions of the institutions by distinguishing the scope of their authorities that arises from the constitution as opposed to the legislative varieties. Often, it solves the practical tension on the ground of separation of powers that negatively emanates from lawmaking authorities.

Third, since there is no a second chamber participating in federal legislative process to protect and promote the interests of regional states, the manner of lawmaking power over shared competencies needs specific provisions. These includes: the scope of federal power, the effects on and the mechanism of representations regional states, and the status of federal laws on shared matters and the principle of federal paramountacy. As such matters are indispensable for the

smooth and healthy working of federalism in its proper sense it becomes evident to put certain constitutional provisions that set out clear standards.

The other equally important point is the institutional role expected from the interpreting organ. As such there is a great deal of expectations from constitution adjudicative bodies to channel and curtail lawmaking power so as to ensure rule of law as opposed from the tendencies observed in the form of rule by law. The specific role of the HOF/CCI in this respect ranges from practically checking the legislative constitutionality of laws in terms of stressing the clear source of authorities to the extent of examining the scope, object and effects of legislations passed by the federal government. It is thus much relevant to develop a distinct mechanism to search beyond mere provision with provision approach of testing unconstitutionality to a broader context based approach. This includes devising constructive tools of interpretations with respect to the generality of languages employed in the constitution. Accordingly, it is expected to set rules and mechanisms as to how the lawmaking organ must fulfill certain predefined purposes, conditions and limits. The particular parameters with regard to general notions like 'one economic community' and 'regulation of interstate matters' also needs further articulation and specifications in practice. Above all there should always be a commitments and faith on the values of the constitution which requires genuine application of constitutional rules and principles on the part of the adjudicative organs. This defect in particular has been observed in the few cases where recourses to constitutional interpretation were sought. Hence, it is highly recommendable to rely on solutions which is more farsighted and general that helps to address permanently other similar matters in the future instead of merely keeping balance with current demands.

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Interview with Ato Tsadik, deputy head of the Legal and Administration Affairs standing committee of the HPR

Interview with Dr Negasso Gidada, ex-president of the FDRE Government

Interview with Ato Abebe Habte, senior expert on IGR in the MOFA, July 25, 2011

Interview with Ato Ewnetu Bilata, Director General of IGR Unit at the MOFA

Declaration

I hereby declare that this thesis is my original work and has never been presented for whatsoever purpose. It is my belief that any information used thereto has been acknowledged in utmost efforts.

Endalkachew Geremew Negash

Signature 

This master's degree thesis has been submitted for examination with my approval as the research advisor

Yared Legesse (S.J.D.)

Signature 

January, 2012

