

# Constitutional review: The Ethiopian Perspective

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## Declaration

I declare that ‘Constitutional Review: the Ethiopian Perspective’ is my work and has not been submitted for any degree or examination in any academic institution. All sources and materials used are duly acknowledged and are properly referenced.

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**Constitutional review: The Ethiopian Perspective**

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## Abstract

*For a given state to be a constitutionally democratic one in which constitutional values and principles sought to be realized through fostering limited and self-government ingredients, an institutional mechanism of enforcing constitutional supremacy must be there. These ingredients amongst others include the provision of basic rights and freedoms, division of governmental powers between the two levels of government or separation of powers between and among the three arms of government, a representative government, extra-ordinary amendment procedures of provisions in constitution, and recognition of the constitution as the higher law of the land. Experiences around the world have been telling us that in nations whereby stable constitutional democracy has been built, basic rights and freedoms are protected and enforced in a better manner, governmental processes are limited, Popular sovereignty Political freedoms, and rule of law...etc. have been flourished. In contrary to this, in states who failed to build a stable constitutional democracy, there have been instabilities and it has been a reason for the birth of dissident groups, as well as the coming in to power and dethrone of a number of governments. Popular revolutions in USA and France in the last quarter of eighteenth century are instances of the latter case. The post revolution eras in these countries and in post-world war two eras of other countries (e.g. Germany) where by constitutional democracy had been built successfully over periods of time through their effective system of constitutional review are indicators of the first instance. The central issue of this study focuses on, whether or not our constitutions, since the adoption of the 1931 constitution of Ethiopia, had been recognizing these important means of constitutional democracy and facilitated their practicability through a system of an independent and effective constitutional review. The writer's investigation of this issue reveals that the pre-1991 Ethiopia, except the 1975 draft constitution of Ethiopia, the essence of constitutional democracy had not been built. Reasons are either limited recognition of the ingredients of constitutional democracy or the absence or ineffective institutional means of guarding these constitutional values. The ineffectiveness reason has to do with those constitutions failure to empower courts the power to review legislative and executive acts. A look in to the 1995 FDRE constitution reveal that these ingredients are there; but, the institution empowered to guard these values is not the judiciary. The writer on the basis of historical and practical reasons calls the empowerment of the ordinary courts or constitutional court to this power. As the last option, given technical and independence reasons he calls the need to readjust the existing system of constitutional review.*

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## List of abbreviations

- ACHPR- African Charter on Human and Peoples' Right.
- AESM (ME'SON) - All Ethiopian Socialist Movement.
- ACHR- American Convention on Human Rights.
- ANDM- Amhara National Democratic Movement.
- CCI- Council of Constitutional Inquiry.
- E.C. - Ethiopian Calendar.
- ECHR- European Charter on Human Rights.
- EPLF- Eritrean peoples' liberation front.
- EPRDF- Ethiopian Peoples' Revolutionary Democratic Front.
- EPRP- Ethiopian Peoples' Revolutionary Party.
- ERCA- Ethiopian Revenue and Customs Authority.
- FCCA- Federal Constitutional Court Act of Germany.
- FDRE- Federal Democratic Republic of Ethiopia.
- HOF- House of Federation.
- HPR- House of Peoples' Representatives.
- ICCPR- International Covenant on Civil and Political Rights.
- ICJ- International Court of Justice.
- NBE- the Ethiopian National Board of Election.
- OLF- *Oromo* Liberation Front.
- ONLF- *Ogaden* National Liberation Front.
- OPDO- Oromo Peoples' Democratic Organization
- PDRE- Peoples' Democratic Republic of Ethiopia
- TPLF- *Tigrean* People Liberation Front
- RSA- Republic of South Africa
- UDHR- Universal Declaration on Human Rights
- UN- United Nations
- USA- United States of America

## Chapter One

### Introduction

#### 1. Background of the Study

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*“People naturally and passionately pursue their self-interest and therefore the power placed directly in the hand of a popular majority is likely to be directed against minority interests.”<sup>1</sup>*

Madison’s solution to this mischief of the faction was a “constitutional system where popular influence works through representative institutions”.<sup>2</sup>

Such worry of Madison has been the worry of Ethiopians which they have been orally transferring from one generation to another. The saying’s “ሰውን ያመነ፤ ውሃ የዘገየ” or “ሰውን ማመን ቀብሮ ነው” which roughly translating; the first gives a meaning that goes, “trusting a person is, trying to catch a water” and the second refers, “if you should believe a person, it should be after his or her death”, that together connote nearly the same meaning with the saying that goes, “trust no one”. This conception of humans has its base on the very egoistic behavior of man, which, if not restrained would cause danger on the very existence of another man. The saying that goes, “ሲጥላ ይፈሳል፤ ሲከር ይበጠሳል”;<sup>3</sup> which roughly translating connotes, “unrestrained things would

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<sup>1</sup> James Madison, *the Mischiefs of Faction*, Federalist no. 10.

John Markakis considers the faction that controls state’s power as a collection of individuals or entities that uses the military, security (repressive apparatuses) and economic (finances the repressive apparatuses) arenas to persist in power and to serve their other interests, which is at the cost of the majority’s’ right and interest. John Markakis, *the Collapse of the Post-Colonial State in the Horn of Africa and the Prospects for Political Reconstruction* in “Genesis of the Ethiopian Constitution of 1994: Reflections and Recommendations from the Symposium on the Making of the New Ethiopian Constitution” (inter-Africa group, 17-21 may 1993, Addis Ababa Ethiopia), p. 37.

<sup>2</sup> Thomas E. Patterson, “we the People: a Concise Introduction to American Politics”,(Harvard University Press, 2004), p. 59

<sup>3</sup> The African tradition and the Ethiopian one in particular, are in most oral traditions; the earliest writings in Ethiopian history are mostly related with church and rulers issues; beyond these writings, the thinking of our ancestors can also be traced from the maxims spoken in a given community or society. This is why I tried to deploy a few of our proverbs, which I thought would represent, though not in broader sense, the mentality of Ethiopians towards limiting humans’ mal behavior-limiting government’s power. Besides, a look in to the earliest

cause problems”, is self-evident of this reality. Then, it follows that government is a collection of men; so, limiting its power is necessary.

Those states (e.g. USA) that foster constitutional democracy in their own spheres, on the basis of this stand, have been practicing relatively settled political and economic conditions and able to develop a broader consensus on their social values.

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They managed to attain this objective irrespective of their form of government (parliamentary or presidential systems) by prioritizing sovereignty of the people (self-government) and a limited government; objectives which are sought:

First, by producing a constitution of the people (peoples of the state genuinely participated in its making process);

Second, by explicit recognition of fundamental human rights and freedoms;

Third, by separating power concentration through, in federalist states, federal and regional power division and in both unitary and federalist governments, through power separation among branches of the government;

Fourth, by having government fixed by its terms and a government that assumes power through election (self-government);

Fifth, by conferring the constitution the status of the uppermost law in the nation, by providing strict and extra-ordinary amendment procedure of provisions of the constitution that involve two-third, three-fourth voting or referendum mechanisms.

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administration traditions of the society reveals that, we Ethiopians do have a tradition of limiting power of our rulers. In this regard, the “Gada democracy” of Oromo can be a good example. In this democracy, for instance, the leaders of the clan are regularly substituted by another, per eight years. For more informative knowhow of this particular tradition, see in general, Asmerom legesse’s, “Oromo Democracy: an Indigenous African Political System (the Red Sea Press, Inc., 2000).

Finally, by developing their own constitutional reviewing system that daily guard the elements of constitutional democracy mentioned here in above- institutional mechanism of enforcing constitutional supremacy.

Through the assistance of this institutional mechanism, for instance, Americans have managed to build a stable constitutional democracy. Particularly, Since the milestone case of Marbury Vs. Madison of 1803, constitutional control of legislative and executive acts on the soil of USA has been playing a major role in stabilizing the “constitutional democracy” of America- a democracy that protects basic rights and freedoms of individuals and peoples, a democracy that pose limitations on government’s powers and a democracy that overrules unconstitutional government process (vertical and horizontal governmental interactions and electoral processes).

Now a days, though it has different forms, which are known either as “Constitutional courts” (e.g. the case in Germany and RSA) “or “Constitutional council” (e.g. France) or quasi-parliamentary body (e.g. Finland), Constitutional reviews of legislative and executive acts have been producing nearly similar outcomes.

These nations are now regarded as nations with normative constitutions whereby constitutional values are daily interpreted and practiced.<sup>4</sup>

Having these in mind, a look in to the history of Ethiopia, particularly its modern history that commences since 1855, reveals that the state of Ethiopia (Ethiopia before 1931) was, a state without constitution in aforementioned sense.

The traditional constitutions that were in operation in this period were not meant to establish a government by compact. This is why; individuals’ and peoples’ basic rights and freedoms had been rarely considered in governmental activities.

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<sup>4</sup> Negede Gobeze, “*Higemengist Mirchana Dimokrasi be Ethiopia ketilant Wodiya iske Nege*, [Constitution, Election and Democracy in Ethiopia: the Past and the Future]” (ASEOP Publishers, 2009), p. 62.

The case in the annexation process of the south and southeastern parts of the present day Ethiopia (1887-1900) and in the implementation of the nation building agenda (1900-1931) is one instance of this. In this epoch, the peoples of Ethiopia were denied of most of their basic rights. To name a few; the right to property (e.g. land ownership right), the right to self-determination, equality and freedom of religion.

Though Ethiopia had witnessed its first constitution (modern) in 1931, it was short of addressing the questions of citizens that came in to play out of the long-existed denial of these rights. The constitution's principal aim was not laying a foundation for citizens vs. government interaction; rather it was there to consolidate the power of the king.

Twenty years later after the adoption of the first constitution, the imperial regime had revised its constitution in 1955. Comparatively with its predecessor, it was modern (e.g. broader recognition of basic rights); but, owing to its claw back sides, it was short of guaranteeing basic rights and freedoms of individuals and peoples.<sup>5</sup>

Failure of these two constitutions to address questions of land ownership, equality (gender and religion), republican form of government, and self-determination; Above all, failure to structure or restructure the pre-existing government to limited one, had reinforced the birth of rural and urban based movements which finally led the demise of the system altogether in 1974.

Since the down fall of the imperial regime up until 1991, the power of state remained in the hands of the military faction. The first thirteen (1974-1987) years of the military regime, save the draft constitution of the 1975, is known for the absence of a constitution.

In this era again the long existed question of the people had not been addressed. Rather, it was remembered as the era of brutality, whereby, for instance, some of individuals' basic rights were

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<sup>5</sup> For instance, citizens were denied to cast vote for their representatives, as a result of which they were unable to have a say on matters that really affects their very lives. In these two imperial regime's constitutions, the king was the head of the three branches of the government, he was the ultimate power repository and there was no institutional mechanism that control constitutional values. Hence, the process of the government was run by his whim.

at the mercy of the military men. Even one's right to life was up to their free whim. In short, the group that controlled the power was unrestrained. It was for this reason that tenth and thousands of the youth had been killed mercilessly.

Even if the faction had come up with constitution in 1987, as the powers of government were concentrated in the hands of a single man, the inclusion of supremacy clause and extra-amendment procedure were like a dog barking at lion in the middle of nowhere. In other words, powers of the government (I can say powers of the president [Mengistu Haile Mariam]) were unrestrained.<sup>6</sup> The long existed questions of the people remained unanswered. For these and other reasons that the combined forces of ethno-nationalist groups who had been revolting against the regime caused the demise of the faction in 1991.

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The first five years (1991-1995) of the post 1991 constitutional history of Ethiopia marked the introduction of two constitutions: the 1991 transitional charter (interim constitution) and the 1995 FDRE constitution. These instruments were relatively better in providing restraint mechanisms of government's unwarranted power exercise. They together, introduced the new federal, democratic and republican state of Ethiopia.

These instruments, particularly, the FDRE constitution departed from its pre 1991 predecessors by reforming state of Ethiopia from unitary to federalist form of government. In other words, two levels of governments that operate within their own territory were constitutionally instituted. This in turn opens a new era of addressing the long existed question of self-administration.

The word, "republic"<sup>7</sup> in the nomenclature depicts that, the new government of Ethiopia is a government by the peoples (a government that would assume state's power through election or it does mean state's power is derived from the people). This constitution had snatched the ultimate power from the working people of Ethiopia (WPE) that was in the immediate previous regime

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<sup>6</sup> For instance, the president was chief of the army, can control the executive and the judiciary and he was head of council of state, a body that substitutes the *shengo* (the national legislative body [national assembly] that meets once in a year) in all its daily functions.

<sup>7</sup> Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995', article 1.



and handed over it to the nations, nationalities and peoples of Ethiopia.<sup>8</sup> By doing this the constitution had heralded, for the first time in constitutional history of Ethiopia, the fact that Ethiopia is a multi-ethnic polity whereby their specific rights are plainly recognized.<sup>9</sup>

The making of the FDRE constitution underwent a relatively extensive public participation that included participation of people at the grass root level. This wider participation of the people is understood as one means of limiting government's power.

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It reserved one third of all its provision to basic right and freedoms of individuals and peoples. These plain provisions have both horizontal and vertical application clauses. To protect these fundamental rights and freedoms, as well as other constitutional values enshrined in the constitution; the constitution had provided constitutional supremacy clause, extra amendment procedures and institutional mechanism to enforce these values.

Besides, the constitution denied power concentration in the hands of a single man or entity. For this very reason, it effectuated different organs of government (horizontal power separation).

In addition, though it was not all inclusive, it provided a room for check and balances. For instance, the legislative body (lower house [HPR]) can control the executive. The instances in which the former controls the latter include, amongst others, when it adopts federal budget prepared by the executive and when appoints officials in the executive.

On the other hand, the executive can control the legislative, for instance, when it executes laws promulgated by the later. Both can control the judiciary, for instance, when the president and vice president of the highest federal judiciary organ (federal Supreme Court) are appointed and when the legislative determines the judiciary's authority. Unfortunately, the authors had ousted the judiciary from this check and balance.

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<sup>8</sup> Ibid, article 8.

<sup>9</sup> Under the PDRE constitution there was mere recognition of Ethiopia as a multi-ethnic polity. It was practically witnessed that ethnic based right were merely provided.

The power to review acts of the legislature or executive is reserved to the house of federation (a house of nations, nationalities and peoples of Ethiopia). The reason for denying courts of this power has two main grounds: first, historical reason; and second, the experience of other nation's courts' activities of transcending the intent of authors.<sup>10</sup>

In the Historical reason perspective, which the constitution articulated as “the unjust relationship” created in the modern history of Ethiopia; the argument principally relies on the idea that, previous governments had brutally denied these groups' basic rights. So, in order to sustain those previously denied, but under FDRE constitution recognized rights, no other body is better than the nations, nationalities and peoples themselves.

In the second case, the reason that has been forwarded is that, if courts are empowered to such power, they would at the end of the day distort the very intention of the authors of constitution (in our current case, nations, nationalities and peoples are the authors), thereby defeat the very purpose of the constitution.

The point is that, unlike the aforementioned stands, in my humble opinion the judiciary's involvement in the check and balance system, in one or another, has been contributing to the productions of states with stabilized democracy; a constitutional democracy that serves the very process of governments' interaction (vertical and horizontal), a democracy that foster self-government through electoral process and a democracy that protects and enforces basic rights and freedoms of individuals and peoples. Particularly in our case, it would strengthen the protection given to the minorities.

Hence, excluding the judiciary from the check and balance system arena may in the long run, mean abstinence from enjoying these fruits- the fruits we had snatched by our former merciless rulers.

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<sup>10</sup> See for instance, GetachewAsseffa, *All about Words: Discovering the True Intention of the Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation*, (Journal of Ethiopian Law, vol. XXIV no.2) pp.141-142.

## 2. Statement of Problem

Then, the pertinent questions that evolve out of the post 1991 historical and practical reasons to oust the judiciary from the power of constitutional review are;

First; did the violations of basic rights and freedoms in imperial regime, except the national oppression, discriminatory? Were the ruling factions compassionate to basic rights and freedoms of ordinary individuals that were ethnically under the same domain? Did not all Ethiopians the victim of governmental action- be it in terms of individual or group rights? Considering these questions, is our justification for empowering the upper house, except its authority on rights that can be enjoyed in group (e.g. Language or culture based rights), sound?

Second; the modern history of Ethiopia depicts that the reason for the suppression of individuals' or group rights was basically unlimited power exercises by previous regimes. If so, how can we guarantee citizens, current and posterity, in the absence of the judiciary from the check and balance arena?

If we say the upper house can do it. Given, the technical knowhow of its members, political affiliation (independence reason) and the degree of accessibility (e.g., the house doesn't meet on a permanent basis; so does the CCI), how far is the house effective and independent in addressing constitutional complaints, thereby limits government's power?

Third, was denying the judiciary's involvement in the check and balance system, the only option available to the authors of the constitution? Taking in to account the judicial self-restraint mechanisms deployed elsewhere (e.g. the political question doctrine, standing, ripeness, mootness and ...etc. in the USA constitutional review jurisprudence) of controlling the judiciary, is the argument that goes, "courts may distort the intention of the authors" viable?

Finally, the constitution plainly recognizes the constitution as the supreme law. If it is law, as the constitution confers judicial power to courts, is it not judiciary's inherent jurisdiction to interpret laws? If yes, is it constitutional and plausible to totally exculpate the court from such jurisdiction?

After all, why does our constitution remain the least interpreted than its counterparts in Germany or USA? For instance, between 2000 and 2015 the constitutional court of Germany had settled about four thousand, nine hundred and twenty one constitutional cases.<sup>11</sup> But, the cases that have been brought to the attention of CCI are about one thousand two hundred fifty and out of these cases that had been settled by the upper house are only eleven.<sup>12</sup> Why is this so? Doesn't this serve as a ground to categorize ours as, semantic constitutional state<sup>13</sup> in which constitution is rarely interpreted and practiced?

### 3. Aims and Justifications of the Study

The main aim of this research is to re-assess the possibilities of bringing the judiciary- ordinary courts or an independent constitutional court, in to the constitutional check and balance system arena, thereby laying additional foundation for the growing constitutional democracy (self and limited government).

As additional justifications that serve the very purpose of the main aim:

- Philosophical foundation of limited government and limited government as *raison detr'e* of constitutional review will be explored.
- As a stepping stone to assess the existence and role of constitutional review system in constitutional history of Ethiopia, other's jurisprudences of constitutional review trends in limiting government's unauthorized power exercise and guarding the constitutional democracy will be described and analyzed.
- To appraise the house of federation's independency and competence in serving constitutional democracy, the modes and systems of constitutional review in some of

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<sup>11</sup> See, the official web address of the German constitutional court.

Available at <http://www.bundesverfassungsgencht.de> (last accessed, on march 22,2015) last accessed, February 5, 2015.

<sup>12</sup> CCI received about one thousand three hundred cases alleged to have constitutional questions; but, transferred eleven cases only to HOF.

<sup>13</sup> Negede Gobeze, *supra* note 4, p. 63

constitutionally democratic states will be described. Panels, composition and access to these institutions will also be explored.

- The nation and empire building agendas of post 1850, that served as the sole reason to oust the judiciary from the check and balance arena and to provide counter-arguments to the other argument (courts would distort the true intention of the authors of the constitution) to exclude the judiciary from same will be re-examined.
- Finally, by considering the above elements as bench marks Constitutional review in constitutional history of Ethiopia will be explored.

#### 4. *Significance of the Study*

The study has the Significance of enabling readers or any other concerned bodies (e.g. representatives of the people, both at regional and federal levels) to re-examine the reasons for ousting the judiciary and to expose themselves to the necessities of bringing the court of laws or independent constitutional court to the realm of check and balance system and to signal whether there is a need to restructure the current constitutional reviewing system, so that the growing democracy will be transformed to a more stable one.

Particularly, it will acquaint them with means of having a limited government whose very existence is well guaranteed through institutional mechanism expressed by the empowerment of either of the two institutions. It will, also help them to appreciate the practical incompetence of the house to execute its role of constitutional control.

Additionally, it will give to any concerned body, a detailed understanding of the historical evolution of constitutional review; the presence of this review and the ingredients that limit government's power and furnish self-government in the constitutional history of Ethiopia (the six constitutions drafted and promulgated between 1931 and 1995).

Above all, it will serve as the starting point of further researches on the area.

## 5. Scope of the Research

The study concentrates on constitutional review of Ethiopia.<sup>14</sup> Taking into account the importance of creating broader comparative understanding on the subject matter of the research; first, the paper consults the ingredients that provide limited government and institutional mechanism of guarding these ingredients, on the basis of the philosophical reasons of constitutional review and the experience of other nations on constitutional review.

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Second, it explores the constitutional review in general and systems of reviewing that have been deployed in different nations around the world; the composition and panels of different umpires that have the authority to exercise power of constitutional review; accessibility to these institutions.

Finally, the paper includes an assessment of the Ethiopian case.

## 6. Methodology

The research is a doctrinal research type, interested in exploring the ingredients of limited government; re-examining the historical and practical assumptions used to oust the judiciary from the authority of constitutional review; and assessing the competence and independence of the house of federation in exercising power of constitutional review. It predominantly restricted itself to the qualitative research methodology.

To this end, the primary and secondary sources that cover the subject matter of the research are qualitatively examined. Accordingly, the analysis rests on the one hand, on relevant theoretical concepts, international standards, legislations and constitutions of some modern and peer states; on the other hand, it considers text books, journals, scholarly articles and bar reviews, and internet sources.

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<sup>14</sup> Post 1991 Ethiopia is a federal state where by two levels of governments are operating in their own spheres. There are one federal constitution and nine state constitutions of the concerned states. So, the writer advices readers to realize the fact that main reliance is on the federal constitution and the system of constitutional review established in it.

As part of the methodology, the writer's personal observation, though rarely, is also used to accompany the issues analyzed through the primary and secondary data.

## *7. Outline of the research*

The dissertation contains six chapters. Chapter one discusses the introduction part. Then, chapter two discusses the need to limit government's power as the principal reason for the evolution of constitutional review, issues of access to institutions and institutional organization. Under chapter three, the discussion is on constitutional review in action taking the experience of different nations' jurisprudences. Then the next chapter examines the Ethiopian case. The last chapter forwards conclusions and recommendations.



## Chapter Two

### Constitutional Review: Evolution, Institutional Organization and Accessibility

#### 1. Introduction

Under this chapter the main focus is, providing stepping stone to appraise the role of constitutional review in providing limited government in the constitutional history of Ethiopia, which I shall discuss in another chapter. Page | 13

Having this in mind under the first part the aspiration for a limited government as a rationale of constitutional review will be described. For convenience purpose; different scholars' view towards the philosophy of limited government, conceptual discourses towards constitutional review as an ingredient of limited government and USA's trend as one of the earliest states with this experience will be discussed.

Then, with a big picture of contributing to the official effort of transforming Ethiopia to a constitutionally democratic nation whereby constitutional principles are daily interpreted and practiced by politically independent umpire; conceptual discourses and trends of peer nations as to the models of review, system of review, panels and composition of institutions, and procedural rules of access to institutions will be discussed.

Accordingly, with specific objective of introducing readers the fact that owing to historical reasons of the concerned nations there is no universal model of reviewing, the reason why nations opts ordinary courts to other models (e.g. impartiality and independence justifications) and the vice-versa (structural and efficiency and distrust to courts reasons) will be discussed. Taking these exposures, the reason to empower HOF in post 1991 of Ethiopia will be appraised in another chapter.

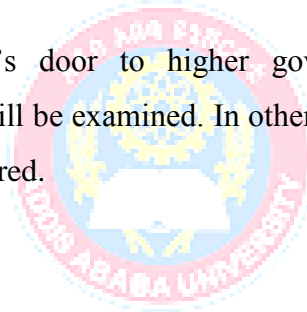
Along with this a centralized or decentralized and repressive or preventive systems of reviewing will be examined.



Then, with the objective of giving to readers an insight on the very personal or institutional independence, which otherwise termed as moral and institutional autonomy<sup>15</sup> of the institutions that enforce constitutional supremacy; the paper will explore the panels and compositions, requirements to be appointed as a member of these umpires, remuneration and terms of office of the judges.

Finally, considering the importance of appreciating institutional effectiveness towards justice, efficiency, individual and public interests; procedural rules that guide access to institutions will be discussed. In doing so, with substantial reliance on the trend of Germany, issues of standing (e.g. whether there is a difference of treating foreigners and citizens), prerequisites for individual complainant's cases admissibility and conditions that enable individual's direct access (without exhaustion of prior available remedies either before administrative or ordinary courts) to the institution will be examined.

Besides, the constitutional court's door to higher governmental bodies (e.g. bundesrat, bundestag, president, and lander) will be examined. In other words, court's abstract and concrete reviewing jurisdiction will be explored.



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<sup>15</sup> Yared Legesse, *Court Stripping: a Threat to Judicial Independence*, (Ethiopian Constitutional Law Series vol. VI) p. 104.

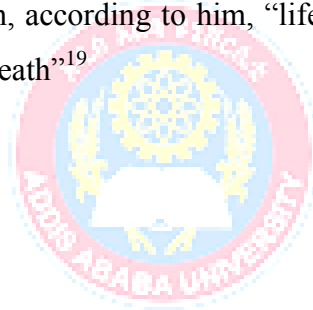
## 2. Restraining Government's Power: Raison D'etre of Constitutional Review

The historical reason for having government as a representative institution, has its root to man's interaction in the state of nature, which otherwise referred as "the original position".<sup>16</sup>

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The thought of thinkers on human's behavior in the state of nature, varies from one to another. For instance, concerning man's behavior in the state of nature (pre-state or government era or we may call it Stone Age), Thomas Aquinas and Rousseau argue that, people in the state of nature were good, happy and healthy.<sup>17</sup> With a little variance, John Locke asserted that, individuals in the state of nature were responsible for their action and they were good action seekers.<sup>18</sup>

In contrast to these stands, Thomas Hobbes categorized individuals' behavior in the state of nature as "egoistic, savage ...etc." and defines them as "creatures that were at liberty to do what pleases them." As a result of which, according to him, "life was nasty, brutish and people were overwhelmingly in fear of violent death"<sup>19</sup>



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<sup>16</sup> See for instance, John Rawls, "A Theory of Justice," (Harvard University Press revised edition, 1999) p. 11.

<sup>17</sup> Samuel Enoch Stumpf, *Philosophy: History and Problems* (McGraw-Hill 1971 reprinted 1989), p. 190. See also, Jean-Jacques Rousseau, quoted in Brooke Woel Moore and Kenneth Bruder, *Philosophy: the Power of Ideas*, p. 279.

<sup>18</sup> G. H. Sabine and T. L. Thorson, "A History of Political Theory", Fourth Edition, p. 483.

<sup>19</sup> Steven Forde articulated the idea of Hobbes as: "nature has made individuals independent; nature has left each individual to fend for himself; nature must therefore have granted each person a right to fend for himself. This right is the fundamental moral fact, rather than any duty individuals have to a law or to each other. The priority of individual right reflects our separateness, our lack of moral ties to one another. One consequence of this is that, in the state of nature, human beings are naturally at war with one another. Individuals create societies and governments to escape this condition." Steven Forde "John Locke and the Natural Law and natural law rights Tradition" (The Witherspoon Institute, 2013).

John Rawls on his part stated that, “individuals in the state of nature, didn’t know their class in the society and even they were naive as to the intelligence, strength, liabilities ...etc. of themselves”.<sup>20</sup>

To maintain the already established values of the society (whose manifestation in part was good behavior of individual members) or to avert “destructive behaviors” of humans in pre-state or government era, these thinkers commonly argue for the importance of effectuating government.<sup>21</sup> In other words, we have governments because, the common idea that goes, “people are better in a properly constituted state, than in the state of nature”, won the hearts of our ancestors.

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But, there is a slight difference on these thinkers’ stands as to the goals that are to be discharged by government, the manner of exercising governmental powers to these ends and the fate the government would face when it transcends the already given power.

As to the first subject, Aquinas proposed a government with the power to promulgate laws that would enhance the peace, existence and continual of human species. In this regard, Thomas Hobbes propagated a government that would take any act it deems necessary to avert violent death and to build strong social cooperation. John Locke recommended the establishment of government that would launch laws that can effectively protect individuals’ natural rights of property, life and liberty.

Emanuel Kant on his part preferred a government that can give priority to property rights of individuals by involving in their interaction using laws, policies and any other government actions.<sup>22</sup> Rousseau urged the establishment of entity that respect and reflect the “general will”. John Rawls advised the importance of having a government that act on the basis of equality and “Vail of ignorance”, towards the fundamental rights of individuals and basic duties in the society.

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<sup>20</sup> John Rawls, *supra* note 1.

<sup>22</sup> Frederick, *Kant’s Social and Political Philosophy*, (Stanford Encyclopedia of Philosophy, 2012).

On the basis of the second subject (in order for enabling government to respect, protect and enforce the values mentioned here in above), personalities like Hobbes argued for the establishment of an entity with ‘absolute power’ that can take any action it deems necessary, except the lives of people. Whereas personalities like Locke, ardently advocated for the establishment of a liberal type of government whose official actions are the result of majorities consent.

As to the third subject, for instance in earliest states where by representatives of the people were mandated state’s power in order for ordaining man to an end of eternal happiness through the law given by God, if the responsible body failed to maintain the values bestowed up on it, resisting it was justifiable. Because, any government that doesn’t exert its effort to push humans’ conduct to have a divine nature, is considered as tyrannical and resisting it even by lodging war was considered as blessed. For such a war is “just war”.

In this regard, John Locke strongly asserted that the government must respect the whims of the governed and in any case, if the government transcends the limits prescribed by the people, they can revolt against it and replace it with another-the right of revolution.<sup>23</sup> To use his words in verbatim:

“In realizing this objective [government’s basic task of promulgating laws that would protect ‘what is naturally and morally right’], the government remains under the guidance of law and moral restraints. If there is a tendency on behalf of government to transcend these benchmarks, the people can replace the operating government with another one.”

For him, people’s power to remove their rulers constitutes the source of their power.

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<sup>23</sup> Mathew I. Nwoko, *Basic World Political Theories*, (Clartian Institute of philosophy, 1988), p. 81. See also, the Basic Law of Germany where by under its article 20, by affirming the extension of the idea to these days, provided that, “the federal republic of Germany is a democratic and social federal state. All state authority is derived from the people though elections and other votes and through specific legislative, executive and judicial bodies. The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice. All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.”

It was on these naturalists thought that, early Americans (USA) added the concept of “government by compact” which dictates that the government must contract with the governed so that it cannot unlawfully inflict danger on their basic right and freedoms. This document, which is commonly referred to us, as “constitution”, had come into picture, for the first time, in post USA revolution era (fourth quarter of eighteenth century [1789]).<sup>24</sup>

Beyond, the moral restraints on government’s authority, the constitution of USA was made in a way that can strongly defend repugnant acts on the parts of the government. For this very objective, basic rights and freedoms of individuals, both in the original draft and subsequent amendments, were plainly recognized.

Within these constitutional provisions, in order to effectively guarantee these rights, horizontal and vertical application clauses were provided. In other words, the constitution imposed on individuals (horizontally) and government or its bodies (vertically), the duty to respect basic rights and freedoms of individuals.<sup>25</sup>

To substantiate this commitment of the authors, governmental powers were not made to remain in the hands of single man or entity; rather, powers of government were divided between and among the two level of government in the nation-vertical power division and the three branches of government-horizontal power separations.<sup>26</sup>

The constitution did not restrict itself only to simple separation powers of government; it also structured the government in a way that allow each branches or levels of governments to check and balance each other’s powers. As a result of these, there is a check and balance system.

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<sup>24</sup> James C. N. Paul and Christopher Clapham, *Ethiopian Constitutional Development* (a source book, Vol. I Oxford University Press, Addis Ababa, 1972) p. 163.

<sup>25</sup> See for instance, the first amendment of US constitution, in declaring freedom of speech forewarned the government not to promulgate laws that unjustifiably abridge this right.

<sup>26</sup> Ibid, For instance, under article 1 section 8 it provides powers of the congress (e.g. the power to tax and the power to declare war). Powers that is not explicitly granted to the congress implies that it is denied. Hence, the congress can’t exercise powers other than those listed in this specific section.

As an extension of this, vertically, states through the upper house (house of senates) can control unwarranted power exercise of the federal government.

Horizontally, the three branches of government were meant to operate distinctively in which one's operation is under the oversight of another. For instance, the executive (through the president's power to veto legislative [house of representative and the senate] acts) can control the legislative.<sup>27</sup>

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The legislative, when it adopts the federal budget prepared by the executive or through impeachment of one or all of executive members can control the executive.<sup>28</sup> Both the executive and the legislative, when appointing judges or determining the size of courts or for other constitution reasons can control unwarranted exercise of the judicial power.

So, Beyond what had been advocated by, Aeron de Montesquieu's (1689-1755) whose conception of separation of power doctrine rested on the assumption that "power corrupts; absolute power corrupts absolutely"<sup>29</sup> and restricted to simple power separation without the check and balance system, American added the check and balance system while they integrated the concept into their 1789 constitution.

Again, in order to avert the possible danger that would arise owing to government's action; they made their constitution and the rules in it, supreme of all-constitutional supremacy.<sup>30</sup> Hence, any action that contravenes constitutional values was made *void*. Besides, they adopted extra – ordinary amendment procedure, so that the government would not amend it easily. Of the three amendment procedures (two- third, three–fourth or referendum), the USA constitution opted the

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<sup>27</sup> Ibid, under its article 1, section 7, paragraph 2, stated that for bills to be passed must acquire the whim of the president.

<sup>28</sup> Ibid, for instance article 2, section 4 provides a room for removing the president and other members of the executive from offices for reasons of impeachment.

<sup>29</sup> E.C.S. Wade and A. W. Bradely, *Constitutional and Administrative Law* (New York, Longman, 1993) p. 56.

<sup>30</sup> U.S. constitution, *supra* note 24, article 6 paragraph 2.

third-fourth decision making method. In this regard, the amendment clause under article V (five) reads:

“ The congress, Whenever two thirds of both houses shall deem it necessary , shall propose Amendments to this constitution, Or , on the application of the legislatures of two – thirds of the several states, shall call a convention for proposing amendments, which in either case, shall be valid to all intents and purposes , as part of this constitution, when ratified by the legislatures of three fourth of the several status, or by conventions in three- fourths thereof , as the one or the other made of ratification may be proposed by the congress...”

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The constitution, as one means to limit unwarranted power exercise on part of government, had privileged the people of USA as the ultimate power repository. As an extension of this right, the people of USA are granted with an opportunity, through election, to reinstitute the government that abuse its power/s.<sup>31</sup>

Besides, these procedural and substantive safeguarding mechanisms which are plainly provided in the constitution, early Americans, though not explicitly provided in the constitution, had adopted an institutional mechanism that guards these constitutional values -guardian democracy.

The institutional Mechanism that controls government's unauthorized exercise of power was expressed through the empowerment of the judiciary. This trend has its root in Marbury and Madison case of 1803. In this specific case, the supreme court which was headed by chief justice John Marshal reasoned out that, “the constitution is a law: it is the power and duty of the judges to apply the law: therefore, when a conflict arises between the constitution and an act of the legislature or the executive, judges must give effect to the higher law, the constitution”.<sup>32</sup>

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<sup>31</sup> Ibid, for instance, article 2 section 1; paragraph 3 in which it is declared that the president will be elected by the people.

<sup>32</sup> Louis Fisher, “Constitutional Structures: Separated Powers and Federalism” (volume 1 of American Constitutional Law, Second Edition, 1995), p. 55.

This ruling of the court was not a simple and an overnight assertion made by the presiding justices, rather it rested on early established and an ever increasing ardent desire of early Americans who had been propagating pro to the empowerment of the judiciary to exercise the power of constitutional reviewing.

In this regard alexander Hamilton is one of the notables. He based himself on the following major points to propagate his assertion;<sup>33</sup>

First, the legislature through its rule making power and the executive as the sword holder of the people may pose threat on basic freedoms and rights of citizens; whereas, the judiciary neither force nor will towards individual rights. It merely produces judgments. Because of these, the judiciary is the least dangerous to the natural rights of individuals.

Second, preserving limited government (for instance, the legislative cannot pass ex post facto laws) in practice is no other than the medium of court of justice.

Third, accepting any legislative act that goes against the peoples values manifested under the constitution would mean the representatives of the people are superior than the people themselves or it would mean deputy is greater than his principal.

Finally, interpreting the law is an inherent power of the judiciary and a constitution is a law (fundamental law). The judges are recognizing it this way. So if any act of, for instance, the legislature found to be contrary to any provision embodied in the constitution, it is natural to adjudicate. In this and other same circumstances, the judges need to prefer the intention of the people to the intention of their agents. According to Hamilton, this conclusion doesn't imply the superiority of the judiciary to the legislative power; it only supposes that the power of the people is superior to both.

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<sup>33</sup> Alexander Hamilton, federalist no. 78.



Since the disposal of the case in 1803, the supreme court of USA has been justifying its authority by relying on Marbury v. Madison case. In Cooper v. Aaron 358, U.S. (1958) the court declared that:<sup>34</sup>

“Article six of the constitution makes the constitution the supreme law of the land...Marbury v. Madison...declared the basic principle that the federal judiciary is supreme in the exposition of the law of the constitution, and that principle has ever since been respected by this court and the country as a permanent and indispensable feature of our constitutional system...every state legislator, executive and judicial officer is solemnly committed by oath...to support this constitution.”

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With the same fashion, in the United States v. Nixon 418 U.S 683 (1974), the court articulated that:<sup>35</sup>

“...many decisions of this court have unequivocally reaffirmed the holding of Marbury v. Madison that it is emphatically the province and the duty of the judicial department to say what the law is.”

Since, the milestone case of Marbury Vs. Madison of 1803, Judicial activism On the soil of USA has been playing a major role in stabilizing the “constitutional democracy” of America- a democracy that protects basic rights and freedoms of individuals and peoples, a democracy that overrules unconstitutional government process (vertical and horizontal interaction) and a democracy that enhanced the electoral processes in which peoples utmost power (changing or maintaining government in power) is manifested.

Now a days, through it has different forms which are known either as “Constitutional courts” (e.g. the case in Germany and RSA) “or “Constitutional council” (e.g. France) or quasi-parliamentary body (e.g. Finland), Constitutional reviews of legislative and executive acts have

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<sup>34</sup> Erwin Chemerinsky, *Constitutional Law* (Aspen Publishers, USA 2005), p. 9.

<sup>35</sup> Ibid.

been maintaining the balance between governments power exercise and basic rights and freedoms of individuals- the powerless, protecting the smooth functioning of governments' and electoral processes. These nations are now regarded as nations with normative constitutions whereby constitutional values are daily interpreted and practiced.

### 3. Institutional Organization

#### 3.1. Institutions empowered to exercise constitutional review: models

The power to exercise constitutional review owing to political or pre-existing historical or social factors may be conferred to ordinary courts as the case in United States of America, or to a centralized umpire (constitutional court), the case in Austrian Republic and republic of south Africa or to other entities; for instance, specified parliamentary bodies, the case in Finland or non-judicial independent body as the case in France.

Abera Jembere once introduced to readers the five competing models of constitutional review.<sup>36</sup> The list includes: first, judicial review- a model that has its root in USA by which courts at different levels are entrusted to test the constitutionality of any acts that can be traced either from the legislator or the executive. Second, specialized constitutional review-Under this system specialized constitutional court has the power to deal with issues of constitutionality. This is first witnessed in Austria.

Third, parliamentary quasi – judicial review which is the system of the Finish where by the legislative committee of the finish parliament has a say before the law is passed. Then, we have the legislator as the interpreter of the constitution without direct competition from the judges. This model is affiliated to the Netherlands. Finally, we have the Ethiopian model where by the

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<sup>36</sup> Aberra Jembere, *Five Competing Models of Constitutional Review: Possibility of Reducing to One Model Applicable Universally*, p.4.

second chamber is entrusted with the power to review constitutionality of any acts from different sources.

The American model of constitutional review had been adopted by the following countries:<sup>37</sup>

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IN EUROPE: Denmark, Estonia, Ireland, Norway, and Sweden are among the examples.

IN AFRICA: Botswana, Gambia, Kenya, Ghana, Malawi, and Nigeria are among the examples.

IN MIDDLE EAST: Israel. IN ASIA: Bangladesh, Fiji, India, Japan, and Singapore are among the examples.

IN NORTH AMERICA: Canada and USA; IN CENTRAL AND SOUTH AMERICA: Argentina, Bahamas, Bolivia, Mexico, Jamaica...etc.

This American model of constitutional review, though it upholds an independent and politically impartial institutional mechanism of controlling constitutional values, it had been suspected of providing conflicting judicial responses that would at the end of the day defeat the very essence of rights and duties of every one (rule of tyranny than rule of law). Hans Kelsen was one of these exponents, who on the grounds of structure and efficiency propagated the importance of building a centralized system of constitutional control.<sup>38</sup>

The structure reason refers a centralized power exercise; whereas, the efficiency reason, as opposed to the self-contradictory ruling that would arise because of different rulings by courts, connotes the *erga omnes* (Latin term that resembles the phrase towards all.) effect of the rulings by this centralized umpire.

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<sup>37</sup> Arne Marjan, "Some Comparative Comments to the Introduction of Constitutional Review in the State of Palestine"

Available at <<http://www.venice.coe.int>> (last accessed on December 11, 2014).

<sup>38</sup> Mario Patrono, "the Protection of Fundamental Rights by Constitutional Courts: a Comparative Perspective" pp. 402-403

Available at <<http://www.victoria.ac.nz/law>> (last accessed on February 7, 2015).

Kelsen had considered, Thomas Jefferson's writing about the Supreme Court who stated that:<sup>39</sup>

“the constitution...is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please and it should be remembered, as an axiom of eternal truth in politics that whatever power in any government is independent is absolute also; in theory only, at first, while the spirit of the people is up, but in practice, as fast as that relaxes. Independence can be trusted now here, but with the people in mass”.

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The centralized institution forwarded by Kelsen is the constitutional court (the court of Kelsen), that was meant to exercise power of resolving any dispute with regard to the boundaries of constitutional authority among governmental organs (as the umpire of constitutional process of government) and repairing any power abuse by government that may contravene basic rights and freedoms.

Austrian republic became the first to constitutionalize this idea in 1920 and then, it has been flourishing in other states of Europe (e.g. Albania, Hungary, Croatia, Spain, Turkey, Germany...etc.), Africa (Angola, Egypt, Rwanda, Republic of South Africa...etc.), Asia (Armenia, Azerbaijan, Korea, Thailand...etc.), central and Latin America (e.g. Chile).<sup>40</sup>

For instance in Germany, it is the Federal constitutional court (*Bundesverfassungsgericht*) that is entitled to have a say on; any cases or disputes involving the meaning and interpretation of the basic law (*Grundgesetz*), constitutional validity of any federal or state statute, and disputes between organs of government at the national level. Besides, it may assume jurisdiction over cases that involve disputes between the Federal Republic and the Landers regarding the latter's administration of the former's statutes, and guardianship over the fundamental rights and privileges of citizens as determined by the Basic Law both on substantive and procedural

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<sup>39</sup> Ibid, Patrono, Citing, Letter from Thomas Jefferson to Judge Spencer Roane, on September 6, 1819, in R. Hofstadter *Great Issues in American History* (2<sup>nd</sup> ed. Vintage Books, New York, 1958) pp. 198-200.

<sup>40</sup> Arne Marjan, *Supra* note 38.

grounds.<sup>41</sup>

When we see the South African trend, it is the constitutional court of South Africa that is empowered to test and have a final say on the constitutionality of legislative acts or acts by the executive.<sup>42</sup> Such empowerment is in one or another way has a connection with the pre-existing political situation (the so called apartheid) that had been existed in the nation. The drafters of the constitution believed that the constitutional court would stand as a new, untainted court to protect citizens' new fundamental rights and safeguard South Africa's new constitutional values.<sup>43</sup>

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In France, constitutional control of legislation or acts of executive has been entrusted to specifically political, non-judicial body. The reason, as explained by manricesunkin, is rooted in a long-standing distrust of the judges, who were perceived as being the "bitterest enemies of even the slightest liberal reform."<sup>44</sup> But, with the intent to fill this gap, the framers of the constitution of the Fourth Republic, established a special thirteen-member committee known as the constitutional committee (*comite constitutionnel*).<sup>45</sup>

The committee is empowered to examine a law prior to its final promulgation to determine whether or not it implies a constitutional amendment. If the committee concurred that a law did in fact imply an amendment to the constitution, it would send it back to the National Assembly

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<sup>41</sup> See, the study on courts of federalism by Philip M. Blair, *Federalism and Judicial review in Germany* (oxford: clarendon press, 1991) p.119

<sup>42</sup> Section 104 (2) of Republic of South African constitution; the constitutional court consists of the president of the court, his or her deputy and nine other judges who are nominated and appointed for the reason of their at least ten years legal experience. Besides, they need to be judges of the Supreme Court, advocates or attorneys or lectured in law at a university for that period.

<sup>43</sup> Hoyt Webb, *The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional law*, (journal of constitutional law, vol.1:2), p. 4.

<sup>44</sup> Aberra Jembere, *supra* note37, p.4

<sup>45</sup> Chaired by the president of the republic, it has ten persons chosen from personnel outside the members of the respective chambers, usually professors of law in general concord with the several political parties represented in parliamentary.

for appropriate action. With the adoption of a provision in the de Gaulle constitution of 1958, France caused the establishment of the so called constitutional council (*council constitutionnel*).<sup>46</sup> It has the preventive power to declare unconstitutional all organic laws<sup>47</sup> and standing orders (rules of procedure) of the houses of parliament; both these categories must be submitted to the council prior to their promulgation.

It has the power to strike down or hold up, pending rectification, those ordinary laws, treaties, and protocols that may be voluntarily referred to it before final enactment or ratification by the president of the republic, the premier, or the presidents of the two houses of parliament.<sup>48</sup> The council is also endowed with the power to supervise the regularity of the elections of the president of the republic, the members of the parliament and senators – and of all popular referenda; it may decide disputes between the government (the ministry) and parliament regarding the “delimitation of executive and legislative competence”.<sup>49</sup>

### 3.2. Systems of Constitutional Review.

In all these models of constitutional review there are two basic systems of reviewing. These are first, the centralized and decentralized system; second, preventive or repressive power of reviewing.

A centralized system of review refers, the form of constitutional review in which a single court has the power to test the validity of the legislative instruments. We may take the German constitutional court as an example of such a system. It and it alone has the power to declare acts of parliament invalid on account of their inconsistency with the constitution. In France, the

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<sup>46</sup> Henry J. Abraham, *The Judicial Process: An Introductory Analysis of the Courts of United States, England and France*, (New York, Oxford University Press, 1993), p.290.

<sup>47</sup> French constitution of the Fifth Republic, article 46.

<sup>48</sup> Ibid, Articles 54-55.

<sup>49</sup> By the end of 1969, the council had decided sixty-six such disputes. See, Roy Pierce, *French politics and political institutions*, (New York: Harper and Pow, 2nd ed. 1979.) pp. 94-95. With only seven of the disputes did the council side with parliament.

constitutional council is also the only organ vested with this power. Its jurisdiction had been extending only to bills which have not yet become law.

A decentralized system refers to those forms of constitutional review whereby all the courts at all levels have authority to test the validity of legislative instruments. The United States system of judicial review is one example of this model.

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Another way of classifying system of constitutional review is to examine whether these institutions have a preventive or repressive power of judicial review.

Preventive power of constitutional review refers the powers of a court or other competent body to pronounce over statutory instrument before that instrument becomes a law.<sup>50</sup>

The French *council constitutionnel* has jurisdiction to pronounce over bills before they become law and its decision are final and binding on all organs with no appeal lying against them. But, since 2008 it has been exercising posteriori constitutional review.<sup>51</sup>

Repressive judicial review on the other hand, is exercised by the court or other competent institution which has the authority to declare invalid an existing law which is in conflict with the constitution.<sup>52</sup> The United States Supreme Court and the German Supreme Court have repressive powers of judicial review.

The constitutional court of South Africa combines almost the entire attributes mentioned here in above. In the first place South Africa has a centralized system of judicial review since the constitutional court alone has jurisdiction to pronounce on the validity of acts of parliament.

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<sup>50</sup> See, The Center for Constitutional Studies: the Constitutional Court of South Africa; an Introduction( University of Alberta), p. 7

Available at <http://ualawccsprod.srv.uaberta.ca/ccs> (accessed on July 3, 2014)

<sup>51</sup> Since the 2008 reform through amendment number 321, article 24(3) it has been exercising posteriori reviewing power. See, Federico Fabbini, *kelsen in Paris: France's Constitutional Reform and the Introduction of a Posteriori Constitutional Review of Legislation*, (German Law Journal vol. 9 no.10), p.1308

<sup>52</sup> Centre for Constitutional Studies, *supra* note 51.

Secondly, in addition to section 167(4) (b) which empowers the court to inquire into the constitutionality of an act of parliament; section 79(4) (b) also authorized it to inquire into the constitutionality of a bill before parliament or a principal legislature put it in to effect. Thus, the court has both repressive and preventive power of judicial review.

### 3.3. Panels and Composition

Considering independence; representation and efficiency, institutional structures and manner of nomination, the number of justices, and personal qualifications of presiding justices in institutions that exercise the power of constitutional review are relative from one state to another. In Germany for instance, at the start the federal constitutional court was intended to be under the supervision of the ministry of justice; however, owing to stiff resistance on the side court's justices, such move couldn't manage to shine consistently.<sup>53</sup>

owing to historical reason of compromising the divergence of ideas between those that proposed court's structure to be one full-fledged institution with smaller panels and those that proposed a fixed body like that of USA, the court was molded to have two senates with mutually distinctive jurisdiction and justices.<sup>54</sup>

Accordingly, the first panel was conferred a jurisdiction on constitutionality of laws, constitutional doubts arising from ordinary litigation, constitutional allegation of citizens, constitutional issues referred to it from courts and related questions that quest concrete review;

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<sup>53</sup>The justices of the court contended it through the 1951 memorandum prepared by them that aimed at the creation of an independent and strong constitutional court. This move later accompanied by the 1968 amendment to the basic law as provided in article 115 (g) that took the status of the court to the higher level whereby the function of the court along with the function of justices declared untouched in times of state of emergency. Then the constitutional court's organization, procedures, and jurisdiction are made to be regulated by the FCCA; whereas the courts internal administration (i.e., budget, administrative duties of judges, authority and procedures of the plenum, selection and responsibilities of clerks, judicial conference...etc.) is to be regulated by the court's standing rules of procedure. See, Donald P. Kommer, *Constitutional Jurisprudence of the Federal Republic of Germany*, (Duke University Press, 1997), pp.10-18.

<sup>54</sup> Ibid, p. 54.



whereas, the second senate was conferred a jurisdiction to entertain constitutional questions arising out of political disputes between branches and levels of government, contested elections, constitutionality of political parties, abstract constitutional questions and the jurisdiction to preside over impeachment proceedings.

Later on for reasons of fair labor division between the two panels, the second panel added the jurisdiction to entertain cases produced to the attention of the court via individual complainants and concrete judicial review.<sup>55</sup>

The number of justices was twelve in each panel; it is now eight in each panel that are wholly independent with regard to judicial matters that fall in their hands. But, the two panels are working as a single court. Among the sixteen judges of the court, the *bundestag* (House of Representatives) elects half of the judges; whereas the *bundesrat* (house of states) elects the rest eight judges.

In the latter case for instance, the appointment of a given judge is realized when s/he succeed in attaining the two-third whim of members of the house.<sup>56</sup> In the former case also the appointment of judges is through a two-third majority vote.<sup>57</sup>

This means, both the federal government and the Lander have the possibility of involving in the selection of the judges in equal footing. In other words the peoples of Germany through their representatives have a say on who should assume the position that renders final say on constitutional issues of the nation.

Besides, a candidate judge must have reached the age of 40, be eligible for election to the Bundestag, and has stated in writing that s/he is willing to become a member of the Federal Constitutional Court.

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<sup>55</sup> Concrete review arises out of ordinary law suit; the constitutional question may be raised by any party before the court or by the court up on its satisfaction that the case should be referred to the constitutional court; whereas in abstract constitutional review controversy out of ordinary law suit is not a prerequisite. The court may entertain cases referred to it by state or federal organ or one-third of members of bundestag, owing to differences of opinion as to constitutionality of a given federal or state law. See, article1 (1) (2) of basic law.

<sup>56</sup> The federal constitutional court act, article 7. See also, article 94 (1) of the Basic Law.

<sup>57</sup> Ibid, article 6(2).

In addition; s/he must be qualified to exercise the functions of a judge pursuant to the Judges Act. Need not be members of the Bundestag, the Bundesrat, the Federal Government, nor of any of the corresponding organs of a Land and on his or her appointment as a judge shall cease to be members of such organs. Page | 31

Up on the appointment, s/he should decline other occupation except that of lecturing of law at a German institution of higher education.<sup>58</sup> In case s/he finds her/himself in dilemma, s/he must prioritize his function of judge.

Furthermore, the basic law (constitution of Germany) stipulates that the judges of courts of Germany including the constitutional court are independent from any kind of influence and interference.<sup>59</sup> As another mechanism to maintain their independence, the judges are granted twelve years of office tenure.<sup>60</sup>

In Italy the mandate of interpreting the constitution is given to the constitutional court. The court consists fifteen judges that are nominated on meritocratic bases, principally from three groups; from the members of bar with at least twenty years of experience practicing at law; from upper level broadly experienced judges; and, those that are full professors of law with considerable sonority.

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<sup>58</sup> Ibid, article 3.

<sup>59</sup> Federal constitution of Germany, *supra* note 55, article 97.

<sup>60</sup> FFCA *Supra* note 58, article 4(1). The Federal Constitutional Court is “the supreme guardian of the constitution, whose seat is in *Karlsruhe*, and it commenced its work in September 1951. The legal basis is provided by Articles 92-94, 99, 100 and Article 115 (g) and (h) of the Basic Law, as well as the Law on the Federal Constitutional Court of 12 March 1951, as published on 11 August 1993 (Federal Law Gazette I p. 1473). The court’s internal affairs are governed by the Rules of Procedure of the Federal Constitutional Court (*GoBVerfG*) of 15 December 1986 (Federal Law Gazette I p. 2529), as amended most recently by the decision of 18 December 1995 (Federal Law Gazette 1996 I p. 474), which supplement the aforementioned law. Panel decisions are published in the collection entitled “*Entscheidungen des Bundesverfassungsgerichts*” (*BVerfGE*.” For more informative information; see, Dr. Gotthard Wöhrmann “The Federal Constitutional Court: an Introduction”

As to the nomination of these fifteen judges; one-third of the judges of the court are nominated by the president of the Republic, the other one - third are nominated by parliament, the remaining one-third by the ordinary and administrative supreme courts. The office term of judges is nine years without re-election. The office of judges is not made to be with in the same premises with that of Member of Parliament or of a regional council, lawyer and with every other appointment and office created by law.<sup>61</sup>

In addition to the forgoing experiences of the nations, we may consult the case of Austria. Just like Germany and Italy Austria granted, the authority of interpreting the constitution to the constitutional court.<sup>62</sup> It is composed of fourteen members with six substitute members. “Among the fourteen judges of the court, the chief justice, his/her substitute, six justices and three substitutes are appointed by the president of the republic of Austria from nominees of federal government; the other six justices and three substitutes appointed by the president on the recommendation of upper and the lower houses.”<sup>63</sup>

Judges of the court should be trained in law and must have a minimum of ten years of experience in a legal profession. Unlike their Germany and Italian counterparts, the judges of Austrian constitutional court have life time tenure up to the compulsory retirement age of seventy. In addition to their activities as constitutional judges, can't involve themselves in any civil service work in the public administration.<sup>64</sup> Beyond these means, Austrians provide constitutional safeguarding mechanism that protects them from any influence and interference in exercise of their judicial office.

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<sup>61</sup> Constitution of the Italian Republic, article 134.

<sup>62</sup> Austria's constitution of 1920 reinstated in 1945, with amendments through 2009, article 137.

<sup>63</sup> Ibid, article 147.

<sup>64</sup> Ibid.

Republic of South Africa is among the few states of Africa which had conferred the constitutional court, the jurisdiction to adjudicate constitutional issues.<sup>65</sup> The court including the president and deputy president is composed of eleven judges.<sup>66</sup>

Persons eligible to be nominated and appointed must be either: (I) judges of the Supreme Court, (ii) persons who are qualified to be admitted as advocates or attorneys and who have practiced as such for a cumulative period of ten years or who have lectured in law at a university for that period, or (iii) persons who by reason of their experience or training have expertise in the field of constitutional law, provided that no more than two persons from this category may be members of the Court at the same time.<sup>67</sup>

The President of the Court is appointed by the President of the Republic in consultation with the Cabinet, after consultation with the Chief Justice and the Judicial Service Commission. The president in consultation with the Cabinet and with the Chief Justice appoints additional four judges from the ranks of the judges of the Supreme Court.<sup>68</sup>

The remaining six judges are nominated by the general public and presented to the judicial service commission. Then, the commission will reduce the candidates to twenty five and after a public interview is held, ten are selected and presented to the president for appointment. The president then appoints six of them.<sup>69</sup>

To protect the independence of the court or individual judges, removal of the judges is made conditional on strict prerequisites. So, the judges after appointment by the president may only be removed from office by the President, "on grounds of misbehavior, incapacity or incompetence,

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<sup>65</sup> Constitution of the Republic of South Africa, *supra* note 42, section 167 (3) (b).

<sup>66</sup> *Ibid*, section 167 (1).

<sup>67</sup> *Ibid*, section 174 and 175.

<sup>68</sup> *Ibid*.

<sup>69</sup> *Ibid*.

established by the Judicial Service Commission; his or her removal must furthermore be requested by both the National Assembly and the Senate”.<sup>70</sup> To strengthen this commitment, the remuneration of all judges is guaranteed in section 176(3) of the Constitution. It reads: “Salaries, allowances and benefits of judges may not be reduced.” Besides, the office term of the judges of the court is made twelve years.

#### 4. *Procedural Rules: Accessibility*

Once, Aristotle articulated that “Man is a social animal”. Yes, we are not islands; our very existence for one or another reason, rests basically on our interaction with individuals or groups.

This is why we form associations like family, community, society...etc. the domestic sayings; “*ከአንድ ብርቱ ሁለት መድሃኒቱ* [many hands make work light]”, or “*ድር ቢያብር አንበሳ ያስር* [Literarily, it connotes that, tiny ropes can tie a lion]”, or “*አንድ እንጨት ብቻውን አይኒድም* [This saying signals that a single stick alone, can’t produce flames]” that have been orally narrated from one generation to another connote that “social cooperation makes possible a better life for all than any would have if each were to live solely by his own efforts [identity of interests]”.

Unfortunately, we are not same in all of our traits. As most of us are “egoistic”, we prefer a larger share to a lessor one and we are, in our social cooperation, dizzy of the manner of benefit and burden distributions.

Because of this conflict between and among members of the society is inevitable. It is for these very reasons that our predecessors determined to produce a set of principles that would govern our conducts and settle the assignment of rights and duties in our societal interactions.<sup>71</sup>

It is to this end that Constitution appeared to be a document that holds the agreement between individuals, individuals and government, and among branches of government. As time went on, our ancestors coined institutional mechanism-constitutional review- that protects the values in this contractual document.

Under the coming sub-section, by broader inclination on Germany’s trend, the paper will explore

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<sup>70</sup> Ibid, section 177.

<sup>71</sup> John Rawls, *supra* note 15, pp4.

whether these institutions are accessible to individuals or any other interested body.

In Germany the two regimes that determine accessibility to the federal constitutional court are the basic law and the federal constitutional court act. Under these documents; individuals (both natural and legal), courts other than the constitutional court itself, the two federal houses (*bundestag* and *bundesrat*), the federal president, and the highest organ of states (*lander*) are conditionally allowed to access justice through the federal constitutional court.



Figure 2- Exterior view: Constitutional Court of Germany.<sup>72</sup>



Figure 3- Interior view of the court: taken while the court was delivering its ruling on a lawsuit that alleged the illegality of Greece's bailout.<sup>73</sup>

With regard to individuals' right to constitutional complaint, these documents differently treat natural persons from that of legal persons. Within this domain too they distinctively see citizens and foreigners; private ( e.g. political parties as they are right holders) and public legal persons.

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<sup>72</sup> Courtesy of International business times

Available at <<http://www.ibtimes.co.uk>> (last accessed on May 3, 2015.)

<sup>73</sup> courtesy of CNN (cable news network)

Available at<[http:// www.edition.cnn.com](http://www.edition.cnn.com)> last accessed on May 3, 2015).

For instance, a given foreigner may not base his allegation on rights that are reserved only to citizens of Germany (e.g. the right to elect and to be elected); but, she or he can do it on the basis of rights reserved to every one (most of basic rights and freedoms provided in the basic law [e.g. his right to life]) or to foreigner (e.g. asylum rights). Public legal persons, in principle, have no right of individual recourse; but, exceptionally, for the protection of fundamental procedural rights. Rights can access the court<sup>74</sup>

For an applicant's case be admissible the application is expected to meet the two requirements recognized in these instruments: First, the nature of the harm alleged must be personal, real and immediate and second, exhausted the prior available remedies (the subsidiarity of the remedy in question).<sup>75</sup>

The word "personal" in the first requirement connotes that the applicant shouldn't be a representative of others' interest. "Real" refers, the harm is materialized at the time of the action. The word "Immediate" implies that the harm shouldn't be potential.<sup>76</sup> The principle of exhaustion requires the applicant to exhaust the available remedies at the administrative or ordinary courts. But this is not a rule, when the case involves general interest and when seeking judicial remedy would result irreversible loss to the applicant.<sup>77</sup>

Beyond individual complaint, Germany has a room for courts to seek justice from the umpire entrusted with the power to entertain constitutional issues. For instance; courts can exercise this right when they seek review of specific law;<sup>78</sup> the two (*bundestag* and *bundesrat*) federal houses may also stand before the court to quest the constitutionality of a party and to seek decision

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<sup>74</sup> Mario Patrono, *supra* note 39, pp. 409, 411. See also, *supra* note 58, article 90(2).

<sup>75</sup> Basic Law of Germany, *supra* note 55, article 94(2).

<sup>76</sup> Mario Patrono, *Supra* note 39, p.411.

<sup>77</sup> *Ibid*, p. 412.

<sup>78</sup> German Constitutional Court Act, *supra* note 58, article 80 (1).

pursuant to the second sentence of article 18 (forfeiture of basic rights ) of the basic law;<sup>79</sup> the federal president when constitutional resolution of disputes between organs of government and the highest organ of a land when it seeks constitutional solution for disputes with in the land, can access the court.<sup>80</sup>

In the current legal system of the republic of South Africa, parliamentary acts or acts traced from the executive in no way be above the constitution. They must conform to the constitution. To this end, the court can pronounce on the constitutionality of act of parliament or any acts of the executive that is in any way in conflict with spirit, purport or letter of the constitution. Thus, if the constitutionality of an Act of parliament or executive is in dispute before any court, the matter must be suspended and the issue of the constitutionality of the Act of parliament referred to the constitutional court.

While referring the matter to the constitutional court however, the court from which the case arises must at first ascertain its decisiveness whether the matter falls under the exclusive jurisdiction of the constitutional court and ultimately, whether referring the matter serves the very interest of Justice.<sup>81</sup>

On the other hand, section 167 (6) of the constitution allows a direct access to the court provided that the matter is an urgent one, or otherwise of such public importance, that any delay necessitated by the use the ordinary procedures would prejudice the public interests or the ends of justice and good government.

Once the court has made a finding that a law referred to it or a provision there of is inconsistent with the constitution, it has full power to declare such law or provision to be invalid to the extent of its inconsistency.

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<sup>79</sup> Ibid, article 36. Article 18 of the basic law reads: “whoever abuses the freedom of expression, in particular the freedom of the press..., the freedom of teaching, assembly, association, the privacy of correspondence...the rights of property or the right of asylum in order to combat the free democratic order shall forfeit these basic rights....”

<sup>80</sup> Ibid, article 63 and 68.

<sup>81</sup> South African Constitution, *supra* note 42, section 170.



Additionally, the court also has a power, under section 172(1) (b) (ii) of the constitution, to suspend the coming into operation of the order of invalidity and instead require parliament to correct the defect in the law or provision.

The normal course for accessing the court, therefore; first, by way of referral from the provincial or local division of the Supreme Court or an appeal from such a court, and the other is, through direct access for reasons of irreversible loss.

## 5. Conclusion

The historical analysis on the evolution of government has its root in human's behavior in state of nature. Concerning human's behavior there are two schools of thought that affirms man's behavior in state of nature as good and as evil. Irrespective of such differences of stands towards man's behavior in state of nature; most scholars argue these behaviors of man can be upheld or defended in a properly constituted state than state of nature. It was this desire of having a properly constituted state that gave birth to what we call now government.

Following the establishment of government as representative of the mass, there were differences of ideas as to the role it should play, the manner of exercising its power and the consequence it would face in cases of power abuse. For instance, there are this group members that wanted a government to play its role towards the protection and enforcement of the right to life, property, and liberty; there were groups that asserted an absolute power to be exercised by government and on the other hand, government whose power is limited naturally and morally.

Those that conferred absolute power on government did not want peoples to have a say on the terms of government; whereas those that called natural and moral restraints argued pro to peoples' right to revolt against a tyrannical government that abridges the moral and natural restraints. It was on the later thought that the idea of government by compact-government constituted on the basis of constitution- in the second half of 18th came in to play.

The idea on government by compact considered limiting government's power as its main concern. To this end, it had considered constitution by the people, basic rights and freedoms,

power separation and power division, constitutional supremacy, extra-ordinary amendment procedures of constitution, election and institutional mechanism of guarding these ingredients (constitutional review) as its pillars. For instance, in American constitutional tradition constitutional review as one reason of limiting government had been considered in justifying the need to empower the judiciary as the sole agent of exercising the power of constitutional review.

So, the desire to limit government's power is the main reason for the evolution of constitutional review. In other words, "constitutional review [judicial review] was fundamentally an outgrowth of thinking on the supremacy of the constitution, the limited power of the legislature, and the independence of the judiciary, achieved through the separation of powers"<sup>82</sup>

In most countries of our world, constitution is the supreme law of the land. In order to enforce the supremacy of constitution, countries employ institutional mechanism. As it has been explored earlier, depending on the existing socio-cultural, historical and political realities of the concerned countries, these institutions have different forms. However these institutions' holds the common objective of ensuring the practicability constitutional principles and values. In order to realize this objective, they are molded to function independently and effectively.

As an extension of this, for independency reason, the judges are hindered from taking part in any other public offices (the case in Germany whereby the members may lecture at Higher education institutions is a rare exception of the case at hand), they are granted longer office term tenure and they are responsible citizens who can challenge or resist external influences. For effectiveness reason, judges should be highly qualified legal personnel. To this end, in Germany and Italy strict qualification are set as prerequisites.

Organizations of these institutions in terms of man power and institutional structure (panels and compositions) are made to go through the decision of the people. It is for this reason that, for instance, in the case of Germany the two houses (*Bundestag* and *Bundesrat*) have a say in the appointment of the judges of the federal constitutional court.

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<sup>82</sup> James C.N. Paul and Christopher Clapham, *supra* note 23, p. 165.

## Chapter three

### Constitutional Review in Action: Experiences from National Jurisprudences

#### 1. Introduction

Taking in to account the recognition of basic rights and freedoms in a given constitution as one reason of limiting government's power, constitutional review as a guardian democracy to the values upheld in such inclination will be explored. In order to give broader understanding of the objective sought through constitutional review of issues that involve questions of basic rights and freedoms, the enforcement of these rights in the international setup (regional and international human rights system) will be discussed in bird's eye view.<sup>83</sup>

Appreciating denial and grant of powers as one mechanism of limiting government's power, the next section is devoted to discuss constitutional principles upheld in separating power among the three branches of government (power separation) and dividing power between the two tiers (central and regional governments) and the system of constitutional review in maintaining these principles.

Finally, constitutional review as a guardian instrument of the right to elect and to be elected as a an instrument that paves the road for realization of citizens' inherent right to have a say in governmental decision making processes and in providing government limited by its period, will be analyzed. To provide a broader and comparative understanding, the system of electoral processes and the objective sought in them will be assessed. In doing so, jurisprudences of different nations and cases that had been disposed by the federal supreme court of USA and Federal constitutional court of Germany are inserted here and there.

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<sup>83</sup> Here it is invaluable to have an understanding of the fact that international and regional human rights instruments may constitute part and parcel of the law of the land or they may be given the status of bench mark in the interpretation of basic rights and freedoms embodied in constitutions. The FDRE constitution's rules provided under article 9(4) and 13 (1) are instances of such fact. To this end under this chapter the status of basic rights and freedoms under international human rights system, particularly their enforcement though the treaty based and the non-treaty based mechanisms will be discussed.

## 2. Basic Rights and Freedoms as a Limit to Government's Power: Their Protection and Enforcement through Constitutional Review

### 2.1. A Descriptive Analysis of Their Status and Enforcement under the International Human Rights System

*“Human rights are almost a form of religion in today's world. They are the great ethical yardstick that is used to measure a government's treatment of its people.”*<sup>84</sup>

These international and regional instruments recognized protection of human rights and their enforcement on the ground that, each person is a moral and rational being who deserves to be treated with dignity. In these instruments the fundamental rights together coined as “human rights”. This naming stems from the very assumption that “human rights are the rights to which everyone is entitled-no matter who they are or where they live-simply because they are alive.”<sup>85</sup>

The preambles of many international and regional instruments are evident of this. For instance, the ICCPR under its preamble 1 (one) asserts that “...recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” Paragraph two reads, “human rights are attached to the inherent dignity of the human person....”

The African human right document (ACHPR), in its preamble paragraph 6 (six) provides that “...fundamental rights stem from the attributes of human beings which justify their national and international protection....”

European nations considered their rights as, “a foundation of justice and peace in the world and an ingredient of their unity.”<sup>86</sup>

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<sup>84</sup> Andrew Heard (1997), Human Rights: Chimeras in Sheep's Clothing?

Available at <<http://www.sfu.ca/~aheard/intro/html>> (last accessed, 19 September, 2014).

<sup>85</sup> ECHR, Paragraph 3 (three) of the Preamble.

<sup>86</sup> Ibid.

American states on their part, conceived these rights as, “rights of man that are not derived from one’s being a national of a certain state, but are based upon attributes of the human personality and they therefore justify international protection in the form of convention....”<sup>87</sup>

These instruments prescribed the obligation, on respective contracting parties (states) to respect and ensure fundamental rights of everyone or persons or individuals, without any ground of discrimination.<sup>88</sup> To name some of the rights enshrined in these instruments; right to life, liberty, equality, privacy, accused persons rights, freedom of assembly and expression are recognized by these instruments.

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For instance, the right to life of individual which is conceived as the supreme of all rights we are entitled to, and one of the rights which constitute ‘the irreducible core of human rights’<sup>89</sup> plainly provided under Article 3 (three) of the UDHR, Article 6 (six) of the ICCPR, Article 4 of the ACHPR and Article 1 (one) and 2 (2) of ACHR.

The international community strengthens its commitment to protect the right to life of individuals, through the 2nd optional protocol to the ICCPR. Under this instrument member states are required not to be reluctant in facilitating the extinction of death penalty with in their jurisdiction. But, it provides reservation when ‘serious crime of a military nature committed during war time.’<sup>90</sup> Similar instruments have also been adopted at regional levels: for e.g. member states of the council of Europe and contracting parties to the ACHR.<sup>91</sup>

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<sup>87</sup> See, paragraph 2 (two) of ACHR’s preamble.

<sup>88</sup> See, for instance, Article 1 or Article 2 (1) of ICCPR. See also, Article 1 and 2 of ACHPR.

<sup>89</sup> Human Rights Committee General Comment No. 6 (1982). See also, Human Rights Committee, Communication Number 45/1979.

<sup>90</sup> Second Optional Protocol to the ICCPR, article 1 and article 2 (1). This protocol was adopted and proclaimed by General Assembly resolution 44/128 of 15 December 1989.

<sup>91</sup> Protocol No.6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Article 5. See also, Article 4 (2) of the ACHPR.

In order for backing their commitment towards the protection of fundamental rights of individuals and peoples, the participants both at international and regional levels, had developed enforcement mechanisms. These are treaty and non-treaty mechanisms.

### 2.1.1. Treaty Based Mechanism

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The treaty mechanism, with in it holds reporting and inquiry procedures; as well as, interstate and individual complaint means of supervising states parties' obligation. The first is principally designed to facilitate the monitoring of member states adherence towards their obligations under a human right instruments. Reporting for example, is required under the ICCPR.<sup>92</sup>

The second ( inquiry procedure), refers instances whereby the committee based upon the allegation made by a given person as to torture, provided that it found it reliable and the allegation contains satisfactory indication that torture is systematically practiced in the territory of state party, by cooperating with the concerned state party, examines the information it has received. It will then make its own comments and suggestions.<sup>93</sup>

The third (inter-state complaints), is a procedure whereby member states to the instrument accept the jurisdiction of monitoring bodies to receive and consider communication from state party that claims another state party is not adhering itself to the obligation arises out of the instrument concerned. In this regard, the ICCPR devoted its Article 41 to forewarn member states that committed themselves in favor of this procedure.

The last (individual complaints), refers the cases in which the provision of the concerned instrument proclaims individuals capacity to present their grievances to the concerned body.<sup>94</sup>

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<sup>92</sup> ICCPR *supra* note 90, Article 40 and the following.

<sup>93</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 20.

<sup>94</sup> Optional Protocol to the ICCPR (Article 1 and 2); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 22); the International Convention on the Elimination of all forms of Racial Discrimination (Article 14); and the International Convention on the Protection of the rights of All Migrant Workers and Members of Their Families (Article 77).

For instance, in the case of *Zoumana Sorifing Traoré* (represented by the World Organization against Torture, OMCT) v Côte d'Ivoire, in which the claimant alleged arbitrary arrest and detention, torture and inhuman treatment while he was in prison and the enforced disappearance of his cousins who were accused of political dissent, the human rights committee held that, "the acts of torture suffered by the author and his cousins, the secret detention of the same and the enforced disappearance of the author's cousins constitute violations of article 7 of the Covenant". On the basis of the concerned state party's vow, the Committee quest the state to enforce, publish and widely distribute its views.<sup>95</sup>

In *Mikhail Marinich v Belarus* case, the claimant (opposition party figure) alleged that he pursued unfair trial, unlawful detention, and inhuman conditions of detention and violation of his right to privacy, freedom of expression and freedom of assembly and the committee held that the charges pressed, the pretrial constraint measure selected and the continued extension of his incarceration were unlawful.

Second, the author's claims that the court was neither independent nor unbiased as the judges were acting under instructions from the authorities; the hearings were not fully open to the public and were closely monitored by special services which taped the whole trial; and the judges tendentiously interpreted the evidence gathered by the investigation, as well as the evidence given by the witnesses and the defendant.

The Committee concludes that the facts alleged constitute a violation of article 14, paragraph 1, of the Covenant. Third, The Committee notes the author's claims that his right to the presumption of innocence has been violated, as some episodes of the interrogation were broadcasted on Belarusian TV accompanied with false and degrading comments about the author suggesting that he was guilty. The fact that, in the context of this case, the State media portrayed the author as guilty before trial is in itself a violation of article 14, paragraph 2, of the Covenant.

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<sup>95</sup> *Zoumana Sorifing Traoré* (represented by the World Organization against Torture, OMCT) v Côte d'Ivoire, (17 October to 4 November 2011) Communication No. 1759/2008 Views adopted by the Committee at its 103rd session.

Finally, the Committee quest the State party, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.<sup>96</sup>

## 2.1.2. The Non-Treaty Mechanism

The non-treaty mechanism includes, enforcement by the ICJ (International Court of Justice), UN (United Nations) Security Council and the UN General Assembly.

The international court of justice is the judicial organ of the United Nations.<sup>97</sup> Its statute is an integral part of the charter of the United Nations and as a matter of this, all member states of the United Nations are *ipso facto* parties to the statute of the court.<sup>98</sup> This institution, amongst other, has jurisdiction concerning the interpretation of a treaty and the existence of any fact which is established, would constitute a breach of an international obligation.<sup>99</sup> So, it is empowered to ascertain the enforcement of state parties' obligation that arises from the concerned instrument. The obligation bestowed upon member states, basically refers their adherence to the well existence of individuals inherent and inalienable natural rights.

The Security Council whose principal task is the maintenance of international peace and security,<sup>100</sup> when it believes and decides the presence of any threat to the peace, breach of the peace, or act of aggression; it may make recommendations or decide what measures shall be

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<sup>96</sup> Mikhail Marinich v Belarus, views adopted by the Human Rights Committee at its Ninety-ninth session (12 to 30 July 2010), Communications No. 1502/2006.

<sup>97</sup> Statue of the International Court of Justice, Article 1.

<sup>98</sup> Ibid, the first paragraph of the preamble.

<sup>99</sup> Competences of the court are provided under Articles 34-38 of its (ICJ) constitution. Specifically, see Article 36 (2) (c) and 36 (1) of same

<sup>100</sup> United Nations charter, Article 24.



taken to maintain or restore international peace and security.<sup>101</sup> On the basis of this authority, the Security Council had dispensed several human rights problems, including massive and repeated violations in South Africa, Somalia, Haiti, Yugoslavia and Rwanda.<sup>102</sup>

One of the functions of the United Nations General Assembly is to initiate studies and make recommendations for the purpose of ‘assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.’<sup>103</sup>

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To wrap up; these international and regional instruments, along with the enforcement mechanisms in them, have been playing pivotal role in the provision of limited government.

These international human rights systems accompany the domestic constitutional reviewing role of limiting government- limiting government not to abuse its powers against the basic rights and freedoms of individuals and peoples.

The subsequent section tries to explore the extent of constitutional review system in guarding these rights.



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<sup>101</sup> The Security Council has fifteen members; five being permanent; China, France, Russia, the United Kingdom and the United States. The ten non-permanent members serve for two years (Ibid, Article 23 (1)). The council before it decides the imposition of a measure, as provided under Article 39 of the charter, it must at first decide the presence of a threat to the peace, breach of the peace or act of aggression. Then, on the basis of Article 4 and 42 of the charter it deems plausible. The types of measures that would be taken by are provided under Article 41 (e.g. complete or partial interruption of economic relations) and 42 (e.g. Blockade). See also, the insightful discussion by Anthony Aust:” Hand Book of International Law”, (Cambridge University Press, 2005) p. 214

<sup>102</sup> Anthony Aust, “Hand Book of International Law”, (Cambridge University press, 2005), p. 216. “Though, Article 2 (7) of the UN charter limits the United Nations from intervening in matters that are essentially with in the domestic jurisdiction of a state, human rights long been regarded in the United Nations, as not ‘essentially’ an internal matters, but of international concern. See also, Resolutions 713 (1991) (Yugoslavia), 794 (1994) (Haiti). “The resolutions emphasize the unique charter of the situation requiring immediate and exceptional response (Somalia) or the unique and exceptional circumstance (Haiti).”

<sup>103</sup> As provided under Article 9 (1) of the charter, the General Assembly consists of all members of the United Nations, each having one vote.

## 2.2. Protection and Enforcement of Basic Rights and Freedoms Through a System of Constitutional Review: Experiences of other Nations

In this concern, the first formal contractual legal document (constitution) to protect human rights was the USA Constitution.<sup>104</sup> A look into the wordings deployed in the declaration of independence, the federal constitution of 1789 and the subsequent amendments and other documents (e.g. federalist paper), reveal the fact that, early Americans were highly committed towards the natural rights of American citizens and any persons in the USA territory.<sup>105</sup> It was for this reason that Thomas Jefferson articulated that, basic rights and freedoms are what the people are entitled to against every government on earth.<sup>106</sup>

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For instance, the phrases “...secure the blessings of liberty to ourselves and our property” under the preamble of the US constitution can be indicated as a good example. The same is true for the first ten amendments (bill of rights, which were adopted in recognition of the fact that the original document contained inadequate sets of guarantees of personal freedoms and rights).

Besides, Article 1 of the constitution which under its sections one and seven plainly provides the notion of “social contract” and the check and balance system between the executive and legislative can also be seen as another example. One may crosscheck Article 6 of same, in which ‘the supremacy of the constitution’ is declared, in order to avert the possible danger that would arise from any sources. Though not expressly provided under the constitution, the practice of “judicial review”, which in one or another contributes to the respect to the natural rights of individuals, can be seen as evidence to the assertion put here in above.

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<sup>104</sup> The 12th century *Magna Carta* of Britain can also be raised in this regard. But, it was not relatively broader than the constitution of USA.

<sup>105</sup> There were these times in which the soil of America was known for slavery, discriminatory electoral rights...etc. But, they had rectified it over periods of time, basically through subsequent amendments to constitution and through their strong constitutional review system.

<sup>106</sup> Thomas E. Patterson, *supra* note 2, p. 45. John Locke argued as follows: “The right to life, liberty and property of individuals are natural rights whose very nature obliges statesmen to abstain from posing danger to them....” James C. N. Paul and Christopher Clapham, *Supra* note 23.

Side by side the Framers of the constitution provides for limitation to those rights enshrined in the constitution and the subsequent amendments. For instance, protection against unreasonable search and seizures may be taken away on justified circumstances (In order to realize rights of other or in favor of the national security).<sup>107</sup>

Additionally, the privilege of the writ of Habeas corpus may be denied in cases of rebellion or invasion that have the tendency of inflicting danger on public safety. Individuals' right to life, liberty or property can also be limited on justified ground as plainly provided under Amendment VI (six) of the constitution.<sup>108</sup>

Here it is worth to emphasis that most of constitutionally democratic states have nearly the same tradition with that of USA. For instance the basic law of Germany recognized basic rights of individuals and peoples.<sup>109</sup>

The provision of basic rights and freedoms in constitutions of different nations around the world has two objectives that represent the two faces of a single coin; these are the objective of recognizing these rights which we are destined to enjoy only for we are human and the objective of limiting government's power.

In realizing these objectives, institutional constitutional control of acts that abridge these rights, have been playing a pivotal role. The protection of free exercise of these rights is against an unlawful and unjustified interference on the side of government or its officials or any other sources. The holdings of the USA Supreme Court on the following two cases, in which issues of

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<sup>107</sup> USA constitution, amendment IV.

<sup>108</sup> Ibid, article 1, section 9(2)

<sup>109</sup> Basic law of Germany *Supra* note 55, article 1-20 whereby basic rights and their limitations are provided. See also, constitution of the RSA *supra* note 68, article 7-39 in which rights and limitation are provided.

government pressure on freedom of speech and free exercise of speech on a public official had been settled, are evidences of this assertion.<sup>110</sup>

In *New York Times co. v. Sullivan*, 376U.S. 254 (1964) the court held that, “if the plaintiff is a public official or running for public office, the plaintiff can recover for defamation only by proving with clear and convincing evidence the falsity of the statements and actual malice.” From this ruling it can be discerned that, a given speech doesn’t constitute defamation provided that the statement is true and the one who delivered the speech (defendant) didn’t know the statement he was going to deliver was false or didn’t act with reckless of the truth.

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In *Bantam Books Inc. v. Sullivan*, 372 U.S. 58 (1963) the court held that, “it was unconstitutional for the Rhode Island Commission to encourage morality in youth to identify ‘objectionable’ books because they were unsuitable for children and to write to sellers urging them to stop having them available....The supreme court found such pressure constitute an unconstitutional prior restraint of speech, even though no books were actually banned and no prosecutions were undertaken.”

Concerning the issue on, whether the phrase “every human being”<sup>111</sup> is extendable to the extent of incorporating “every person”: in particular, whether it includes an inborn child has been the subject matter of debates.

The following holdings of institutions that exercise constitutional reviewing are another example.<sup>112</sup>

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<sup>110</sup> But this need not be understood to convey that the protection is only towards rights of individuals. The court’s holding in *New York Times co. v. United States*, 403 U.S. 713 (1971) shows that freedom of speech can be limited for the sake of national security. In this case (the pentagon papers case), the New York Times published excerpts from a top secret defense department history of the Vietnam War. The United States government sought federal court injunctions precluding publications on national security grounds. This right can also be limited under the guise of protecting the defendant’s right to fair trial. In *Nebraska Press Assn. v. Stuart* case, the court considered court injunction order against pre-trial coverage of legal proceeding, as an instrument that enhances defendant’s ability to receive a fair trial. Chemerinsky, *supra* note 33, pp. 1104, 1097.

<sup>111</sup> See for instance, Article 2 (two) of ECHR.

In this regard the federal constitutional court of Germany interpreted the phrase as:<sup>113</sup>

“Life in the sense of the historical existence of a human individual exists according to established biological and physiological knowledge at least from the 14th day after conception. The process of development beginning from this point is a continuous one so that no sharp divisions or exact distinction between the various stages of development of human life can be made. It does not end at birth: for example, the particular type of consciousness peculiar to human personality only appears a considerable time after the birth. The protection conferred by Article 2 (2), first sentence of the basic law; can therefore be limited neither to the ‘complete’ person after birth nor to the fetus capable of independent existence prior to birth. The right to life is guaranteed to everyone who ‘lives’; in this context no distinction can be made between the various stages of developing life before birth or between born or unborn children. Everyone in the meaning of Article 2 (2) of the basic law is ‘every living human being’; in other words; every human individual possessing life, “everyone therefore includes unborn human beings.”

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With the same line to the second stand, the constitutional court of Poland observed that “while one may choose not to have children by refusing to conceive, one is not entitled to decide whether to have a child when it is already conceived and is growing in the pre-natal phase.”

Against the preceding two stands, the Austrian constitutional court, interpreting Article 2 (two) of ECHR held that “viewed in the context of the entire Article 2 (two), the sentence. Everyone’s right to life shall be protected by law did not cover the unborn life.”

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<sup>112</sup> Nihal Jaya Wickrama, “the Judicial Application of Human Rights: National, International and Regional Jurisprudence (Cambridge University Press, 2002) p. 247.

<sup>113</sup> “The concept of rights is one of the most used and abused of political ideas.” For this very reason, having an institution that would defend the possible danger that might be materialized using this loophole is invaluable. The federal constitutional court of Germany’s interpretation of the phrase is nothing than serving this objective.

### 3. Limited Government Processes through Constitutional Review: Separation and Division of Powers

#### 3.1. Separation of Powers

Earon de Montesquieu (1689-1755), was amongst the ice breaker in bringing the idea of un-concentrated power in the hands of a government. The driving force behind his thought on separation of power is basically facilitating the protection and enforcement of individuals' liberty, security and their protection against tyrannical government.

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He portrayed undivided executive and legislative bodies as a means to enactment and execution of laws tyrannically. The same danger would happen, when the judiciary is not separated from the rest two branches. Because, according to him, "life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator".<sup>114</sup>

John Locke (1632-1704) on his part contributed to the growth of the doctrine of separation of power. In his second treatise of civil government he stated that:<sup>115</sup>

"It may be too great a temptation to human frailty, opt to group of power for the same persons who have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage."

Stands of the above scholars had been seen as a doctrine of "simple power separation" which refers a system of power distribution between and among branches of government without a system of power overlapping- the check and balance system. Madison was amongst the prominent advocators of this thought. According to him, simple power separation would lead to the birth of tyrannical government. To use his wordings:

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<sup>114</sup> James C. N. Paul and Christopher Clapham, *supra* note 23, p. 46.

<sup>115</sup> E.C.S. Wade and A.W. Bradely, *constitutional and administrative law*, (New York, Longman, 1993), p. 55.

“The accumulation of all powers: legislative, executive and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny. The preservation of liberty requires, more than the conception of the maxim that goes ‘three great departments of power should be separate and distinct’.”<sup>116</sup>

For this very reason, he argued for the presence of a system whereby the interior structure of government is made in a way that allows branches of government to force one another their proper places. In doing this, so as to allow each of them to have their own will, members of each should have as little agency as possible in the appointment of the members of the others.

By taking in to account the fear of Madison and the historical reasons they had, the authors of the USA constitution emphasized the “power separation doctrine”, which within it holds a system of checks and balances system.

They considered this mechanism as a basic means to limit government’s power. Hence they caused the birth of independent branches of government. Accordingly, “they made the president, principal agent that exercises all executive power and made his accountability to the electorate. The congress bestowed with exclusive power of legislation and is elected by the people. The judiciary enjoys tenure in office and is accountable to the law and the judicial conscience.”<sup>117</sup>

But, owing to the experience of Pennsylvania’s all-powerful legislature, unrestrained by independent judiciary or executive, that systematically attacked minority groups’ basic rights and freedoms (e.g. Quakers were denied of their right to vote [disfranchised], for reasons attached to their religious beliefs, conscientious objectors to the revolutionary war were prosecuted, and the right of trial by jury was eliminated)<sup>118</sup> and the fear of “the mischiefs of faction”- according to Madison- this refers “serving the interest of majorities rather than according to the principles of

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<sup>116</sup> James Madison, Federalist No. 47.

<sup>117</sup> James C. N. Paul and Christopher Clapham, *supra* note 23, p. 47.

<sup>118</sup> Thomas E. Patterson *supra* note 2, p. 42.

justice or governments action or inaction to advance itself at the expense of all others,”<sup>119</sup> the framers were suspicious of the total separation which they thought lacks a means to block a single faction’s door to exploitation of a particular kind of political power. According to them, for instance, “a faction that controlled the legislature could enact laws ruinous to other interests.”<sup>120</sup>

For these very reasons, they added to the idea developed by Montesquieu that, “no single institution could exercise great power without the agreement of other institutions.” For this, they furnished system of separated but overlapping powers, as a result of which, no single group would easily control the rest institutions. A system that necessarily pushes each branches of government to work together, thereby serve the interests of many. They call this system a system of “cheeks and balances.”<sup>121</sup>

Accordingly, the congress, may check the acts of the president when it enacts the budget and laws, approve treaties and executive appointments, investigates presidential action, impeaches president (e.g. Nixon) and overrides presidential veto.<sup>122</sup> On the other hand, it controls the judiciary, when it decides the size of the federal court system, confirms judicial nominees, impeaches and removes federal judge and when it initiates constitutional amendment.<sup>123</sup>

The executive on its part may control the judiciary when it nominates federal judges, pardons those convicted in the court and executes court decisions.<sup>124</sup> At the same time, it can control acts

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<sup>119</sup> James Madison, *supra* note 1.

<sup>120</sup> Thomas E. Patterson *Supra* note 2, p. 43.

<sup>121</sup> Federalists No. 47 and 48.

<sup>122</sup> US constitution, *supra* note 108, Article II, section 2.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid*, section 1 of Article II.



of congress when it executes laws passed by it, and when it veto acts of congress.<sup>125</sup>

The judiciary through the power of judicial review since the milestone case of Marbury v. Madison, has been cross-checking acts of the executive or acts of congress; provided that, the acts of the former go beyond what was authorized by the legislator or the latter's acts offended constitutional values (principally, basic liberties of individuals).

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On the basis of the tradition of judicial review, the Federal supreme court of USA has been disposing cases that involve the question of power separation doctrine in the USA constitution sense-power separation with check and balance system- there by limiting unjustified power exercises on the side of government.

The typical of such case is, United States v. Clein 80 U.S. 128 (1871). Under this specific case, a law promulgated by the congress in 1863, allowed concerned citizen's right to recovery of their property seized in the civil war. But, the exercise of this right was conditional on claimant's participation in the war. Hence, she or he need to proof that he didn't lend his hand for the enemy. Later on the Supreme Court held that, a given claimant shouldn't be asked to proof, provided that he was the beneficiary of the pardon on the side of the president.

Contrary to the previous ruling of the Supreme Court, the congress came up with additional law that provided the inadmissibility of pardon as evidence in a claim for return of seized property. Further, it required federal courts to decline for want of jurisdiction on such cases.

After considering this, the Supreme Court held that, as first instance and appellate jurisdictions are constitutionally vested in ordinary courts that encompasses the supreme court and other subordinate courts, congress, by proclaiming such law, has inadvertently passed the limit which separates the legislature from the judiciary.

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<sup>125</sup> Ibid, Article I, section of which reads "Every bill which shall have passed the House of Representative and the senate, shall, before it becomes law, be presented to the president of the United States..."

For the court, this law outdid the independent functioning of the legislative and the executive. Because, in the former case it is up to the judiciary to decide on its jurisdiction after the congress had adopted a law on its jurisdiction and in the latter case, granting pardon is an independent constitutional power of the executive which it would exercise without any limit. The court emphasized in its judgment that, “it is the intention of the constitution that each of the great co-ordinate departments of the government- the legislative, the executive and the judiciary- shall be in its sphere, independent of the others.”<sup>126</sup>

Though it is not a copy-paste, this trend of America have been transplanting in the constitution of different constitutional states of the world. The 1948 basic law of Germany is one example of these.

German constitution makers re-affirmed the importance of integrating the power separation doctrine in to the basic law as a system of power separation with “reciprocal controls marked by numerous checks and balances”.<sup>127</sup> For instance, on the basis of article 93 of the constitution, the federal constitutional court can entertain legislative or executive acts that offend constitutional values.

On the basis of this jurisdiction, since its establishment in 1949, the constitutional court has been disposing issues that involve the question of the power separation doctrine. One example of such cases is, the Josef –Franziska case (1959) that involved the issue of separation of administrative and judicial personnel.

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<sup>126</sup> But, this doesn’t mean that the court would always limit any action or inaction on the side of the other two branches. The other ruling of the court in the United States v. Klein case is evident of the fact that the judiciary may restrain itself from involving in the activities of the other two branches. In this case the court ruled out that, in cases that trigger want of jurisdiction it is the duty of the court to do so. Chemerensky *supra* note 33, pp. 27-29.

<sup>127</sup> Donald P. Kommer, *supra* note 54, p. 115. As one element of the power separation doctrine, the basic law incorporated the principle of judicial independence through its article 97(1), which reads: “judges shall be independent and subject only to the law.”

Under this specific case the court invalidated *Baden-wuttemberg*'s creation of special justice of the peace courts staffed by local civil servants. This special court had assumed jurisdiction on petty criminal and civil law suits which the federal constitutional court confirmed it as "convenient and economically feasible". However the court invalidated it on the ground that such trend abridged the principle of judicial independence and the defendant's right to be tried by his lawful judge.<sup>128</sup>

### 3.2. Division of Powers: Federalism<sup>129</sup>

Federalism as a system of government has no single full-fledged universal definition. But, a look in to it may lead us to the following commonly shared distinctive features by nations that adopt it. The first is, in this form of government there are two tiers of governments whose interactions are founded in the constitution. Second, states are granted some degree of autonomy which is to be achieved through division of expenditure responsibilities and means of financing the discharge of responsibilities. Third, it has a central government that holds states in its decision making processes.<sup>130</sup>

The objectives sought through the installment of this system of government, though they are relative on the basis of historical justification, population pattern or any other similar reasons of the concerned state, includes; first, in heterogeneous society, the objective of accommodating demands of different ethnic groups (e.g. Canada and the post 1991 Ethiopia); second, the

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<sup>128</sup> Ibid, p. 132.

<sup>129</sup> The German federalism rests on shared rule and self-rule where by states are autonomous governments with their own legislative, executive and judicial institutions. Its peculiar feature is that, most of legislative power is conferred up on the central government and the administration of federal law is the main responsibility of the states. For this reason I relied on the American trend which has nearly similar concept of federalism with the FDRE one

<sup>130</sup> Asfaw Wossen Asserate, *the Necessity of a Federal Structure for Ethiopia*, in "Genesis of the Ethiopian Constitution of 1994: Reflections and Recommendations from the Symposium on the Making of the New Ethiopian Constitution" (Inter-Africa group, 17-21 may 1993), p. 206.

objective of providing political arena that allows broader citizens participation. Finally, military and economic reasons can also be raised as objectives.<sup>131</sup>

In the American constitutional history, the evolution of federalist government has principal tie with the aspiration of constitution makers towards the establishment of a nearby government and a central government without concentrated powers. Their reason had a connection with the fear of the then anti-federalists that the experience of British kings whose far off ruling caused denial of peoples' liberty would be repeated by the distant central government and additionally they were in fear of a national government with concentrated powers in its hands would threaten the sovereignty of independent states and individuals liberty.<sup>132</sup>

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By considering the views of the antifederalists, the "federalists", on their part, strongly argued that the constitution would alleviate such loopholes; First, by bestowing powers to the center, so that it can be effective in bringing a secured and prosperous union; second, by restraining its power, so that it cannot encroach in the sovereignty of independent states and peoples' liberty.<sup>133</sup>

By taking into account these differences of values of that times, the framers devised a federal system of government whereby the two governments (federal and state) operate within their own area of authority and a system of federal decision making process that allows states participation. By these, independent states can be effectively protected. Its essential concept refers the combining of shared rule for some specific purposes and regional self-rule for others.

Accordingly, the farmers, while granting certain powers to the central government their intention was restricting of its powers only to those powers that are expressly granted to it.

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<sup>131</sup> Ibid.

<sup>132</sup> Thomas E. Patterson *Supra* note 2, p.39.

<sup>133</sup> Federalists No. 47.

So, in principle authority not granted to the center implies the denial thereof.<sup>134</sup> For instance, congresses powers of law making are explicitly listed under Article 1 (one), section 8, of the constitution. They are seventeen in number and amongst others include; the power to lay and collect taxes, to regulate commerce with foreign nations and among several states, to constitute tribunals inferior to the Supreme Court, to declare wars etc.... If the law making body of government involves itself in areas that are not covered by Article 1, section 8 of the constitution; it would be, on the basis of the above premises, considered as “power abuse”.<sup>135</sup>

Whenever there have been power abuse in the above manner and produced to the attention of the federal Supreme Court, the court, using its power of constitutional reviewing has been quashing it, there by limited government’s unjustified power. What the court had done in *Hammer v. Dagenhart* 247 U.S. (1918) was evident of this.

In this specific case the issue was; does the tenth amendment limit congressional powers? The controlling question was, is it within the authority of congress in regulating commerce among the states to prohibit the transportation in inter-state commerce of manufactured goods, the product of a factory in which, within thirty days prior to their removal therefrom, children under the age of fourteen have been employed or permitted to work...?

The court in addressing the issue did not contest the congress’s power of regulating inter-state commerce which it was granted on the basis of article one, section eight; but, it questioned the hidden agenda behind the act.

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<sup>134</sup> In this regard the tenth amendment of the USA constitution that protects states sovereignty from the centers intrusion can be raised. It reads, “the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people”.

<sup>135</sup> Federalism as a system of government evolved this way and succeeds in winning the hearts of nations that hold 40% of the world’s population within them and 52% of the world’s surface. It includes countries like, ‘Canada, Brazil, Germany, Russia, India, Nigeria, South Africa, Ethiopia ...etc. See for instance Asfaw Wossen Asrate *supra* note 130.

By taking in to account the fact that the goods were harmless and the overrated labor cost of the products before the shipment and the transportation begins, it deduced that, the intention of the legislature is not to regulate interstate commerce; rather it is to deny the facilities of interstate commerce to those manufacturers in the states who employed underage children (children between the age of fourteen and sixteen).

Then, the court reasoned out that, the act would have remained convincing if it had targeted the interstate transportation or its incidents; but, in this particular case, the act tried to regulate the production of articles intended for interstate commerce which in accordance with the intention of the makers of the constitution fall under local regulation power. So, sustaining the act would mean practically excluding states from their inherent authority, which would trigger a result, not contemplated by the framers of the constitution. Finally the court stated that:

“The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed.” Hence, the act is repugnant to the constitution.<sup>136</sup>

#### *4. Constitutional review as a guardian democracy to self-government: the electoral processes*

Election is one of the major means that expounds the principle that holds powers of the government emanates from the people (sovereignty).<sup>137</sup> This very principle by enabling eligible

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<sup>136</sup> Chemerensiky *supra* note 33, p. 127. For further informative discussion of similar cases disposed by the U.S. Supreme Court, see chemernisky pp. 127-153.

<sup>137</sup> Under the preamble of the U.S. constitution, for instance, the phrase “we the people” is set to connote the intention of the framers that they wanted self-government (enabling people to govern themselves), not king or dictator, or any other body.

citizens to take part indirectly in the decision making process (representative democracy), obliges party members that constitute government to abide themselves by constitutional principle that reflect the will of the people. Failure to do so would entail their removal through election of other competent body that the people consider responsible to its commitments imposed up on it through constitution.

In the countries that hold diversified groups, in addition to its purpose in serving the essence of sovereignty, it also paves a way for “power-sharing democracy” in which participation of representatives of different interests is guaranteed in decision making processes.<sup>138</sup>

But, the manner of determining seats on the basis of the votes casted by the electorates differs from one state to another. Such differences in preference are basically the result of the values upheld through each electoral system.<sup>139</sup> These values include for instance, government effectiveness, responsive and accountable government, and fairness to minor parties (major values sought through proportional representation electoral system).<sup>140</sup>

In this regard we have the following three broader types of electoral systems that differently serve the aforementioned values; the majoritarian, proportional and the intermediate systems.<sup>141</sup>

The Majoritarian system, whose very objective amongst others is having an effective (strong) government, conveys the electoral system by which the competitor who secured the largest

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<sup>138</sup> Goran Hayden, *Electoral Systems and Political Reform*, in “Genesis of the Ethiopian Constitution of 1994: Reflections and Recommendations from the Symposium on the Making of the New Ethiopian Constitution” (Inter-Africa group, 17-21 may 1993), p. 17. See also, Arend Lijphart, “Constitutional Design for Divided Societies”, (Journal of Democracy vol. 15, no. 2, 2004), p.99.

<sup>139</sup> Pippan Norris, *Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems*, (International Political Science Review, Harvard University, vol. 18 [3]), pp.297-312. See also in general Getachew Assefa, “Electoral System and Political Pluralism in Ethiopia”, (Ethiopian Constitutional Law series, vol.VI), pp. 11-20.

<sup>140</sup> Ibid, p. 5.

<sup>141</sup> Arend Lijphart *supra* note 138, p. 100.

number of the vote won the election. Within it, it has three components; the simple, absolute majority and alternative vote.

The first, otherwise known as first past the post, suggests that, the winner is a candidature who scored a relatively larger number of votes among candidates; the lower houses electoral system in united kingdom, Canada, India,...etc. displays this majority system.<sup>142</sup>

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Whereas in the second case, a candidate will be declared a winner only if he/she gets an absolute majority of votes (50 %+1). If there is no candidate that has met this minimum requirement, a second round will be held between the two candidates who get the highest number of votes and the one who gets the least number of votes will be excluded. The presidential elections in France and Russia are an example of it.<sup>143</sup>

In the alternative voting system (e.g. House of Representatives election in Australia), “voters rank their preferences among candidates (1, 2, 3) and for a candidature to win s/he must secure an absolute majority vote. Where no one gets over 50 percent after the first preferences are counted, then the candidates at the bottom of the pile with the lowest share of the vote is eliminated, and their votes are redistributed amongst the other candidates. The process continues until an absolute majority is secured.”<sup>144</sup>

Proportional representation (PR) electoral system is a quota based system, whose principal purpose is having responsive government and guaranteeing fairness to minor parties have been in most cases employed in multi-nation federations. Under this category we have party list (open and closed) and single transferable (semi-proportional) vote.

In the open party list system (e.g. Norway, Netherlands and Italy), preferences as to a particular candidate is left to the sole whim of the electorates; whereas, in the closed one (Israel, Portugal

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<sup>142</sup> Pippin Norris, *supra* note 139, p.3.

<sup>143</sup> *Ibid*, p. 4.

<sup>144</sup> *Ibid*.



and Germany), the voters right is restricted only to electing the parties provided in the list. In the single transferable vote, “parties announce their candidates. Then, voters rank their preferences among candidates. Finally, the total number of votes is counted and then, the number of seats divides this total in the constituency to produce a quota.”<sup>145</sup>

In the intermediate system voters elect representatives through two different systems, one majoritarian and another proportional. In this case, for instance, “...members of the Bundestag are elected... in simple plurality votes, members of parliament are elected from closed party lists in each region.”<sup>146</sup>

Under the coming parts the issue on whether, institutions responsible to adjudicate constitutional questions in USA and federal republic of Germany are playing their role of maintaining limited government through reviewing of constitutional questions that involve issues of electoral processes will be examined.

Accordingly, a look in to the electoral process in the constitutional history of USA reveals that the framers had furnished the elections of the House of Representatives, US senators, and the president to depend on the will of the people.

In order to make government more sensitive to the concerns of popular majorities, they made elections to be direct and frequent. For instance, the president would serve four years and be eligible for another election; the senators are elected every two years and allowed to six year terms; election of members of House of Representatives is made to be held in two year interval.<sup>147</sup>

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<sup>145</sup> Arend Iijphart, *Supra* note 138, p. 101. See also, Yonathan Fisseha “ethnic identity and institutional design: choosing an electoral system for divided societies.”

Available at <<http://www.heinonline.org>> (last accessed on November 12, 2014.).

<sup>146</sup> Pippin Norris, *supra* note 138.

<sup>147</sup> US constitution, *supra* note 108, Article I (section 2, clause 1).

But, the framers decided that federal judges and justices would be appointed rather than elected. They would be nominated by the president and confirmed through approval by the senate. Once confirmed, they would hold their offices during good behavior. In effect, they would be allowed to hold office for life unless they committed a crime for any other constitutionally justified reasons. The reason is to make the judiciary more of a “guardian” institution than a “representative” one.<sup>148</sup>

The constitution of USA by establishing representative democracy, for instance, under its article 1 section 2 reads that:

“The house of representatives shall be composed of members chosen every second year by the people of several states....”

But, it left up to the concerned states to determine citizens eligible to exercise this right. For this very reason, the exercise of this right had been discriminatory on the basis of race, color or any other discriminatory mechanisms up until 1870; it had been excluding women up until 1920, persons who were unable to pay tax up until 1964 and citizens who were above the age of eighteen up until 1971. But, the embodiment of the fifteenth amendment in 1870, the nineteenth amendment in 1920, the twenty-fourth amendment in 1964, and the twenty-sixth in amendment 1971 respectively to the original constitution had conferred the exercise of this right to all citizens irrespective of their color, race, sex, failure to pay tax and age, provided that, in the last case the person is above the age of eighteen.

With the objective of guarding this very right, the federal supreme court of USA has been disposing cases that it found questionable in light of the constitutional principles sought through the electoral process.<sup>149</sup> One of the major cases whereby the court played this prominent role is in *Reynolds v. Sims*, 377 U.S. 555 (1964), case. In reasoning out everyone’s duty of avoiding

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<sup>148</sup> Thomas E. Patterson, *Supra* note 2, p. 50.

<sup>149</sup> The constitutional principles sought through electoral process amongst other include a government limited by its period, citizens’ right to have a say in matters that affect their lives...etc. that are the extension of the stand that state’s power is derived from the people.

restriction on the right to vote of citizens, the court made a link among the right to vote, democratic society and representative democracy and marked any attack on the right to vote is a direct attack on the other two. It explained that:

“The right to vote freely for the candidate of one’s choice is of essence of democratic society, and any restrictions on that right strike at the heart of representative government.”<sup>150</sup>

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In *kramer v. union free school district* 395 U.S. 621 (1969) case, in which the law that required property ownership as a prerequisite for voting was contested, the court broadly invalidate the requirement , by emphatically addressing that “any unjustified discrimination in determining who may take part in political affairs or in the selection of public officials undermines the legitimacy of representative government.”<sup>151</sup> In *Harper v. Virginia state board of elections* 383, U.S. 663 (1963) case, by considering the constitutional value held in the twenty-fourth’s amendment, the court firmly stated that “... any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized”. It then declared that “poll taxes are unconstitutional as a denial of equal protection for all other elections.”<sup>152</sup>

Finally, in *Wessberry v. Sanders* 376 U.S. 1, 17 (1964) the court articulated the right to vote as the most invaluable right, as follows:<sup>153</sup>

“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, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”

In federal republic German the basic principles of the electoral process are provided under article 20 (2) and 38 (1) of the basic law. Under these provisions it is held that state authority rests on

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<sup>150</sup> Chemernisky, *supra* note, pp. 943.

<sup>151</sup> *Ibid.*

<sup>152</sup> Poll tax is a type of tax, the payment of which is a prerequisite to exercise the right to vote.

<sup>153</sup> Chemernisky, *supra* note, pp. 943.

the whim of peoples of Germany which they shall exercise it through the system of election. For the election to achieve its objective, the constitution ordains the process to be general, direct, free, equal, and secret. Besides, in order to strengthen the achievability of the objective sought through the electoral process, the constitution provides a four year term of election, there by guarantee a government limited by its period. But, the right to vote is restricted to citizens above the age of eighteen.

A look into the following holdings of the federal constitutional court of Germany, depict the extent of the court's involvement in guarding the constitutional principles sought through the electoral process. Of the prominent cases the *Maastrich* case (1993) 89 *BVerfGE* 155 is one. Under this case the claim rested on the point that the *maastricht* treaty that quests the assignment of member states sovereignty to the supranational entity defeats citizens inherent right to have a say in government's decision making processes. The main point of the allegation was, such duty on parts of Germany would distract the enforcement of the basic principles embodied on the basis of article 20 (2) and 38 (1) of the basic law. To put the allegation in verbatim:

“The basic law confers on German citizens an equal right to vote for their parliamentary representatives. Consistent with the core principles of democracy, citizen-voters participate in the exercise of state authority through their parliamentary deputies.... To the extent that this authority has been transferred to a supranational institution beyond the control of German legislators, citizens- voters have lost their right to participate in the national legislative process. In short, they are disabled from influencing the determination of national policy through the act of voting....”<sup>154</sup>

Considering the case brought to its attention, the court emphasized the constitutional principles sought through article 20 (2) and 38 (1)<sup>155</sup>, which are, according to the wording of the court-

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<sup>154</sup> Donald P. Kommer, *supra* note 54, pp. 181.

<sup>155</sup> The basic law, by upholding the people as the ultimate repository of state power, under its article 20 (2) reads that “all state authority is derived from the people. It shall be exercised by the people through elections and other

- “means to legitimation of state power and influence its exercise” and reckoned the absence of any room of weakening principles that are declared inviolable on the basis of article 79 (3), 20 (1) and (2), through the transfer of power to another organ.

It then deduced that, the complainant’s right enshrined under article 38 would remain ineffective if the responsibilities of the legislative (*bundestag*) is transferred to an external institution. But, the court after realizing the fact that the content of the treaty did not take away *bundestag*’s functions and powers, it found the complainant’s allegation unfounded and dismissed the case by stating that:

“The democratic principle does not prevent the federal republic of Germany from becoming a member of community of states organized on supranational basis. However, it is a precondition for membership that the legitimation derived from the people be preserved within the alliance of states.”<sup>156</sup>

In *state list* case 3 BVerfGE 45 (1953), in settling constitutional question on the phrase “direct election”, enshrined under article 38 (1) Donald P. Kommers summarized the court’s stand as follows:

“An electoral law would violate the principle of direct suffrage if it permitted a political party to add a person to its nomination list after the election, even if additions were necessary to fill legislative vacancies. Political parties are crucial in the electoral process but the final selection of candidate may validly rest only on the will of the electors. A direct election within the meaning of article 38... means the direct election of their representatives and not merely of their political parties....the voter must know for whom he is voting.”<sup>157</sup>

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votes and through specific legislative, executive and judicial bodies.” Under its article 38 (1) it reads that “members of the German *bundestag* shall be elected in general, direct, free, equal and secret elections....”

<sup>156</sup> Donald P. Kommer, *supra* note 54, pp. 181.

<sup>157</sup> *Ibid*, pp. 191. Here it is worthwhile to reckon that the system of election in Germany is Proportional Representation whereby individuals cast their vote for parties than individuals that represent parties.

Hence, anybody that holds state power through the vote of citizens will remain in power up until its period lapses. If a given person or group of persons that constitute a government of a given constitutionally democratic nation, tries to transcend the constitutional principles embodied in the constitution of the concerned nation, voters may casted them away from the office on another event of election. Even in their stay in the office, as depicted here in above, their constitutionally unjustified act can be overruled through constitutional review of the concerned institution that exercises constitutional reviewing power- guardian democracy.

## 5. Conclusion

Under the discussion made here in above it has been argued that through institutional mechanism of enforcing constitutional supremacy-constitutional review- the constitutional objectives sought in basic rights and freedoms, power separation and power division and the right to elect and to be elected have been realized.

Basic rights and freedoms which we are entitled with because we are humans irrespective of any conditions of exclusion, have both international and national systems of enforcement. In the former context there are treaty based and non-treaty based mechanisms of enforcement; where as in the latter, amongst others, we have institutional setup of enforcement- a system of constitutional review.

In the international setup the treaty based mechanism holds with in it means of supervising contracting states obligations, like reporting and inquiry procedures, and inter-state and individual complaints. The non-treaty mechanism refers enforcement through UN agencies which includes for instance actions by ICJ or UN Security Council.

In the national set up the provision of basic rights and freedoms in constitutions have objectives of giving recognition to these rights and laying one means of limiting government's power. In realizing these objectives institutional control of governmental acts that abridges the free enjoyment of these rights has been playing a pivotal role. For instance, through the institutional

system of constitutional review cases those involve freedom of speech and right to life have been disposed by institutions in respective nations empowered to exercise this power.

Grant and denial of powers expressed through power separation and power division have been discussed as one means of limiting government's power. The constitutional objective sought in separating powers horizontally among different arms of government and dividing power between the two tiers of governments in nations that adopt a federalist form of government, is avoiding the birth of tyrannical government.

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To make the realization of this objective more realistic, different nations have been structuring government's power in a way that could enable each entity to force one-another so that they would act in accordance with the delegation tailored for each entity on the basis of the constitution- the check and balance system.

Some of Constitutionally democratic nations have been corroborating the realization of this objective through a system of constitutional review they had adopted. A look in to the trends of these nations reveal that institutions empowered to exercise the power of constitutional review have been maintaining this objective by quashing governmental acts that contradict the constitutional principles sought in these separation and division of government powers.

Considering the right to elect and to be elected as the main pillar that enables citizens' involvement through their representative in governmental decision making processes (self-government) and as one means of limiting government's power- a government limited by its period- it has been argued that constitutional review as a system is a guardian democracy to these values.

## Chapter Four

### Constitutional Review: the Case in Constitutional History of Ethiopia (1931-1995)

*“The rights held by the English and French were different, since they were the product of different political struggles through history.”* Edmund Burke. Page | 69

#### 1. Introduction

Under the first section, taking in to account Burke’s assertion and by developing the question, how have our politics been constructed? the modern history of Ethiopia,<sup>158</sup> with specific reference to nation building agenda, its implementation since the fourth quarter of the 19<sup>th</sup> century and its *Pandora’s* box (national and class oppressions that re-enforced rural and urban based revolts that finally caused the demise of the feudal system altogether) as a back ground consideration will be dealt.<sup>159</sup>

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<sup>158</sup> The house of federation in deciding the major and the only case on the right to elect and to be elect as provided in the FDRE constitution, amongst other, had considered the modern history of Ethiopia as a stepping stone. So, revisiting the modern history of Ethiopia “as just as mini skirt to cover the matter” necessitated for this and other reasons touched while appraising the Ethiopian case. For instance, for reasons of rectifying the “historical unjust relationship” that had been undergoing in the modern history of Ethiopia, as provided under article 46 (2) of the FDRE constitution, state structure in post 1991 Ethiopia was made to rest on population pattern, language, identity, and consent of the people concerned.

<sup>159</sup> In my opinion, these historical incidents- class and nation oppressions- happened not because the rulers of that time were meant to act that way; those messes had happened owing to the absence of constitutional setup that can limit government’s unjustified power exercise. To be frank, if I were one of them I could be one of the perpetrators. Because, I believe that “environment determines human behavior” or people might escape the surrounding mentality exceptionally. In other words, it is not because I happened to rule or others happened to rule; as human creature, in the absence of constitutional democracy, we could be part of it. If the then rulers need to be blamed, it should be because of their failure to establish a constitutionally democratic state- limited and self-government- that really consider the realities of the country- a country with a diversified values in terms of culture, language, religion, economic demands...etc. and that consider the role of institutions (e.g. courts) as a guardian and protector of constitutional principles recognized, at least in post 1931 constitutional era (e.g. peoples basic rights and freedoms). The judiciary was not established neither as instrument of limiting government’s power nor as a means of implementing these oppressions. In French constitutional tradition courts were ousted from reviewing power because in the era of feudalism they were anti to liberalism. From this then the question- what is the ground to oust the court in post 1995 Ethiopia may come in to picture.



Within it, the main justification of authors of the 1995 FDRE constitution to oust the judiciary from constitutional review arena will be revisited; the effectiveness Ethiopian constitutions introduced in different times towards protection of basic rights and freedoms of individuals and peoples, limiting government's unjustified power exercise, provision of a government limited by its period and providing enabling environment for citizens to have a say in governmental decision making process, will be discussed.

The next section of the paper is devoted to explore institutional organization and accessibility of institutions empowered to defend and enforce constitutional principles. To this end, by considering the competing models of constitutional review, systems of review, panel and composition of institutions, and whether these institutions are accessible (rules of procedure), the case in constitutional history of Ethiopia (the case in the six constitutions of Ethiopia in different times) will be appraised.

Objectives sought in this sub-section are;

First, to identify institutions empowered to exercise the power of constitutional review in constitutions of Ethiopia in different times;

Second, whether these institutions have been exercising a centralized or decentralized, priori or posterior, system of review;

third, whether or not these constitutions or other enabling acts had been valuing institutional, and personal independence of institutions, when they are providing rules of nominating justices, determining remuneration of justices, determining life tenure of justices and structuring the institution;

Fourth, considering the fact that the practicability of constitution amongst others lies on the opportunity of concerned bodies or individuals to access the umpire established for constitutional interpretation, the issue on whether or not these institutions have been accessible in terms of individuals, public figures or institutions, and other procedural rules in creating enabling environment to access to justice will be explored.

Under the subsequent section constitutional review as a means to limited government and self-government, in post 1931 constitutional history of Ethiopia will be examined. In doing so, under the first sub-section the issue on how had been basic rights and freedoms recognized in our constitutions and whether they have been enforced and protected through institutional setup of constitutional review will be examined.

In the next sub-section the issue on, how had been government's power limited through the grant and denial of powers- power separation and power division- will be discussed.

As there were systems of unitary form of government in which power had been devolved from the center to the lowest governmental authorities, the power division-federalism-in pre-1991 Ethiopia will not be our major concern.

Finally, the issue on how had been the right to elect and to be elected as a principal means to self-government recognized in these constitutions, will be explored. Besides, how they have been guarded through a system of constitutional review will be the main concern of the discussion.

The discussion in the last section will be accompanied by Practical cases disposed in post 1995 era. In some places, years are put in Ethiopian Calendar; to indicate this I used the acronym E.C. (Ethiopian calendar).

## **2. Background Conditions: Bird's Eye View of the Modern History of Ethiopia (1855-1991)**

The present day Ethiopia is a home of faunas and floras,<sup>160</sup> natural resources (gold, potash, water...etc.) and more than eighty ethnic groups; it is also geographically blessed state -as it is the nucleus of the horn Africa and a strategic transition point from Africa to Middle East or Europe or the vice-versa; and for its enormous historical accounts.

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<sup>160</sup> See, for instance, the articulation by the Ethiopian Institute of Biodiversity which stated Ethiopia as a country that holds 476 (four hundred seventy six) Endemic plants.

Particularly, its major historical accounts that predate the modern history may be chronologically rooted to the era that predates the *Axumite* kingdom. But, notably the history of Ethiopia extends beyond its territory since the Axumites that had shined in the aftermath of the birth of Christ to the mid ninth century; but they could not manage to continue then after.

At this moment the supremacy of the Axumites witnessed its end and the era of Yodit-Gudit (she was a Jewish background) started.<sup>161</sup> Yodit-Gudit and her successors managed to persist in power up to the second quarter of tenth century (920 A.D.)<sup>162</sup>

Then, the history of Ethiopia shows the coming into power of the *Zagwe* dynasty in North Central Ethiopia under the leadership of Mera Teklahymanot who reigned 920A.D. to 933 A.D.<sup>163</sup>

But, the dynasty succeeded only up until the second half of thirteen century (1270 A.D.)- the era that marked power shift to a newly constituted dynasty led by Yekuno-Amlak, the time which is also known as the restoration of Solomonic dynasty in Ethiopian history.<sup>164</sup>

Then, we have the occurrence of religious wars between a group led by Imam Ahmed Ibrahim Al-Ghazi (Ahmed Gragh) and the then rulers of central and northern Ethiopia.<sup>165</sup>

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<sup>161</sup> Aleka Taye, "The History of the Ethiopian People: the Chronology of Reigning Kings and Queens")

Available at <<http://www.AfricanIdea.org>> (last accessed on January 21, 2015).

<sup>162</sup> Ibid.

<sup>163</sup> Ibid.

<sup>164</sup> Fasil Nahum, "Constitution for a Nation of Nations: the Ethiopian Prospect" (the Red Sea press, 1997) p. 7. The *Zagwe* Dynasty claimed descent from the biblical Moses, in order to strengthen its power and legitimacy.

<sup>165</sup> The war between Ahmed Gragh and Emperor Libna Dengel at the battle of *Shembera Kure* in the second quarter of 16<sup>th</sup> century can be a good example of this.

Available at <<http://www.ethiopianhistory.com>> (accessed January 21, 2015).

Besides, the history of Ethiopia shows the rise of *Gonderian* period under the leadership of king Fasil (1623-1659, reigned), which persisted to the time of Iyoas (1747-1762, reigned).<sup>166</sup>

The *Zemene Mesafint* (otherwise, known as era of princess) is also another historical account Ethiopia had hosted. It lasted for about a century (1755-1855 A.D.) and in this era, Ethiopia had virtually divided among various regional lords. The notables were, *Ras* Michael Sehul of *Tigray* and Gondar and Negus Sahlesilassie of *Shewa*.<sup>167</sup>

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Following the long period of fragile, after defeating the regional lords one by one, King Tewdros II emerged as the supreme sovereign.

This era from Axumite-Tewodros II was marked by the birth of monarchical system and Solomonic legend; developments in Architectural and cultural wisdoms<sup>168</sup> ... etc. On the other hand, which is its black side; it involved slavery of human creatures and repeated wars between and among feudal or religious groups.

The year 1855 that marked the coronation of King Tewodros II of Ethiopia is the point of start for the modern Ethiopian history. It is said, the start of the modern Ethiopian history because he was the first to setup the goal of extending his sphere of influence (uncontrolled territory) in unprecedented manner.

He planned to establish a centralized system of administration under his leadership. However, his objective remained unsuccessful for internal and external reasons.<sup>169</sup> Tewdros's ambition to build

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<sup>166</sup> Aleka taye, *Supra* note 155.

<sup>167</sup> *Ibid*

<sup>168</sup> For instance, we have the rock-hewn church of *Lalibela* and the *Gondar* castle and palace that resemble the architectural skill of early Ethiopians.

<sup>169</sup> The internal reason was attached to resistances he faced in his attempt to collect funds and centralize power, principally from the side of regional chiefs and the church. He wanted the fund to administer the new army he established and for the running of state machinery. In his sense of centralized administration, he tried to incorporate regional chiefs under the name of salaried officials and demanded their accountability to him.

a system of centralized administration in his new Ethiopia was not graded. The *Shoan* king broadly known in his coronation name-Emperor Menelik II- was the prominent figure in ensuing the same idea emperor Tewdros wanted to realize; It was even, beyond Tewodros's imagination. He successfully managed the move to incorporate the rest territories, notably the south and southeastern parts of the present day Ethiopia.<sup>170</sup>

Menelik's forces that combined mainly Shoan *Oromo* and *Amhara*, expansion to the south, had confronted sever resistance, as well as peaceful subjugation. In the former case, the Muslim *Gurages*, *Arsi Oromos*, *Oromos* and other ethnic groups (e.g. *Harari*) around *Harar*, the kings of *Wolayita* and *Keffa* had resisted the expansion; but lost the war.<sup>171</sup> In the latter case, Christian *Gurages*, rulers of *Wollega Oromo*, and ruler of *Jimma (Abba Jiffar)* were notables. The Shewan

The start of his action was not as he thought; it brought to him internal resistance from both sides. For regional lords his action was a mischief on their autonomous status, which they were enjoying in the previous period of weaker kings. His clash with church reached its peak, when he imprisoned the *Abun* (head of the Orthodox Church).

The second was his clash with foreign states. Driven by "sense of history", the king was preparing himself to lodge a holy war on Muslims (ottoman Turks who were *at mesewa*). For this to come true he wanted the support of British. Nevertheless, they turned deaf for his quest. He took this as betrayal and imprisoned Europeans as hostages to force those who refused him to lend their hands. Again, this action of him triggered foreign resistance led by Robert Napier.

To sum up, Tewdros's goal of modernization (centralized administration system) and strengthening his religion (Christianity) ended up him with resistances both from internal and external sources that caused his downfall in 1868. For a detailed informative know how See, Tekle Tsadik Mekuria, *ye Ethiopia Tarik ke Aste Tewdros iske Kedemawi Hailesilassie* (1942), pp. 26-27 and 29. It articulates the letter of King Tewdros II sent to queen Victoria of Britain which contains support in a planned war against Turkeys and Muslims surrounding him. But, he did not succeed in securing their help; so that, he detained their citizens (e.g. Captain Cameroon). This act on the side of the king was the main reason for a war with British army led by General Robert Napier. The battle at *Mekdela* marked the death of king Tewdros II.

<sup>170</sup> Bahiru Zewdie "a History of Modern Ethiopia, (1855-1991)", (Addis Ababa University Press, 2002) p. 60

<sup>171</sup> Ibid. for instance in 1882 at the battle of *imbabo* (present day of northeastern *wollega [oromia* region, Ethiopia]) the force of Menelik led by *Ras* Gobena outweighed King Tekle Haymanot of *Gojjam* and at the Battle of *Azule* (1886) Menelik's force led by *Ras* Darge Sahlesilassie defeated warriors of *Arsi Oromos*. The same is true at the battle of *Challanqo* (1887) wherby the forces of the king had managed to conquere areas surrounding the city of *Harar*-a city known for its central role in eastern Ethiopia's economic and political activities.

army access to European firearms was one of the main reasons for the defeat of resisting groups.<sup>172</sup>

Their expansion to the north was relatively peaceful. The reason behind was, weaknesses of the *Tigrayan, Gojjam, Gondar* and *Wollo* who were exhausted and divided at the time.<sup>173</sup>

All these incidents happened within fifteen years (1875-1900) and this “stick or carrot” approach had enabled the *Shewa’s* elite and their compatriots (in most cases, Oromo of Shewa who were assimilated to them by affinity [e.g. Ras Mekonnen Guddisa and Gobena Dache]) to give birth to their dream empire, Ethiopia.

After the completion of territorial annexation agenda around 1900, emperor Menilik and his comrades had launched two agendas triggered by the aspiration of modernization<sup>174</sup> and the aspiration to transform an ethnically plural Ethiopia into a nation- state (cultural and social homogeneity).<sup>175</sup> In other words they tried to effectuate one Ethiopian nation out of more than eighty diversified ethnic groups.



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<sup>172</sup> Ibid, pp. 61-64.

<sup>173</sup> See for instance, Merera Gudina, “Ethiopia: from autocracy to revolutionary democracy, 1960’s-2011” (chamber printing house, Ethiopia, 2011), p.5.

<sup>174</sup> Menilik’s invaluable effort to introduce modern technologies (e.g. train, telephone, car, light, road, modern education...etc.) can’t be overlooked here. But, as the focus of this paper is on the implementation of the nation building in his and subsequent rulers the writer may not get in to it.

<sup>175</sup> The idea of building a nation had emerged as a new phenomenon following western Europeans’ elite exposure to the external world owing to the discovery and exploration of new continents in the era of Renaissance- the 14th century revival of classical art, architecture, literature and learning that originated in Italy and spread throughout Europe over the following two centuries. The renaissance also witnessed the discovery and exploration of new continents [Available at <http://www.history-world.org/renaissance.htm>] (last accessed January 9, 2015). Their introduction to the new worlds led them to compete for resources on which their economic base rested. To this end, they had given birth to the nation state. See, Buredict, Anderson (1983), “Imagined Communities: Reflections on the Origin and Spread of Nationalism”, cited in Leenco Lata’s “the Horn of Africa as Common Homeland”, (Wilfrid University Press, 2004) p. 4.

The major motive behind the project lies on the aspiration to create an effective political system that would mobilize the whole constituent units both in national and international orders.<sup>176</sup> The subsidiary goal was facilitating economic, political, and military control in the hands of personalities at the center (e.g. king) of the ruling class.<sup>177</sup>

To this end, the ruling class had casted a systematized political ideology that would enable it to control every move in the empire. The system considered religion, culture and language of the dominant ruling elites as pillars of the ideology in one hand and the church (orthodox Christianity) and subordinate compatriots- that later became rulers of the newly annexed frontiers- as implementers of it.

The manner of its implementation was not same on those who submit themselves to the king peacefully, with that of those who resisted the annexation.<sup>178</sup> For instance, in *Jimma* neither the northern had appointed as rulers nor their religion was installed at the cost of other religions practiced within the territory under the control of the king.

In this regard, Bahiru Zewdie stated that:<sup>179</sup>

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<sup>176</sup> Mylonas, Harris, *The Politics of Nation Building: Making Co-nationals, Refugees and Minorities*, (Cambridge University press, 2012), p. 17. While articulating the objective behind the nation building aspiration under this excerpt, it is stated that the process of constructing or structuring a national identity using the power of state aims at the unification of the people within a given state so that it would remain politically stable and viable in the end.

<sup>177</sup> See for instance, Bahiru Zewdie “the Quest for Socialist Utopia: the Ethiopian Student Movement C. 1960-1974” (Addis Ababa University Press, 2014), p. 188.

<sup>178</sup> John markakis related such difference of treatments to the guidance offered in *FethaNnegast* that reads: “when you reach a city or a land to fight against its inhabitants, offer them terms of peace. If they accept you and open their gates, the men who are there shall become subjects and shall give you tribute, but if they refuse the terms of peace and offer battle, go forward to assault and oppress them, since the lord your God will make you master of them.” He further stated that, “King Minilik and his generals followed this advice faithfully.... submission accompanied by conversation to Christianity enabled ruling families in the south to retain governing power as representatives of the Ethiopian emperor. Those who chose to resist were treated harshly, and heir people suffered the consequences of Ethiopian vengeance.” See, john markakis, *Ethiopia Anatomy of a Traditional Polity*, (Oxford University, 1975), p.104

<sup>179</sup> Bahiru Zewde, *Supra* note 171.

“...Menelik punctiliously respected not only the political but also the religious autonomy of the region, binding himself to refrain from setting northerners in the region or building churches in *Jiren*, the capital.”

In the later territories in which inhabitants were destined to face harsh punitive expeditions, persons with northern background were mobilized as administrators, court official, soldiers... etc.<sup>180</sup> and in order to accompany them they had envisioned the so-called ‘*ketema*’<sup>181</sup> - small towns that served the mobilized subordinates as their seat of administration.

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These groupings managed to arrive at different sites within these resisted territory. Soon after their arrival, they took the land of the indigenous peoples and redistributed to themselves and to the church. The indigenous people were forced to render free labor to them and pay high uniform taxation. Out of their total production, they were distributing one-third to the noble who owned the land, one-third to the church and they had been reserving only the rest one-third of their labor fruit.<sup>182</sup>

These were instances of class oppression underwent in areas where there was stiff resistance. The peoples in the newly annexed territories destined to this ill fate, by peoples equipped with firearms (*neftegna*). Along with this, they had continued the process of installing their own religion, culture and language on members of ethnic groups whom they dominated.

Picking Orthodox Christianity as the only and the official religion of the empire was seen as an instance of religious oppression. In contrary to this, other religions that have been practiced since ancient times (e.g. Islam and Judaism) were casted away. The very reason behind such iniquitous treatment was the mentality of the rulers towards the other two as “the antithesis of

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<sup>180</sup> Ibid.

<sup>181</sup> Merera Gudina, *supra* note 167, p. 14.

<sup>182</sup> See for instance, John Markakis and Nega Ayele “class and revolution in Ethiopia” (the red sea press, 1986), p. 23



*Ethiopianism.*<sup>183</sup> Hence, by adopting different mechanisms, especially as to the southerner and south eastern, evangelization ensued continuously. To facilitate this, state-financed churches were established in numbers unprecedentedly.

The church stick to the state, not only with religion reasons but also, with it held the purpose of facilitating the nation building process (one language and one religion nation) and softening the hearts and conquering the minds of the newly incorporated peoples to be honest and respectful to the imperial legitimacy.

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Taddesse articulated this involvement of the church as follows:<sup>184</sup>

“...through the *kidans*[orthodox church ritual of thanking God held 5am to 2am in the morning] and *te’ammir* [narrating glory of saints] so cleverly and imaginatively wrought by the clergy, these forces constantly intervened in the daily life of the peasant motivating him to act in accordance with the wishes and class interests of the ruling feudal elite...”

Besides, evangelization of the conquered groups, projecting the empire as a nation necessitated adopting the language of dominant rulers (Amharic) as the national language. This broad goal of the dominant ruling elites, facilitated to reach the expected degree:

first, by destining Amharic language to be the working language of the court and other administrative institution, as a result of which non-Amharic speakers necessarily forced to cope up with it; second, by making it medium of instruction for students below the secondary level and this mandatory prerequisite made non-Amharic speaker students to test the same fate.<sup>185</sup>

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<sup>183</sup> Leenco Lata, *Supra* note 169, p. 120.

<sup>184</sup> Tamirat Taddesse, “Feudalism in Heaven and on Earth: Ideology and Political Structure in Medieval Ethiopia”, cited in Merera Gudina, *Supra* note 167, p. 13.

<sup>185</sup> *Ibid*

“A more systematic policy of establishing Amharic as the dominant language comes with its establishment as the official language of the country in the revised constitution of 1955.”<sup>186</sup>

With a nearly same manner, they had tried to install their own culture. for instance residents of the newly annexed territories were either indoctrinated or forced to change their names to Amharic one, to develop the habit of wearing *Yehabesha Libs* (cultural dressing stiles of the ruling elite) and even the new rulers caused change of place of names (e.g. *Bishoftu* to *Debrezeit*, *Bule Hora* to *Hagere Mariam*, *Ambo* to *Hagere Hiwot* and ...etc. whose previous names were in *Afan*[language] Oromo).<sup>187</sup>

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In line with this, it is meaningful to put what Walelign Mekonnen (one of the mind master in the student movement of the 1960s and 70s) had underscored. He articulated the process in the following manner:<sup>188</sup>

“...Ethiopia was not one nation but a collection of a dozen nationalities with their own languages, ways of dressing, history, social organization and territorial entity. ...the nationalism propagated by the ruling class is fake Ethiopian nationalism- a mask for Amhara or at most for *Amhara-Tigre* hegemony. All other groups have to wear this mask to be accepted as ‘genuine Ethiopians, often going to the extent of changing their names to conform to the dominant norm.’”

The *Shewan* elites, especially personalities at the Centre of power and their subordinate compatriots along with the orthodox Christian church were the dominant figures that had played the role of bringing the diversified Ethiopia into ‘a one nation’ realm.

To wrap up, the attempt to realize a ‘one nation state’ within it triggered the then Ethiopia to witness a system of class stratification and national oppression.

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<sup>186</sup> Bahiru Zewde, *Supra* note 171, p. 193.

<sup>187</sup> See, for instance, Mekuria Bulcha, “The language polices of Ethiopian regimes and the history of written *Afan Oromo*: 1844-1991”, (the journal of Oromo studies, Vol. 1, No. 2, 1994), p. 91.

<sup>188</sup> Bahiru Zewde, *supra* note 171, pp. 200-2001.

In the first case, hierarchical relationship between the ruling class and the mass (farmers, non-aristocrat civil servants, factory workers ...etc.) was fabricated. Members of the ruling class in urban areas were known for their extra-ordinary living standards in times of the *gebar* (feudal) system. The main sources of their income were farmers whom they were forcing to bring them a two-third of their production either in kind or in cash.

Besides there were tendencies of ascendant stratification in which, for instance, some Ethiopians were identified metaphorically by derogatory connotations. In this regard, the name '*Gurage*' had come to assume the general use to summon porters.<sup>189</sup>

The second reality marked in the era was religious, cultural and linguistic domination of the faction all over Ethiopia. The aboriginals were forced to transfer themselves to the ruling classes' religion, language and culture.

In not less than these, the history of the northern part upheld as the official history of the state. The history of the south and southeastern parts was made unrecorded. The practical assumption had to do with picturing the newly annexed territories as entities that have neither their own history, nor their own distinctive cultural personalities. Even peoples in different localities were not bestowed with the right to self-administration, on the ground that it would instigate a separatist movement.<sup>190</sup>

The annexation and nation building moves, beyond their modernization and historical senses, have been seeing as a forceful system of class and national oppressions.<sup>191</sup> The former mainly

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<sup>189</sup> Ibid, p. 194.

<sup>190</sup> Leenco Lata, *supra* note 169, p. 119.

<sup>191</sup> These oppressions had been continued through strong Centralized administration. The local rulers dispersed in different localities were made to be loyal to peoples at the center; particularly, the king. the subsequent replacement of *Begemedir*, *Gojjam* rulers by rulers of *Shewa* origin *Ras* (the highest military position in the feudal Ethiopia) *Kasa Haylu* and *Ras* *Emiru Haile Selassie* respectively and after the death of *Abba Jiffar II* of *Jimma*, between 1930 and 1935 the centralization process gained momentum and full-fledged centralization was realized after 1941. To this end, rulers had been launching uniform laws to strengthen this system of centralized administration. In this regard, the 1931 constitution and the provincial administration proclamation of 1943

targeted the northern; whereas the southern and southeastern, particularly those that resisted the annexation had faced both.

In this regard, Merera asserted that:<sup>192</sup>

“...In the north, it was the issue of reunifying regions, which had been part of the Abyssinian polity for centuries, and peoples who shared the Christian tradition and Abyssinian cultural ethos for millennia. In south, it was the issue of mostly bringing into the emerging empire-state new lands and new peoples on unequal terms. For worse, for the south the outcome was a dual oppression: national as well as class....”

In addition to these, as the leading thought was “divine rule”, it was the king who had been seeing us the ultimate power repository. In other words, the people were not seen as source of power. In short, peoples within the territory of the empire were not allowed to have a say on matters that affect their lives: It was up to the faction to do what pleases it, on their fate.

While Ethiopia had been hosting such miseries, it was not without constitutions: Ethiopia had *Fetha Negast* (law of the kings), and *Kibre Negast* (glory of the kings) which commonly referred as “The traditional constitution”.<sup>193</sup> Additionally, it had witnessed the first modern written

whereby in the former case rule by the king was made to have a constitutional backing and in the latter case, the ministry of interior was designed as all powerful ministry to which all provincial governors were made accountable to it, had played prominent roles- rule by the law (laws that serve the interest of the ruling faction) than rule of the law.

However, it was also the principal reason for rural and urban based dissident movements which successively caused the enthroned and dethroned of rulers. In this regard, some countries that persisted nation building around the world also had related exposure; Greece’s and Ottoman ruled Balkans’ emancipation, which finally at the end of world war first, caused the disintegration of the whole empire itself and the birth of Haiti (formerly known by the name of San Domingo) from mother country France are notables of the case at hand.

<sup>192</sup> Merera Gudina, *supra* note 167, p.6.

<sup>193</sup> The two instruments that constitute the ‘traditional constitution’ had rare rules that govern the interaction between the government and people; rather, due attention was given to power relationship between and among the monarchy, nobility and the church. The two basic principles upheld in these instruments were, eligibility to the throne and the monarch’s fidelity to the church. See, Fasil Nahum, *supra* note 158, pp. 17-18.

constitution in its history-the 1931 constitution- and the subsequent revised constitution of the 1955 constitution.

### 3. Constitutional Review: Institutional Organization and Accessibility

#### 3.1. Institutions Bestowed with the Power of Constitutional Review: Models

Here, it is worth to refresh our memories that the constitutional history of Ethiopia can be divided as the traditional (*fithanegest* and *kibrenegest*) and modern one whereby the later refers the six successive constitutions. Obviously, the pre 1931 Ethiopia was without formally promulgated constitution and for this very reason, in pre 1931 we had no history of institutional mechanism of enforcing constitutional supremacy.

But, under the first modern constitution of 1931 in which peoples of Ethiopia were not makers of the constitution and the constitution was a grant of the emperor to the people;<sup>194</sup> rights provided in the constitution were there, because the emperor had recognized them; the constitution upheld the supremacy of the emperor and considered him as the head of the executive; peoples were seen as incapable of deciding on who should represent them in the two houses (chambers of senate and deputies), so denied of their right to elect; there was no republican form of government; the emperor had been serving as a personal mechanism to enforce the constitution's values.<sup>195</sup> For this objective, he was conferred with the power to control any legislative acts before they become a law. In this respect article 34 reads:

“No law shall be put in to force without having been discussed by the chambers [chamber of senate and deputies] and *having received the confirmation of the emperor* [Italics mine].”

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<sup>194</sup> Preamble of the 1955 Revised Constitution of Ethiopia.

<sup>195</sup> The 1931 Constitution of Ethiopia; see, the caption under chapter three, article 10 and 11, article 31 and 32 and article 4 respectively.

So, neither courts nor other institutions were exercising power of constitutional control.

In the 1955 revised constitution of the imperial regime in which divine rule was declared; there was no republican form of government; sovereignty rests in the hands of the emperor and he was head of the executive;<sup>196</sup> and the emperor constituted one part of the judiciary through the supreme imperial court; the emperor was empowered to exercise the power of constitutional control of legislative acts prior to their promulgation. In this regard Article 88 reads:

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“Every proposal of legislation approved by one chamber of parliament shall be immediately forwarded through the president thereof to the other chamber. If it is approved by the other without amendments within a period of two months, it shall be promptly communicated through the prime minister to the emperor and either shall be promulgated as law, or shall be returned by the emperor to the chambers with his observation thereon, or with a new proposal of legislation...[emphasis added]”.<sup>197</sup>

Again, the power of constitutional control was not in the hands of the judiciary or other institutions.

During the last days of the imperial regime in which a collection of military personnel held key posts in the capital, but the king remained on his power, the two famous proclamations-

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<sup>196</sup> The revised constitution of 1955, *supra* note 188, article 27.

<sup>197</sup> An apparent look to the provisions of the 1931 imperial constitution and the revised constitution of Ethiopia may lead a given individual to think that there is no single explicit provision that confer the power of constitutional review to a certain entity or a person as I have claimed here in above and the cited provisions are rather representative of the emperor’s power to cross-check the activities of the legislature-chambers of senate and deputies- as the case in USA constitution whereby the president, as ahead of the executive has the power to veto the bills presented before him or her for approval. But, a deep look in to the wordings or phrases in 34 and 36 of the 1931 constitution and article 88 of the 1955 revised constitution of Ethiopia, comparatively with article 1 sec. 7, the 2<sup>nd</sup> and the final paragraphs of USA’s constitution reveal that the congress in USA can override the veto of the president through a two-third majority vote; whereas, in the two imperial constitution there is no such way out. Hence, in my opinion, the case in the two constitutions can be understood beyond the check and balance tradition of USA and as there is no any restriction on the emperor to reject proposals for constitutional principles reasons, we may, for stronger reason, take the emperor’s power in this regard as the power of constitutional review that holds a prior reviewing system- constitutional review before legislative acts become a law.

proclamation no. 1 and 2 of 1974- that provided the provisional military government of Ethiopia had been produced to the attention of the mass.

Under these proclamations,<sup>198</sup> particularly under the first one, the parliamentary democracy on the basis of the 1955 revised constitution was blamed for being undemocratic and a democracy that only served the interests of the aristocrat, for it conferred absolute power on the king, for being unsatisfactory in giving protection to fundamental rights, and etc.

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For these reasons the constitution had been suspended and also the king had been deposed from his seat and replaced by his son whom the proclamation had denied the power to involve in administrative and political affairs of the nation.

Above all it called for preparation of a new constitution that reflects the socio-economic and political philosophy of the country and that safeguards the human rights of the people.<sup>199</sup> Though under its article 10 declared the supremacy of the proclamation, it didn't provide personal or institutional mechanism to enforce its provisions.

Then, on the basis of article 5 (b) of proclamation no. 1/1974, a draft constitution-a constitution that had established a constitutional monarchy- was produced to the attention of the people after nearly ten months of preparation on July, 1975 (*hamle* 1966 E.C.). This draft constitution by considering the Supreme Court the highest organ of the judiciary, under its article 120, conferred to the Supreme Court a final say on the interpretation of the constitution. In other words, under this constitution it was a judiciary that was preferred to exercise the power of constitutional review.

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<sup>198</sup> Proclamation no.2/1974, a proclamation to define the provisional military administration council and its chairman had a total of eleven provisions that discusses the military council's governmental powers and responsibilities on foreign affairs, internal security, law making and responsibilities of the chairman and his or her deputy.

<sup>199</sup> Proclamation no. 1/1974, preamble and article 1-5.

Under the 1987 constitution of the *derg* regime, whereby the working people of Ethiopia were the makers of the constitution and repository of sovereign power; because of the socialist ideology upheld at that time there was one party system; the makers put the constitution at the higher apex of hierarchy of laws (constitutional supremacy); they had recognized some basic rights of individuals and peoples;<sup>200</sup> had empowered council of state- a standing body of the national *shengo* (assembly)-as an umpire that interprets the constitution. In empowering the council to interpret the constitution, article 82 (1) (b) reads:

“The council of state shall have the power to interpret the constitution and other laws.”

This power was not constitutionally granted to the judiciary.

In the interim constitution (transitional charter)<sup>201</sup> of the 1991 in which basic rights and freedoms of individuals and peoples were recognized; transitional government fixed by its terms was established; supremacy of the constitution was provided and strengthened this by denying

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<sup>200</sup> PDRE Constitution of 1987; the preamble, article 118 and part two chapter seven [holds about twenty four provisions on basic rights and freedoms] respectively.

<sup>201</sup> The transitional charter guided by retrospective and prospective appraisals, considered four main values as its springboards. First, it upheld the notion of equality before the law whereby any person including those that hold government offices remained subordinates to the law. In order for carry on this value the authors of the charter, made the making process more participatory so that different scenarios could be touched in the charter. In addition to this, with the aspiration for genuine implementation of same, made their tenure temporal and provided supremacy clause in the charter; but ignored amendment clause.

Second; the government effectuated by the charter was made to be inclusive of personalities or groups of different backgrounds (political, religions and ethnicity). Third; it sought transitional justice through the reformation of state apparatuses and personnel in previous regimes. The assumption here was the institutions and the state as a whole in the previous regimes were the apparatuses of the ruling classes that enabled them to pursue injustice, subjugation and oppression on the governed. Hence, they should be dismantled and replaced by another, so that individuals’ basic rights and the right to self-determination of nations and nationalities truly exercised.

Finally, the charter emphatically postulated just peace, by acknowledging the interplay of justice, democracy and peace.



the opportunity to amend the constitution; though not explicitly articulated, courts role in constitutional control of fundamental rights and freedoms was recognized. In this regard article 9 sub f reads:

“...the courts shall, in their work, be free from any governmental interference with respect to items [fundamental rights and freedoms of individuals as provided under UDHR] provided in part one, article one of the charter.”

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Here it is worth to know that, the authors had restricted (intentionally or unconsciously) such power of courts to basic rights and freedoms of individuals as provided in the UDHR. In other words, under the interim constitution Ethiopia had the experience of judicial review with regard to basic rights and freedoms of individuals only. No provision was there as to whose power is it to interpret other aspects of the charter.

As to the 1995 FDRE’s stand in this regard there has been a considerable debate on, who may interpret the constitution. Different scholars have been trying to give insights on this issue.

Among the known domestic scholars in relation with this, Asseffa Fisseha is one. In his article on constitutional adjudication in Ethiopia in which he explored the experience of the house of federation he argued that “courts are empowered to have a say on interpreting the constitution”.

He based his argument specifically, on the phrase embodied under the Amharic version of article 84(2) of the constitution and concluded that “courts may interpret the constitutionality of acts by any source other than that of the federal house of people’s representative and state legislatures of the respective nine regions (state counsels)”.

He added, article 13(1) of the FDRE constitution to substantiate his argument. This article has bestowed courts the duty to respect and enforce fundamental rights and freedoms provided under chapter three of the constitution.<sup>202</sup>

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<sup>202</sup> Getachew Asseffa, *supra* note, 10.

On the other hand, Dr. Menbere Tsehay who was the then vice president of the supreme court and the vice chairperson of the council of constitutional inquiry came up with an argument that goes, “Courts may interpret constitution; for one thing, courts need to test the plausibility of constitutionality question and for another, on the basis of article 3 of the federal courts establishment proclamation no. 25/1996 they are empowered over cases arising under the constitution”.<sup>203</sup>

On the other hand personalities like Getachew Assefa rested on the notion of originalism that dictates the interpreters to consult the original meaning attributed to a word or a clause or a phrase by the framers and to use that same meaning to solve a case.<sup>204</sup>

Having this in mind, Getachew had consulted the minutes of constitutional assembly that embody the discussion in relation to Articles 62(1), 83 and 84 of the constitution. Based on his findings he goes on to concluding that, the drafters had intended to oust ordinary courts from interpreting the constitution for the very reason that, “if courts are made to interpret the constitution they may through interpretation fundamentally change the constitution just like the American Supreme court has been doing.

According to the authors, such rewriting of the constitution by courts may result in dire consequence group rights recognized in the constitution.” So, the nations, nationalities and peoples that are the mother of the constitution are entitled to adjudicate it. This stand of Getachew is also manifested by Fassil Nahum.<sup>205</sup>

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23Asseffa Fisseha, *Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation* (African Network of constitutional law conference on fostering constitutionalism in Africa, Nairobi, April 2007), p.4.

<sup>203</sup> Menbere Tsehay, *Ye Ethiopia Fith Getsitawoch* [Aspects of Ethiopian Justice] (Addis Abeba, December 1999 E.C), pp. 136-137.

<sup>204</sup> Getachew Asseffa, *supra* note, 10.

<sup>205</sup> Fassil Nahum, *supra* note 158, p.58.

The other stand that supports the above stand rested on the framers view of the ‘nature’ of the constitution in general and to the role of the nationalities in particular. The framers think that the new federal dispensation is the outcome of the ‘coming together’ of the nationalities. Indeed, it is clearly stipulated in the preamble and Article 8 of the FDRE constitution that the ‘nations, nationalities and peoples are sovereign.’

The Constitution is considered as the reflection of the ‘free will and consent’ of the nationalities. It is, in the words of the framers, ‘a political contract’ and therefore only the authors that are the nationalities should be the one to be vested with the power of interpreting the constitution.<sup>206</sup> To this effect, the HOF that is composed of the representatives of the various nationalities is expressly granted the power to review the constitutionality of laws.

In addition to the above stands, legal scholars like Taddese Melaku substantiate their argument by taking in to account the practice of countries that have similar form of government with Ethiopia (parliamentary form of government). In some of these countries ordinary courts have the competence to deal with the questions of constitutionality of acts by executive organ of the government.<sup>207</sup>

Practically, constitutional disputes have been settled by the house of federation. Among cases that were adjudicated by the house are; the election case that arose in *benishangul-Gumuz* regional government, the *Silte* nationality’s demand for internal self-determination and the family case of W/ro Kedija are notable.

In my opinion on the basis of Articles 62(2), 83 and 84 of the FDRE constitution and proclamation number 251/2001 that consolidate the power of the house, the House of Federation through the assistance of the council of constitutional inquiry is a non-judicial body entrusted with the power to interpret the constitution.

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<sup>206</sup> Getachew Asseffa, *supra* note, 10, p.157.

<sup>207</sup> Taddesse Melaku, *Constitutional Adjudication in Ethiopia: Exploring the Institutional System and its Limitations*, (Ethiopian Bar Review vol.4, no. 4 may 2012) p.109.

To wind up, a look in to the constitutional history of Ethiopia, particularly, as to institutions empowered to exercise the power of constitutional review, reveals that there had been a personal (the king) model in the first two imperial constitutions, the judicial review model in the constitution that had established constitutional monarchy, a quasi-parliamentary body in PDRE constitution of 1987, the case in the transitional charter of Ethiopia in which the judiciary was restricted only to fundamental rights, and the case in FDRE constitution whereby the HOF through the assistance of the CCI exercises the power.

### 3.2. Systems of Constitutional Review

From the above discussion, with the exception of the transitional charter of the 1991 and the 1975 constitution in which courts were empowered to exercise the power of constitutional review, we can easily draw that in the constitutional history of Ethiopia the working system have been the centralized one.

On the other hand during the two imperial constitutions of 1931 and 1955 in which the emperor had been empowered to have a final say before any legislative acts became a law, there was a preventive system of constitutional review.

The phrase “having received the confirmation of the emperor” under article 34 of the 1931 constitution and the statement “If it is approved by the other [one of the legislative bodies] without amendments within a period of two months, it shall be promptly communicated through the prime minister to the emperor and either shall be promulgated as law, or shall be returned by the emperor to the chambers with his observation thereon, or with a new proposal of legislation” under article 88 of the 1955 revised constitution, are indicators.

Under the 1975 draft constitution, as it was courts that had been empowered, from the very nature of court’s activity- interpreting laws- and as the provisions were silent as to the courts preventive power of constitutional review, it can be deduced that there was repressive or posteriori constitutional review system.

In PDRE constitution it was a quasi-parliamentary body (council of state) that was empowered to interpret constitution and from the word “interpret” deployed under article 82 (1) (b) it can be grasped that it was a system of posterior constitutional review.

Under the transitional charter again as the power was conferred up on courts it can be entrenched that it was posteriori constitutional reviewing power.

Under the FDRE constitution, the House of Federation- a non-judicial organ- is the sole agent to dispose constitutional issues.

In order to have a brief picture of the case in post 1995, we need to consult the governing legal regimes. Accordingly, the first legal source to the consult is the FDRE constitution. Under the constitution, the provisions committed to deal with interpretation of the constitution are basically Articles 62(1), 83 and 84. These provisions provide that the house of federation through the assistance of the council of constitutional inquiry shall interpret the constitution and also, shall deal with constitutional disputes. But, the constitution is silent as to the reviewing system of legislative acts before they become a law. Besides, the provisions embodied in proclamations number 251 /2001 are also silent as to this case.

Another legal regime with respect to constitutional interpretation worth mentioning here is a council of constitutional inquiry proclamation number 250/2001 which was later repealed through proclamation no. 798/2013-a proclamation to re-enact for the strengthening of the powers and duties of the CCI. This proclamation under its article 6(1)<sup>208</sup> provides that, when the council finds necessary to interpret the constitution, it shall submit its recommendation to the house of federation.

Besides, under its part two that deals with constitutional interpretation, the council of the constitutional inquiry is empowered to investigate the constitutional issues. When executing this task as dictated under article 17(2),<sup>209</sup> the council may test the constitutionality of any law or decision given by government organs or official which alleged to be contradictory to the constitution.

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<sup>208</sup> It is provided with the same verbatim under article 3 (1) of the Council of constitutional Inquiry Proclamation No. 798/2013.

<sup>209</sup> Ibid, article 16 (1).

Hence, from these stipulations too, one may draw the conclusion that the house of federation with the assistance of Council of constitutional inquiry may exercise constitutional interpretation and deal with constitutional disputes; but, these laws remain silent as to the empowerment of these two entities with respect to legislative acts before they become a law. Then from this, we may easily reach to the point that, the governing regimes are silent as to preventive way of reviewing. But, from the above discussion it can be easily inferred that, there is a repressive way of reviewing.

### 3.3. Panels and Composition

In the 1931 and 1955 constitutions there was a one man constitutional reviewing system.

Under the 1975 draft constitution it is provided that there shall be three levels of courts; the supreme court, appellate court and first instance court. Interpreting constitution was vested in the hands of these courts and out of them the Supreme Court shall have the final say on constitutional issues.

The judiciary was provided to be headed by the *afe nigus* (chief justice) of the Supreme Court and other judges who are required to have a good behavior and sufficient knowledge of laws and work experience. Number of judges in courts at all levels, minimum age of judges, remuneration, and life tenure were provided to be determined by a law.<sup>210</sup>

Under PDRE the body responsible to interpret constitution-council of state- was composed of a president, vice presidents, a secretary and other members. The council had the president of the republic as its head and the vice-president as its one of the vice-presidents.<sup>211</sup>

Under article 82 (3), the council was empowered to come up with a decree that could enable it to exercise its power of constitutional review. On the basis of this, it could determine the eligibility of its members other than the president and the vice president of the republic.

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<sup>210</sup> Articles 120, 122 (1) and 123 of the draft constitution of 1975 (the last constitution in the imperial regime).

<sup>211</sup> PDRE constitution, *supra* note 194; the plural word “presidents” under article 81(2) suggests the presence of more than one vice-president.

In the interim constitution of 1991 there was no provision that guides the manner of courts composition or panel while executing their role of constitutional review as to cases that involve questions of basic rights and freedoms.

In the FDRE constitution, the house of federation (upper house) is the umpire that entertains constitutional issues. The house is composed of the representatives' of nations, nationalities and peoples of Ethiopia.<sup>212</sup> The state councils may elect their representatives in the house, by themselves or they may hold election to have representatives elected by the people.<sup>213</sup>

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The seats in the house are determined in proportion with the number of human population in each nation, nationality, and people in the whole country. But, it is mandatory that each nation at least represented by one candidate. The additional seats are reserved for additional one million of the concerned nation or nationality.<sup>214</sup> In other words, a given nation or nationality whose total number of its individual members together constitutes fifteen million of the total population of the country, will have sixteen seats. The office term of representatives in the house is five years.

Professionally, the house is supported by another institution (council of constitutional inquiry).

The CCI has the president and vice president of the federal Supreme Court, six legal experts and three members of the upper house eleven members as its members.

The president and vice president are appointed by the lower house through nomination by the prime minister; the six legal experts are appointed by the president of the republic on the recommendation by the house of people's representatives; and, the remaining three members are appointed by the upper house.<sup>215</sup>

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<sup>212</sup> FDRE constitution, *Supra* note 7, article 61(1).

<sup>213</sup> *Ibid*, 61(3).

<sup>214</sup> *Ibid*, article 61(2).

<sup>215</sup> CCI proc. No. 798/2013, *supra* note 201, article 15 and FDRE constitution *supra* note 7, article 81 on the president and vice president. The minimum standards the two presidents expected to meet (as provided under

So, more or less, citizens of Ethiopia do have a say on the very appointment of personalities that exercise the authority of disposing constitutional questions.

With the intent to protect its independent functioning, the law maker (lower house, only), provided the tenure of the two presidents to be the same with the term of their presidency at the federal supreme court; the three members from the upper house is also same with term of mandate of the HOF; and, the remaining legal experts for six years only; The latter two can be re-elected.<sup>216</sup>

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As to their removal, it is provided that, the two presidents may decline their positions only when they lost their post at the federal supreme court. The rest can be removed by the body appointed them, when significant lack of competence and efficiency or disciplinary offence on their side is proved. To give it financial freedom, its annual budget is made to be prepared by it and approved by the house of peoples' representatives.

It is up to the members of the CCI to determine their own remuneration. Article 18 (1) of the Council of constitutional inquiry no. 798/2013 reads:

“Members of the council shall be entitled to pre-diem and transport allowances commensurate with their attendance of meetings at the council and their extra service in their capacity as member of the council. Particulars shall be determined by directive to be issued by the council.”

#### **3.4. Rules of Procedures: Accessibility**

Under the 1931 and the 1955 revised constitutions, as it was preventive- the king prevents any legislative acts before they become a law- there is no need to discuss as to its rules of procedure and accessibility.

article 81 of the constitution the only prerequisite is securing the will of the executive) and the three representatives from the upper house are not provided in the proclamation. But, the six legal experts are expected to meet the professional competency and high moral standing as provided in article 15 of the proclamation which is a copy paste of article 82 (2) of the constitution.

<sup>216</sup> Ibid, article 17.



Under the 1975 draft constitution, the judicial power was in the hands of courts. So, individuals did have the right to produce constitutional allegation to courts. Article 33 and 125 bestowed on individuals the right to be tried before a legally established court and as courts were the only institution with inherent power of interpreting laws (e.g. the constitution itself) individuals could stand before courts in search of remedies on the basis of provisions placed in the constitution.

In the PDRE constitution, any one that has a case that demands constitutional interpretation can appear before the council, so that the state council would settle the case brought to its attention.<sup>217</sup> The transitional charter holds no signal of same issues.

In post 1995 the FDRE constitution and the proclamations that consolidate and erect the HOF and CCI respectively are the governing regimes.

The FDRE constitution that expressly entitles the house of federation as the only institution to entertain constitutional issues has put nothing as to procedure for gaining access to it. But, a look into sub provisions of article 84 of the FDRE constitution reveals that access to the house of federation can be realized by going through the council of constitution inquiry. For this, a look into sub article two of the same article may suffice. It reads:

“When any federal or state law is contested as being unconstitutional and such as dispute is submitted to it by any court or interested party [governmental bodies that seeks the service], the council shall consider the matter and submit it to the house of federation for a final decision.”

So, from this sub provision we may deduce that any interested party or court before which the case appears for adjudication, is expected to submit the matter to the council of constitutional inquiry, whom under article 84 of the constitution is empowered to investigate the existence of constitutional disputes or a need for constitutional interpretation. If this organ believes that the

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<sup>217</sup> PDRE constitution, *supra* note 194, article 82 (1) (b) and (3) that confers the power to interpret the constitution to the council of state and the responsibility to prepare laws to implement this right. On the basis of its second responsibility we may conventionally draw that the subordinate law that could be promulgated by it would have rules of procedure to access the council.

matter needs to be disposed by the house of federation, it shall submit the case with its recommendation to the house, so that the latter may adjudicate the matter conveniently.

Cases that involve constitutional issues may arise in courts and outside courts. Accordingly, in the first case, when parties to the case of their opinion that the case at hand involves constitutional issue then he or she may request the court to submit the case to the authorized institution (CCI).

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But, the court is at a duty to refine the fact that the disposition of the case in its hand necessarily quest interpretation of constitution. If the court rejects the claim of the party, the latter has a right to appeal to CCI within ninety days. Besides, the court can by its own motion decline jurisdiction and refers the case to the CCI for constitutional disposal.<sup>218</sup>

Hence, anyone who submitted his case to ordinary courts can't withdraw from the litigation and stand before CCI, without at first secure confirmation on the side of the court handling the case (exhaustion of remedies available at courts of law).

Under the second case (constitutional issues that arise outside courts of law), any person who alleges violation of his one or more basic rights by decisions of government or its official, up on exhaustion of the available administrative remedies can present his case to CCI.

When laws enacted by either state or federal legislative body are contested for their constitutionality, the one (court or any interested party) that initiate the case can directly submit his application to CCI.<sup>219</sup>

Additionally, though there is no controversy (abstract review), constitutional interpretation may be initiated through state or federal executive organ and state or federal legislative organ, provided that it is accompanied by one-third vote:

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<sup>218</sup> CCI proc. No. 798/2013 *supra* note 201, article 4.

<sup>219</sup> *Ibid*, article 5.

“Constitutional interpretation on any unjusticiable matter [abstract review] may be submitted to the council by one third or more members of the federal or state councils or by federal or state executive organs”

Any application to CCI can be made in person or through representation.<sup>220</sup>

#### 4. *Constitutional Review in Action: the Case in Constitutional History of Ethiopia*

### 4.1. **Fundamental Rights and Freedoms of Individuals and Peoples: Their Enforcement and Protection through a System of Constitutional Review**

Fundamental rights and freedoms have been one of the main concerns of Ethiopian constitutional jurisprudence. A look in to the 1931 constitution, for instance divulges the bitter-sweet commitment of the emperor towards these rights.<sup>221</sup> It had recognized some of basic rights of individuals. For instance; freedom of movement, right to privacy, right to liberty, the right to be tried by legally established court, and property rights of citizens were provided in the constitution.

In providing protection to the privacy right of individuals, under its articles 25 and 26, it reads:

“Except in cases provided for by law, no domiciliary searches may be made...no one shall have the right to violate the secrecy of the correspondence of Ethiopian subjects.”

Besides, under Article 27 it provides protection to property rights of individuals as:

“Except in cases provided by the law, no one shall have the right to deprive an Ethiopian subject of any movable or landed property which he owns.”

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<sup>220</sup> Ibid, article 7 (2).

<sup>221</sup> By the way, the emperor hadn't considered these rights as rights peoples enjoy because they are human; rather he declared as if he granted these rights to his people-as if they are destined to them because of his very whim [plainly stipulated under the caption of chapter three of the 1931 constitution].

As the territory of Ethiopia and individuals residing in the territory had been portrayed as subjects of the emperor, different groupings were denied of the right to self-administration (rule).<sup>222</sup> In other words, the constitution had failed to address the national oppression started by his predecessors.

The constitution did not provide institutional mechanism<sup>223</sup> to sustain the sweetest provisions that provided basic rights and freedoms and this had made it one of the bitter constitutions in the constitutional history of Ethiopia.

The 1955-revised constitution which had come in to picture after twenty-four years had lapsed since the promulgation of the 1931 constitution, unlike its predecessor, had opened itself to a wider recognition of basic rights of individuals. In addition to rights recognized under the former constitution, freedom of press, religion, assembly...etc. had acquired protection.<sup>224</sup>

Though there were such progressive acts, again the constitution lacked institutional mechanism of enforcing the basic rights and freedoms in it.

This reason,<sup>225</sup> accompanied by additional factors that had been undergoing in rural and urban areas caused resistances against the system.

It is for these reasons that between 1940's and 1970's Ethiopia witnessed rural and urban-based resistances. For instance, administrative inefficiency, corruption and immoral malpractice of the Territorial Army units stationed in the present day of *Tigray* region were reasons for the first *woyane* movement in the early 1940s.<sup>226</sup> Twenty years later, high taxation rate and denial of land

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<sup>222</sup> Ibid, article 1.

<sup>223</sup> As it has been argued elsewhere in this paper there was personal mechanism of protecting constitutional principles. But, in my opinion, it was not satisfactory and also it was inoperative.

<sup>224</sup> See for instance, 1955 Revised Constitution of Ethiopia, *supra* note 188, Article 41.

<sup>225</sup> I have raised it as a reason because lessons from peer nations reveal that their democracy in one or another way has been the result of the realization of the objectives sought through the system of constitutional review.

<sup>226</sup> Bahiru Zewdie, *supra* note p. 215.

ownership, accompanied by the imposition of Christian settlers that managed to dominate the predominant Muslim population of the bale both economically and politically, triggered resistance in Bale. The *bale* resistance had persisted from 1963 to 1970.<sup>227</sup>

Owing to the imposition of high taxation, citizens in *Gojjam* had revolted against the regime around 1968. The other two resistances that happened in this period were the peasant uprisings in *Yajju* in the province of *Wallo* around 1948 and the *Gedeo* uprising 1960. The main reason to revolt against the system was principally government's refusal to address their appeals against alienation of their land.<sup>228</sup>

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In short, these rural based movements involved the questions of property rights (e.g. land ownership), fair taxation, equality (e.g. equality of religion in the case of bale) and the right to self-administration (e.g. the first *Woyane* movement).

On the other hand, in this era there were town based resistances against the regime which are traced to the ruling class itself, students, taxi drivers, teachers, factory workers...etc. in the urban areas. For instance, in 1960, the two brothers of Neway (Brigadier General Mangestu Neway and Garmame Neway) with Colonel Workneh Gebeyehu driven by the idea of "restoring Ethiopia to its former glory" had organized the military and intellectual components and attempted a *coup* against the monarchy.<sup>229</sup>

The students on their behalf conducted the "land to the tiller" demonstration in 1965. It had the objective of bringing social and economic equity. Not only this, there were demonstrations in the quest of freedom of expression and assembly, education for all, equality of nationalities and of women. The same is true for taxi drivers, civil servants and some wings of the military.

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<sup>227</sup> *Ibid*, p. 216. See also, leenco lata *supra* note 169, pp. 119-120.

<sup>228</sup> *Ibid*.

<sup>229</sup> Birhanu Asres, "*ye Tahisasu Girgir* [the December riot]" (Addis Ababa University Press, 2013), pp. 63.

These movements later took the form of an organized movements principally headed by parties that had been operating in underground in their first days and officially on later days, like, EPRP, *MEISON* (all Ethiopian socialist movement), EPLF, TPLF, OLF, ONLF, Dergue (the coordinating committee of the armed forces) ...etc. These parties, though differently, were heralding the prevalence of class or national oppression in the soil of Ethiopia.<sup>230</sup>

These out loud and organized questions of basic rights and freedoms, forced members of the ruling faction to reconsider their system of governing and they had reached an agreement of producing a more democratic constitution that could address these grievances.

Accordingly, the draft constitution of July 1975 in terms of its commitment towards basic rights and freedoms of individuals and peoples tried to be more inclusive. For instance, it had reserved about thirty nine provisions (article 21-59) to these rights. Amongst others, under its articles 21 and 22 recognized equality of all irrespective of religion, sex, and language. Under article 24 and 25 Freedom of religion, thought, expression, movement, and association were also recognized. Under article 26 the right to life, liberty and property are also some of rights provided in the constitution. Arrested person's rights, like, the right to be brought before court within 48 hours and protection from self-incrimination; accused person's rights such as presumption of innocence, the right to be tried before a legally established court, and the right to rebut evidences brought against them were also there.<sup>231</sup>

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<sup>230</sup> See for instance, Andargachew Asegid, *Beachir Yetekache Regim Guzo: MEison be Ethiopia Hizboch Tigil Wust* [the Journey Hijacked Earlier: MEISON in Ethiopian peoples' struggle] (central printing press, 2000.) p. 155.

See also, *Kiflu Tadesse, Ya tiwld: Ye Ethiopia Hizbawi Abyotawi Tarik* [The Generation: the History of EPRP]" (2006 E.C.) p. 182. See also, Mengistu Hailemariam, *Tiglachin: ye Ethiopia hizb abyotawi yetigil* tarik part I, [Our Struggle: the Revolutionary Struggle History of Ethiopians, vol. I] (Tsehay Publishers, 2012), p. 78.

<sup>231</sup> The draft constitution, *supra* note 203, Article 32 and 33.

Group rights, like, the right to protect and develop one's own language and culture was also enshrined.<sup>232</sup> It also guaranteed the enforcement of these rights, amongst others, through imposing horizontal duty on citizens to respect basic rights recognized in the constitution.<sup>233</sup>

It had also institutional mechanism of enforcing and guarding these rights. To this end, on the basis of its article 120, courts were granted the responsibility of exercising this power-judicial review.<sup>234</sup>

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The 1987 PDRE constitution<sup>235</sup>, under its part one, chapter three provided social and cultural policy provisions and under part three chapter thirteen, devoted some provisions that cover the manner of administrating autonomous regions. These provisions were there as an extension of creating an enabling environment for all nationalities in the state, whom the constitution declared as equal on the basis of its Article two.

Under this specific provision, “chauvinism and narrow nationalism” were identified as an anti-equality of nationalities. Based on this assumption it had unequivocally stressed the need to combat these “extremist” stands. Reducing and if possible, vanishing the economic disparity between and among them also underlined as one means to realize equality. Granting regional autonomy and respecting languages of nationalities were seen as the other two roads to create a state that would handle its diversified groups equally.<sup>236</sup>

Under its part two chapter seven it had committed about twenty-four provisions (the widest of all chapters) to recognize and protect fundamental freedoms, rights and duties of citizens.

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<sup>232</sup> Ibid, article 45.

<sup>233</sup> Ibid, article 51.

<sup>234</sup> Unfortunately for reason of regime change we were no destined to enjoy the fruits of this draft constitution.

<sup>235</sup> It was a socialist oriented and had four parts, seventeen chapters and one hundred nineteen provisions.

<sup>236</sup> The 1987 PDRE constitution, *supra* note 194, Article 2 (4) and 2 (5).

For instance, it recognized equality of all Ethiopians unconditionally (no discrimination on the basis of sex, color ... etc.); particularly equality of women and men in which affirmative actions to the former were declared to ensure their equal participation in socio-economic, cultural and political fronts.<sup>237</sup>

Some rights of arrested and accused persons' were also plainly provided; freedom from arbitrary arrest, habeas corpus, presumption of innocence and principle of non-retroactivity are some of them.<sup>238</sup> Freedom of movement, privacy, religion (secularism), speech, press, assembly, peaceful demonstration, and association were also recognized.<sup>239</sup> Nevertheless, these rights were subject to limitation for the sake of rights of other, interest of the state and the society.

Weighing up the atrocities that had been happening in the first thirteen years<sup>240</sup> of its ruling time,

<sup>237</sup> Ibid, article 35 and 36.

<sup>238</sup> Ibid, article 44 and 45.

<sup>239</sup> Ibid, article 47.

<sup>240</sup> Though the constitution, in terms of its room for basic rights of individuals, was seen as better than its predecessors, what had been undergone in the first thirteen years of its ruling on soil of Ethiopia was the inverse of the values demonstrated in the constitution. For instance, the ruling military committee that pictured itself as the vanguard of the revolution, under the guise of Ethiopia *Tikdem* (Ethiopia first) which later changed to *Inat Hager Ethiopia woyim Mot* (mother Ethiopia or death) banned basic rights of citizens. For instance, all types of strikes and demonstrations were banned. See for instance, Andargachew Assegid *supra* note 222, pP. 187-191.

There were these times whereby the life of one innocent citizen was at the mercy of another military man. In this regard, peoples in the *Gondar* region (Northern Ethiopia) once expressed their fear and trembling towards comrade Melku Teffera as follows:

“መላኩ ተፈራ የእግዚር ታናሽ ወንድም

የዛሬን ማርሳኝ የነገን አልወልድም፡፡”

“Melaku Teferra God’s little brother

Please give me your mercy this day

I won’t give birth to offspring on another day.”





the 1987 PDRE constitution's provisions on basic rights and freedoms were promising; however the constitution's failure of introducing an independent institutional mechanism of guaranteeing these rights was its down side.<sup>241</sup>

To conclude, the people's democratic republic of Ethiopia of 1987 constitution, by recognizing Ethiopia as a home of diversified groups, introducing secularism, bestowing sovereignty on the people (the working people), giving constitutional base for autonomous regions, by reserving wider provision's to basic rights of individuals ...etc., made a an invaluable departure from its predecessors- the 1931 and 1955 constitutions.

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In order to protect these values from mischiefs, it encompassed within it supremacy and stringent amendment clauses. In the former case, any subsidiary law or decisions traced from any sources which is anti to the values in the constitution was made void; In the latter case, the constitution put extra-ordinary requirement for its amendment.

Under Article 119 of the PDRE constitution, it is provided that:

“The constitution of the people's democratic republic of Ethiopia may be amended only by a three-fourths majority decision of the members of the National *Shengo* [italics mine].”

However, in addressing the long existed grievances of nationalities in the state, what had been done was not more than recognizing their very existence. It is true that, the constitution

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Melaku Teferra was responsible for atrocities peoples in Gondar region had suffered. Nevertheless, he was not appeared before the court for his wrong deeds. Besides, the then youth were forcefully recruited to military service. Once president Mengistu Haile Mariam happened in *Sidist Kilo* (main campus of the present Addis Ababa University) and delivered a speech to this end.

Additionally, as command economy was the rule, ownership right to citizens was principally guided by the state; because of which, no individual was allowed to accumulate a capital (cash) more than 500,000 (five hundred thousand birr). These are just to name a few.

<sup>241</sup> However, this doesn't mean that there was no a system or institutional setup of interpreting constitution. Though its impartiality was in question, as it was headed by the head of the government, there was a quasi-parliamentary body conferred with such power. Its down side is discerned from the principle that dictates “*nemo judex in causa sua* [no one shall be a judge on his own case]”.

recognized the fact that Ethiopia is a home of groups with different language, culture ...etc.; but, it overlooked the oppression (cultural or linguistic) they had been suffering; first, it reserved little room, comparatively than the oppressed class (e.g. peasants and the working class) who attained the status of sovereign power holders.

Then, in terms of its social and cultural policy principle, it was up to the state and society, not to the concerned ethnic group, to preserve its own historical and cultural heritage.

Finally, though it granted the right to self-determination as a major means to achieve equality of nationalities through autonomous regions, the notion of democratic centralism whereby in the then unitary Ethiopia order from the center was expected to be implemented at all grassroots levels had made it a right only on paper.

Practically, autonomous regions were established only in areas that had demonstrated stiff resistance against the ruling faction; other linguistic minorities or culturally dominated groups were not granted this right.<sup>242</sup> Though the constitution, in terms of its room for basic rights of individuals, was seen as better than its predecessors, what had been undergone on the soil of Ethiopia was the inverse of the values demonstrated in the constitution.

As the saying goes “power corrupts, absolute power corrupts absolutely”, the faction had indulged itself at the cost of the lives of many. Finally, this caused its extraction from power in May 1991, by combined forces of ethno-nationalist movements by *Eritrean Peoples’ Liberation Front (EPLF)*, *Tigrean Peoples’ Liberation Front (TPLF)*, *Oromo Liberation (OLF)* and etc.

The transitional charter (the interim constitution) of the 1991, in the perspective of human rights of individuals, had made the UDHR its base and undisputedly called the free exercise of rights recognized in it. It particularly enumerated, the so-called political rights such as freedom of

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<sup>242</sup> It was granted to Eritrea, Somalia (present day Ethiopian Somali region) and *Tigray*. It was a mere declaration, than its genuine application. See for instance, Asseffa Fisseha “Federalism and the Accommodation of Diversity in Ethiopia: a Comparative Study”, (Wolf Legal Publishers, 2007) p.42

expression, association, assembly, organizing political parties and the right to engage in political activities.<sup>243</sup>

Besides, concerning ethnic based group rights, it had considered the right to self-determination including that of secession.<sup>244</sup> On the basis of this constitutional right, it allowed the right holders to involve in activities that aimed at preserving and promoting their respective culture, language and history. As an extension of this, the charter provided them with the right to be part of governmental-central and local-decision (policies, laws ...etc.) making processes.

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To this end, free and fair representations in both governments were furnished.<sup>245</sup> The very purpose behind was, to let them enjoy the right that they were denied in previous regimes-the right to have a say on matters that would affect their lives. It upheld the judiciary as institution responsible to enforce these values.

Believing that respecting, protecting and fulfilling basic rights of individuals and peoples are the nucleus of all, the authors of the 1995 FDRE constitution committed about thirtyone provisions of chapter three (article 13-44)of the constitution and other related provisions (Article 10, 9, 105 ...etc.) to cover these matters. The provisions encompassed civil and political rights; socio-economic and cultural rights and group (solidarity) rights.

Under the first category; for instance, the right to liberty, life, security, privacy, equality, freedom of expression, association, and movement are provided.<sup>246</sup>

Besides, with aspiration to strike balance between public's interest and basic rights of individuals, accused and arrested persons rights (e.g. bail right, writ of habeas corpus, the right to

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<sup>243</sup> Transitional Charter of Ethiopia, article 1.

<sup>244</sup> Ibid, article 2.

<sup>245</sup> Ibid.

<sup>246</sup> FDRE constitution, *supra* note 5, articles 14-17 in which protection to the right to life, security and liberty of a person are plainly provided.

remain silent, presumption of innocence, non-refractivity principle, protection from double jeopardy ...etc.) are also recognized.<sup>247</sup> Marital, personal and family rights are also provided.<sup>248</sup>

Under the second category, for instance the right to freely engage in economic activities and state's commitment to progressive realization of social services are provided.<sup>249</sup>

Under the third category, rights to development, clean and healthy environment, and self-determination up to secession are explicitly recognized.<sup>250</sup> The inclusion of the right to self-determination up to secession to nations, nationalities and peoples makes it peculiar in the African region.<sup>251</sup>

In order for guarantee their application, the constitution provided both vertical and horizontal application clauses; in the former case it refers the relationship between individuals and government; whereas, in the latter case it governs the relationship between and among subjects.<sup>252</sup> In other words, the legislative, executive and judicial bodies of both (regional and federal) governments are constitutionally restrained from taking or failure to take unjustified or constructive actions respectively, as to rights recognized under chapter three of the constitution and provisions of constitution as a whole. The same is true for individual subjects to respect the rights of others. Hence, both individuals and governmental bodies could be found guilty of violating human rights.

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<sup>247</sup> Ibid, article 19 and 20.

<sup>248</sup> Ibid, article 34.

<sup>249</sup> Ibid, article 41 (1) and (4).

<sup>250</sup> Ibid, article 39, 43 and 44.

<sup>251</sup> Adem Kassie Abebe, *Human Rights under the Ethiopian Constitution a Descriptive Overview*, (MizanLlaw Review Vol. 5 No. 1, 2011), p. 44

<sup>252</sup> Ibid, pp. 44-45; see also, FDRE constitution *supra* note 5, articles 9 (2) and 13 (1) and article 10 where these application clauses are obviously set.

In addition to this, for better appreciation of the values under chapter three of the constitution, the authors granted the concerned body responsible for interpreting constitutional provisions, the freedom to cross refer “the UDHR, international covenants on human rights and international instruments adopted by Ethiopia.”<sup>253</sup>

But, as the exercise of this freedom is restricted only to rights under chapter three, then constitutional issues that involve the derogation clause as provided under Article 93 (state of emergency) or policy issues (Articles 85-93) cannot be cross referred in the eyes of these bill of rights. Besides, reliance needs to be only on principles (principles of indivisibility, principles of limitations of rights are exceptions ...etc.); not on all provisions of these bills of rights.<sup>254</sup>

Another mechanism that demonstrates the true commitment of the authors towards fundamental freedoms and rights is the provision of independent extra-ordinary amendment clause.

Concerning this amendment procedure of basic rights, Article 105 (1) of the constitution reads:

“All rights and freedoms specified in chapter three of this constitution...can be amended... when all state councils, by a majority vote, approve the proposed amendment; when the house of people representatives (HPR), by a two-thirds majority vote, approves the proposed amendment; and when the house of the federation (HOF), by a two-thirds majority vote, approves the proposed amendment.”

As discussed previously the constitution had furnished institutional mechanism of enforcing these basic rights and freedoms. The task is conferred up on the HOF that it would put in to effect with technical support of CCI. The following cases that involve questions of basic rights and freedoms are the famous ones’ that had been disposed by the house.

In Mrs. Kedija Beshir (represented by EWLA [Ethiopian women lawyers’ association]), the applicant who was a defendant before religious courts produced the case to the attention of CCI

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<sup>253</sup> FDRE constitution, *Supra* note 5, article 13 (2).

<sup>254</sup> Adem Kassie, *Supra* note 243, p. 48.

by alleging that “while the case was pending before the federal sharia court, on the basis of article 17, 20, 22 and 23 of proclamation no. 250/2001, I requested the concerned court that I don’t want my case to be disposed by the sharia law and sharia courts. However, the court overlooked my claim and rendered decision.

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Then, I appealed to the supreme sharia court on the same ground; but, the court didn’t consider my allegation and upheld the lower courts judgment. Finally, I brought my case to the federal Supreme Court cassation bench division for the courts had committed basic errors of law; again it had rejected my claim. Hence, all these institutions had been violating the principle of constitutional supremacy as provided in article 9 (1) of the constitution.”

Then the CCI on the basis of the claims brought to it had examined decisions of courts and ruled that the case should be interpreted by HOF. In its decision it reasoned out that “...under article 4 (2) of proclamation no. 188/200- a proclamation to strengthen federal sharia courts- it is provided that sharia courts shall assume jurisdiction when parties to dispute explicitly consented. This provision is in line with the spirit under article 34 (5) of the constitution.

However, even if the concerned justice organs are at a duty to respect and enforce constitutional principles embodied in chapter three of the constitution (article 13 [1] of the FDRE constitution), when disposing the case these institutions at hand had violated this duty and contravened article 9 (1) of the constitution.

Hence, the holdings of courts in this regard need to be quashed.” Finally, the HOF in its 4<sup>th</sup> year, 2<sup>nd</sup> regular session, May 15, 2004 approved the proposal by CCI only with one man reservation.<sup>255</sup>

There is also another case whereby the house decided the internal self-determination question of the *silte* nationality-group right as recognized in the FDRE constitution.<sup>256</sup>

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<sup>255</sup> See, “decision rendered by HOF on the Kedija Beshir case”, (House of Federation, Journal of Constitutional Decision, vol.1, no.1, July, 2008), pp. 35-41.

The other case worth mentioning here is that, the case between Tamirat Geleta Jirru v. the Federal public prosecutor.<sup>257</sup> The case had started at the federal high court. The applicant was a defendant and prosecuted on six counts; two aggravated homicide, homicide attempt, rape and two fraudulent misrepresentation.

Then the federal high court in its seventy nine pages judgment after considering the evidences brought to its attention found him guilty in all counts and rendered a life imprisonment and confiscation of all his property.<sup>258</sup>

Following the decision of the high court, the applicant appealed to the federal Supreme Court and the court reconsidered facts of the case along with relevant evidences and laws. Then in its fifty five pages judgment had reversed the lower court's decision partially and found him guilty only with the four counts. Accordingly, it reduced the life imprisonment to twenty five year rigorous imprisonment; but did not reverse the lower court's decision as to the confiscation of the applicant's properties.<sup>259</sup> This decision of the Supreme Court had been confirmed by the federal Supreme Court cassation bench division.<sup>260</sup>

After exhausting remedies before ordinary courts, the applicant brought his case to CCI by stating that the courts in disposing the case had been violating my constitutional right recognized under article 17(1), 18(1), 22(1), and 40 of FDRE constitution.

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<sup>256</sup> See, "decision rendered by HOF on the *Silte* internal self-determination [question of identity]" (House of Federation, Journal of Constitutional Decision, vol.1, no.1, July, 2008), p. 41.

<sup>257</sup> See, CCI's decision on *Tamirat Geleta Jirru v. the Federal Public Prosecutor* (file no. 815/2005).

<sup>258</sup> See, a decision rendered by the Federal high court on *Tamirat Geleta Jirru v. the Federal Public Prosecutor* (file no. 72448, *nehase* (august) 6, 2001 E.C).

<sup>259</sup> See, a decision rendered by the federal supreme court on *Tamirat Geleta Jirru v. the Federal Public Prosecutor* (file no. 48915, *tahisas* (December) 28, 2003 E.C).

<sup>260</sup> See, a decision given by the federal supreme court casation bench division in *Tamirat Geleta Jirru v. the Federal Public Prosecutor*, (file no. 66943, *hamle* (July) 18, 2004 E.C.)

Then the council, in its two pages judgment stated that the constitutional right provided under the applicant's allegation will be materialized when the new law penalizes the same act;<sup>261</sup> it is not on procedural issues as raised by him. So, the applicant's allegation in this regard is inadmissible.

As to the applicant's allegation on constitutional right of property, the council stated that, such right will work only if the applicant acquired those properties by his efforts as provided in article 40(2)<sup>262</sup> of the constitution. So, this allegation too is inadmissible.

Finally, concerning the applicant's allegation that broadcasting my case through media outlets abridges my constitutional right to be presumed innocent, the council stated that none of the courts' rulings reveal such facts as the allegation; so, it is also inadmissible.

## **4.2. Limited Government Processes through Constitutional Review: Vertical Power Division and Horizontal Power Separation**

As it has been argued elsewhere in this paper, one means of limiting government's power is either through denial and grants of power between the two levels of government or through horizontal power distribution among the three branches of government both at the central and state levels.

Having this in mind stepping in to the history of Ethiopia shows that up until 1991 there had been a one full-fledged governmental structure where by power had been devolving to local

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<sup>261</sup> The applicant argued that I had committed two of the crimes before the promulgation of the new criminal code of Ethiopia; but calculated the sentence, on the basis of the new one which holds a heavier than the repealed penal code that was applicable at the time when the criminal offence was committed.

<sup>262</sup> It reads: "Private property, for the purpose of this Article, shall mean any tangible or intangible product which has value and is produced by the labor, creativity, enterprise or capital... [Emphasis added]." The council stated that the confiscated properties are not the fruits of the applicant's labor.



governments from the center.<sup>263</sup> Hence, it may be needless to try to explore the power denial and grant between the two levels of government in the pre-1991 Ethiopia. So, the following discussion will restrict itself to the integration of the power separation doctrine under the pre 1991 constitutions of Ethiopia and both the division of power and power separation in the post 1991 era.

Accordingly if we explore the 1931 imperial constitution of Ethiopia we may stick at the provision that declares “the territory of Ethiopia and individuals residing in the territory are subjects of the emperor”. This start latter entrenched to empowering the emperor as the holder of highest executive and legislative powers. As to emperor’s legislative power, the emperor was given wider power to have a say on membership, term and even the dissolution of the chambers.<sup>264</sup>

The two chambers could not promulgate laws without a confirmation by the king. As head of all executive departments, the emperor was bestowed with the power to order execution of laws in force. The emperor was at liberty to give any measure on any military or civil officials.<sup>265</sup> It was up to him to decide their respective functions and salaries. Surprisingly, he was also with authority to interpret laws, in his *Zufan chilot* (imperial bench).<sup>266</sup>

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<sup>263</sup> Under the draft constitution of July 1966 E.C. states and cities were granted legislative, executive and judicial powers on their internal matters. The constitution listed out powers that could be exercised by them. It includes the power to conduct election of representatives and appointing local officials, the responsibility to maintain internal security, and other powers on socio-economic, development and agricultural affairs of the concerned state or city. But, I afraid to consider this form of state structure as a system that had two levels of government in strict sense. Because, though the constitution apportioned expenditure responsibilities to them, it didn’t grant powers of generating revenues that could enable them to finance the discharge of these responsibilities; it rather specify that funds can be generated from the government (government at the center). Then, the issue of autonomy would rise. In such cases the system of government is more near to the unitary one. See, the draft constitution *supra* note 203, article 140 and 141.

<sup>264</sup> The 1931 constitution, *Supra* note 47, Articles 37 and 41.

<sup>265</sup> *Ibid*, Article 10 and 11

<sup>266</sup> *Ibid*, Article 50.

The constitution was molded this way for two principal objectives;

The first was, laying constitutional foundation to the centralization process. To this end, administrative units, the army and ministerial frameworks were given attention under the constitution, in a way that helps the emperor to assume an absolute power. The other was, to block the church and nobility from the discretion of the emperor.

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To this end, the nobilities as the only members of chamber of senate, required to avail themselves in the capital; which in turn enabled the emperor to look over them and weakened them politically. As to the church, the appointment of the *Abun* (head of the Orthodox Church) made subject to approval by the emperor.<sup>267</sup>

Under the 1955 revised constitution of the imperial regime the king was the head of the executive, legislative and though not in equal manner with the previous constitution he was the head of the judiciary.

As head of the executive the emperor was with powers to appoint and dismiss or suspend ministers, to determine the organization, power and duties of all ministries.<sup>268</sup> The emperor had wider legislative powers. For instance, “the emperor has the right to initiate legislation and to originate other resolutions and to proclaim all laws, after the same have been passed by parliament.”<sup>269</sup> Besides, the emperor was empowered to have a say on the appointment of judges. In line with his power on the judiciary, it is worth to put the wordings deployed under Article 108 of the constitution. It reads:

“The judicial power... shall be exercised by the courts in accordance with the law and in the name of the Emperor...”

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<sup>267</sup> Fasil Nahum *Supra* note 158, pp. 166. See also, Asseffa Fisseha *supra* note 234, pp. 25-26.

<sup>268</sup> The Revised Constitution of 1955, *supra* note 188, article 27.

<sup>269</sup> *Ibid*, article 88.

Hence, there was an absolute monarchy in which the king was the head of all the three branches of government. In other words, there was no power separation. The saying that goes “ሰማይ አይታረክ፤ ንጉሥ አይከሰስ” which literary refers, the sky cannot be plowed so the king cannot be charged, supports this reality. It is for this very reason that, individuals of old age in towns in Ethiopia are heard saying “*behig amlak* (in the name of the creature of laws)” or “*be janhoy* [in the name of the king]”; in an attempt to avert the evil infliction going on them.<sup>270</sup>

Constitutional review, (basically, the posterior one) was not explicitly recognized in these constitutions.

Then we have the 1975 draft constitution of Ethiopia, which for reason of avoiding power concentration in single hands had denied the king the discretion to involve in administrative and political affairs of the nation. It had horizontally divided powers of government among the three branches of government and these powers were made overlapped in order to enable each arms of government to cross-check the other. Accordingly we have the legislative, executive and the judiciary.

The legislative body had the House of Representatives and house of senates that together form the national assembly. It was declared the highest law making organ of the nation.<sup>271</sup>

The council of ministers headed by the prime minister constituted the executive wing of the government and it was recognized as the highest executive body.<sup>272</sup> It was bestowed with powers and responsibilities; amongst others it had the responsibility to handle natural or man-made disasters’ (emergency situations), the responsibility to inter in international commitments, the

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<sup>270</sup> Personal observation.

<sup>271</sup> The draft constitution of 1975, *supra* note 203, article 60 (2).

<sup>272</sup> *Ibid*, article 92.

power to make laws as to the size and other affairs<sup>273</sup> that concerns the military, the responsibility to prepare the overall yearly budget of the nation<sup>274</sup>, and etc.

Finally, we have the judiciary that as the third organ of government was empowered to interpret laws, including the highest law (constitution).<sup>275</sup> It was provided to operate at three levels as Supreme, appellate and first instance courts. The Supreme Court was upheld as the highest organ of it.

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But, this horizontal power division was not a simple separation whereby each of them operates independently in their own spheres. Rather, for the purpose of facilitating the check and balance system there by strengthening the objective of limiting government's power, each of them had made to have a say in one-another's exercising responsibilities and power. For instance, there was no a system of simple and direct exclusive promulgation of laws to be done by a single entity.

Accordingly, for a certain proposed bill either from the lower or the upper house to become a law it shall at least secure the whim of the two houses, plus the whim of the council of ministers. It is for this reason that, under its article 72 provided that in addition to the consensus of the two houses the whim of council of ministers must be there for a proposed bill to become a law.

The council of minister was at a liberty to refuse or to agree as to the proposed bill; but, when it disagrees with the proposed bill it shall along with its reasons send it back to the house where the bill had originated. Then, for the congress's proposal to override the refusal on the side of the executive, two-third members of the two houses through a joint session shall vote pro to the proposed bill.<sup>276</sup>

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<sup>273</sup> *Ibid* article 110, e.g. procedural rules on promotion of military staffs, tenure and etc.

<sup>274</sup> See, for instance, *ibid* article 130.

<sup>275</sup> *Ibid*, article 120.

<sup>276</sup> *Ibid*, article 76.

Even after the promulgation of a given law, if it appeared against the constitutional principles, the judiciary through its power of judicial review granted to it on the basis of article 120 and 148<sup>277</sup> could make it void.

As the legislative body was empowered to have a say in the appointment of the prime minister and other ministers, as the annual budget prepared by the executive was made to be adopted by the legislative, as the legislative can impeach members of the prime minister or other ministers, or for other additional reasons provided under article 92-117<sup>278</sup> of the draft constitution, the legislature was empowered to cross-check the activities of the executive. The judiciary through its power of judicial review could control the unjustified power exercise of the executive wing.

Along with these, the constitution had furnished a system of controlling the judiciary through the other two branches. For instance, the constitution had made the appointment of the chief justice of the Supreme Court conditional to the consent of the legislative. The annual budget of the judiciary was made to be prepared by the court itself; but, for it to be realized, again the consent of the legislative must be secured.<sup>279</sup> Finally, the executive, for instance, when it prepares the nominee for the post of the chief justice<sup>280</sup> and when it executes decisions of courts could cross-check the activities of the court.

After ten years had lapsed, the figures in the provisional military administrative council had come up with a new name and form the so called working people of Ethiopia that gave birth to the workers party of Ethiopia (WPE) in 1984.<sup>281</sup> These groupings three years later (1987)

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<sup>277</sup> It reads, "Constitution is the supreme law of the land. Any law or decision that contravenes the constitution shall be of no effect."

<sup>278</sup> E.g. ratification of bills instigated by the council of ministers as provided under article 105 of the draft constitution.

<sup>279</sup> Ibid, article 122 and 124. The first provided rules on the appointment of the chief justice and the other on the budget of courts.

<sup>280</sup> Ibid, article 122.

<sup>281</sup> Merara Gudina, supra note 167, p.33.

promulgated the constitution of the people's democratic republic of Ethiopia. This day marked the introduction of the fourth constitution in Ethiopian constitutional history, the 1931, the revised constitution of 1955 and the draft constitution being its predecessors. Under its part three encompassed principles that guide the structure and functioning of the state.

Under Article 59 it declared that Ethiopia is a unitary state consisting administrative and autonomous regions. In this state, the national *shengo* was the ultimate power holder: out of which, for instance, had the power to proclaim constitution and proclamation; besides, it could amend and supervise their implementations. The creation of administrative and autonomous regions was also under its authority. The power to elect the president and vice president of the state was also its power. Matters of domestic and foreign affairs: as well as defense and security policies were under its power. The constitution allowed one regular meeting per a year and in exceptional cases additional sessions might be held. Its term was for five year only.<sup>282</sup>

Under the national *shengo*, the constitution instituted different organs of the government. In this regard, we have the executive wing. The executive wing had council of ministers at its apex and its principal members were the prime minister, deputy prime minister and ministers.

Members of the council, upon presentation by the president of the state, are elected by the National *Shengo*. Amongst other, the council had the power to issue regulations and directives, prepare social and economic plans ...etc. it had also the duty "to ensure the implementation of laws enacted and decisions made by, the national *shengo*... or president of the republic."<sup>283</sup>

The president of the republic who was the head of state and commander in chief of the armed forces was bestowed with the power to ensure the execution of internal and overseas policies of the country and to nominate and present for approval members of the judiciary (e.g. president and vice president of the Supreme Court) to the national *shengo*.

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<sup>282</sup> PDRE constitution *supra* note 194, article 62 and 63 (1) (a), 63 and 67 respectively.

<sup>283</sup> *Ibid*, article 92 (1).

At the same time, if compelling circumstances arise, the president had the power to dismiss members of the judiciary. Not only this, the president had also, the duty to follow up that the Supreme Court's activities- whether it discharged its responsibilities.<sup>284</sup>

Then we have the judiciary. The then judicial authority was in the hands of the Supreme Court, courts of administrative and autonomous regions ...etc. The Supreme Court was the highest judicial organ and vested with the power to supervise the activities of the remaining courts in the nation. The term of office of justices and judges was only five years.<sup>285</sup> However these structures-power separations- were not guaranteed through institutional mechanism of constitutional review.

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The prior constitutional review power bestowed up on the council of state was not as such operative. The main reason for it was the president's legal and political powers (the party channel system) that enabled him to put senior party members to run the government under his foot.

The government effectuated in the transitional charter (interim constitution) had council of representatives and council of ministers as its main bodies. Under part three of the charter in which the structure and composition of the transitional government provided it is articulated that:<sup>286</sup>

“There shall be established a transitional government consisting of a council of representatives and a council of ministers.”

An apparent consideration of this specific provision may lead a given reader to draw a conclusion that, the transitional government was with two bodies only without the judiciary as its third branch. But, a look into the wordings deployed in 9 (f) of the charter whereby the judiciary

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<sup>284</sup> Ibid, Article 85.

<sup>285</sup> Ibid, Article 101.

<sup>286</sup> Transitional Period Charter of Ethiopia, *supra* note 235, article 6.

as an administrator of justice was provided, reveals that the judiciary as one branch of government was there.

Hence, the transitional government was a combination of council of representatives headed by the head of state (president), council of ministers headed by the prime minister and the judiciary.

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The council of representative-the house of representatives of national liberation movements, political organization and prominent individuals-as the legislative body of the transitional government was, with powers to approve the appointment of the prime minister, members of council of ministers, adopt national budget, provide for the administration of justice on the basis of charter ...etc.<sup>287</sup>

Courts were recognized as the principal administrator of justice; whereas, the responsibilities of council of ministers (the executive) were not provided.

The charter emphatically underscored the independent functioning of organs of the government. For instance, it explicitly provided judicial independence in the administration of justice.<sup>288</sup>

On the other hand, the interim constitution furnished the system of checks and balances between and among branches of government in their execution of responsibilities conferred upon them.

In this regard, the council of representatives (the legislative body) was enabled to crosscheck the activities of the other two branches. The charter under its Article 9 (nine) paragraph one empowered it to oversee the activities of the council of ministers (the executive).

Besides, the council of representatives when approving the appointments of the prime minister and members of the executive and ratifying the national budget can control the executive branch of the government, so that the later cannot abuse its powers in a way that contravenes the values upheld in the charter.

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<sup>287</sup> *ibid*, article 7 and 9.

<sup>288</sup> *ibid*, article 9.



It had also the means to control the judiciary; particularly, when it prepares and proclaims their enabling act and when it ratifies the national budget. The charter is silent as to the executive involvement in the check and balance system.

The judiciary, on its part, was with the authority to serve as the watch dog on the other two branches. The base of this authority lies on the charter's supremacy clause that heralded: "...any law or decision in contrary to the charter shall be null and void"<sup>289</sup> and article 9 (f), allowed court's involvement in the protection and fulfillment of fundamental rights of individuals. Hence, when any law (proclamation and regulation) that could be traced from the other two bodies found as contrary to the fundamental rights as recognized in the charter, at least the victim could appear before authorized courts for redress. In other words, judicial review of legislative or executive acts as a road to check and balance was there, explicitly, with regard to basic rights of individuals.

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Beyond basic rights of individuals, for instance cases that involve ethnic based issues (e.g. self-determination rights) could appear before courts, so that the court crosschecks the alleged activity as per the values enshrined in the charter. This is justified; first owing to the supremacy clause of the charter that made all provisions in it supreme of all. As the right to self-determination of the right holders is the right embodied in the charter, it follows that, both legislative acts (proclamations) and executive acts (e.g. regulations) are subordinates to it.

Second, there was no another institutional mechanism provided in the charter to handle cases that would arise based on rights declared in the charter. Above all, it was provided as if it is courts' inherent authority to handle disputes of such cases.

Hence, when acts of the legislative or executive contravenes the values embodied in basic rights and freedoms of the charter, courts with jurisdiction would entertain it-judicial review of legislative and executive acts. However, there was no a system of constitutional review in terms of guarding the power separation among the three branches of government.

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<sup>289</sup> Ibid, article 18.

The constitution that has been in practice since the 21st day of August 1995, unequivocally introduced four main objectives. These are; first, creating a room for full and free exercise of the right to self-determination of nations, nationalities and peoples of Ethiopia; then, building political tradition on the basis of rule of law so that it would bring long-lasting peace; third, guarantying a democratic order and finally bringing socio-economic developments.<sup>290</sup>

The authors of the constitution convinced themselves that, full respect of basic rights of individuals and peoples is a prerequisite for the realization of the objectives. They believed that simple provision of these rights would probably lead to destructive consequences; so, they emphatically articulated the exercise of these rights to be on the basis of equality of religion, gender, culture ...etc. Subsidiary, they heralded the need to purify the historically unjust relationships that underwent in and after the completion of the annexation process and to pursue the common values that would persistently tie them together. They also emphasized the importance of building one economic community out of them that would move on the basis mutual benefits.<sup>291</sup>

By keeping these end and means, they produced a constitution that declared Ethiopia as a “Federal Democratic Republic”<sup>292</sup> state in which two levels of governments; namely, federal and state governments operate with in the suit tailored for them independently. Such reformation of the previously existed unitary state to the federalist one had two basic reasons: the reason to be under one roof for certain purposes<sup>293</sup> and the reason to operate independently for another.<sup>294</sup> These reasons, made the new Ethiopia to have organs of government (legislative, executive and judiciary) at both levels of governments (federal and state governments).

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<sup>290</sup> FDRE constitution, *supra* note 5, preamble.

<sup>291</sup> *Ibid.*

<sup>292</sup> *Ibid*, article 1.

<sup>293</sup> See for instance, Yonatan Fisseha “Institutional Recognition and Accommodation of Ethnic Diversity: federalism in South Africa and Ethiopia”, p. 127.

<sup>294</sup> *Ibid*, p. 109.

From these, it naturally follows that there is constitutional powers distribution between the two governments and among the three branches of government within these two governments. Accordingly, under the coming sections an attempt will be made as to such power divisions' room in providing limited government.

Concerning the vertical power division, the political powers (legislative, executive and judiciary) in the FDRE constitution are conferred upon two governments operating distinctively.<sup>295</sup>

The manner of power division (vertical) has two pillars with in it: these are facilitating shared rule through common institutions and self-rule for constituent units.<sup>296</sup> Accordingly, "the federal government is empowered with those powers that are shared in common; whereas the states are provided with those powers considered relevant for the expression of regional identity."<sup>297</sup>

On the basis of these assumptions for instance, the federal government is given the power to protect and defend constitution; to formulate and execute the country's financial monetary and foreign investment policies and strategies; to establish and administer national defense and public security forces as well as a federal police force; administer the national bank, print and borrow money, mint coins....; to formulate and implement foreign policy and negotiate and ratify international agreements...etc.<sup>298</sup> These powers, that constitute the most common interests of the states, are exclusively granted to the central government.

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<sup>295</sup> Ibid, article 50 (1) and (2).

<sup>296</sup> See, Solomon Negussie, "Fiscal Federalism in the Ethiopian Ethnic-based Federalism System" (wolf legal publishers, 2008), p. 31. He articulated such type of interaction as "...the constitutional contractual agreement between the units to form a general cooperative authority, in contradistinction with a unitary system."

<sup>297</sup> Assefa Fisseha, *supra* note 234, pp. 301 and the following.

<sup>298</sup> FDRE constitution, *supra* note 5, article 51 and 55.

On the other hand, the constitution granted to states exclusive powers to establish a state administration...; to establish and administer a state police force and to maintain public order and peace within the state; and other similar powers are also provided.<sup>299</sup>

Beyond these exclusive powers, on areas that neither be granted to the center, nor to states; the constitution allowed both entities operations.<sup>300</sup> These areas basically include socio-economic spheres. The manner of exercising these powers, in the wording of the constitution, can be categorized as framework and concurrent powers; in the former case, the center is given the power to enact general legislations; whereas states are allowed to come up with detailed legislations. As to the latter case, each of the governments does have joint powers.<sup>301</sup>

As a framework power division in the constitution, both levels of governments' powers to prepare and execute policies, strategies and plans concerning socio-economic and developmental lives of the governed, are provided<sup>302</sup> in order for paving a way to enable parallel exercise of such power, the federal government was granted only an overall (general); whereas, powers on details subject matters of this power are left to the concerned state.<sup>303</sup>

In an attempt to address the dilemma on how to demarcate the clear cut point between these framework powers, Assefa Fisseha articulated that, "...as states are endowed not merely with

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<sup>299</sup> Ibid, article 52.

<sup>300</sup> As stated by Assefa Fisseha, the reasons for calling both entities in the decision making process arise; first, impossibility to draw clear responsibility division; second, spillover effect that result owing to the very nature of these responsibilities ...etc. Assefa Fisseha *supra* note, 234, p. 312.

<sup>301</sup> Ibid, p. 320.

<sup>302</sup> FDRE constitution, *supra* note 5, article 52 (2) (c) and 51 (2).

<sup>303</sup> See for instance, the phrase "overall, socio-economic and developmental" under Article 57 (2) of the constitution which indicates, the intention of the authors to exclude the central government from engaging in detailed activities of such authority.

Further, Article 55(2) (10) of the constitution limited the power of the legislature to approve "general policies and strategies..." not detailed one. The word 'general' is self-evident of this claim.

administrative power but with the power to formulate and execute economic, social and developmental policies. Hence, the federal government cannot exhaustively legislate on all these matters.<sup>304</sup>

With regard to concurrent powers attributed to both entities, for instance, they are with a power to jointly levy and collect; first; profit sales, excise and personal income taxes on enterprises they jointly establish; second; taxes on incomes derived from large-scale mining and all petroleum and gas operations, and royalties on such operations.<sup>305</sup>

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Hence, the federal (central) government is not at liberty to exercise additional powers than those exclusively reserved to it on the basis of Article 51 (fifty one) and 55 (fifty five) and the shared powers it can exercise On the basis of specific powers enshrined under Articles 51 (2) and 51 (3). The later powers are shared with states on the basis of Art 52 (2) (c), which literally resembles framework powers.

The other shared powers that can be exercised by the center with states are those taxation powers specified under Article 98 of the constitution.<sup>306</sup> Along with this, some scholars raised the probability of states capability to share, central government's power on penal matters that are not covered by the criminal code of Ethiopia.<sup>307</sup> Their stand rests on Article 55 (5) of the constitution which reads:

“It (House of Peoples’ Representatives) shall enact a penal code. The states may, however, enact penal laws on matters that are not specifically covered by federal penal legislation [emphasis mine].”

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<sup>304</sup> Assefa Fisseha *supra* note, 234, p. 317.

<sup>305</sup> FDRE constitution, *supra* note 5, article 98.

<sup>306</sup> Solomon Nigussie, *supra* note, 286 p. 64. He asserted that Article 98 of the constitution is no more operative. An amendment of this specific provision has been made and need to be interpreted as “...taxes which are determined and administered by the central government but the proceeds of the taxes are shared with the states.”

<sup>307</sup> Assefa Fisseha *supra* note, 234 p.327.

In short, beyond its exclusive powers and those powers it shares with states, the federal government cannot by its own motion step into exercising extra powers.

The same is true for states. Beyond those seven jurisdictions stipulated under Article 52 (2) of the federal constitution, and the residual powers (powers that neither given to the federal government alone or concurrently with states) reserved to them with the exception of undesignated powers of taxation. They cannot exercise some other powers legitimately.

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It is for this very reason that the constitution forewarned both levels of governments by imposing reciprocal duties to respect one-another powers. With respect to their reciprocal duties, Article 50 (8) of the constitution reads;

“Federal and state powers are defined by this constitution. The states shall respect the powers of the Federal Government. The Federal Government shall likewise respect the powers of the states.”

On the basis of Article 52 (2) (a) and 50 (4) of the constitution, the power divisions are not restricted only between states and the federal government; but also, even within the states themselves powers can be delimited, as they are required to devolve adequate power to the lowest units of government (*kebele*, or *woreda* [sub-administrative units]) so as to enable the governed to have a say in the administration of such units.

On the other hand, the powers of the federal government were not meant to concentrate in the hands of one full-fledged entity; rather the powers are divided between and among the three (legislative, executive and judiciary) organs that together form the government.<sup>308</sup>

Accordingly, the House of Peoples Representatives (HPR) as the highest organ of the federal government constitutionally enabled to have the following legislative powers and functions.<sup>309</sup>

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<sup>308</sup> See, minutes of legislation on the draft constitution of 1995 Volume 4, No. 24, pp. 25. The authors had emphatically discussed on the need to have a government with divided powers. The phrase “የሰልጣን ክፍፍል ግልፅ ሆኖ እንዲያይ የሚፈለግ በመሆኑ [the powers of each arms of government shall be assigned in explicit manner]” is an evidence of it.

The legislative powers amongst others include the power to enact laws on; utilization of land and other natural resources, of rivers and lakes crossing the boundaries of the national territorial jurisdiction or linking two or more states; inter-state commerce and foreign trade; air, rail, water and sea transport, major roads linking two or more states, postal and telecommunication services; nationality, immigration, passport, exist from and entry into the country, the rights of refugees and of asylum; the possession and bearing of arms; and beyond aforementioned areas, its powers of legislation is also extended to matters that fall under federal jurisdiction.

Along with the legislative power it has the following responsibilities (functions):<sup>310</sup>

First, the responsibility to determine the organization of national defense, public security, and a national public force, which also includes the power to investigate and take necessary measures on these institutions, provided that their operation pose a threat on human rights and the national security. Second; the responsibility to cross-check the decree of state of emergency that is to be declared by executive, to declare state of emergency and to proclaim war.

Third, the responsibility to approve socio-economic and developmental policies and strategies prepared by the council of ministers and submitted to it; the responsibility to ratify international agreements adopted by the executive; the responsibility to approve appointment of officials nominated by the concerned body and submitted to it by the Prime Minister.

Fourth; the responsibility to adopt federal courts' annual budget and to approve federal annual budget submitted to it by the council of ministers. Besides, it has the power to impeach the Prime Minister and other members of the executive. This power is entrenched to take any necessary actions provided that one-third of the house's members requested it.

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<sup>309</sup> FDRE constitution, *supra* note 5, article 50 (3), 51 and 55.

<sup>310</sup> *Ibid*, article 55 (2).

There are also other responsibilities and powers; for instance it has responsibility to hear periodic reports by the Prime Minister on the activities of the executive; the responsibility to produce enabling act to the executive so that the later enact regulations.

The other organ that has a constitutional base is the executive. It encompasses the Prime Minister as its head with members of council of ministers.<sup>311</sup> To name a few of its principal tasks;<sup>312</sup> it implements legislative actions and other decisions upheld by house of peoples representatives; draw and implement the annual budget, provided that in the latter case the house (house of people representatives) approves the draft budget; ensuring the observance of law and order; formulating country's foreign policy and exercise overall supervision over its implementation; selecting and submitting for approval to the house of peoples representatives nominations for post of... the president and vice president of the federal supreme court...; enacting regulations pursuant to powers vested in it by HPR.

As the third branches of government we have the judiciary. The judicial power of the federal government rests in the hands of courts that operate at three levels; the federal first instance court, high court and Supreme Court. The federal Supreme Court is the highest judicial sect that has the final judicial power over federal matters and through, its cassation power, holds the final say on any matters (states or federal) that contain basic error of law.<sup>313</sup>

The constitution explicitly declares an independent operation of judicial authority which it sought through protection clause that prohibits unjustified interference on behalf of governmental bodies, their official or any other source; by calling judges to strictly incline themselves to the law when exercising their functions; by granting judges protection that avoids early removal of them before reaching the lawful retirement age (60) provided that they comply with disciplinary rules, demonstrate sustainable efficiency and remain healthy so that they can

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<sup>311</sup> Ibid, article 72 (1) and 74 (1).

<sup>312</sup> Ibid, article 74 and 77.

<sup>313</sup> Ibid, article 79 (1), 78 (a) and Article 80 (3) (a).



discharge the task conferred upon them.<sup>314</sup> The judges are appointed either by recommendation of the Prime Minister or judicial administration council.

The president and vice president of the Federal Supreme Court are upon recommendation by the Prime Minister appointed by the House of Representatives.<sup>315</sup> Other federal courts judges are nominated by Judicial Administration Council (JAC) and submitted for approval by the Prime Minister to the House of Peoples Representatives.<sup>316</sup>

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The Supreme Court took the responsibility of preparing federal courts' budget. Then HPR would approve it. If the later approves the draft, then the Supreme Court will administer it.<sup>317</sup>

On the basis of the constitutional frame work discussed here in above cases have been entertaining both before the CCI and the HOF. The following two cases are put as a sample of cases that have been disposed by these organs, particularly on vertical power division as provided in the FDRE constitution.

The first is the HOF's ruling on article 98 of the FDRE constitution that incorporates subject matters of concurrent taxation powers over which the two levels of governments are empowered to levy and collect taxes.

By reasoning out that, first, "powers of taxation mean the power to levy tax rate and collect the proceeds. If the two levels of government are eligible to exercise it at the same time, it would mean the two authorities would levy the rate and collect the proceeds independently. This would probably lead to tax competition between the two governments. If so, conflicts or mismatch between them is inevitable; hence, in the absence of supremacy clause of either of the laws the way out would be difficult.

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<sup>314</sup> Ibid, article 79 (4) (a-c).

<sup>315</sup> Ibid, article 78 (1), 79 (2), (3) and 4.

<sup>316</sup> Ibid, article 81 (1), 74 (7) and 55 (13).

<sup>317</sup> Ibid, 79 (6).

Second, if it is to be exercised by both governments same tax payers may probably pay different rates for same products and a single tax payer may fall under the authority of two bodies. Third, the possibility of tax evasion; because, if these entities fail to cooperate and exchange adequate information, then some of few tax payers may take it to their advantage and evade or avoid taxation.” Finally, the constitution was interpreted to mean those taxes under article 98 have to be levied and collected by the central government but the proceeds are compulsorily shared with states.<sup>318</sup>

The second is the CCI’s ruling in ERCA v. Mr. Hiredin Husen File no. 1273/2007, December 21, 2014. In this case, the parties before the court<sup>319</sup> contested;

First; the constitutionality<sup>320</sup> of article 52 (4)<sup>321</sup> of Addis Ababa city government revised charter proclamation no. 361/2003 that conferred the city government a fiscal power to assess and collect profit, excise, and turn over taxes from individual businessmen trading in the city that it would have been constitutional had Addis Ababa was regional government.

Second, income tax proclamation no. 286/2002 whose scope of application is extended to cover individual businessmen and lower tax payers that are operating in regions and Addis Ababa city, took fiscal powers of states recognized under article 97 of the constitution.

Then the court (the federal first instance court 9th criminal bench division) handling the case referred to the CCI on November 23, 2014.

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<sup>318</sup> Solomon Nigussie, *supra* note, 286 pp. 140-141.

<sup>319</sup> See, a decision by federal first instance court in ERCA v. Mr. Hiredin Husen, (file no. 205375).

<sup>320</sup> The argument on the side of the plaintiff before the court rests on the idea that article 97 (4) of the constitution confers such powers to entities recognized as states under the constitution; not to city governments. This article states that, “States shall levy and collect profit and sales taxes on individual traders carrying out a business within their territory.”

<sup>321</sup> The caption of article 52 says “fiscal power” and out of this fiscal power under its sub article four reads “the city government shall assess and collect profit, excise and turn over taxes from individual businessmen trading in the city.”

CCI in settling the constitutional question raised on article 52 (4) of Addis Ababa city government revised charter proclamation no. 361/2003, had revisited the right to self-administration in centralized and federalist forms of governments and deduced that in the later accountability is to peoples they represent and in the former to the higher organ that controls them.

It then stated that, “on the basis of this assumption the authors of the FDRE constitution with the intent to guarantee their autonomy, had conferred the concerned states adequate power of administering themselves. The constitutional principles provided in article 46 (1), 47 (1), 49(2), 49(3), 50(2), 50(4), and 88(1)<sup>322</sup> are evident of this objective. Hence, in order to realize the right to self-rule recognized in the constitution, amongst other, the power to levy and collect taxes is pivotal. This was considered to grant them the freedom of financing their expenditure responsibilities.” It then held that, “on the basis of article 49 (2), 97 and 100<sup>323</sup> of the constitution, article 54 (4) of proclamation no. 361/2003 doesn’t contravene the constitution. Hence, the case is inadmissible.”

As to the claim against, proclamation no. 286/2002 it held that, “it provides rules that guide tax administration and implementation assigned to the federal government; it doesn’t take fiscal powers assigned to states in the constitution; nor does it challenge states’ freedom of levying and collecting taxes on the basis of powers assigned to them in the constitution. Hence, the case is inadmissible”

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<sup>322</sup> Article 46 (1), states that, “The Federal Democratic Republic shall comprise of States.” article 47 (1) enumerates the nine regional governments recognized in the constitution; article 49(2) states that, “The residents of Addis Ababa shall have a full measure of self-government. Particulars shall be determined by law.” article 49(3) states that, “The Administration of Addis Ababa shall be responsible to the Federal Government.” article 50(2) states that, “The Federal Government and the States shall have legislative, executive and judicial powers.” article 50(4) states that “State government shall be established at State and other administrative levels that they find necessary. Adequate power shall be granted to the lowest units of government to enable the People to participate directly in the administration of such units.”, and article 88(1) states that, “Guided by democratic principles, Government shall promote and support the People’s self-rule at all levels.”

<sup>323</sup> Article 100 reads that “In exercising their taxing powers, States and the Federal Government shall ensure that any tax is related to the source of revenue taxed and that it is determined following proper considerations. ....”

### 4.3. Constitutional Review as a Guardian Democracy to Self-government:<sup>324</sup> the Right to elect and to be elected

In the era of the 1931 imperial constitution, citizens of Ethiopia at that time were not granted with the freedom to decide on who should be their ruler or representatives--tutelary democracy. The constitution, by denying republican form of government, declared eligibility to the throne (the highest position in the country) through blood tie to the emperor.<sup>325</sup>

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Even, membership to the two deliberative chambers: (the house of senate and chamber of deputies) was not on the basis of election.

These chambers, that were with the responsibility of discussing proposals transmitted to them by the ministers of the various departments and promulgating laws, provided that confirmation by the king is secured their members were appointed either by the emperor himself or by *mekuanent* (nobilities) and *Shumoch* (local chiefs). In the case of chamber of senate whereby membership was limited only to *mekuanents*, the emperor was with a power to appoint them; whereas in the case of chamber of deputies membership was up to the whim of the *mekuanents* and *shumoch*.

In the latter case, peoples were denied the right to elect their representatives because the ruling faction saw them incapable.<sup>326</sup>

In similar manner with its predecessor, the 1955 constitution did not bestow citizens to have a say on who should rule them. Under its Article 2 it reads: “The imperial dignity shall remain perpetually attached to the line of Haile Selassie I, descendant of King SahleSelassie, whose line

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<sup>324</sup> Self-government refers the concept that peoples have inherent right to govern themselves which they would exercise it through electoral processes- by exercising their right to elect and to be elected. See, Thomas E. Patterson, *supra* note 2, p. 47.

<sup>325</sup> Ethiopian constitution of 1931, *supra* note 189, Article 4.

<sup>326</sup> *Ibid*, Articles 31, 32, 34, and 35 respectively.

descends without interruption from the dynasty of Menelik I, son of the queen of Ethiopia, the queen of Sheba, and king Solomon of Jerusalem.”

In contrast to its predecessor, the 1955 constitution made membership to chamber of the deputies, conditional to the vote by the people.

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Under its Article 95, it unequivocally provides:

“All Ethiopian subjects by birth of twenty one years of age or more who are regularly domiciled or habitually present in any electoral district and who possess the qualifications required by the electoral law, shall have the right to vote in such electoral district for the candidates from such district as members of the chamber of deputies...”

But, there was no institutional mechanism of guarding this principal road to a partial self-government.

The draft constitution of the 1975 that denied the king’s involvement in political and administrative affairs of the nation had established two houses- House of Representatives and senates- and made membership to these houses conditional on the votes of citizens who are with a minimum of eighteen years of age. For citizens to appear as a candidate they shall be a minimum of twenty five years of age.<sup>327</sup> It had institutional mechanism of guarding the self-government through courts of law. But, we were not destined to enjoy its fruits.

The constitution of 1987 renamed the previous Ethiopia to “people’s democratic republic of Ethiopia” to mark power transfer from the monarchy to the people. In this constitution the “working people” of Ethiopia were recognized as genuine representatives of the people and holder of the sovereignty.

On this ground under Article 2 Sub 2 of the constitution, it was plainly provided that:

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<sup>327</sup> The draft constitution of 1975, *supra* note 203, article 84 and 85.

“The working people exercise their power through the National *Shengo* and local *shangos* which they establish by election. The authority of other organs of state shall drive from these organs of state power [italics mine].”

Hence, the working people of Ethiopia were meant to exercise their sovereign power through the medium of election. It provided that it should be opened, except in special cases, to all Ethiopians who could be voters or candidates.<sup>328</sup> However there was no independent institutional mechanism to guard this value through constitutional review.

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As the principal body in the transitional charter,<sup>329</sup> the council of representatives accorded with, amongst others, the responsibility to facilitate the constitution making process. To this end, the charter imposed up on it the duty to establish constitutional commission that would prepare draft constitution. Upon approval of the draft constitution submitted to it by the commission, the council would present it for public discussion. Then, the constitution will finally be ratified by a constituent assembly (a body elected by the public with the purpose of adopting and ratifying the constitution).<sup>330</sup> On the basis of the constitution, a nationwide election would be held, so that a party or parties that gain majority seats in the national assembly would hand over the power from the transitional government.<sup>331</sup>

The FDRE constitution recognized inherent rights of citizens to elect and to run as a candidate of election. In comparing our electoral system of the federal lower house (HPR), in the eyes of

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<sup>328</sup> PDRE constitution, *supra* note 194, article 50 (1).

<sup>329</sup> After an apparent defeat of the military government, it was the EPRDF (TPLF, OPDO, ANDM and SEPDF) that became the first to control the seat of the previous government (the palace at *Arat Kilo*) and appeared as the provisional power holder since May 27 1991, up until 22nd July 1991 the time that marked the promulgation of the transitional period charter of Ethiopia. See, for instance, Leencoo Lata “The Ethiopian state at the cross roads: decolonization and democratization or ‘disintegration?’”, (red sea printing, Inc. 1999), p. xi

<sup>330</sup> Transitional period charter of Ethiopia, *supra* note, 235, article 10 and 11.

<sup>331</sup> *Ibid*, article 12.

major electoral systems in the world, one need to refer both the FDRE constitution, specifically its Art 54 sub 2 and Art 102/1, along with its subsidiary regime of electoral system, proc.no.111/1995 which later repealed and replaced by Electoral Law of Ethiopia Amendment Proclamation No.532/2007, specifically, article 13(2) and article 25 respectively.

These laws stipulate that, “candidate with more votes received than that by other competitors within the constituency shall be declared winner”. In other words, what the system opted is simple majority, which is also known as first past the post. Membership to the upper house (HOF) is either through appointment by state councils or direct election by the people.<sup>332</sup> If the concerned region inclined to the second option it may take one of the types of electoral system.

On the basis of these laws national election in Ethiopia has been conducted for four rounds and the fifth round will be conducted on May, 2015.

The following case shows the major and the only case till this day, disposed by HOF as to the right to elect and to be elected.

Facts of the case depicts that in the second round of national election the highlanders (*Amhara, Oromo, Tigray and Agew*) in *Benishangul Gumuz* region had run as a candidature for election in a regional state council at *Assosa* and *Bambis* constituency. However, such start of the highlanders couldn't win the heart of one of the indigenous ethnic groups (*Gumuz, Berta, Shinasha, Komo and Mao*) party-the *berta* nationality's party. Then it brought its claim before the NBE on the ground that the highlanders couldn't run for election for they didn't speak the *Berta* language. After taking in to account respondents stand on the claim brought against them, on the basis of proclamation no. 111/1995 article 38 (1) (b) the NBE held that “the highlanders couldn't run as a candidate for seats in the council of the region”.

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<sup>332</sup> Till these days election to assume seat in HOF has not been held. Members have been represented from state councils.

On March 5, 2000 (*yekatit* 27, 1992 E.C.), the highlanders had brought the case to the attention of HOF. Then the house on the basis of article 62 (1), 82 and 84 referred it to CCI to consider the case.

The CCI on its session held on July, 2000 (*sene* 28, 1992 E.C.) in stating its majoritarian recommendation, under scored that the constitution under its article 38 conferred up on individuals the right to have a say through their representatives in a governmental decision making process. Then it held that the proclamation, by providing language as a prerequisite to run for election abridged the value established under article 38 of the constitution.<sup>333</sup>

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The HOF after it had received recommendation by CCI referred the case to prominent legal professionals for re-consideration purpose. The professionals had established two issues to settle the case. These are; first, whether considering language as a requirement to run for election as provided in the proclamation offends the constitution; second, whether the decision of NBE was constitutional.

Then, they upheld the following points as their pillars of the recommendation; first, objectives held in the constitution; second, governmental structure and sources of government authority; third, basic rights and freedoms of individuals and groups as provided in the constitution; finally, the history of Ethiopia, particularly the era in which those unjust relationships had occurred.

In addressing the first issue, they emphasized the supremacy of constitution, that Ethiopia is a country with federalist form of government whereby for purposes of shared rule and self-rule two levels of government operates, and that nations, nationalities and peoples of Ethiopia are the ultimate power holder.

They stated that “if the ultimate power rests on nations, nationalities and peoples of Ethiopia, the right to elect and to be elected should be fully respected, so that citizens can elect or revoke their

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<sup>333</sup> The dissenting opinion argued that the proclamation by providing language as a requirement to run as a candidate had strengthened the self-rule constitutional principle provided in the constitution. It didn't contravene the rights considered under article 38 of the FDRE constitution.



rulers. It is respected mean, they are empowered to rule themselves which is the great input for the growing democracy” and they added that, “a look in to article 25<sup>334</sup>, 39 (2)<sup>335</sup> and (3)<sup>336</sup> depicts that the authors of the constitution inclined to the equal enforcement of basic rights and freedoms of individuals and groups. They forewarned us not to discriminately enforce one for the sake of the other. So they shall be enforced on equal basis.”

Then they deduced that, “the decision to elect and not to elect should be a matter left to the concerned people. But, to introduce the party program to the electorate and to ensure the respectability of the rights and interests of the people, knowing the working language of the regional state would be better. So providing language as a requirement by no means abridge the objective sought in article 38 of the constitution.”

In addressing the second issue-whether the decision reached by NBE is constitutional-, they stated that “as it can be inferred from the facts of the case the working language of the region is Amharic. So limiting their right to run as candidates on the ground that they couldn’t speak a language [*berta* language] other than the working language of the region, is constitutionally unjustified.

Considering it as valid would damage people’ self-government and also, obstructs the move to create one economic community. Hence, on the basis of article 9 (1) of the constitution the decision rendered by NBE is reversed.”

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<sup>334</sup> It reads, “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall guarantee to all persons equal and effective protection without discrimination on grounds of race, nation, nationality, or other social origin, color, sex, language, religion, political or other opinion, property, birth or other status.”

<sup>335</sup> It reads, “Every Nation, Nationality and People in Ethiopia has 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.”

<sup>336</sup> It reads, “Every Nation, Nationality and People in Ethiopia has the right to a full measure of self-government which includes the right to establish institutions of government in the territory that it inhabits and to equitable representation in state and Federal governments.”

The house adopted this recommendation of the professionals on its 1<sup>st</sup> year, 1<sup>st</sup> session in 2001.<sup>337</sup>

## 5. Assessment

a look in to the constitutional history of Ethiopia, particularly, as to institutions empowered to exercise the power of constitutional review, reveals that there had been a personal (the king) model in the first two imperial constitutions, the judicial review model in the constitution that had established constitutional monarchy, a quasi-parliamentary body in PDRE constitution of 1987, the case in the transitional charter of Ethiopia in which the judiciary was restricted only to fundamental rights, and the case in FDRE constitution whereby the HOF through the assistance of the CCI exercises the power.

The system of constitutional review in constitutional history of Ethiopia was centralized and preventive in the first two constitutions of the imperial regime, decentralized and posteriori in the draft constitution of 1975, centralized but repressive (posteriori) in the PDRE constitution of 1987, decentralized and repressive in the transitional charter and centralized and posteriori in the 1995 FDRE constitution.

A look in to Institutional organization of the case in the 1931 and 1955 constitutions reveals that there was a one man constitutional reviewing system. In 1975 draft constitution it was for courts. There was a mono panel system of judicial review and number of judges in courts at all levels, minimum age of judges, remuneration, and life tenure were provided to be determined by subordinate law.

Under the 1987 PDRE constitution there was a single panel system and was composed of a president, vice presidents, a secretary and other members whose size are left to be determined by laws enacted by the council itself.

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<sup>337</sup> See, decision rendered by HOF on the right to elect and to be elected case that rose in the *Benishangul Gumuz* region, (House of Federation, Journal of Constitutional Decision, vol.1, no.1, July, 2008) pp. 14-34.

Under the transitional charter there were no detail rules of courts' composition, but, it can be deduced from courts' conventional structure that there was a mono panel system of reviewing.

In the 1995 FDRE constitution there is a mono panel system; but, alongside the HOF there is CCI whose principal task is refining whether cases are admissible for interpretation and supporting the house technically.

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The house is composed of nations, nationalities and peoples of Ethiopia and the council has eleven members two from the Supreme Court (the president and vice president), six legal experts known for their high moral standing and professional competence, three members from the HOF.

Considering the degree of accessibility, the post 1995 institutional mechanism of enforcing constitutional supremacy appears narrower, especially when it is seen in light of that of Germany. Besides, as the umpire situates at the capital, applicants from peripheries may lose the courage to produce their case to the attention of CCI or may not quest the court to refer their case to the CCI.

Members of the CCI are handling this task as their secondary business. Most of them are known in their other official capacities and they meet once in a month. Lessons from the experiences of peer nations must be drawn and reform to the existing system should be materialized.

For instance, as provided under article 3 (2) of the CCI proclamation for any claim to be admissible it should exhaust remedies available at courts of law or administrative remedies from the concerned government organ. Unlike the first one, in the latter instance for a case to ripe for adjudication, the claim must arise out of the final decision against which no appeal lies. But, there are no rules of procedure when a direct access to the umpire for reasons of irreversible losses is available to the applicant as the case in other jurisprudences (Germany and RSA).

Second, on the basis of article 4 and 2 (9) persons- natural or juridical- are competent to take their case to CCI. However, there are no rules of procedure that demarcate the border line between and among citizens and foreigners or public and private legal persons.

For instance, Ethiopia has been a home for tenth and thousands of refugees from neighboring nations and also it is a country in which many foreign tourists come in and out. What if, a certain person base his constitutional claim on rights granted to every one under the constitution (e.g. a foreigner who on the basis of article 32 of the constitution claims restriction on his right to movement)? Besides, there are subjects of property rights that foreigners are not allowed to own; the typical case is ownership of immovable property.<sup>338</sup>

Can a foreigner base his constitutional claim on immovable properties? For instance, the concerned court may, for lack of vested interest as provided under article 33 (2) and 244 (2) (d) of the civil procedure code of Ethiopia, declare that the case is inadmissible and rejected a remedy without getting in to the merits of the case. Here a certain reasonable man may welcome the court's decision. Then, this foreign national may take his appeal to the CCI. Which explicit provision would enable it to settle the case?<sup>339</sup>

Finally, among governmental bodies, executive and legislative organs at the two levels of government are allowed; but, the federal president is not granted to produce constitutional claims in his or her official capacity.

As the president is the head of state of the country, it would have been better to confer up on it such privilege. In this regard experience of the Federal Republic of Germany can be drawn.

Taking in to account the Institutional mechanism of enforcing Basic rights and freedoms,<sup>340</sup> if we look in to the traditional constitutions, they were inadequate to protect human rights of

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<sup>338</sup> Civil Code of Ethiopia, article 390-393.

<sup>339</sup> On the basis of article 3 (2) (a) of CCI proclamation no. 798/2013 it may be argued that the case is non-justiciable; so CCI cannot assume jurisdiction on such cases. But, what I am arguing is that, it should be plainly stated in the proclamation that which types of claims are non-justiciable.

<sup>340</sup> Here it is worthwhile to reckon that the class and national oppression that had been in operation since the last decades of 19th century were reasons for denial of basic rights and freedoms of the peoples of Ethiopia in every direction.

individuals and peoples; as well the first two imperial constitutions of Ethiopia owing to their claw-back sides in the constitutions and the absence of institution to enforce these rights, were inadequate.

Though it was not put in practice, the 1975 draft constitution of the last days of the imperial regime had a promising protection and institutional enforcing mechanism-judicial review- of human rights and it was broader than the previous two imperial constitutions.

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The 1987 PDRE (*derg*) constitution had a wider room for human rights; but, owing to lack of independent institutional mechanism of enforcing these rights and the presence of a one man and his compatriots government, I can say, these rights were the most politically abused and violated of all times.

Then we had the transitional charter of the 1991 that had directly considered these rights as provided in the UDHR. It upheld the court as an independent institution to guard them. But, it couldn't stay in practice more than four years.

Finally, we have the 1995 FDRE constitution whose philosophy of protecting and enforcing these rights triggered from the "unjust relationship" that had been undergoing during the previous regimes. It is for these very reasons that, the constitution reserved one-third of its provision to fundamental rights and freedoms of individuals and peoples. Through its vertical application clause forewarned the government to adhere to the values incorporated in provisions as to basic rights of individuals and peoples.

In order to substantiate their commitment towards these rights, the authors provided a distinct extra-ordinary amendment procedure. To this end, the constitution incorporated institutional mechanism of enforcing these rights through the house of nations, nationalities and peoples of Ethiopia- HOF.

In terms of power separation and power divisions, the history of Ethiopia depicts that it had been a unitary state up until 1991. Under the 1931 constitution the king was head of the three branches of government. In other words, there were no power separations. The 1955 in not less than the

1931 constitution had strengthened the power of the monarchy. The king was the head of the executive, legislative and though not in equal manner with the previous constitution, he was the head of the judiciary. Independent and institutional constitutional review, even as a concept had not been given a place in the constitution.

Then we have the 1975 draft constitution of Ethiopia, which for reason of avoiding power concentration in single hands had denied the king the discretion to involve in administrative and political affairs of the nation. It had horizontally divided powers of government among the three branches of government and these powers were made overlapped in order to enable each arms of government to cross-check the other.

The PDRE constitution of 1987 failed to furnish check and balances between and among branches of the government, through the system of constitutional review. This Lacuna paved a road to one-man rule whereby the president become head of the national *shengo*, the executive and as members of the judiciary was made to be nominated and, dismissed by him became an indirect head of the judiciary too. This necessarily turned the president (Mengistu Haile Mariam) to a dictator ruler with unlimited power.

As underscored by Negede Gobeze, the mother of all these wretchedness was government's preference of the soviet version of constitution.<sup>341</sup>

For the socialist block, constitution is not a document that embodies principles that govern the structure and responsibilities of the government; it is neither an instrument that guides the interaction among the three branches of government; nor, the relationship between the government and the governed. Rather, it represents a document that serves the ruling party's role in the transformation of the society into communism (classless society).<sup>342</sup>

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<sup>341</sup> Negede Gobeze, *supra* note 4, p. 59.

<sup>342</sup> *Ibid*, p. 63.

Based on this assumption, in this type of constitutions the tendency is accumulating governmental powers in the hands of the main body of government (national assembly); horizontal division of powers (separation of power) does not constitute one of their values.<sup>343</sup>

For instance, the parliament as the highest organ of the government in the Bulgarian constitution bestowed with powers of law making and supervision of their implementation. Besides, it plays some sort of executive roles.<sup>344</sup> But, in our case, as the parliament did not operate more times in the year, the council of state exercises its powers. This council is a sum total of representatives of the ruling party with president of the state as its head. Such vertical devolution of power to the council may probably lead into the accumulation of power on a single hand, most probably the president himself or herself.

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In the case of PDRE constitution, the council of state with the president of the republic as its head established as the standing body of the national *shengo* (national assembly) and assumed the following powers and duties that it would exercise when it operates.<sup>345</sup>

These are, responsibilities to ensure the implementation of constitution and other laws; the power to interpret the constitution and other laws; the power to enact laws, revoke regulations and directives, ratify or denounce international treaties; grant amnesty, citizenship and political asylum; the duty to call regular and extra-ordinary sessions of the national *shengo*; the power to oversee the discharge of responsibilities by the council of ministers, the supreme court, the procurator general ...etc.; even the power to declare war when circumstances justify.<sup>346</sup>

In other words, the president and the group (other members of the council) under its order exercise powers of the judiciary or constitutionally enabled institutions (e.g. interprets the constitution and other laws); exercise powers of the legislative (e.g. power to enact laws) and

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<sup>343</sup> Ibid, p. 65.

<sup>344</sup> Ibid.

<sup>345</sup> PDRE constitution, *supra* note 194, article 82.

<sup>346</sup> Ibid, article 83 (2).

powers of the executive (e.g. implement constitution and other laws). Besides, this faction can determine on the very existence of persons in the executive (e.g. members of council of ministers) and the judiciary (justices and president of the Supreme Court).

Post 1991 Ethiopia hosted two constitutions; the transitional period charter (interim constitution) which had been in operation between 1991 and 1995 and the FDRE constitution which has been in operation since 1995. Within these constitutions, there have been two governments; the transitional period government and the government established after the promulgation of the 1995 constitution.

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These instruments, as a contractual documents for the agreements between the government and governed, provided a number of rules, clauses, and even institutional mechanisms that would restrain unjustified operation of the government (the sword and the purse holder). In this context, for instance, the interim constitution had considered an independent operation of the judiciary which was an organ responsible for the administration of justice as a whole, and enforcement of human rights in the charter.

The institutions that constituted the transitional government were established in a manner that enables them to control each other's powers. For example the council of representatives (the legislative body) was with a power to control the activities of the other two branches.

In order to avoid tyranny of the majority, the charter even avoided an amendment clause. These rules and clauses (even their absence [e.g. amendment clause]) had the effect of narrowing the unjustified governmental operations.

A look into the FDRE constitution's rules and clauses reveals that the authors (nations, nationalities and peoples) inclined themselves, amongst other, to limit unauthorized operation of the government. For instance, in providing vertical power division between the two levels of government, the constitution paved the road for power-control mechanism in which each entity can resist unjustified operation of the other.



This is why states as a house of nation, nationalities and peoples through the power of constitutional reviewing can control the abuse of power by the central government in its powers of law making and execution.

In its provisions of horizontal power division among the three organs of government, it also furnished power control mechanisms. For instance, the federal legislative body when it appoints judges, when it determines the size of courts, when it enacts enabling laws and when it approves budgets of courts can control the judiciary.

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The presence of supremacy clause and extra-ordinary amendment procedure along with institutional mechanism of guarding the constitutional principles sought in this power separation and division corroborate these values.

On the basis of Self-government, if we examine what has been in our constitutional history, for instance under the 1931 constitution concept of election, as a major road to self-government, was not there. The ruling ideology was “divine rule” whereby the king was seen as representative of God on earth because of which citizens were not allowed to have a say on who should be their ruler.

Not only this, but also citizens were not empowered to cast their votes for membership to the two chambers that constitute the legislative body. But, the 1955 revised constitution allowed citizens to elect their representatives in chamber of deputies. This principal means of self-government had no institutional mechanism of enforcement.

Though not put on the ground, 1975 draft constitution allowed citizens to cast their votes for their representatives both in the House of Representatives and house of senates. Besides, it had institutional mechanism of guarding this means to the self-government.

The 1987 PDRE constitution had empowered citizens to elect their representatives; but, as the constitution lacked a multi-party system, peoples were not at a freedom to have different representatives. Again, the institution to guard this core right was headed by the principal of the party and other executive members of the government.

These realities intensified for the very reason that such outright exclusion of the mass from governmental decision making process was facilitated through the installment of electoral system in which the people was made mere principal of its representatives in the parliament; not an elector. Members of the parliament were nominated and presented before the people by the ruling party and its affiliates.

In this respective article 64 of the PDRE constitution reads:

“Candidates to the national *shengo* (parliament) shall be nominated by organs of workers’ party of Ethiopia, mass organizations, military units, and other bodies so entitled by law [italics mine].”

The PDRE constitution was tailored in a way that could enable a certain group or person to assume almost all powers of the state, thereby became an authoritarian.

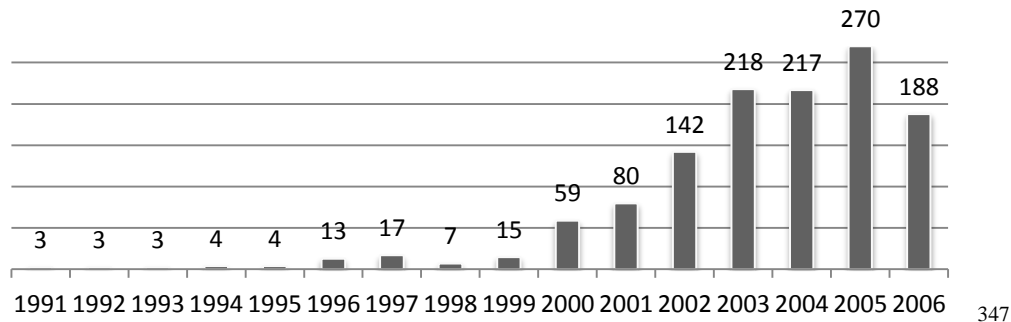
As it had transferred such issue to the next constitution the transitional charter had a lacuna in this regard.

The 1995 FDRE constitution had furnished self-government both at the federal and regional levels. Through election which has been held on the basis of five years interval, the nations, nationalities and peoples, as the repositories of the ultimate sovereignty control the government as a whole. Because, a government that failed to satisfy public demands would be discarded from the office by electing another competent body.

To this end, it has also institutional mechanism- HOF through the assistance of CCI- of guarding the core constitutional principle of self-government.

To conclude, though they are small in number the constitutional principles sought through the protection and enforcement of basic rights and freedoms, power separation and division, and self-government have been realized and guarded through the system of constitutional review as provided in the FDRE constitution.

**Figure 3- cases that had been brought to the attention of CCI between 1991 and 2006 E.C.**



However, the independence of the institution, issues of composition and accessibility remain in questions which need to be revisited to step in to the action of upgrading the existing system of constitutional review, so that the growing democracy will be boosted.



<sup>347</sup> The diagram resembles cases that had been brought to the attention of CCI between 1991 and 2006 E.C. the total number of cases are 1243. The highest number of cases was brought in 2005 E.C. which was 270 in number; the least number had been recorded between 1991 and 1993 E.C. where by in each year only three cases had been produced. But, since 2002 cases have been increasing; for instance, in 2002 there happened 142 cases, then in 2003 and 2004, 218 and 217 respectively. In 2006, 188 cases had been produced to the attention of CCI. Before, 2002, cases had not been exceeding 80. In 1994 and 1995 for instance, they were only four cases in each year; in 1996 there were 13 cases, in 1997 only seventeen, in 1999 Only 15, in 2000 only 59 cases, in 2001 only eighty cases and in 2002 it had reached 142. However, only eleven cases had been transferred to HOF.

## Chapter Five

### Conclusions and Recommendations

#### 1. Observations, Proposals and the Way Forward

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The focus in the preceding chapters was on investigating the constitutional review tradition of Ethiopia on the basis of philosophical foundations, historical considerations, the experiences in the international and regional human right instruments, particularly on the enforcement of basic rights and freedoms on international setup and the experience of peer states with relatively stable constitutional democracies. Following from that, this concluding chapter will focus on the outcome of the analysis done.

Studies of prominent legal and political theorists that had been undergone on the subject matter of evolution of state in general and that of government in particular, had suggested human's behavior in state of nature as the main forcing factor to the birth of these two entities. But, the outcome of these studies was not same as to the specific character of individuals in state of nature, which they had considered it either as good or evil. But, if there is a common stand of prominent philosophers in this regard, the undisputed one is, the idea that, life is better in a properly constituted polity.

Then the question that had undergone was what type of government should head these entities, particularly, as to the dilemma of limited or unlimited government? Again there were differences among the leading philosophers. Some of them proposed a government whose power is restrained; whereas, some other called the establishment of unlimited (either by law or morally) government. These different thoughts were the stepping stones for political actions that were triggered in, for instance, modern states of the post medieval period and Free states that started to flourish in post revolution areas of the eighteenth century.

In the former states, the driving policy of the governments' was the survival and security of the state and the statesmen repugnant acts were justified under the guise of "might makes right [የትም ፍጻሜው፤ ዱቁቱን አምጭው]".

Besides, processes of political actions were strictly limited to the knowledge of those that run state apparatuses (administrators or policy makers). Because of these, prioritizing the survival of the republic had been proven to be an instrument to exclude citizens from the administration of state affairs.

However, this was unacceptable in the eyes the advocates of the later type of states who had been calling a governmental system on the basis of free society, whereby broad participation of citizens is furnished, basic rights and freedoms of individuals and peoples are upheld and the power of government is limited.

The earliest advocates of Free states (mainly, the leading personalities of the American Revolution who had been highly influenced by the ideas of naturalists [e.g. John Locke]) documented the main ideas of limited government in their constitution. The idea of having constitution emerged from the idea of government by compact in the revolution era that dictates the existence of written agreement between the governed and government.

The agreement provided the duties and rights each party owes one another. For instance, the governed vowed the duty to pay tax on their part and the government on its part declared its duty to respect and protect their basic rights and freedoms.

But, they did not want to leave this document this way. They feared that constitutionally unrestrained government may on some other day defeat the contractual obligation; hence they inserted and developed the ingredients that can limit its authority.

The ingredients are; participation of peoples or their representatives in the making of the contract (the document that reflects the consent of both parties); plain recognition of basic rights and freedoms of the governed; governmental powers that do not concentrate in the hands of single man or entity, an objective sought through vertical power division and horizontal power separation operating on the basis of the check and balance system; government by the people (periodical election); supremacy of the constitution against any governmental actions; strict extra amendment procedure (rigid constitution); and institutional mechanism to enforce constitutional supremacy (guardian democracy).

The idea of defending the ingredients through institutional mechanism, for instance, in the American constitution of 1789, was not explicitly provided. It was upheld fifteen years (1803) later through the famous Marbury v. Madison case. Alexander Hamilton was one of the federalists who had been arguing for the empowerment of the judiciary as institution that defend these constitutional ingredients. Later his idea was integrated in this famous case by chief justice John Marshal and has been practiced up until these days.

As creatures of “the supreme being” that is omnipotent and omnipresence in the world, we are culturally and politically diversified. This reality had been the reason that pushed Hans kelsen to adopt another way of institutionally defending these ingredients- constitutional court. We have also another mechanism that has been practiced in different nations, such as, parliamentary body (the case of Finland), or other bodies (constitutional council of French).

These constitutional ingredients and the independent operation of the institutions that guard them, have been the major grounds for the practicability of basic rights and freedoms of the governed, limited government processes, prevalence of rule of law, popular sovereignty, political freedoms and for the overall stability of constitutional democracy.

Their absence all in all or the absence of independent institutional mechanism as a guardian democracy of the ingredients, have been the major reasons to revolt against governments. For instance, unlimited and unrepresentative governments that suppress basic rights and freedoms of individuals and peoples were the major reasons for the mass revolutions in USA and France which finally led the downfall of the governing regimes. The subsequent democratic governments in these nations have been the reason for prosperities mentioned here in above.

As Ethiopians, we have our own distinctive history since ancient times. Particularly, a look in to the modern history of Ethiopia reveals that in its first periods the move on parts of main actors of state was towards the annexation of the present day southern and south eastern parts of Ethiopia and after the successful completion of this project, the hearts of the rulers inclined to the implementation of the nation building agenda.

This agenda had picked the main state figures' culture, language, and religion as instruments of implementation. Besides, the compatriots of the ruling faction picked as the human element of enforcing the agenda; for this reason, they were sent to the newly annexed territories as administrators, judges, and church (orthodox Christianity) men.

The nation building agenda had involved different strategies on those who submit themselves peacefully and those that stiffly resisted the annexation process. In the latter case, the language, culture and religion of the ruling faction had been installed and the compatriots become their rulers; whereas, in the former case, these instruments were not employed and the local chiefs remained as rulers but they were under the centralized administration system.

The continual operation of this system had reinforced the birth of questions of nationality, self-determination, property rights, equality (religious and gender), fair taxation, republican form of government and other similar questions. But, the constitutions- both the traditional and the modern constitutions- were not molded to address these questions. The traditional constitutions were not destined to govern the relationship between the governed and government. The modern constitutions (the 1931 and the 1955 revised constitutions of Ethiopia), though they had embodied some elements that govern the relationship, they were inadequate to address the growing questions of the mass.

The claw-back sides the constitutions (e.g. citizens did not have the right to elect their representatives- in the revised constitution, however, they were empowered to elect the deputies), the absence of most constitutional ingredients of limited government, and the absence of institutional mechanism to guard the values in the constitutions take the major positions.

These realities reinforced resentments on the side of the people and caused the birth of rural and urban based movements which finally led the demise of the system.

In the first thirteen years of the *dergue*'s regime neither the imperial regime's constitution was in force, nor did new constitution come into play.<sup>348</sup> There was rule by the whim of military men who had managed to take state powers.

Thirteen years later, the military faction had come up with a socialist oriented constitution. The constitution was the whim of the working segment of peoples of Ethiopia and it upheld them as the highest repository of power. Hence, this way denied people's involvement in the making of the constitution. Besides, even if there were some constitutional ingredients of limited government, the very nature of the constitution that concentrated powers of state in single man's hand made it difficult to citizens to enjoy their basic rights and freedoms.

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Besides, it was the council of state- headed by the president of the country- empowered to enforce constitutional supremacy. Additionally, the constitution had failed to address self-determination based questions of nations and nationalities. These realities again with other nationwide reasons caused stiff resistance on the side of national liberation fronts and finally led its down fall.

So, the two regimes because they had failed to appreciate the importance of the constitutional ingredients of limited government and even if they tried to consider some of the ingredients, their failure to back them with institutional mechanism, had led them to be reluctant to the questions of the mass and become the reason for incalculable atrocities- basic rights and freedoms of individuals and peoples fall prey to the ruling factions' whim.

The post 1991 era in the constitutional history marked a clear departure from previous times and statesmen committed themselves to consider the ingredients- except the judiciary's involvement in the check and balance system under the 1995 PDRE constitution- and backed them with the institution (the judiciary in the 1991 interim constitution and the upper house in the 1995 PDRE constitution) responsible to defend these values.

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<sup>348</sup> As it has been discussed under chapter four of this paper there was a progressive draft constitution that had considered the ingredients of limited and self-government. However it did not put in practice.



The authors of FDRE constitution of 1995, taking in to account the historical and practical reasons, ousted the judiciary from becoming the institution that defends the ingredients.

The practical justification rests on the assumption that if courts are made to interpret the constitution they may through interpretation fundamentally change the constitution just like the American Supreme court has been doing. The historical analysis based itself on the point that rewriting of the constitution by courts may result in dire consequence for Ethiopia if group rights fall prey to the authority of courts.

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Contrary to the above assertion, the tale of constitutional adjudication in USA reveals that courts have been developing tests of judicial self-restraints so that they won't distract the very essence of constitutional democracy tradition.

These self-restraints amongst others include; interpretative, congressional, and justiciability limits. The third ground limit of judicial power includes; prohibition of advisory opinion, standing (constitutional and prudential), ripeness, mootness, and the political question doctrine.<sup>349</sup>

These judicial self-restraints have been adopted by other nations around the world. Hence, in the presence of these limits, picking the judiciary as the potential distractive agent of group rights (mostly, those rights enjoyed by nations, nationalities and peoples) would remain unjustifiable.

There was another way out in which the group rights would be protected. One of which could be, restraining courts from issues that involve group rights attached with nations, nationalities and peoples- the group rights doctrine. Restricting the repressive reviewing power of the house only to group rights enjoyed by nations, nationalities and people of Ethiopia could also be another means.

Besides, the fear that ordinary courts may distort the true intention of the authors of the constitution can be minimized through a system of appellate review of lower court's judgments.

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<sup>349</sup> See in general Chemerensky *supra* note 33.

This can be strengthened by obliging courts through the enabling acts, to refer to the original documents that can demonstrate the true intention of the makers of the constitution (rules of interpretation [the doctrine of originalism]).

In order to make the upper house the defender of group rights recognized in the constitution, we may grant it the power of preventive reviewing of legislative acts-constitutional control before the promulgation of any laws. This way, it can defend both the acts of legislative and that of the executive; in the latter case by controlling the legislative enabling acts that determines executive activities or through controlling delegated powers of the legislature.

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Total integration of the upper house in the law making process (counter majority) can also be another means of defending the rights enjoyed by nations, nationalities and peoples of Ethiopia.

Besides, denying courts role in adjudicating constitutional issues had fragile historical reason.

A deep look in to the modern history of Ethiopia, as well as its constitutional history divulges that, it was not the judiciary that suppressed the basic rights and freedoms of individuals and peoples; rather it was the factions' unrestrained power that caused the violations of these rights. Hence, courts exclusion from the arena of constitutional adjudication is nothing than posing danger on the very basic rights of individuals.

What we should restrain, on historical basis shouldn't be courts power; it should rather be the power of government, principally that of the legislative and the executive- entities that hold state's purse and sword<sup>350</sup> whose unlimited power practically proofed violent of these natural rights.

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<sup>350</sup> "Power of the purse refers the power to command wealth and redistribute it through taxes to pay for public services; whereas power of the sword refers that the essence of government is coercion and to make those people who will not perform their duties, perform their duties or suffer some other consequence.

The two great government powers are linked- without the power of the purse you can't pay for the sword and without the power of the sword you can't fill the purse."

For instance, the executive through council of minister regulation no.155/2008, article 37, empowered the director of ERCA to take measure of dismissal on the employee whom he suspected of corrupting his authority. Such measure is final and no appeal lies on it.

Contrary to this specific provision, the FDRE constitution under its article 37 (1) provided individuals, a constitutional right to access justice and under article 79 (1), it recognized the judiciary as the sole organ that delivers justice.

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Besides, under article 78 (4) of the same, it is prohibited to confer judiciary's inherent authority to the body that doesn't adopt legally prescribed procedures (e.g. accused's right to appeal as provided under article 20(6) of the constitution). Hence, what has been given to the custom authority was unconstitutional.

The susceptibility of basic rights being politically abused, usually owing to the general nature of limitation clauses deployed in the provisions that cover these rights (e.g. your freedom of expression can be limited under the guise of protecting the wellbeing of the youth) are evidences; the practicability of the constitution, a relative inaccessibility<sup>351</sup> to the institution, and independence reasons are supportive of this deduction.

Above all, this can be a means of reinstating the judiciary as an entity that can boost the existing check and balance system. In other words, the ingredients will more be protected and practiced on daily basis, there by the growing constitutional democracy will be transformed in to the stable one as the other counterpart nations have been doing it.

Article 9 (2) and 13 (1), 37 (1) and 79(1), which respectively provide, the judiciaries duty to respect and enforce constitutional provisions in general and the human rights provided under chapter three of the FDRE constitution in particular, everyone's access to justice and exclusive

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<sup>351</sup>in line with the assertion made on this point questions like, region do have their own system of reviewing; if so, why does the issue of accessibility remain our concern, may come in to play. In my opinion, the presence of regional system of constitutional review, don't bar the production of cases that rest on the violation of federal constitution.

empowerment of courts on judicial powers, are another constitutional reasons that can be raised as grounds to the case at hand.

If empowering courts is not plausible to representatives of the people, then another option (plan B) available is adopting the Hans kelsen's court- constitutional court.

In adopting this model of reviewing the constitution, we should deeply consider accessibility (seat of the court and rules of procedure), manner of appointing the judges (meritocracy and representativeness [composition and panel]), and the structure of the court and the jurisdiction of the court.

Hence, in order to quench the thirst of people, if kelson's court is preferred to ordinary courts, we need to have branches at least in the major cities of the country, so that individuals even from peripheries can have the opportunity to provide their constitutional compliant to this court. Besides, in order to warrant the nations, nationalities and peoples the protection of their rights, it would be better to empower them through the federal upper house (HOF) or both HOF and HPR to have a say in the appointments of the judges.

In this regard, lessons from other nations can be consulted. For instance, in the case of Germany the two houses (*Bundestag* and *Bundesrat*) have a say in the appointment of the judges of the federal constitutional court. In Italy the president and the parliament appoint the two-third of the judges of the court. The same is true for Austria and Republic of South Africa. Besides, the mechanisms of judicial self-restraints mentioned here in above can also be integrated in this case too.

If peoples' representatives both in federal houses and state councils drop the two options, then I strongly recommend (plan C) them to consider the gaps identified in this paper and restructure the reviewing system in a manner that enables individuals' or any concerned body's access to the house. They should rethink the issue of independence by reforming the system of nominating and appointing, at least members of CCI.

In terms of accessibility, as the house is responsible to handle other issues of the nation<sup>352</sup>, as adjudicating constitutional issues is not the members principal business, and the house situates in the capital, grievances may not be brought as they should have been and cases may not be disposed immediately.

In terms of independence, the presence of executive members of states may lead one to experience the executive as constitutional adjudicator, which naturally force one reasonable man to wonder what if the reason for the case is state government's act- the *nemo judex in causa sua* (no one can be a judge on his own case) question.

Another means of guaranteeing independence can be, adopting two panels in HOF. The first to be responsible for cases that involve questions of self-determination or other group based rights (cases like the *silte* nationality internal self-determination case), and amendment issues, as they are the authors of the constitution and the other panel will have a say on basic rights of individuals.

The second panel should be a collection of experts whose only business should be adjudication of cases brought to their attention on a daily basis, and its personal and functional independence should be guaranteed.

The experience of nation with stable constitutional democracy suggests this. For instance, in order to safeguard the independent functioning of judges or the court, the judges in Germany, Italy and Austria can't assume other public offices or work in any public offices. Exceptionally as the case in Germany, the members may lecture at Higher education institutions.

But the case in Ethiopia is a bit different. Public officials can preside as a judge, as membership in the upper house is not restricted only to non-officials. Therefore instead of safeguarding the supremacy of the constitution, there is high tendency of protecting their political concern.

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<sup>352</sup> for instance, as provided under article 62 of the constitution, settling the issues that involve inter-state conflicts and even if they don't involve constitutional question, determining civil matters that need the enactments of laws by the lower house and settling undesignated taxation issues are some of them

Because they are members of the ruling party that won in election and form a government. So this should be emphasized.

In terms of composition, unlike other nation's (e.g. Germany and Italy) strict qualification, no prerequisite is set to assume seat in the house. Even, the requirement set for members of CCI (the six members) is only "legal experts" or with regard to the other three, only membership of the upper house.

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As it is obvious, constitution is too general and the base for subordinate laws of certain nation. A single provision of the constitution involves many interests or rights of the citizens or groups or the process of government. So, the one who is going to interpret the constitution should be a well acquainted legal professional.

It may seem that the council of constitutional inquiry addresses the legal technicality the house lacks; but, when we see the power and function of council of constitutional inquiry in light of the house, it doesn't go beyond providing suggestion or opinion on the issue at hand.<sup>353</sup>

The ultimate decision rests on the house; whether to accept or reject. But, expertise knowledge is invaluable, in order to effectively accept or reject the recommendation of the council. So, we need to revise our mind set up on this regard too.

Safeguarding the independence of the umpire that entertains constitutional issues additionally demands wise takes on the tenure of the presiding judges. Taking this in to consideration, different countries provide office term which is independent from political election of the country. For example the office term of constitutional judge of Germany and South Africa is twelve years. The office term of judges of constitutional court of Italy is nine years and the office term of constitutional court to judge of Austria is life time.

But, when we see the office term of House of federation, it is correlated with political election of the country and it is only five years and the life tenure of members of CCI ranges from five years

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<sup>353</sup> In this regard the house's declination in the *benishanul gumuz* election case can be raised as a good example.

(members appointed from the house) to six years for the six legal experts and life tenure for the two presidents of the federal supreme court.<sup>354</sup>

Again, this forces us to re-think. The first reason is the lack of uniformity in the life tenure of members and the other is years of stay in the office.

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As to the first reason, what should be done if the period of the three members of CCI appointed from HOF or the six legal experts lapsed while deciding cases that are not disposed at all and ripe for recommendation? Would they finalize? If yes, legally speaking, can they do it? If not, what would be the fate of cases in the hands of CCI? Would they be settled by the remaining members? What if, as provided under article 11 of the CCI proclamation no. 798/2013, the remaining members don't constitute the quorum [two-third of the members]? These issues are not considered under article seventeen of the CCI proclamation number 798/2013 when providing terms of the office.

## 2. Conclusion

The conclusion reached here is that, the modern and constitutional histories of Ethiopia reveal that group rights had been suppressed, not because the judiciary was an instrument of the oppression; rather, it was because of the successive failures to constitutionally restrain the power of governments.

Besides, courts can be restrained through judicial restraining systems, so that, they won't transcend the very intention of the authors of the constitution. Additionally, a look in to the panel and composition of the bodies responsible to adjudicate constitutional issues divulges that they are either from state executive or the federal executive bodies. From this it will naturally follows that the members have not been independent in entertaining cases provided before them.

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<sup>354</sup> See article 79(4) of the FDRE constitution and article 19 (2) of CCI proclamation number 798/2013.

Again, because of these institutions temporary presence in the office and their seats only in the capital, they are inaccessible to any interested bodies in the peripheries. Hence, denying courts inherent right to interpret the constitution may no more be viable.

Taking in to account, the experiences of states with stable democracies whereby individuals or any interested body, have rule based free accesses and constitutions are interpreted and practiced on a daily basis, proposals are made to shift our focus to the empowerment of ordinary courts or constitutional courts.

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This way we can witness meaningful check and balances between and among the three branches of government, facilitate democratic process of governments, intensely serve individuals' constitutional access to justice right and ultimately boost the growing constitutional democracy.





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