



ETHIOPIAN CONSTITUTIONAL AND PUBLIC LAW SERIES

(VOLUME-VIII)

Addis Ababa University - School of Law

**Making, State-Building and Issues of Legitimacy
in Ethiopia:**

Chronicling the Achievements, Failures and Prospects

EDITOR

Aberra Degefa (PhD)

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First Printed in 2017 in Addis Ababa, Ethiopia.

The Publisher:

School of Law

Addis Ababa University

Main Campus (6 Kilo)

P.o.Box 1176

Addis Ababa, Ethiopia

www.aau.edu.et/clgs/academics/school-of-law

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ACKNOWLEDGEMENT

Ethiopian Constitutional and Public Law Series Volume VIII is published with the financial assistance of the Ministry for Foreign Affairs of Finland through the Project ‘Strengthening Human Rights Research and Education in Sub-Africa (SHUREA)’. The School of Law of Addis Ababa University extends its deepest gratitude to the Ministry of Foreign Affairs of Finland for helping with the publication of this Volume by providing financial assistance.

Thematic Research Conference and Proceedings Rules

Ethiopian Constitutional and Public Law Series is an annual thematic publication of the School of Law of Addis Ababa University in the field of civil and commercial laws. It was re-established by the Academic Committee of the School of Law on December 2, 2016 to publish cross-cutting thematic researches on domestic and international legal, social, economic and political issues in the field and to support the graduate programs of the School thereby encouraging staff and student participation in research activities.

Each volume of *Ethiopian Constitutional and Public Law Series* covers different themes in priority areas identified by committee of conveners and approved by the Academic Committee of the Law School. Submissions to this volume have been presented in a national conference organized by the School on August 8, 2017 attended by invited faculty members from law schools in Ethiopia and experts from different walks of life. Moreover, each submission has been blind peer-reviewed by experts in the field for substantive merit as per the Addis Ababa University School of Law Thematic Research Conference and Proceedings Rules of 2016.

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Introduction

Ethiopia is a state that claims to have thousands of years of statehood but in terms of establishing sustainable constitutional order, the constitutional history of the country has shown that very little progress has been made. With all these years of statehood and constitutional history, Ethiopia is still having difficulty in establishing a sustainable democratic constitutional order. The causes for this failure haven't been properly explored. The contributions in this volume of Ethiopian Constitutional and Public Law Series explore the possible explanations for this perpetual lack of stability and state legitimacy.

Aberra Degefa's contribution emphasizes the significance of legitimacy for a sustainable political order. He considers lack of legitimacy as the major contributor to state fragility. According to the author, even though Ethiopia claims to have statehood of thousands of years, it has not as yet succeeded in establishing a sustainable political order. In his view, Ethiopian as a State was created by force from the very outset and has never been transformed to consent-based polity.

Abera's article assumes that there is strong correlation between state stability/fragility and state legitimacy. The nature of the relationship between Ethiopian society and the state has been looked at from historical perspective with a view to determine whether or not the Ethiopian State ever had legitimacy. The causes and consequent problems associated with lack of state legitimacy have been explored in the context of state building. In the author's view, in as far as Ethiopian state was not consent-based at birth and so long as the diverse Ethiopian people have been denied the opportunity to build consent-based state since then; legitimacy of Ethiopian state will remain contested. Hence, there is a need to renegotiate and reconstitute Ethiopian polity to make it consent-based and legitimate.

Gedion Timothewos has authored an article entitled “*Constitutionalism without liberals, democracy without democrats.*” The author maintains that constitutional democracy is a desirable form of governance in contemporary world. In Ethiopia, although the FDRE Constitution has guaranteed the establishment of constitutional democracy, the author contends that very little has been achieved in the past two decades in practical terms. Gedion argues that domination of Ethiopia’s political system over the past four decades by politicians who subscribe to Marxism-Leninism and the limited role that liberals and democrats had in crafting and operating our constitutional order has contributed to the failure of constitutional democracy in the country.

According to Gedion, the main focus has mostly been on constitutional design and the role of specific political groups. The exclusive focus on the laws on the texts and institutional factor while disregarding political culture as an important factor in democratic transition will mean that our efforts to build a constitutional democracy in Ethiopia will remain as an exercise in futility and self-deception. In his view, the importance of political culture and socialization to sustain constitutional democracy has been neglected. Gedion has attributed the failure to build constitutional democracy to the ideological orientation and political culture of Ethiopia’s political elites.

The article jointly authored by Zelalem Tesfaye and Alemnesh Ts. Kassa analyzed constitutional legitimacy drawing on three constitutional principles, namely: constitutions as covenant, constitution as supreme law and amendability. The authors argue that the FDRE Constitution was born of violence and in return, the constitutional document is being used to normalize violence. The issue of constitutional legitimacy has been approached from critical discourse analysis perspective. The authors maintain that the genesis of FDRE Constitution is violence than unanimous consent of the people. Constitutional supremacy and constitutional amendment procedure have been used as an instrument of

normalizing state violence. Contrary to the violence induced constitutional legitimacy and its origin, the authors suggest reflexive democracy, proximity, and governability.

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2017

State-Building and Issues of Legitimacy in Ethiopia: Chronicling Achievements, Failures and Prospects

*Aberra Degefa (PhD)**

Introduction

History has shown that almost all modern sovereign states have originally been built through force or conquest. The fundamental and the most difficult part in state building has always been legitimacy building. That is why it took many states several years to build legitimacy.¹ Legitimacy deficit has been the major contributor towards the fragility of many states.² Lack of legitimacy has still continued to be chronic problem in a good number of states.³ Although legitimacy of many states has been contested internally, all independent states considered themselves legitimate and they have been recognized and viewed legitimate internationally. But in reality, the mere fact that a certain state has been given recognition by other states does not necessarily mean that such a state has internal legitimacy by way of gaining recognition from the people of that state.⁴

Ethiopia claims to have a statehood of thousands of years. But having had statehood for thousands of years one would wonder why she has not as yet established a sustainable political order. With all these years of statehood, very little has been achieved by way of creating stable political

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¹ Zaum, D. Legitimacy, state building and conflict. GSDRC Professional Development Reading Pack, no 11, Birmingham, UK: University of Birmingham (2015), p.1.

² Norwegian Agency for Development Cooperation (NORAD). The Legitimacy of the State in Fragile Situations, (2009), Oslo. p. 8.

³ Roberts, D. Post-conflict State building and State Legitimacy: From Negative to Positive Peace? *Development and Change* 39(4) (2008), p. 545.

⁴ Norad cited above at Note 2, "State legitimacy concerns the very basis in which state and society are linked and by which state authority is justified" at p.3.

order and positive state-society relation. We need to search for the main cause of this perpetual lack of stable political order. Surely, Ethiopian State was established through force and conquest. But why hasn't Ethiopian State as yet transformed itself from force-based to consent-based?

This article aims at exploring the question of legitimacy of Ethiopian State and its institutions from the broader Ethiopian society perspective. The article examines the nature of relationship between Ethiopian state and the society from historical perspective, with a view to determine whether or not there has ever been state legitimacy.⁵ It explores the impacts lack of legitimacy has had on the ongoing Ethiopian state-building venture. The basic assumption here is that there is a direct correlation between state legitimacy and its stability or fragility.

1. State Legitimacy and State building - Conceptualization

Max Weber defines a state as a human community that “claims the monopoly of the legitimate use of force within a given territory.”⁶ As it focuses on the existence of formal set of state institutions, like bureaucracy, an army and police force, a judiciary as sufficient requirements to constitute a state, this Weberian definition of a state doesn't adequately capture the realities of state-society relations.⁷ If we define a state only in terms of its structure and set of institutions, we are going to limit the determinants of a state to mere physical control over a specified territory and the existence of institutional structure which dismisses the legitimacy aspect.

⁵ State legitimacy is manifested through constructive state-society relation.

⁶ Max Weber, *Politics as Vocation* Available on line <http://anthropos-lab.net/wp/wp-content/uploads/2011/12/Weber-politics-as-a-vocation.pdf> accessed on September 15, 2017.

⁷ Organization for Economic Cooperation and Development (OECD), *The State's Legitimacy in Fragile Situations, Unpacking Complexity*, (2010), p.16.

In order to understand the realities of state-society relations, one needs to go beyond Weberian approach and adopt a holistic conception of state and state-building with broader and deeper examination of the interplay between a state and society which is the main determinant of state legitimacy.⁸ To begin with, “the creation of a stable polity depends first and foremost on stability ‘taking off’ within the state being built or rebuilt; this in turn depends to a large extent on whether the elite is considered legitimate by its citizens.”⁹

As a concept, legitimacy refers to that particular quality conferred upon a political entity by those who are within the entity, thus giving it authority.¹⁰ It can as well be defined as a popular approval of the state’s ‘rules of the game’, or the system of rules and expectations on which government actions are based.¹¹ Legitimacy “denotes popular acceptance of government officials’ right to govern.”¹² In that sense, legitimacy is something to be earned by a state and that is given by people freely without being coerced. In other words, a state and its institutions can claim to have legitimacy only when there is evidence of citizens’ consent conferring legitimacy on the state.¹³

In its broader sense, state legitimacy refers to “the formal and informal social and political contracts that govern relationships between the state

⁸ Carter, D. Sources of State Legitimacy in Contemporary South Africa: A Theory of Political Goods. Working Paper 134, Afrobarometer, (2011).

⁹ Roberts, Cited above at note 3, p.538.

¹⁰ NORAD, Cited above at note 2, Executive Summary.

¹¹ Beetham, D. *The Legitimation of Power*. Basingstoke: Palgrave Macmillan (1991), p.11.

¹² Levi, M. Sacks, A., & Tyler, T. Conceptualizing Legitimacy, Measuring Legitimizing beliefs, *American Behavioural Scientist*, Vol 53(3),(2009), p.354.

¹³ Gilley, B. The Meaning and Measure of State legitimacy: Results for 72 Countries. *European Journal of Political Research*, (2006), p. 499-525.

and citizens.”¹⁴ Citizens’ believe in the state’s basic right to rule over them is the essential marker of state legitimacy.¹⁵ Legitimacy is the very foundation on which state and society are constructively “linked and by which state authority is justified.”¹⁶ In short, state legitimacy means “people accept the state’s fundamental right to rule over them”¹⁷

State legitimacy assumes the existence of a contractual and constructive relationship between the state and society that is actually working effectively.¹⁸ Any analysis of state legitimacy requires that we give focus to the existing power relationship between state and society and between the state and the various social groups as a whole.¹⁹ In whichever context, legitimacy of a certain state cannot be properly determined without taking into account these important relationships.²⁰

Legitimacy is an authority “acquired and exercised according to certain socially accepted normative standards and criteria.”²¹ Before such an authority can be characterized legitimate, three conditions need to be fulfilled. Firstly, the power must be exercised according to established rules, whether these are embodied in formal legal codes or in informal conventions. Secondly, these rules must be justified in terms of shared beliefs of the government and the governed. Thirdly, legitimacy must be

¹⁴ Clements, K. What is legitimacy and why does it matter? *Accord Issue* 25, p.13, Available online www.c-r.org/downloads/Accords_WhatIsLegitimacy_o.pdf Accessed Sept 15, 2017.

¹⁴ Beetham, D. Cited above at note 8, pp 15-16.

¹⁵ Gilley, B. cited above at note 12.

¹⁶ NORAD, 2009. Cited above at not 2, Executive Summary.

¹⁷ McLoughlin, C. When Does Service Delivery Improve the Legitimacy of a Fragile or Conflict-affected State? *Governance*. Advance online publication. [Dx.doi.org/10.1111/gove.12091](https://doi.org/10.1111/gove.12091), (2014), p.1.

¹⁸ Clements, Cited above at note 13, p.13.

¹⁹ NORAD, Cited above at note 2, Executive Summary.

²⁰ Zaum, D. Cited above at note 1, p.2.

²¹ Clements, K. Cited above at note 13, p.14.

demonstrated by an expression of consent on the part of the governed.²² Hence, in order to be legitimate, an authority has to fulfill all these conditions.

In any state-building, legitimacy building is a crucial element.²³ Any state-building effort that does not embrace legitimacy building cannot create a stable political order. A successful state-building is a fundamental political process where all political, social and economic forces within a given state take part. Such a state-building process would involve reciprocal relations between a state which delivers public goods and services and a society that constructively engages with the state.²⁴ A successful state-building would require an agreement between all parties as to the process that will be used to create that state which would ultimately help the state earn legitimacy.²⁵ In short, as a process, legitimacy building involves building “the capacity of a political system to engender and maintain the belief that existing political institutions are the most appropriate or proper ones for the society.”²⁶

As they would involve constructive state-society engagement, bargaining on matters of political, economic and social significance, state and legitimacy building takes time. Both are products of “a very long history of intense interaction, bargaining, tension and conflict between and among different state and social actors”²⁷ The process would ultimately create a social compact between a state and different groups in society by

²² Beetham, D. Cited above at note 10, pp 15-16.

²³ NORAD, Cited above at note 2, p.3.

²⁴ OECD Cited above at note 7, p.16.

²⁵ Brahimi, L. State building in crisis and post Conflict Countries. Paper presented at the 7th Global Forum on Reinventing Government, Building Trust in Government, Vienna, (26-29 June), 2007, p. 8.

²⁶ Lipset, S.M. Some Social Requisites of Democracy: Economic Development and Political Legitimacy, *American Political Science Review*, Vol. 53(1), p.86.

²⁷ OECD, Cited above at note 7, p.16.

way of establishing rules and procedures capable of sustainably maintaining positive relation between the state and society. Through this lengthy process, authority would ultimately be conferred on the state allowing it to make and enforce binding decisions. This integrated process of legitimacy and state-building would help in transforming force-based entity into durable consent-based political authority.²⁸

Issue of state legitimacy becomes ostensibly disputable at moments of crises or critical junctures when legitimacy is in the process of being acquired or is being challenged. This usually occurs during acute political turmoil where legitimacy is either under threat or entirely absent or where its normative basis is stifling.²⁹ When a state's legitimacy is contested, its right to make rules and policies, its position as the highest political authority is questioned. When a state is not accepted by substantial groups in the society or its authority is challenged, it lacks institutionalized authority to rule.³⁰

2. Sources and Operational Components of Legitimacy

The main sources of legitimacy are input or process legitimacy, output legitimacy or performance legitimacy, shared beliefs and international legitimacy. Input legitimacy relates to basic rules and procedures agreed upon through which a state takes binding decisions and organizes people's participation. Output legitimacy or performance legitimacy is defined in relation to the effectiveness by way of providing quality of public goods and services. Shared beliefs include a sense of common political community, and beliefs shaped by common values and aspirations. These are manifested through shared community of identity intimately related to the state allowing the people to see the state as

²⁸ Clements, K. Cited above at note 13, p.13.

²⁹ Beetham, Cited above at note 10, p.44.

³⁰ Norad, Cited above at note 2, p.11.

having rightful authority.³¹ International legitimacy has got to do with external legitimacy which is derived from recognition of a state's sovereignty by other states.³²

In order to have a stable political order, sustainable peace and development, a state's legitimacy has to be derived from all the four stated sources. A certain state may have normative rules and procedures which have been agreed upon by citizens but if it performs badly, such a state cannot be considered legitimate in the eyes of the public. Likewise, in its performance by way of providing public goods and services, a state may do well, but if the shared beliefs of the people relating to the legality of state authority are missing, the state would still lack legitimacy. Of all the sources, a key element is "legitimacy derived from the beliefs citizens hold about the normative appropriateness of government's structures, officials and processes"³³

3. Consequences of (Lack of) Legitimacy on State- building

State legitimacy matters because it provides the basis for rule by consent rather than by coercion. Legitimacy draws our attention to the accord between the rulers and the ruled.³⁴ It is a critical measure for stable social and political order, sustainable peace and development. Legitimacy "enables rulers to govern with a minimal application of force."³⁵ Its existence "reduces the transaction costs of governing by reducing reliance on coercion and monitoring"³⁶ Legitimacy entitles those who are ruled to expect that political power will be exercised to advance the

³¹ Norad, Cited above at note 2, p.15.

³² OECD, Cited above at note 7, p.8.

³³ Levi *et al*, cited above at note 11, p.354.

³⁴ Coicaud, J.M. Legitimacy and Politics: A Contribution to the Study of Political Right and Political responsibility. Cambridge: Cambridge University Press, (2002), p.13.

³⁵ Clements, Cited above at note 13, p.13.

³⁶ Levi et al Cited above at note 11, p.355.

common good, as opposed to narrow personal or partisan interests.³⁷ It helps to transform force-based rule into durable political authority thus enhancing the prospects for state stability and sustainable development.³⁸

It is possible to rule using coercive power, but having legitimate power makes governing easier and effective for the government. States that rely merely on coercion or individual payoffs are unstable.³⁹ Since it undermines the processes of state-society bargaining which are crucial to state-building, lack of legitimacy is a major contributor to state fragility.⁴⁰ Without legitimacy, there is likely to be conflict and disorder in a state and governments are forced to expend more resources on making people comply with their rules.⁴¹ States that lack legitimacy have less effective governance which reduces popular support and makes them vulnerable to overthrow or collapse.⁴²

When a state is legitimate and acts within the boundaries of justifiable power, citizens will reward the state by everyday acts of consent and compliance with rules.⁴³ But when individuals or groups fail to get what they expect from the state and its institutions, legitimacy will disappear and “rulers are forced to move from persuasive to coercive governance.”⁴⁴ Particularly, in pluralist societies, where there are ethnic, linguistic, religious and cultural differences, citizens may differ in their views of legitimacy of the state. Depending on “individual’s differential placement along socio-economic scale” perceptions of legitimacy may vary.⁴⁵ In such societies, favoring one group and excluding other groups

³⁷ Clements, Cited above at note 13, p. 13.

³⁸ *Ibid.*

³⁹ Gilley, B. Cited above at note 12, p.499.

⁴⁰ Norad, Cited above at note 2, p. 6.

⁴¹ Mcloughlin, Cited above at note 16, p.1.

⁴² Gilley, Cited above at note 12, p.499.

⁴³ Mcloughlin, Cited above at note 16, p.7.

⁴⁴ Clements, Cited above at note 13, p.13.

⁴⁵ Carter, Cited above at note 8.

would create a situation where the favored group supports the state while those disfavored perceive the state as illegitimate. In such settings, only a state with high level of support from the various social groups by way of political inclusion, participation and representation will have greater degree of legitimacy. Hence, “the extent to which contemporary democratic political systems are legitimate depends in large measure upon the ways in which the key issues which have historically divided the society have been resolved.”⁴⁶

4. State-building and State Legitimacy in Ethiopia

Modern Ethiopian state was brought into existence as a consequence of war and conquest. Owing to this, one can say Ethiopia was born with legitimacy deficit. Since then, in the institutional path they pursued, the successive Ethiopian rulers assumed power through force and removed from power same way. Regarding sources of their legitimacy, until the end of the Imperial period, the rulers claimed that they derived their authority from God. The element of peoples’ consent was totally absent from the equation of legitimacy. The multi-ethnic Empire brought together different groups of people through force and kept them together by force which has made the Empire a prison-house of nationalities.⁴⁷ With the initial lack of consensual-basis at birth and the subsequent drive by the successive rulers of the Empire to forcibly maintain the multi-ethnic Empire, Ethiopia remained a seed-bed for perpetual legitimacy crises and instability. The centralist nation-building project of the successive rulers has been causing series of resistances

⁴⁶ Lipset, S.M. Some Social Requisites of Democracy: Economic Development and Political Legitimacy, *American political Science Review*, Vol. 53(1), p.86.

⁴⁷ Markakis, J. *Ethiopia: The Last Frontiers*, New York: (2011).

from the very outset which has drawn the country into several decades of civil war.⁴⁸

Ultimately, the architects of the Empire have succeeded in creating a centralized and territorially defined state recognized by the international community. In their drive to build a nation-state out of the multiethnic society, the rulers adopted assimilationist policy with a view to establish a state under the dominance of one language, culture and religion. The assimilationist policy ruled out the need for accommodating diversity and seeking legitimacy from the diverse people of Ethiopia. In his state-building effort, Haile Selassie has succeeded in establishing a centralized unitary state with their extractive state institutions but failed to build the much desired nation-state. In the end, the 1974 popular uprisings and revolts made by the diverse subjugated people of the Empire removed the Emperor from power bringing the close to fifty years of Haile Selassie's autocratic rule to an end.⁴⁹

After the removal of Haile Sellassie from power, the Provisional Military Administrative Council (PMAC) known as the *Derg*, assumed power and ruled the country for 13 years without a constitution. The Constitution adopted by the Derg in 1987 was the third constitution for Ethiopia and it was the first to constitutionally declare Ethiopia a 'Republic'. The 1987 Peoples Democratic Republic (PDRE) Constitution was made to serve as a camouflage for the Derg's naked rule by force. Except for the change in its name and form, the PDRE Constitution endorsed essentially the previous Imperial assimilationist policy and declared Ethiopia a centralized unitary State. Instead of being responsive to the continuous, deepening and legitimate demands of the diverse subjugated

⁴⁸ Merera, Gudina, Ethiopia: Competing Ethnic Nationalisms and the Quest for Democracy, 1960-2000, Addis Ababa, (2003).

⁴⁹ Gebru Tareke, Ethiopian Revolution: War in the Horn of Africa, Yale University, 2009.

people of Ethiopia for equality, the Derg regime became more centralist, authoritarian and assimilationist than Haile Sellassie.⁵⁰

Other than abolishing the hereditary rule and changing Ethiopian state from Empire to a “republic”, the Derg regime had perfected and used the hegemonic, predatory and repressive features of all state machineries that have been put in place and used under Haile Sellassie. In trying to make multiethnic Ethiopian polity more centralist and unitarist, the Derg regime worsened the fragility of the predatory and authoritarian state it took over from the Emperor. In fact, “the legal unaccountability of officials that was pioneered by Haile Selassie took even more authoritarian direction under Mengistu.”⁵¹ Ultimately, the Derg’s extreme assimilationist strategy and hegemonic rule generated ethnic backlash and led to the appearance of different armed insurgent groups which brought the downfall of the regime in 1991.⁵²

Overall, when one looks at the pre-1991 Ethiopian State building path, in terms of building a legitimate, sustainable and constitutional State with inclusive State institutions, there was a complete failure. Rather, what they have established as a legacy was a hegemonic culture of power that nurtured and promoted authoritarian mind-set among the ruling elites.⁵³ Each time, the Ethiopian ruling elites aimed at the control of central state power and at accessing the country’s resources, most importantly

⁵⁰ Brietzke, P, ‘Ethiopia’s “Leap in the Dark”: Federalism and Self Determination in the New Constitution’, *Journal of African Law*, Vol. 39(1), 1995, p.20.

⁵¹ *Ibid.* “Mengistu’s style of governance was Universalist and unitarist in the extreme through ‘popular’ mobilization ‘the masses’ were to be emancipated from their nationalities as well as their class”, at 20.

⁵² *Ibid.*

⁵³ Vaughan S. & Tronvoll, K *The Culture of Power in Contemporary Ethiopian Political Life*, Stockholm: SIDA (SIDA Studies 10, 2005.

land.⁵⁴ The kind of State and institutions they built were extractive in their nature and impervious to democratic values thus lacking legitimacy.

The fall of the unitarist Derg in 1991 by the joint forces of a number of national liberation movements drawn from the different subjugated ethnic groups in Ethiopia proved the futility of trying to build a nation-state out of the multi-ethnic Empire.⁵⁵ The series of events and the movements that led to the downfall of the Derg conclusively proved the need to transform Ethiopia from force-based prison-house of nations to a consent-based pluralist state. What's more, the legitimacy of Ethiopian state became contentious.

With the downfall of the Derg, the different subjugated people in Ethiopia have been provided with another opportunity to make a fresh start and re-constitute a consent-based democratic Ethiopia. The first opportunity was that of 1974, which according to Eshetu Chole, "turned out to be a bitter harvest of sorrow."⁵⁶ Many thought the opportunity offered in 1991 could be used by Ethiopian people to establish a legitimate state with sustainable and inclusive State institutions. According to Abram Saati,

if such an opportunity is either mismanaged due to incompetence or deliberately misused by political or other elites in the society, if institutions are installed that serve to fragment and exclude the polity from exercising influence over the constitution building process, the country may steer itself on a vicious path with possible long-term destructive consequences.⁵⁷

⁵⁴ Markakis, Cited above at note 47.

⁵⁵ Merera, Cited above at note 48.

⁵⁶ Eshetu Chole, 'Ethiopia at the Cross Roads: reflections on the Economics of the Transition Period', *Dialogue 3rd Series* 1(1) Addis Ababa, 1992.

⁵⁷ Saati A. How Participatory Constitution building affects the Quality of Democracy, www.diva-portal.org/smash/get/diva2:759746/FULLTEXT01.pdf (2011), p. 13.

In the pre-1991 state building project, the architects of the Empire have obviously steered the country on a pernicious path. The Ethiopian People's Revolutionary Democratic Front (EPRDF) removed the Derg regime by force of arms and assumed power which followed the established vicious path or "via the familiar route of military action."⁵⁸ Having assumed State power, the EPRDF convened a national Conference in July 1991 which adopted the Transitional Period Charter. The EPRDF invited different political movements to take part in the July Conference and adopted the Charter which was meant to serve for the transitional period and to lay down procedures for the new constitution to be adopted.⁵⁹

At the end of the Conference, a Transitional Council of Representatives (COR) which had 87 members was created based on the Charter. But decisions regarding who could take part on the Conference and the allocation of seats for the 87 COR were manipulated in favour of the EPRDF by using the exclusive control of state power it has already assumed. The allocation was made on the basis of who contributed much in the fight against the Derg. According to Merera, "the EPRDF leaders, keen on the consolidation of their hard-won victory, made sure to selectively invite weak parties most of which were created overnight, and selectively excluded the actual or potential real power contenders from the process."⁶⁰ This was a battle ground *modus operandi* totally incompatible with democratic principle. Consequently, the whole transitional process and the subsequent constitution-making process

⁵⁸ Vestal, T M. *Ethiopia: A Post-Cold War African State*, 1999, p.179.

⁵⁹ *Ibid.* "While most of the world breathed sighs of relief that Mengistu and the Derg were gone, few attended to the mischief of the TPLF dominated-EPRDF was about." P. 112.

⁶⁰ Merera Gudina, Cited above at note 48, p 121.

became the exclusive affair of the EPRDF and those allied to it.⁶¹ As stated by Paulos Milkiyas:

No sooner than they climbed to power did the political culture of the new elite which was shaped by the ideological pronouncement of Alabania's Enver Hoxha steer the system back to authoritarianism. The fundamentals of a democratic system which entail respect for human rights, genuine electoral competition, transparency and accountability were soon systematically smothered.⁶²

At last, the 1995 FDRE Constitution was adopted as a fourth constitution of Ethiopia in a political landscape that was totally dominated by the EPRDF. But the question is, to what extent had the constitution making exercise in the 1995 FDRE gone beyond the traditional mere constitution-writing and sought to build a legitimate State by way of creating a polity with shared beliefs and inclusive state institutions? Have the diverse Ethiopian people who have been brought together through conquest and kept together by force used the opportunity of building a consent-based political community capable of nurturing democratic values and institutions? Have the architects of the 1995 Constitution maintained or abandoned the vicious path established by the previous ruling elites of Ethiopia?

⁶¹ Abbink, J. The 'Ethiopian Second Republic and the Fragile Social Contract', *Africa Spectrum*, Vol. 44, (2) (2009); See also Britzkie 1995, and Lyons T. 'Closing the Transition: The May 1995 Elections in Ethiopia' *The Journal of Modern African Studies* 34(1) 1996. According to Vestal cited above at Note 58 "the seat allocation was manipulated to give the EPRDF and its allies a built in majority." at 8. Immediately after the Charter, the first test case was what has happened to the United Democratic Nationals (UDN) which was a multi-ethnic political party. This "potentially popular political party standing for democracy and unity was rendered impotent by repeated harassment and intimidation of its members by the government and the EPRDF". *Ibid* at 26.

⁶² Paulos Milkiyas, 'Authoritarianism and the Ethiopian Body Politic Dissonance between Democratization and Elite Political Subculture,' Proceedings of the 16th International Conference of Ethiopian Studies, Svein Ege, Harald Spen, Birhanu Teferra and Shiferaw Bekele (Eds.), Trondheim, 2009 at 678.

It is now widely assumed that whatever the axes of conflict, “constitutional outcome will be more sustainable if those who experienced past injustices are involved in creating new solutions.”⁶³ In view of the fact that Ethiopia was a multiethnic-Empire constituted by conquest and maintained by force, building a political community with shared beliefs and establishing a sustainable political order would call for effective bargaining among the different political forces, renegotiating and reconstituting the state on the basis of consensus.

In order for former adversaries to be able to transfer conflicting issues from the battlefield to a democracy arena where grievances are handled through articulation rather than violence, the predictability in the realm of politics that a constitutional order assures must be secured.⁶⁴

As it has been the case before, in the 1995 FDRE Constitution, the constitution making landscape was dominated by that same pernicious traditional Ethiopian power elites’ hegemonic culture established by the architects of the Empire. The same elite manipulation which has been the defining feature of Ethiopian state building strategy prevailed in the 1995 Constitution making. Ultimately, rather than being a compromise document which comes out of series of negotiation and bargaining among the different political forces, the 1995 Constitution was a victors’ dictate, once again resulting in legitimacy deficit.⁶⁵ There was a group who did the stage-managing by way of excluding and including and those who have been included and excluded.⁶⁶ In effect, the relation between

⁶³ Hart, V. C. ‘Constitution making’, United States, Institute of Peace. Accessed March 13, 2015 from <http://www.usip.org/files/resources/sr107.pdf> (2010), p.21.

⁶⁴ Saati, Cited above at note 57, p.2.

⁶⁵ Vestal, T. M. ‘An Analysis of the New Constitution of Ethiopia and the Process of its Adoption’, *North East African Studies* 3(2) (1996), 21-38.

⁶⁶ The strong parties representing significant number of Ethiopian population like the All Amhara People’s Organization (AAPO), Oromo Liberation Front (OLF) and many others have been excluded. Those included were the ones willing to accept the dictates.

Ethiopian state and society has remained disconnected as in the past.⁶⁷ In Vestal's view "by denying political opposition group meaningful participation in the constitutional process, the EPRDF/TGE may have missed a final opportunity to broaden, by peaceful means, the political basis of governance."⁶⁸

State legitimacy assumes the existence of constructive relationship between the state and society. In Ethiopian history, state-society relationship has never been constructive. The hitherto Ethiopian history has shown that the struggle for power has always been exclusively between Ethiopian power elites whose fight has been to capture state power with a view to have access to resources and enrich one's own group at the expense of the broad Ethiopian society. The exclusive struggle between Ethiopian ruling elites belonging to one group or the other has contributed only towards the producing and sustaining of the predatory character of Ethiopian state institutions.

As ruling elites, although all the past Ethiopian regimes claimed legitimacy, when looked at from the perspective of Ethiopian people, the state-society relation has never been changed from force-based to consent-based. In the domestic realm, state legitimacy would call for a normative foundation agreed upon by all the political forces but in the case of Ethiopia, this fundamental element is still lacking. As put by Abbink, "there are violent succession problem in the Ethiopian political system - already known in the time of the Zagwe Dynasty (eleventh to thirteenth century) - underlies the remarkable but tragic continuity of

As stated in Britzkie cited above at note 50, the EPRDF excluded "those parties which carry real political weight, and sought to camouflage this by involving minor parties with little or no political support" at 22.

⁶⁷ Hence, the critical juncture or the historical opportunity in which Ethiopian people could have turned the state from force-based to consent-based was wasted.

⁶⁸ Vestal T. M Cited above note 65, p. 36.

Ethiopian history.”⁶⁹ The required popular approval and recognition that approves a government’s right to rule, shared sense of national identity have been lacking all along. Regarding the nature of state-society relationship, there was no common framework of belief, no consensus derived from shared common values, feeling of common identity. Consequently, the second opportunity history has offered to Ethiopian people to change the State from force-based to consent-based has been deliberately misused by political elites thus turning it into another harvest of sorrow.

5. Achievements, Failures and Prospects

Modern Ethiopian State was formed through conquest and as such, the single most enduring problem in its entire history has been lack of consensual-basis for the state which is a precondition for building a sustainable state with inclusive state institutions. Ethiopian constitutional history thus far shows that every successive ruling elite modified or changed the previous structure but “each time with a view to raising its efficiency as an instrument of control and raising revenue.”⁷⁰ At every critical juncture, a ruling elite assuming power has never aimed at the creation of a consent-based state or legitimate pluralist state, but to control key state institutions with a view to enrich itself at the expense of the society. As stated by Vestal, “the lack of freedom of choice has plagued Ethiopians during the twentieth century. The monarchy, the Derg, and the EPRDF have all been self-anointed rulers, who, once in power, have never given the people an opportunity to change the government.”⁷¹ Hence in relation to state building and legitimacy, the

⁶⁹ Abbink J. ‘Discomfiture of Democracy? The 2005 Election Crisis in Ethiopia and its Aftermath’, *African Affairs*, 105/419, (2006) at 198.

⁷⁰ Markakis, Cited above at note 47, p.12.

⁷¹ Vestal T.M. www.addisvoice.com

initial vicious path set by the architects of the Empire has remained unbroken.

In their pernicious state building path, the architects of the Empire devised an assimilationist policy which aimed at building a nation-state out of the multiethnic Empire. In this drive, what they achieved was the creation of a centralized state which has given Ethiopia legitimacy in the eyes of the international community.⁷² But to the extent that the State authority lacked the popular approval regarding its right to rule over them, Ethiopian State lacked the domestic legitimacy acquired from the people of Ethiopia.

In formally declaring Ethiopia a federal State and in its full acknowledgement of multiethnic character of the polity, the 1995 FDRE Constitution has made significant move. In terms of what it promised in the text, the Constitution has also made significant departure from the past. The Constitution has guaranteed the rights to self-determinations of nations, nationalities and peoples and the fundamental rights and freedoms of citizens. In terms of the real intent, “the Constitution embodied essentially what the EPRDF/TGE wished the world outside and its own people to believe about political order.”⁷³ In practice, the subsequent measures taken after the adoption of the Constitution has also proved that the regime had no intention of establishing a legitimate state.⁷⁴

⁷² Vestal, T M, Cited above at note 58, “The EPRDF issued its order of march, a document providing a blueprint of the organization of party and government to establish and maintain hegemony in the newly established Federal Democratic Republic of Ethiopia.” at 101.

⁷³ *Ibid.*

⁷⁴ *Ibid.* The measures taken by the regime from 1992 to this date indicate that the regime in power is not ready to share power rather what seems to be the case according to Vestal is “the Front will do whatever it takes to win all elections and destroy effective political opposition”, at 101.

When looked at in retrospect, the Constitution was not meant to be implemented but only to deceive the international community. In so doing, the elites who were in the driving seat have underestimated the value of the people's support for their rule. As it became obvious afterwards, the ruling elites have managed to manipulate the exclusivist institutions as they wished to maintain their power with no support from the society. But by "rejecting the values of justice, fairness, compromise, cooperation, tolerance, benevolence, and respect for the law in their actions, the leaders of the EPRDF/TGE irreparably damaged their credibility to rule in the name of the people, much less write a constitution for the nation."⁷⁵ Ultimately, the distance between state and society remained as far apart as it has been before, and the opportunity to constructively bring the two together was wasted.⁷⁶ A clear case which showed that the EPRDF has no intention to share power is the 2005 election. What has happened in the aftermath of the 2005 election has "revealed major constraints in Ethiopia's political system, underlining that after the regimes of Haile Selassie (1930-1974) and the military leader Mengistu (1974-1991), centralist authoritarianism is not gone but perhaps is being reinvented in a new form."⁷⁷

As discussed earlier, there are conditions which need to be fulfilled before an authority can be characterized as legitimate.⁷⁸ The first requirement is power must be acquired and exercised according to established rules, whether these rules are embodied in formal legal codes or informal conventions. In Ethiopia, there has never been agreed upon rules and procedures which established the normative foundation to regulate the exercise of power or state-society relation. This shows that

⁷⁵ Vestal T M, Cited above at note 65, at p.30.

⁷⁶ Roberts, Cited above at note 3, p.545.

⁷⁷ Cited above at note 69, p. 174. The best example is the 2015 election in which the ruling party controlled the parliament 100%.

⁷⁸ Beetham, Cited above at note 8, p. 15-16.

there was lack of legitimacy derived from the existence of foundational normative rules and procedures agreed upon by citizens. The second requirement is; the rules must be justified in terms of shared beliefs of the government and the governed. Here again, as exclusivist as the political systems have been, there was no opportunity for the required collectively shared belief relating to the state's right to rule to unfold or be nurtured.⁷⁹

The third is legitimacy must be demonstrated by an expression of consent on the part of the governed. "Acts of consent refers to positive actions that express a citizen's recognition of the states right to hold political authority and an acceptance, at least in general, to be bound to obey the decisions that result."⁸⁰ Where Ethiopian citizens haven't been able to lay down agreed upon rule of the game to govern the state-society relation, there was no way people could give free expression of their consent. Regarding obedience, since citizens may sometimes obey rules for lack of fear, obedience cannot always be taken as an indicator of consent.

Regarding performance, reports have been frequently made depicting the positive performance of the incumbent regime by way of providing public goods and services which according to some groups' argument signify legitimacy. Surely, performance is one source of state legitimacy, but in the absence of all other requirements, legitimacy derived solely from economic performance cannot be sufficient and sustainable. In view of the fact that the state political institutions remained exclusivist, the beneficiaries of these public goods and resources are members of the ruling coalition and those who support them. A group in exclusive control of political power can generate some degree of economic growth

⁷⁹ The reality in Ethiopia still shows that there are competing ethno nationalisms where a political community with shared beliefs has not evolved.

⁸⁰ Gilley, Cited above at note 12, p. 503.

and even introduce some degree of law and order.⁸¹ The kinds of growth we are witnessing in Ethiopia are an unsustainable ‘authoritarian growth’ brought by extractive institutions.⁸²

As already indicated, lack of state legitimacy has consequences. Legitimacy determines how people behave towards the state by way of certain observable actions. Injustice and violation of rights committed by a government is likely to lead to protest and rebellion. In the past, under the Imperial rule and the Derg, lack of legitimacy has led to the popular revolutions of 1974 and 1991. Under the incumbent regime, the ongoing mass protests against the State are manifestations of lack of legitimacy.⁸³

The extractive political and economic institutions built by the architects of the Empire and maintained since then by the successive regimes are incompatible with legitimacy and sustainable state building. If Ethiopia wants to genuinely address the perennial legitimacy deficit of the State, there is a need to acknowledge that the diverse Ethiopian people have not as yet built a consent-based political community. Where a society is under the grip of extractive political and economic institutions like Ethiopia, such institutions contribute towards poverty and state fragility.⁸⁴ The fact that legitimacy of Ethiopian State and its institutions under the successive regimes has been contested all along has to be recognized and reckoned with.

⁸¹ Acemoglu D. & Robinson, J. A. *Why Nations Fail*, London: Profile Books Ltd, (2013), p.124.

⁸² Acemoglu & Robinson, p. 445.

⁸³ These protests which are still continuing since 2014 have led to declaration of state of emergency. The protests have continued after the removal of state of emergency which is a clear indication of lack of legitimacy. Hence, in view of what is currently going on in the country, the regime cannot claim that it has turned Ethiopian State from force-based to consent-based polity.

⁸⁴ Acemoglu D. & Robinson, Cited above at note 81, at 243.

Conclusion

Now, more than a century after modern Ethiopian State was formed, eighty-five years after the 1931 Constitution and 22 years after the 1995 FDRE Constitution, Ethiopian state which was born with legitimacy deficit has not as yet gained legitimacy. As already discussed, legitimacy depends on constructive relations between state and society. Ethiopian State's experience over a century has shown that the link between the State and society has remained as disconnected as it was at the time of the formation of modern Ethiopian State. In fact "the distance between the rulers and the ruled has increased to remarkable proportion."⁸⁵

Institutions determine the success and failure of states, poverty and prosperity depend on the nature of state institutions.⁸⁶ The perennial problem of Ethiopian state has been the extractive and exclusivist character of state institutions which enabled the successive ruling elites to access public goods and resources. By making use of their control over the extractive political institutions, the ruling elites have made public goods and resources easily accessible for themselves and for their supporters. Through this exclusive control over the extractive state institutions, they have succeeded in making these resources inaccessible to those who opposed the ruling elites.⁸⁷

In a state like Ethiopia where there is lack of agreed upon normative foundation establishing and regulating constructive state-society linkage, the ruling elites curve up "the benefits of state institutions to maintain their own networks of power-preserving patronage and clientilism."⁸⁸ That is how in the hitherto state building effort, Ethiopian State "experienced a long vicious circle of the persistence and recreation of

⁸⁵ Abbink J, Cited at note 69, at 197.

⁸⁶ Acemoglu & Robinson, Cited above at note 81 at 44.

⁸⁷ In a parliamentary system, where one party controls the parliament, the executive/ the prime minister/ will be the one in control of everything.

⁸⁸ Roberts, Cited above at note 3, p. 544.

extractive political and economic institutions.”⁸⁹ Ethiopian ruling elites have remained reluctant to change the pernicious, elitist institutional path established by the architects of Ethiopian Empire State. With respect to the federal arrangement, Lovise Aalen states that “like in the past, the central government, now the EPRDF/TPLF instead of the Emperor or the Derg, is attempting to control the regional forces through power exercise.”⁹⁰

State-building in a divided and post-conflict society like Ethiopia should aim at re-building the society with a view to create a political community with shared beliefs that can serve as foundation for legitimate state, sustainable and democratic political order. Having studied Ethiopian nation-building project for many decades, John Markakis stated that the analysis of succeeding crises in Ethiopia along the route “highlights the structural fault in its design, which is the Centre’s monopoly of power.”⁹¹

John Abbink also maintains that there is “historically engrained authoritarian/hierarchical tradition in Ethiopian politics.”⁹² It is this historically engrained authoritarian tradition which has been generating and nurturing hegemonic mind-set among the ruling elites. This has been the main impediment to participatory and inclusive state institution building in Ethiopia. Owing to this engrained hegemonic and authoritarian mind-set which always haunted them, the ruling elites could not be accommodative by renouncing their unyielding hegemonic drive. “Ethiopian political culture is not yet free from its historical heritage of authoritarianism, elite rule, and patronage and that in this context a

⁸⁹ Acemoglu & Robinson, cited above at note 81, P.116. Such extractive institutions “tend to reproduce patterns of extractive institutions and political absolutism that empower and enrich a few at the expense of the masses.” p. 90.

⁹⁰ Aalen I. Ethnic Federalism in a Dominant Party State: The Ethiopian Experience, Chr.Michelson Institute Development Studies and Human Rights 2002 at 105.

⁹¹ Markakis, Cited above at note 47, p.355.

⁹² Abbink, Cited above at note 69, at 173.

change of government and the ousting of the reigning party stand small chance in post-1991 Ethiopia.”⁹³ Owing to this historically engrained hegemonic mind set, Ethiopian ruling elites had no interest in establishing constructive engagement or linkage with the society.⁹⁴

The feeling among Ethiopian power elite groups is fear of ‘creative destruction’ and the anxiety that they would lose economically and politically.⁹⁵ But the bitter truth is, the past eighty-four years Ethiopian State building experience has shown that renegotiating and reconstituting Ethiopian polity to make it consent-based and legitimate is crucial. In as far as Ethiopian state was not consent-based at birth and so long as the diverse Ethiopian people have been deprived of the opportunities to build a consent-based state since then, the legitimacy of Ethiopian state would remain contested.

As to the way out of this legitimacy crises, Markakis talks of two risky alternatives available to Ethiopian state builders one of which is the pernicious path which has already been tried for close to a century and failed utterly. If Ethiopia continues to pursue this vicious path as it is now, it would lead to state fragility and perhaps fragmentation. The other path, with which I concur, would be to “cross the political frontiers, make a clean break with the past, renounce center hegemony and accept equitable power-sharing with the periphery. The result could be a genuine multi-national, multi-cultural, decentralized state.”⁹⁶ Only this institutional path would transform Ethiopian State from force-based to consent-based and thus making the state legitimate and the political order sustainable.

⁹³ *Ibid* at 193.

⁹⁴ *Ibid*. The measures taken so far by the regime indicates that “the executive is prepared to use coercive force to prevent change.” at 195.

⁹⁵ Acemoglu & Robinson, Cited above at note 81, p. 121.

⁹⁶ Markakis, Cited at note 47, p. 357.

Constitutionalism without Liberals, Democracy without Democrats: The Ethiopian Case

Gedion Timothevos*

Introduction

Constitutional democracy, which is a form of governance that synthesizes constitutionalism with democracy, is widely perceived to be a superior and desirable form of governance in the contemporary world. Since the end of the cold war, even though the triumphalist declaration of the “end of history”¹ has proved to be premature and unrealistic, it is still true that constitutional democracy has gained the upper hand compared with its alternatives as the more desirable form of governance.² The normative triumph of constitutional democracy over its alternatives especially in our continent can be seen among others in the African Charter on Democracy, Elections and Governance that explicitly commits African countries to constitutional democracy.³ The formal commitment of African countries to constitutional democracy has also been affirmed in the constitutions adopted by various African countries since the end of the cold war. One of the notable new constitutions that have been adopted in the early 1990’s in Africa is the Constitution of the Federal Democratic Republic of Ethiopia. This Constitution, like most other constitutions adopted in the past two

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¹ See Fukuyama, Francis. *The end of history and the last man*. Simon and Schuster, 2006.

² See Law, David S. and Versteeg, Mila, *The Evolution and Ideology of Global Constitutionalism* (June 13, 2011). California Law Review, Vol. 99, p. 1163, 2011; APSA 2010 Annual Meeting Paper; 5th Annual Conference on Empirical Legal Studies Paper; Washington University in St. Louis Legal Studies Research Paper No. 10-10-01. Available at SSRN: <https://ssrn.com/abstract=1643628>.

³ See the African Charter on Democracy, Elections and Governance, available at http://www.ipu.org/idd-E/afr_charter.pdf.

decades in Africa express a commitment to establish a constitutional order that is both democratic and that meets the requirements of constitutionalism.⁴ Hence, the adoption of the FDRE Constitution could be considered as an attempt to institute constitutional democracy in Ethiopia.

However, as the past two decades have shown, the attempt to establish a constitutional democracy in Ethiopia has not been a success.⁵ The purpose of this paper is to argue that one of the major reasons for the failure so far to establish a functional constitutional democracy in Ethiopia is rooted, among other things, in the ideological orientation and political culture of our political elites. So far, our research especially within the legal academia has focused on the institutional setup and structure of our constitutional system. Our ideas for reform have also been focused on these aspects of the political order. In this paper, I would like to underscore the role that the ideological orientation and political culture of our elites play in undermining constitutional democracy in Ethiopia. In particular, I would argue that the domination of our political system over the past four decades by politicians who subscribe to Marxism/Leninism and the limited role that liberals and democrats had in crafting and operating our constitutional order has contributed to the failure of constitutional democracy in our country. To advance this argument, first of all, I will discuss what constitutional democracy means by discussing its constitutive elements, i.e. constitutionalism and democracy. In the next section of the paper, I will argue the importance of political culture and socialization to sustain constitutional democracy. In the third section of the paper, I will try to show how the Marxist ideological orientation of our most influential

⁴ See FDRE Constitution Preamble and Article 8 & 9.

⁵ See Ibrahim, Abadir M. "Ethiopia: A State Regressing from Democracy." In *The Role of Civil Society in Africa's Quest for Democratization*, pp. 121-146. Springer International Publishing, 2015.

politicians and their political socialization and culture is antithetical to constitutional democracy.

1. What is Constitutional Democracy?

Constitutional democracy is a form of governance that synthesizes democracy and constitutionalism. These two elements which make up constitutional democracy have analytically distinct meanings and contents of their own. As much as they reinforce and sustain each other, they are also at times at odds with each other. In other words, as has been noted by several scholars, there is an inherent tension that exists between constitutionalism and democracy. This section of the paper is dedicated to exploring the meaning of constitutional democracy by discussing its two components and by showing how constitutional democracy resolves the tension between constitutionalism and democracy. Therefore, in the first part of this section, the discussion will focus on the classical meaning and understanding of constitutionalism while the second part of the section will be devoted towards providing a working definition of democracy. The third part of this section will analyze the relationship between democracy and constitutionalism by discussing the ways in which democracy and constitutionalism sustain and contradict each other.

i. Democracy: The Thesis

At the outset, it should be noted that conceptions of democracy could be thin/proceduralist or thick/substantive. One of the most widely cited definitions of democracy and a classic example of a proceduralist conception of democracy is the one by Joseph Schumpeter. According to Schumpeter, “democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to

decide by means of a competitive struggle for the people's vote."⁶ This definition provides a clear and precise criterion to determine whether or not a system is democratic. Its clarity and simplicity makes it attractive. However, it has been criticized for being too minimalist, too descriptive and a mere reflection of the status quo and lacking in substantive and normative content.⁷ Schumpeter's conception of democracy and similar conceptions that focus on the democratic process and electoral procedure have also been criticized for pretending to be value-neutral and objective, while in fact they are conservative and laden with their own normative implications.⁸

Przeworski defends this minimalist and procedural conception of democracy by arguing that even if democracy is defined in minimalist terms and might not guarantee other laudable goals such as representation, equality or rationality of policies, it is still worth having because it enables society to avoid bloodshed.⁹ This is so, he argues, because the "mere possibility of being able to change governments can avoid violence" and that the fact that the change of governments is brought about through votes indicates the distribution of power in society which is likely to induce compliance with the electoral result.¹⁰

Samuel Huntington also adopts a proceduralist conception of democracy and defines it as a political system in which the "most powerful collective decision makers are selected through fair, honest and periodic elections in which candidates freely compete for votes and in which virtually all

⁶ Joseph A. Schumpeter, *Capitalism, Socialism and Democracy*, (Harper Perennial, 2008), 269.

⁷ See for example David M. Ricci, "Democracy Attenuated: Schumpeter, the Process Theory, and American Democratic Thought," *The Journal of Politics* 32, no. 2 (May 1, 1970): 239-267; Jack L. Walker, "A Critique of the Elitist Theory of Democracy," *The American Political Science Review* 60, no. 2 (June 1, 1966): 285-295.

⁸ Quentin Skinner, "The Empirical Theorists of Democracy and Their Critics: A Plague on Both Their Houses," *Political Theory* 1, no. 3 (1973): 287-289.

⁹ See Adam Przeworski, "Minimalist Conception of Democracy: A Defense," in *Democracy's value*, ed. Ian Shapiro (Cambridge University Press, 1999).

¹⁰ *Ibid.*, 45.

the adult population is eligible to vote”.¹¹ Lipset and Lakin similarly define democracy as “an institutional arrangement in which all adult individuals have the power to vote, through free and fair competitive elections, for their chief executive and national legislature”.¹² While still minimalist (in the sense that it focuses on the democratic process and procedure as opposed to its outcome), a more elaborate and often cited conception of democracy is the one provided by Robert Dahl. Dahl defines democracy as an ideal system that is absolutely responsive to all of its citizens.¹³ He then goes on to assert that for a government to be so responsive three necessary conditions must exist, namely:¹⁴

All full citizens must have unimpaired opportunities: 1. to formulate their preferences, 2. to signify their preferences to their fellow citizens and the government by individual and collective action, 3. to have their preferences weighed equally in the conduct of the government that is weighted with no discrimination because of the content or source of the preference.

He further argues that for these three basic conditions to be present, the following eight institutional guarantees are necessary:¹⁵

1. Freedom to form and join organizations
2. Freedom of expression
3. Right to Vote
4. Eligibility for public office

¹¹ Samuel P. Huntington, *The Third Wave: democratization in the late twentieth century* (University of Oklahoma Press, 1991), 7.

¹² Seymour Martin Lipset and Jason M. Lakin, *The Democratic Century*, (University of Oklahoma Press, 2004), 19.

¹³ Robert Alan Dahl, *Polyarchy: participation and opposition*, (Yale University Press, 1971), 2.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, 3.

5. Right of political leaders to compete for support and votes
7. Free and fair elections
8. Institutions for making government policies depend on votes and other expressions of preference.

He notes that the above guarantees constitute different dimensions of democratization, namely, contestation and participation.¹⁶ Acknowledging that no system empirically fulfills all these requirements completely enabling full contestation and participation, Dahl calls the real life systems that most approximate these conditions and guarantees in reality as *polyarchies*.¹⁷

The common denominator of the above proceduralist definitions can be summarized as follows:

1. They understand democracy as a system, procedure or an arrangement;
2. It is a procedure or an arrangement in which, in principle, all the adult population of a polity are entitled to participate in as voters, contestants or any other auxiliary capacity (for example as commentators, critiques, activists and so on);
3. It is a competitive process;
4. It is a procedure through which those who are to fill the highest echelons of political power and decide on major policy issues are to be elected.

Such definition of democracy clearly has in mind a representative democracy and not a direct democracy of the Athenian type. This is justifiable since even the smallest of countries in the contemporary world have population sizes that would make direct democracy utterly unworkable. Furthermore, in contemporary societies, few people would

¹⁶ *Ibid.*, 4.

¹⁷ *Ibid.*, 9.

have the energy, time and interest to be fully engaged in “direct democracy”, perhaps with the exception of the lowest tier of local government. For these reasons, when we speak of democracy in the contemporary world, we generally mean representative or indirect democracy. In addition to being a mechanism of overcoming the unworkability of direct democracy, representative democracy is also lauded for being “a comprehensive, filtering, refining, and mediating process of political will formation and expression.”¹⁸

Hence, for the purpose of this paper, democracy is understood as *the form of governance in which all adult citizens are legally free to participate in any capacity of their choosing in the process of electing and influencing those who hold important public offices and make binding collective decisions*. While a system that meets such a description would deserve to be called a democracy, it is conceivable that such a system could not be a liberal democracy. In fact, many contemporary democracies are electoral democracies which meet only the minimalist procedural requirements of democracy.¹⁹

ii. Constitutionalism: The Anti-thesis

McIlwain asserts that “...in all its successive phases, constitutionalism has one essential quality; it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law.”²⁰ This statement encapsulates the essence of the minimalist conception of constitutionalism. To a person

¹⁸ Nadia Urbinati, *Representative Democracy: Principles and Genealogy* (University of Chicago Press, 2006), 6. A similar view is expressed by James Madison in the Federalist Papers; see James Madison, The Federalist No. 10, ‘The Utility of the Union as a Safeguard Against Domestic Faction and Insurrection,’ *Daily Advertiser*, Thursday, November 22, 1787.

¹⁹ See Steven Levitsky and Lucan Way, ‘The Rise of Competitive Authoritarianism,’ *Journal of Democracy* 13, no. 2 (2002): 51–65.

²⁰ C. H. McIlwain, *Constitutionalism: Ancient and Modern*, Liberty Fund Inc., 2007 (Originally Published by Cornell University, 1940), p. 21.

who subscribes to this view, a state would qualify as a constitutionalist state even if it is not a democratic state or a state that guarantees respect for fundamental human rights, as long as the government is one limited by law. The criterion is whether or not there is a binding legal limitation on the power of the government. If the answer to this question, in relation to a certain state is in the affirmative, then that state could be deemed as a constitutionalist state. It might be a state with universal suffrage and a periodically elected government or it might be a hereditary monarchy with no democratic pretensions. It might be a state with an extensive bill of rights that guarantees all sorts of liberties and freedoms or it could be a state that accords no formal guarantee of such liberties. So long as the government is limited by law, so long as the will of the government or the sovereign is subject to legal constraints, that state will qualify as a constitutionalist state. Therefore, this conception has rather low threshold of constitutionalism and is outdated.

On the other hand, the expansive view of constitutionalism would add on top of legal limitations on governments, guarantees of democratic governance and fundamental rights as the defining features of constitutionalism. It is not enough that there are legal constraints on the powers of government. These limitations on the powers of government must be complemented by popular sovereignty and recognition and respect for fundamental freedoms. Such a view can be reflected in U. K. Preuss's claim that "constitutionalism encompasses institutional devices and procedures which determine the formation, structure and orderly functioning of government and it embodies the basic ideas, principles and values of a polity which aspires to give its members a share in government".²¹ He goes on to assert that "...in the last analysis constitutionalism involves much deeper than the idea of limited

²¹ U. K. Preuss, *The Political Meaning of Constitutionalism*; in R. Bellamy ed., *Constitutionalism, Democracy and Sovereignty: American and European Perspectives*, Avebury 1996, p. 12.

government, important as this undoubtedly is”²². In a less contemporary and less scholarly work, T. Paine stresses the inherence of a democratic element in constitutionalism from the perspective of the making of the constitution itself by maintaining that the essence of constitutionalism is the act of a people constituting government through a written and supreme law.²³ L. Henkin asserts that contemporary constitutionalism demands, *inter alia*, popular sovereignty, democratic and representative governance and respect for individual rights.²⁴ M. Rosenfeld also opines that the term constitutionalism in its contemporary and wider sense includes respect for the protection of fundamental rights.²⁵ A. Sajo points out “constitutionalism is the restriction of state power in the preservation of public peace. It seeks to cool current passions without forfeiting government inefficiency.”²⁶ This quote can arguably be interpreted as a definition of constitutionalism in the minimalist sense. However, Sajo asserts this to be an inadequate definition of constitutionalism and note that the concept is one that “resists the oppression of definition”.²⁷ Furthermore, his subsequent discussion of the concept of constitutionalism shows his understanding of constitutionalism to be intimately associated with fundamental rights.²⁸

²² *Id*, p. 25.

²³ T.C. Gray, *Constitutionalism: An Analytical Framework*, in J.R. Pennock and J.W. Chapman ed., Constitutionalism, 1979, New York University Press, P.189.

²⁴ L. Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, in M. Rosenfeld ed, Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives, DukeUniversity 1994, pp. 41-42.

²⁵ M. Rosenfeld, *Modern Constitutionalism as Interplay between Identity and Diversity*, in M. Rosenfeld ed, Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives, DukeUniversity 1994, p.1.

²⁶ A. Sajo, Limiting Government: An Introduction to Constitutionalism, CEU Press 1999, p.9.

²⁷ *Ibid*.

²⁸ *Id*, pp 9-14.

But as has been pointed out earlier, the two conceptions of constitutionalism though different are not contradictory. They both underscore that constitutionalism implies a limited government. While the expansionist view incorporates certain values and ideals as integral elements of constitutionalism, the minimalist view seems to be indifferent as to the inherence or otherwise of popular sovereignty and fundamental freedoms in the concept of constitutionalism.

Nevertheless, regardless of the conception of constitutionalism one might subscribe to, be it a minimalist or expansionist view of the concept, constitutionalism is intrinsically related with fundamental rights and liberties. If one envisages constitutionalism in the expansionist, i.e. the broader and contemporary sense, then constitutionalism will be directly related with fundamental rights. This relation will not only be direct but obvious and evident as well. This is so because the expansionist conception of constitutionalism considers the constitutionalist state, by its very definition, to be a state in which fundamental rights are enshrined in a supreme law, above and beyond the reach of the ordinary political process. It is a state in which the constitution serves as a bulwark of fundamental rights against the vagaries of the majority and the government.

On the other hand, if one was to adopt the minimalist conception of constitutionalism, the relationship of fundamental rights and constitutionalism might not be so apparent. However, a closer analysis of even the minimalist conception of constitutionalism would reveal an intrinsic relationship between fundamental rights and constitutionalism. The minimalist conception of constitutionalism insists constitutionalism is nothing but a government limited by laws. This view seems to make it conceivable to have a constitutionalist state in which fundamental rights are not respected. However, the very idea of a “limited government” begets as of necessity the idea of liberty and freedom. If a government is limited by law, to the extent that it is limited, citizens would be free. By

limiting government, constitutionalism empowers the governed to do what they please, by constraining the “leviathan”, constitutionalism liberates the people. Therefore, even the minimalist conception of constitutionalism cannot deny the existence of a relationship between constitutionalism and human rights. Constitutionalism, although indirectly, would advance fundamental rights even in a state where it exists in a strictly minimalist sense.

So ultimately, constitutionalism in both the minimalist and expansionist sense would advance fundamental rights; more directly and effectively in the latter case, indirectly and less effectively in the former. It should be borne in mind, however, that a minimalist conception of constitutionalism would result not only in a less effective and an indirect protection of human rights but also in a vague and confined regime of human rights. So long as what we have is a government limited by law and there is no positive stipulation of fundamental rights, fundamental rights could not be fully secure.

iii. Constitutional Democracy

Having discussed the concepts of democracy and constitutionalism separately, we now turn our attention to an exploration of their relationship. In this regard, it is important to point out that the relationship of constitutionalism is multifaceted and complicated. Nevertheless, it is possible to indicate two salient facets of this relationship. The first facet in the relationship of constitutionalism and democracy is the tension that exists between the requirements of the two concepts. Democracy, premised on the principle of popular sovereignty requires primarily that the will of the majority be given effect. Democracy, unless qualified by other values and considerations gives primacy to the popular will or the preference of the majority as expressed through the democratic process. The validity of a decision or an act from the perspective of democratic theory is the support that a

decision or measure enjoys among the majority of those who belong to the relevant political community.

However, from the perspective of constitutionalism the validity of any decision, act, practice or measure is conformity with constitutional rules. Constitutionalism requires that we consider any act or decision as void and invalid if the act or decision is found to be in violation of constitutional rules. Constitutionalism, premised upon the supremacy of the constitution, would require that even decisions that are backed by a democratic majority be rendered void if they are found to be in violation of constitutional norms. Constitutionalism would justify blocking the preference of the majority of citizens that has been expressed through the democratic process if the preference or desire of the majority violates the constitution. Constitutionalism subjects the democratically expressed will of the majority to constitutional limits. It is only when and if the democratic majority enacts its will in a way that meets constitutional strictures that constitutionalism accepts those enactments and decisions as being valid.

Therefore, it will be fair to say that at times, constitutionalism and democracy could be in tension with each other. This is especially true in countries where there is a system of constitutional review either by the ordinary judiciary or a specialized constitutional court.²⁹ This tension between constitutionalism, backed by constitutional review and democracy has in fact given rise to a large body of literature in constitutional theory addressing what is often called the “counter-majoritarian dilemma”. However, at the same time, it should not also be forgotten that constitutionalism and democracy reinforce each other. This is so because, as we have seen above with regard to the definition of democracy, sustaining a democratic system requires guaranteeing

²⁹ See Bickel, Alexander M., *The Least Dangerous Branch: the Supreme Court at the bar of politics*. Yale University Press, 1986; see also Ely, John Hart, *Democracy and Distrust: A theory of judicial review*. Harvard University Press, 1980.

certain rights and freedoms. Democracy cannot exist and function if there is no scheme to secure some fundamental civil and political rights. Constitutionalism meets this need by securing the rights and freedoms necessary for the operation of a democratic system. By limiting the ability of those in power to permanently entrench themselves in power and subvert the democratic order, constitutionalism provides the mechanism for minimizing and preventing abuse of power.

Likewise, democracy could help maintain constitutionalism by giving citizens an opportunity to protect the constitutional order through the democratic process. This happens when the voters vote out of office and punish officials who are deemed to have violated constitutional rules and norms. Such process of political constitutionalism requires an engaged citizenry with a great deal of reverence and attachment to the constitution. But as some scholars have pointed out, it is an essential mechanism of enforcing a constitution and protecting a constitutional order from those who might attempt to subvert.

Constitutional democracy takes into account the tension as well as the symbiotic relationship between constitutionalism and democracy. Hence, constitutional democracy tries to provide a synthesis of constitutionalism and democracy. Constitutional democracy reconciles the demands of constitutionalism and democracy by giving effect to the principle of popular sovereignty within the framework and bounds of a constitution. While the particular configuration of constitutional democracy could be different from one country to another, the general approach of constitutional democracy is to provide safeguards for the freedom and liberties of individuals while at the same time giving the democratic majority the opportunity for governing the state. The common adage of majority rule and minority rights could be considered the main ideal constitutional democracy tries to accomplish. In other words, constitutional democracy provides for a system in which the will of the

democratic majority will be given effect, as a rule and will be exceptionally rendered invalid to the extent the majority's will violates fundamental constitutional norms.

2. Political Culture and Constitutional Democracy

i. Political Culture and Democracy

Since the publication of the seminal book *The Civic Culture* by Gabriel Almond and Sidney Verba in 1963, an impressive body of literature has emerged in modern political science addressing the significance of cultural factors for sustaining democratic systems. While the link between political culture and political systems has been something that even classical political thinkers have raised, Almond and Verba's ground breaking work has made the issue of political culture one of the important areas of focus especially in the field of comparative politics and democratization. Almond and Verba define political culture as "the particular distribution of patterns of orientation towards political objects among the members of a nation".³⁰ Another scholar defines political culture as "the mass-psychological underpinnings of political systems, including *all politically relevant beliefs, values, and attitudes*, as they prevail in a given population." (Emphasis added).³¹ The assumption underlying the vast literature on political culture is that politically relevant beliefs, values, and attitude or the patterns of political orientation in a country play a crucial role in determining the nature and stability of its political system. Particularly this point has been made in relation to the bringing about and sustaining democratic transitions. In a succinct summation of such positions, Roland Inglehart asserts that;

³⁰ Almond, G.A. and Verba, S., *The civic culture: Political Attitudes and Democracy in Five Nations*, Princeton University Press (2015.) p 13

³¹ Welzel, Christian. "Political culture." *The SAGE handbook of comparative politics*. Los Angeles, Calif.: Sage (2009): 299-318.

Different societies are characterized by specific syndromes of political cultural attitudes; these cultural differences are enduring but not immutable; and that they have major political consequences being closely linked to the viability of democratic institutions.³²

ii. Constitutionalism and Political Culture

Although there is no extensive literature that links constitutionalism with political culture, some scholars have also observed that political culture plays a considerable role in sustaining and giving rise to constitutionalism.³³ If constitutionalism is understood as an ideal that requires limiting governmental power in order to optimize the liberty and freedom of citizens, it is obvious that realizing this ideal requires a population that has a liberal political orientation. If the politically relevant beliefs, values, and attitudes of the population, and particularly that of the political elites in the society are illiberal, then it will be difficult to imagine such a society accomplish constitutionalism. In other words, a degree of liberal consensus regarding the importance and value of individual liberty and the need to restrict political power for the sake of protecting individual liberty is necessary to bring about and sustain constitutionalism. Furthermore, since constitutionalism requires that the restrictions or limits on political power be made through the instrumentality of a constitution that serves as the supreme law of the land, it also means that constitutionalism requires a political culture that fosters respect for the rule of law. In a society where law is seen as subservient to politics and wherein the substantive, institutional, and methodological autonomy of the law from politics is not recognized, it is hardly possible to imagine constitutionalism taking root. Therefore,

³² Inglehart, Ronald. "The renaissance of political culture." *American political science review* 82, no. 4 (1988): 1203.

³³ See Blokker, Paul. "Constitutions and democracy in post-national times: a political-sociological approach." *Irish Journal of Sociology* 20, no. 2 (2012): 68-90.

constitutionalism requires a political culture that embraces political liberalism and rule of law. In the absence of such a political culture, the mere existence of a constitution, whatever its textual content, is unlikely to give rise to constitutionalism.

iii. Sources and Approaches towards Political Culture

There are several approaches through which scholars attempt to analyze and understand the political culture in a given polity be it in comparative or individual case studies. These approaches are also related and correspond to different perspectives regarding the sources of political culture. One of the notable approaches towards the study of political culture focuses on history. The premise of such approaches is that formative events or founding moments of a nation are essential in shaping its political culture. For example the main proponent of this approach, Martin Lipset contrasts the political culture of Canada and the United States and argues that the American Revolution was the formative event that had a decisive role in launching the political cultures of these two countries in different directions.³⁴ Some scholars focus on opinion and value surveys or polls to gather data for analysis aimed at unearthing the political culture of a society. The premise of such studies is that the values, beliefs and opinions of the citizenry constitute the political culture of a society. Almond and Verba's comparative study of the political culture of Mexico, Germany, Italy, the US and Britain had adopted such an approach.³⁵ Another prominent approach towards the study of political culture is through a study of the process and agents of political socialization.³⁶ The underlying insight in this approach is that

³⁴ See Lipset, Seymour Martin. *Continental Divide: The values and institutions of the United States and Canada*. Psychology Press, 1990.

³⁵ See Almond, Gabriel Abraham, and Verba, Sidney. *The Civic Culture: Political Attitudes and Democracy in five nations*. Princeton university press, 2015.

³⁶ See Niemi, Richard G., and Mary A. Hepburn. "The rebirth of political socialization." *Perspectives on Political Science* 24, no. 1 (1995): 7-16.

the means or process through which the values and attitudes contained within a political culture are transmitted from generation to generation, i.e. the processes of political socialization are essential in understanding the political culture of a given society. Therefore this approach leads to a focus on the values transmitted through the process of political socialization and agents that play a role in this process. The agents of political socialization very often include family, media, peers, schools, religious institutions and political parties. Finally, it should also be noted that there are those who try to study political culture by examining the habituated political practices and institutions within a society.

3. Constitutional Democracy and Political Culture in Ethiopia

In the previous sections of this paper, I have tried to discuss the meaning of constitutional democracy as a synthesis of constitutionalism and democracy as well as the importance of political culture to bring about and sustain constitutional democracy. I have also discussed different approaches for the study of political culture. In this section, I will argue that although we have adopted a constitution that provides an adequate textual and legal basis for constitutional democracy, so far we lack the political culture that is necessary to foster constitutionalism and democracy.

Even a cursory look at the FDRE Constitution will reveal that the Constitution provides for some of the essential requirements of a constitutional democracy. Most importantly, the constitution provides for an extensive list of human rights which provide a limit on the exercise of political power and it provides the mechanism for democratic self-governance by the people through their elected representatives.³⁷

³⁷ See Abebe, Adem Kassie. "Human Rights under the Ethiopian Constitution: A descriptive overview." *Mizan Law Review* 5, no. 1 (2011): 41-71.

The constitution also proclaims itself to be the supreme law of the land and provides a mechanism of constitutional interpretation and enforcement that tries to blend political and legal approaches towards the resolution of constitutional disputes.³⁸ Hence, we can say that the FDRE Constitution provides an adequate basis for constitutional democracy.

However, an honest look at the reality and practice of the past twenty-two years, especially the past two decades reveals that the promise of constitutionalism and democracy enshrined in the FDRE Constitution have yet to be realized.³⁹ The civil and political rights recognized in the FDRE Constitution and which are essential to a constitutionalist political order are frequently violated and disregarded.⁴⁰ The periodic elections we hold have come to be rituals in which there is little meaningful participation and contestation.⁴¹ Despite the protests and contention of government officials and apparatchiks of the ruling party, the reports and indexes of various international nongovernmental organizations do

³⁸ FDRE Constitution Articles 9 & 83.

³⁹ See Gedion T., "The Ethiopian Constitution: More Honored in the Breach than the Observance", July 29, 2012, Blog of the International Journal of Constitutional Law, available at <http://www.iconnectblog.com/2012/07/the-ethiopian-constitution-more-honored-in-the-breach-than-the-observance/>, last accessed on February 28, 2018.

⁴⁰ *Ibid.* See also "Ethiopia: 25 Years of Human Rights Violations", Amnesty International, 2 June 2016, Index number: AFR 25/4178/2016, available at <https://www.amnesty.org/en/documents/afr25/4178/2016/en/>, last accessed on February 28, 2018; see also "They Want a Confession": Torture and Ill-Treatment in Ethiopia's Maekelawi Police Station (Human Rights Watch, October 17, 2013) available at <https://www.hrw.org/report/2013/10/17/they-want-confession/torture-and-ill-treatment-ethiopias-maekelawi-police-station> last accessed on February 28, 2018; See also "One Hundred Ways of Putting Pressure": Violations of Freedom of Expression and Association in Ethiopia, (Human Rights Watch, March 24, 2010) available at <https://www.hrw.org/report/2010/03/24/one-hundred-ways-putting-pressure/violations-freedom-expression-and-association>, last accessed on February 28, 2018.

⁴¹ See Ibrahim, Abadir M. "Ethiopia: A State Regressing from Democracy." In *The Role of Civil Society in Africa's Quest for Democratization*, pp. 121-146. Springer, Cham, 2015.

indeed reflect the reality of Ethiopia with regard to freedom and democracy and as these reports attest, contemporary Ethiopia is both “unfree” and “undemocratic”.⁴² In other words, the constitutional promise and the day to day reality of the FDRE are quite different.

In explaining this discrepancy between the constitutional text and our political reality, one could raise several factors that have contributed to the frustration of our aspiration to see a constitutional democracy in Ethiopia. In this paper, the focus as has been pointed out earlier is on the political culture and ideology of our political elite. To explain the incompatibility of the political culture and ideology of our political elite with constitutionalism and democracy, I will approach the issue from three perspectives. The first is from the perspective of formative/founding events theory, the second is from the perspective of political socialization and the last is from the fragments theory; which are all perspectives discussed briefly in the previous section of the paper.

i. Formative Event / Founding Moment

According to Martin Lipset’s formative event or founding moment perspective, organizing principles and norms of behavior that grow out of a nation’s formative event or founding moment play an essential role in shaping the political culture of a country.⁴³ If we want to rely upon this insight for the purpose of understanding the political culture that is prevalent in Ethiopia, we need to identify the formative event or events that have been most decisive in our history. In my opinion, the events or moments that has been most decisive in shaping the political history of contemporary Ethiopia are the 1974 revolution and the transition from

⁴² See The Economist Intelligence Unit’s Democracy Index, available at <http://www.eiu.com/topic/democracy-index>, see also Freedom in the World 2017, available at <https://freedomhouse.org/report/freedom-world/freedom-world-2017>.

⁴³ See Lipset, Seymour Martin. *Continental Divide: The values and institutions of the United States and Canada*. Psychology Press, 1990.

the PDRE to the FDRE that begun in 1991. Both of these events are of monumental consequence in our history.⁴⁴ In 1974 and 1991, what Ethiopians observed were not simple, discreet regime changes. Both 1974 and 1991 were years of revolutionary change.⁴⁵ These were indeed founding moments that led to the foundation of two republics, i.e. the defunct PDRE and the FDRE. If one agrees to the fact these were indeed founding or formative moments in Ethiopian history, then from the perspective of the 'Formative Event / Founding Moment' theory advanced by scholars like Martin Lipset, these events would have had a role in shaping the political culture prevalent in the country.

In fact, it will be difficult to gainsay that these events had a decisive role in shaping the *politically relevant beliefs, values, and attitudes*, i.e. the political culture of many Ethiopians. Most of the political elites of the country and those who are politically conscious in Ethiopia came of age during these events or took active part in the events surrounding these founding moments. Many veteran politicians who were or have been active in Ethiopian politics currently began their political career in the tumultuous period around the 1974 Revolution.⁴⁶ These same politicians have also

⁴⁴ See Tirunch, Andargachew. *The Ethiopian Revolution 1974-1987: A transformation from an aristocratic to a totalitarian autocracy*. Cambridge University Press, 1993; see also Ottaway, Marina, and David Ottaway. *Ethiopia: Empire in Revolution*. Africana Pub., 1978 ; see also Keller, Edmond J., *Revolutionary Ethiopia: from empire to people's republic*. Vol. 646. Indiana University Press, 1991 and Haggmann, Tobias, and Jon Abbink. "Twenty years of revolutionary democratic Ethiopia, 1991 to 2011." *Journal of Eastern African Studies* 5, no. 4 (2011): 579-595; see also Lewis, Herbert. "Ethiopia: Beginning Again." *Africa Report* 36, no. 5 (1991): 59; see also Lyons, Terrence. "The Transition in Ethiopia." (1991).

⁴⁵ *Ibid.*

⁴⁶ Most of the veterans of the TPDF as well as many from the ANDM, both members of the ruling coalition and even prominent opposition politicians in the diaspora fall in this category of politicians who started their career in the late 1960 or early 1970', in the prelude to the 1974 revolution. See Zewde, Bahru. *The Quest for Socialist Utopia: The Ethiopian Student Movement, C. 1960-1974*. Boydell & Brewer Ltd, 2014; see also Kebede, Messay. *Radicalism and cultural dislocation in Ethiopia, 1960-1974*. Vol. 36. University Rochester Press, 2008.

been key actors in 1991, when a new political order emerged.⁴⁷ Therefore, according to the Formative Event / Founding Moment' theory, 1974 and the 1991 transition could be considered as having, at least partially shaped the politically relevant beliefs, values, and attitudes of these individuals.

So, what are these politically relevant beliefs, values, and attitudes that emerged from these two events? On the one hand, both formative events gave prominence to the ideal of equality as an organizing principle. The 1974 Revolution was animated by the need to bring about socio- economic equality and eliminate the social and economic hierarchies of the ancient regime.⁴⁸ The 1991 Revolution on the other hand was animated by a desire to bring about equality between various ethno-cultural groups within Ethiopia and bring to an end the cultural and political marginalization and subordination of most ethnic groups in the country.⁴⁹ In other words, relatively speaking, equality as opposed to liberty was the more prominent and fundamental value animating these two revolutions. Furthermore, the leading protagonists of these two revolutions were avowed Marxist/Leninist. While their adherence to Marxism/ Leninism was qualified and enmeshed with their respective nationalism (Ethiopian nationalism in the case of the Durge and EPRP and MEISON and ethnic nationalism in the case of the TPLF/EPRDF),

⁴⁷ Zewde, Bahru, ed. *Documenting the Ethiopian Student Movement: An exercise in oral history*. African Books Collective, 2010.

⁴⁸ Tiruneh, Andargachew. *The Ethiopian Revolution 1974-1987: A transformation from an aristocratic to a totalitarian autocracy*. Cambridge University Press, 1993; Markakis, John, and Nega Ayele. *Class and Revolution in Ethiopia*. Red Sea Press, 1986.

⁴⁹ Habtu, Alem. "Ethnic Federalism in Ethiopia: background, present conditions and future prospects." (2003); Cohen, John M. "Ethnic Federalism" in Ethiopia." *Northeast African Studies* 2, no. 2 (1995): 157-188.

at the end of the day the actors that played the most decisive roles in these revolutions were Marxist/Leninist political groups.⁵⁰

Therefore, their beliefs, values, and attitudes were more attuned to equality than liberty. In other words, these were both revolutions that were led by political groups that had very little liberal credentials. The ideology of these groups put the collective, be it class or ethnic groups ahead of the individual. The individual freedom was not seen as an ideal or objective of these within the ideological framework of these groups. The emancipation of collectivities be it the ‘broad masses’, ‘the workers’, or ‘oppressed ethnic groups’ was the desired outcome in the normative vision of these groups. In this context, limiting state power and its exercise for the sake of protecting individual autonomy and liberty was not considered desirable or necessary. The objective was to ensure that state power is controlled by the ‘revolutionary vanguards’ who are supposed to exercise power on behalf of and to the benefit of the people. Restraining state power constitutionally or ensuring its responsiveness through elections and the democratic process was not required or in fact considered useful according to the ideological blueprint of these groups.

Furthermore, these were also events that perpetuated the practice according to which “political power emerges from the barrel of a gun”. For instance, TPLF, one of the political groups that was formed in the early 1970’s and that played a decisive role in 1991, “... strongly believed in the Maoist dictum that ‘political power grows from the barrel of the gun’, hence earnestly applying it to settle differences not only against the government forces but also rival groups and

⁵⁰ Tadesse, Kiflu. *The Generation: Ethiopia, transformation and conflict: the history of the Ethiopian People's Revolutionary Party. part II.* University Press of Amer, 1998; Keller, Edmond J. "State, Party, and Revolution in Ethiopia." *African Studies Review* 28, no. 1 (1985): 1-17; and Young, John. *Peasant Revolution in Ethiopia: The Tigray People's Liberation Front, 1975-1991.* Cambridge University Press, 2006.

internal dissenters.”⁵¹ This comment about the TPLF by one of its earliest leaders could be used to describe the belief of most of the political groups that emerged and were influential during that period in Ethiopia in the late 1960’s and early 1970’s.⁵² Both in 1991 and 1974, the forces that were able to take over power and dictate the terms of transition to a new political dispensation were the groups that were armed, organized and triumphed over their opponents in military terms as opposed to in participatory and competitive democratic process. Military might and prowess were more relevant than any other factor in the coming to power of the Dergue in 1974 and EPRDF in 1991. One also needs to point out that 1974 and 1991 were not novelties in Ethiopian history. Real political power had always been held by those who were able to defeat their rivals in the battle field. Bullets as opposed to ballots have always been the source of political power in Ethiopia. 1991 and 1974 were no exceptions to this rule. The history of modern Ethiopia and the logic through which power transferred from one Emperor to the other throughout the history of modern Ethiopia attests to this rule. With the exception of *Lij* Iyasu’s brief and ill-fated rule and Empress Zewditu’s nominal spell on the throne, all modern emperors in Ethiopia owed their power to a great extent to their military superiority over their rivals. This was true for Emperor Teklagiorgis who replaced Emperor Tewodros, this was also the case when Emperor Yohanes IV defeated and replaced Teklagiorgis or when Yohanes IV was replaced by Emperor Minilik II.⁵³ Even Haile Silassie’s ascent and ability to hold on to power very much depended on the support he got from the most

⁵¹ Berhe, Aregawai. *A Political History of the Tigray People's Liberation Front (1975-1991): Revolt, Ideology and Mobilisation in Ethiopia*. Tsehai Publishers & Distributors, 2009, p. 109.

⁵² See for example, Teffera, Hiwot. "Tower in the Sky." (Addis Ababa University Press, 2013).

⁵³ See Zewde, Bahru. *A History of Modern Ethiopia, 1855–1991*. Ohio University Press, 2002.

powerful military chiefs of the day.⁵⁴ Though palace intrigue was the road that led him to power, it was buttressed from the beginning till the end by military strength and might.⁵⁵ He ultimately lost his power and the monarchy came to an end also when the Emperor lost his grip on power by his own military.⁵⁶

ii. Political Socialization

As has been noted earlier, political socialization focuses on the process through which the values and attitudes contained within a political culture are transmitted from generation to generation as well as the institutions and actors that play a key role in this process.⁵⁷ When we apply this approach to analyze the political culture of contemporary Ethiopia, the focus has to be on the institutions and processes that have been instrumental in shaping the politically relevant beliefs, attitudes and values of the society and the politicians that have been playing a prominent role in Ethiopia over the past few decades. When one thinks of the process and institutions that have been instrumental in shaping the political outlook of the most influential politicians in Ethiopia, one of the obvious places to start with is the student movement of the 1960's and early 70's as well as the political parties that emerged out of this movement.⁵⁸ While there were numerous other factors that have been important in shaping the political attitudes and beliefs of our politicians since their childhood, especially for the generation of political leaders who came of age in the 1960's, the student movement and the parties

⁵⁴ See የተፈሪ መኩንን ረዥሙ የሥልጣን ጉዞ፣ አዲስ አበባ፣ ሴንትራል ማተሚያ ቤት 2006 ::

⁵⁵ See Marcus, Harold G., Haile Sellassie I: the Formative Years, 1892-1936. Red Sea Press (NJ), 1987.

⁵⁶ See Legum, Colin. Ethiopia: the Fall of Haile Selassie's Empire. Africana Pub., 1975.

⁵⁷ See Niemi, Richard G., and Mary A. Hepburn. "The rebirth of political socialization", Perspectives on Political Science 24, no. 1 (1995): 7-16.

⁵⁸ See Balsvik, Randi Rønning. "Student Protest—University and State in Africa 1960–1995." In Forum for Development Studies, vol. 25, no. 2, pp. 301-325. Taylor & Francis Group, 1998.

that originated from it have been the crucible of their political formation.⁵⁹ The politicians who were just getting started as student activists back then are still active and influential in the 21st century. The structures, language and approach to politics that they have practiced in the 1960's has dominated and until very recently been hegemonic in the political scene of Ethiopia. That is why our focus has to be on the Ethiopian student movement of the 1960's and early 1970's as well as the political parties and fronts that emerged out of this movement.

This movement, as Bahru Zwede points out, brought about "the transmutation of the religious orthodoxy of the classical tradition...in to a Marxist orthodoxy, or continuation of dogma by other means."⁶⁰ The political parties that emerged from the student movement were in general very dogmatic, radical, and militant and advocated for the emancipation of collectivities as opposed to individual citizens. These parties were all convinced that, as vanguard parties that have the right ideology, they were entitled to pursue political power through any means including violence and armed struggle. Both their ideology and practice, especially in terms of how they dealt with their rivals, dissidents and opponents clearly manifests that these were not political parties that valued individual freedom and democracy. Of course, this orientation was not a novelty introduced to the Ethiopian body politic by the student movement and the political parties it gave rise to. The movement and the political parties were reinforcing an already existing and deeply entrenched propensity in Ethiopian politic. As one commentator has noted;

⁵⁹ A deeper and more comprehensive study on the subject would also have to look in other processes and institutions including the family, schools, religious institutions and social structures. But unfortunately the resources and disciplinary limitations of the current author make such a study difficult to undertake at the moment.

⁶⁰ Zwede, Bahru. *The Quest for Socialist Utopia: The Ethiopian Student Movement, C. 1960-1974*. Boydell & Brewer Ltd, 2014, P.138.

The toxic effects of this form of cosmetic Marxism in Ethiopia became more apparent in student debates about whether Ethiopia was an “empire-state,” “imperial power,” “kingdom state,” “feudal,” “capitalist,” or “feudo-capitalist”. Marxist students interpreted every national problem exclusively in Marxist terminologies and sought uncompromising solutions. Lack of tolerance for opposing views in revolutionary discourse can be attributed to the absence of a serious democratic tradition in Ethiopia under Haile Selassie.⁶¹

In an apt description of the defects of the student movement, which is to be found at the fountainhead of the genealogy of the most influential political parties in the last half a century in Ethiopia, Messay Kebede asserts that the movement suffered from the defects of “extremism, dogmatism and unrealism.”⁶² These illiberal and undemocratic political values and predispositions were also further strengthened when the student movement activists became rebel’s and formed various liberation fronts.

Most of today’s most influential politicians in Ethiopia have been nurtured and politically socialized in the student movement and the liberation fronts that were formed during the revolution of 1974. Even the politicians who were not part of that generation were initiated into politics and socialized in vanguardist political parties steeped in the principle of “democratic centralism” and having very little regard for individual rights and freedoms. It should be noted that the lack of liberal and democratic ethos is not a reality within the ruling coalition in Ethiopia. Illiberal and undemocratic attitudes are pervasive across the board, even among opposition politicians and parties given the fact that most of them had been politically socialized through the same institutions and processes as their counterparts in the ruling party. As J.

⁶¹ Kissi, Edward. *Revolution and Genocide in Ethiopia and Cambodia*. Lexington Books, 2006, p 32.

⁶² Kebede, Messay. *Radicalism and Cultural Dislocation in Ethiopia, 1960-1974*. Vol. 36. University Rochester Press, 2008. P.15.

Abbink notes, "Ethiopian political culture is not yet free from its historical heritage of authoritarianism, elite rule, and patronage and that in this context a change of government and the ousting of the reigning party stand small chance in post-1991 Ethiopia."⁶³ The ruling party has, however, done much to sustain, expand upon and propagate the illiberal and undemocratic legacy of earlier times. Through its massive recruitment of members and training of cadres as well as through the relentless propagation of its views and ideology through the state owned media, EPRDF has inculcated in a new generation of Ethiopians an antipathy towards individual freedom and sympathy for autocratic mode of governance even while they might verbally profess a strong desire for democracy.

iii. Fragments Theory

According to the fragments theory, political cultures are "colonial heritages and the ideological genetic codes implanted by founding pioneers".⁶⁴ This perspective highlights the decisive role of the legacy of "founding pioneers".⁶⁵ If we adopt this perspective and apply it to Ethiopia, it requires that we identify the founding pioneers whose legacy and political values have been implanted since the emergence of the Ethiopian state in its current territorial shape. As most people would agree, those who have played a leading role in the formation of the modern Ethiopian state are the Shoan nobility of the late 19th century.⁶⁶ The generals and officials of the Shoan kingdom took the lead in consolidating the traditional highland kingdom of central and northern Ethiopia and in expanding its boundaries to the south, to the east and to

⁶³ Abbink, Jon. "Discomfiture of Democracy? The 2005 Election Crisis in Ethiopia and Its Aftermath." *African Affairs* 105, no. 419 (2006): 173-199, p. 21.

⁶⁴ Wiseman, Nelson, *In search of Canadian Political Culture*. UBC Press, 2011, p.9.

⁶⁵ *Ibid.*

⁶⁶ See Salole, Gerry. "Who're the Shoans?" *Horn of Africa* 2, no. 3 (1979): 20-29.

the west through conquest and inter-elite bargaining.⁶⁷ This process of conquest and expansion as well as its leading protagonists cannot be said to have carried over liberal and democratic values, attitudes and beliefs into the empire they founded. The empire was formed having as its nucleus a kingdom with a political tradition that is both highly illiberal and undemocratic. Describing the power of the Shoan King in the political tradition of the Kingdom, in his monograph about 19th century Shoa, Sveine Ege points out

The answer given ...to the question of the power of the king is a simple one, summed up in the concept of despotism. The king was the master of lives and land; there was no class in Shoa, everybody was the king's slave. The subjects are from the first to last, both rich and poor, the mere slaves of one sole lord and master, and scarcely a day passes over but in some way or other the most wealthy are obliged to confess it, or run the risk of being denounced as an enemy of the sovereign, which would be followed by confiscation of all property, or incarceration....⁶⁸

The conquerors from the central highland who served as the founding pioneers of the new empire carried over this hierarchical, autocratic and violence prone political culture to the rest of the country as well.⁶⁹ The illiberal attitudes, beliefs and values which constituted this political culture mutated in to an even more virulent illiberalism and tyranny once they were transplanted in the new frontiers of the empire. Such antipathy to democracy and liberal values was carried over by the Shoan monarchy to the very end of the Empire it built. The ultimate incarnation of Shoan

⁶⁷ See Zewde, Bahru. *A History of Modern Ethiopia, 1855–1991*. Ohio University Press, 2002; see also Tibebe, Teshale. *The Making of Modern Ethiopia: 1896-1974*. The Red Sea Press, 1995.

⁶⁸ Ege, Svein. *Class, State and Power in Africa: A Case Study of the Kingdom of Shāwa (Ethiopia) about 1840*. Vol. 46. Otto Harrassowitz Verlag, 1996., p97-98.

⁶⁹ See Markakis, John. *Ethiopia: Anatomy of a Traditional Polity*. Oxford University Press, 1974.

supremacy, Haile Selassie has expressed his distaste for democracy in the following words, according to the account of one of his descendants;

Democracy, Republic: What do these words signify? What have they changed in the world? Have men become better, more loyal, kinder? Are the people happier? All goes on as before, as always, illusions. Illusions. Besides, one should consider the interests of a nation before subverting it with words. Democracy is necessary in some cases and we believe some African people might adopt it. But in other cases, it is harmful. It is a mistake.⁷⁰

The genetic code of despotism implanted in the Ethiopian state by the founder of the Empire has persisted even after the demise of the empire and the supposed foundation of two successive republics. In fact, if anything the centralizing and despotic tendency of the Ethiopian state was only intensified and continued after the revolution by the military junta that replaced the monarchy.⁷¹ The despotic propensity of the Ethiopian political elite was very persistent and has been kept intact throughout the 20th century.⁷² When the military regime's belated attempt to turn itself in to a republic failed catastrophically and a new republic was founded by the rebels who toppled it, the same style and attitude to politics persisted.⁷³

Conclusion

As has been pointed in the earlier parts of these article, in explaining our failure to build a constitutional democracy we often neglect the

⁷⁰ See Asserate, Asfa-Wossen. *King of Kings: The Triumph and Tragedy of Emperor Haile Selassie I of Ethiopia*. Haus Publishing, 2015, p.246.

⁷¹ Tadesse, Wolde Gossa. "Evading the Revolutionary State" in *Remapping Ethiopia: Socialism and After*. James Currey [et al.], 2002, p.14.

⁷² *Id.*, p. 150.

⁷³ Zewde, Bahru, and Siegfried Pausewang, eds. *Ethiopia: the Challenge of Democracy From Below*. Nordic Africa Institute, 2002, p.68.

importance of political culture. Our focus is mostly on constitutional design and the role of specific political groups. However, we should not discount the extent to which our illiberal and autocratic political culture hampers the consolidation of constitutional democracy in Ethiopia. Particularly, we need to pay attention to the political culture that is deeply entrenched in parts of the country that constitute the core of the current Ethiopian state as well as the formative influence of Marxist, Leninist and Maoist thought on the political elites of the country who have been the leading figures of political developments in Ethiopia. The advancement of constitutional democracy in the country requires understanding this fact and exploring ways in which we could counter aspects of our political culture which are detrimental to constitutional democracy and how we could bolster aspects of our political culture that are conducive to the consolidation of constitutional democracy. The exclusive focus on the laws on the texts and institutional design while disregarding political culture as an important factor in democratic transition will mean that our efforts to build a constitutional democracy in Ethiopia will remain an exercise in futility and self-deception.

Revolutionary Democracy: Constitutional Legitimacy in Discourse, Constitutional Violence in Practice?

*Zelalem T. Sirna** & *Alemnesb Ts. Kassa*[▲]

Man is born free; and everywhere he is in chains.

J. J. Rousseau, 1954

Abstract

This article critically analyzes Federal Democratic Republic of Ethiopia (FDRE) constitutional legitimacy drawing on three constitutional principles, viz. constitution as a covenant, as supreme law and its amend-ability. It argues that the FDRE constitution is born of violence – and in return, the constitutional document is being used to normalise it. This paper is a review article. It approaches the issue of constitutional legitimacy from critical discourse analysis (CDA) perspective. The article finds that although unanimous consent of all is an unattainable requirement, at least, it must be shown that such a constitution is consistent with the background rights of the individual. It is also found that supremacy is not mere legal hierarchy but an inauguration of the political regime the elites wanted to create. Once a regime is constituted, a new identity is formed, others will be outlawed – and thus people with distinct constitutional questions and interests will be prone to state violence. Contrary to the violence induced constitutional legitimacy and its crisis, the paper suggests reflexive democracy, proximity, and governmentality.

Keywords: Constitutional violence, critical discourse analysis, reflexive democracy.

Introduction

Down the road to legitimacy, Ethiopia has gone a long and treacherous line – from religious tainted polity, i.e. monarchical system from the late

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19th C to communist regime, i.e. the *Dergue* military rule from 1974 to 1991; from the “developmental” revolutionary democracy (the Ethiopian Peoples’ Revolutionary Democratic Front (EPRDF)) to the current politically conscious and vigilant society. Under the monarchical system, religion as well as use of force was the source of legitimation of the *negus*. It was argued that this was possibly the strongest antidote to political fragmentation in the hands of the Amhara ruling class.¹ Following the annihilation of monarchical political structure in 1974, the Marxist regime of Mengistu Haile Mariam tried to establish new political theology under the motto ‘Ethiopia First!’ (ኢትዮጵያ ጉቅደም!). Thus, instead of political power legitimation through the Ethiopian Orthodox Religion, socialism became state religion. The separation between state and religion was furthered under the incumbent regime. Nevertheless, unlike the Dergue regime’s adherence to socialist ideology, the current regime did come up with another political theology known as revolutionary democracy.

However, the past as well as the incumbent regimes’ political theologies are the reflection of the world order than only internal political dynamics. Whereas the effect of the East and West Block cold war had remarkable imprint on the Dergue’s political regime, the current regime seems the reflection of the great powers – US and China. Thus, EPRDF’s political theology is a hybrid one, in the sense that, “democracy” was drawn from US and “revolutionary” emanating from the Chinese communist party ideology – and therefore EPRDF designed – revolutionary democracy (አብዮታዊ ዲሞክራሲ). For instance, it is observable that EPRDF sees the Chinese Communist Party as a “sister party” – and strives to emulate the latter’s experiences.

¹ Mattei, Ugo. The New Ethiopian Constitution: First Thoughts on Ethnical Federalism and the Reception of Western Institutions. *Cardozo Electronic Law Bulletin*. <http://www.jus.unitn.it/cardozo/Review/constitutional/Mattei2.html>. 1995(a).

It has to be noted that the notion of revolutionary democracy is found on political economy.² That is, “for the success of the revolutionary democratic forces represented by various associations, organizations, and individuals would have to play a crucial role as investors within the economic sectors not directly controlled by the state; ... it should be supported with credit facilities, favorable politics, and other services.”³ As a result, state hegemony has been bolstered diametrically. In comparison to the past regimes, the current regime has become economically and militarily robust.

Yet, a walk to full-fledged democratic system and fully legitimate political order could not be realized in Ethiopia. Being militarily and economically progressing could not bring legitimacy to the EPRDF regime. This article argues that the so-called “revolutionary democracy” inhibited democratization in Ethiopia – leaving the state organs irresponsible and the authorities unaccountable. Where democracy is, as an evolutionary project demanding rigorous human rights protection; conversely, deploying the idea of “revolutionary democracy” gives rise to zero sum game. The blend of “revolution” and “democracy” – at worst scenario breeds authoritarianism and in best case it may give rise to benevolent regime, but not a democratic system. That is why EPRDF is at odds with constitutional legitimacy.

This article is organized into five sections. The first section introduces the methodological approach of the article, and the second section provides an overview of the concept of legitimacy in relation to the

² In his thesis entitled *Dead ends and new beginnings* the late Prime Minister Meles Zenawi (an engineer of revolutionary democracy) of Ethiopia, neoliberalism is discarded as a dead end and the developmental state model of the eastern experience is welcomed as a new beginning for Africa. See Meles Zenawi, *African Development: Dead Ends and New Beginnings*, 2006 (unpublished).

³ Schröder. From the Bullet to the Bank Account. The Economic Empire of the Ethiopian Peoples’ Revolutionary Democratic Front (EPRDF), Preliminary Assessment. 2006, pp.6 & 7.

FDRE Constitution. Third, the three core constitutional principles, viz. constitution as a covenant, constitutional supremacy and constitutional amendment are discussed – from the perspective of constitutional/regime legitimacy. Fourth, constitutional violence vis-à-vis constitutional legitimacy is critically analyzed. Fifth, three remedial elements are dealt with and forwarded, viz. democratic reflexivity, proximity and governmentality. Finally, concluding remarks is forwarded.

1. Critical Discourse Analysis: A Methodological Approach

This article utilizes critical discourse analysis (CDA) as a research approach. CDA is an important tool to analyze the legal texts and official statements in relation to state legitimacy. First, let's see what discourse means and then contextualize CDA for the purpose of this article. So far, the understanding of "discourse" varies depending on the discipline that employs the concept. For linguists, "discourse" refers to anything "beyond the sentence."⁴ For example, there are numerous spheres of critical discourses: among others "power," "dominance," "hegemony," "ideology," "class," "gender," "race," "discrimination," "interests," "reproduction," "institutions," "social structure," and "social order" are notable ones.⁵ J. R. Martin, for instance, affirms that "the goal of discourse analysis ... is to build a model that places texts in their social contexts and looks comprehensively at the resources which both integrate and situate them."⁶ Thus, although there is no reason to expect discourse to be analyzed in terms of a code or set of rules or

⁴ Schiffrin, Deborah and et.al. (eds.). *Introduction. The Handbook of Discourse Analysis*. Blackwell Publishers. 2001, p. 1.

⁵ Teun A. Van Dijk. *Critical Discourse Analysis*. in: Deborah Schiffrin, and et.al. (eds.). *The Handbook of Discourse Analysis*. Blackwell Publishers. 2001, p. 354.

⁶ Martin, J.R. *Cohesion and Texture* in: Deborah Schiffrin, and et.al. (eds.). *The Handbook of Discourse Analysis*. Blackwell Publishers. 2001, p. 35.

conventions, at least, a discourse should aim to discover social conventions.⁷

Coming to the concept of CDA, Van Dijk defines it as “a type of discourse analytical research that primarily studies the way social power abuse, dominance, and inequality are enacted, reproduced, and resisted by text and talk in the social and political context.”⁸ Whereas the tenets of CDA was found in the Frankfurt School (in the aftermath of the Second World War), it is often employed to unearth social inequality and state-society asymmetrical power relations. Nowadays, CDA “focuses on the ways discourse structures enact, confirm, legitimate, reproduce, or challenge relations of power and dominance in society.”⁹

For the purpose of this article, CDA is utilized to indicate the discursive side of state power dynamics in relation to constitutional principles such as: constitution as a covenant, constitution as supreme and constitutional amendment. These three constitutional principles are selected since they are politically loaded, often invoked by authorities, and convenient for CDA. The group that has access to media has the potential of setting the agenda and shaping the course of the political discourse in Ethiopia. Hence, in addition to the text analysis, selected higher officials’ speeches are analyzed.

⁷ Blakemore, Diane. *Discourse and Relevance Theory*. in: Deborah Schiffrin, and et.al. (eds.). *The Handbook of Discourse Analysis*. Blackwell Publishers. Blakemore 2001, p. 101.

⁸ *Supranote* 2 at p. 352.

⁹ In sum, the main feature of CDA are: 1. Addresses social problems, 2. Power relations are discursive, 3. Discourse constitutes society and culture, 4. Discourse does ideological work, 5. Discourse is historical, 6. The link between text and society is mediated, 7. Discourse analysis is interpretative and explanatory, and 8. Discourse is a form of social action. See: Fairclough and Wodak 1997 quoted in Dijk 2001: 353.

2. Regime/Constitutional Legitimacy: An Overview

Constitutional legitimacy is the political and legal cliché of our time. Constitution is believed to be a document – where the subjects consented to be abided by, constitute the political structure the elites believe in, limit the power of the governing organs and enshrines fundamental human rights. Thus, it is a crucial document where the elites use to establish a regime and inaugurate political legitimacy. However, the adoption process of a constitution and its interpretation is not free of myths and usurpation. It is often overlooked that violence plays crucial role in the development of a constitutional document. Contrary to this fact, almost all constitutions state that the source of power emanates from “we the people” or “sovereignty rests in the people”. This legal paradox is furthered with the introduction of “constitutional supremacy” clause and stringent constitutional amendment procedures.

The term legitimacy was derived from the Latin term *legitimus*, “to characterize a state of affairs that was in accordance with law, justice, and customs.”¹⁰ Legitimacy possesses two domains: a domain of politics (where the people rule: democratic – procedural) and a domain of law (where elites rule: constitutional – substantive). Whereas the former is normative, the latter is empirical. In normative sense, legitimacy refers to acceptability and/or rightfulness in the eyes of the beholder. As goodwill is one of the most important assets for business organizations; so is legitimacy for political institutions. Building regime legitimacy requires, beyond adopting a constitution, inter alia, bureaucratic consistency, free and fair electoral cycle and responsiveness.

Legitimacy is important for legal authorities in order to function effectively and the absence of legitimacy inhibits or challenges the former to perform or regulate the public behaviour. Rosanvallon

¹⁰ Hurrelmann, Achim, and et.al. *Introduction.: Legitimacy in an Age of Global Politics*. Palgrave. In: Hurrelmann, Achim, and et.al. (eds.). New York. 2007, p. 4.

perceives legitimacy as an “invisible institution”, just like a trust between individuals is important, so does the trust between the governing and the governed.¹¹ For trust to be developed, state- society relation shall be rooted in consent than coercion, deliberation than intimidation, and responsiveness than evading responsibility. Trusting the governing also means believing in one’s government. In other words, a country’s democracy also depends on how the citizens view and judge their government.

Empirically speaking, state legitimacy may be evaluated based on specific criteria¹² – legitimacy affirmed or denied.¹³ Empirical legitimacy signifies the matter of degree of state legitimacy – ranging from nominal legitimacy crisis to erosion of the acceptance of core government institutions or the regime itself. The normative understanding of legitimacy may be described as “observers’ usages” and “actors’ usages”¹⁴ – the former encompassing politicians and political theorists and the later indicating citizens. Barker notes further that “citizens legitimate themselves ... this democratic legitimation is not an activity just of rulers, but of all of the active members of the polity.”¹⁵

When it comes to political or regime legitimacy, ensuring electoral cycle plays crucial role. Rosanvallon notes that “political legitimacy is subject

¹¹ *Infra note* 16, p. 9.

¹² David Beetham’s presume that the legitimacy of a political order should be assessed against “(1) power conforms to established rules (legal validity); (2) these rules can be justified by reference to the beliefs shared within a society (justifiability); and (3) there is evidence of consent by the subordinates (legitimation)” (Beentham 1991, 15–25 quoted in Hurrelmann and et.al 2007: 7).

¹³ *Supra note* 10, p. 3.

¹⁴ See Connor 1981 quoted in Barker, Rodney. *Democratic Legitimation: What Is It, Who Wants It, and Why?* In: Achim Hurrelmann, and et. al. (eds.). *Legitimacy in an Age of Global Politics*. Palgrave. New York. 2007.

¹⁵ Barker, Rodney. *Democratic Legitimation: What Is It, Who Wants It, and Why?* In: Achim Hurrelmann, and et. al. (eds.). *Legitimacy in an Age of Global Politics*. Palgrave. New York. 2007. p. 28.

to the rhythms of the electoral cycle.”¹⁶ Elections have two-fold implications: one, it symbolizes expression of equality of citizens’ and two, allows the majority to select the best candidate who can mirror their images.¹⁷ Quoting François Guizot, Rosanvallon further notes that: ...

The goal of representative government is to discover all the elements of legitimate power that are scattered throughout society and organize them into an actual power, or, in other words, concentrate them, in order to give reality to public reason and public morality and summon those scattered elements to power. ... It is not a numerical machine for counting up individual wills. It is a natural procedure for distilling from the bosom of society public reason, which alone is entitled to govern.¹⁸

Thus, for government legitimacy the moral and intellectual side of the representatives is an integral part of internal legitimacy of a constitution. For example, one can witness the legitimacy deficit in Ethiopian parliament’s inability to effectively bridge the interests of ordinary citizens with the executive organs. Besides, the judicial organ in Ethiopia could not independently interpret and enforce legal principles and thus it often fails to assist the legislature overcome this democratic deficit by establishing a practice of constitutional dialogue between the courts and the legislature itself.¹⁹ Hence, where the legislature is not mirroring peoples’ demands and the judiciary is not autonomous, democracy becomes so expensive. In other words, without democracy constitutional restraint of power remains elusive.

¹⁶ Rosanvallon, Pierre, *Democratic Legitimacy. Impartiality, Reflexivity, Proximity*. Princeton University Press, *Trans.* Arthur Goldhammer [2008](2011), p. 53.

¹⁷ Madison also put the relevance of elections as “to obtain for rulers’ men who possess most wisdom to discern and most virtue to pursue the common good of the society.” See: Madison 1961 quoted in Barker 2007, p. 56.

¹⁸ *Supra note* 16, p. 58.

¹⁹ Bustamante, Thomas and Fernandes, B. Gonçalves. *Law and Philosophy Library* Volume 113. Springer. 2016, p. 6.

In the subsequent section, Article 8, Article 9 and Article 104 of the FDRE Constitution, appropriation and usurpation are discussed. Usurpation means in principle, constitutional provisions are supposed to be invoked by the governed against the governors; however, they are often misappropriated by the latter against the former. This in turn gives rise to the constitutional violence and ultimately constitutional totalitarianism.

3. EPRDF: Constitutional Legitimacy in Discourse and Constitutional Violence in Practice?

One may argue that, people obey law if they believe it is legitimate, not because they fear punishment. Furthermore, on the ground of *necessity*, violence is legal and once it is legal, it is not violence. That is, legality presupposes legitimacy and for such theorists, legitimate violence is not violence: and “legal stability was afforded by violence.”²⁰

Nevertheless, violence and law are inextricably linked. Law is the creature of the literal as well as imaginings – thus it is difficult to buy the idea that, people obey laws especially public laws such as a constitution, because they are just; “but because they are laws: that is the mystical foundation of their authority, they have no other ... One obeys (laws) not because they are just but because they have authority.”²¹ Sarat and Kerns also state that “law is a creature of both literal violence, and

²⁰ Antoni Abati Ninet. *Constitutional Violence. Legitimacy, Democracy and Human Rights*. Edinburgh University Press. 2013. He also relates Rousseau’s notorious statement “Man is born free; and everywhere he is in chains” to constitutional legitimacy and argues that as long as a people is compelled to obey, and obeys, it does well; as soon as it can shake off the yoke, and shakes it off, it does still better; for regaining its liberty by the same right as took it away, either it is justified in resuming it, or there was no justification for those who took it away (2013: 96).

²¹ Montaigne quoted in J. Derrida, ‘Force of law: the mystical foundation of authority’, *Cardozo Law Review*, 11, 1990, p. 939.

imaginings and threats of force, disorder and pain”.²² By and large, constitutional law, as a regime inaugural factor, often originates in violence and violence sustains it. In other words, the source of constitution is force than mere consent – and once a regime is constituted, the constitution plays the role of normalizing the state violence. Michel Foucault, one of the prominent historian and thinker of the 20th C., remarks that “humanity installs each of its violence in a system of rules and thus proceeds from domination to domination”.²³ He sums-up that power produces knowledge – the later normalises violence.²⁴

When it comes to the case of FDRE Constitution, its origin was violence since the EPRDF came to power by overthrowing the *Dergue* regime. EPRDF’s constitutional violence takes place at two stages: at a formative stage and in everyday political practice. For example, from 1991 to 1994, Ethiopia was ruled under a Transitional Government – and that moment has discontinued the socialist political orientation and transformed to ethno-linguistic federalism with the promulgation of the 1995 Constitution. Therefore, it can be said that it was constitutional moment where discontinuity and transformation did take place in Ethiopia’s constitutional history. Of course, although this constitutional moment was temporary and rare, it was a defining moment of Ethiopia’s political order.

As opposed to the constitutional formative stage, the normal moments include everyday decisions taken by the government and there is no popular mobilization.²⁵ In the case of constitutional moments, the people are active actors, whereas in the normal moments the people

²² A. Sarat and T. R. Kearns, *Law’s Violence*, Ann Arbor, MI: University Michigan Press, 1993, p. 1.

²³ M. Foucault, *Discipline and Punish: The Birth of the Prison*, London: Penguin, 1977.

²⁴ See also: R. Cover, ‘Violence and the world’, *Yale Law Journal*, 95, 1995, 1601–29.

²⁵ *Supra* note 20, p. 71.

withdraw from politics and the political delegates act on behalf of the people. It covers, the “everyday normal moments” – the political discourse, decisions, media and narrations that followed since 1995 up to present. Considering this second dimension of constitutional moment allows us to see beyond *corpus juris*. It also allows us to explore the “narratives in which the corpus is located, and narratives that ‘establish paradigms for behavior’ and describe ‘a repertoire of moves – a lexicon of normative action’.”²⁶ Macedo also notes that “law is an argumentative practice, its meaning as a normative practice depends on the conditions of truth of the argumentative practices that constitute it.”²⁷

There are numerous instances where the FDRE Constitution is narrated as sacrosanct and the political dissidents are dangers to the former. For example, inter alia, some of the notable moments are the state broadcasting organizations’ narration of FDRE Constitution due to: on the occasion of the commemoration of the downfall of the Dergue regime, (ግንቦት ፶፩) on May 20, the annual celebration of “nations and nationalities day” (የብሔር ብሔረሰቦች ቀን) on November 29, the Flag Day (የባንድራ ቀን) on October 10, and etcetera. On the contrary, it is common to broadcast state authorities’ tagging of the political activists and challengers as dangers to constitutional order (ህገ-ግንግሰቱን ለመናድ), anti-development (ፀረ-ልማት), anti-peace (ፀረ-ሰላም), and terrorists (ሽብርተኞች). Thus, a strong political dissent could easily be labelled as anti-peace or terrorist in Ethiopia.

²⁶ Sarat 2001:56, quoted in *Supra* note 20.

²⁷ Macedo, Ronaldo Porto Jr.. On How Law Is Not Like Chess – Dworkin and the Theory of Conceptual Types. Chapter 14 In: Democratizing Constitutional Law. Perspectives on Legal Theory and the Legitimacy of Constitutionalism. Francisco J. Laporta, and et.al. (Eds.). Law and Philosophy Library. Volume 113. Springer International Publishing. 2016, p. 293. See also Dworkin, Ronald. 1986. *Law's empire*. Cambridge, MA: Harvard University Press.

Once, a journalist asked the late Prime Minister Meles Zenawi whether the EPRDF would be ready to negotiate with the political organization such as Ginbot 7 and the OLF. His reply was:

The main concern is the principle. The principle to resolve differences through peaceful means is proper and civilized strategy. This is the first principle. Second, in our country peace can be entrusted through accepting the constitution and constitutional order; and in this structure, aiming to pursue one's objective is legitimate. Any organization, group or even individuals who are aggrieved can negotiate and turn to constitutional framework and thus the EPRDF is ready.²⁸

This statement clearly indicates that EPRDF was ready to “negotiate” but only under the terms of the FDRE Constitution. That is, one may have distinct political objective and mission, but not disagreements with the stipulations of the Constitution. In that sense, the Constitution is an unquestionable document which everyone has to subscribe to. To be critical of the FDRE Constitution and demanding change is an invitation of a normalised violence up on oneself: being tagged as anti-peace and thus normalising government brutalities.

One may read the Preamble of the FDRE Constitution and positively understand that it is brought by the “struggles and sacrifices” of all Ethiopian peoples.²⁹ However, a covert reading of the Preamble tells us that the genesis of peace as well as democratic order is “the sacrifice”. The term “sacrifice” would mean “violence”, but the former is morally appealing term than the latter. In several instances, the TPLF veterans, obnoxiously state that it has brought democracy and development to Ethiopia through its sacrifices; and thus, expecting the transfer of power through ballot box is the pursuit of the wind. That is why it is valid to

²⁸ Meles Zenawi Speech available at: http://www.youtube.com/watch?v=w_v2l5_OdvI (Accessed on August 12, 2017).

²⁹ See the preamble of the 1995 Federal Democratic Republic of Ethiopian Constitution. Proclamation No. 1/1995.

question how violence gives birth to peace and how “peace” could be sustained without constitutional violence.³⁰

Needless to say, there is always a tension between the political/democracy and legal/constitutional spheres. It has to be noted that “the challenge for contemporary constitutional theory is then to conciliate a reasonably stable constitution that assures full protection to people’s rights and at the same time it restrains power with an institution in favor of self-government.”³¹ For example, one may take election related intimidations, political crisis and human rights abuses in the past quarter of a century in Ethiopia. The 2005 post-election political crisis and state crackdown on peaceful protesters between 2014 and 2016 are the examples of violence induced constitutional order. Moreover, the social movements in Ethiopia (particularly in Oromia National Regional State following the Addis Ababa Integrated Development Master Plan) are examples of the tension between democracy and the Constitution.

In inflicting pain and death, the people in uniform are the end actors in the hierarchical chain of command. In Turkey, for instance, the military is the machine of domination and often extremely violent against political dissidents and ethnic minorities. The same is also true in the case of Chile as well as in Ethiopia, where constitution gave “legal backing” for genocide³² and massacre, respectively. In Ethiopia’s political and constitutional history, the military played, and still plays a fundamental role. In the face of state violence, the legal instrument serves to normalize police brutalities. For instance, the Ethiopian Human Right Commission (EHRC) (state agent) released a report stating that “a

³⁰ One may hold that, as in any legal order, violence is always closely related to law. It is understandable that people often obey the law not because they are just but because they have violence behind them. The enforcers may view such constitutional enforcement established and sustained through violence as “legitimate”.

³¹ See Gargarella 1996 quoted in *Supra* note 16, p. 243.

³² *Supra* note 20, p. 115.

total of 669 Ethiopians were killed during the 2016 widespread anti-government protests.”³³ However, it should be noted that EHRCO’s report is difficult to be regarded as accurate – owing to EPRDF’s refusal to accept an independent international investigation – even when demanded by the UN Commission on Human Rights.³⁴

4. The Paradox of the Constitution as a Covenant

In almost every modern constitution it is a cliché to declare that “Sovereignty cannot be divided.” This, however, should not be taken for granted. If we consider sovereignty as power, then it can be created, transformed or destroyed entailing “a capacity to exercise violence with legal impunity.”³⁵ Here, sovereignty is a metaphysical entity,³⁶ a legislative hypothesis,³⁷ ideality,³⁸ artificial person³⁹ – deciphering the violence induced power structure. Aristotle affirms the sovereign power

³³ See: <https://www.reuters.com/article/us-ethiopia-unrest/ethiopia-unrest-killed-669-in-three-regions-report-idUSKBN17K243> (Accessed on September 17, 2017).

³⁴ On June 09, 2017, a non-governmental organization, Human Rights Council of Ethiopia, reported that nineteen people (fifteen from Oromia, three from the State of Southern Nations and one from the State of Amhara); “detained 8,778 individuals from Oromia regional state followed by 5, 769 people from SNNPR, 640 from Amhara, 411 from the capital, Addis Ababa ... 6, 926 individuals were also detained from unspecified locations, bringing the total number of people detained in the wake of the state of emergency to 22, 525” (EHRC 2017). As the space for such huge number of detainees was not available in the country, the detainees were taken to military camps, colleges and any available halls in the country. Although more than twenty thousand of them were released, between five to six thousand detainees are languishing in state penitentiaries without legal charges. In a recent political change, some notorious opposition political leaders and a few hundreds of political prisoners are released.

³⁵ M. Taussig-Rubbo, ‘Outsourcing sacrifice: the labor of private military contractors’, *Yale Journal of Law & Humanities*, 21(1), 2009, 110.

³⁶ Derrida perceives sovereignty as a – *prima causa* – the unmoved mover (Derrida 1995 quoted in Antoni Abati Ninet. *Constitutional Violence. Legitimacy, Democracy and Human Rights*. Edinburgh University Press. 2013, p. 18.

³⁷ H. Kelsen, *General Theory of Law and State*, New York: Russell & Russell, 1961.

³⁸ G. W. F. Hegel, *Philosophy of Right*, Oxford: Clarendon Press, 1942, p. 36.

³⁹ T. Hobbes, *The Leviathan*, Oxford: Oxford University Press, 2009.

(*dynamis*), in congruent with Derrida's understanding, as the source of change in another thing or in another aspect of the same thing.⁴⁰ Whereas, Mbebe, which we concede to, redefines sovereignty as the state of exception where the power and the capacity to dictate who may live, and must die rests.⁴¹

Legitimacy based on peoples' sovereignty seems valid and natural – a way of doing things. For instance, social contractarians argue that a constitution is a contractual document.⁴² Such depiction (as if citizens have tacitly consented to the constitution) undermines the fundamental rights of citizens to question or even amend the constitution. Barnett explains that “it is wrong because it applies a standard of consent that no constitution can meet.”⁴³ The authors argue that fundamental legal documents such as a constitution should not be constituted tacitly. Although unanimous consent of all is an unattainable requirement, at least constitutionalism may rectify the foundational flaws. Barnett also argues that “for a constitution to be legitimate ..., it must be shown that such a constitution is consistent with the background rights of the individual.”⁴⁴ Tsegaye Regasa also affirms that FDRE Constitution's secondary chance is to redeem itself by deeds – through constitutionalism.

⁴⁰ See: Aristotle 1984 quoted in Chueiri, Vera Karam de. Is There Such Thing as a Radical Constitution? Chapter 11 In: *Democratizing Constitutional Law. Perspectives on Legal Theory and the Legitimacy of Constitutionalism*. Francisco J. Laporta, and et.al. (Eds.). Law and Philosophy Library. Volume 113. 2016, p. 240.

⁴¹ Mbembe, Achille (Trans. by Libby Meintjes) *Necropolitics*. Duke University Press. 2003, p. 11.

⁴² See: J. J. Rousseau, *The Social Contract or Principles of Political Right*, ed. R. Maynard, Great Books of the Western World: 38, Montesquieu, Rousseau, Chicago, IL: Encyclopaedia Britannica, 1954, p. 387.

⁴³ Barnett, Randy E., *Constitutional Legitimacy*. Colum. L. Rev. 2003, p. 112.

⁴⁴ *Supra note 20*, p. 138. See also: Tsegaye Regassa. *The making and legitimacy of the Ethiopian constitution: towards bridging the gap between constitutional design and constitutional practice*. Afrika focus — Volume 23, No .1, 2010, pp. 85-118.

Article 8 (1 and 2) of the FDRE constitution reads that:

All sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia.

This Constitution is an expression of their sovereignty.

In common parlance, one may think that this constitutional provision is the expression of Ethiopian peoples' sovereignty. However, it is sugar-coated; in a sense that it depicts the constitution as an instrument which emanates from the people; yet it normalizes the infliction of pain and death. Moreover, the concept "peoples" is not a monolith.⁴⁵ The idea of coming to power through ballot box "has always implicitly rested on the idea of a general will and thus on a 'people' symbolically standing in for the whole of society."⁴⁶ Nevertheless, who the "nations," "nationalities" and , "peoples" are still remains obscure.

Needless to say, the genesis of FDRE constitution is violence than unanimous consent of the people. That is, the EPRDF came to power by bullet than ballot box. Although constitutional enactment might be procedurally valid, it does not necessarily mean just.⁴⁷ Put differently, although a constitution can serve as a covenant, at least symbolically, the fundamental problem is that "if the 'other' is excluded ... becoming an outlaw, the constitution becomes a tool of oppression at the service of the new nation against the excluded."⁴⁸ Therefore, the theory that

⁴⁵ For example, Condorcet sees "the people" in three general categories: the electoral people (numerical) superiority, the sociological people (a variety of protests and initiatives), and the people as principle (the rights-bearing subject- blood-and-flesh). See: Condorcet 1790 quoted in *Supra note* 19, p. 129.

⁴⁶ *Supra note* 16, p. 2.

⁴⁷ See also *Supra note* 20.

⁴⁸ *Supra note* 20.

acknowledges the people are the source of sovereignty and constitutional law as the expression of the peoples' desire is a fiction.⁴⁹

To establish consistency, the constitutional drafters invented a theological discourse “we the people” and, the state media echoes this pretence. It is often heard that the state media depicts the FDRE Constitution as the best ever legal document Ethiopia have had in her political history, and thus striving to constitute a “constitutional faith.”⁵⁰ It has to be noted, however, that a constitution is not a word of God and hence, its enactment process and fairness could be evaluated. If the U.S. democracy is cosmetic appliance (“we the people”) than what constitutional democracy demands, then we wonder how constitutional legitimacy could be real in countries such as Ethiopia.⁵¹ Conceding to the view of Ninet, the authors argue that if the FDRE Constitution had to be amended, instead of “we the people”, the constitutional drafters should adopt “I the constitution” or “we the elite” to avoid the *de facto* relocation of sovereign power.⁵²

⁴⁹ Ninet also affirms citing the case of U.S. that “the people have never been the true sovereign in our system. ‘Constitutional democracy’ is simply a euphemism, since there is only one sovereign, there is no ‘we the people’”.

⁵⁰ This is not peculiar to Ethiopia only. For example, the U.S. constitution was described as the “Miracle of Philadelphia” – as if it was inspired by God.

⁵¹ It seems that the theological co-relation between God – Moses – the commandments is refurbished and deployed in the Western political theory as *People – the representatives – the constitution*, respectively. In religion, God is the source of everything – from Him, for Him and by Him – “the people” are set at the centre as a source of sovereignty. As Moses was the mediator between the people and God, so are the elected representatives acting on behalf of the people. Finally, as the commandments are believed to be universal and eternal, so is the current constitution as a supreme and aspirational document. Thus, modern states promote their constitutions as “sacred tablets; and the people ... became the chosen people” (Ninet 2013: 4).

⁵² *Supra* note 20, p. 29.

5. The Usurpation of Constitutional Supremacy and Constitutional Amendment

Constitutional supremacy is also one of the core principles every constitution bears. Article 9(1) of the FDRE Constitution reads that:

The Constitution is the supreme law of the land.

In a literal sense, one may perceive that constitutional supremacy signifies the status of the constitution in the hierarchy of a legal system. However, it should be underscored that it is a principle more than mere legal hierarchy. It rather signifies the supremacy of the political regime in normative and empirical terms. For instance, one may relate the inauguration of constitutional supremacy to the foundation one of the Plato's five regimes; aristocracy, oligarchy, theocracy, democracy and tyranny.⁵³ Hence, the FDRE Constitution can be understood as a founding act, creating a new identity, a new state, a new political order against the political, ethnic or racial reality that it faces. ..., becoming an outlaw, the constitution becomes a tool of oppression at the service of the new nation against the excluded.⁵⁴ That is, in one way or another, a constitutional supremacy clause signifies the establishment of one of these regimes intended by political technocrats. Therefore, the constitutional supremacy clause is a wisdom constituting a regime and normalizing the outlaw.

Suppose that the "will of the people" conflict with the FDRE Constitution. Can we think that "the people" prevail? The experience from the Swiss constitutional system proves the will of the people can prevail over the constitution. That is, under the Swiss legal system, "laws

⁵³ Besides, Cicero also affirms that "when supreme authority is in the hands of one man, we call him king, and the form of state is a kingship (*regnum*); when selected citizens hold this power we say that the state is ruled by an aristocracy (*civitasoptimatum*). But a popular government (*civitaspopularis*) (for so it is called) exists when all the power is in the hands of the people" (Cicero 1961 quoted in Ninet 2013: 31).

⁵⁴ *Supra* note 20, p. 116.

proclaimed by Parliament or by a popular majority may not be barred by the Federal Court on the grounds of unconstitutionality.”⁵⁵ This principle is consistent with the constitutional principle which states that sovereignty resides with the people. However, the Swiss system is an exception – where it can be cited in defense of democracy against constitutional violence. In a democracy, like ours, it is difficult to reconcile “democracy” and “constitution” in the absence of violence. Thus, where the law resorts to power, it acknowledges the limits of meaning.⁵⁶ In the same vein, Paulo Arantes notes that “political initiative cannot discard mediations without being *demonized*.”⁵⁷ Therefore, against the will of the people there can be constitutional enforcement but not constitutional legitimacy.

The principle of constitutional amendment is an integral part of every constitutional democracy, and not free of misappropriation. Constitutions that keep pace with the changing social, political and economic phenomenon are the ones that are up to date and consumable. Many strong democracies are known for flexible constitutional amendments. For example, the Constitution of France, ‘of the Fifth Republic, has been amended twenty-four times since it was first adopted in 1958’.⁵⁸ One of the founding fathers of the US, Thomas Jefferson, also stated that “Constitutions should be amended by each generation in order to ensure that the dead past would not constrain the living present.”⁵⁹

However, in the case of Ethiopia, the FDRE Constitution Article 104 provides for the initiation of amendments as follows:

⁵⁵ See: Swiss Federal Constitution 2000 quoted in *Supra note 34*, p. 57.

⁵⁶ See: *supra note 20*.

⁵⁷ Arantes 2013 quoted in Chueiri 2016, p. 234.

⁵⁸ *Supra note 16*, p.165.

⁵⁹ T h. Jefferson quoted in *Supra note 20*, p. 60.

Any proposal for constitutional amendment, if supported by two-thirds majority vote in the House of Peoples' Representatives, or by a two-thirds majority vote in the House of the Federation or when one-third of the State Councils of the member States of the Federation, by a majority vote in each Council have supported it, shall be submitted for discussion and decision to the general public and to those whom the amendment of the Constitution concerns.

In the last quarter of a century, numerous social, environmental, cultural and economic changes have taken place in Ethiopia. However, the 1995 FDRE Constitution has never been officially amended. Perhaps, this dormancy under the EPRDF regime did happen since the legal authorities attain their goals through other legal apparatus without meddling into constitutional amendment procedures. For example, in the aftermath of the death of Prime Minister Meles Zenawi, three ministers with the rank of deputy-prime minister⁶⁰ to the incumbent Prime Minister (Hailemariam Dessalegn) were assigned. This was contrary to what the FDRE Constitution provides regarding deputy prime minister and his powers. The public knows little why more than one deputy to the Prime Minister was required and for that matter, no constitutional amendment to Article 75 of FDRE Constitution was undertaken.

6. Roads to Legitimacy: Democratic Reflexivity, Proximity and Governmentality.

Considering the flaws of the “general will” theory, critical legal theorists advocate for legitimacy based on individual will – that is, legitimacy

⁶⁰ The deputy prime ministers were Muktar Kedir who was also the president of the State of Oromia, Debretsion Gebremichael from Tigray and Demeke Mekonnen from Amhara regional state. Later, Aster Mamo replaced Muktar Kedir. Obviously, one may argue that they were not deputy prime ministers but ministers with rank of deputy prime ministers and hence there is violation of the FDRE Constitution. However, whether we call it ministers with this rank or that rank, the constitution is clear and any addition entails inconsistency and thus unconstitutional. See: <https://www.ezega.com/News/NewsDetails/3412/Ethiopian-PM-Appoints-Two-More-Deputy-Prime-Ministers> (Accessed on March 16, 2018).

through reflexive democracy (*particularity as opposed to generality*), proximity, and governmentality. These remedial elements are discussed hereunder.

Democratic Reflexivity – Here, reflexive democracy refers to the multiplication of democratic forms – beyond the idea of majority rule and parliamentary drama. Of course, popular sovereignty can be expressed through political representatives. However, there is a huge gap between the peoples’ demand and the realities – and thus there is observable democratic deficit in Ethiopia. Hence, one strategy to fill this gap and increase constitutional legitimacy is pluralization – “adding complexity to democratic forms and subjects on the one hand and regulating the mechanisms of the majoritarian system on the other.”⁶¹ That is, there has to be open political spaces which allow different forms of popular sovereignty beyond representative democracy. In the same vein, contemporary social theorists Boaventura de Sousa Santos propose high-intensity democracy – introducing reflexive democracy.⁶² In other words, the principle of democratic reflexivity calls for particularity as opposed to the fiction of generality.

Proximity – The term proximity indicates the closeness between the governing and the governed. In this age of information, citizens are more aware of the government businesses and its flaws – and thus become more concerned about how they ought to be governed. For example, the political consciousness and political dynamics of the people of Ethiopia in the early 1990s and in 2010s is quite different. The authors think that the people have gone way far more (in their political consciousness) than the ruling elites who are in power since 1991. Global surveys indicate that “a central concern of people everywhere is that

⁶¹ *Supra* note 16, p. 123.

⁶² Santos, Boaventura de Sousa “General Introduction. Reinventing Social Emancipation: Towards New Manifestos” In: *Democratizing Democracy. Beyond the Liberal Democratic Canon*. Verso, New York, 2005, Vol. 1.

political leaders should share their experiences and consult them about what ought to be done.”⁶³ For instance, Ethiopia’s new generation want to be listened to and expect the government to be attentive to their problems and to show genuine concern for their everyday experiences.

Proximity works where leaders are accessible, receptive, and open to their people. Under the secretive political order such as the EPRDF’s, it is difficult to imagine honest “proximity”. Citizens are judges – they judge their leaders and government institutions based on the treatment they receive from them. For instance, studies of police-community engagement confirm that “the perceived legitimacy of the police depended on how individuals judged police behavior toward themselves and others.”⁶⁴ In other words, proximity also means recognition.⁶⁵ It is natural that the voters expect their representatives to be close to them, and to share their worries and aspirations. In Ethiopia, the authors wonder how far the members of the parliament, once elected to the House of Peoples Representatives, would have time to meet the people they represent and identify their problems for possible solution. When people feel abandoned, what would be at stake is not just their interests but their very existence.⁶⁶ Once the people feel abandoned, then the necessity of the state will be questioned and thus it severely undermines state legitimacy. As a result, the people may manifest their grievances through protest and disapprove the regime. The political crisis in Ethiopia since 2014 is an example of the gap between the government and the governed. Especially following the infamous Addis Ababa Integrated Developed Master Plan and the social movements that

⁶³ *Supra note* 16, p. 171.

⁶⁴ *Supra note* 16, p. 174.

⁶⁵ Honneth explains three types of recognition in her work, *The Struggle for Recognition*. They are: love, respect and esteem. Honneth sees *love* in the sphere of private relations, *respect* in the realm of law and politics, and *esteem* in social life and especially work life (Honneth 1996 quoted in Rosanvallon 2011: 178).

⁶⁶ See: Rosanvallon, Pierre [2008] (2011). Trans. Arthur Goldhammer, *Democratic Legitimacy. Impartiality, Reflexivity, Proximity*. Princeton University Press.

erupted in Oromia Regional State, hundreds of civilians were killed in the hands of military forces, tens of thousands were jailed, and many were tortured in state penitentiaries. The state, being violent towards the protesters, has found itself entangled to establish legitimacy, at least in Oromia National Regional State.

Governmentality⁶⁷ – The idea of proximity is also linked to the concept of “governmentality”, which means paying “close attention to individual situations ... an *art* of governing.”⁶⁸ Legitimacy of legal authority depends on the “government of minds” – and due to a strange error authorities lose credibility or due to genuine proximity build legitimacy. One may consider government is the institution and legal actors such as the ministers, mayors, judges, tax collectors, soldiers and etcetera. Nevertheless, Guizot argues that “the true means of government ... lie within the bosom of society itself and cannot be divorced from it. It is idle to pretend to govern society by forces external to its own, by machines which are affixed to its surface but have no roots in its entrails and do not draw their strength from within society itself.”⁶⁹

Governmentality works in a sense that if people’s minds could be influenced, e.g. their knowledge or opinions, then some of their actions can also be indirectly controlled. Dijk affirms that “those groups who control most influential discourse also have more chances to control the minds and actions of others.”⁷⁰ Orwell suggests, for example, that “political speech and writing are largely the defense of the

⁶⁷ Here the concept of governmentality is a non-Foucauldian concept. The authors are not referring to Michel Foucault’s view of governmentality, “the art of governance” which is associated with the technology of power, and its mechanics.

⁶⁸ *Supra note* 16, p.180.

⁶⁹ Guizot 1821 quoted in *Supra note* 16, p. 182.

⁷⁰ Broadly speaking, the following social categories can be regarded as groups who can influence others: professors in scholarly discourse, teachers in educational discourse, journalists in media discourse, lawyers in legal discourse, and politicians in policy and other public political discourse. See: *Supra note* 20 p. 356.

indefensible.”⁷¹ In other words, governmentality would also mean creating a condition where “others believe you, do what you want them to do, and generally view the world in the way most favorable for your goals, you need to manipulate, or, at the very least, pay attention to the linguistic limits of forms of representation.”⁷² In a nutshell, it can be underscored that there is “imagination in discourse”, that is, “people appear to create visual or spatial representations as they understand many utterances.”⁷³ Governmentality, in non-Foucauldian sense, would mean, understanding the society’s social values, passions and interests.⁷⁴

Therefore, in order for these enabling inputs (i.e. reflexive democracy, proximity and governmentality) contribute to constitutional/regime legitimacy, there has to be a policy and strategy sensitive to the former. Hence, open political spaces, empathy and understanding people’s quest instead of inflicting and sustaining pain require a long-term effort on behalf of the ruling body.

Concluding Remarks

In this paper, we have tried to indicate that, first, the FDRE Constitution is found on violence than consent; the idea that sovereignty rests with the people is not only paradoxical but also a legal fiction. Moreover, up on critically analysing the selected constitutional principles such as: the constitution as a covenant, constitutional supremacy and amendment, the authors found that these principles are not free of usurpation.

⁷¹ See Orwell 1969 quoted in Wilson, John. Political Discourse. In: Deborah Schiffrin, and et.al. (eds.). *The Handbook of Discourse Analysis*. Blackwell Publishers. 2001.

⁷² Supra note 20, p. 401.

⁷³ Clark, Herbert H. and Wege, Mija M. Van Der. 2001. *Imagination in Discourse*. In: Deborah Schiffrin, and et.al. (eds.). *The Handbook of Discourse Analysis*. Blackwell Publishers. 2001, p. 773.

⁷⁴ Prosper Enfantin, notes that, “in order to command workers, you must above all be familiar with work and know the working man’s habits; you must commune intimately with the poorest and most numerous class of the people, not just in your heart but in the harshness of everyday life” (See: Enfantin 1865 quoted in *Supranote* 18, p. 192).

Moreover, the authors have tried to analyse some common discourse and speeches of EPRDF politicians such as the late Prime Minister Meles Zenawi, and have found that in the name of safeguarding the constitution and constitutional order, the state violence has been normalized.

In a nutshell, this paper finds that although unanimous consent of all members of the public is an unattainable requirement, at least, it must be shown that such a constitution is consistent with the background rights of the individual. The paper also argued that constitutional supremacy is not mere legal hierarchy but an inauguration of the political regime the elites wanted to sculpture. Once a regime is constituted, a new identity is formed, others will be outlawed – and thus people with distinct questions and interests will be prone to state violence. Hence, the FDRE's Constitutional supremacy and constitutional amendment procedure has been used as an instrument of normalizing state violence. Considering the violence induced constitutional legitimacy crisis, the authors have argued in favour of *proximity* instead of obnoxiously regurgitating constitutional supremacy and finally, “governmentality” instead of suppression/violence. The authors believe that these tenets could be used as a tool to enhance constitutional/regime legitimacy.

