

## THE QUEST FOR ETERNAL CLAUSES IN THE ETHIOPIAN CONSTITUTIONAL AND DEMOCRATIC REFORMS

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### ABSTRACT

*For continuity of states, some constitutions have eternal clauses, which are immune from amendments forever. However, the concept of eternity has never been recognized in any of Ethiopian constitutions despite long history of constitution-making processes. Ethiopians have been tackling to establish a viable, constitutional, and democratic government through making and remaking many constitutions in their political history. Among the constitutional reforms in Ethiopia are the 1931 and 1955 Monarchical Constitutions, the 1987 Socialist Oriented Constitution and the 1995 Federal Oriented Constitution. The chief challenge in the Ethiopian constitutional and democratic reforms is that the previous reforms have never been utilized as steppingstones for the new reforms. To this date, Ethiopians have neither developed their common constitutional culture nor recognized the eternal clauses on important political and constitutional matters. There is no consensus on the issue of national identity, state structure, the form of government, language policy, regional state formation and others. Currently, Ethiopia has also been facing multiple challenges, including ethnic tensions, sporadic border conflicts, massive internal displacement, drought, poverty, and gross human rights violations. For this reason, this Article argues that Ethiopia must introduce 'eternal constitutional clauses' on issues of common national interests.*

**Key words:** *Constitution, Eternal Clauses, Ethiopia, Federalism*

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## 1. INTRODUCTION

Ethiopia introduced the first written constitution in 1931 in its constitutional history. Since 1931 to 2020, Ethiopia has enacted three types of constitutions. The first constitution was the Monarchical Constitution enacted in 1931 and revised in 1955 during the kingship of Emperor Hailesillase I. Following the 1974 Revolution, Ethiopia introduced a new system of government (Socialism). The Socialist Regime of Military Dictator led by Mengistu Hailemariam, named as ‘the Derg’ was governing Ethiopia without a constitution for around thirteen years. However, Derg enacted its constitution in 1987 as the People’s Democratic Republic of the Ethiopian Constitution (PDRE Constitution). Nevertheless, the fundamental freedoms and democratic rights recognized under this constitution had not practiced during the Derg era.<sup>1</sup>

Of course, the 1974 Ethiopian Revolution had completely eliminated the feudal system and the emperor himself successfully. The slogan of the 1974 Revolution was ‘Land to the Tiller’; accordingly land was taken from the Landlords and redistributed to the Ethiopian farmers free of any charges. Nevertheless, the quest for ‘national identity’ or the right to self-determination was not practised under the Derg government. Furthermore, the right to a full measure of self-government was never guaranteed under the 1987 Constitution although it recognizes regional autonomy.

Moreover, though it was expected to come in to effect starting from the 1974 Revolution, the Derg refused to recognize and implement the right to self-determination of Nations, Nationalities, and Peoples of Ethiopia. This encouraged the establishment of various liberation fronts during the Derg Regime. For instance, the Eritrean People’s Liberation Front (EPLF), the Tigray People’s liberation front (TPLF), and the Oromo Liberation Front (OLF) were considered the major liberation fronts in Ethiopia during the Derg era. After a disastrous civil war had been fought between these liberation fronts and the Central Government, the Derg regime collapsed completely in 1991.

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<sup>1</sup>Girmachew Alemu, *Apology and Trials: The Case of the Red Terror Trials in Ethiopia*, African Human Rights Law Journal (2006), Vol. 6, Pp 64-85.

After the downfall of Derg Regime in May 1991, the Liberation Fronts agreed to establish a Transitional Government irrespective of their differences. Accordingly, the Peace and Democracy Conference took place from 1-5 July 1991 in Addis Ababa with the attendance of some 27 political parties, including the major political parties, the Ethiopian People's Revolutionary Democratic Front (EPRDF), the TPLF, the OLF, and others.<sup>2</sup> This Peace and Democracy Conference was resulted in the following important agreements:

*The points on which agreement was reached included: first, establishing a Transitional Government made up of a coalition of democratic forces, whose main task would be to prepare the ground for National Election; second, convening a popularly elected constituent assembly to draft and to ratify a new constitution; third, prosecuting the members of the Derg and their henchmen for the heinous crimes they had committed against the people of Ethiopia; and fourth, handing over power to a democratically elected government after a transition of no longer than three years.<sup>3</sup>*

Consequently, Ethiopia adopted the 1995 Federal Democratic Republic of Ethiopian Constitution in 1994. This constitution has incorporated several golden democratic and human rights principles in its contents. Additionally, the Preamble of the same constitution claims that this constitution is

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2 Assefa Fiseha, Emergence and Transformation of Territorially Based Cleavages and Constitutional Responses in Ethiopia (Occasional Paper Series Number 28, Forum of Federations, 2019), P8.

3 See, the Peace and Democracy Conference which took place 1-5 July 1991 in Addis Ababa. And furthermore, the Peace and Democracy Conference attracted mass media and published on various newspapers both nationally and internationally at that time. For instance, a transitional programs of several opposition groups are published in special issue of Imbylta (June 1991), an Ethiopian quarterly journal of political opinion, published in Washington DC. Additionally, all the discussions during the Conference on Peace and Democracy from 1-5 July 1991 can be listened from the following websites: [https:// www.youtube.com/watch?v=5UkwtgBD8mw](https://www.youtube.com/watch?v=5UkwtgBD8mw)<https://www.youtube.com/watch?v=e61bzzbJF-k> <https://chilot.files.wordpress.com/2011/11/the-transitional-period-charter-of-ethiopia.pdf> <http://www.operationspaix.net/775-biographie-de-wodajo-kifle.html>

considered a covenant among the Nations, Nationalities, and Peoples of Ethiopia, in holding the country perpetually.<sup>4</sup>

The problem is that in all these constitution-making processes; the previous constitutions were completely repealed and replaced by the new constitution. For instance, the monarchical constitution of 1955 was all in all repealed by the 1987 People's Democratic Republic of Ethiopia. Similarly, the 1987 Constitution was dropped and replaced by the 1995 Federal Democratic Republic of Ethiopian Constitution [shortly the 1995 FDRE Constitution]. Therefore, the prior constitution cannot be used as a steppingstone for the later one.

In addition, the concept of eternity has never been recognized under any of these constitutions previously enacted in Ethiopia. Any laws including the constitution are indeed subjected to amendments to cope with time, technology, socio-political and economic conditions. Nevertheless, the notion of 'Eternal Clause' is related to the unamendability of certain important constitutional principles to ensure state's perpetual existence. That means, some clauses guarantee the immunity of certain parts of the constitution from any constitutional amendment.<sup>5</sup> In the context of eternity, the amendment is a principle to update certain constitutions to cope with the changing world; however, eternity is an exception in which few principles in the constitution remain eternally unamendable.<sup>6</sup> The reason why a certain constitutional principles remain eternally unamendable is to entrench basic human rights and to ensure democratic governance; and thereby to uphold the unity of the state. Nevertheless, eternal clause cannot be incorporated and justified for the sake of strengthening the power of the ruling government or

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4 See the Preamble of the 1995 Federal Democratic Constitution of the Ethiopia: It says, "We, the Nations, Nationalities and Peoples of Ethiopia."

5 Preuss, Ulrich K, *The Implication of Eternity Clauses: The German Experience*, Isr. L. Riv.44 (2011), P430.

6See Article 79(3) of the German Basic Law of 1949, "Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible". Article 89 of 1958 France Constitution, "The Constitution of France provides that amendments of the Constitution of France cannot affect the Republican form of government or the territorial integrity of the country". These provisions show the eternity clauses both under German and France Constitutions respectively.

for any other purposes except for the sake of ensuring democracy and nurturing human rights principles as constitutional literature reveals.

Hence, the key problem assessed in this Article is connected to the lack of eternal constitutional clauses and its drawbacks in the Ethiopian constitution-making history. Thus, this Article strongly argues that if the concept of eternal constitutional clauses are recognized and accommodated in the present constitutional reforms, it will be utilized as a grand norm for all political parties and the ruling government to ensure a viable Ethiopian state perpetually. The problem in Ethiopia is that, whenever, there is a change of government, there is a change in all aspects: For instance, a change of constitution, a change of state structure, a change of ideology; a change of National Flag, a change of language policy, and others. Always there is a paradigm shift frequently, whenever a government change occurs in Ethiopia. Accordingly, lack of genuine democratic and constitutional culture, and the non-availability of eternal constitutional clauses in the Ethiopian constitutional and political history remains a serious challenge in present-day Ethiopian political reforms.

Accordingly, this Article will answer the following main questions: what is the purpose of recognizing eternal clauses under a certain constitution? Have the concepts of eternal clauses been recognized in the Ethiopian constitution-making history? If eternal constitutional clauses will be recognized or incorporated in the present-day Ethiopian constitution, is it possible to ensure common constitutional culture, and national consensus, especially, on the issue of national identity, state structure, the form of government, language policy, and regional state formation in the present-day Ethiopian federation?

However, Ethiopia has neither recognized eternal clauses nor utilized the prior constitution as a source for the later constitution in its constitution-making history. Ethiopia faced multiple problems as a state, which include but not limited to lack of common constitutional culture/values; lack of consensus on the issue of national identity/interest, state structure, the form of government, language policy, regional state formation, and others. Moreover, currently, Ethiopians are suffering from ethnic tensions, sporadic border conflicts, massive internal displacement, impoverishment, and gross human rights violations. Constitutional reform can be considered as an

element in resolving the complex problems faced by Ethiopians. This Article argues that incorporating eternal clauses on important and core constitutional principles has paramount importance in resolving some constitutional deficiencies in present- day federalist Ethiopia.

## 2. THE CONCEPT OF ‘ETERNAL CLAUSE’ IN A CONSTITUTION

Before delving into entertaining the concept of eternal constitutional clauses, I would like to briefly describe the concept and types of constitutional amendments. Simply, a constitutional amendment is a process of modifying or altering, or changing certain constitutional provisions or principles. However, there are different rules for amending the constitution which can be either strict or flexible.<sup>7</sup>It is noted that most provisions require a simple amendment procedure, whilst a minority of provisions are more difficult to amend; they enjoy special protection as they are deemed to be more fundamental.<sup>8</sup>

Furthermore, some countries have substantive limitations on the alteration or amendment of the constitution which are explicitly included in the text of the constitution (for example, the Constitutions of Germany, France, Romania, Kosovo, Moldova, Turkey, Ukraine). Among provisions which contain substantive limitations on the alteration of the constitution, there are explicit eternity clauses, with which all constitutional amendments must comply. Consequently, we may have amendable constitutional provisions that may be amended easily or strictly; as well as, non-amendable or eternal clauses in the constitutional amendment process.

On the other hand, the concept of ‘*eternal clause*’ is highly related to un-amendability issues or immune constitutional provisions from amendment by

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7 European Commission for Democracy through Law (Report on Constitutional Amendment, Venice, 11-12 December 2009). Available at: [http://www.venice.coe.int/web/forms/documents/CDL-AD\(2010\)001.aspx](http://www.venice.coe.int/web/forms/documents/CDL-AD(2010)001.aspx)<accessed 16 June 2020> .

8 Roznal Y., Unamendability and the Genetic Code of the Constitution (New York University Public Law and Legal Theory Working Papers, Paper 514). Available at: [http://lsr.nellco.org/nyu\\_plltwp/514](http://lsr.nellco.org/nyu_plltwp/514), <accessed 14 May 2020>.

For instance, see, Article 104 and 105 of the 1995 Federal Democratic Constitution of the Ethiopia; amendments of human rights has strict procedures; it says, “*All rights and freedoms specified in Chapter Three of this Constitution, this very Article, and Article 104 can be amended only in the following manner:*”

any organs. Hence, some clauses guarantee the immunity of certain parts of the constitution from any constitutional amendment.<sup>9</sup> Therefore, these clauses function as barriers or stop lines to constitutional amendment; any amendment violating those clauses would be unconstitutional in itself and, as such, would be invalid.<sup>10</sup> Such unamendable or eternal clauses may be either formal, that is, explicitly included in the text of the Constitution, or implicit.<sup>11</sup> Explicit eternity clauses are included in nearly 35 percent of the world's constitutions (that is, 71).<sup>12</sup> However, it is also important to talk about judicial eternity clauses, that is, implicit eternity clauses, which are identified through the process of interpreting the Constitution by Constitutional Courts or other institutions exercising constitutional review.<sup>13</sup>

The contents of unamendable provisions or principles in the constitutions of different countries are almost similar though there may be slight differences. The contents of explicit unamendable provisions in different states may vary; but one can identify several common groups of components: For instance, 'form and system of government; state's political or governmental structure; state's fundamental ideology or "identity"; basic rights; state's integrity; and other provisions, unique constitutional subjects (for example, immunities, amnesties, reconciliation and peace agreements, taxation or rules governing nationality)'.<sup>14</sup>

## 2.1 THE SIGNIFICANCE OF 'ETERNITY CLAUSES' IN A CONSTITUTION

As elaborated hereinabove, the eternity clause can be defined as constitutional provisions or constitutional principles that are immune from amendments. Hereunder, the importance of 'eternal clause' in a certain constitution is assessed.

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9 Preuss, Ulrich K, *The Implication of Eternity Clauses: The German Experience*, Isr. L. Riv.44 (2011), P430.

10. Prof. Dr. Dainius Žalimas, Presentation to the XVIIth Congress of the Conference of the European Constitutional Courts "Role of the Constitutional Courts in Upholding and Applying the Constitutional Principles", June 28-July 1st, 2017, Batumi, P3.

11 *Ibid*.

12 *Id*,P3.

13 *Id*,P6.

14 RoznalY, Unamendability and the Genetic Code of the Constitution,*supra* note 8, P4.

### 2.1.1. To Mould Constitutional Identity

The concept of ‘Constitutional Identity’ is related to a certain nation’s history, values, and aspirations.<sup>15</sup> That is, certain nation’s history, values, national interests, symbols, and aspirations should be protected by eternity clauses in the constitution. Hence, eternity clauses should be understood as protecting the core of fundamental constitutional principles and therefore leaving space for evaluative interpretation of these principles.<sup>16</sup>

As the Venice Commission has noted, concepts like “sovereignty”, “democracy”, “republicanism”, “federalism” or “fundamental rights”, that is, principles, most often protected by un-amendability, over the years have been subject to continuous evolution, both at the international and national level, and should properly continue to be so in the years to come.<sup>17</sup> Therefore, eternity clauses, properly understood, should be seen not as imposing “dead hand constitutionalism”, but as ruling out amendments that would violate the very substance of relevant constitutional principles.<sup>18</sup>

### 2.1.2 Safeguarding the Basic Values of Substantive Democracy

Truly speaking, a constitution should not become an instrument for democratic suicide by inserting eternity clauses without a justifiable cause. Nevertheless, rarely it is necessary to make some fundamental democratic and human rights principles unamendable forever under certain constitutions. For instance, some constitutions, like the German or Czech Constitution, comprise clauses, explicitly declaring the unamendable nature of the democratic form of government.<sup>19</sup> Other constitutions, like that of Kosovo,

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15Dainius Žalimas, Eternity Clauses: A Safeguard of Democratic Order and Constitutional Identity (President of the Constitutional Court of Lithuania), P1.

16*Ibid.*

17*Ibid.*

18*Ibid.*

19See Article 9 (2) of the Czech Republic's Constitution of 1993 with amendments through 2002.

- 1) This Constitution may be supplemented or amended only by constitutional acts.’
- 2) Any changes in the essential requirements for a democratic state governed by the rule of law are impermissible.
- 3) Legal norms may not be interpreted so as to authorize anyone to do away with or jeopardize the democratic foundations of the state.



prohibit [*albeit* indirectly] amendments diminishing the constitutional rights and freedoms.<sup>20</sup> Obviously, democracy and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. These democratic rights and human rights are universally applicable and becoming parts and particles of international customary laws.<sup>21</sup>

Consequently, independence, democracy, and the inherent nature of human rights and freedoms are associated with the highest constitutional protection through the consolidation of their absolute un-amendability.<sup>22</sup> In the light of the notion of the Constitution as integrity, this inviolability means not only the prohibition on altering or revoking constitutional provisions consolidating these values, but also the prohibition on adopting amendments to the other articles of the Constitution that would deny any of such values.<sup>23</sup> Accordingly, eternity clauses are very useful in upholding and protecting democratic governments across the globe. Thus, the eternal clauses in a certain constitution have paramount importance in strengthening the essence of rule of law, inalienable human rights, and safeguarding democratic order in a certain country.

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20See the 2008 Constitution of the Republic of Kosovo, Art.144 (3).

‘The President of the Assembly of Kosovo refers proposed Constitutional amendments before approval by the Assembly to confirm that *the proposed amendment does not diminish the rights and freedoms guaranteed by Chapter II of the Constitution.*’

21 For example, the Preamble to The North Atlantic Treaty states that “the Parties to this Treaty are determined to safeguard the freedom, common heritage and civilization of their peoples, founded on the principles of democracy, individual liberty and the rule of law.” The well-established dictum of the European Court of Human Rights is stating that “democracy is without doubt a fundamental feature of the European public order”. Similarly, Article 10 of the 1995 FDRE Constitution of Ethiopia says, “Human rights and freedoms, emanating from the nature of mankind, are inviolable and inalienable.”

22 Prof. Dr. Dainius Žalimas, Presentation to the XVII<sup>th</sup> Congress of the Conference of the European Constitutional Courts, Cited at *supra* note 10, P4.

23*Ibid.*

### 3. THE PLACE OF ETERNAL CLAUSES IN THE ETHIOPIAN CONSTITUTION-MAKING HISTORY

#### 3.1.THE CONSTITUTION-MAKING HISTORY IN ETHIOPIA: GENERAL OVERVIEW

Constitution-making is the most important event in the political life of a country. A constitutional moment is a revolutionary event. It is a moment of constitutional festivity and it is a moment of negotiating national identity too. Unfortunately, very few nations are blessed with a constitutional moment. Since in the history of the constitution-making process, very few nations are successful in freely participating in its making and unmaking process. Accordingly, from history, we have witnessed that most of the world constitutions were imposed by monarchies or dictators. Even in modern times, though the name of the world government incorporates the nomenclature ‘*Democratic Republic*’; their nations have never conferred on people the chance of freely participating in the making and unmaking of their national constitutions. Consequently, most of the the world states’ constitutions have been enacted as per the interest of the dominant political parties in their respective countries, not as per the interests of their people.

The constitution-making and unmaking process in Ethiopia is also like the above illustrations. Hence, the Ethiopian history of the constitution-making process has proven that the people of Ethiopia have never participated either directly or indirectly in their constitution-making process. Ethiopians have never been participated in making and re-making their constitution neither directly nor through their representative in a democratic and transparent manner. In its history, Ethiopia has seen three types of constitution, namely: monarchical constitution [1931-1974]; socialist constitution [1974-1991] and federal oriented constitution [since 1991].

Accordingly, Ethiopia had written constitutions since 1931; nevertheless, the constitutional making had never been participatory, inclusive, and legitimate. The making processes and the contents of both 1931 and 1955 monarchical constitutions were not democratic. Thus, during the monarchical era [from 1931-1974], Ethiopia had nominal constitutions. The absolute power was

vested in the emperor himself. Consequently, the emperor himself was considered the chief executive and commander-in-chief of the national army forces; he was considered the lawgiver, the parliamentary legislation was never enacted unless he signed; and furthermore, the emperor himself was accepted as a fountain of justice; the final decider on legality and constitutionality at his imperial Chilot [bench].<sup>24</sup>

In the aftermath of the 1974 Revolution, the Military Dictatorship called ‘the Derg’ had introduced Socialism as a new system of government ideology in Ethiopia. The Derg ruled Ethiopia without a constitution for thirteen years [from 1974-1987]. The Derg government enacted its socialist-oriented constitution in 1987 as the People’s Democratic Republic of the Ethiopian Constitution [The 1987 PDRE Constitution]. This constitution introduced many improvements on paper; like the Principle of Separation of Power, Secularism, and others; however, it had never been practiced by the then government. Nevertheless, political parties were banned; there was no right to run for or contest elections.<sup>25</sup>The regime of military dictator led by Mengistu Hailemariam refused to recognize the right to self-determination of nations, nationalities, and peoples of Ethiopia. This encouraged the establishment of multiple liberation fronts as explained hereinabove.

### 3.1.1 The History of the 1995 FDRE Constitution Making

The process of constitution-making is as important as its substance to determine the acceptance of a certain constitution as democratic or not. The strength of the participatory constitution-making process is that it secures the consent of the majority elites and stakeholders.<sup>26</sup> All have to be included because, in divided societies, inclusion is a prerequisite to genuine consent.<sup>27</sup> More broadly, it is a process of constructing a political consensus around constitutionalism in society as a whole.<sup>28</sup> This means that not only the elites but also the people at large consent to it.<sup>29</sup> As a result of this process, people

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24 Ethiopian Constitution of 1931 established in the Reign of Majesty Haile Sellassie I, 16<sup>th</sup> July 1931.

25 Kifle Wadajo, *The Making of the Ethiopian Constitution* (1991), P135.

26 Kifle Wodajo, *Id*, P7.

27. *Ibid*.

28. *Ibid*.

29 *Ibid*.

will have a sense of ownership of the constitution.<sup>30</sup> They identify with, uphold, and safeguard it.<sup>31</sup> The participation of all the political, ethnic, and socio-economic groups in this democratic process fosters or strengthens in all of them the awareness that they are part of the same polity.<sup>32</sup> Therefore, in the process of constitution-making, the various stakeholders should be in the dialogue and reach on an understanding or consensus to ensure the legitimacy of the constitution.

However, the process of the 1995 FDRE Constitution making had encountered many shortcomings: For instance, during its drafting stage, the OLF-one of the principal actors during the Transitional Period had left the transitional process. Despite the nominal coalition structure of the EPRDF, from the beginning, the TPLF provided the leadership, ideological direction to majority of the fighters of the movement.<sup>33</sup> Regional elections were held in most of Ethiopia on 20 June 1992 but, after alleged intimidation and other irregularities, the OLF boycotted the election and withdrew from the government.<sup>34</sup> Its forces then launched an armed insurrection against the government.<sup>35</sup> So, as we see from these explanations at the drafting stage the 1995 FDRE Constitution was not participatory or all-inclusive.

A constituent Assembly was formed after a separate election was held on 5 June 1994 to complete and ratify a new constitution. In both elections (the 1992 regional elections and the 1994 election), there was evidence of human rights violations and in the latter case 39 parties participating, most of them were members or supporters of the government, while the major opposition forces, including the OLF, the All Amhara People's Organization (AAPO) and a coalition of southern parties boycotted them.<sup>36</sup>The most important opposition parties those representing the Oromo and the Amhara withdrew from the electoral competition during the transition. The EPRDF and its

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30.*Ibid.*

31.*Ibid.*

32. *Id*,P8.

33.John Young: Regionalism and Democracy in Ethiopia (Vol.19,No.2) (1998) Stable URL:<http://www.jstor.org/stable/3993156>), P194.

34. *Ibid.*

35. *Ibid.*

36.Ugo Mattei: The New Ethiopian Constitution; First Thought on Ethnical Federalism and the Reception of Western Institutions (1995), P6.

alliance won 539 seats, leaving 18 seats for other parties or independent candidates; only in Addis Ababa, where independent candidates won 12 out of 27 seats, indicative of semblance of competition.<sup>37</sup> Though Ethiopia experienced a disastrous civil war which led to the fall of the dictator (the Derg) in 1991, yet Ethiopia failed in enacting a legitimate constitution in the post-conflict era.

Nevertheless, during the making process of the 1995 FDRE Constitution, many international principles were incorporated by its drafters to make it more democratic. Especially, Chapter Three of the 1995 FDRE Constitution guarantees most rights recognized in the Universal Declaration of Human Rights (UDHR).<sup>38</sup> Rights recognized in other international instruments like International Convention on Civil and Political Rights (ICCPR) were incorporated into this constitution.

Also, the all-inclusive 1995 FDRE Constitutional making process was contentious; hence, it was not all-inclusive in its drafting stage since most of the political parties such as the OLF and AAPO have left the transition. Additionally, its contents were criticized by some scholars such as Tsegaye who have listed the major challenges of the Ethiopian federalism in contemporary Ethiopia as follows<sup>39</sup>:

*The threat of secession and internal fragmentation, managing extreme interstate imbalances, the task of state-building especially in the economically impoverished and historically underserved states, power-sharing in the executive office, the quest to have more than one federal working language, choice of capital cities (both at federal and state level) and the promotion of uniform human rights standards in the face of the intensely polarized legal system.*

However, the preamble of the Constitution talks about, living together based on equality, building of common interest, and contribution to the emergence of a common outlook, rectifying historically unjust relationships and by

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<sup>37</sup>*Ibid.*

<sup>38</sup> See, Chapter Three of the 1995 FDRE Constitution, Arts. 14-44.

<sup>39</sup> Tsegaye Regassa, State Constitutions in Federal Ethiopia: A Preliminary Observation (A Summary for the Bellagio Conference, March 22-27, 2004), P20.

further promoting our shared interests and to live as one economic community.

Furthermore, the 1995 FDRE Constitution has incorporated some important pillars of democracy such as, Sovereignty of the People, Supremacy of the Constitution, Sanctity of Human and Democratic Rights, Secularism and Accountability and Transparency of the government officials.<sup>40</sup> But, the 1995 FDRE Constitution had failed in incorporating the so-called eternal constitutional clause; even discussions had never been conducted on this issue during its drafting phase. That is why, this Article strongly argues that it is possible to build the Ethiopian constitutionalism and constitutional culture on the 1995 FDRE Constitution for the future rather than dismissing this constitution, and go for a completely new constitution in the present Ethiopian constitutional reforms.

#### **4. RETHINKING FOR ETERNAL CONSTITUTIONAL CLAUSES, AND UMPIRING INSTITUTIONS IN ETHIOPIA**

As assessed hereinabove, Ethiopia is neither successful in nurturing its constitutional cultures; nor in utilizing earlier constitutions for developing the later one. Always, the change of the government resulted in a radical change in the constitution and constitutional culture in Ethiopia. Undeniably, some changes happened in Ethiopia were supported by a revolution which brought a paradigm shift in the overall political and constitutional aspects. For instance, the 1974 Revolution, which dismantled the feudal system drastically, shifted the ideology of the Ethiopian politics to socialism. The change was from absolute monarchy to socialist government (from monarchy to republic). The 1991 Ethiopian Revolution (May be Ethnic Revolution or Multiculturalism) resulted in ideological change from socialism to capitalism. When radical political and economic change occurs, there may be a tendency of eradicating all legacies of previous regime. Still, it was possible to consider eternal constitutional clauses on the area of national identity, national interest, national symbol, and common national consensus, especially, under the 1995 FDRE Constitution. Nevertheless, the drafters of the 1995 FDRE Constitution had not been deliberated on the issue

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<sup>40</sup>FDRE Constitution, Arts. 8-12.

of eternal clauses, during their discussions on various constitutional principles; consequently, it was not incorporated in the 1995 FDRE Constitution.

Of course, incorporating the eternal clauses in a constitution is not an end by itself since establishing genuine, independent, and functioning constitutional institutions, to secure the values of eternal clauses is also necessary in Ethiopia. As a result, impartial and independent umpiring constitutional institutions those interpret and adjudicate constitutionality issues; both in concrete and in abstract cases must be introduced to benefit from the values of eternal clauses in the present Ethiopian federation. Therefore, to make the concept of eternal constitutional clauses more workable; it is highly necessary to introduce an independent constitutional adjudicatory organ, like the Constitutional Courts, through removing politically sensitive institution, like the House of Federation, in the current ongoing Ethiopian constitutional and political reforms.

#### **4.1 THE NEED TO INTRODUCE ‘ETERNAL CLAUSE’ IN THE ETHIOPIAN CONSTITUTION**

##### **4.1.1. To Establish a Common Constitutional Identity/Value**

As explained hereinabove, Ethiopia has never been blessed in adopting a legitimate constitution since its creation. The previous constitutions have not been utilized as a steppingstone for the new ones. Always a change in government results in a change in the constitution and political ideology. That means, there is a frequent paradigm shift in the Ethiopian political and constitutional system. For instance, the monarchical system itself strived a lot to imitate the monarchy of Japan through transplanting the Japanese monarchical constitution. Nevertheless, the Japanese model was not compatible with the Ethiopian circumstances, as Japan is a nation-state while Ethiopia is a highly diversified one. Hence, Emperor Haileseilassie I was forced to review his 1931 Constitution and enacted the 1955 Revised Constitution of Ethiopia which was a direct replica of the West-Ministerial Style at the time. Again, it had never worked at the time; then the 1955 revised monarchical constitution was completely changed to the Socialist oriented constitution of 1987. Furthermore, the 1987 socialist constitution of

Ethiopia was also replaced by the 1995 federal oriented constitution of Ethiopia.

At this juncture, one can understand that Ethiopia has shifted from a monarchical and unitary system to a socialist and unitary state structure; and then transformed into a multinational federation. Amid all these political turmoil's, there has been no consensus on the issues of constitutional identity or important national values and interests. For instance, there is no agreement on several issues including, *national identity*, *a national symbol* like National Flag and National Working Language, *Structure of state* [federalism or unitary structure, multinational or geographical federation], *System of government* [a parliamentary system of government or presidential one]. Additionally, *the establishments of regional states* are also another anomaly. Moreover, the status of *the capital city*, *Addis Ababa* and other cities like *Dire Dawa* is also among the challenging issues in present-day federalist Ethiopia.

Furthermore, Ethiopia has been disturbed by divergent political ideologies and political parties. *Firstly*, there are political groups that strongly claim for federation [Hence they put federalism as the best option for state structure and government system in Ethiopia]. *Secondly*, unionist forces are claiming to restore the old unitary state systems and thereby to ensure a nation-state in Ethiopia. This group condemns federalism; specifically, ethnic federalism as a dangerous system that will result in disintegration and civil war at the end of the day. *Thirdly*, there are political groups that strongly claim for the right to self-determination up to secession. These groups or political parties comprise of Ethnic-based Liberation Fronts; and therefore, they are struggling to make their ethnic group independent from domination or to strengthen multicultural federation. These groups need to agree on common constitutional value to introduce eternal clauses in the Ethiopian constitution.



#### 4.1.2 Strengthening Democracy and Rule of Law in Ethiopia

Of course, the term democracy and rule of law are omnipresent in the modern political world. One may find these terms everywhere on the paper even in the dictatorial regimes. Nevertheless, practising democracy and rule of law in a certain country is a difficult task both for the government and the opposition parties.

Ethiopia has been striving a lot to ensure rule of law and democracy for a long period. Especially, upon the introduction of federalism in 1995 through adopting the federal constitution in the same year; democracy and rule of law were incorporated in the constitutional text, and repeatedly attempts have been made by the Ethiopian government to implement the principles of rule of law and democracy. For instance, the multiparty system was introduced and elections were taken place many times in Ethiopia as a symbol of democracy.<sup>41</sup> However, still, even under the federal democratic republic-oriented governance system, Ethiopia has failed to conduct a free, fair, and democratic election since 1991. On the other hand, gross human rights violations had taken place during these elections.<sup>42</sup> Furthermore, Ethiopian People's Revolutionary Democratic Front (EPRDF) announced hundred percent victories in the election that was conducted in 2015. Hence, these acts of conducting undemocratic elections erode democracy and rule of law in Ethiopia.

Beside this, ensuring rule of law is another difficult agenda in the Ethiopian political and democratic reforms. Rule of law is directly related to establishing a limited government in a certain country. It is a concept which

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41 Ethiopia had conducted her first national wide multiparty oriented election in 1992. From 1992 onwards, Ethiopia had been conducting periodic elections per five years until today [1992, 1995, 2000, 2005, 2010, and 2015]. Now, also there will be nationwide a multiparty election in 2020 which is postponed into 2021 because of COVID\_19.

42According to the European Union Election Observation Mission Final Report on the Ethiopian Legislative Elections of 2005; in the post 2005 National Election of Ethiopia; thousands of people were killed in the post-election throughout the nation. Especially, hundreds of peoples were massacred in Addis Ababa [capital city] in the post-election violent oriented demonstrations.

refers to a government based on principles of law and not of men.<sup>43</sup> The nature of limitations will vary with the society, culture, political and economic arrangements; but the need for limitations on the government will never be obsolete, where and when rule of law is respected.<sup>44</sup> Today, rule of law is the foundation of good governance. This requires adherence to constitutional supremacy, recognition that government and the governed are equal before the law, acknowledgment that government itself is limited by the law and cannot engage in any arbitrary exercise of power, and recognition that individuals are endowed with certain inalienable rights that cannot be denied even by legitimately constituted governments.<sup>45</sup>

Certainly, rule of law depends upon the notion that claims powers of state and government can be exercised legitimately only following the applicable laws and according to laid down procedures; which are almost rare in the Ethiopian scenario. Therefore, it is very important to introduce eternity clauses under the Ethiopian constitution to ensure rule of law in Ethiopia.

#### **4.1.3 To Entrench Human Rights and Fundamental Freedoms in Ethiopia**

In general, human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent, and indivisible.<sup>46</sup> The pertinent elements of human rights are incorporated in international treaties, international customary laws, covenants, declarations, national constitutions, laws like UDHR, ICCPR, ICESCR, UN Charter, and others. The concept of human rights and fundamental freedoms are also incorporated under the 1995 Federal Democratic Republic of Ethiopian Constitution. Human rights and freedoms,

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43 Alok Kumar Yadav, International Journal of Law and Legal Jurisprudence Studies Vol. 4 No.3), P6, available at: [http://ijlljs.in/wp-content/uploads/2017/08/Rule\\_of\\_Law.pdf](http://ijlljs.in/wp-content/uploads/2017/08/Rule_of_Law.pdf)<accessed on 21 May 2020>.

44 Brian Z. Tamanaha, On the Rule of Law: History, Politics and Theory(Cambridge: Cambridge University Press, 2004), P101.

45Alok Kumar Yadav, *supra* note 43, P3.

46Vienna Declaration and Programme of Action (1993, para.5).

emanating from the nature of mankind, are inviolable and inalienable.<sup>47</sup> The 1995 FDRE Constitution has entrenched human rights and fundamental freedoms broadly. Particularly, Chapter Three of the FDRE Constitution guarantees human and democratic rights.<sup>48</sup>

## 5. PROPOSED ETERNAL CONSTITUTIONAL CLAUSES IN ETHIOPIA (RESEARCHER'S PROPOSAL)

There is no concept of eternal clauses in any of the previous Ethiopian constitutions including the current federal oriented constitution. However, the 1995 Federal Democratic Republic of Ethiopian Constitution introduces more stringent procedures on amending some specific constitutional provisions.<sup>49</sup> Accordingly, there is a difference between the rules on the amendment of constitution which can be strict or flexible ones as per the 1995 FDRE Constitution; but, the concept of eternal constitutional clauses has never been recognized under this Constitution.

As per Article 104 of the 1995 FDRE Constitution, initiation of the constitutional amendment follows the following procedures:

*Any proposal for a 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.*

However, strict procedures are imposed to amend the human rights and fundamental freedoms recognized under chapter three of the 1995 FDRE Constitution as per its Article 105 as follows:

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47 FDRE Constitution, Art. 10.

48 FDRE Constitution, Arts.13-44.

49 FDRE Constitution, Arts.104 and 105.

1. *All rights and freedoms specified in Chapter Three of this Constitution, this very Article, and Article 104 can be amended only in the following manner:*
  - (a) *When all State Councils, by a majority vote, approve the proposed amendment;*
  - (b) *When the House of Peoples' Representatives, by a two-thirds majority vote, approves the proposed amendment; and*
  - (c) *When the House of the Federation, by a two-thirds majority vote, approves the proposed amendment.*
2. *All provisions of this Constitution other than those specified in sub-Article 1 of this Article can be amended only in the following manner:*
  - (a) *When the House of Peoples' Representatives and the House of the Federation, in a joint session, approve a proposed amendment by a two-thirds majority vote; and*
  - (b) *When two-thirds of the Councils of the member states of the Federation approve the proposed amendment by majority votes.*

However, the researcher strongly argues that imposing stringent amendment procedures on core human and fundamental freedom is not enough to hold Ethiopia as a single nation perpetually, and thereby to establish a constitutional identity for the Nations, Nationalities, and Peoples in this federation. Therefore, the researcher has proposed the following constitutional provisions as an '*eternal constitutional clauses*' in the ongoing constitutional and democratic reforms in present-day Ethiopia:

### **5.1 FEDERAL AND DEMOCRATIC STATE STRUCTURE**

Although there are different grounds to impose unamendable/eternal constitutional clauses; many states recognize their structure of state or system of government as an eternal clause. The best example is the German scenario. According to the German Basic Law, the state of Germany remains federal forever; or federalism remains state structure eternally or unamendable constitutional provision in Germany.<sup>50</sup>

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50 See the 1949 Basic Law of Germany, Art.79 (3):“Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.”

In the same scenario, Ethiopia had been governed under absolute monarchies since its establishment in the late 19<sup>th</sup> century. From Minilik II to Haileselassie I [from 1889-1974] absolute monarchies ruled Ethiopia. Though the great revolution was conducted in 1974 and socialism was introduced to Ethiopia; the quest for the national identity of numerous Nations, Nationalities, and Peoples of Ethiopia had never been answered until 1991. However, after disastrous civil wars were conducted between various liberation fighters and the central government of Ethiopia<sup>51</sup>; federalism was introduced to Ethiopia in 1991 upon the collapse of socialist-oriented military dictator [the Derg regime] in post-1991.

Accordingly, federal oriented state structure has been recognized as a response to the quest for national identity, right to self-determination and as a rectification to the past historically unjust relationship among the Ethiopian Nations, Nationalities, and Peoples. Of course, the federal-state structure is recognized under the 1995 FDRE Constitution<sup>52</sup>; nevertheless, it is subjected to amendment as per Article 104 and 105 of the same constitution.

Therefore, ‘*a Federal and Democratic State structure*’ shall be declared as an eternal constitutional clause in Ethiopia, to guarantee the right of self-determination for the Nations, Nationalities, and Peoples of Ethiopia. Hence, the federal-state structure shall be recognized as unamendable constitutional provisions in the ongoing constitutional and democratic reforms in present-day federalist Ethiopia.

As this researcher argues, there may be two justifications for claiming ‘a federal and democratic state structure’ as an eternal constitutional clause in Ethiopia:

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51The main liberation fighters during the regime of military dictator led by Mengistu Hailemariam [the Derg regime] includes: The Eritrean People’s Liberation Front (EPLF), The Tigreyan People’s Liberation Front (TPLF) and The Oromo Liberation Front (OLF) in Ethiopia.

52 See Article 1 of the 1995 FDRE Constitution: “This Constitution establishes a Federal and Democratic State structure. Accordingly, the Ethiopian state shall be known as the Federal Democratic Republic of Ethiopia.”

*Firstly*, Ethiopia was an empire established through war and conquest by king Minilik II in the late 19<sup>th</sup> century. Minilik II had subjugated many independent peoples like the Oromo, Wolaita, Sidama, Somalis, Hadiya, and others after bloody wars were conducted. Since then, this empire has never democratized. The victor and the vanquished people had been living together for more than a century and a half in the Ethiopian Empire. Accordingly, the 1991 ethnic revolution [federalism] was introduced to mould a classless society in Ethiopia in which all people are considered themselves as victors. The Nations, Nationalities, and Peoples of Ethiopia also agreed to rectify their historically distorted relationship in all aspects. Hence, a federal and democratic state structure was introduced as a guarantee for the Nations, Nationalities, and Peoples of Ethiopia, which bestows the right to self-determination upon all the Nations, Nationalities, and Peoples of Ethiopia. Consequently, federal and democratic state structures shall be declared an eternal constitutional clause in Ethiopia.

*Secondly*, currently, unionist forces are claiming to restore the old unitary state systems and thereby to ensure a nation-state. Especially, these groups condemn federalism; specifically multicultural federalism as a dangerous system that will result in disintegration and civil war at the end of the day. Thus, the unionists and lovers of the monarchical systems are struggling to dismiss the federal and democratic state structure in contemporary Ethiopian politics. They are striving a lot to kick out the multicultural federation and to restore the unitary state which propagates one language, one flag, and probably one religion.<sup>53</sup> Therefore, the suppressed Ethiopian Nations, Nationalities, and Peoples shall struggle a lot to declare a federal and democratic state structure as an eternal constitutional clause to save themselves and the countries from disintegration.

## **5.2 HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS**

Human rights are rights related to the nature of mankind. Hence, democratic governments must be based on the universally recognized human rights

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<sup>53</sup>The unionist political forces claim Amharic as an Ethiopian language, Amhara culture as an Ethiopian culture, most probably Orthodox Christianity as a state religion in Ethiopia similar to the past monarchical governments of the Ethiopian Empire in the same manner with their ancestors, the Amhara kings.

frameworks. Also, the sanctity of human rights is recognized as one pillar of the FDRE Constitution and human rights and freedoms, emanating from the nature of mankind are inviolable and inalienable.<sup>54</sup> Nevertheless, these human rights and fundamental freedoms have not been respected and enforced by the Ethiopian governments. Though human rights and fundamental freedoms have been incorporated in the contents of the 1995 FDRE Constitution; these rights are not immune from the amendment.<sup>55</sup> Therefore, it is very necessary to create Ethiopian constitutional identity/basic constitutional values on these several elements of human rights and freedoms. Accordingly, the protection of fundamental rights, the protection of human dignity, the respect for the supreme federal constitution, and the sovereignty of the people shall be governed under eternal constitutional clauses.

## 6. CONCLUSION

Eternal constitutional clauses have paramount importance in ensuring a certain country's integrity, to entrench human and fundamental freedoms, and thereby to create that country's constitutional identity/values perpetually. Accordingly, incorporating eternal constitutional clauses in a certain constitution is very useful in establishing unshakable constitutional guarantees which can be utilized as a ground norm in that specific state. With slight differences, most constitutions contain eternal constitutional clauses on the following constitutional topics: form and system of government; state's political or governmental structure; state's fundamental ideology or identity; basic rights; state's integrity; and other provisions, unique constitutional subjects (for example, immunities, amnesties, reconciliation and peace agreements, taxation or rules governing nationality).<sup>56</sup>

Ethiopia as a country also has been suffering from several constitutional challenges in its political history. The main challenge in the Ethiopian constitution-making and remaking process is that the prior constitution has never been utilized as a steppingstone for the later constitutions. As a result

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54 FDRE Constitution, Art. 10.

55 See FDRE Constitution, Art.105.

56 Roznal Y, *supra* note 8.

of this, Ethiopians have neither created their constitutional identity/values nor recognized the eternal clauses on core constitutional and political principles. Consequently, Ethiopians have not reached a consensus on various constitutional and political issues, which include but not limited to the issue of national identity, state structure, the form of government, language policy, regional state formation and others to this date. Therefore, Ethiopia has been facing multiple challenges as a result of these diverging interests on basic constitutional and political values. Hence, this article argues that Ethiopia should consider introducing ‘eternal constitutional clauses’ on grand constitutional and political values during the ongoing constitutional and democratic reforms currently.