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State constitutional amendment patterns in Ethiopia; The case of beninshangul gumuz, gambella, harari, and snnprs constitutions

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PREPARED UNDER THE SUPERVISION OF ABERA DEGEFA

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Approval Sheet by Board of Examiners

State constitutional amendment patterns in Ethiopia-Special emphasis on beninshangul gumuz, gambella, harari, and snnprs constitutions.

Approved by Board of Examiners

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Letter of Declaration

State constitutional amendment patterns in Ethiopia-Special emphasis on beninshangul gumuz, gambella, harari, and snnprs constitutions

I, **Zemene Bizualem**, declare that this thesis is my original work and it has never been presented in any other University. All source materials used in this work have been duly acknowledged. It is hereby presented in partial fulfillment of the requirements for the award of LL.M Degree in Constitutional and Public Law.

Declared by: ZEMENE BIZUALEM_____ Date_____

Approved by: ABERA DEGEFA_____ Date_____

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Acronyms

CCI	Council of Constitutional Inquiry
EPRDF	Ethiopian Peoples' Revolutionary Democratic Front
FDRE	Federal Democratic Republic of Ethiopia
HNL	Harari National League
HOF	House of Federation
HPR	House of Peoples' Representatives
SCIC	State Constitutional Interpretation Commission
SNNPRS	Southern Nation Nationality and Peoples' Regional State
TC	Transitional Charter
TPC	Transitional Period Charter

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Chapter One

1. Introduction and general overview of the paper

1.1. Introduction

The fall of ‘Derg’ in 1991 in Ethiopia witnessed the end of undemocratic and dictatorial rule by the military junta and marked the total transformation of the political system of the country from centralized, unitary system in to federal structure. The introduction of this federal structure has brought about substantial changes in the political system and administration of the country.

The adoption of the federal constitution in December 1994 and the coming in to effect of it in 1995 was the turning point in the political structure and transformation process. In addition to incorporating five fundamental constitutional principles namely sovereignty of the people, supremacy of the constitution, protection and promotion of human and democratic rights, separation of state and religion and accountability of government, the constitution establishes a federal and democratic state structure with nine ethno-linguistic based states as members of the federation.

The constitution has fully recognized the sovereignty of the nations, Nationalities and peoples of Ethiopia, entitles the minority nation, nationality and peoples within the nine member states to exercise their right to self determination and in the long run to establish themselves as a member state of the federation and even to exercise their right to secession unconditionally

Moreover, the constitution has divided legislative, executive and judicial organs between the federal government and member states. The federal constitution also states that member states of the federation can have their own constitution. As a result of such an unprecedented and step forward authorization, all member states of the federal government have adopted their own constitution which (re) affirms their autonomy, establishes the regional government; determine the organization and structure of government organs of the state, contain provisions that deals with human and democratic rights etc...

One of the advantages of federalism is that it gives full autonomy to each tier of government whereby one will not interfere in the domain of the other. And one of the defining attributes of federalism is of course the autonomy it grants to subnational units and the most important way in which sub-national autonomy manifests itself is in the authority of subnational units to govern themselves with some degree of independence from rules and policies established at the national level. This makes the member states of the federation to be autonomous in deciding their own affairs, establishing their own institutions, executing their own policies and addressing social needs. The existence of constitutions at state level may also help the citizens to have double constitutional protection and multiple access point of recourse at federal and state levels. Constitutional arrangements in the states that takes in to account the special (local) conditions of the states may also help to accommodate the diversified demands and interests of different ethnic groups. But these wider visions expected from federalism-autonomy of member states of the federation, accommodation of diversity at state (local) level in plural societies like Ethiopia, providing double standard of protection and promotion of human and democratic rights may be either hampered or facilitated depending on the federal and state constitutional and institutional frame works. Mere having of a constitution by states may be meaningless unless the states are free to design, establish and organize institutions which are proper to their local condition and are at the same time expressions of their autonomy. One aspect of this constitutional practice (framework) which logically follows having a constitution by states is *amendment of their constitution*.

Because of different reasons, federations have different approaches in regulating the behavior of local government in general and *subnational constitutional practices* (adoption, amendment, interpretation, revision...) in particular. Despite the presence of some variations, most federations have left issues or works on subnational constitutions to the people of the state. As state constitutions are the sources of authority to the state government and means of expression of sovereignty of the state population, they have to be adopted by the holders of the state's sovereign power. The same holds true for their amendment whenever there is a need to amend them. The stipulation under the Ethiopian Federal Constitution negates this assertion. It stipulates that the *State Council [of a given state] has the power, among others, to amend the State Constitution*. This raises the issue

of the available constitutional space for subnational constitutional practice and state's autonomy in relation to the amendment of their constitution. However, states have designed their own mechanism of constitutional amendment which deviates from the prescription of the Federal Constitution. At this juncture it becomes necessary to investigate whether the approach of states is novel that has to be appreciated or in contradiction of the stipulation of the Federal Constitution. Though states have provided mechanisms for their constitutional amendment, still they failed to escape criticisms since they are not participatory of the citizenry at large. Subregional territorial administrations (Zones, Woredas, Nationality zones and Nationality special Woredas in the context of multi-ethnic Regions) have a considerable degree of autonomy. This autonomy is protected by the state constitutions which can not be amended without the participation of the 'same' subregional administrations. However, not all ethnic groups have their own Woredas or Zones which indirectly denies them from participating in the constitutional amendment process. The issue of initiation and ratification of state constitutional amendment in multi-ethnic states is thus criticized as being not inclusive of all ethnic groups which is rather dominated by few ethnic groups. Different ethnic groups are also not proportionately represented in the regional council, a major actor in the state constitutional amendment process. By comparing the amendment pattern of four multi-ethnic members of the Federation, this study examines these and other issues related to state constitutional amendment in Ethiopia.

1.2. Statement of the Problem

One of the underlying and well entrenched principles of federal arrangement is that the two tiers of government (the federal government and the member states of the federation) should be autonomous and independent of each other within the spheres allotted to them. However, with regard to the issue of 'dictating' state constitutional making power, there are variations across federal systems. In center seeking (coming together) type of federations, the states, mostly with their constitution, precedes the federation and the federal constitution. Therefore, there is no or little room for the federal constitution to dictate the manner of making and influence the structure (content) of the constitutions of the member states of the federation. Rather the reverse is true. In federations created by devolution (holding together) type, states and their constitutions are created after the formation of the

federation and the federal constitution dictates the forms, content and structure of state constitution. Since our federal system is a holding together type, the federal constitution precedes the constitution of member states and there is clear constitutional mandate with regard to the manner of drafting, adoption and amendment of state constitutions to be undertaken by the state council of the respective states. Despite this mandate from the federal constitution, member states of the federation have adopted (devised) their own way of amendment procedures to their respective constitutions. This gives us insight in to examining the amendment pattern of state constitutions.

The most pertinent issues that has to be discussed here includes; the implication of the federal constitutional mandate in the constitutional amendment autonomy of states, its implication in being inclusive and participatory of the state's citizenry, as to whether the approach taken by states is novel or contradictory to the Federal Constitutional mandate and the effect of the state's approach from the perspectives of entrenching constitutionalism and public participation at state level. Examining the adequacy and detailed nature of state constitutions to regulate all issues that may arise from amendment is also part of the concern of this paper. Among many challenges that may be raised during amendment, judicial review of substantive and procedural issues is the most pressing one in many countries. The issue of standing to challenge amendments is "*not clearly*" provided in Ethiopia either in the Federal or state constitutions. Even if we reach to conclude that they are reviewable, this power is not entrusted to constitutional or ordinary courts both at Federal and State level. Having been influenced by the model of the federal constitutional interpretation, all state constitutions are interpreted through constitutional interpreting commission. This in turn calls for the assessment, the effectiveness of the model in achieving the right of access to justice, the effectiveness of the regional constitutional interpretation by constitutional interpreting commission as a close analogy to the Federal model of Constitutional interpretation by the HOF.

Even though the numbers of member states of the federation are nine, there are other minority nations, nationalities and peoples within some member states. So, in addition to examining the effectiveness of the state's choice of constitutional interpretation by interpreting commission from human right, democratic and federalism perspectives, this

research study also tries to see the representative (inclusive) nature of composition of the commission in some multi-ethnic member states of the federation. In addition to this, the spread of federalistic constitutional design for a variety of systems especially in the interstate arena has become a post modern phenomenon worthy of special consideration because of its special characteristics and newness.

1.3. Objective of the Study

As its central objective, the study tries to evaluate the institutional set ups and constitutional frame works designed both under the federal constitution and the constitutions of member states with regard to issues of sub national constitutional amendment. The study also tries to examine the effectiveness of these constitutional frame works for the achievement of state's autonomy, sub national constitutionalism and future constitutional developments. In so doing, the study tries to examine what merits or demerits the stipulation of state constitutional amendment mechanism by the federal constitution and the states approach of having their own will have. By making a critique look at of the experience of other federal systems in the areas of constitutional practice especially amendment, the study tries to identify the progresses and innovations made by the Ethiopian federal system vis-à-vis the area of sub national constitutional amendment and try to identify the lessons that our system can learn from other federal systems which can be an input for proper implementation of constitutionalism in the country.

1.4. Research Questions

Any federal arrangement presupposes the existence of two tiers of government and the exercise of full autonomy independently of each other within their spheres of power. As a means of expressing their autonomy and as a tool for the establishment of the political-legal order, members of the federation in most federal systems have their own constitutions as is the lands in Germany, the States in the United States and the Regional States in Ethiopia. Mere having of a constitution may not serve a lot for states unless they do have proper mechanisms for the amendment of the same.

When we see the issue of sub-national constitutional amendment in Ethiopia, there is a mandate from the Federal Constitution as to the organ that is authorized to amend the constitution even though states have devised their own procedure of amendment in their

constitution. Despite such a stipulation by the Federal Constitution, states have devised their own mechanism for the amendment of their constitution which raises a question of constitutionality. The approach taken by states is also criticized from many angles like its rigid procedure, non-inclusiveness of all ethnic groups and the citizenry at large, gaps in the constitutions to regulate all issues that may arise from amendment etc. Inspired by these issues (problems), the study tries to address the following questions and attempt to forward recommendations for them.

- What implication does the mandate of the Federal constitution as to the amendment pattern of state constitutions have?
- If the mandate of the federal constitution is followed:
 - ❖ How far is the amendment mechanism by the state councils inclusive of different ethnic groups living in the states?
 - ❖ How far is it participatory of different stake holders (like political parties, human right activists and the citizens at large?)
- Is designing special procedures for amendment by state constitution a novel approach or a contradiction to the federal constitution?
- According to the procedure of state constitutions, who is (are) authorized to initiate the amendment process and who is (are) authorized to participate in the amendment process?
- Is the amendment mechanism and procedure provided by state constitutions detailed and clear enough to regulate all issues that may arise from amendment?
- Is the amendment mechanism adopted by states rigid or flexible (like many state constitutions in other federations) that enables states to cope up with frequently changing situations?

- What implication will the current arrangement have in making states and state constitutions laboratories of human right protection and forums of accommodating regional diversities (distinctiveness)?

1.5. Research Methodology

In this research, the primary methods employed will include literature review by way of referring books, legal materials, scholarly articles on journals, laws and other unpublished as well as official documents. In the analysis of laws, closer scrutiny of the federal and state constitutions takes the lions share. To know recent and current information that is relevant to the issue, on line /internet/ sources will also be employed.

1.6. Scope of the Study

The nature of the research problem and the issues it involves may make the research area very wide. However, this study will focus only on the assessment of the constitutional approach taken by states for constitutional amendment and more specifically the effectiveness of the methods adopted for the development of constitutionalism the promotion and protection of human rights, accommodation of diversity by enhancing popular participation, the strength of federalism, and the maintenance of state's autonomy. These parameters can be looked at the constitutional frame work both at state and federal levels.

1.7. Significance of the Study

By thoroughly examining the stipulations (provisions) of the federal constitution and subnational constitutions that deals with subnational constitutional amendment patterns (processes), this study tries to give insight what regulatory power does the federal government have as to the amendment of state constitutions, what powers do states have in amending their constitution and exercising their autonomy freely. In addition to this, by examining the organs, institutions and procedures involved for initiation and ratification of state constitutional amendment patterns in four multiethnic states, this study highlights the major shortcomings of the methods adopted like rigidity of the amendment process, its un participatory nature of different stakeholders and the citizenry at large and exclusionary tendency of some ethnic groups. Such kinds of constitutional designs for amendment are causes of inter-ethnic tension, rivalry, and competition that result in political unrest and

instability under some regional states. By identifying such vices in the constitutional designs, this finding would help to make these vices (awkward) correct and in the long run, it may also help to correct problems that may threaten the solidarity and stability of the federal order as a result of interethnic rivalry at sub state level. Scholars who studied constitutional law are usually interested in the study of the national (federal) constitution and *study of constitutions at state level have paid little attention*. This is particularly true in Ethiopia where the study of state constitutions is at its infant stage though it has been more than a decade and half since states adopted their constitutions. Since the issue of sub-national constitutionalism is new especially in our country, this research may serve as an input and a spring board for future research for judicial and legal professional including political scientists, law years, state and federal court judges and other state public officials.

1.8. Organization of the Thesis

The paper is organized in the following manner. The first chapter sets the stage and provides guiding information about the whole course of the research. Thus, with a brief introduction of the whole theme of the study, it introduces issues [discussed above] like scope, significance, objective, organization, and methodology of the thesis together with the statement of the problem and research questions. The second chapter discusses general overview of constitutions and their features. As the subject matter of our study is amendment of a *constitutional document*, it highlights what a constitution is all about, its features and types. Since the issue of subnational (state) constitution is the byproduct of federalism, this chapter also discusses the concept of dual constitutions in a federal set up, types of federal formations and their implication in regulating subnational constitutions. By providing general information about the various forms, natures (features), purposes, and elements of state constitutions, the paper under this chapter also tries to avoid confusions as to what *actually constitutes state constitutional documents*. Having grasped these general concepts under chapter two, the third chapter explores constitutional amendment methods and practices. With a view to differentiate amendment from the various mechanisms that changes the constitution, the meaning and scope of amendment is discussed. The different ways of constitutional amendment mechanism are also discussed. Different issues associated with amendment like judicial review of amendments, the principle of unamendability (entrenchment) are also discussed and analyzed in the Ethiopian context.

Discussion of subnational constitutional amendment pattern of different federations is undertaken in this chapter. This helps us to have a clear understanding of the issue in the Ethiopian context and to grasp points of divergence and convergence with subnational constitutions of other federal systems on the issue. The last chapter is devoted to the discussion of subnaional constitutional amendment pattern in Ethiopia. After highlighting the evolution of the Ethiopian federal system and the federal constitution, the amendment procedure of the Federal Constitution, the organs involved for initiation and ratification of amendment are described. By providing general information on state constitutions in Ethiopia, the next part discusses how state constitutions are amended. Issues like the power of states to amend their constitution, organs involved in the initiation and amendment process, ways of checking the constitutionality of the amendment process, classification of the provision of the constitution as ‘human rights’ parts and ‘other parts’ for the purpose of amendment under state constitutions and its implication its implication on the autonomy of states to amend their constitution and the rigidity/flexibility of amendments will be discussed here. The paper ends by concluding (summarizing) the whole discussion and by providing recommendations to the problems that are identified by the study

1.9. Limitation of the study

The study of subnaional constitutions is not yet well developed in the Ethiopian federal system though it has been two decades since federalism is introduced in the country and regional states have enacted their own constitution some sixteen or more years of ago. Because of such low visibility of state constitutions fro study and research, there are no sufficient written materials and documents to be referred. Besides to this, it is not even simple to access the state constitutions. These were some of the challenges which I have faced.

Chapter Two

2. General Overview of Constitutions and their Features

It is clear from the research title that the main theme of the paper is assessing constitutional amendment procedure at state level in the Ethiopian federal set up. However, instead of proceeding directly in to the discussion of state constitutional amendment and the procedures therein, it is better to acquaint our selves with the concepts of a constitution, federal system of government that is accounted for the creation of states with their constitution and the concept of dual constitutions in a federal system. This may serve as a spring board for the discussion of subsequent issues.

2.1. What is Constitution?

The concept of constitution is very wide that cannot be defined in a short and precise manner. Despite the presence of some common elements and understandings, it is defined differently by different authors and documents depending up on the context in which the word “constitution” is used.

Webster’s 3rd New International Dictionary defines a constitution as a:

The system of body of fundamental rules and principles of a nation, state or body politic that determines the powers and duties of the government and guarantees certain rights to the people. It is a written instrument embodying these basic or fundamental rules and constituting the organic law of the land.¹

In some what the same manner, Black’s Law dictionary defines a constitution as:

The fundamental or organic law of a nation, or state, establishing the conception, charter and organization of its government as well as prescribing the extent of its sovereign power and the manner of its exercise.²

We can deduce some core points from the above two definitions about a constitution. Constitution is a body of basic rules and principles. These rules and principles play diversified roles in the legal, social and political spheres of a state in establishing and

¹Webster’s 3rd New International Dictionary.

²Black’s Law Dictionary, 3rd Edition.

organizing the government, in limiting the exercise of power of the government to a legitimate level and in providing protection to the people. All these features make a constitution an organic and basic law of the land.

K.C. Wheare understands constitution in two senses. According to Wheare, the wider and older conception of a constitution is the assemblage of laws, institutions and customs, derived from certain fixed principles of reason... that compose the general system according to which the community has agreed to be governed.³ The broader conception of a constitution is, therefore, the collection of legal and non legal rules which establish and regulate or govern the government. In its narrower sense, constitution is used to describe not the whole system of government of a country, not the whole collections of legal and non-legal rules. Rather, Wheare noted that constitution for most countries in the world is a selection of the legal rules which have been embodied in a document or in a few closely related documents thus excludes unwritten legal norms and constitutions. Generally, the definition given by Jose M. Aruego also contains many of the elements incorporated in the above definitions and may help to conclude our discussion of this part. He defined a constitution as

*a fundamental law determining the fundamental political principles of a country, containing the principles upon which the government is founded, regulating the division of sovereign power and directing to what persons each of these powers is exercised, determine the relationship between government and the individual and regulate how different government bodies and institutions interact with each other.*⁴

2.2. Basic Features of Constitutions

As we will see below, constitutions may be classified in different ways. But irrespective of their classification and whether they are found at the federal or state level or be they in a unitary or federal state, we can draw some common features of constitutions from the different definitions given above. Some of these features are the following.

Supreme (superior) law- All the authors have reflected the supremacy of a constitutional document in their definitions. Where a constitutional document does exist, it represents a

³K.C. Wheare, *Modern Constitution*, Butler and Tanner Ltd, Frome and London, 1960, P1-2.

⁴Jose M. Aruego, *Philippine political law*, Manila University Publ. 1950, P. 19.

form of law superior to all other laws in the state. It is not uncommon to find provisions in many constitutions that declare the supremacy of the constitution. For example, Art. 9 of the FDRE constitution provide the supremacy of the constitution. More specifically sub article 1 of article 9 puts the constitution beyond any contravening customary practice or decision of an organ of a state or government official. In the same way, the South African Constitution states that “This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”⁵

Constitutive document-one of the characteristics of constitutions is that they are constitutive documents of the government, determinants of the state structure and organizing instruments of the whole political system of a country. As we have seen above in the definitions, constitutions establish the different government organs and determine their powers and functions.

Contain Fundamental rights and freedoms-As supreme laws of the land and constitutive documents of the polity, giving place to fundamental right and freedoms in the constitution is important in a democratic governance system. In line to this, K.C. Wheare expressed that ‘if fundamental rights and liberties which the government should enforce or at any rate should not invade are not inserted in the constitution, some influential body of opinion may be alienated and the constitution may fail to be accepted.’⁶One of the functions constitutions are supposed to achieve is delineating the powers of government organs and ensuring the rights of citizens from encroachment by different officials. In addition to these points, a constitution usually has the following features

Preamble-Even if the preamble is not itself part of the constitution and therefore not part of the law,⁷ it is desirable because it ascribe sovereignty to the people, express the shared aspiration and common commitment of the people for rule of law, democracy human and democratic rights. As such, constitutions usually have a preamble. In conformity to this, the FDRE constitution has a preamble which addresses itself to the Nations, Nationalities, and peoples of the country. It also describes the determination of the Nations, nationalities and peoples for rule of law, democracy, lasting peace and the need for full respect of individual rights and freedoms

⁵South African Constitution (1996), Section 2.

⁶ K. C. Wheare at Supra note 3, p.55.

⁷Ibid, p.72.

Procedure for Amendment- Since the constitution is the supreme law within the nation or state, it is unlikely that it will be capable of being amended in the same way as other laws. Documentary constitutions often provide for their own amendment. As we will discuss under chapter three in greater detail, amendment will sometimes be necessary to reflect the changes that have occurred within society. It, therefore, prevents the constitution from becoming an historical anachronism. But, usually a special procedure will have to be followed in order to effect a change to a documentary constitution. The experience of many countries witnessed that constitutions cannot be altered by the ordinary method of legislation without following a special procedure for that purpose laid down in the constitution. We will see how countries formulate rules for initiation and ratification of amendments and some other pertinent issues related to it under chapter three.

Certain Level of Entrenchment-It naturally flows from the supremacy of the constitution and the special procedures provided for its amendment. The special procedures for amending documentary constitutions amount to entrenching provisions. In other words, the fundamental importance of the constitution as the supreme law within a state dictates that it should not be susceptible to amendment in the same way as other laws. In addition to providing special procedures for amendment constitutions may prioritize provisions and provide different procedures or require different votes or even specifically preclude or prohibit some constitutional provisions or principles which they considered sacrosanct from the realm of amendment.⁸

Rule of law-As a supreme law, a constitution evokes respect due to law.⁹This can be achieved by incorporating issues that are intended to be regarded as rule of law. Concerning this K.C. Wheare stated that, constitution evokes the respect, affection, and obedience of the people in a way which no exclusively legal document can hope to do.¹⁰

2.3. Types of Constitutions

The preceding section gives us general insight as to what a constitution is all about. But all constitutions are not of the same type. Constitutions may be classified in a variety of different ways. Though there is no exhaustive basis and concrete method of classifying

⁸More about this issue see the discussion under section 3.3.2.5 infra.

⁹K. C. Wheare at Supra note 3, p.73.

¹⁰Ibid. p.74.

constitutions, mostly constitutions are classified in to different categories based on the *type of the constitution* it self as *written and unwritten*, based on its *amendment requirement* as *rigid and flexible*, based on the *type of government* established by the political system as *parliamentarian and presidential*, based on *the nature of state* to which the constitution applies as *unitary and federal*, based on *the method of assigning (election) of the head of state* as *monarchical or republican* .Dealing with each of these kinds of constitutions extensively is not the concern of this discussion. But let's have a bird's eye view of some of the classifications.

2.3.1 Written and unwritten Constitutions

Irrespective of the actual content of the constitution or the system of government within the state, constitutions may be written or unwritten, in the sense that they either exist or do not exist in a documentary or codified form. As regards constitutions classified in this way, C.F. Strong said, “a constitution generally called written is one in the form of a document which has special sanctity. A constitution generally called unwritten is one which has grown upon the basis of custom rather than of written law.”¹¹ Such a classification is regarded by the same author as a false distinction, because there is no constitution which is entirely unwritten and no constitution entirely written.¹² Israel and Great Britain are examples of countries with unwritten constitution whereas the majority of countries in the world have written constitution.

2.3.2. Flexible and Rigid Constitutions

Based on the procedures involved and the degree of complexity for their amendment, constitutions can be classified as rigid and flexible. An important issue closely related and corollary to the supremacy of a constitution is its rigid amendment procedure. Rigid constitution are those that are difficult or slow to change because of a prescribed process of amendment that is mostly detailed and lengthy in procedure as distinct from constitutions which can be amended by the legislature through the ordinary law making (legislation) process. Rigid constitutions require a special process during initiation and ratification and also require different stake holders for their amendment as distinct from normal legislations that are the day to day routine business of the legislature.¹³ Flexible constitutions on the

¹¹C.F Strong, *A History Of modern Political Constitutions*, G .P. Putnam's Sons, New York, 1963, p.80.

¹²Ibid.

¹³ Webster's dictionary at Supra note 1, p.21.

other hand, are those that may be amended easily usually through the procedure of normal legislation.

One thing that we should be cautious of the distinction between “rigid” and flexible” is that the terms are used to indicate differences of degree. It referred only to certain formal requirements in the legal process of amendment.¹⁴ K.C. Wheare noted that the terms “flexible” and rigid” should be used to distinguish constitutions not according to whether or not they require for their amendment a special procedure which is not required for ordinary laws, but according to whether they are in practices through the force of a variety of circumstances, easily and often altered or not.¹⁵

2.3.3. Unitary and Federal Constitutions

One of the functions of a constitution, as reflected in the previous discussion, is establishing the type of government the people wish to have and administer the country. The types of government established by the constitution may take various forms. It may be unitary, federal, quasi federal, confederal etc. But the most common types of governments in the world today are federal and unitary. Thus, based on the type of government established by the constitution, we can classify constitutions in to federal constitutions and unitary constitutions.

Unitary constitutions are features of unitary forms of governments. So, in order to understand what unitary constitutions are and what they regulate, it is better to see the manifestations of a unitary form of government. A unitary form of government may be defined as one in which the powers are concentrated in the hands of a central government.¹⁶As mere administrative units, there may be local governments. But they are left with meager power that can be taken away by the central government at any time. In a unitary form of government, local governments are not free from the control of the central government. They derive their power from the central government and as such are subordinate to the same in all respects.

As we will see below in detail, one of the features of a unitary government which distinguishes it from a federal form is that, in the latter form of government, there is a

¹⁴Ibid, p.2.

¹⁵Ibid, p.24.

¹⁶[www.Hubpages.com/hub/unitary-form-of government...](http://www.Hubpages.com/hub/unitary-form-of-government...), accessed on 30 August, 2010.

constitutional division of power between the central (federal) and unit governments whereas in unitary form there is no constitutional division except some form of delegation.¹⁷

The other feature of a unitary form of government that is most relevant for our discussion is the presence of only a single constitution common to both the centre and local governments. Here the central government is the supreme authority. Because of the concentration of power at the centre, local governments have no legislative power including constitution of their own. It is only a single constitution that is applied throughout the country and regulates what the local governments can do and can't do.

Before the country takes its current form (structure) under the federal dispensation following the overthrow of the Derg regime in 1991, Ethiopia was a unitary form of country. Local governments and administrative units that take the name of Awraja and Woreda were established. They were not constitutionally authorized to have their own powers and constitutions. Rather, they were mere administrative functionaries of the central government.

2.3.4. Federal Constitutions, their Features and the Concept of Dual Constitutions in Federal Systems

In order to have better understanding of federal constitutions, it is advisable to know some points about what federalism is all about and the reasons why countries opt for this form of government and why it is proliferated. The idea of dual constitutions and emergence of state (subnational) constitutions have a lot to do with federalism. To be specific, the development of these concepts (subnational entities with their constitutions) is the direct outcome of federalism. Federalism has been a major choice of government system for many countries. To date about 28 countries of the world that comprises forty percent of the world population are living under such an arrangement.¹⁸

The term federalism is believed to be derived from the Latin term “foedus” meaning covenant, pact or trust implying mutual agreement of a group of members to bind together

¹⁷Ibid.

¹⁸Ronald L. Watts, *Comparing Federal Systems*, 3rd edition, 2008, p.5-6.

by this covenant with a governing representative head.¹⁹ Daniel Elazar who is widely known as the father of modern federalism defines it as:

*The mode of political organization that 'unites' smaller polities within an overarching political system by distributing power among general and constituent governments in a manner designed to protect the existence and authority of both national and sub national political systems, enabling all to share in the overall systems decision making and executing.*²⁰

Federalism in this context is self rule plus shared rule. The key issues reflected here includes the presence of two tiers of (spheres) of government, the division of power among these orders of governments and creation of unity of the various constituent governments and the central government to materialize the federation. Ronald Watts conceived federalism as a normative term and defines it as the advocacy of multi-tiered government combining the desire to build effective and dynamic forms of integrated national government and the search for distinctive and local identity.²¹

From all the above definitions, we can understand that in a federal form of government, sovereignty is constitutionally divided between a central governing authority and constituent political units. In relation to this, Watts expressed that one of the characteristics of federations as a political system is the presence of at least two orders of government, one for the whole federation and the other for regional units, each acting directly on its citizens.²²

The arrangement should also result in the division of legislative, executive, Judicial and taxing power between the two tiers of governments so as to ensure a certain level of autonomy for both. In principle, matters that have a direct bearing and importance up on the local people should be left to the regional government where as those matters that affect

¹⁹D. J. Kriek, *Federalism: The solution?* (Pretoria, HSRC Pub. South Africa, 1992)p.1-10 as cited by Solomon Nigussie (PhD), *FISCAL FEDERALISM IN THE ETHIOPIAN ETHNIC BASED FEDERALISM*, (Wolf Legal Pub., Netherlands, 2008), p.31.

²⁰Daniel J. Elazar, *American Federalism; A view from the states*, 3rd ed. 1992, p.2.

²¹Ronald Watts at Supra note 18, p.5.

²²Ibid.

the interest of the whole nation like foreign trade, waging war and national defense have to be reserved for the federal government.²³

This being the general concept of federalism, now let's turn to look at a glimpse why federalism has gained increasing importance in the contemporary world. There are arguments favoring federal orders compared with completely independent state and centralized unitary state. Many reasons are suggested generally which include the following;

- Federations may foster peace by preventing wars and fears of war. States can form (join) a federation to become jointly powerful to dissuade external aggression and to prevent preemptive wars among themselves.
- Federations can promote economic prosperity by avoiding trade barriers and by creating one economic community.
- Federal arrangements may protect against central authorities by securing immunity and non-domination for minority groups. More importantly, it can accommodate minority nations who aspire to self-determination and the preservation of their culture, language or religion.²⁴

Federalism may also help constituent units to maintain their regional distinctiveness since it allows the closest institutional approximation to the complex multi-cultural and multi-dimensional economic, social and political reality there by helps them to fulfill their desire to make government more responsive to the individual citizen and to give expression to primary group attachments which provides the distinctive basis for a community's sense of identity and yearning for self-determination.²⁵

Due to a growing awareness of worldwide interdependence in an era whose advanced technology makes both mass destruction and mass construction possible, there is a pressure for larger political units from a desire for progress, rising standard of living, social justice and influence in the world arena. In addition to this, federalism's potential of giving sense of identity for distinct groups; certain level of autonomy for constituent units and results in

²³Solomon Nigussie, *Fiscal Federalism in the Ethiopian Ethnic Based Federalism*, (Wolf Legal Publishers, Netherlands, 2008), p.36.

²⁴Ronald Watts at supra note 18.

²⁵Ibid, p.6-7.

self administration, federalism is situated best to address the interest and desire of diverse groups especially in ethnically heterogeneous countries like Ethiopia.

2.3.4.1. The Concept of Dual Constitution in Federal Systems

The underlying concept in federal forms of governments is the existence of two tiers of government orders. The establishment of these two government levels is accompanied by the division of legislative, executive and judicial powers.²⁶ Legislative power at sub national level may be exercised in multi-faceted ways. In some federations where residual power is left to the states like US, states will have the right of legislation in all matters not specifically provided for the federal government. This power of legislation includes, among others, the power to enact their own constitution. As such, legal pluralism in a broader understanding and constitutional pluralism in a narrower sense rests up on the very idea of federalism. That is to say, federalism is inherently and inextricably intertwined with legal pluralism.²⁷ Robert F. Williams also asserted that the road to democratic pluralism might eventually pass through territorial federalism and pluralism is a precondition for true federalism.²⁸

In federations where legislative power for the states is provided in specified areas, the scope of legal pluralism may be narrower as compared to those federations that give a wide area of legislative jurisdiction to the constituent units. But still the concept of constitutional pluralism remains intact. However, this does not mean that always having constitutions at constituent level is mandatory requirement of a federal system. Therefore, although the presence of states with their own constitutions is not a necessary condition of a federal system, it is often the case.²⁹

Similarly, concerning the way we should understand state constitutions, Duchacek observed that while in the United States and Switzerland both the birth and subsequent modification of state constitutions confirm a two-way traffic in federal practices between

²⁶Ibid, p.83.

²⁷ Alemayehu Fentaw, *Legal pluralism in Ethiopia: Its promises and pitfalls*, Jimma University Journal of Law, vol. 1, No 1, P.2.

²⁸Robert F. Williams, *Comparative Sub national Constitutional Law, South Africa's Provincial Constitutional Experiments*, South Texas Law Review, vol.40, No.625, p.630.

²⁹Ivo Duchacek, *State Constitutional Law in Comparative Perspective*, Annals of the American Political and Social science, Vol.496, March 1988, p.128.

federal and state governments, in other systems, though labeled “federations,” state constitutions rarely reflect political assertions of regional autonomy from below. Instead, subnational constitutions in such federations may only represent a unitary or dictatorial delegation of some administrative powers to territorial sub units, a delegation that can easily be revoked by the central government. On the other hand, due to a federal political tradition, federal practices may flourish in some unions whose territorial components lack indigenous subnational constitutions as in Canada and Australia.³⁰ The idea here is that in some federations state constitutional practice (adoption, application and subsequent modification) has its own place, role and development independent of the federal constitutional practice. To the contrary, subnational constitutions in some federations are not instruments to assert regional autonomy per se. This as it may, constituent units in most federations have their own constitutions. Regardless of whether the constituent polities are called States, Estados, Cantons, Lander, Provinces, Pblasts or some other term, they have their own constitution.³¹

To conclude the discussion, the issue of dual constitution in federal systems is a natural consequence of self administration and more importantly the division of legislative power between the federal and state governments both of which are features of a federal system. However, existence of dual constitutions is not a feature of all federations across the world. Due to various factors and reasons attributed to the federal formation and the federal culture developed in the concerned country, constituent units of the federation may not have written constitution of their own at all or some of the constituent units in a federation may have while others do not. For example of all the states of SA, only Kwazulu Natal and the Western Cape have their own constitution. Only few provinces in Spain have statutes of autonomy. The document under the designation of state constitution may also vary that range in a continuum from a statute of autonomy in Spain to a separate ordinance document of state government under the federal constitution as in India and Canada to a separate and independent state constitution proper in USA and Ethiopia. Having this in mind, the next issue that we have to discuss here is the nature of federal and constituent unit constitutions in federal systems. The next subsections are devoted to the discussion of these concepts.

³⁰Ibid.

³¹ Ivo Duchacek at Supra note 29, p.136.

2.3.4.2. Federal Constitutions

As we remember in our previous discussion, federalism is a covenant (compact) between the central government and constituent units. It is an outcome of a negotiation that embodies many conflicting interests. The adoption and ratification of a federal constitution is the first step and a mandatory requirement to the formation of a true federation. This is because it is the sign post of the coming to an end of the negotiation process and reaching of an agreement on many areas especially the division of power between the federal government and constituent units. Every federal system is structured by a central constitution which divides power, established central institutions, prescribes the rules for resolving disputes and provides for a procedure for its own alteration.³² In conformity to this assertion, J.A. Jameson expressed that fundamental laws(constitutions) are expression of the sovereign will in relation to the structure of the government, the extent and distribution of its powers, the modes and principles of its operation and the apparatus of checks and balances proper to insure its integrity and constituted existence³³. Federal constitutions are embodying values that counteract the impulses of interests and passion.³⁴ Constitutions embody such values because they are the outcomes of a process of deliberation meant to identify matters of fundamental importance to the people and to place those matters in a constitution specifically to protect them from quotidian predations of pluralistic power struggle³⁵

There are some common themes that can be identified in the constitutions of most federal systems. One of the features is the prescription by the federal government of essential characteristics of sub national governments, including the basic civil and political rights which all citizens, considered nationally, are entitled to enjoy.

Issues of the scope of jurisdiction of sub national governments and of their inter relationship with the national or federal government have always been defined in the national or federal constitution. The scope of legislative competence, executive jurisdiction and taxing power as well as constitutional provisions governing inter governmental

³²Cheryl Saunders, *The relationship Between National and Subnational Constitutions*; Seminar Report: Subnational Governance, Konrad-Adenauer-Stiftung, 1999, p.,23.

³³John A. Jameson, *A treatise on Constitutional Conventions: Their history, Powers and modes of proceeding*, Chicago, Callaghan &Co.1887, p.84.

³⁴James A. Gardner, *The Failed Discourse of State Constitutionalism*, Michigan Law Review, vol.90, p.761.

³⁵ Ibid.

relations, collaboration and financial transfers have in most cases been set out totally in the federal constitution.³⁶

To sum up the discussion, federations are based on a “compact” or “covenant” negotiated between different interest groups. As a manifestation of the agreement to the bargain and more importantly to “delineate” the division of power between the federal government and the states, the terms of the agreement which establish the federal government and the states and which distributes power between them must be enshrined in a binding and supreme document - this being the federal constitutions.³⁷

The federal government and the states will remain autonomous within their respective spheres of jurisdiction, only when the authority of one do not depend on the other but when it is derived from something supreme to both of them.³⁸ This means that once the spheres of competence of the two tiers of government are incorporated in the higher law of the land supreme to both of them, one level of government can’t interfere in the autonomy of the other in contravention of the constitution that demarcates and assures their autonomy. In line with this assertion, R. Watts stressed that one of the characteristics of federations is the presence of a supreme, written constitution not unilaterally amendable and requiring the consent for amendment of a significant portion of the constituent units. It seems for this reason that countries incorporate a provision (clause) stating the supremacy of the federal constitution. Article VI section 2 of the US Constitution states that “this constitution and the laws of US which shall be made in pursuance thereof, and all treaties made or shall be made under the authority of US shall be the supreme law of the land...”

An important issue closely related and corollary to the supremacy of a federal constitution is its rigid amendment procedure. As R watts make it clear, federal constitutions should not be amended unilaterally either by the federal government or the constituent units and the consent of a significant portion of the constituent units must be obtained.³⁹ Concerning the involvement of both units of governments for amendment, Dr Assefa Fiseha also expressed

³⁶Ronald L. Watts, *Provinces, Lander, Cantons and States: Constitutional variation among subnational constitutions*, p.17.

³⁷Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia; A Comparative Study*, 2007, p.121.

³⁸Ibid.

³⁹Ronald Watts at Supra note 18 p.161.

in an interesting manner that if ultimate control over constitutional changes is in the hands of all the states, such a system based on unanimity seems to have not moved from an association of states to a federation, if for any amendment the consent of every single component unit is required. On the other hand, if only a vote of federal parliament is required, such a system makes the amendment process indistinguishable from a unitary system.⁴⁰

Maintaining the authorities and autonomy of both orders of governments' calls for the participation of the constituent units and the federal government in the amendment of the supreme federal constitution from which the authority of both orders of governments emanates. In order for the constitution to be a supreme law, it should not be easily alterable. Federal countries follow various amendment formulas for their constitutions. These differences may be reflected in the procedures they prescribe and the degree of states participation for any amendment.⁴¹ While in a few countries the people are directly consulted about constitutional reform through referenda and may even initiate it themselves, in most countries the role of the people in constitutional reform is exercised indirectly through their elected representatives. In some countries special majorities are required either in referenda or in parliamentary vote in order to protect the interest of minorities, be they ethnic, linguistic or territorial minorities.⁴² For example, Australia and Switzerland requires double majority for the passage of constitutional referenda.

As I have tried to express earlier, the degree of states participation in constitutional amendment varies across federations. In some federations, constituent units are given the right to initiate constitutional amendment. The Brazilian constitution provides that constitutional amendment may initiated by more than half of the legislative assembly of states.⁴³ Legislatures of the autonomous communities of Spain have the power to initiate constitutional amendment.⁴⁴ In Switzerland, popular initiative of constitutional amendment

⁴⁰ Assefa Fiseha at Supra note 37 p.127.

⁴¹ Ibid.p.125.

⁴² Anne Twomey, The Involvement of Subnational Entities in Direct and Indirect Constitutional Amendment within federations, Legal Studies Research Paper Series, prepared for the 7th world congress international association of constitutional law, Athens, Greece, June 11-15, 2007. Also available at [http://camlaw.rutgers.edu/statecon/workshop11greece2007/workshop p11/Twomey.pdf](http://camlaw.rutgers.edu/statecon/workshop11greece2007/workshop%20p11/Twomey.pdf)

p. 1.

⁴³ Constitution of Brazil, Art.60.

⁴⁴ Constitution of Spain, Section 166 cum. Section 87.

is permitted.⁴⁵The people may initiate a partial or complete revision of the constitution by collecting 100,000 signatures.⁴⁶

The constitution of some federations is amended primarily by the national parliament. For example, the Malaysian constitution provides that constitutional amendment may be made by a majority of two-thirds of the total members of each house.⁴⁷Here, there is no state involvement except in matters that affect the constitutional position of states. In Brazil, even though states are entitled to initiate amendment, approving the amendment must be done by three-fifths of members in each House of the national congress on each of two readings of the bill.⁴⁸In Germany, the basic law can be amended by two-third majority votes of both the Bundestag and Bundesrat of the German parliament without any direct participation of the Lander.⁴⁹

The most common method of constitutional amendment in federations is to require the approval of both the national parliament and a proportion of sub-national units. Especially, if the amendment relates to the whole document of the constitution or of those of particular importance to sub-national units, their involvement becomes mandatory. For example, art V of the U.S constitution provides that constitutional amendment may be initiated by the congress itself by being passed a two-third majority in each house of the congress. Once proposed, amendments must be ratified either by the legislatures of three-fourths of the states or by conventions in three-fourths of the states. A petition supported by a two-third of the member states is also sufficient to initiate proposal for constitutional amendment.

In the Ethiopian Federal Constitution, state councils have their role in the amendment and initiation for amendment of the federal constitution. Any proposal for constitutional amendment can be submitted for discussion and decision if supported by a two-third majority vote in either Houses of the Federal parliament (House of Federation or House of People Representative) or when one-third of the state councils of the member states of the federation, by a majority vote in each council have supported it. This means, majority vote of three state councils is sufficient to initiate proposal for amendment. The required vote and

⁴⁵Constitution of Switzerland, Art 138 and Art.139.

⁴⁶ Assefa Fiseha cited at Supra note 37, p.159.

⁴⁷Malaysian Constitution, Art.159.

⁴⁸Supra note 43.

⁴⁹Basic Law of Germany (1949), Art 79(2).

degree of participation of states during amendment varies according to the matter subject to amendment. Thus, the amendment of provisions of the constitution dealing with fundamental rights and freedoms, the procedure for initiation and the amending provision itself requires majority approval by all state councils in addition to a two third majority vote by both the houses of the federal parliament i.e. House of Federation and House of People's Representatives.⁵⁰ For the amendment of all other provisions of the constitution, in addition to a two third majority vote of the joint session of the HPR and HF, the majority vote by two third of the council of the member states of the federation (6 states) is requires.⁵¹

In Nigeria and Mexico too, constitutional amendment requires the approval of two-third majorities in each house or chamber of National Congress (in case of Mexico, those present and voting) in addition to the approval by more than half of the state legislatures in case of Mexico and a higher standard of approval of two third of the state houses of assembly in Nigeria.⁵²

2.3.4.3. Constitutions of subnational Units of a Federation

The existence of two tier governments with dual sovereignty is what underlies the very concept of federalism. From the sovereignty to administer their own affairs and establish their own government machineries, there emerges the power of subnational units to enact and implement laws on matters under their jurisdiction. One of the legislations and in fact the primary one that assures (supplements) their sovereignty and establishes the government is the state constitution. Even if the constitutions of constituent units are part and parcel of the total constitutional structure of federal systems and play a vital role in giving the system direction, sub national constitutions have been, and generally remain low visibility constitutions. Studies of constitutional federalism have tended to be almost exclusively top down looks at the national constitution and its federal features, rather than a bottom up look at the sub national constitutions themselves.

⁵⁰FDRE Constitution, Art104.

⁵¹FDRE Constitution, Art.105 (1 and 2).

⁵²Anne Twomey cited at Supra note 42.

Daniel Elazar reported recently that “we found little, if any, work being done to explore constituent state constitutional design in federal systems.”⁵³

There is precious little discussion in the literature on constitutional theory and discouragement about state constitutions as separate objects of inquiry. Concerning American state constitutions, one commentator has lamented:

*The explanation for the comparatively small amount of intensive professional and scholarly interest in at least the basic study of comparative state constitutional provisions lies to a great extent in the nature of the state constitutional documents themselves. This can be proved, for any one with the necessary time and patience, by reading the fifty states constitutions. With some exceptions, the state constitutions are notable as master pieces of legal draftsmanship on literary style.*⁵⁴

A system of constitutional federalism cannot be fully understood without analyzing the constitutional arrangements within the constituent units. This is so because state constitutions create the legal frameworks in which many of the basic regulatory decisions affecting citizens' lives are made. State constitutions are not only intrinsically important as legal frameworks for the implementation of public policy in the states, but they are also especially fertile objects of inquiry for theoretical discussion of key issues in the public law of a country. The institutional processes and decision making structures affecting, and affected by, state constitutions can be known by studying state constitutions. That is by understanding state constitutions and state constitutionalism, we can better understand the process in which fundamental sub national decisions are made and should be made. Moreover, coming to terms with the law, politics and economics, modern federalism requires coming to terms with the interstate aspects of law and politics and the basic framework within which interstate governmental decisions making is made is the constitution of a state.

Even if the presence of states with their own constitution is not a necessary condition of a federal system the practice of most federations in the world exhibits such a trend.

⁵³Daniel J Elazar, *Introduction: State Constitutional Design in Federal systems*, Publius; The journal of federalism, winter 1982, p.1-5.

⁵⁴Morris M. Goldings, *Massachusetts Amends: A Decade of State Constitutional Revision*, Harvard Journal on Legislation, Vol. 5,1968,p.373.

As such, all the fifty states of US, the twenty-six cantons of Switzerland, the ten German Landers plus West Berlin in a special category, the nine Austrian Landers,⁵⁵ the nine states of Ethiopia, just to list few examples, have their own constitutions. However, in some federations such as Canada the territorial component units have not enacted their own constitution. The twenty states of Venezuela and the states of Australia are on the way of having their own constitution.⁵⁶

Our examination and understanding of sub national constitutions depends naturally very much on our definition of what is and is not a constitution. However it is not as such simple to define what a sub national constitution is and should be because of many reasons which include the following among others;

The nature and issue of multi-sphere governance is evolving through time with various forms like decentralized unitary, confederation, quasi federation, federation etc All such arrangements surely have their own implications in the autonomy of states and their constitution.

The documents in the constituent units of some federations do not correspond to the definitions of a constitution proper. This is because either it may be drafted centrally to mirror some central doctrine of federalism like the Latin American federations of Argentina, Brazil and Mexico or is mere documents (instruments) of management like the Canadian provinces and Australian states. As regards the status of the autonomy statutes in Spain, Rosario Serra and Pablo Onate noted that the autonomy statutes are not really constitutions, but that they include characteristics of constitutions. The question of whether they are really constitutions is controversial in Spain.⁵⁷

This as it may, Ivo D. Duchacek defines subnational constitution as:

a document with a collection of principles and rules that define the constituent people and identify the sources, purposes, uses and restraints of public power,

⁵⁵Ivo D. Duchacek at Supra note 29, p.134.

⁵⁶Infra note 78.

⁵⁷Rosario Serra and Pablo Onate, *The Reform of the Spanish Subnational Constitutions: Rules and Regulations and Political Contexts*, International association of constitutional law 7th world Congress on Constitutional Law ; Subnational Constitutions in Federal Constitutional States , June 13, 2007 Athens, Greece.

*usually in the form of a bill of rights and liberties. Most constitutions also contain a preamble; a declaratory portion of a constitution that often glorifies the territorial community's past achievements and identifies its commitment to an ideology defined future. As a manifesto of nationalism or subnational territorial pride, the preamble addresses itself to the collective memories and emotions of the constituent people rather than only to the legislatures and constitutional lawyers. With its preamble and bill of rights, a constitution is more than an organizational chart, more than a power map.*⁵⁸

What we can understand from this definition is that a sub national constitution must be a written document incorporating rules and principles especially bills of rights and liberties as a source of authority, liberty and manifestations of sovereignty. The scope of application of the constitution is limited to the people of a territory mostly specified in the preamble proclaiming common values and territorial pride. Once the document that incorporates basic rules, principles, preamble and bill of rights is drafted (created) under the designation of a “constitution”, it becomes the supreme law, higher in hierarchy as distinguished from an organizational chart or mere power map.

Viewed from the perspective of this definition, the constitutions of the states of US have preamble that address itself to the constituent people saying “we the people of the state of..., Alaska, Arizona”, etc. They also have bills of rights and liberties provisions sometimes wider and more protective than their national counterpart. When we see the state constitutions of the Ethiopian federation, they do have preamble that address itself to the nation, nationality or people concerned. They have also incorporated the verbatim copies of bills of rights found under the federal constitution. Both the US and Ethiopian state (constituent unit) constitutions have basic rules and principles concerning governmental power, separation of power, organization of the government machinery at state level etc just to name a few.

2.3.4.4. Features of State Constitutions

Sub national constitutions of different countries have differing features attributed to different reasons. Concerning this issue, Ronald Watts commented that” the form and

⁵⁸ Ronald L. Watts at Supra note 36, p.138.

character of sub national governments, and hence of their constitution, varies throughout the world because of the variety of the contexts within which they have been established and operate.⁵⁹

The amount of “space” that sub national constitution makers have for innovation, the content of sub national constitution, the process of their creation and change, the degree of participation given to local governments etc are not uniform in the constitutions of constituent units of different federal systems. Investigating all these issues in a greater detail under the state constitutions of different federal systems is out of the scope of this paper. But to have clear understanding about the features of state constitutions, we will see some points.

From the perspective of their origin, the sub national constitution of some federations predates the constitution of the federal government. Before the creation of the national constitution in 1887 at Philadelphia, thirteen states of the US federation were in possession of their own constitution. All but the original thirteen states come in to the union with their constitutions after the establishment of the national (federal) constitution. The same holds true for federal Germany where all subnational constitutions predate the basic law. In Austria too, some of the constitutions of the states have predated the federal charter.⁶⁰ In other federations like Ethiopia and South Africa, states come to have their constitutions after the formation of the federation and the federal constitution. As we will discuss later, this difference in origin is attributed to the kind of federal formation.

If the federation is created by the aggregation of the previously independent states, like US and Germany, the constitution of states may predate the federal constitution and the reverse will be true if the federation is created by the segregation of a previously unitary state like Ethiopia. The kind of federal formation has its own impact not only in their origin but also in their content and substance.

In terms of length, state constitutions in most federations tend to be much more detail oriented than the federal constitution. State constitutions cover a broader range of subjects and provide greater details of what the government can and can not do than does the federal

⁵⁹Ivo. Duchacek at Supra note 29, p.12.

⁶⁰Ibid, p.132.

constitution.⁶¹ Some scholars argue that state constitutions must be of greater length because they encompass a wide range of institutions and powers, caused, in part, by the need to structure and limit the powers of governments that inherently possess all governmental powers of the state government.⁶²

Christopher W. Hammons suggested four reasons why the state constitutions in US are longer than the federal constitution. First, while the US government is a government of limited power, state constitutions deal with a much broader range of powers and institutions than found at the national level. Second, state constitutions have more extensive bills of rights, which are typically placed at the beginning. Third, state constitutions incorporate a larger number of statutory type provisions. The final reason is the higher amendment rate of state constitutions.⁶³

In terms of length the Alabama constitution, for example, has 5204 provisions, about 22 times longer than the 240 provision of the US constitution.⁶⁴ The state constitutions in Ethiopia are longer than the federal constitution after they are revised in 2001.⁶⁵ For example, after revised in 2001, the constitution of the Gambella People's Regional State has 123 articles, the SNNPR constitution has 128 Articles, and the constitution of Benishangul Gumuz Regional State has 121 articles. All of them are longer than the federal constitution. We will see the reasons for the length and the content of sub national constitutions generally in the next unit.

In terms of their form and content, state constitutions in most federations may not be regulated and guided by the federal constitution. The US state constitutions are classic examples where they are left unregulated except the guarantee clause that forced them to have a republican form of governments.⁶⁶ The same holds true for the constitution of the

⁶¹James A. Gardner cited at Supra note 34, p.761-64.

⁶²John Kincaid, *State Constitutions in Federal systems*, Annals of the American Academy of Political and Social Science, 1988, vol.12, p.12.

⁶³Christopher W. Hammons, *State Constitutional Reform: Is It Necessary?* Albany Law Review, 2000-2001, vol. 64, p. 1329-33.

⁶⁴Ibid.

⁶⁵Tsegaye Regassa, *State Constitutions in Federal Ethiopia: A preliminary Observation* (A Summary for the Bellagio Conference, March 22-27, 2004) p.7.

⁶⁶The US constitution, Art V, section IV.

Australian states. Australia is an extreme example in which sub national units have been left to experimentation with different constitutional form.⁶⁷

On the other extreme, the South African national constitution regulates the form and content of sub national constitutions through the requirement of certification by the Constitutional Court. Regulating the relationship between local government and the state government is mostly the jurisdiction of state constitutions. However, this is always not the case as there are federations like India, Germany and South Africa that recognize local governments and regulate their relationship even with the federal government under the federal constitution.

The other feature of sub national constitutions in most federations is their flexibility for amendment and the availability of various possibilities for amendment (revision). But, even then there are variations in allowing citizen initiative, popular referendum, holding conventions etc. From the institutional government structure point of view, in following a tripartite division of power between the legislature, the executive and the judiciary, the state constitutions of some federation like US and Ethiopia follow the federal pattern. To the contrary, some federations like India and South Africa have avoided full duality in the judiciary.⁶⁸

2.4. Ways of Federal Formation and its Implication on State Constitutional Making

I have discussed earlier that formation of federalism is one of the factors for the creation of sub national (state) constitution though it is not always the case. I have also discussed the different features in form and content of sub national constitutions and I have tried to highlight that the difference in form, content and degree of regulation of the federal constitution on state constitutions is partly attributed to the process of federal formation. This sub section is devoted to the discussion of this issue.

A federation may be created in two ways. The first way of federal formation is by aggregation (coming together) where a number of previously independent autonomous units agree to merge in order to form a single autonomous unit while maintaining, at the

⁶⁷John A. Jameson cited at Supra note 33, P. 30.

⁶⁸Ronald L. Watts cited at Supra note 36, P. 17.

same time, their regional autonomy.⁶⁹ The USA, Swiss and Canada federations fall under this category.⁷⁰

The second way of federal formation is through the process of devolution of a previously single and unitary government to create new members or self governing entities.⁷¹ Belgium, Spain, Ethiopia and South Africa have used this system.

In devolutionary or holding together types of federations, the constitutions of the sub national governments have usually been embodied within the federal constitution. Here, sub national constitutions have sometimes simply been set out in statutes of the national government.⁷² For example, in the 1996 constitution of South Africa, the broad frame work for provincial governments is set out in chapter 7 of the national government and provinces are required to comply with certain stipulations in the national constitution and be so certified by the constitutional court. In line with this assertion, Art 56(2) (b) of the FDRE constitution authorizes the states to enact and execute the state constitution and other laws. In a more mandatory manner, Article 50 (5) of the constitution commands the state council to draft, adopt and amend the state constitution. If the federation has been created instead by the aggregation of previously separate entities, the federal (uniting) constitution may include few minimum requirements.

2.5. Elements of an Ideal State Constitution

As discussed earlier, state constitutions in most federations are detailed and long. There are scholars who argue favoring their length from the point of view of addressing social needs, regulating local government, providing expansive list of bill of rights and protection thereof, enumerating the powers and functions of state government. To the contrary there are arguments saying that because of their length, state constitutions often look like super legislation, not sacred texts. They further argue that a constitution is no more than the skeleton or essential frame of orderly government.⁷³ So, it should contain only certain fundamentals. Even if it is difficult to determine as to what points /fundamentals/ to

⁶⁹Solomon Nigussie cited at Supra note 23, p.17.

⁷⁰Ibid.

⁷¹Ibid.

⁷²Ronald L. Watts cited at Supra note 36, p.13.

⁷³Elements of Democratic government, New York, Oxford university press, 1947, p.17.

include in and exclude from the constitution, Judge Cooley identified five “basic elements of the constitutional pattern” as follows.⁷⁴

1. A general framework of government to be designed.
2. Declarations of the qualification for right of suffrage
3. Separation of power between the legislature, the executive and the judiciary and checks and balances
4. Recognition and regulation of local government as a political and administration system.
5. Declaration of rights for the protection of individuals and minorities.

Some scholars add another element in addition to the above mentioned features – provisions for its amendment.

2.6. Purposes of State Constitutions

States through the instrumentality of their constitution may act as “local laboratories” in the federal system of government. State constitutions have always expressed regional ideals in a creative way, fascinated experimentation in government and provide unique views of the social contract or innovative solutions to local problems. According to Lawrence Schalm, local experimentation with social compact is justified because there emerges a wide range of issues in which the dominant interest in any state can act as if they had state wide consensus behind them. These include some substantive issues in which the welfare or interest of the bulk of a state’s citizenry are clearly involved.⁷⁵

Concerning the importance of states as “social experimentation”, Brandeis commented that to stay experimentation in things, social and economic, is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous state may, if its

⁷⁴David Fellman, *What Should a State Constitution Contain* on a Collection of readings on State constitutions, Their nature and purpose, prepared by Montana Constitutional Convention, p.45.

⁷⁵Robert B. Dishman, *Essential Function of State Constitutions on a collection of readings on state constitutions, their nature and purpose*, prepared by Montana constitutional Convention Commission, p.30-32. For detailed purposes of a constitution, see also Sunstein, R. Cass, *Designing Democracy: What Constitutions Do*, oxford university press, 2000, p.54-67, p95.

citizens choose, serve as a laboratory and try novel social and economic experiments with out risk to the rest of the country.⁷⁶

One of the advantages of federal arrangement is fostering economic development by creating inter state competition and by exchanging best experiences between states. An analyst of the Swiss federalism gave the following description:

*The Swiss cantons are the democratic workshops of Europe, on their twenty five anvils are hammered out almost every conceivable experiment in political mechanics; and if a particular experiment proves successful, it is adopted by one canton after an other until it ultimately receives a definitive consecration by becoming part of the federal constitution, which is indeed, largely molded on cantonal experience.*⁷⁷

Modern social, economic and environmental rights are on sub national constitutional agenda, modern general welfare rights need quick response and they impose on sub national governments more initiative, responsibility, planning and action. Emphasizing the need for area specific and particular paradigm of constitutionalism, Rousseau on social contract says the same laws can not be suitable to so many diverse provinces which have different customs, live in contrasting climates and which are incapable of enduring the same form of government. Similarly Michel Rosenfield argued, in a 'Founding', the most important thing is the will of a specific society that is contingently and situationally defined. Only by recognizing and respecting this contingent and situated nature of the general will at a particular place in a particular time can all the elements of a society truly be accounted for.⁷⁸ The role of state and local institutions in public policy has been augmented. To the extent intra state decision making takes place within the context of state constitutions and their respective constitutional law, the pertinence of state constitutionalism seems unavoidable, and even urgent. State constitutions are useful to govern state and local political institutions which are helpful to achieve the objectives of state governance. State constitutional discourse would empower sub state political units such as local governments to participate in policy decisions and to provide their own sets of

⁷⁶Dissenting Judge in the case between New Castle Ice Co. vs. Liebmann

⁷⁷Simon Deplogie, *The Referendum in Switzerland XIV* as cited by Ronald F. Williams on supra note 2, p.628.

⁷⁸Michel Rosenfield, *The Identity of the Constitutional Subject*, Cardozo Law Review, vol. 16, p.1049.

checks on the exercise of power by state institutions. State constitutions can also strengthen federalism when states “articulate and live by standards that suit their different needs.”⁷⁹

In addition to the benefits discussed above, state constitutions have the following purposes. State constitutions are the expressions of sovereignty of the people. Government exists by the consent of the people. All ultimate sovereign power is vested in the people who ordained and established the constitution and who by this document allocated the spheres of government authority between the central government and the states. State constitutions are enacted by the people of the state as a means of exercising their power and as a means of discharging the duty imposed upon them. The people of each state are vested with the constitutional power and indeed, the duty to fashion a system of government effective within the state’s territorial jurisdiction.

The other function of state constitutions is organizing and delineating the power of government. The government is to be subject to such restraints as the people see fit to improve as well as to the restraints resulting from the federal character of the system. State constitutions are also used to reaffirm the rights protected under the federal bills of rights and to give an expansive protection to the rights of citizens. This helps citizens to have double protection and wider protection by taking the protection under the federal constitution as a floor.

To summarize the discussion, it has become common place for autonomous, democratically self governing populations to adopt rules and principles for their own collective self governance in the form of a constitution. As a result, the spread of federalism has, predictably, been accompanied by a proliferation of subnational constitutions or documents that can fairly be described as such which are found, for example, in the states of US, Australia, Ethiopia, Lander of Germany and Austria, Cantons of Switzerland. Concerning their importance an author expressed that the existence of subnational constitutions for component units may promote stability, enabling the federation to better manage conflict. It gives increasing political flexibility for political actors to make concessions that they can’t make at the federal (national) level and provide alternative political forums to articulate

⁷⁹Michael G. Colantuno, *Comment, The Revision of American State Constitutions, legislative power, Popular Sovereignty and Constitutional Change*, California Law Review, 1987, vol.75, p.1473 and 1510.

subnational demands and legitimate dissent for minorities when specific accommodation and adaptation of the federation is required.⁸⁰

⁸⁰James A. Gardner, *In Search of Subnational Constitutionalism*, Buffalo Legal Studies research Paper series, prepared for the 7th International Association of Constitutional Law, Athens, Greece, June 11-15, 2007.

Chapter Three

3.1. Constitutional Amendment Methods and Practices

Fundamental laws (constitutions) are expressions of the sovereign will in relation to the structure of government, the extent and distribution of power, the modes and principles of its operation, and the apparatus of checks and balances proper to insure the government's integrity and continued existence. As an expression of the sovereign will (the desire of the people), constitution are usually reflections of the compromises of conflicting interests in terms of social, political and economic spheres. As some authors also expressed, constitutions tend to embody or reflect or protect the social opinions of those who frame them.¹ As such, it is a platitude that constitutions are the products of their time.²

But it does not mean that constitutions adopted few years ago are not relevant few years later. Rather, this calls for mechanisms that help us to adapt the constitution with the change in time and circumstances. One of such mechanisms is *constitutional amendment*. It is, therefore, the concern of this chapter to deal with issues like meaning and scope of constitutional amendment, the need to amend a constitution, various methods of amending constitutions and assessment of constitutional amendment procedure of some countries.

3.2. Meaning and Scope of Constitutional Amendment

Reforms or changes to a constitutional document can be undertaken in various ways. Beginning from replacing an old constitution by a new one in rare cases, changes to a constitution can take place through revision or amendment. There is, however, a blurred distinction between the last two concepts.

So, it is necessary to know what kind or degree of change in the constitution exactly counts as amendment and most importantly what distinguishes it from revision. We shall deal with such issues primarily by analyzing what the concept amendment means.

Black's Law Dictionary defines the word "*amendment*" as change or modification for the better. However the nature of modification or change is disputable. In reality, the term amendment in modern constitutional law is applied to imply not only "change" or

¹ K.C. Wheare, *Modern Constitutions*, oxford university press, London, 1960, P.102.

² Ibid, P.103.

“modification” for the better but also alterations, additions, substitution and repeal in a wider context.

A constitutional amendment is a change to the constitution of a nation or a state. Amendments have been defined to be *changes that merely improve the current constitutional scheme of government*. Here, it is pertinent to see what distinguishes it from revision since both of them results in change to the constitution. While no ‘bright line’ separates revisions from amendments, revision is meant to be a more qualitatively and quantitatively substantial change in the constitution.³ Revision can mean either the adoption of a new constitution or a substantial alteration to the principles, rights and governmental structure of an existing constitution. The revision process is more lengthy and complex than the amendment process. Revision can be expressed in short as fundamental constitutional changes or total replacement. To the contrary, for legal, political and institutional reasons, successful amendments tend to be narrow in scope, specific and less controversial than revision.⁴

Michael G. Colantuno expressed the distinction between “revision” and “amendment” as a matter of degree rather than of kind since both result in the adoption of new constitutional language.⁵ The term “amendment” typically refers to changes to one or a few provisions, usually related to a single subject. The term “revision,” on the other hand, refers to more pervasive changes ranging from the drafting of an entirely new document to changes that alter multiple provisions and touch up on multiple subjects.⁶

In the same token Gerald Benjamin argued that one of the fundamental principles that should guide constitutional change is the incorporation of separate and distinct provisions and procedures for constitutional revision and constitutional amendment.

The reason for the incorporation of separate provisions specifically for amendment and revision, as propounded by the writer, is that amendment and revision are not the same.⁷

³Bruce E. Cain and Rogger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, P.6.

⁴Ibid.

⁵Michael G. Collantuno: *The Revision of American State Constitution: Legislation Power, popular sovereignty and constitutional change*, Jul. 1987, *California Law Review* Vol. 75, No.4, P.1478.

⁶ Ibid.

⁷Gerald Benjamin, *Formal State Constitutional Change Process*, a summary derived from a larger empirical work on state constitutionalism to be published in connection with state constitution for the 21st century, Rutgers law school, Camden, New jersey P. 1.

Practices in the state constitutions of US shows many evidences how amendment and revision are treated differently. As we will discuss in detail later on, the legislature has no similar role for initiation of amendment and revision. While the legislature in each of the fifty states may propose an amendment by fulfilling the minimum required vote provided in a given state, only six states allow a revision to be proposed by the legislature. In terms of approval too, in every state but Delaware, an amendment proposed by the legislature becomes law only when ratified by the electorate. However, ratification process of revision is time consuming, expansive and more procedural.⁸ To distinguish by scope and subject matter those changes that can be achieved by the less cumbersome amendment process from those that can be achieved solely by revision procedures, some courts have also tried to place a substantive limit on amendment proposals called “non revision requirement”⁹, which means that a proposed amendment should not be too wide in scope that forces the revision of many constitutional provisions.

In line with this, some scholars like Bruce E. Cain and Rogger G. Noll recommend that constitutional provisions that establish individual political and human rights should be changed only through the revision process, while provisions about the details of governance institutions should be subject to change by an easier amendment process.¹⁰

In Ethiopia, the word ‘amendment’ is written under Article 104 and 105 of the federal constitution that deals with ‘*initiation of amendment*’ and ‘*amendment of the constitution*’ respectively. In the same way, all state constitutions contain the word amendment. But none of these constitutions define the meaning and determine the scope (subject matter) of amendment. It is not clear as to whether the concept of amendment in Ethiopia under the federal and state constitutions is wider enough to include revision or substitution of the whole constitutional document according to the amendment procedures in the respective constitutions or is limited to connote minimal changes of one or few provisions.

So far we have discussed the two commonest ways of effecting constitutional change namely amendment and revision. However, there is also another possible way for

⁸Ibid.

⁹Ibid.

¹⁰ Bruce E. Cain and Rogger G. Noll cited at Supra Note 3, p.1.

constitutional reform or change that may result in the adoption of a new constitution or replacement of an existing constitution by a new one. This is through revolutionary constitutional change. As opposed to a change accomplished in accordance with written constitutional provisions and textual authority, revolutionary constitutional change is conducted by force or violence.¹¹ The American Revolution is a prime example of revolutionary constitutional change. If revolutionary change is an outcome of violence and revolt, it behooves to question how it derives legal force and become binding. The main requirement for the acceptance of revolutionary constitutional change is popular ratification or approval of the outcomes by the majority. The fact that revolutionary constitutional changes have the majority support does not mean that the changes on the processes were legal or had legal basis. What gives them moral and legal force of constitutional regime is popular ratification. The American constitution that is the outcome of a revolution is law, despite the absence of legal authority in the constitutional convention to draft it because it was ratified.¹² To sum up the discussion of this part, a constitutional revision makes substantial, basic, fundamental changes in the plan of government. It makes extensive alterations in the basic plan and substance of the existing document which attains objectives and purposes beyond the line of the present constitution.¹³ Constitutional revision or change is a comprehensive overhaul in the institutional arrangements and of the constitution but constitutional amendment is an option to fine-tune and alter some provision of a constitution with a view to make it compatible with the current societal need.

¹¹Mickael G. Collantuno cited at Supra note 5, p.1496.

¹²New York Times, 1966, p. 28, column 6 as cited by Michael G. Colantuno, supra note 5, p.1497.

¹³Opinion of the justices, 264, A2d 343, 364, Delaware, 1970.

3.3. The Need to Amend a Constitution

“If ever a set of law was considered to be permanent, it was certainly the Ten Commandments that Moses brought down from Mount Sinai”.

John R .Ville

As constitutions are the product of their time, not every constitutional procedure can with stand the test of time. True, highly stable constitutions can provide more durable protection of individual rights and other benefits that flow from enabling citizens to take actions in reliance on the stability of government institutions. However, it is equally important to note that malleable constitutions can be more innovative and responsive to changes in society. K.C. Wheare expressed that the forces which cause constitutions to be changed may operate in one of two ways.¹⁴ The first case is *change in circumstances* which, of themselves, do not lead to any actual change in the wording of the constitution but which cause the *constitution to mean some thing different from what it used to mean* or which disturb its balance. The second way is that “forces” produce circumstances which lead to a change in a constitution either by the process of formal amendment or through judicial decision or by the growth and establishment of some custom or convention of the constitution.¹⁵ We can understand two basic concepts from the two reasons suggested above for constitutional change. The first reason relates to factual changes in economic, social and political life of the people that might have implications for the context of a constitution. Such changes include expansion of territory, population growth, economic restructuring, and an external threat to sovereignty or simply improvement in knowledge that have significant implications for designing governance institutions.¹⁶

The second reason propounded by K.C. Wheare tells us the “various ways” for changing the constitution in responses to circumstantial changes. These methods include formal amendment, judicial decision, custom, or convention etc. We will discuss the various ways of constitutional amendment mechanism in the next sub section.

¹⁴K.C Wheare cited at supra note 1, p. 103.

¹⁵Ibid, p.104.

¹⁶Bruce E. Cain and Rogger G. Noll cited at supra note 3, p.21.

The concept of popular sovereignty is also one of the reasons for constitutional amendment. Popular sovereignty, a deep-rooted concept in the American constitutional tradition, required that constitutions be written by a popularly selected convention, rather than the legislature, and then ratified through a process that elicited popular consent – ideally in a referendum. Accompanied by John Locke’s argument that entitles the people the right to overthrow a corrupted government, Americans institutionalize the power to change the constitution. This included not only replacing the constitution but formally amending it.¹⁷ In conformity to this expression, John Austin also argued that the power to amend a constitution is a fundamental political power; it is the essence of sovereignty.¹⁸

In addition to the reasons stated above, there are some more reasons that necessitate constitutional amendment. An imperfect but correctable (educible) human nature is one of the premises. Originally, the amendment process was predicated on the need to compensate for the limits of human understanding and virtue. In a sense, the entire idea of a constitution rests on an assumption of human fallibility, since, if humans were angels, there would be no need to erect, direct and limit government through a constitution.¹⁹ Fallibility is part of human nature. So provisions in constitutions have to be made for altering institutions after experience revealed their flaws and unintended consequences.

Rhys M. Blavier, in his writing, “we need to amend the constitution or America is doomed”, expressed some developments that may require constitutional amendments for proper social regulation. *He said,*

We need to amend a constitution to ban gay marriage because people getting married to show their love of each other is an abomination... and because the idea of two guys or two chicks making out each other is just gross... and can not stop thinking about what it would be like to try it. We need to amend the constitution to ban the burning of American flag except the bay scouts... we need to amend the

¹⁷Donald S. Luth, *Toward a Theory of Constitutional Amendment*, American political science review, vol. 88, No2, P.356.

¹⁸John Austin, *Lecturer on jurisprudence or the philosophy of positive law*, (London, clauses and sons), 1885, p. 261.

¹⁹*Ibid.*

constitution to ban abortion because the wealthy can always find doctors to take care of their wives, mistresses and daughters.”²⁰

The various causes and factors that necessitate constitutional amendment (change) are applicable equally for both state and federal constitutions. But state constitutional amendments come about for other reasons. As I have already discussed in chapter two, state constitutions tend to contain much more detail than the federal constitution, and many amendments are necessary to correct technical defects or instances where specificity has been rendered obsolete or unworkable by the passage of time. Amendments to remove or create new limits on legislative action are a popular subject, as are amendments to restructure executive (judicial) branches to reflect demographic, economic and other changes.²¹ Generally, modesty on the part of constitutional designers requires them to acknowledge that even their best efforts may need to be adjusted to take account of new circumstances, new ideas, or new information.

Demands for constitutional reform may also emerge whenever alternative procedures appear to advance rule of law, democracy, good governance and constitutionalism. The demand by the majority of the people in a country to improve its own situation through constitutional reform may also justify reform of the constitution.

The idea of Bjorn Erik Rasch and Rogger D. Congleton may help to strengthen the discussion about the need for constitutional amendment. They expressed that political interests are not constant over time, nor are all institutional structures equally effective at advancing the shared interests of the electorate.²² They argued further that a nation’s citizenry may want to modify their system of governance as they learn about unintended unexpected and unwanted consequences of their present institutions.²³

As we can see below, the Rhode Island’s Dorr rebellion demonstrates how changing social and political realities may create unwanted consequences to the present situation and the

²⁰Rhys M. Blavier, *We Need to Amend a Constitution or America is Doomed*, last free voice, www.Worldpress.com/2009/04- accessed on September 25, 2010

²¹Supra note 17.

²²Jorn Erik Rasch and Roger D. Congleton, *Amendment procedure and constitutional stability*, p. 359.

²³ Ibid.

way citizens react to rectify constitutional vices in the absence of proper changing mechanisms. Till 1841, Rhode Island was governed under the colonial charter of 1863 that restricted suffrage to a small class of landowners, apportioned seats in the legislature in a manner that failed to reflect the population shifts of almost two centuries, and concentrated political power in the legislature at the expense of the executive and judicial branches.²⁴ Because of the refusal of the political leadership and small electorate of the time to allow constitutional change, the citizens tried to reform under the right of revolution stated in the declaration of independence. Accordingly, the Rhode Island suffrage association called a constitutional convention and drafted a constitution that was approved in an election.²⁵ The election resulted in two vying governments – the government established by the former “people’s constitution” headed by Thomas w. Dorr and the charter government. After struggle, the charter government troops won the skirmish and the government drafted a new constitution that broadened suffrage and lessened the inequality of legislative apportionment. It was, then ratified by election.²⁶ This incidence teaches us at least two basic concepts in relation to constitutional change.

First, the need to reform the constitution so as to make it compatible with the socio political realities of its time is at the centre of constitutional change. As Gerald Benjamin wrote, the process of altering the basic arrangements of governance may itself be salutary for citizens in democracy.²⁷ Thomas Jefferson also wrote in 1816 that each generation has a right to choose for itself the form of government it believes most promotive of its own happiness.²⁸ The second thing that we can learn from this above incidence is that there must be some means of constitutional change short of violent rebellion; Sanford Levinson asserted that amendments will be necessary to remedy defects and it will be better to provide for them, an easy regular and constitutional means than to trust to chance and violence.²⁹

²⁴Michael G. Cullantuno cited at Supra note 5, p.1476.

²⁵Ibid.

²⁶Ibid.

²⁷Gerald Benjamin cited at Supra note 7.

²⁸Adrienne Koch and William Paden (eds.), *The Life and selected writings of Thomas Jefferson* (1994), p.575 as cited by Gerald Benjamin Supra note 7, p.1.

²⁹Sanford Levinson, *Responding to Imperfections; The Theory and Practice of Constitutional Amendment*, Princeton university press, 1995 p.3.

K.C. Wheare expressed that the amending process in most modern constitutions is aimed at safeguarding one or more of four objectives.³⁰ First, the constitution should be changed only with deliberation, and not lightly or wantonly. As I discussed earlier, this argument has its source from the consideration of the constitution as a supreme law, an expression of the sovereign will and any change or amendment to it should not be made without deliberation with the people. The second objective that is very much related with the first is that the people should be given an opportunity of expressing their views before a change is made. The requirement is far more than merely informing the people as to the constitutional change supposed by the legislature or few interested groups. Rather it is to get the view or idea of the general public. Third, in a federal system the powers of the units and of the central government should not be alterable by either party acting alone. The fourth objective that an amendment process sought to achieve is that individual or community rights should be guarded.

George Washington also expressed in his letter to Bushrod Washington as regards the importance of putting an amendment mechanism saying:

*The warmest friends and the best supporters the constitution has, do not contend that it is free from imperfections; but they found them unavoidable and are sensible if evil is likely to arise there from, the remedy must come here after. Fortunately there is a constitutional door open to such remedies.*³¹

Before summarizing our discussion concerning the importance of constitutional change through amendments, it is better to remember the eloquent expression of Thomas Jefferson:

Some men look at constitutions with sanctimonious reverence, and deem them like The Arc of the covenant, too sacred to be touched... But I know also, that laws and institutions must go hand in hand with the progress of human mind. As that becomes more developed more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with time we might as well require a man to wear still the coat

³⁰K.C. Wheare cited at Supra note 1, p.29.

³¹Supra note 28.

*which fitted him when a boy, as civilized society remain even under the regime of their barbarous ancestors.*³²

3.4. Constitutional Amendment Methods

As has been discussed earlier, the trade-offs between constitutional rigidity and flexibility is not simple to determine. Constitutions are designed to restrict the current and future domain of possibilities. They can promote efficiency by decreasing transaction costs, reducing uncertainty and creating mutual expectations. However, like other institutions designed to promote and sustain collective action, constitutions must balance the efficiency created by their constancy with the need to adapt to changing external circumstances. The best constitutional device serving as a window in to political and constitutional theory and reality to bring change is constitutional amendment.

Using amendment mechanisms to maintain the balance between rigidity and flexibility is not new. The innovation of an amendment process, like the innovation of a written constitution, has diffused throughout the world to the point where less than 4% of all national constitutions lack a provision for a formal amending process.³³

However, there is no single common standard to effect constitutional change. There are many ways with their own sets of procedures to bring about constitutional change. The variation in the methods and procedures are attributed to many reasons. Many constitutional provisions are means of interest balancing between the governor and the governed, the minority and the majority, and between the three branches of government as between themselves in the form of checks and balances etc. Protection of and regulation of some of the constitutional norms, values and interests which are of greater importance is also cause for differences in their amendment procedure.

Bruce E. Cain and Roger G. Noll suggested two reasons for the application of different methods for constitutional change and more importantly for making laws at the top in the

³²*The writings of Thomas Jefferson* (Paul L. Ford ed.), New York G.P Puntana son's, 1899, p.42-43 as cited by Lawrence Schalm, *State CONSTITUTIONAL AMENDING, INDEPENDENT INTERPRETATION AND POLITICAL CULTURE, A CASE STUDY IN CONSTITUTIONAL STAGNATION*, DePaul Law Review, 1994, V.41, p.269.

³³Donald S. Luth, *Principles of Constitutional Design*, Cambridge University press, 2006, p.145.

hierarchy i.e. constitutions more difficult to change.³⁴ First is the idea that temporary majorities should not be able to pass laws that weaken fundamental principles of governance, such as existence of a democratic form of government or the basic rights of citizens second is the idea that society benefits if citizens can commit to and rely on stability in some aspects of governance.

Having this in mind, as we can remember in the discussion of the previous section, the concept of “constitutional change” encompasses not only amendment but also revision and revolution each of which has its own features and follow distinct courses. Not all constitutional change takes place through the formal mechanisms for change prescribed by constitutions. Changes can also occur informally, through changes in constitutional interpretation, constitutional construction, or constitutional practice.³⁵

In line with assertion, Gerald Benjamin expressed that constitutional change in democracies occur in two ways: by altering the meaning of the document, through interpretation or by altering the text of the document through amendment or revision. Thus, based on all the above expressions, methods for constitutional change can be broadly classified in to two. These are formal and informal amendment methods.

3.4.1. Informal Means for Constitutional Change

The substance and message of a constitutional text may be changed informally without the help of the amending formula and the procedures set forth under it. Such informal mechanisms include judicial interpretation, durable legislation, usage and convention or some aggressive (unlawful) means like political adaptation, corruption and fiat. Thus, we can classify informal mechanisms of constitutional reform in to lawful (legal) that includes the first group of the above list and unlawful (irregular) that consist the second group. In formal mechanisms that fall under the lawful or legal category are also called by some authors as implicit change because, as we see below, they result in change of constitution without changing the text.

³⁴Supra note 3, p.2.

³⁵G. Alan Tarr and Robert F. Williams, *Foreword: Getting from here to there: Twenty First century Mechanisms and opportunities in State constitutional reform*, Rutgers Law Journal, Vol. 36 p. 1075 see also, K.C. Wheare supra note 1, p.146, 178, Benjamin Eric Rasch and Rogers O. Congleton, supra note 21, David A. Strauss, *The Irrelevance of Constitutional Amendment*, Harvard Law Review, vol. 5, Mar 2001, p.1469.

I. Judicial Interpretation: A constitutional framework may be substantially reformed by means of judicial interpretation. True, courts cannot amend a constitution. They cannot change the words.³⁶ But they may introduce change through their interpretation of the meaning of the words. An example is the landmark *Marrbery vs. Madison* decision of the US Supreme Court in 1803 through which the principle of judicial review was established.³⁷ In countries that entrusted the power of judicial review to their ordinary courts, it is the function of judges to decide what the constitution says if there is some conflict between the law of the constitution and some other law.....action. In doing so, they must determine the meaning not only of the rule of ordinary law but also of the law of the constitution.³⁸ Robert. Williams also expressed that evolution and development is [US] federal constitutional law takes place almost exclusively through judicial interpretation.

In common law countries, because of the principle of staredecisis, the decisions of the highest courts becomes binding in all other similar cases that comes latter. This tells us that, what the court says concerning the meaning and scope of a certain constitutional provision becomes a permanent norm and binding through the text of the constitution is not formally changed.

How far courts play such a role in Ethiopian context? The answer to this question is that courts have no role in shaping or reforming the constitution. Courts in Ethiopia are arguably excluded from interpreting the constitution. We will discuss the role of courts while discussing what importance they have in checking the constitutionality of constitutional amendments.

II. Conventions and Customs: - conventions and customs are other informal but lawful methods of constitutional reform. To understand the distinction between the two, by ‘convention’ is meant a binding rule, a rule of behavior accepted as obligatory by those concerned in the working of the constitution; by ‘usage’ is meant no more than a usual practice.³⁹

³⁶ Supra note 1, p. 153.

³⁷ Supra note 21, p. 540.

³⁸ Supra note 1, p. 146.

³⁹ Ibid, P. 1979.

These accepted rules of behavior and practices by different political actors like the legislature and the executive bodies may have impact in the law of the constitution. K.C. Wheare expressed that usage and convention supplements constitutional law sometimes by making it in practice a dead letter, some times by determining the way in which in practice it will be interpreted or exercised.⁴⁰ Conventions and usages can affect the law of a constitution in three ways; mollifying a provision of a constitution (making its use impossible), transferring power granted in a constitution from one person to another and supplementing the law of a constitution.⁴¹

III. Aggressive and irregular ways:- constitutional procedures and constraints may simply be ignored or reconfigured without reference to constitutional documents. Concerning such kinds of irregular and informal amendments, some persons raised the 13th and 14th equal suffrage amendment to the US. Constitution in 1860 and the suspension of constitutionally required electoral laws in fascist Italy and Nazi Germany prior to WWII.⁴²

For example, the 13th and 14th amendment to the US Constitution in 1890s which emancipated slaves and gave them suffrage would not have been achieved if the formal process laid down under Art V had been followed since the southern states had enough vote to block amendment.⁴³ Revolutionary reform of a constitution also falls under this category.

To sum up, informal constitutional changing mechanisms may take place either in lawful forms of implicit change, like judicial interpretation, durable legislation, customs and conventions or unlawfully in irregular procedures. Informal amendment mechanisms are mostly choices of last resort, secondary in importance to be resorted which formal amendment mechanisms are cumbersome and unattainable.

3.4.2. Formal Methods to Amend a Constitution

We have discussed thoroughly in chapter two that constitutional amendment of federal systems at federal level should be rigid that should not be altered by the federal government

⁴⁰ Ibid, P. 178.

⁴¹ Ibid, P. 181-191.

⁴² Supra Note 22,p. 541.

⁴³ Ibid.

and member states of the federation unilaterally and in most federations it is rigid. A certain level of difficulty is also expected at state level for proposal of constitutional amendment and revision as compared to the adoption of ordinary legislation. This is because constitutions are fundamental laws. More over protections that constitutions afford to minorities would mean little if they were as easily changeable by majorities as is ordinary laws. Concerning the reasons for the difficulty of constitutional amendment [in the U.S], Donald S. Lutz expressed that:

The difficulty of the amendment process chosen by the framers of constitutions seems related to the framer's relative commitment to the premises used by the Americans when they invented the formal amendment process: (1) popular sovereignty, (2) a deliberative process, and (3) the distinction between normal legislation and constitutional matter.⁴⁴

Generally, a commitment by constitutional designers to entrench certain rules and procedures or specific programs and prohibitions, the need to create a higher legal system that will stand above and limit ordinary legislation necessitates the need for putting certain formal mechanisms for constitutional change. Having said this much the next question that we are going to answer in the following sections is what these formal constitutional amendment methods are.

3.4.2.1. Amendment by Constitutional Conventions

One of the methods by which countries effect change to their constitution is through constitutional convention. A convention is a representative body chosen for the purpose of considering either adopting or proposing a new constitution or a change in an existing one.⁴⁵ Convention may be established not only to amend, revise or to change an existing constitution but also to adopt a new constitution especially when regimes with its older institutions have been suppressed by revolution.⁴⁶ Janice C. May expressed a convention as an assembly separate from the legislature, had as its sole mission the drafting of a new

⁴⁴Donald S. Lutz cited at supra not 17 p. 362.

⁴⁵Jose M. Argue, Philippine political law Review, 1950, p. 244.

⁴⁶Ibid.

constitution or changing an existing one.⁴⁷ Constitutional reform (amendment) by conventions is mostly prevalent in subnational constitutions and only few federations make explicit provision for conventions in changing their national constitution.⁴⁸

If we see the experience of some countries with regard to the use of convention for constitutional amendment, Art V of the US constitution provides that one of the methods /processes/ through which the constitution may be altered is through a proposal by a national convention assembled at the request of the legislatures of at least two-thirds of the states i.e. by 34 states. Certain Latin American states also apply this system. For example, Argentina provides for the calling of a constitutional convention (assembly) in the event that two-thirds of the members of congress declare the need for a constitutional reform.⁴⁹ Russia and Venezuela also apply the calling of a convention for their constitutional reform.⁵⁰

As I have said before, conventions are widely used at subnational level. But even there under the states of US, conventions have been followed by a number of legal issues like who is entrusted with the power of calling the convention, prescribing the manner and time of calling, and whether to put limitation on their power or not.⁵¹ As regards the power of calling a convention, most state constitutions authorize the state legislature to propose a constitutional convention.⁵² But even in the absence of express authorization, state courts found an implied power to call or propose a convention under state constitutions recognizing the people as the source of political power.⁵³

Concerning the power of a convention, some argue that once they are representing the people, it is not proper to put limitation up on their power. But because of a threat that putting popular interests at the risk of change or removal by the convention, states

⁴⁷Janice C. May, *Constitutional Amendment and Revision Revisited*, publius, the Journal of federalism, Vol. 17, No 1, winter 1987, p. 155.

⁴⁸John Dinan, *Patterns and Developments in Subnational Constitutional Amendment Process*, Wake Forest University, USA, p. 22.

⁴⁹Argentina Constitution (as amended in 1994) Article 30. See also C.F Strong, *History of modern political constitutions*, 1963, p.244.

⁵⁰Janice C. May cited at supra note 47, p. 22-23.

⁵¹Jose M. Argue cited at supra note 45, p. 156.

⁵²Ibid.

⁵³G. Alan Tar and Robert F. Williams cited at supra note, 35 p. 1083.

developed the limited constitutional convention, which limits the range of matters to be considered by the convention.⁵⁴

3.4.2.2. Amendment by Referendum

Popular involvement in constitution making /reform/ can be institutionalized in various ways.⁵⁵ One of the practices in some countries is referendum. Referendum is the direct participation of the people in a constitutional reform process that allows the legislature to propose legislation to the voters for them to accept or reject.

In countries that used referendum for constitutional change, after passing certain procedures like initiating an amendment, drafting the proposal of an amendment etc by those to whom such a power is granted, it is the people that have the final say (decision). A national tradition of holding referendum may contribute to the democratic legitimacy of a constitution.⁵⁶

As holders of sovereign power in a modern democracy, giving place for popular vote and will through referendum is an interesting approach in the process of constitutional amendment. As the European commission for democracy through law expressed in its report on constitutional amendment, referendum may also reduce the risk that political actors could try unilaterally to change the rules of the game. It can also contribute to strengthening the democratic legitimacy of constitutional protection of human rights.⁵⁷ It is from this perspective that the constitutions of some countries make referendum a mandatory requirement for a valid constitutional amendment.

In the Swiss Federation, for example, any amendment passed by parliament must be submitted for referendum. The Swiss Federal Constitution permits the people to initiate and ratify national constitutional changes independently of other officials or political actors.

⁵⁴Ibid.

⁵⁵John Dinan identifies 3 circumstances for popular involvement in constitutional reform (amendment)-(1) permitting citizens to play a formal role in proposing amendments that are then consider by legislators, (2) requiring the citizenry to ratify changes proposed by a convention, commission or legislators and (3) permitting citizens to initiate and ratify constitutional changes independent of the legislator.

⁵⁶John Dinan cited at supra note 48, p.25.

⁵⁷European commission for democracy through law (Venice commission), Report on Constitutional Amendment, Venice Commission 81st plenary session, Venice, 11-12 December 2009, p. 16

The constitution stipulates that if 100,000 citizens request a change in the national constitutions which trigger the process of partial or total revision, the proposed change must be submitted to a popular referendum.⁵⁸ In Russia, one of the methods to approve a national constitution that is drafted by a constitutional assembly is majority approval by the people in a referendum.⁵⁹ In Sudan, if the National Assembly approves an amendment contrary to the basic principles underlying the constitutional system, popular ratification by referendum is required.⁶⁰ In Spain, amendments relating to some provisions of the constitution that are enjoying special protection must be approved by referendum.⁶¹

Other states like Australia and Austria also employ this method. Under the Australian constitution, once the amendment is ratified by the parliament of the commonwealth, it has to be sent to the states and the territories for popular vote.⁶² Similarly in the constitution of Austria, fundamental changes /*Gasamtänderung*/ of the constitution requires confirmation by referendum.⁶³ For example, Austria's accession to the European Union was approved by popular vote and it was the first since 1945.⁶⁴ Under the constitution of Austria, in addition to fundamental changes to the constitution, total revision or adoption of a new constitution requires popular approval by referendum.

Because of the higher value referendum yields to obtain the consent of the people, some US scholars argue that even if it is not expressly provided for under Art. V of the US constitution, citizens have a retained right to amend the federal constitution through Popular referendum and could also initiate an amendment through an amendment process.⁶⁵ The argument raised to substantiate this argument is that the US constitution is a far more majoritarian and populist document than the citizens has generally thought; and

⁵⁸Swiss Constitution, Art.120 and 121, Swiss Constitution (1874) as Revised in May 1992 and comes into force in January 2000.

⁵⁹Russia Constitution, Art. 135 (Adopted 12 December 1993).

⁶⁰Sudan Constitution, Art. 139.

⁶¹Spain Constitution, Art. 167 and 168.

⁶²List of Methods of constitutional amendment on [http:// wikipedia. org/ wiki](http://wikipedia.org/wiki) – accessed on 8-27-2010.

⁶³Ibid.

⁶⁴Ibid.

⁶⁵Achill Reed Amir, *The Consent of the Governed, Constitutional Amendment Outside Art 4*, Columbia Law Review, 1994, Vol. 99, p. 457.

the people of US have a legal right to alter their government and to change their constitution.⁶⁶

3.4.2.3. Amendment by the Legislature

Parliament (the legislature) plays crucial role in constitutional amendment process. Beginning from initiation of proposals for constitutional change, the parliament in different countries has its own role in the adoption of proposed amendments. The formal right of initiation usually, if not always, rests exclusively with the national political actors.⁶⁷ Of these actors, the legislature in many countries takes the lions share both in the initiation and approval of constitutional amendment.⁶⁸

The minimum threshold to initiate proposal for amendment varies across countries. Some countries like Netherlands and Switzerland authorize individual members of the parliament to introduce proposal.⁶⁹ In some others the requirement is for a certain number, not percentage, of the parliaments. Notable examples include Montenegro, 25 members of the total 81 of unicameral parliament and Slovenia 20 deputies of the total 90 of the national assembly.⁷⁰ The Malaysian constitution provides that constitutional amendment may be made by a majority of two-thirds of the total members of each house.⁷¹

In many countries of the world, the required number is a specific percentage of the members be it a qualified minority out of the total members of the parliament such as one-sixth (Greece), one-fifth (Albania, Estonia, Poland), one fourth (Bulgaria, Lithuania), one third (Ukraine, Turkey, Moldova, Andorra), or ordinary majority of 50%+1 (Georgia, Korea).⁷²

In the constitutions of some countries, the initiation of constitutional amendment by the national parliament requires qualified super majority of two thirds (Example, U.S and

⁶⁶Ibid.

⁶⁷ European Commission Report cited at supra note 57.

⁶⁸Janice C. May cited at supra note 48, p. 24. see also the Venice commission Report on constitutional amendment at Supra note 57.

⁶⁹European commission Report cited at supra note 57.

⁷⁰Ibid.

⁷¹Malaysian Constitution, Art. 159

⁷²European Commission Report cited at supra note 57.

Ethiopia)⁷³ In Ethiopia and US, the majority requirement is not necessarily two-thirds of the entire membership of the two houses. Two-thirds of those members voting in each house are required provided the quorum exists when the vote is cast. However, under the Malaysian constitution, amendment may be made by a majority of two thirds of the total members of each house. But such a quorum may not be required for the amendment of certain provisions that can be amended by the procedure used for ordinary legislation.⁷⁴ Amendment of the Belgian constitution requires the approval of two thirds majority in each house of the next parliament after election since the first parliament is required to dissolve after identifying the provisions needing reform.⁷⁵

Once the proposal for constitutional amendment is raised, the next procedure is adoption of the proposal after holding necessary deliberation with the concerned actors. The minimum required parliamentary vote to adopt the proposal varies like the variation for initiation as we have discussed above. In some countries like Sweden, an ordinary majority in parliament is enough to adopt the proposal of a constitutional amendment even though this is supplemented by the requirement that the amendment must be passed by a majority in two successive votes.⁷⁶

The idea here is that the approval or disapproval of a proposed amendment should not be dependent on the parliament of the time. The parliament that supported the proposed amendment by majority vote is required to be dissolved and be substituted by a new parliament. For the approval of the proposed amendment, the new parliament should support the proposal by majority vote. This gives an indirect chance for the electorate to vote representatives that may either support or reject the proposal based on the preference of the electorate. However, in vast majority countries of the world, qualified majority vote is required for approval. For example, in Austria, two-third majority vote of at least half the members of the National council is required.⁷⁷ In Switzerland, majority approval in each house of the parliament is required.⁷⁸ In Germany, two thirds majority vote both in the

⁷³ USA constitution Art V and FDRE constitution Art, 104.

⁷⁴ Supra note 71.

⁷⁵ Belgium Constitution, Art. 195.

⁷⁶ John Dinan cited at supra note 48.

⁷⁷ Supra note 62.

⁷⁸ Swiss Constitution, Art.120 and 121 (2)

Bundesrat and Bundestag is required.⁷⁹ In Spain, the qualified majority of three-fifths in both chambers is required.⁸⁰

Even within a country, the required vote for approval may vary depending on the type of issue at hand or the type of provision to be amended. For example, in Austria, fundamental change of the constitution requires confirmation by referendum as distinct from the ordinary two-thirds majority approval in the national parliament. Similarly, the Spanish constitution provides that if change on the constitution is a total revision or partial revision affecting the provisions, on for example, human rights and freedoms..., the required vote is two thirds majority of the members of each house as distinct from the ordinary requirement of 3/5 majority of each house. In the FDRE Constitution, approval for the amendment of chapter three of the constitution, the amending provision and the provision that provides for the initiation of the amendment procedure requires two- third majority vote of the HPR and the HOF *independently* where as approval of proposals for any other provisions of the constitution, two third majority vote is required in a *joint session*.

3.4.2.4. Amendment by the majority of Constituent Units in Federal Systems

As we have discussed under chapter two, one of the features of a federation is the existence of written, supreme and rigid constitution as an outcome of the federal bargain that embodies the organization of the federal government, bills of rights, competence and authority of the federal government and constituent units etc. What follows the supremacy of the constitution is its rigid amendment procedure that is manifested by the involvement of both the national government and significant proportion of constituent units. A constitutional amendment system that grants one party to a federal compact the power to changes of the terms of that compact is not consistent with federalism.⁸¹ Cheryl Saunders argued that the same logic that requires an overriding constitution as the basis for federal arrangement suggests that the constitution should not be able to be amended by a single

⁷⁹Basic Law of Germany, Art.79.

⁸⁰European Commission Report cited at supra note 57.

⁸¹Thomas Huglien and Alan Fennan, *Comparative Federalism – systematic inquiry* (broad view press, Ontario,) 2006, P. 248.

order of government.⁸² Similarly, IVO Duchacek expressed that a new supra territorial identity, institutions and power have not really been created if the amendment of the federal constitution does not involve both the centre and the units.⁸³

Despite some exceptional federations like Argentina, Austria, Venezuela and Germany whose national constitutions can be change without any formal participation of sub-national governments,⁸⁴ the majority of federal systems provide for some type of formal involvement of sub national governments in the national amendment process. Sub national units may involve in proposing constitutional amendments. This is the case in Brazil, Spain and Sudan just to name a few.⁸⁵ Other federations like South Africa, Malaysia and India authorize sub national units in the ratification of the amendment process. Still some other federations like USA⁸⁶, Russia⁸⁷ Ethiopia⁸⁸ and Mexico⁸⁹ authorize states to involve both in initiating and ratifying constitutional amendment.

3.4.3. Principles of Unamendability or Entrenchment

In the discussion of various topics, we have come across that countries have included amending provisions to their constitutions. However, due to greater commitment to some fundamental norms and values in their constitutional and political history, the constitutions of some countries use entrenched clauses to restrict the kind of amendments to which they maybe subject. Among a number of different legal mechanisms that may be used for creating obstacles to constitutional change, absolute entrenchment or unamendable provision or principles is one of the mechanisms Accordingly, constitutions may specifically preclude or prohibit some constitutional provisions or principles which they considered “sacrosanct” from the realm of amendment. Declaring important legislations as

⁸²Cheryl Saunders, *Constitutional Arrangement of Federal Systems*, P.64 as cited by John Dinan, PATTERNS AND DEVELOPMENTS IN SUB NATIONAL CONSTITUTIONAL AMENDMENT PROCESS, Wake Forest University, USA, P.16.

⁸³Ivo D. Duchacek, *Comparative Federalism*, Lesley frost press, New York City, December 1963, P.230.

⁸⁴Supra note 48, p.17.

⁸⁵Ibid.

⁸⁶US Constitution Art v.

⁸⁷Russia Constitution, Art.134 and 136.

⁸⁸FDRE Constitution, Art.104 and 105 (1 and 2).

⁸⁹Mexico Constitution, Art.135.

“eternal” and not subject to change was not uncommon in the past. However, by giving up this old version of rigid stance, constitutions today proclaim that certain parts, certain provisions or principles to be unamendable or unalterable. Among the special principles protected by unamendability in most countries are the fundamental democratic or republican form of government, the federal structure, sovereignty and freedoms. For example, the Basic Law of Germany expressly forbids modification of the federal nature of the country, or abolition of human dignity under Art 1 or the basic principle of the state under Article 20.⁹⁰ Under the constitution of Brazil, amendments that intend to abolish individual rights or to alter the fundamental framework of the state namely the separation of powers and the federal republic is forbidden.⁹¹ Art 89 of the French constitution states that the republican form of government shall not be the object of any amendment.

As expressed before, the rationale for incorporating unamendable provisions or principles is the desire to entrench some constitutional principles and rules. But there are criticisms for such kinds of stances for that if circumstances change enough, or if the political pressure gets too strong, then even “un amendable” rules will be changed one way or the other.⁹²

What if there is (are) no special provision(s) on unamendability like the Ethiopia constitution? Can we argue that all “provisions” and “principles” can be amended “at any time?”

The most widely accepted argument is that if there is no special provision on unamendability, all parts of the constitution are subject to possible amendments.⁹³ But this generalization has a qualification that some basic principles are so fundamental that even the constitutional legislator should not be allowed to break even in times of crisis or turmoil. This argument should be fully accepted to Ethiopia though the determination of what principles are fundamental is subjective and open to interpretation. With regard to the time for amendment though it is different from unamendability, a substantial number of countries have provisions limiting constitutional amendment in times of war, emergency or

⁹⁰ Basic law of Germany, Art 79(3).

⁹¹ Brazil Constitution, Art 60.

⁹² European Commission Report cited at supra note 57, p.43.

⁹³ Ibid.

tranquility.⁹⁴ When we see the FDRE Constitution, few provisions are made not subject to “suspension” during state of emergency. These are articles 18, 25 and sub-articles 1 and 2 of article 39. Except Articles 18 and 25, all the rest are group rights that serve more as political declarations than limitations on constitutional legislators to safeguard basic individual rights from becoming subjects of amendment. More specifically, it is possible to argue that the prohibition concerning these specific provisions is “suspension” /suspending them/ in times of emergency, not a prohibition of their amendment so long as the given procedure is fulfilled /respected/.

3.4.4. Amendment of the Amending Provision

When analyzing constitutional amendment, a distinction may be made in the constitution of a country between the various provisions found in the constitution. There are two important issues that are usually given special and distinct amendment procedure in most constitutions of the world. The first one is the institutional rules which encompass issues like the electoral system, the competence and procedure of the main state organs, separation and balance of powers, procedure for legislation, the court system etc. The other constitutional issue that is given special consideration for its amendment is bill of rights the catalogue of human rights which protect the individual and regulates the fundamental relationship between the state and individuals.⁹⁵ In addition to these two categories of constitutional provisions, in those countries where different types of constitutional provisions are afforded different levels of protection, the amendment provision itself is usually granted the highest level of protection available⁹⁶.

The logic behind is that if such formulas are not designed, the less stringent amendment procedures could be used to remove the more stringent amendment procedures by way of altering the amendment formula itself.⁹⁷ For example, under the Russia constitution, the amendment procedure can not be amended at all by the federal assembly. Section 135 of

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Anne Twomey, *The Involvement of Subnational Entities in Direct and Indirect Constitutional Amendment within Federations*, available at

<http://camlaw.rutgers.edu/statecon/workshop11greece2007/workshop11/Twomey.pdf>, p.19.

⁹⁷ Ibid.

the constitution provides that if an amendment is proposed to the amendment provision by three fifths of the total number of deputies of the federation council and state Dumas, a constitutional assembly must be convened, not to amend it but to determine whether the provisions are inviolable or may be amended. The amendment is effected only when it is approved by a two third majority of constitutional assembly or a popular vote where at least half the electorate takes part.⁹⁸ A certain level of entrenchment to the amending provisions can be observed in the constitution of Canada where the unanimous agreement of the Canadian parliament and the legislative assembly in each province is required.⁹⁹ In South Africa, amendment of the amending formulae requires the approval of three- fourth of the National assembly and the approval of 2/3 of the nine provinces in the national council of provinces.¹⁰⁰ Resolutions of the legislatures of not less than half of the states and a two – third majorities of the members of each federal house is required for the amendment of the amending provision of the Indian constitution.¹⁰¹ Under the constitution of Nigeria, a four fifths higher majority in each chamber of the national assemblies and a two thirds majority of the state House of Assembly is required for the approval of or the amendment of the amending provision.

When we see the Ethiopian constitution in terms of giving priority for certain provisions from the perspective of their amendment procedures, fundamental rights and freedoms specified under chapter three of the constitution, the provision that provides for the procedures for initiation and the amending provision itself have been given priority and certain level of entrenchment is reflected for that two-third majority vote in each houses of the federal parliament and majority vote of all state councils is required for the amendment of these provisions. Approval of the amendment of the remaining provisions of the constitution requires majority approval at least six state councils and a 2/3 majority vote of the HPR and HOF in a joint session.

⁹⁸Ibid.

⁹⁹Constitution of Canada, Section .41.

¹⁰⁰Constitution of SA, Article.74.

¹⁰¹Indian Constitution, Section.368.

3.4.5. Judicial Review of Constitutional Amendments

In the preceding discussions, we have seen the various methods and procedures that countries have used to amend their constitutions. We have also discussed the incorporation of entrenched clause and special procedures for the amending formulae. But what if there is failure to comply with the procedures or encroachment of entrenched provision during amendment?

It is then followed by other questions like can courts (ordinary and constitutional) review the constitutionality of constitutional amendments? If so, is it the process (amendment procedure) or the out come of the amendment that is subject to review?

Is it possible for federal courts to review the constitutionality of state constitutional amendments in a federal set up?

Before discussing the approach that countries have developed concerning judicial review of constitutional amendments, let's have a bird's eye view of the importance of compliance with procedural requirements for amendment as established by laws. Procedural regularity in the amendment of a constitution helps to promote effective political participation.¹⁰² In the case between *Wes Berry and Sanders*, while declaring the right to vote as a fundamental right that preserves all other rights, the US Supreme Court opined that no right is more precious in a free country than that of having a voice in the election of those who make the laws under which we must live. Other rights are illusory if the right to vote is undermined.¹⁰³ Effective participation requires citizens to have ample opportunity to develop, share and debate the views with others and to be notified in advance the content of proposed amendments, publication of voter guides¹⁰⁴ The constitution also acquire the required level of legitimacy whenever it is an out come of a deliberative process held according to the procedures stipulated there in¹⁰⁵. Professor Schacter identifies two

¹⁰²Teresa Stanton Collett, *Judicial Independence and Accountability in an age of Unconstitutional Constitutional Amendments*, University of St. Thomas, School of law, Legal Studies Research Paper No.09-15 available on <http://papers.ssrn.com/abstract-1444583> accessed on 12 August 2010.

¹⁰³*Wes berry Vs Sanders*, 376 US 1, 17 (1976).

¹⁰⁴Teresa Santon Collette cited at supra note 102.

¹⁰⁵European Commission Report cited at supra note 57.

problems of popular democracy in the initiation of constitutional amendment – lack of information by the voters, and inequity or lack of clarity in the initiative process¹⁰⁶. She then argues that procedural regularity should be given place for amicus participation. For example in states where constitutional amendments can be proposed by initiative, it is important for citizens to know in advance the number of signatures needed, and when the petitions must be submitted to officials in order to allow voters to plan their campaigns promoting or opposing the proposed amendment.

In the same fashion, judicial review of the substance of proposed amendments is justified by the principles of natural law. Some scholars like Murphy argue that amendments that destroy or cripple the values of constitutional democracy would be invalid.¹⁰⁷ Substantive limits on the power to amend constitutions expanded to include limitations implied by “universal” agreements or jus cogens principles under international law and the evolving understanding of human rights.¹⁰⁸

Those who advocate for judicial review of constitutional amendments also argue that judicial review of the process of amendment is consistent with the traditional understanding of courts as umpires or referees. When conflicts arise over whether proponents of a particular amendment have complied with existing rules to amend the constitution, the courts are the proper branch of government to review proponent’s action and determine whether they have “played by the rules of the game.”¹⁰⁹ Even though there is a general consensus about the importance and necessity of judicial review of the process (procedures) of constitutional amendment, there are, however, criticisms on judicial review of the substance of constitutional amendments. Many countries expressly denied their courts of this power on the argument that the courts can not place themselves above the constitutional legislator.¹¹⁰ Scholars argue that if substantive review is to be justified it must be justified by the text of the constitution being amended, rather than by judicial

¹⁰⁶Marvin Krislov and Daniel M. Katz, *Taking State Constitutions Seriously*, p.17

¹⁰⁷Dant B. Gatmayatan, *Constitutional Adjudication and Democracy: Judicial Review of Constitutional Change; Defending Constitutions with Constitutionalism*, Philippines. P.1.

¹⁰⁸ Ibid.

¹⁰⁹Teresa Santon Collette cited at supra note 102.

¹¹⁰European Commission Report cited at supra note 57, p.4.

discovery of penumbral rights or substantive due process.¹¹¹ There are also arguments that criteria of amendment appropriateness surely must not be elaborated or enforced by courts because allowing the judiciary to pass on the merits of constitutional amendment would unequivocally subordinate the amendment process to the legal system it is intended to override and would thus gravely threaten the integrity of the entire structure.¹¹² When we come to see the practice of countries in light of the questions we raised at the beginning i.e. entitling their ordinary or constitutional courts to review the constitutionality of constitutional amendments, basically there are three approaches. The constitutions of some countries expressly authorize their courts with the competence of reviewing the constitutionality of constitutional amendments.¹¹³ Such competence of the court may be either a priori review of amendment proposals before a proposal for constitutional amendment can be adopted by parliament or a more widespread a posteriori review of whether the correct procedures for constitutional amendment have been respected or the amendment adopted is not in breach of unamendable provisions or principles.¹¹⁴

For example, the constitution of Ukraine authorizes the constitutional court to verify compliance with the constitutional provisions on amending the constitution.¹¹⁵ In Austria, Bulgaria and Portugal, if unamendable provisions are amended /touched/ during constitutional amendment, it is good cause /justiciable matter/ to have standing to challenge the amendment.¹¹⁶ The Turkish Constitution of 1982, the Chilean Constitution of 1980, and the Romanian Constitution of 1991 are also good examples in expressly permitting courts to undertake judicial review of constitutional amendments.¹¹⁷ Under the South African Constitution, one of the jurisdictions of the constitutional court is to review not only the constitutionality of constitutional amendment processes but also reviewing the substance of the amended text through a certification process as to whether the text incorporates and is not in contradiction of constitutional principles. While certifying the 1996 amended

¹¹¹Teresa Santon Collette cited at supra note 102, p.14.

¹¹²Laurence H. Tribe, *A constitution We are Amending: In Defense of A Restrained Judicial Role*, Harvard law review, 1997, vol. 97, p.442.

¹¹³Supra note 102, p.3-4.

¹¹⁴Supra note 57, p.38.

¹¹⁵Ibid.

¹¹⁶Ibid.

¹¹⁷Teresa Santon Collette cited at supra note 102, p.4-6.

constitution the court held that “all of the grounds for non-certification of the earlier text had been eliminated in the new draft and accordingly certified the text complied with the requirements of the constitutional principles.”¹¹⁸ Art 167(4) (d) provides that only the constitutional court may decide on the constitutionality of any amendment.

On the other side of the spectrum are those countries which expressly prohibit courts from reviewing the constitutionality of amendments. The 1950 Indian Constitution (as amended in 1976) falls under this category. The constitution stipulated that “no amendment of this constitution made or purporting to have been made... shall be called in question in any court on any ground.”¹¹⁹ Moreover, the same constitution provides that “there shall be no limitation whatever on the constituent power of parliament to amend by way of addition, variation or repeal the provisions of this constitution.”¹²⁰ The third feature of constitutions is their silence about the role of courts and review of constitutional amendments. This is true in the French constitution of 1958, the German Basic Law of 1946, the Irish Constitution of 1937, the Slovenia Constitution of 1991 and the ‘US’ Constitution.¹²¹ To know the role of the judiciary under such systems, it is important to see the general power of courts concerning judicial review. There are two models of judicial review – the decentralized (American model) and the concentrated (European model).¹²²

Under the American model of judicial review, all courts have jurisdiction to examine the constitutionality of legal acts in the course of deciding legal cases and controversies. So, the jurisdiction of courts to review the constitutionality of constitutional amendments can be easily established.¹²³ But even here, some authors commented that courts are playing a “hands off” role, leaving many constitutional issues to the determination of the legislature under the guise of political questions.¹²⁴ When we come to the European model of judicial review, only a specialized court (constitutional court) has jurisdiction to adjudicate the

¹¹⁸Constitutional Court, South Africa, ‘*The Certification Process*’, accessed on 12 November 2010. See also Art. 167 of the Constitution.

¹¹⁹Indian Constitution, Art 368, clause 4.

¹²⁰Ibid.

¹²¹Teresa Santon Collette cited at supra note 102, p.19.

¹²²Mauro Cappeletti, *Judicial Review in Comparative Perspective*, *California Law Review*, 1970, vol,58, No.1, p. 10-17 (as cited in supra note p.10).

¹²³Ibid.

¹²⁴Laurence H .Tribe cited at supra note 112.

constitutionality of laws. Under such systems, the constitutional court that is primarily established to check the constitutionality of laws may not necessarily have the power to review the constitutionality of constitutional amendments unless it is expressly authorized to do so. For example the French Constitutional Council confirmed that:

*Article 61 of the constitution vests the constitutional council with the power to review the constitutionality of institutional acts and ordinary laws when they are referred to in the constitutional council under the conditions laid down by this article. The constitutional council did receive, neither from article 61, Article 89, nor from another article in the constitution, the jurisdiction to rule on a revision of the constitution.*¹²⁵

In the same fashion, the Hungarian Constitutional Court declared that the scope of its jurisdiction did not extend to the review of the constitutionality of laws amending the constitution.¹²⁶ The constitutions of some countries expressly authorize the constitutional court to have jurisdiction in reviewing the constitutionality of constitutional amendments. As we remember in our earlier discussion, the South African constitutional court is a classic example with such express authorization (Art 167 of the South African constitution).

The Basic Law of Germany is silent with regard to the competence of the constitutional court to review the constitutionality of constitutional amendments; the court is empowered to rule on the formal and material compatibility of federal or land “legislation” with this Basic law.¹²⁷ But by interpreting the term “federal legislation” to include not only ordinary federal laws, but also the “law expressly modifying or supplementing the text of the Basic law”, the constitutional court has acquired jurisdiction.

When we come to the Ethiopian constitution, there is no provision that explicitly deals with whether constitutional amendment (both procedural and substantive) can be reviewed or

¹²⁵Constitutional council decisions No 2003-46 Decision, Mar. 26, 2003 as cited by Teresa Santon Collet, supra note 102, p.15.

¹²⁶Hungarian Constitutional Court, decision of Feb. 9, 1998, No 1260/B/1997 Alkotmanibirosaji Kozloni/

¹²⁷Basic law of Germany, Art 93(1) (2)

not. In order to understand the status of judicial review of constitutional amendments and the organ who is entrusted with this power, it is important to see and analyze it from the perspective of judicial review in general. As per Art 62(1), Art 83(1), Art 84(2) of the constitution, some provisions on proclamation No.250/01, a proclamation to consolidate the powers and functions of the HOF, and Art.6 (2) of the CCI proclamation (proclmn. No. 251/01), the power to adjudicate constitutional issues (both constitutional interpretation and nullifying unconstitutional laws, actions and decisions of government organs or officials) are given to the HOF which is composed of representatives of Nations, Nationality and Peoples.

The scope of constructional adjudication involves interpretation of constitutional provisions, determination of the constitutionality of “legislative acts” of the federal or state governments which include proclamations and regulations as well as international agreements which Ethiopia has endorsed and accepted. Moreover, even if what constitutes “constitutional disputes” is not made clear, Art 83(1) of the constitutions talks in a broader manner that “All constitutional disputes shall be decided by the HOF.”

So, following the silence of these provisions on the competence of the constitutional adjudicating body as to its power to review the constitutionality of constitutional amendments, based on the experience of countries we have discussed so far, two lines of arguments can be drawn. The first line of argument may be the one followed by countries like French which advocates that constitutional review of constitutional amendment is not possible if there is not constitutional provision expressly vesting the constitutional court with the competence to review. This is supported by the maxim “*expressio unius exclusion alterius*”-meaning express mention of one thing implies the exclusion of an other to imply that constitutional acts like reviewing amendment that are not enumerated in the constitutional provision should not be subject to review.

The other line of argument may be the Germany model that considers amendments as “laws” and puts all “laws” for the test of their constitutionality I.e. by considering the law amending the constitution as “a legislative act” and checking its constitutionality. The other argument to favor this approach can be raised by interpreting the term constitutional

disputes widely to cover all issues including challenges and oppositions concerning constitutional amendments. But despite such kinds of possible arguments, to the knowledge of this author, there are no cases or decisions to substantiate either line of arguments.

As regards checking constitutionality of constitutional amendments at state level, countries have various approaches. Under the South African constitution, through the requirement of certification, the constitutional court regulates both the substance of state constitutions and the mechanism of their adoption.¹²⁸ Under the German federal system, it is allowed to challenge Lander constitutional amendment procedures and legal challenges to amendment can be submitted to the Land Constitutional Court before a referendum is held. Like the case in Germany, challenges to the constitutionality of state constitutional amendment in US can be submitted to state courts. But if the scope of state constitutional amendment is not limited on the state constitution itself and have impact on the federal constitution, federal courts can review state constitutional amendments. As such in the case of *Hawke vs. Smith*, the Ohio constitutional provision which subjects the federal constitutional amendment to a popular referendum in the state was found unconstitutional by the federal Supreme Court.¹²⁹ To avoid the direct and indirect effect that the amendment and revision of the autonomous statutes of Spain usually creates on the autonomy of the federal constitution, the Spanish constitution requires that all amendments to the statute of autonomy of the states should be reviewed by the national parliament.¹³⁰ Under the Sudanese constitution, the ministry of justice is empowered to review the constitutionality of state constitutional amendment.¹³¹ In Canada, the constitution Act of 1982 stipulates that although provinces have the authority to amend their own constitution, any effort by a province to alter the office of its lieutenant Governor must be approved by the national parliament and the legislatures of all other provinces.¹³² In the same way, Art 51(1) of the

¹²⁸South African constitution, Art 174

¹²⁹Kemal Gozler, *Judicial Review of Constitutional Amendments: A Comparative Study*, Uludag university, Turkey, Ekin press, Bursa, 2008, P.2.

¹³⁰John Dinan, *Patterns and Developments in Subnational Constitutional Amendment Process: Legal Studies Research Paper Series*, prepared for the 7th world congress international association of constitutional law, Athens Greece, June 11-15, 2007 P.27).

¹³¹Murray and May Wald, *Subnational Constitution Making in Southern Sudan*, p.211, as cited by John Dinan supra note above, P. 27.

¹³²Supra note 130, p. 27.

Swiss Constitution stipulates that any proposed partial or total revision of the cantonal constitution must be approved by the electorate. More specifically, Art 51(2) and Art 172(7) of the constitution stipulate that changes in the cantonal constitution must be in accordance with the federal law that is ensured by the approval by the federal assembly.¹³³ The Austrian Constitutional Court also rules that Art 33(6) of the constitution of the land of Vorarlberg was in compatible with the federal constitution.¹³⁴

To wind up our discussion, in some federations like South Africa, Spain and Sudan, review of constitutionality of sub national constitutional amendments by the federal government or its machineries is a mandatory requirement mostly regulated by the federal constitution. To the contrary in some federations like USA and Germany reviewing state constitutional amendment is primarily the jurisdiction of states so long as the revision (amendment) is within the constitutional jurisdiction of states and do not contradict the stipulations provided by the federal constitution.

When we come to the state constitutions in Ethiopia, many issues discussed in other systems are left vague /blurred/. To begin with, there is no “clear” provision under any of the state constitutions as to whether review of constitutional amendments is possible. We shall discuss this and other issues like the role the federal government and state governments might have in the coming chapter.

3.4.6. Subnational Constitutional Amendment Practice in Some Federations- Comparative overview

We have repeatedly said in our earlier discussions that designing constitutional amendment procedures are vital for the continuing existence of the constitution. Because with the help of such mechanisms a constitution can respond to changing circumstances, it will adequately respond to emerging social needs, the society can, in the words of John J. Dinan,¹³⁵ make further advance in the science of government.

¹³³Fischer Justinian, *Development of Direct Democracy in Swiss cantons between 1997 and 2003*, university of Hohenheim, 08 July 2008, p.10.

¹³⁴Kemal Gozler cited at supra note 129, p.2.

¹³⁵John Dinan cited at supra note 130.

Designing certain strict procedures for constitutional amendment distinct from ordinary legislation is also important from other perspectives like fostering societal consensus on basic values, promoting constitutional stability and limiting majoritarianism. As a result, sub national units of federal systems have incorporated procedures for the amendment of their constitution. Examination and analysis of state constitutional amendment practice in all federal countries of the world is impossible, even if it is worthy for this study. Accordingly, I prefer to see how subnational constitutions of few federations are amended. This may serve as an initial reference point for our discussion of state constitutional amendment mechanism in Ethiopia under chapter four of this paper.

The constitutions of America's fifty states provide a variety of means for their own amendment and revision.¹³⁶ The state constitutions also generally feature less restrictive amendment processes than is present at the federal level.¹³⁷ When we see the various avenues through which state constitutions can be amended, as opposed to the two mechanism to initiate constitutional amendment at the federal level i.e. by 2/3 majority vote of the two federal houses and by securing a call for constitutional convention from 2/3 of the states, state constitutions can be amended by one of four processes: voter adoption of legislative referred proposals, voter adoption of citizen initiated proposal, amendment through constitutional conventions and amendment through commissions.¹³⁸

Constitution may be amended, revised or initially adopted by an organ or body specifically established /organized/ for this task. Thus, the constitutions of 41 states expressly detail processes for calling constitutional convention. A constitutional convention may be established in three ways: by the state legislature with or without submitting the issue whether to call a convention to popular referendum, through an automatic convention call or by popular initiative.¹³⁹ In every state but Delaware convention proposals are subject to ratification via referendum though the requirement for ratification varies from state to state. The involvement of the public emphasizes the importance of popular support for constitutional change, while at the same time ensuring that any change is the result of a

¹³⁶Michael G. Collantuno cited at supra note 5, p.1477.

¹³⁷Marvin Krislov and Daniel M. Kath cited at supra note 106, p.2.

¹³⁸G. Alan Tarr and Robert F. Williams cited at supra note 35.

¹³⁹Ibid.

deliberative process. The right of the public to call an automatic convention may encourage public scrutiny of the state's constitutional arrangement. It is also important to aware the legislature to address citizens concerns.

Legislative proposal of Amendments is also one of the methods for state constitutional change in US. All state constitutions authorize state legislatures to propose amendments.¹⁴⁰ There are some salient features as regards a legislative proposal of amendments. Most state constitutions limit amendments to a single purpose. This means that amendments at a time should be limited in scope and be specific to certain provisions. This is to facilitate voter understanding of what is proposed and to prevent combining popular and unpopular items in a single proposal.¹⁴¹ It also helps voters not to be overwhelmed by the number of issues on which they have to decide. Many state constitutions also impose limits on the resubmission of proposals to voters again with in a given period of time. Such provisions protect voters from repetitive proposals and prevent recently rejected proposals from clogging the ballot.¹⁴² The provision also gives appropriate respect to the formal expression of the popular will represented by a negative vote on ratification.

Most state constitutions also specify a minimum period of time that must pass after legislative approval. This requirement ensures an opportunity for public discussion and deliberation. Many constitutions require publication of the text of the amendment before ratification. This will help to promote informed voter choice-giving citizens ample opportunity in their decision of ratification based on their understanding of the proposal. Legislature may resist change in the structure and process of state government. Being aware of such possibilities, the constitutions of about twenty five states expressly provide methods for proposing amendment with out legislative participation.¹⁴³ One of such mechanisms is constitutional change by popular initiative. Under this procedure, proponents of an amendment collect the signature of voters on petition to place a proposal on the ballot. State /sub national/ constitutional amendment mechanisms in federations are not parallel with their federal counter part not only in the USA but also in many other

¹⁴⁰Ibid, p.1092.

¹⁴¹Ibid.

¹⁴²Ibid.

¹⁴³Gerald Benjamin and Melissa Cusa, *Constitutional Amendment Through the Legislature in New York*; (in CONSTITUTIONAL POLITICS IN THE STATES in G. Alan Tar ed.1996), p.47-50.

federal systems. This non-parallelism in the amendment mechanism which makes sub national constitution amendments easier can be manifested in two ways. The sub national constitutions of some federations like Germany, Argentina, and Russia are easier to amend because additional and more accessible mechanisms are present at the state level but not at the national level.¹⁴⁴ When we see constitutional amendments in the German Lander, there is no common method of amendment among them. Even though approval of amendments in most Land Constitution can be made by two-thirds majority vote of the unicameral land legislature, the people can initiate amendments that have to be submitted to and considered by the legislature before being voted on by the citizenry. Thus most of the Lander provide for some form of popular initiative and referendum. By 1997, all Lander had constitutional provisions for referenda.¹⁴⁵ In many Landers such as Saxony, Thuringia, Schleswig-Holstein, there is a provision for a people's initiative a petition to place certain items or a specific proposal on the Land parliament's agenda for consideration.¹⁴⁶ If the parliament does not act on the proposal within a given period of time, interested citizens may complete a petition for a popular referendum on a specific bill. In Argentina, even though the dominant pattern for provincial constitutional amendment is by convention convened upon a vote of two-thirds of the two houses of provincial legislatures, many provincial constitutions can be amended more easily whereby a two-thirds provincial vote can submit amendments for approval in a popular referendum.¹⁴⁷ In the constitutions of sub national units of the Russian federation, constitutional amendment can be approved by two-thirds majority vote of the members of a constitutional assembly or by a majority of the people. Such arrangement mirrors the federal constitution arrangement. But in addition to this method, some state constitutions permit amendments to be proposed by initiative petition. The second reason why subnational constitutions are easier to amend is because they lack some of the burdensome requirements found at the national level. This is true in the state constitution of Australia, Austria, and Canada, Mexico and Venezuela.¹⁴⁸ For example, the Australian national constitution can be amended by two-thirds legislative vote, but if one-

¹⁴⁴John Dinan, *Patterns of Subnational Constitutionalism in Federal Countries*, Rutgers Law Journal, Vol.39, 2007/08, p.843.

¹⁴⁵Arthur B. Gunlicks, *Land Constitution in Germany*, Publius, The Journal of Federalism, Fall 1998, p.116 .

¹⁴⁶Ibid.

¹⁴⁷John Dinan cited at supra note 144.

¹⁴⁸Ibid.

third of the members of either legislative chamber request a popular referendum or if the proposed change amounts to a total constitutional revision, then a popular referendum must be held.¹⁴⁹ But with the exception of some Australian states that have entrenched some provisions of their constitutions which require a referendum for change, most provisions and in some states all provisions of state constitutions can be amended by ordinary legislation without a need for submission to the people.¹⁵⁰ In the same token, there is no need for a popular referendum on provincial constitutional change. It is enough for these changes to be approved by ordinary provincial legislative acts.¹⁵¹ In Mexico, the dominant mode of changing state constitutions is through a permanent constituent congress which is convened up on the vote of two-thirds of state legislatures.¹⁵²

Even though the majority of state (subnational) constitutions in many federations are amended in easier manners and through a variety of mechanisms mostly involving popular participation, there are some exceptional federations whose subnational constitutions amendment mirrors a very similar procedure with the national or federal constitution. This is especially true when the amendment mechanism of subnational constitutions is dictated by the national constitution. Malaysia, South Africa and Switzerland are classic examples of this kind of federation. The South African constitution requires the provincial constitutions and any amendments to them be certified by the constitutional court.¹⁵³ Similarly, the Swiss National Constitution stipulates that any proposed revision of the Cantonal constitution must be approved by the electorate.¹⁵⁴ Accordingly, amendment of cantonal constitutions in Swiss requires approval and initiation by popular referendum.¹⁵⁵

Summary-constitutions are usually designed to incorporate core elements of a democratic society so as to gain durability and constancy in their application in serving the present and future generations. However, constitutions should not be too rigid to handle changes with

¹⁴⁹Ibid, p.145.

¹⁵⁰Anne Twomey, *The Involvement of Subnational Entities in Direct and Indirect Constitutional Amendments within Federations* (June 2007), available at <http://camlaw.rutgers.edu/statecon/workshop11greece07/workshop11/Twomey.pdf>, p.29.

¹⁵¹John Dinan cited at supra note 144, p.846.

¹⁵²Ibid.

¹⁵³South African Constitution of 1996, Section 144.

¹⁵⁴Swiss Constitution, Art.51(1)

¹⁵⁵Supra note 133.

time, human development, occurrence of unwanted consequences etc. Thus, balancing rigidity with flexibility is of vital importance for the continuance application of a constitution. As a means of adapting constitutions with societal demands and changing circumstances, change in a constitutional document may be undertaken either informally by judicial interpretation, customs, and convention or formally by revision or amendment. The formal means of constitutional amendment may vary across countries in involving the legislature, the general public (referendum), and in using conventions and constitutional assemblies for initiating and ratifying constitutional amendments. We have also seen that the way of amending subnational constitutions are far more diverse than those used for amending national constitutions. Even within a country, constituent units of a federation may use different mechanisms of amendment. Since subnational governments are closer to the people and subnational governance is more manageable in greater scale, mostly subnational units involve the people directly for constitutional amendment both for initiation and ratification of amendments.

CHAPTER FOUR

4. Subnational (state) Constitutional Amendment under the Ethiopian Federal System

4.1. General overview

I. The Ethiopian Federalism and its Evolution

Until 1991, successive regimes tried to suppress the unique cultural identities of the country's more than eighty ethno-linguistic groups. Following a relatively brief civil war, Ethiopian Peoples' Revolutionary Democratic Front (EPRDF), an umbrella organization comprised of a number of ethnically based political parties, assumed state power in May 1991. EPRDF came to power with triple promises; to create a nation state of equals by ending ethnic domination, and democratize the Ethiopian state and society by ending centuries of autocratic rule.¹As a practical movement for the implementation of these promises, a Conference was convened in July 1991 to establish a Transitional Government. A Charter for the Transitional Period, which openly proclaimed the right to self determination including and up to secession to the country's diverse communities was approved and an 87 seat Council of Representative was formed to oversee the transitional process.²

The Transitional Government had begun its task by reviewing the political, administrative and economic systems of the country which had existed for the previous century. The formation of three-tiered administrative authorities as central government, regional self – government and the Woerda administration and the establishment of fourteen regions were the major events that took place by the TGE under the provisional constitution (Transitional Charter) adopted by the Representative of Councils. The Transitional Charter (TC), then, terminates its operation in 1995 with the ratification of the constitution of the FDRE on December 8 in 1994 that comes into effect on the 21st of August, 1995. This Constitution which addresses itself to the Nations, Nationalities and Peoples of Ethiopia,

¹Merera Gudina, *The Problematic of Democratizing a Multi-cultural Society: The Ethiopian Experience* on a conference on IMMIGRATION, MINORITIES AND MULTICULTURALISM IN DEMOCRACIES, (October 25-27, 2007), p.2.

² Solomon Nigussie, *Fiscal Federalism in the Ethiopian Ethnic-based Federal system*, (Wolf Legal Publishers, Netherlands, Revised edition, 2008), p.23.

has, as distinct from the previous constitutions, *declared the state structure as a federal one.*

The establishment of a federal form of government after seventeen years of struggle is praised by some authors as an ideal solution for the survival of a state. In line to this some expressed that;

*Seen in light of the fragile situation the country was in a decade ago, threatened by various national liberation movements, the commitment to national self determination and the establishment of regional governments based on nationality was a bold measure that ensured the Ethiopian state.*³

Fasil Nahum also expressed that;

*The most important thing to note about the Ethiopian constitution of 1994 is, it is clearly a departure from all the previous Ethiopian constitutions. The state it envisages and the government it establishes are different in form and content.*⁴

True, the establishment of the Federal Democratic Republic of Ethiopia,⁵ recognizing and declaration that the state structure comprises the federal government and the state members,⁶ and the constitutional division of legislative, executive and judicial powers between the federal and state governments⁷ are major departures that the current constitution has incorporated as manifestations of the federal dispensation.

The Ethiopian federal system takes the nations, nationalities and peoples of the country as a building bricks of the federation. The preamble which says” the Nations, nationalities and peoples of Ethiopia” signifies the Nations, Nationalities and Peoples as the authors of the constitution and parties to the covenant. They are also made holders of sovereign power.⁸

³Assefa Fiseha, *Theory versus practice in Ethiopia's Ethnic federalism* (in David Turton's edition) *ETHNIC FEDERALISM; THE ETHIOPIAN EXPERIENCE IN COMPARATIVE PERSPECTIVE*, AAU press 2006, P.135.

⁴Fasil Nahum, *Constitution for a Nation of Nations*, (Red Sea Press, 1996), p.84.

⁵FDRE Constitution, Art1.

⁶FDRE Constitution, Art.50.

⁷FDRE Constitution, Art. 50(2), Art 52, Art 78, Art 55 and 62.

⁸FDRE Constitution, Art 8.

Every Nation, Nationality and people has the right to self determination including the right to secession.⁹ For the realization of the internal aspect of self determination, the constitution provides for the establishment of state government at state and other administrative levels by granting adequate power to the lowest units of government to enable the people to participate directly in the administration of such units.¹⁰

There is also a commitment in the constitution towards every Nation, Nationalities and Peoples the right to speak, to write and to develop its own language to express, to develop and to promote its culture; and to preserve its history.¹¹ The constitutional recognition of equality of languages goes to the extent of not declaring any (single) language as the national language of the country except making Amharic as the working language of the federal government.¹²

The Ethiopian Ethnic-based Federal State thus consists of nine member states which are delimited on the basis of settlement patterns, language, identity and consent of the people concerned. These nine self-governing member states of the federation are the states of Tigray, Afar, Amhara, Oromiya, Somali, Benishangul/Gumuz, SNNP, Gambella, and Harari. Despite the prevailing social asymmetries in terms of geographic area, population size, economic and social development among the members of the federation, political asymmetry that treats all member states with an equal footing by granting them all equal rights and powers is what is envisaged in the constitution. The constitution goes far more declaring that the federal government and the states have legislative, executive and judicial power. Powers and functions of the federal government and the states are provided under articles 51 and 52 of the Constitution respectively. Following the US model of division of power, all powers not expressly given to the federal government alone, or concurrently to the federal government and the states are reserved to the states. Parallel court system of supreme, High and first instance courts are established both at the federal and state level.

⁹FDRE Constitution, Art.39.

¹⁰FDRE Constitution, Art 50(4).

¹¹FDRE Constitution, Art 39.

¹²FDRE Constitution, Art 5.

In relation to the Ethiopian Federal arrangement some authors expressed that the federal arrangement in Ethiopia has some unique features.¹³ These features are the recognition of the right of secession, and empowering the second chamber, the House of the federation, a non legislative house with the authority to interpret the constitution.

II. General Overview of the Federal constitution

So far, we have discussed the features of the Ethiopian federal system and its evolution in a nutshell. However, it is equally important to discuss what the constitutional frame work looks like and what essential elements are incorporated in the constitution so as to strengthen the federal ideal.

The federal constitution, that is adopted on December 1994 and came in to effect on the 21st of August 1995 is a covenant, a (compact) entered in to by the Nations, Nationalities and peoples of Ethiopia .The Preamble that addresses itself to the Nations, Nationalities and Peoples of the country expressed among others their common interest to build a political community to advance their economic and social development, to guarantee rule of law and democratic order which their struggle and sacrifices have brought about.

The constitution which contains 106 Articles under 11 chapters have incorporated many issues like fundamental principles of the constitution, fundamental rights and freedoms, the state structure, and division of power between the federal government and the states, organization and powers of courts, national policy principles and objectives etc.

The constitution stipulates popular sovereignty, supremacy of the constitution, human and democratic rights, separation of state and religion and transparency in conduct and accountability of government as fundamental principles of the constitution. Fundamental rights and freedoms provisions that run from Article 13 to Art.44 enumerate a bundle of individual and group rights.

¹³Tsegaye Regassa, *Subnational Constitutionalism in Ethiopia; Towards entrenching Constitutionalism at state level*, Mizan Law Review, Vol. 3, No 1 march 2009, P. 43. See also Assefa Fiseha; supra note 3 and Solomon Nigussie supra note 2.

As a manifestation of popular sovereignty and as a means of ensuring the power and autonomy of one government level from encroachment by the other, constitution in a federal system has to be supreme and written. It should not also be altered unilaterally either by the federal government or the member states. The FDRE constitution fulfills these “yardsticks” for that the constitution under art 9 is made the supreme law of the land. As we have seen before and as we will see later on, its amendment procedure involves both the federal government and member states.

Establishing a federal arbiter that settle disputes that may arise out of jurisdiction on division of power between the federal government and the member states or as between the legislature, the executive and the judiciary at the federal level is also a feature of federal systems. The Ethiopian Federal Constitution responds to this issue by granting the power of constitutional adjudication to the HOF, a representative of Nations, Nationalities and Peoples.

4.2. Amendment of the Federal constitution

In our earlier discussions of various topics and subtopics, we have seen the constitutional amendment practice of many federations. In the due course of our study, we have also seen that the FDRE Constitution contains provisions as to its amendment mechanisms. We have also seen the procedures in a sporadic manner mainly in comparison with other systems. So, in this section we will see the amendment procedure, the process and procedure of initiation of proposals for amendment, the role of member states in the process of constitutional amendment, the role of the general public (citizenry) in the amendment process, procedure and the amount of required vote for ratification and the fate of a bill amending the constitution. Understanding of such issues at the federal level may help us to compare it with the constitutional amendment mechanisms at state level and to have better understanding as to whether states have devised their own way of constitutional amendment mechanism or are influenced by the federal model.

Some scholars argue that providing and putting provisions for constitutional amendment in a separate article in the document devoted to constitutional change is preferable than

placing provisions for amendment in the legislative article.¹⁴ This helps to reduce complexity and assure full understanding of available options to the polity. In line with this assertion, the whole procedure of constitutional amendment mechanism of the FDRE Constitution is clearly stipulated under Art 104 and 105 of the constitution. The former article provides the procedures of initiation while the latter one deals with the ratification process. We shall discuss them in detail.

4.2.1 Organs Authorized to Initiate Constitutional Amendment

AS we expressed above, the whole process and procedure of initiation of constitutional amendment is provided under article 104 of the constitution. This provision states that

Any proposal for constitutional amendment, if supported by a two thirds majority vote in the house of people's representatives, or by a two thirds majority vote in the house of the federation or when one third of the state councils of the member states of the federation by a majority vote in each council have supported it, shall be submitted for discussion and decision to the general public and to those whom the amendment of the constitution concerns.

We have repeatedly said that one of the pillars of a true federalism is the involvement of both the central (federal) government and member states of the federation in the process of constitutional amendment. The constitutional amendment mechanism-initiation, deliberation, and approval should not be the sole function of either level of government. This is because in all polities that claim them as “federal”, subnational units have a vested interest in many areas which include the maintenance of the federal structure, the protection of their representation in the upper house of the national parliament, the maintenance of the integrity of their boundaries, and the distribution of legislative, executive, judicial and taxing powers between the levels of government.¹⁵ In line with this reasoning, under Art 104 of the FDRE Constitution, the proposal for constitutional

¹⁴Gerald Benjamin, *Formal State Constitutional Change Process*; derived from a large empirical work to be published in connection with the project on state constants for the 21st century, Rutgers Law school, Camden, New jersey, p. 6

¹⁵Anne Twomey, *The involvement of sub-national entities in direct and indirect constitutional amendment within federations*, a paper presented on the 11th international workshop in subnational constitutional law at Athens, Greece in 2007.

amendment can be *initiated* by the *federal* or *state* government organs. Thus, at the federal level, the two federal houses can initiate proposal for amendment. Accordingly, a proposal for amendment of the constitution can be submitted by the House of Peoples Representative (HPR) if a two-thirds majority vote support the proposal, provided at least more than half of the members are present during the vote which is the minimum requirement to constitute the quorum.¹⁶ Similarly, the House of Federation, upper house of the federal parliament can, by a two-thirds majority vote, initiate a proposal for constitution amendment provided a quorum is satisfied during voting i.e. at least 2/3 of the members are present as per Art 64(11). As parties to the covenant and institutions having vested interest in the making and amendment of the constitution, states are also authorized to initiate proposals for constitutional amendment. So, according to Article 104 of the Constitution, proposal for amendment can be initiated by one-third of the state councils i.e. by three out of the nine of the member states of the federation provided the state councils in the respective states approve the proposal by majority vote.

There are two more important issues that have to be emphasized under this provision. First, there is no limitation or restriction on the kind of proposals for amendment. As we have already discussed, the constitutions of some federations have incorporated some entrenched principles and provisions and clearly exclude them from the realm of amendment. But Art 104 provides “*any proposal for amendment shall be submitted...*”

The other point is concerning submission of the proposal “*for discussion and decision*” to the “*general public*” and “*those whom the amendment concerns.*” The literal message of the provision is that once a proposal for amendment is submitted after fulfilling the minimum required vote, the proposal shall be submitted for deliberation, discussion and finally for decision by the general public and by those whom the amendment concerns. Some authors also argue that constitutional amendments require popular discussion and submission for referendum.¹⁷ But as we will see below in detail, the process of ratification is provided under Art 105 and *popular approval is not required for ratification.* The Way how the general public decides proposals is not clear and the whole process of ratification

¹⁶FDRE Constitution, Art.58(1)

¹⁷Fasil Nahum cited at supra note 4, P. 60.

is undertaken by government machineries and political actors as per Art. 105 of the Constitution.

4.2.2. Ratification of the Amendment proposal

Like the initiation of proposal for amendment, ratification of the amendment proposal requires the involvement of both the federal government and member states of the federation. Thus, the same organs that involve during initiation are also required to ratify. However, as we will see in detail, the degree of participation of the organs or the required vote for ratification depends on the type of constitutional provision under consideration. Based on the rigidity of requirements for ratification, provisions of the constitution can be categorized in to two.

The first groups of provisions that are given special protection with relatively rigid ratification requirement are rights and freedoms specified in chapter three of the constitution, the amending provision it self and the provision that provides for the initiation of amendment.

As we have already discussed under chapter three, it is not uncommon to prioritize and give special protection for some kinds of constitutional principles and provisions. As such, the aforementioned provisions in the Ethiopian constitution are given rigid ratification procedure, even if they are not totally excluded from being amended.

Fundamental rights and freedoms as “bills of rights” regulate the basic relationship between the individual and the state. These rights protect individual and minority interests against misuse of power by majority.

As is reflected in the Preamble of the Constitution and as the human rights protection history of the country witnessed some two decades ago, special emphasis for their protection is given because of the past human suffering, injustice and wide spread human rights violation. Special protection is also afforded for the amending provision and for the provision that triggers amendment so as not to defeat the protections guaranteed by the constitution using the amending provisions as easy gates. Because of these deriving forces, ratification of amendment of these three provisions requires

- *Majority approval by all state councils;*
- *Two-thirds majority approval by the HOF; and*
- *Two-thirds majority approval by the HPR*

The other group of provisions in the constitution that requires relatively small threshold of votes for ratification is the remaining parts of the constitution, other than those that are expressed as discussed above. A *two thirds* majority vote of the *joint session of the two federal houses* and *majority approval by two thirds of the councils of the member states* is sufficient to amend all the rest provisions of the constitution.

4.3. State constitutional Amendment procedure in Ethiopia

In the preceding sections, we have thoroughly discussed the amendment mechanism of the federal constitution which may serve as a reference point in the study of subnational constitutional amendment practice as to whether states have designed new approach of their own for state constitutional amendment or are modeled after the federal one. But before that it is necessary to highlight the scene of state constitutions in federal Ethiopia.

4.3.1. General overview of state constitutions in Ethiopia

As we have discussed so far, one of the post 1991 political development in Ethiopia is the formation of federalism that is composed of nine member states delineated on the basis of settlement pattern, language and consent of the people concerned. Common to all federations, the Ethiopian federal constitution divides power between the federal government and member states of the federation. One of the powers of states as provided under Art 52 of the constitution is the power “*to enact and execute their own state constitutions*”, and other laws.¹⁸

Since 1995, immediately up on the coming in to force of the federal constitution, states have come to adopt their own constitution and to utilize them to manage state politics in

¹⁸ FDRE Constitution, Art.52 (2) (b).

accordance with them.¹⁹ Thus, in every state there is a written constitution as the formal basis for the state government.

The federal constitution has clearly authorized the legislature of the respective states to draft, adopt and amend state constitutions. Accordingly, it is the state legislature through its standing committees that was playing role in state constitution making.²⁰ Some authors argue that not many people and many stakeholders are made part of the drafting, deliberation and adoption process²¹ which may have its own negative impact on the legitimacy of the constitutions.

True to all sub-national constitutions in other federations, state constitutions in Ethiopia serve many purposes. They constitute /establish/ the state government, determine the powers and functions of the different government organs in the state, consolidate and reaffirm the powers the federal constitution ensured them, contain bill of rights and political rights as the freedom of speech, press, movement etc. that provides citizens with double protection of rights, establish and regulate local government etc.

When we see the contents of state constitutions, they mirror the federal constitution both in form and substance. The constitutions usually opens with a preamble which is a brief doctrinal foreword setting forth the presumed reasons for which the constitution was drafted and adopted including commitment and shared aspiration by the people of the state to live together in harmony by establishing rule of law and democratic order. In their first chapter, they provide general provisions like nomenclature of the state government, boundary, flag, regional anthem, language which perfectly follows the federal model. Under their chapter two, state constitutions stipulate basic principles of the constitution popular sovereignty, constitutional supremacy, human and democratic rights, separation of state and religion, conduct and accountability of government– all the five principles stated by the federal constitution. Under their chapter three like that of chapter three of the federal constitution, state constitutions provide a list of fundamental rights and freedom most of which are verbatim copies of the federal constitution. In addition to this, state

¹⁹Tsegaye Regassa cited at supra note 13, p.50.

²⁰ Ibid.

²¹ Ibid.

constitutions contain provisions that establish and determine the powers of the state legislative, executive and judicial organs. They have also detailed provision for the establishment and regulation of local government which is the main reason for the length of state constitutions.

With this back ground information, in the next topic we will discuss constitutional amendment under four states namely Gambella, Benishangul Gumuz, SNNPR and Harari State. I choose these states mainly because all of them are heterogeneous – comprised of at least three and more ethnic groups. In addition to know the general framework of constitutional amendment at state level, our study of the amendment mechanism in these four regions help to know if or whether there are points of divergence or convergence in the regions and to know if a special approach is followed by one or more of the regions as a result of ethnic heterogeneity. But before we directly go in to the discussion of state constitutional amendment mechanisms, we have to see what constitutional powers they have in amending their constitutions.

4.3.2. Constitutional powers of States to Amend Their Constitutions

The US constitution does not require states to have a constitution. If a State that is created after the formation of the federation *comes with its constitution* to join the federation, the Federal Parliament checks only whether the form of state government is republican or not. The FDRE constitution on the other hand seems to have strong stand and requires states to have their own constitution in an obligatory manner saying “*states shall... enact and execute state constitution and other laws*” (Art 52(2) (b). The constitution goes further up to determining the organ that is responsible for the drafting, adoption and amendment of state constitutions. Accordingly, Art 50(5) of the FDRE constitution authorizes the State Councils of the respective states to do these tasks. In the strict sense of the terms of the federal constitution, these three major functions in the state constitutional making process- drafting, adoption, and amendment, are left to the sole jurisdiction of the state council. As we have discussed earlier, the drafting and adoption of state constitutions were under taken by state councils through the instrumentality of standing committees with out public discussion and deliberation. Providing the power of constitutional amendment only to the state council is adding fuel on the fire. I.e. unlike state constitutional amendment

mechanism in other federations that involve the public both during initiation and ratification, the provision under the federal constitution excludes the general public once again by authorizing state council to amend the constitution. Determining the organ and providing the mechanisms (processes) for constitutional amendment has to be the *power of the people of the state* and the *state government* that is duly established by the free will of the people. The expression under the federal constitution will infringe popular sovereignty and the autonomy of States from designing their own set of mechanisms and institutions.

However, state constitutions have devised their own way of amendment mechanism and take the amendment process from being the sole function of the state council. Though this can be taken as a positive step for state constitutional practice and can be appreciated, still the constitutional amendment mechanism of states covered in this study are rigid and do not involve the public. As we shall discuss, in all states the amendment mechanism involves the different administrative units at various levels. As some authors expressed it, the increase in number of veto points and veto players is one of the causes for constitutional rigidity. Thus, the involvement of different administrative authorities including and up to the lowest Kebele administration may make the required vote unattainable. Generally, the issue of amendment mechanism in the Ethiopian federal system is a mixed blessing: unlike the amendment of cantonal constitution in Swiss which is totally regulated by the federal government or provincial constitution in south Africa that are subjected to the requirement of certification by the constitutional court, the FDRE constitution authorizes states to amend their constitution albeit by their respective council. And state constitutions since 1995 have made the amendment participatory of different administrative units. Even though this step can be partly appreciated; it has its own demerits. As will be discussed below, it has no place for popular participation and it makes the amendment procedure rigid.

4.3.3. Amendment procedure of the SNNP State constitution

The southern Nation, Nationality and Peoples' Regional State is one of the largest and ethnically diversified member states of the Ethiopian federation. Unlike other regions like Amhara, Tigray, Somali or Oromiya Regional states which are named after the dominant ethnic groups, the name "southern Nation Nationality and peoples' region" does not refer

any ethnic group and some authors expressed it as “*lacking anthropological personality.*”²² According to the 1994 population and housing census, forty five ethnic groups are administratively recognized with in SNNPR.²³ Because of its ethnic heterogeneity and some arrangements to accommodate this ethnic diversity (like establishment of Nationality councils representing different ethnic groups analogous to the HOF), some scholars called the arrangement in the region as federation with in a federation.²⁴ Having a constitution in this region serves far more than establishing the state government, and dividing power between different government organs. It is one of the essential tools to regulate the interaction between government and these diversified ethnic groups and a means to maintain the balance of power as among the different ethnic groups themselves. The region is organized in to zones which are thirteen in number,²⁵ woredas, special woredas (8 in number)²⁶ and kebeles.

As we will see below in detail, the state council, the council of Nationalities, the zonal councils and special woreda councils are the major actors in the constitutional amendment process.

4.3.3.1. Initiation for Amendment

Submission of proposals for constitutional amendment is the first step that triggers constitutional amendment. It is undertaken by initiating supposed proposals for change. As constitutions are supreme laws, embodying various democratic principles and norms, expressions of the will of the people and constitutive documents of government, interest groups or individuals cannot claim their change as they wish. When need arises to change constitutions, it should be done by those who are authorized by the constitution to propose amendments in a manner prescribed by the same document. In line to such understandings, the SNNPRS constitution has provided mechanisms for constitutional initiation and identifies the organs who can initiate proposals for change.

²²Tsegaye Regassa cited at supra note 13, p.52.

²³Sarah Vaughn, *Responses to Ethnic Federalism in Ethiopia's Southern Region* (in David Turton's edited book: ETHNIC FEDERALISM; THE ETHIOPIAN EXPERIENCE IN COMPARATIVE PERSPECTIVE, p.203).

²⁴Tsegaye Regassa on supra note 13, p.56.

²⁵ Sarah Vaughn cited at supra note 23.

²⁶Ibid.

Councils at various administrative levels in the region are entitled to initiate amendments. According to Art 124 of the constitution, a proposal for constitutional amendment can be valid and be submitted for discussion if it is supported by a two-thirds majority vote in the state council, or if it attains a two-third majority vote in the council of Nationalities, or if one third of the council of zonal or special woreda supports the proposed bill by majority vote. This provision provides that the proposal for constitutional amendment initiated in this manner be *submitted for discussion and decision to the general public and to those whom the amendment may concern*. The problem, however, is that ethnic groups that have their own zonal and special woreda status are entitled to have representatives in the council of nationalities.

As regards the scope that a proposal for initiation should cover, the constitution permits *any kind of proposal*-thus, makes every constitutional provision and principles subject to amendment except these expressly excluded i.e. chapter 3. The requirement that proposals should be submitted for discussion and decision to the general public and to those whom the amendment concerns, the expansion of the scope of constitutional amendment to any kind of proposal and the majority requirement for approval are all analogous to the procedures for initiation under the federal constitution.

The initiation procedure can also be described as “legislative initiative” controlled by state council, council of nationalities, zonal and woreda councils that leaves no room for popular initiative. If government of a time, paying no heed and ignorant of socio-political changes or with a desire to maintain the status quo, refuses to initiate proposals for constitutional amendment, there is no legal and constitutional means for the public to bring about change through constitutional amendment except through violence. Accompanied by the manageability in size of state population, states in many federations have a desire to participate the people directly in the political process. It is from this perspective that the majority of state constitutions in USA, the majority of Land Constitutions in German, and all Cantonal constitution in Switzerland require popular initiation of constitutional amendment.

As regards submission of the proposal of constitutional amendment to the general public and to those whom the amendment concerns for decision, the requirement seems to have a paper value for that the manner of ratification (the required vote) and the organs that can ratify are clearly mentioned and no public approval is required. The experience of some states tells us that if the power to initiate amendment is vested on the legislature, the people should be consulted about the proposal by requiring the legislature to submit it to the public.

4.3.3.2. Ratification process

Based on the number of votes required and the kinds of organs involved to ratify a certain proposal, Article 125 of the SNNPRS constitution has three categories of provisions. The first category is the amending provision that can be amended when all Zonal and Special Woreda council approved the proposed amendment by majority vote and when state council and council of Nationality approve the proposal by two-thirds majority vote. This provision is parallel with the amendment procedure of the amending provision in the Federal Constitution which requires the involvement of all state councils and two-thirds majority vote of the two federal houses in independent session. This parallelism is, however, questionable seen in light of the formal representation of local governments especially Woredas in the state government. While subnational governments are given formal representation in national governments and in some cases were created prior to them, all local governments are not represented. Special woredas that are on the same level of hierarchy with zones next to the regional council are shaped and reshaped many times as a political negotiation. Above all, all ethnic groups are not given the status of special woreda-thus creating difference between different ethnic groups.

The other category of constitutional provision with special amendment procedure is chapter two and three of the constitutions that deal with fundamental principles of the constitution and fundamental rights and freedoms. State constitutions generally have adopted two approaches. Some state constitutions including the SNNPRS constitution makes its amendment conditional effected only if the same parts of the federal constitution are amended as we will see below. Some state constitutions like the constitution of Benishangul Gumuz have provided their own procedure which is very rigid.

When we come to the SNNPRS constitution, as we have said before, the regional state has no power to amend chapter two and three of the state constitution regardless of an urgent need or what ever kind of reason that needs modification /amendment/ may arise. If provisions of chapter two and three of the federal constitutions are amended, these amendments should be ratified according to ordinary provisions of the constitution as we shall see below.

All provisions of the regional state constitution other than those discussed above have their own set of ratification procedure (requirement). Provisions in this category can be amended when the *joint session* of the state council and *council of Nationalities* approve a proposed amendment by a two- thirds majority vote and when two thirds of the Council of Zonal and Special Wareda approve the proposal by majority votes.²⁷

4.3.4. Amendment procedure of the Gambella Regional State Constitution

The Gambella region is located in western Ethiopia along the Sudanese border. There are five ethnic groups traditionally referred as “*indigenous*” living in the region: the Anywas, who make up 27 percent of the population, the Nuer that constitute 40%, the Majangar, 6% and the Omo and Kopo – 3%.²⁸ In addition to these ethnic groups, there are other ethnics groups mainly Amharas, Oromos, Tigrians and other ethnic groups that have their origin in the SNNPR that constitute about 24% of the regional population.²⁹

After many years of loose integration with the centre, the Gambella region exercised full autonomy since 1991 following the over throw of Derg. Thus, the region has adopted its first constitution in 1995 which was amended in 2002. (It is rather better to say revised given the degree (intensity) of work done on the constitution since an overall assessment is under taken). The current constitution was adopted on December 9, 2002. The constitution with its 123 Articles under thirteen chapters addresses many issues. In its first chapter, the constitution contains general provisions like nomenclature of the region, boundary, flag, regional anthem, language etc. The second chapter consists of five basic constitutional

²⁷The SNNPRS Constitution, Art.125 (3).

²⁸Dereje Feyissa: *The Experience of Gambella Regional state* in David Turton’s edition Book, ETHNIC FEDERALISM: THE ETHIOPIAN EXPERIENCE IN COMPARATIVE PERSPECTIVE P. 209.

²⁹Ibid, p.221.

principles all of which are stated under the federal constitution under similar chapter .The third chapter is devoted to fundamental rights and freedoms mostly verbatim copies (exact replicas) of the rights stated under the federal constitution. The constitution has detailed provisions about the structure of the regional government, the powers and functions of the different government organs etc.

The regional administration is organized in the hierarchies of the region, nationality zones, administrative woredas and Kebeles. As we will see below, all these administrative units through their councils are participatory in the amendment process. One thing more, only the five “*indigenous groups*” that are described as the “*founding members of the region*” namely Annuwa, Nuer, Majanger, Omo and Kopo are entitled to establish nationality zones.³⁰

4.3.4.1. Initiation of constitutional amendment

The Gambella people’s regional state constitution consists of a long list of organs who can initiate proposals for constitutional amendment. Beginning from the lowest kebele administration, the state administration (executive organ) and the state council can initiate proposal for constitutional amendment. In addition to these organs, nationality zones (established by the five indigenous ethnic groups), nationality special woredas and woreda administrations can initiate proposals for constitutional amendment.

Accordingly, proposal for constitutional amendment can be initiated, at the request of;

- One- third of the members of the state councils or
- Majority vote of the state administration or
- One- thirds of the Nationality zones or nationality special woredas or
- One - thirds of the woreda councils in the region or
- One - thirds of the kebele councils in the region.³¹

4.3.4.2. Ratification process

Based on the process of ratification, the provisions of the Gambella Regional state constitution can be categorized in to three groups. As is common to all constitutions this

³⁰ Gambella people’s Regional State Constitution, Art.46

³¹ Gambella People’s Regional State Constitution, Art.120

study covers, chapter two and three of the Gambella People’s Regional State Constitution can be amended only when these parts of the federal constitution are amended.³² The message of the provision is that so long as these chapters in the federal constitution are not amended, the provisions under chapter two and three of the regional constitution can not be touched at all. The constitution provided that if these parts (provisions) are amended under the federal constitution, they may be ratified according to the ordinary provisions of the state constitution which is undertaken in the following manner. All other provisions other than chapter two, chapter three and the amending provision have their own mode of ratification. The amendment of these provisions requires ratification by;

- Majority vote by more than half of the Woreda Council in the region and
- Majority vote by more than half of Nationality Zone or Nationality special Woreda councils and
- Three-fourth majority vote of the state council.³³

The constitutionality of providing separate procedures for the ratification of chapters two and three of the constitution once they are amended under the federal constitution is questionable for that the state constitutions can’t always resist or contradict changes and they are expected to comply with changes especially if the changes (amendments) made at the federal constitution brings substantial change on the contents of the rights or principles under these chapters and requires positive response on the side of states.

The third category of the state constitution with a special ratification mechanism is the amending provision itself. Even though the same organs that involve in the ratification of ordinary provisions are participating, the required majority vote and the number of participating Nationality zones, Nationality special woredas and woredas is very high. As such, the amending provision can be amended when the proposal is ratified by:

- Two-third majority vote of woreda councils in at least two-thirds of the woredas in the region;

³² Gambella People’s Regional State Constitution, Art. 121

³³ Gambella People’s Regional State Constitution, Art 121(2)

- Two- thirds majority vote of Nationality zones or nationality special woredas in at least two-thirds of the Nationality zones or special woredas;
- A three- fourth qualified super majority vote of the state council.³⁴

There are some common features between the SNNPRS and Gambella state constitution with respect to their amendment. Both of them follow a legislative initiative amendment at different levels. Even if both of them requires the submission of the proposal for the public and for those whom the amendment concerns for discussion and decision, ultimately the decision in both regions falls in the hands of the legislatures and there is no clear requirement of popular ratification. Both of them make amendments of chapter two and three of their respective constitutions dependent up on the amendment of the corresponding parts of the Federal Constitution.

Some variations can be observed under these two constitutions. Though both of them follow legislative initiation, the Gambella People’s Regional State Constitution widens the opportunity to the Kebele Council and to the State Executive to initiate amendment though these two organs have no role in the ratification process.

These two constitutions have approached the issue of ethnic accommodation and maintaining the balance of power in constitutional amendment mechanism in different manners. While the SNNPRS constitution establishes the Council of Nationalities which is analogous to the HOF that represents different ethnic groups, the Gambella Regional State Constitution acknowledges only five ethnic groups to establish their own nationality Zones thereby participate in constitutional amendment. This leaves other ethnic groups that comprises one-fourth of the regional population with no formal mechanism of participation unless they are concentrated in one Woreda or Kebele.

As we have seen above, the amendment mechanism of the SNNPRS Constitution is parallel with the Federal Constitution in terms of the required vote for initiation and ratification and the limited in scope of the participating organs. To the contrary, the Gambella Peoples’ Regional State Constitution authorizes a long list of administrative organs to initiate and ratify amendments. For examples in the Southern Nation Nationalities and Peoples

³⁴ Gambella People’s Regional State Constitution, Art.121(3)

Regional State, special Woreda Councils can ratify amendments by majority vote for the amendment of provisions other than the amending provision and chapter two and chapter three.

4.3.5. Amendment Mechanism of the Benishangul Gumuz Regional State Constitution

Like most of the regions of the country, the Benishangul Gumuz Regional State has adopted its first constitution in 1996 which was amended and replaced by the then constitution in 2002 which came in to force as of December 2nd. The Constitution which addresses itself to the Nationalities and Peoples of the region in its Preamble declares the reasons why the constitution is amended. It is amended to reflect transparency and accountability to the people and to enhance efficiency in government organs. It also expresses the commitment by different ethnic groups to live together harmoniously. The constitution also stipulates five ethnic groups namely Berta, Gumuz, Shinasha, Mao and Como in its preamble that gave them special recognition in addition to the whole people of the region.

More importantly, article 2 of the constitution expressly states that these five ethnic groups are indigenous to the region. Because of this listing, these ethnic groups are treated “differently.” I.e. they are not only specifically mentioned as distinct from the whole people of the region that hold sovereignty, they are also entitled to establish their own nationality Zones that in turn helps them to participate in initiating and ratifying amendments.

The constitution has striking similarity in form and content with the two state constitutions discussed earlier. Like the two state constitutions and the Federal Constitution we have discussed so far, chapter one of the Benishangul Gumuz Regional State Constitution deals with general provisions like nomenclature of the state, Boundary, flag and emblem etc. The only exceptional provision is the declaration of five ethnic groups as “indigenous” to the region under Art 2. Chapter two is all about fundamental principles of the constitution. Popular sovereignty, constitutional supremacy, advocacy for protection and promotion of human and democratic rights, the concept of secularism and transparency in conduct and accountability of government are the fundamental principles that the constitution anchors.

The next chapter that runs from Article 13-44 is the fundamental rights and freedoms part. In its subsequent parts, the constitution provides the structure and administrative hierarchies of the regional government

Lastly, the constitution contains provisions that provide the mechanisms for its amendment. Thus, Article 118 provides procedures for initiation and Art 119 deals with how proposed amendments should be ratified.

4.3.5.1. Initiation of constitutional amendment

The constitution under Art 128 contains a long list of government organs that can initiate constitutional change with the minimum required vote. The range of these organs extends from the state council at top down to the kebele councils in the region. Accordingly, a proposal for constitutional amendment may be submitted for discussion and decision to the concerned organs at the request of;

- One- thirds of the members of the Regional State Council;
- The majority members of the Regional State Executive;
- One-third of the council of Administration of Nationalities;
- One-third of the Woreda councils in the region; or
- One-third of the Kebele councils in the Region³⁵

Like the two state constitutions that we discussed earlier, initiation for constitutional amendment in the Benishangul Gumuz Regional state is undertaken solely by the existing government machineries. Unlike the initiation mechanism of the southern Region constitution which in its entirety is legislative based and extends only up to special woreda councils as a bottom line, the Benishangul- Gumuz state constitution authorizes the state executive council and extends up to Kebele Councils. Such a broader approach may enable different organs to initiate constitutional amendment so as to add or repeal provision (s) which they found pertinent. But still the public has no opportunity to influence the constitutional practice in the region. The provision that requires the submission of any proposal of or constitutional amendment to those whom the amendment concerns loses its sense in the constitution for that there is no clear provision for area specific amendment

³⁵ Benishangul Gumuz Regional State Constitution, Art.118

which obliges the submission of the matter to a certain group or area if it affects such section of the society or geographical area. There is also no possibility for the public to participate in the initiation of amendments though there is such an expression in the constitution. When we see the required vote and the kinds of organs that involve in the initiation of constitutional amendment, there is an exact match /parallelism/ between the Benishangul Gumuz and Gambela Regional States- the two historically similar neighboring regions. This may be because of the possibility of borrowing or adaptation of one from the other.

When we see the constitution approach to accommodate the interests of different ethnic groups especially in involving them in the process of initiation and ratification of amendments, the indigenous ethnic groups are authorized to have proportional representation in the Regional Government and there was also redrawing of Zones / Special Woredas ensuring self rule.³⁶ Like the case in Gambella, those ethnic groups that do not have their own Woreda /Zone or that are not entitled to fair representation in the Regional Government can not air their voice in a formal (constitutional) manner for constitutional initiation/ ratification.

4.3.5.2. Ratification Mechanism

As regards the ratification mechanism, there are two features that distinguish the Benishangul Gumuz regional state constitution from the other two constitutions we have discussed before. First, the constitution does not provide special procedure to amend the amendment and initiating provisions. Second, even though the amendment of chapter two and three of the regional state constitution are made dependent up on the amendment of the corresponding parts of the federal constitution, unlike the two state constitutions we discussed earlier, the amendment of chapter two and three of the federal constitution may not automatically call for ratification of these provisions in the constitution of the region. The constitution has its own set of requirements for ratification. Accordingly, chapter two and three of the constitution can be amended when;

³⁶ Assefa Fiseha (PhD), *Federalism and the accommodation of diversity in Ethiopia*, Wolf Legal publishers, revised edition 2007, p.280

- It is approved by more than half of the members of the Woreda councils in the region. (N.B. The required vote is not clear.)
- It is approved by three-fourths of the members of the regional state council.

All other provisions of the constitution can be amended when they are ratified or approved by;

- Two third majority vote of the Woreda councils in two thirds of the Woredas in the region and;
- The majority of the members of the regional council.

Even though the right to initiate amendment is given to different organs of the government, the process of ratification is limited only to state and Woreda councils which makes the process of constitutional amendment a sole jurisdiction of few government organs.

4.3.6. Constitutional Amendment Mechanism of the State of Harari

The Harari state is one of the member states of the Ethiopian federation. It is inhabited by Oromos that constituted 52% of the regional state population, Amharas 32%, Gurages and Tigriyans 9%. The Hararis constitute only 7% of the region's total population.³⁷ The Hararis have a long history and tradition of independent culture and administration. After the fall of Derg and during restructuring of the country's politics and administration, the people have given full autonomy and the establishment of the Harari Regional state came true.

The Region adopted its first constitution in 1995 which was replaced in 2004 by the present constitution. Facilitating proper division of power between the Hararis and the Oromos for sustainable economic development and dividing power and determining functions between the three branches of government are some of the reasons for the amendment of the earlier constitution by the State Council.³⁸ The Harari state constitution is the shortest one as compared to the federal constitution and constitutions of other member states. It contains only 80 Articles. Common to all state constitutions that follow the federal model, chapter one, chapter two, and chapter three of the Harari state constitution deals with general

³⁷This is as per ESA's 2007 National Population and Housing Census summary and Statistical Report.

³⁸Preamble of the Harari state constitution that was adopted on September 30, 1997

provisions, Basic principles of the constitution, and fundamental rights and freedoms respectively. All the points that we have discussed in other state constitution of the member states of the Ethiopian federation are included in these chapters. So, in order to avoid redundancy, I will not go in to the discussion of these points.

Chapter four of the constitution deals with the hierarchy of state government. Unlike the regional states of Gambella, Benishangul-Gumuz and SNNPR that organize the state government in the hierarchies of the Region, Zonal, Woreda and Kebele administrative levels, the hierarchy of state government is organized at Region and Kebele level.³⁹ The state government at regional level has the three government functionaries- the State Council (legislature), the State Executive and the State Judiciary. As will be discussed below, the State Council that plays the dominant role in the state constitutional amendment process has two chambers. These are the People's Representatives consisting of 22 members from all election constituencies in the region and the Harari National League (HNL) consisting of 14 members composed of the Harari Nationals (ethnic groups) within and outside of the region.⁴⁰ The Harari National League has given the authority to decide on many key issues. Among others, it has the authority to nominate the regional president who is in turn given the power of appointing key figures like the president of the State Supreme Court and police commission.

The HNL that represents the Hararis and maintains their interest is also given a special place in the composition of the region's constitutional interpretation commission that decides constitutional issues and controversies. Out of the seven members of the commission, three of them including the chairman are from the Harari National League. This casts doubt on the neutrality of this institution especially on issues that involve the interests of the Hararis.

With this general background information, now let's see what the constitutional amendment mechanism looks like and what organs are involved in the process of amendment.

³⁹ Harari State Constitution, Art 45

⁴⁰ Harari State Constitution, Art 46

4.3.6.1. Initiation of Constitutional Amendment

Based on the requirements for initiation and ratification provided under art 79 of the Harari state constitution, we have two categories of provisions. The first group of provisions includes chapter three (fundamental rights and freedoms provision). These parts of the Regional State Constitution can be amended only in accordance with the procedures of Art 105 of the Federal Constitution.⁴¹ The message envisaged in this provision is that the amendment of chapter three of the Harari regional state constitution can be effected when

- Both Houses of the Federal Parliament (i.e. the HOF and the HPR) in independent session approved the proposed amendment by 2/3 majority vote and;
- All state councils ratified the proposal by (majority vote).

Thus, unless the two federal houses and councils of all regional states are consented and approved (ratified) the proposal, the Harari Regional State council cannot amend chapter three of its own constitution.

The second category of provisions includes all provisions other than chapter three of the constitution. Initiation for amendment of these groups of provisions requires submission of a proposal by either chamber of the state council.⁴² It is not clear as to whether a single individual is entitled to initiate or what amount of vote is required for initiation.

4.3.6.2. Ratification Procedures

As we have seen earlier in the discussion of the three state constitutions, the process of ratification is the reflection of the hierarchy of state government and administration. Accordingly, in the SNNPR, Gambella and Benishangul-Gumuz regional states that are organized at Regional, Zonal, Woreda and Kebele levels, state constitutional ratification involves the councils at each level except the Kebele councils. The same analogy applies to the ratification process of the Harari state constitution. The state government is organized at Regional and Kebele level. But the Kebele councils are not participatory of the ratification process. The State Councils are the sole organs that ratify proposals that are

⁴¹ Harari state constitution, Art 79(1)

⁴² Harari State Constitution, Art 79(1) (a)

submitted by the same organs. The constitution expressly states that a proposal for constitutional amendment shall be ratified when;

- The proposal is approved by two-thirds majority vote by both councils in independent session and;
- The Joint session of the state councils approve the proposed amendment by a two thirds majority vote.

Thus, the constitutional amendment mechanism of the State of Harari is the function solely performed by the State Council both during initiation and ratification. The stipulation under Art 50(5) of the Federal Constitution that authorizes state councils to amend state constitutions fits its place under the Harari State Constitution. Unlike the constitutions of the SNNPR, Gambella and Benishangul-Gumuz states that opens a door for different interest groups like the State Executive, Woreda and Kebele Councils for initiation and also involves the Woreda Councils or Council of Nationalities for ratification, the Harari State Constitution has vested the powers of both initiation and ratification to the State Council.

As we can remember in our earlier discussion under chapter three, constitutional amendment should be undertaken by the legislature and by other mechanisms involving the citizens that by pass the legislature's mechanisms. This is so because the legislature may be reluctant to change the status quo. This may be practically true in all state constitutions but more probably true in the Harari state. As we have seen above, one of the two chambers of the state council that has given the power to initiate and ratify constitutional amendments is the Harari National League. This organ which is composed of the Hararis has key and decisive roles in the state politics. So, any kind of proposal for constitutional amendment such as for fair representation of different ethnic groups that are numerically dominant, proper division of power, right to be elected etc. and which may diminish the dominance of the Hararis in the state political process which disturbs the status quo, there is little, or no possibility for the bill to be passed by the state council especially by the Harari National League. This shows us that the public in general has no role to play in the state constitutional amendment mechanism thereby able to influence the political process. Having observed the eligibility of the Hararis to run for office in the city, the Oromos

outside the city and the rest ethnic group's role the right to elect but not to be elected, some scholars expressed that large section of the society are not meaningfully participating in the city state's politics.⁴³

The Harari state constitution also did not require the submission of proposals of amendment for discussion to the public and for those whom the amendment concerns, a requirement stipulated in other states constitution, at least on paper. Conducting discussion with the public may help to know the attitude of the society towards a given proposal which may indirectly influence its ratification.

4.3.7. Power of States to Amend Human Rights Provisions under their Constitutions

In addition to there being legislature oriented for their amendment, the amendment mechanisms of all state constitutions have one common denominator – making the amendment process of human rights provisions under their constitutions conditional dependent up on, and effected when the corresponding parts of the federal constitution are amended. While incorporating human rights provisions under state constitutions may provide a double standard of protection for individual rights of citizens of the country, making their amendment procedure quiet rigid by making them conditional, subject to the amendment of the federal constitution has, as we will see below, its own implications (ramifications) on the autonomy of states to amend their constitution, on wider or expansive human rights protection at state level and on the rigidity of the constitutions' amendment process.

A. Expansive and Independent State Constitutional Rights

The presence of constitutions at sub national (state level) is praised from many angles. One of the advantages that a state constitution yields is providing double protection of rights, reaffirming the rights recognized by the federal constitution and at times the articulation of distinct “municipal rights” and also the pursuit of unique protectionist goals with respect to the community's natural and built environment.⁴⁴ Although universal rights seems the

⁴³Assefa Fiseha cited at supra note 36, p.285.

⁴⁴Daniel B. Rodriguez, *State Constitutional Law and Its Prospects*, New Mexico Law Review 1998, Vol. 28, p. 298.

natural order and incorporating rights in the national constitution is practiced in many federations, ethnic, religious, and linguistic hostilities preclude consensus on common rights.⁴⁵ The incorporation of bills of rights under the federal constitution is also not always true. In relation to this, John D. Leshy suggests Australia as an example, a country which has no formal, separate bills of rights succinctly protecting a range of individual freedoms such as speech, religion, and privacy.⁴⁶ Given such kinds of challenges, independent state constitutions offer opportunities to entrench certain rights. Incorporating human rights provisions in state constitutions also permit the society to have easy access to state courts for the enforcement of the rights under the state constitution.

All the state constitutions in Ethiopia contain bills of rights under chapter three. But with the exception of some rights which are better protected in the state constitution than in the federal constitution,⁴⁷ the majority of fundamental rights and freedoms protected under the state constitutions are verbatim copies of what are stated under the federal constitution. This issue together with their rigid amendment procedure which is made subject to the amendment of the federal constitution is a pushing factor for the study of the status of human rights protection in state constitutions in different federations in general and in Ethiopia in particular.

One of the most developments in the US state constitutional history is the concept of “New Judicial Federalism”. It is all about more protective and expansive protection (interpretation) of the rights by state courts than were protected by the federal constitution in areas where both the federal and state constitutions protect similar or identical rights as interpreted by the Supreme Court. In relation to this the Alaska Supreme Court stressed that:

⁴⁵Robert Williams, *The New Judicial Federalism in the US: Expansive state constitutional Rights decisions*, on seminar report: SUB NATIONAL GOVERNANCE, Konrad, Adenlder, Stiftung, 1999, p.67.

⁴⁶John D. Leshy, *The State of Constitutional Law in the Sates of the United Sates: Are There Any Lessons for Australia?*, western Australian Law Review, 1990, Vol. 20, P. 375

⁴⁷For example, the SNNPRS, Gambella, and Benishangul-Gumuz Constitutions as per Art121 (4), Art. (117(4) and Art. (115 (4) provided that the right to life is not derogable even in times of emergency, a protection that is not granted even under the federal constitution.

*While we must enforce the minimum constitutional standards imposed up-on us by the us supreme court's interpretation [of the fourteenth Amendment], we are free, and we are under a duty, to develop additional constitutional rights and privileges under our [Alaska] constitution... we need not stand by idly and passively, waiting for our constitutional direction from the highest court of the land.*⁴⁸

The idea here is that federal law creates a national minimum of rights. Robert F. Williams puts it clearly saying

*“As a practical matter state constitutional law cannot provide less right than are recognized in that particular area under the federal constitution. If a state court interpreted its state constitution to provide less right than the federal constitution it would still have to enforce the higher federal standards because they are the supreme law of the land.”*⁴⁹

The South African constitutional court also confirmed that the rights under provincial bills can be protected more than the protection afforded by the federal bills of rights. The court opined that:

*A provincial bill of rights could (in respect of matters falling within the province's power) place greater limitations on the province's powers or confer greater rights on individuals than does the [interim] constitution, and it could even confer rights on individuals which do not exist in the [interim federal] constitution.*⁵⁰

What the state constitutions in Ethiopia can learn from the above explanations is that they can contain a long list of rights and can provide better protection by taking the protection under the federal constitution as a minimum standard as opposed to exact replicas of the rights protected by the federal constitution. What makes rather expansive state constitutional protection illusive in Ethiopia is the absence of Judicial reviews both at federal and state level. Countries like USA have entrusted their ordinary courts to interpret

⁴⁸Robert F. Williams cited at supra note 45, p.68.

⁴⁹Robert F. Williams, American State Constitutional Law, p.6.

⁵⁰Certification of The Constitution of Kwazulu Natal, CCT 15/96, September 6 1996 as cited by Robert F. Williams, supra note 49, p.72.

the constitution. As forums of dispute settlement in the day to day life of individuals, citizens can be benefited a lot from court's interpretation of fundamental rights in the constitution. Other federations like South Africa have established constitutional courts with and special jurisdiction on constitutional matters.

When we come to Ethiopia, the power of judicial review or constitutional interpretation both at federal and state level is given neither for ordinary courts nor for special constitutional courts. The power of constitutional interpretation at federal and state level is given to political organs- the HOF and Constitutional Interpretation Commission (CIC) respectively. As compared to courts, this denies individuals from obtaining easy and direct access for the enforcement of human right provisions. Even though courts can play their own roles in enforcing human rights in the due course of entertaining cases, practically they restrain from expounding (interpreting) constitutional provisions especially if there is any controversy over the meaning, content and scope of the rights in the constitution.

What makes things worse in Ethiopia is the composition of the (CIC) Constitutional Interpreting Commission especially in multiethnic states. Under the Gambella Regional State Constitution, the commission is composed of representatives from Nationality zones including Opo and Como.⁵¹ Those ethnic groups that are entitled to have nationality zones are the Annuak, Nuer, Majanger, Opo, and Komo which are designated as the "founding members of the region." The partiality of the commission is questionable if a case is submitted by individuals or ethnic groups which do not belong to members of the commission or which do not have representative in the commission. The Constitutional Interpretation Commission of the Benishangul-Gumuz regional state consists of twenty members composed of four representatives drawn from each indigenous nationality.⁵² The question of partiality arises also under this constitution. Political domination by few ethnic groups excludes other non indigenous groups. For example, candidates from Amhara, Oromo, and Tigray nationalities for the 2000 election for the regional council were prohibited on the basis that they were not able to speak the vernaculars of one of the five "indigenous ethnic groups". The issue was involving constitutional interpretation that

⁵¹ Gambella Peoples' Regional State Constitution, Art.72.

⁵²Benishangul-Gumuz Regional State Constitution, Art.71.

was finally decided by the HOF and permitted them to run for office since they can speak the working language of the region. In the same token, the Hararis have influential role in the composition of the interpreting composition beginning from controlling the position of the chairman ship. The council of Nationalities of the SNNPR that interprets the constitution is a majoritarian organ compassed of representatives of Nations, Nationalities and peoples at least by one member and by one additional representative for each one million of its population.⁵³ Generally, an expansive and independent state constitutional right is a concept missed in the state constitutions in Ethiopia mainly for three reasons.

1. If contested, fundamental rights are not subject to judicial interpretation which denies individuals direct access to claim their enforcement.
2. The organ /institution/ established by state constitutions for constitutional interpretation is political and probably partial which is dominated by few ethnic groups.
3. Human rights provisions in state constitutions are direct replicas of the provisions in the federal constitution. Moreover, they cannot be amended easily and can't provide better protection than what they are providing now unless the counter part of the federal constitution is amended

B. Autonomy of States to determine their Regional Political Process including Amendment of their Constitution

One of the greatest political developments ever taken following the demise of the unitary rule of the Derg regime is the formation of federalism and the constitutional division of power between the federal government and member states of the federation. Accordingly, Art 52 of the federal constitution authorizes the states to establish a state administration that best advances self government, a democratic order based on the rule of law, to protect and defend the federal constitution, to enact and execute the state constitution and other laws among others. The constitution also provides the establishment of the state government at state and other administrative levels. It also authorizes the state council the

⁵³SNNPRS Constitution, Art. 58(1) and (2).

power to draft, adopt and amend the state constitution.⁵⁴ Some authors expressed that such expression in the federal constitution set the outer limits of the freedom to adopt one's own constitution at the state level for that state constitutions can't establish a system that, has a deficit of democracy, rule of law or self government.⁵⁵ Circumscribed by the requirements provided by the federal constitution, all state constitutions have adopted their own constitution and provide their own mechanisms of amendments. However, many persons and scholars argue that the actual political process at state level is affected by many factors, which includes among others single party domination by EPRDF and its coalitions, fiscal dependence of states and lower administrative units on federal budget and grant, curtailment of public space for discussion and decision, and conflicts in between ethnic groups in multi-ethnic member states etc.

As regards the effect of central party domination, some expressed that "every day politics under the EPRDF are often ignored. They are marked by top down policy making, popular participation is restricted, decisions are monopolized by the de facto one party state, and there is little local room for deviating from federally fixed policy priorities."⁵⁶ In line with this Scott Bennet describes the way how party influences the politics of constitutional amendment during referendum in Australia as "A referendum is an exercise in participatory democracy and *the temptations of partisan advantage can be hard to resist at campaign time.* With both major Australian parties, ideological and political considerations have tended to outweigh any chance of a proper and careful consideration of the place of the Constitution in the Australian system of government."⁵⁷ There are many mechanisms through which the federal government intervenes in regional affairs. Before 2001, the regional affairs Bureau in the prime minister's office dispatched technical advisors to the regional capitals, who exerted strong influence. Officials of the Federal Affairs Ministry, successor of the Regional Affairs Bureau, are second administrative layer on whose approval officials are strongly dependent.⁵⁸ It is clear that the domination of the federal state by EPRDF and its

⁵⁴ FDRE Constitution, Art.50 (1 and 2).

⁵⁵Tsegaye Regassa, *Subnational Constitutions in Ethiopia: Towards Entrenching Constitutionals at State Level*, Mizan Law Review, vol. 3, No 1, March 2009, p.40.

⁵⁶Ethiopia: Ethnic federalism and its Discontents, Crisis Group Africa Report No 153,4 September 2009, p.15

⁵⁷Scott Bennett, *The Politics of constitutional amendment in Australia*, Research Paper No. 11 2002-03, Information and Research Services Department (Publ.),2003, p.17.

⁵⁸Supra note 56.

affiliates will undermine democratic institutions. Since state institutions and the party system are systematically intertwined, centralized party rule and federal intervention in the regions undermine local self government.

The other factor that influences the region's political process is inter-ethnic conflict. For example, in Gambella, the Nuer stand to be numerically greater than their rivals, the Annuaks, but the latter dominated the region's political process until recently. Like the case in Gambella, ethnic conflict and crisis has also occurred in Benishangul-Gumuz between Berta and Gumuz on the one hand and between the indigenous ethnic groups and the highlanders on the other.⁵⁹ In relation to the minority tyranny against the majority some authors expressed that "the most serious problem in Ethiopia today is that the rule of the minority is being institutionalized in the name of democracy. It is a minority that rules Ethiopia today, excluding the majority."⁶⁰

Maintaining the balance of power relationship between different ethnic groups is essential. Concerning self administration, local empowerment and its potential of maintain power balance Preston King stated that

*local decentralization in multicultural federations can only go so far it will not be short of confirming some ethnic class or other groups in an underrepresented or minoritarian position... the power accorded to local oligarchy to rule will always in some degree permit it to deal unfairly sometimes grossly so, with those subject to it and most specially where the latter take no part in, or are automatically denied any significant impact up on local deliberations.*⁶¹

As we have discussed earlier, inter ethnic conflicts and crisis in many regions has caused the federal government to intervene. This finally led to a proportional representation of contending groups in the regional government and the redrawing of Zones and Special Woredas. This in turn has its own ramification in the state constitutional amendment

⁵⁹Assefa Fiseha cited at supra note 36, p.273.

⁶⁰Kjetil Tronvoll, *Ethiopia- A New Start? , Minority Rights Group International Report*, April 2000, p.20

⁶¹Preston king, *Federalism and Federations*, London; Croomhelm, 1982 p. 116 as cited by Assefa Fiseha cited at 36, p. 273.

process since ethnic groups with Nationality Zones and Special Woredas can participate in the initiation and ratification process. As regards human rights provisions under state constitutions, we have argued earlier that by taking the protections under the federal constitution as a minimum core standard, state constitutions can afford greater protection. But state constitutions in Ethiopia made human rights provisions amendable only when the corresponding parts of the federal constitutions are amended. Such an approach has two ramifications: states cannot provide better protections other than what is currently provided under the constitutional document. By making their amendment dependent up on the amendment of the federal constitution and the procedures set forth there in, states have made their constitutional amendment so rigid and submit their autonomy to amend the constitution for the consent and good will of the two federal houses and other state's councils for amendment.

Conclusion and Recommendations

I. Conclusion

Federalism as a form of government is gaining acceptance as opposed to secession or unitary state. Many justifications are generally given for federalism as an option. The desire for common market, common defense, the need to protect individuals against political authorities by constraining their power, its efficiency to accommodate minority nations who aspire to autonomy and its potential of giving opportunities for citizens' participation at different levels are some of the reasons that makes federalism more acceptable.

Following the fall of the Derg regime in 1991, Ethiopia has also openly declared the state structure as federal which is a total break from the past that was dominated by a tradition of monarchical rule and centralized unitary state. Thus, the country is composed of nine member states.

One of the features of Federalism is the creation of two tiers of government that are autonomous and independent in the spheres of their competence. One of the manifestations of their autonomy, if not the necessary and exclusive one, is the right of constituent units to have their own constitution. Now a days, autonomous and democratically self governing populations adopt rules and principles for their own collective self-governance in the form of a constitution. Accordingly, subnational constitutions or their functional equivalent are now found in many federations in the world including Ethiopia. We have seen in the second chapter that state constitutions have myriad functions in the administration and political process of state government; state constitutions are the constituting documents of state government, they determine the powers and functions of different government organs and regulate the relationship between individuals and the government and as between the different government organs themselves. State constitutions are also manifestations of the commitments and aspirations of the peoples of the state. By incorporating bills of rights state constitutions reaffirm and provide double protection for rights and freedoms of citizens. Rights in State Constitutions also enable citizens to know their rights since they are closer and proximate to the state citizens.

After many years of neglect, recently different scholars have studied state constitutions in different federations from many aspects like the amount of space left by the national constitutions for state constitutional practice, the process of original adoption of state constitution, the similarity and difference between national and sub national constitutions in governmental institutions, rights protection, distribution of power, general nature (feature) of state constitutions, similarity and difference among subnational constitutions in a federal polity, the kind of governmental institutions provide authoritative interpretation to state constitution and the like. While each of these issues can be a fertile ground for future research of state constitutions in Ethiopia whose study is not yet well developed, this paper focuses on the processes and mechanisms of amendment of state constitutions, the organs involved in the initiation and ratification of state constitutions in Ethiopia by focusing on the constitutions of four states that are known in their ethnic heterogeneity. With a view to have better understanding of the mechanisms and procedures of state constitutions in Ethiopia and to know as to what prospects does state constitutional amendment in Ethiopia have, under the first section of chapter three, an attempt is made to define the concept of amendment and to determine its scope in general. Most importantly, the kinds of organs involved in constitutional amendment and the mechanisms (procedures) of amendment in different federations are thoroughly discussed. In order to facilitate the stage for the discussion of these issues in the state constitutions of Ethiopia and to grasp the points of divergence and convergence (if any) with the methods and procedures of the federal constitution and state constitutions of other federations, the manner of amendment of the Ethiopian federal constitution and state constitutions of other federations are also discussed by way of comparison.

As the socio- political fabric of the society, supreme and basic law of a country, constitutions are normally expected to be stable. But in order to respond to emerging societal needs in areas of social, economic and political life, constitutions like any other laws have to be changed from time to time. Adaptation of constitutions to changing circumstances may be taken place in various forms. Judicial interpretation and usage in the form of customs and convention are informal mechanisms that used to apply constitutional provision in manners different from what a provision in the document of a constitution says. In addition to such kinds of implicit change, constitutions may be changed in a

formal manner through a constitutionally prescribed process called *constitutional amendment*. Providing mechanisms for constitutional amendment by the framers of a constitution is justified from many angles. The limited scope of knowledge by the framers to foreseen the future, occurrence of unwanted and unintended consequences, social, political and economic dynamics over time etc are some of the reasons that justify constitutional amendment and the inclusion of procedures for the same.

Even though prescribing mechanisms for constitutional amendment is a norm, taken for granted in most constitutions, there is no single, uniform and agreed up on approach followed by all. As such the amendment mechanism of some countries requires only the legislature for initiation and ratification. Some countries allow the legislature to initiate proposals for amendment but require it to submit it to the public for ratification. Still some others authorize the people the right to initiate and to ratify amendments. While this being true for the amendment of federal constitutions in many federations, the amendment mechanism of state constitutions in most federations has its own unique features. As it is discussed under the third chapter, amendment processes of state constitutions are usually participatory of the people of the state. As the experience of the States of US, Cantons of Switzerland and Land of Germany show, direct popular participation in constitutional change can be institutionalized by permitting the people to initiate proposals for constitutional amendment or to participate in the ratifications of amendments proposed by the legislature, a constitutional convention, commission or assembly. Even though there are few exceptional federations that permit direct popular participation at the federal level, the majority of federal systems have institutionalized direct popular participation at state level. When we come to the Ethiopian experience, neither the federal constitution nor any of the state constitutions, have institutionalized direct popular participation both for initiation and ratification of constitutional amendments. It is often true that the opportunities for opening up participation in the decision making process for ethnic and linguistic minorities may be greater at the sub national level than the national constitutional level. Unless there is an opportunity for discussion and deliberation by all ethnic groups in the constitutional making and amendment process and if it is controlled by few ethnic groups, it may cause grievance for some ethnic groups which can serve as an instigator to illegal movements for secession – a right guaranteed by the constitution for every Nation,

Nationality and people to be exercised unconditionally. In addition to some forms of mechanisms for popular participation, amendment mechanism of state constitutions can take place in various ways like convention, commission, popular referendum, legislative mechanism or a combination of these methods. The experience of, for example, the States of US witnessed this fact since many states have adopted at least two mechanisms for amendments. More specifically, except Delaware all states require popular approval of legislative initiated amendments.

There is also consensus among scholars that state constitutions should provide for at least two means for amendment, one through governmental institutions established by the constitution and one that by pass the existing institutions. This is so because if government of a time is reluctant to amend the constitution despite urgent needs, there should be an avenue outside the existing government institutions probably through popular initiative to bring about the intended change. When we see the Ethiopian case, there is a mixed blessing. On the one hand, the federal constitution authorizes the state councils to amend their respective state constitution. Strict adherence to this provision may prevent organs other than the state council from amending the constitution. On the other hand, by setting aside this provision states have devised their own mechanisms for constitutional amendment. But all state constitutions have similar approach of constitutional amendment that is under taken by government institutions in particular by the legislature. As we have discussed above, in such circumstances there is no formal possibility for the public to initiate and ratify constitutional amendment. The other feature of state constitutions in most federations is the flexibility in their amendment mechanism notably in their lower threshold majority requirement. This is true, for instance, in US to the extent of saying that pursuing state policy through constitutional amendment is simpler than by legislating laws. However, state constitutions in Ethiopia proceeds in lockstep with the federal constitution and with each other (example, there is an exact similarity between Gambella and Benishangul Gumuz states). By so doing, states failed to consider what might be most appropriate for their particular circumstance.

The approach of SNNPRS constitution in establishing council of Nationalities that represent different ethnic groups living in the region for constitutional amendment and

interpretation is a positive step to be appreciated and followed by other multi ethnic states yet it is criticized as being majoritarian. Our state constitutions are rigid and their rigidity is reflected by the qualified supermajority requirement vote and the number of actors and decision points. For example, ratification of the amendment of the amending provision of the SNNPRS constitution requires the consent of *all* Zonal and Special Woreda councils by majority vote and 2/3 majority vote by state council and council of Nationalities.

The participation of lower administrative units like Zones, Woredas, and Special Woreda councils in the Ethiopian context not only increase the number of veto players there by makes constitutional amendment rigid but also creates a pseudo-analogy to the federal arrangement of state's participation in the amendment of the federal constitution. Many interests of states like their territorial integrity, powers and functions are incorporated in the federal constitution. That is why their participation in the amendment of the federal constitution becomes one of the essentials of federalism. However, the same is not true for government hierarchies at state level since they are mere administrative units with minimal power of legislation. What is more, even if many ethnic groups live in the states of Gambella, Benishangul and SNNPR, not all ethnic groups are entitled to establish Zones, Woredas or Special Woredas of their own. This makes many ethnic groups to compete to have their own Zones or Woredas which was practically implemented in some regions by redrawing Zones and Woredas even by the intervention of the federal government.

The other issue in relation to state constitutions, as the experience of many federations witnessed, is the expansive and independent state constitutional protection and interpretation of human rights provisions by taking the protection in the federal bills of rights as a minimum floor, not a ceiling. The fate of human rights protection in the state constitutions of Ethiopia is not much better than what is protected under the federal constitution. For one thing, in case they are contested, they are out of the realm of day to day application and interpretation by courts which in turn denies access for many individuals. For another thing, human rights provisions in state constitutions are verbatim copies or direct replicas of the provisions in the federal constitution. In addition to this, unlike the case in many federations where human rights provisions can be expanded through amendment, there is little room for such a possibility in the state constitutions in

Ethiopia. The amendment of human rights provisions is very rigid, effected when the corresponding parts of the federal constitution is amended or by following the procedures of the federal constitution. This in turn has its own ramification on the autonomy of states to amend their constitution. States cannot amend the human rights parts under their constitution unless the corresponding parts of the federal constitution are amended which requires the consent of the two federal houses (HOF and HPR) and the councils of all states. Judicial review of substantive and procedural aspects of constitutional amendments is legally recognized in the constitutions of many countries. However, it is not expressly mentioned both under the federal constitution and state constitutions of Ethiopia as to whether an individual has standing challenging amendments. By widely interpreting the term “constitutional dispute” in the constitutions, we can argue that challenges to amendment can be grounds for standing and be submitted to organs that are authorized to decide. But these organs in Ethiopia are not courts (ordinary or constitutional). The power to interpret the constitution and to determine constitutional issues is given to a special constitutional interpreting commission composed of few politically dominant ethnic groups whose impartiality and inclusiveness of all ethnic groups is open to doubt.

Finally, as constitutional amendment is different from the amendment mechanism of ordinary legislation, the constitutions of many countries have stipulated clear rules and procedures governing the procedures of amendment from the time of initiation to adoption and promulgation. Requiring submission of the proposals for public discussion, determining the time within which they may be stay open for discussion, permission/prohibition/ about resubmission of a bill that was not ratified, requirement of promulgation and determining the effective date of amendment are some of the issues that require special emphasis and are accordingly treated by the constitutions of many countries. This helps to avoid possible conflicts among interest groups in the due course of amendment. But all such issues are not properly addressed in the state constitutions in Ethiopia. Therefore, they may possibly be source of future conflict during constitutional amendments. As compared to subnational constitutional practice in other federations, subnational constitutional experimentation in general and constitutional amendment mechanism in particular suffers from a lot challenges in the Ethiopian polity. So as to eliminate the

various vices prevalent in the state constitutions of Ethiopia, as recommendation, the following points need to be stressed.

II. Recommendations

- The expression of the federal constitution that authorizes the *state council* the power, among others, *to amend the state constitution* seems in contravention of the state's autonomy to design democratic institution and organs of their own choice that fits best their socio-political circumstance. Such an expression, if strictly followed and applied, may also hinder state constitutional experimentation in designing, creating and resorting for other alternative, simpler, and participatory means of constitutional amendment mechanisms. Even if states have devised their own set of amendment mechanism that deviates from what is stipulated under the federal constitution, this approach that goes beyond the stipulation of the federal constitution may bring constitutional issues to the forefront. So, by leaving detail matters to the determination of states under their constitution that may also help to make state constitutions as laboratories of local self government, the expression under the federal constitution *should grant the power to the state government and the people of the state* instead of the state council.
- The State constitutional amendment mechanism in Ethiopia is in lockstep with the federal constitution which is dominated by the legislature. This approach of states may have many side effects. It denies citizens of the state from taking part and influencing constitutional amendment processes. States can't also serve as laboratories of constitutional practice. Accompanied by the proximity the state governments have with society at state level and in view of giving chance to the people of the state to participate in the amendment process, there should be some role for the citizenry that is not fully controlled by the legislature which at times may be reluctant to change the status quo.
- Given the number of actors and decision points that extend from the state council down to the Woreda councils for initiation and ratification, state constitutional amendment in Ethiopia is highly entrenched and can't be achieved easily. Given the necessity of frequent constitutional adjustment at state level so as to cope up with

changing circumstances, *making state constitutional amendment procedures relatively flexible is advisable.*

- Though the legislature at various levels is given the power to initiate and ratify constitutional amendments, this study in all of the multi ethnic states of Ethiopia shows that all ethnic groups do not have their own Zones or Woredas so as to have their say in the initiation and ratification of amendments via their councils. This creates competition and rivalry among ethnic groups for ethnic Zonation. It also leaves some ethnic groups passive in the process of constitutional amendment. The system of organization of the Ethiopian State on an “ethnic” basis and the system of “ranking” of ethnic groups lead to oppression and exploitation of politically weaker ethnic groups by the stronger ones and sometimes empowerment of the minority at the expense of the majority. These kinds of events may create conflict and hatred among ethnic groups and fragment groups along ethnic lines. So, instead of constitutionalizing such kinds of ranking and differential treatment among ethnic groups in the constitutions of states , particularly in the process of constitutional amendment, *states should devise a more inclusive, participatory and representative mechanism acceptable by all ethnic groups.* Establishing a constitutional amending commission or convention composed of all ethnic groups, for example, may be pertinent from many angles like reducing ethnic rivalry for ethnic based territories, giving chance of participation for all ethnic groups in the region, the relatively large degree of freedom the commission (convention) enjoy in making proposals for change, and the possibility of lesser political pressure on a body established temporarily than the legislature.
- The superiority of some specified ethnic groups (i.e. the Hararis in Harar, the five ‘indigenous’ and ‘founding member’ ethnic groups of the Benishangul-Gumuz and Gambella regions respectively) is reflected not only in initiating and ratifying constitutional amendments but also in determining all constitutional disputes including challenges to amendments. So putting the whole constitutional process at the mercy and within the hands of few ethnic groups may not help to endure full participation, sense of belongingness and mutual integrity of all ethnic groups.

Moreover, constitutional endorsement of collective rights for specified ethnic groups will be in conflict with individual and collective rights of “other” ethnic groups in the region especially in some kinds of institutions like the constitutional interpreting commission which is dominated by few ethnic groups in all the states.

- The role of states and state constitutionalism as laboratories of human rights protection is also a missing concept under the state constitutions of the Ethiopian polity for most of the provisions are verbatim copies of the federal bills of rights and the courts can't interpret the constitution in time of contestation so that they can't add important human right values on a day to day basis. But, state constitutions should be designed in a manner that contains a long list of rights not found at the federal level like cultural, linguistic, and religious rights.
- All state constitutions, as regards amendment of fundamental rights and freedoms, have submitted themselves to the amendment procedures of the federal constitution that requires the involvement of the two federal houses and all state councils. By implication, an amendment procedure of human rights provisions under a state constitution requires the involvement of these organs. By so doing states have lost their autonomy to amend their constitution at any time they want. They can't also extend human rights protection and include provisions easily through amendments. So, state constitutions should be drafted (amended) in a way that avoids such provisions.
- Finally, so as not to give rise to problems and disputes of their own, rules and procedures on constitutional amendment should be as clear and simple as possible. Beginning from providing constitutional detail defining amendment and revision, requirement to conduct free and open public debate, providing sufficient time for public opinion to consider the issues and influence the outcome, determining the fate of a rejected proposal as to whether it can be resubmitted again and if so with in what time gap, the amount or kinds of proposals that can be submitted at a time, the effective date of a ratified proposal, the requirement of promulgation or otherwise of ratifications... should be provided clearly.

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