

# UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS IN ETHIOPIA: THE PRACTICE UNDER VEIL AND DEVOID OF A WATCH DOG

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## Abstract

*The Constitution of the Federal Democratic Republic of Ethiopia (FDRE) under Article 104 and 105 sets forth amending clauses for formal constitutional changes that sets procedures to be observed in the process of constitutional amendments: both initiation and approval. Such constitutional provisions serve to confine the power to amend the constitution within the prescribed legal requirements as well as help to control arbitrary changes to the constitution, which consequently promotes constitutionalism within the country. The FDRE Constitution has been amended twice within these twenty years. The first amendment was made on Article 98 of the Constitution in 1997, and the second on Article 103 (5) of the Constitution in 2005. This study explores the practice of such constitutional amendments and their constitutionality under the Ethiopian legal context. The study argues that the first and the second amendments substantially contravened procedural requirements set by the Constitution, and hence are unconstitutional. Moreover, the study also examines the institutional set up of the Ethiopian legal system and finds that neither the House of Federation nor ordinary courts are appropriate organs to review the constitutionality of constitutional amendments. Finally, the study recommends that amendments made on the FDRE Constitution should be published, and institutional reforms to be carried out in order to (re-)organize a watch dog body to safeguard the Constitution against practice of unconstitutional amendments.*

**Keywords:** amendment, constitution, Ethiopia, House of Federation, judicial review, unconstitutionality

## I. INTRODUCTION

The Constitution of the Federal Democratic Republic of Ethiopia (FDRE) under Article 104 and 105 sets forth amending clauses for formal constitutional changes.<sup>1</sup> These articles lay down procedures which have to be observed in the process of constitutional amendments. These procedures had been practically invoked while the Ethiopian Constitution was amended twice in the past twenty years. Accordingly, Article 98 of the Constitution has been amended so as to change the spirit of concurrent power of taxation in to revenue sharing. Besides, Article 103(5) of the Constitution has also been changed to extend the period for conducting national population census to more than 10 years.

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<sup>1</sup> The Federal Democratic Republic Of Ethiopia (FDRE) CONSTITUTION, Proclamation No. 1/1995, FED. NEGARIT GAZETA, 1<sup>st</sup> Year No. 1, 1995 (herein after FDRE CONSTITUTION), Art 104.

This scholarship intends to examine the constitutionality of these constitutional amendments and their review mechanisms under the Ethiopian legal system based on analytical approaches. This article has three main interrelated sections. Following this short introduction, the amendment rules for changing the Ethiopian Constitution will be discussed. In connection, procedural and substantive requirements for constitutional change will be elaborated. The Third section deals with the concept of unconstitutional constitutional amendment under the Ethiopian legal system. A particular focus is given to the first and the second amendments made on Article 98 and 103(5) of the FDRE Constitution. Judicial review of amendments and the question of competence as well as grounds of review are explored comparatively under Section Four. More importantly, it looks into the appropriateness of the House of Federation (HoF) as an umpiring institution to review unconstitutional constitutional amendments in Ethiopia. Finally, this piece closes with some concluding remarks.

## II. THE AMENDMENT RULES IN THE ETHIOPIAN CONSTITUTION

Amendment clauses are common features of contemporary democratic constitutions. More importantly, this clause expressly provides rules for formal constitutional changes that imply amendments to be made only in accordance with the formula provided within the constitution.<sup>2</sup> This amending formula which is built-in the constitution serves to confine the right to amend within the prescribed legal requirements as well as helps to control arbitrary changes to the constitution, which consequently promotes constitutionalism within the country.<sup>3</sup> Although present-day constitutions make use of a wide variety of amendment formulas, it often comprises of procedural and substantive requirements, by which formal changes to a constitution may occur.

### A. Procedural Requirements

The procedural aspects of an amendment formula have a formal character, and subsequently make out the bodies engaged on the process of constitutional amendment along with the majority required for amending the constitution. Typically, it deals with the rules of initiation and ratification.<sup>4</sup> The rules of initiation delineate the organs having legitimate power to kick off constitutional amendment proposals. However, they may not be necessarily made available within a constitution.<sup>5</sup> In such cases, initiation is assumed to be carried out in the same manner as to

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<sup>2</sup> Teresa S. Collett, *Judicial Independence and Accountability in an Age of Unconstitutional Constitutional Amendments*, 41 CHICAGO L. J 327, 333 (2010); see also Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective*, 347 CHICAGO PUB. LAW. & LEG. THEO. W. PAP. 96, at 96-98 (2011).

<sup>3</sup> VICKI JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 201-203, 309-310 (Cambridge University Press, 2<sup>nd</sup> ed., 2006); Charles Fombad, *Limits on the Powers to Amend Constitutions: Recent Trends in Africa and Their Potential Impact on Constitutionalism*, 1, 20-21 (Paper Presented at the World Congress of Constitutional Law, Athens, Greece, 11-15, June 2007).

<sup>4</sup> Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 WAKE FOREST L. REV. 913, 936-40 (2014).

<sup>5</sup> Carlos Closa, *Constitutional Rigidity and Procedures for Ratifying Constitutional Reforms in EU Member States*, at 291-297, available at: [https://www.researchgate.net/publication/259645822\\_Constitutional\\_Rigidity\\_and\\_Procedures\\_for\\_Ratifying\\_Constitutional\\_Reforms\\_in\\_EU\\_Member\\_States/](https://www.researchgate.net/publication/259645822_Constitutional_Rigidity_and_Procedures_for_Ratifying_Constitutional_Reforms_in_EU_Member_States/) (accessed on 13 May 2015); See also Fombad, *supra* note 3, at 20-21.

ordinary legislations. And consequently the parliamentary working procedures for amending ordinary laws will be applied.<sup>6</sup>

Under the Ethiopian legal system, the rules governing initiation of constitutional amendment are provided under Article 104 of the Constitution. However, the organs having the power are not clearly apparent from the reading of the provision which at first glance gives an impression that the House of Peoples' Representatives (HPR), the House of Federation (HoF) and one-thirds of the State Councils of the member states of the federation have the authority to support or otherwise the proposals made by others in order to table it for discussion.<sup>7</sup> Although the title of Article 104 is about initiation, the power provided under it is not that of proposing constitutional amendments. Rather, it is the power to vote on amendment proposals, made by other bodies, for the purpose of submitting them to discussion. This way of interpretation has been endorsed by some authors like Dr. Monga Fombad who argued that the Ethiopian Constitution is silent on defining the bodies having the power to initiate constitutional amendments and he concludes that normal procedures for initiating amendments on ordinary legislations are applicable.<sup>8</sup>

However, this view departs from what was conceived by the constitutional framers who wished to give the power to the House of Peoples' Representatives, House of Federation and State Councils.<sup>9</sup> Inconsistently, this intention of the framers is not mirrored in the final text of the Constitution, which later on reflected on the House of Peoples' Representatives and the House of Federation Joint Organization of Work and Session Rules of Procedure Regulation No.2/2008.<sup>10</sup> This regulation under Article 9 provides that the HPR and HoF with a two-thirds majority may initiate amendments. Besides, one-thirds of the State Councils can also propose the same. Therefore, it is possible to conclude that in Ethiopia, the HPR, the HoF and State Councils have the power to initiate constitutional amendments.

In addition, the Ethiopian Constitution under Article 104 entails amendment proposals to be submitted for the general public. The purpose of this submission is for discussion and decision. This constitutional provision states that; "*any proposal for constitutional amendment... shall be submitted for discussion and decision to the general public*". Under the Ethiopian Constitution, the phrase "*submitted for the general public for discussion and decision*" is not clear whether it denotes referendum or not.<sup>11</sup> Although the Minute of the Constitutional Assembly is not clear enough on this point, it may give some clues to understand the spirit of the provision. During

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<sup>6</sup> *Id.*

<sup>7</sup> FDRE CONSTITUTION, *supra* note 1, at Art. 104.

<sup>8</sup> Fombad, *supra* note 3, at 10-11.

<sup>9</sup> The Constitutional Assembly, *Minutes of Constitutional Assembly; Discussions and Debates on the Making of the FDRE Constitution*, Vol. 5, (Unpublished, Addis Ababa, Ethiopia, 1994).

<sup>10</sup> *The House of Peoples' Representatives and the House of Federation Joint Organization of Work and Session Rules of Procedure Regulation*, Regulation No. 2/ 2008, FED. NEGARIT GAZETA, Year 14, No.2. Addis Ababa, 2008 (herein after The Joint Working Procedure Regulation).

<sup>11</sup> Referendums are the most effective way of ensuring that the citizens are actively involved in the process of constitutional amendment. See ASHOK DHAMIJA, *NEED TO AMEND A CONSTITUTION AND DOCTRINE OF BASIC FEATURES*, 298-310 (Revised 1<sup>st</sup> ed., Wadhwa and Company Nagpur Law Publisher, 2007).

discussions of constitutional making, the Chairman of the Constitutional Structure Committee provided that “as long as the Houses are the representatives of the people, then the people- the general public- is not directly required to participate in the amendment process.”<sup>12</sup> Other members of the assembly also argued that “the people have the right to be consulted on amendment proposals.”<sup>13</sup>

These and similar debates conducted at the time of constitutional making reveals that the role of the people on the process of constitutional amendment is not giving binding decision in a form of referendum. Rather, their role is mere consultation and discussion on the proposed amendments, by which they may contribute significant inputs to the decision making bodies. Therefore, although referendum as a means of giving binding decision is not envisaged under the Ethiopian Constitution, Article 104 requires the people to be notified and consulted on the amendment proposals. On top of this, the use of the word ‘shall’ under Article 104 indicates that submission of an amendment proposal to the general public is not an option left for agencies’ discretion but a mandatory requirement that must be observed in the process of constitutional change.

The FDRE Constitution under Article 105 also provides rules for ratification of constitutional amendments. It provides two different kinds of rules, each used to ratify proposals relating to different matters. Amendment proposals relating to human rights and fundamental freedoms provided under Chapter Three of the Constitution, and the amending clause itself can be ratified by the HPR and the HoF, sitting separately, with a two-thirds of majority vote at each House. Moreover, it requires such amendment proposals to be ratified by all State Councils of the member states of the federation with a majority vote. However, amendment proposals pertaining to other provisions of the Constitution can be ratified with a majority vote of two-thirds at a joint session of the two Houses (HPR and HoF) and with the support of two-thirds of the State Councils with a majority vote at each regional state.<sup>14</sup>

All these reveal that the amending power under the Ethiopian legal system is characterized by procedural limitations. As a result, the Constitution can formally be amended only by institutions such as HPR, HoF and State Councils which must also exercise their powers in accordance with the procedures provided under the amending clauses. An attempt to change the Constitution in a manner different from that stipulated under the amending formula will be unconstitutional.

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<sup>12</sup> Minutes of Constitutional Assembly, *supra* note 9. የጉባኤው ሊቀመንበር ለቀረቡት ጥያቄዎች የህገ መንግስት ቅርጽ ጉዳይ ከሚቱ ምላሽ እንዲሰጥባቸው በጠየቁት መሰረት የኮሚቴው ሰብሳቢ ኢንጅነር አብይሌ ፍላቴ በህገ መንግስቱ ላይ ስለሚደረጉት ማሻሻያዎች የህዝቡ አስተያየት እንዴት እንደሚጠየቅ የቀረበውን ጥያቄ አስመልክተው በሰጡት ምላሽ የፌዴሬሽን ምክር ቤትና የህዝብ ተወካዮች ምክር ቤት ህዝቡን በቀጥታና በተመጣጠነ መልኩ የሚወክሉት አባሎቻቸው የህዝቡን ፍላጎት የሚያንጸባርቁ የህዝብ ልሳን በመሆናቸው በህገ መንግስቱ ላይ የሚቀርቡ ማሻሻያዎችን ሊያጸድቁ እንደሚችሉ፤ ከዚህም አኳያ ስለማሻሻያዎች ህዝቡ አስተያየት እንዲሰጥ ላይጠየቅ እንደሚችል ገልጸዋል።

<sup>13</sup> *Id.* አቶ ሰለሞን አበበ የሚባሉ ተወካይ በሰጡት ማብራሪያ ላይ በአንቀጽ 94 (በረቂቁ ላይ ስለህገ መንግስት ማሻሻያ የሚደነግገው አንቀጽ) መሰረት በሚቀርበው ማሻሻያ ሀሳቦች ላይ ህዝቡ ሊወያይ እንደሚችል ገልጸዋል።

<sup>14</sup> THE FDRE CONSTITUTION, *Supra* note 1, at Art. 105 (2).

## B. Substantive Requirements

In addition to procedural requirements, the amending formula of some constitutions place substantive limitations that prohibit changes on certain provisions of the constitution.<sup>15</sup> These constitutions set forth immutable principles which cannot be touched through the amending power.<sup>16</sup> Although the content of these provisions differ widely from country to country, a comparative study conducted by Ashok Dhamija demonstrates that the republican nature of the state, the fundamental rights and freedoms guaranteed to citizens, human dignity, rule of law, democratic structure of the state, territorial integrity of the state, separation of powers, independence of courts, popular sovereignty, political pluralism, official language, sovereignty of the state and the amending clause itself are the main and the most common subjects upon which the limitation has been placed.<sup>17</sup>

No substantive limitation up on the amending power is provided under the Ethiopian Constitution. The amending clauses, which are Article 104 and 105, are so general and plenary that gives power to the actors to amend the Constitution without any exception whatsoever. Had it been intended to save certain matters from the operation of the amending power, it would have been perfectly easy for the framers of the Constitution to make that indication clear by adding a stipulation to that effect. Thus, the plain meaning of the amending clauses of the FDRE Constitution suggests that every provision of the Constitution can be amended by following the procedure prescribed under it. And then literally it is possible to argue that there are no matters under the Ethiopian Constitution which have been clearly provided to be beyond the reach of the amending power. As a result, the amending power is not constrained based on substantive requirements in Ethiopia.

## III. UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENTS UNDER THE ETHIOPIAN LEGAL SYSTEM

### A. The Practice of Constitutional Amendment in Ethiopia: General

Constitutional amendments may be unconstitutional for procedural as well as substantive reasons. A constitutional amendment which fails to comply with the relevant procedural requirements may not be held constitutional.<sup>18</sup> The same is true for amendments which are inconsistent with the eternity clauses which define the immutable elements of the constitution. At this time,

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<sup>15</sup> KEMAL GOZLER, *JUDICIAL REVIEW OF CONSTITUTIONAL AMENDMENTS; A COMPARATIVE STUDY* (Ekin Press, Turkey, 2008), at 55; Aharon Barak, *Unconstitutional Constitutional Amendments*, 44 ISRAEL L. REV. 321, 336-341 (2011); Ulrich Preuss, *The Implication of Eternity Clauses; The German Experience*, 44 ISRAEL L. REV. 429, 431-433 (2011).

<sup>16</sup> *Id.* Article 79 of the German Constitution provides that any constitutional amendment against the federal nature of the state, the inviolable status of human dignity, the principle of republican and democratic government, the rule of law, popular sovereignty, the binding of the state authorities to the basic rights as set out in Articles 1 to 19, the separation of powers and the right to resistance against tyranny is inadmissible.

<sup>17</sup> DHAMIJA, *Supra note 11*, at 291.

<sup>18</sup> Gray Jacobsohn, *Unconstitutional Constitution? A Comparative Perspective*, 4 IN'L J. OF CONS. L (2006) 460, 460-470; Rosalind Dixon, *Transitional Constitutionalism and Un-Constitutional Constitutional Amendments*, 394 CHICAGO PUB. L. & LEG. THEO. W. PAP.1, at 1-8 (2011).

amendments could be declared unconstitutional on the basis that their content is at dissent with the express substantive limitations, albeit they are enacted in accordance with the constitutionally stipulated procedures.<sup>19</sup> Therefore, the procedural as well as the substantive requirements of the amending formula must be observed in the process to keep away from unconstitutional constitutional-amendments.

As long as there are no expressly provided substantive limitations against the amending power in Ethiopia, amendments may not be unconstitutional due to substantive grounds. However, there are possibilities for amendments to be unconstitutional because of procedural reasons. As we have seen, initiation by the appropriate organ, public participation and approval at HPR, HoF and State Councils in pursuance of the required majority are mandatory steps that should be carried out to amend the Ethiopian Constitution. Therefore, an attempt to change the Constitution in a way that departs from these procedural requirements would be held unconstitutional.

Practically, the 1995 FDRE Constitution has been amended twice within these twenty years. The first amendment was made on Article 98 of the Constitution in 1997. The second amendment was also made on Article 103 (5) of the Constitution in 2005. The author's preliminary observation shows that most of the citizens including political elites, constitutional law teachers, law students, judges, prosecutors and even parliamentary members have no information about such amendments, and hence are unaware of the substance of the changes.<sup>20</sup> Astonishingly, the 'official' copies of the Constitution still reflect the original versions of the two provisions. The copies distributed by the HPR or HoF, and other state entities, such as the National Human Rights Commission, do not reflect the changes.

Besides, some who have awareness about the amendments consider them as informal changes.<sup>21</sup> But the author believes that the amendments are formal constitutional changes intended to be carried out based on the amending clauses of the Constitution. The concerned bodies tried to amend the constitutional provisions based on the formal procedures of the Constitution provided under the amending clauses than using interpretation or political adaptation.<sup>22</sup> Therefore, the first and the second amendments are formal constitutional changes, albeit the existence of some irregularities on the process.

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<sup>19</sup>*Id.*

<sup>20</sup> The observation is preliminary and not made based on systematic approach. It was made at random. For instance among seventy five 4<sup>th</sup> year law students at Wollo University, School of Law in 2013 and 2014 which have taken the course of constitutional law, no one knows about the fact that the constitution has been amended. Most of the judges, attorneys and law instructors which I have consulted randomly have no information about the fact that the Constitution had been amended.

<sup>21</sup> Solomon Neguise (PhD, Asso. Prof.) and Taddese Lencho (PhD) consider, in their works, amendments made on Article 98 of the FDRE Constitution as informal changes. Dr. Solomon Neguise is the author of a book "Fiscal Federalism in Ethiopian Ethnic-based Federal System" and teaches at Civil Service University and Addis Ababa University, and conducting research on the area. Dr. Taddese Lencho is also a prominent scholar on tax law. See; Taddese Lencho, *The Ethiopian Tax System: Excesses and Gaps*, 20 MICHIGAN STATE INT'L L. REV. Vol. 328, (2012); Taddese Lencho, *Income Tax Assignment Under the Ethiopian Constitution: Issues to Worry About*, 4 MIZAN L. REV. 32, (2010).

<sup>22</sup> Besides the formal constitutional amendment mechanism that is carried out as per the constitutionally stipulated procedures, constitutional change can also be brought informally through constitutional interpretation and

### B. The First Constitutional Amendment (1997)

Article 98 of the Ethiopian Constitution previously conferred concurrent legislative power over taxation to federal and state governments. This original provision provided that:

*Article 98*

*Concurrent Power of Taxation*

- (1) *The Federal Government and the States shall jointly levy and collect profit, sales, excise, and personal income taxes on enterprises they jointly establish.*
- (2) *They shall jointly levy and collect taxes on the profit of companies and on dividends due to shareholders.*
- (3) *They shall jointly levy and collect taxes on incomes derived from large-scale mining and all petroleum and gas operations and royalties on such operations.*

Nevertheless, the first constitutional amendment made on the above provision changes the spirit of concurrency in to revenue sharing that allows the specified taxes to be determined and administered by the federal government while the constituent units share the proceeds from it.<sup>23</sup> This amendment on Article 98 provides that:

*Article 98*

*Concurrent Power of Taxation*

1. *Profit, sales, excise, and personal income taxes on enterprises jointly established by the federal government and regional states;*
2. *Taxes on the profit of companies and on dividends due to shareholders and;*
3. *Taxes on incomes derived from large scale mining and all petroleum and gas operations and royalties on such operation shall be levied by the federal government, and the proceeds will be divided between the federal government and states in pursuance of a formula determined by the House of Federation as provided under Article 62(7) of the Constitution. The federal government may delegate its power of tax collection to regional states.<sup>24</sup> (Translation from Amharic by the author)*

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political adaptation. Constitutional interpretation brought gradual revision of the constitutional framework. By judicial interpretation, the existing provision in the constitution may get a new meaning without there being any formal amendment to the constitution. Besides, unintended revision of the constitutional framework can also be brought through political adaptation by the legislative and executive bodies. According to Donald Lutz, when we compare these modes of constitutional changes, political adaptation and judicial interpretation reflects declining degree of commitment to popular sovereignty. See: Donald Lutz, *Towards A Theory of Constitutional Amendment*, 88 AME. POL. SCI. REV. 355, 355-370 (1994).

<sup>23</sup> To understand the concept of concurrent power of taxation and revenue sharing see; Solomon Neguise, FISCAL FEDERALISM IN ETHIOPIA ETHNIC-BASED FEDERAL SYSTEM 63-67, 212-214 (Revised ed., 2008).

<sup>24</sup> The FDRE House of Peoples' Representatives, *Proclamations, Official Discussions and Resolutions Made by the 1<sup>st</sup> HPR*, Vol.2, (1996/97, Unpublished, HPR Library, Addis Ababa, Ethiopia). The Amharic version of the amendment provides that;

**አንቀጽ 98**

**የጋራ የታክስና የግብር ሥልጣን**

1. የፌዴራል መንግስትና ክልሎች በጋራ በሚያቋቁሟቸው የልማት ድርጅቶች ላይ የሚጣለው የንግድ ትርፍ ግብር፤ የሥራ ግብርና የሽያጭና ኢክሳይስ ታክስ፤

The amendment proposal was initiated by the Ministry of Finance and Economic Development (MoFED) that pointed out the practical difficulty of implementing the principle of concurrent power of taxation as a ground for justifying the amendment proposal.<sup>25</sup> The proposal was tabled for deliberation on March 6, 1997 to the HPR which discussed on the amendment accordingly and submitted it to the Parliamentary Legal Affairs Standing Committee for further scrutiny. The standing committee scrutinized the amendment proposal in detail and talked about it thoroughly with the concerned bodies like the Ministry of Finance and Economic Development and various committees such as the Legal Affairs Committee, the Regional State Affairs Committee and the Revenue Allocation Committee within the House of Federation.<sup>26</sup> The Parliamentary Legal Affairs Standing Committee submitted its report to the general meeting of the HPR on April 7, 1997. Besides, on its report, the committee recommended to the House for the approval of the amendment proposal according to Article 104 of the Constitution.<sup>27</sup> Based on this recommendation, HPR examined the amendment bill, and finally approved the proposal as proclamation No. 71/97 with a unanimous vote.<sup>28</sup>

This amendment bill was then directed to the HoF that deliberated on the proposal and voted in favor of the amendment on April 9, 1997. At that time, the Minister of Finance and Economic Development appeared on the floor of HoF to brief the members of the House of Federation about the rationales of the amendment proposal.<sup>29</sup> Lastly, the amendment bill was submitted to the joint session of the two Houses which unanimously approved the proposal on April 10, 1997. The Ministry of Finance and Economic Development also presented at the joint meeting for briefing the members about the importance of the constitutional amendment.<sup>30</sup>

**C. The Second Constitutional Amendment (2004/2005)**

The Ethiopian Constitution under Article 103 established a National Population Census Commission which is authorized to conduct a population census periodically. The Constitution further provides the periodic interval at which the census must be conducted. Accordingly, the national population census should have been conducted every ten years. The second constitutional

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2. በድርጅቶች የንግድ ትርፍ ላይ እና በባለአክሲዮኖች የትርፍ ድርሻ ላይ የሚጣለው ግብርና የሽያጭ ታክስ፤  
 3. በከፍተኛ የማእድን ስራዎችና በማንኛውም የፔትሮሊየምና ጋዝ ሥራዎች ላይ የሚጣለው የገቢ ግብርና የሮያሊቲ ክፍያዎች፤ የሚጣሉትና የሚሰበሰቡት በፌዴራል መንግስት ሁኖ ፌዴራል መንግስትና ክልሎች ገቢውን የሚከፋፈሉበት ቀመር በህገ መንግስቱ አንቀጽ 62(7) መሰረት የፌዴሬሽን ምክር ቤቱ የሚወስነው ይሆናል። የፌዴራል መንግስት ግብርን የመሰብሰብ ስልጣን ለክልሎች በውክልና መስጠት ይችላል።

<sup>25</sup> *Id.*  
<sup>26</sup> *Id.*  
<sup>27</sup> *Id.*

<sup>28</sup> The FDRE House of Peoples’ Representatives, *Minutes of the House of Peoples’ Representatives at the 2<sup>nd</sup> Year Working Time 38<sup>th</sup> Regular Secession*, (1997, Unpublished, HPR Library, Addis Ababa, Ethiopia). As the minutes indicate, the Ministry of Finance and Economic Development briefed the members about the rationales of the amendment and responded for those questions raised by some parliamentary members. Most of the questions were actually about the impact of the amendment on the right of regional states.

<sup>29</sup> The FDRE House of Federation, *Minutes of the House of Federation on its 1<sup>st</sup> Year 2<sup>nd</sup> Regular Secession*, (1997, Unpublished, HoF Library, Addis Ababa, Ethiopia). Most of the questions raised by the members were about the relevance of the amendment. Latter on it approved the matter with Seventy Three supporting vote, Three opposition and Five abstentions.

<sup>30</sup> *Federal Democratic Republic of Ethiopia House of Peoples’ Representatives and House of Federation 2<sup>nd</sup> Joint Session at the 2<sup>nd</sup> Working Year*, (April 10, 1997, Un Published, HoF Library, Addis Ababa, Ethiopia).

amendment changes this ten years' time table and allows it to be postponed as necessary. This amendment proposal adds a phrase on Article 103(5) which provides:

*“However, if the HPR and HoF in a joint session ascertained the existence of a force majeure to conduct the census, this period of ten year may be prolonged as necessary.”<sup>31</sup>(Translation from Amharic by the author)*

The second constitutional amendment was initiated by HPR. As the 2005 national election and national population census fell on the same fiscal year, making it difficult for the country to run both simultaneously due to financial constraints. Then, the HPR, based on the report and recommendation given by the Parliamentary Legal Affairs Standing Committee, decided the national population census to be put off until 2007 through constitutional amendment on September 10, 2003.<sup>32</sup> This decision initiated the proposal for the second constitutional amendment. The initiation was then directed to the HoF, which also discussed on the matter thoroughly and voted in support of it, with four abstentions only, on October 6, 2003.<sup>33</sup>

After this juncture, the initiation which is supported by the two Houses was sent to the State Councils of the member states of the federation seeking their approval according to Article 105 of the Constitution. As a result, all except Gambella Regional State Council responded positively for the proposed constitutional amendment that is expressed through letters written to the Houses.<sup>34</sup> Most of the State Councils responded on a reasonable period of time. Nine months was the maximum period of time taken by Tigray and Afar Regional States. Most of the regional states responded within four months. Lastly, the amendment proposal was submitted to the joint session of the two Houses which approved the proposal by the vote of all the members present and voting, but with six abstains, on October 5, 2004.<sup>35</sup>

#### **D. A Blemished Practice of Constitutional Amendment**

When we see the practice of constitutional amendment in Ethiopia, the process is found to be disregarding essential procedures that such amendments need to follow. In those cases, the

<sup>31</sup> The FDRE House of Peoples' Representatives, *Proclamations, Official Discussions and Resolutions Made By the 2<sup>nd</sup> House of Peoples' Representatives at its 5<sup>th</sup> Working Year*, Vol. 1, (2005, Unpublished, HPR Library, Addis Ababa, Ethiopia). The Amharic version of the amendment provides that; “ሆኖም ግን ቆጠራውን ለማካሄድ ከአቅም በላይ ችግር ስለመኖሩ የተወካዮች ምክር ቤትና የፌዴሬሽን ምክር ቤት በጋራ ስብሰባ ካረጋገጡ የቆጠራው ዘመን እንደሁኔታው ሊረዘም ይችላል”::

<sup>32</sup> The FDRE House of Peoples' Representatives, *Proclamations, Official Discussions and Resolutions Made By the 2<sup>nd</sup> House of Peoples' Representatives at its 3<sup>rd</sup> Working Year*, Vol. 8 (2003, Unpublished, HPR Library, Addis Ababa, Ethiopia).

<sup>33</sup> The FDRE House of Federation, *Minutes of the 2<sup>nd</sup> House of Federation on its 4<sup>th</sup> Working Year 1<sup>st</sup> Regular Session*. (October 6 -7, 2003/4, Unpublished, HoF Library, Addis Ababa, Ethiopia).

<sup>34</sup> Oromiya Regional State with Date 02-07-96, No.Co/761/DA-01/96, Amhara Regional State with Date 26/6/1996, No.h/7/ጠ/3624/ጠ/4--1, Southern Nation Nationality and Peoples Regional State with Date 19/06/96, No. Kim01/Me/119/96, Tigray Regional State with Date 05/11/1996, No.Ti/29/1/84, Benishangul Gumze Regional State with Date 26/06/96, No.1367/Me-01/96, Afar Regional State with Date 2/11/96 No A4/5 and Harari Regional State with Date 8/7/96 No.3/Ha112/2/96 (all the letters are available at the Library of HPR, Addis Ababa, Ethiopia).

<sup>35</sup> The FDRE House of Peoples' Representatives, *Proclamations, Official Discussions and Resolutions Made By the 2<sup>nd</sup> House of Peoples' Representatives at its 5<sup>th</sup> Working Year*, Vol. 1, (2004/5, Unpublished, HPR Library, Addis Ababa, Ethiopia).

amendments are likely to be unconstitutional. For instance, the first constitutional amendment was initiated by the Ministry of Finance and Economic Development, which was also active throughout the whole process. But the Constitution under Article 104 does not give the executives any power to initiate constitutional amendments. Thus, it was initiated by the body which has no power to propose constitutional amendments. More importantly, this amendment was not also approved by the State Councils. The first constitutional amendment was approved only by the joint session of the two Houses. State Councils of the member state of the federations did not take part at the stage of amendment approval, although the Constitution requires their participation under Article 105 (2).

As the author's interview reveals: "*they (the members of the HPR) were orally informed about the consent of the member states of the federation in favour of the amendment at the floor of parliament.*"<sup>36</sup> But, this is not documented and carried out formally. As a result, nowadays it is difficult to verify the participation of the State Councils of regional states on the amendment process. As the Minutes of the amendment indicate, some parliamentary members raised the issue of regional states' participation at parliamentary discussion. However it was responded that "*the parliamentary members as well as the members of the HoF can evaluate the issue from the perspective of the interests of member states.*"<sup>37</sup> From these discussions then, it is safe to conclude that the member states of the federation are denied of their right to participate in the process of constitutional amendment, which is guaranteed under Article 105 of the Constitution.

Moreover both the first and the second constitutional amendments were not presented for the general public. Consequently, public discussions along with consultations were not held on them. As the Minutes indicate, the process was directly from initiation to approval without inviting the people to participate in any manner.<sup>38</sup> Therefore, the public participation requirement which is envisaged under Article 104 of the Constitution is ignored during both the first and the second constitutional amendments. Besides, both the first and the second amendments passed through unnecessary steps like approval of the HoF at stage of initiation. For instance, for the second amendment, after it was initiated with a two-thirds vote at HPR, it was presented before the other House (HoF) as if the initiation process is not accomplished or to complete the initiation process. The same was true for the first constitutional amendment which was sent to the HoF, after it was discussed at HPR, as part of the initiation process. According to the Constitution, amendment proposals initiated at one of the Houses can go to the next steps of public discussion and approval without seeking support from the other House. Nevertheless, the first as well as the second amendment proposals which were held up at the phase of initiation by the HPR were needlessly directed to the HoF for further gratuitous support. Therefore, the practice on the first as well as the second constitutional amendments aptly indicates that they are not made in accordance with the procedures provided under the Constitution. As a result, it is possible to conclude that they are

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<sup>36</sup> Interview with Ato Mohamed Ahmed, Senior Legal Advisor to the Office of the Speaker of HPR and Former Member of the House of Peoples' Representatives, On 15 April 2013.

<sup>37</sup> The FDRE House of Peoples' Representatives, *supra* note 28.

<sup>38</sup> Interview with Ato Mohamed, *supra* note 36; Interview with Ato Seifu G/Mariame, Senior Legal Researcher at the House of Peoples' Representatives, On April 15 2013.

unconstitutional constitutional amendments, although their constitutionality has not yet been challenged.

### **E. Unpublished Constitutional Amendments: A Move towards Unwritten Constitution?**

The first and the second constitutional amendments have not yet been published in the *Negarit Gazeta*, which is an official newsletter for publication of federal laws in Ethiopia.<sup>39</sup> Whether this failure to publish them renders the amendments to be unconstitutional needs critical examination. The amending clauses, which are Article 104 and 105 under the Ethiopian Constitution, do not require constitutional amendments to be published on the *Negarit Gazeta*. As a result, approval as per Article 105(1) (2) alone is sufficient to make an amendment be part of the Constitution.

However Article 71(2) of the FDRE Constitution which describes the powers and functions of the President provides that “*He (the President) shall proclaim in the Negarit Gazeta laws approved by the House of Peoples’ Representatives.*” Moreover the Federal *Negarit Gazeta* establishment proclamation states that all laws of the federal government shall be published in the Federal *Negarit Gazeta*.<sup>40</sup> The same proclamation under Article 3 further provides that all courts and all other organs of the federal and regional government as well as other natural and physical persons are required to take judicial notice of the existence of those laws that are published in the *Negarit Gazeta*.

All of these provisions are pertaining to ordinary legislations. If ordinary laws must be published, it may be strongly argued that, considering their significance, constitutional amendments must also be published. Besides, it is also reasonable to interpret the term ‘law’ in the aforementioned provisions so broadly that it includes constitutional amendments. As per this view, as long as constitutional amendments are federal laws, albeit a higher law, they must be published in the Federal *Negarit Gazeta* which is a federal law newsletter published under the umbrella of the House of Peoples’ Representatives. Moreover, the fact that the FDRE Constitution itself has featured in the *Negarit Gazeta* incontestably demand all its amendments to follow the same practice.

However, there is nothing in the Federal *Negarit Gazeta* establishment proclamation or Article 72 of the Constitution which indicates that publication is a requirement for the validity of laws. From this what we can understand is that publication in the Federal *Negarit Gazeta* is a matter of practicality and judicial notice. It is not a matter of validity. Therefore, the first and second constitutional amendments may not be unconstitutional by the mere fact of not being published in the Federal *Negarit Gazeta*.

Nonetheless, the author of this piece does not deny the practical significance of publication. Publication in the official *Gazeta* has importance from practical point of view so as to improve access to the amended provisions, and maintain the comprehensiveness of the constitutional

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<sup>39</sup> *The Proclamation to the Establishment of the Federal Negarit Gazeta*, Proclamation No. 3/1995, FED. NEGARIT GAZETA, Year 1, No.3, Addis Ababa, 1995, Art. 2.

<sup>40</sup> *Id.*

document. It also enables the public and other institutions to be informed about the substance of the amendments and thereby invoke the amended constitutional provisions to demand their rights. Despite this practical importance, the first and second constitutional amendments have not yet featured in the official *Negarit Gazeta*.

Actually, there is no satisfactory reason for this incidence of unpublished constitutional amendments. However, the lack of an organ to assume the responsibility of publication can be pointed out as a reason for the failure to publication. For a long period of time that extends from 1995 to 2007, nobody was mandated specifically for the task of publishing constitutional amendments. The Office of Speaker of the House considered itself as competent only for laws (legislations) enacted by HPR. As the amendments are approved at the joint session of the two Houses (HPR and HoF), the Office viewed them as falling beyond its power and duty. Nowadays, this is essentially rectified by the Joint Working Procedure Regulation No.2/2008, which purposely mandated the HPR to publish constitutional amendments in the *Federa Negarit Gazeta*.<sup>41</sup>

#### IV. JUDICIAL REVIEW OF THE AMENDING POWER: A MEANS OF SAFEGUARDING THE CONSTITUTION

The exercise of the amendment power is one of the areas that raise disputes in many countries including Germany, Turkey, India and USA.<sup>42</sup> This would happen when the constitution has been amended by disregarding the prescribed rules and procedures.<sup>43</sup> In addition, amendments that are enacted according to the constitutionally stipulated procedures could also be declared unconstitutional on the ground that their content is at variance with the express substantive limitations.<sup>44</sup> At this juncture, the un-constitutionality of the amendments may be claimed and a case could be brought to an umpiring body, which has been established to rule on constitutional disputes.<sup>45</sup> However, whether this body has the power to review constitutional amendments is debatable for a long period of time among scholars. The question of competence and the scope of review are the focus areas of the debate.

##### A. The Question of Competence

Some constitutions make clear provision with regard to the competence of their umpiring body to rule on the constitutionality of constitutional amendments. As a result, the review would be

<sup>41</sup> The Joint Working Procedure Regulation, *supra* note 10, Art. 9(7).

<sup>42</sup> Yaniv Roznai, *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Power*, 1, at 10-16 (Dissertation for Doctor of Philosophy, London School of Economics, England, February 2014).

<sup>43</sup> Richard Albert, *Non-constitutional Amendments*, 22 CANADIAN J. LAW & JURI, 5, 6-10 (2009).

<sup>44</sup> *Id.* See also; Barak, *supra* note 15, at 322-332.

<sup>45</sup> Most of the constitutions expressly or impliedly recognizes the concept of judicial review and for this designate a body empowered to handle constitutional disputes. However, the nature of the institution and its jurisdiction may not be the same among constitutions. In some constitutions like Germany special constitutional court having broad power has been established where as in some countries like USA the ordinary courts with restrictive jurisdiction may engage on the task of judicial review. Despite these differences, the institution deals with, *inter-alia*, disputes relating to constitutional matters like the constitutionality of legislations. For more on the issue see: ASSEFA FISEHA, *FEDERALISM AND ACCOMMODATION OF DIVERSITY IN ETHIOPIA: A COMPARATIVE STUDY* 395-467 (3<sup>rd</sup> edn. 2010).

carried out through this institution.<sup>46</sup> For instance, the Constitutions of Turkey, Chile, Romania, Ukraine, Kyrgyzstan and South Africa clearly authorized their constitutional courts to review the constitutionality of constitutional amendments.<sup>47</sup>

The 1961 Turkish Constitution, as amended in 1971, under Article 147 stipulated that the Turkish constitutional court can review the constitutionality of amendments. On the same vein, Turkish Constitution which was enacted in 1982, under Article 148 expressly authorizes the constitutional court to review constitutional amendments.<sup>48</sup> The 1980 Chilean Constitution under Article 82(2) also regulates the judicial review of constitutional amendments and empowers the constitutional court to review their constitutionality.<sup>49</sup> Similarly, the South African Constitution under Article 167(4) allows the constitutional court to decide on the constitutionality of amendments.<sup>50</sup> Therefore, constitutions may specifically recognize judicial review of constitutional amendments.

However, as the study conducted by Kemal Gozler demonstrates, most of the constitutions are silent on the question of judicial review of constitutional amendments.<sup>51</sup> The same idea also resonates by R. Yaniv who provides that constitutional silence on the judicial review of constitutional amendments is the common trend of current constitutions.<sup>52</sup> According to Kemal Gozler, this constitutional silence on review of amendments has different meanings under the American and European models of judicial reviews. Under the American model of judicial review, courts may examine the constitutionality of constitutional amendments despite the silence of the constitution on the area. This is due to the fact that under the American model, the court does not need to receive special power for exercising judicial review which is part of their day to day activities.<sup>53</sup> For this reason, they have the competence to inspect the admissibility of the grounds invoked by the parties in the course of litigation.<sup>54</sup> Therefore, courts view themselves as competent to scrutinize the constitutionality of amendments, even if the constitution does not expressly vest them with this power.<sup>55</sup> The Indian, the Brazil and the US Supreme Courts are typical examples which have examined the constitutionality of amendments on a number of occasions.<sup>56</sup> Conversely, the US Supreme Court later on departed from this general trend and denies itself, the power to review constitutional amendments based on the political question

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<sup>46</sup> Barak, *Supra* note 15, at 322-332; Roznai, *supra* note 42, at 180-193.

<sup>47</sup> *Id.*

<sup>48</sup> GOZLER, *supra* note 15, at 4-5.

<sup>49</sup> Barak, *supra* note 15, at 331-332. See also: Dante Figueroa, *Constitutional Review in Chile Revisited: A Revolution in the Making*, 51 DUQUESNE L. REV. 387, 396-403 (2013).

<sup>50</sup> Barak, *supra* note 15, at 332; see also; Adem Kasse, *The Substantive Validity of Constitutional Amendments in South Africa*, 131 SOUTH AFRICA L. J., 135 (2014).

<sup>51</sup> GOZLER, *supra* note 15, at 5-10.

<sup>52</sup> Roznai, *supra* note 42, at 185.

<sup>53</sup> JACKSON & TUSHNET, *supra* note 3, at 456-460.

<sup>54</sup> *Id.*

<sup>55</sup> GOZLER, *supra* note 15, at 10-11.

<sup>56</sup> *Id.* See also Roznai, *supra* note 42, at 185-90.

doctrine.<sup>57</sup> The Court believed that amendment is a political issue, which should not be addressed by the judiciary; rather it must be left for Congress.<sup>58</sup>

Under the European model, judicial review is carried out through a special constitutional court that does not have a general jurisdiction to review all legal norms and acts. This constitutional court has limited and special jurisdiction on matters which are specifically given by the constitution or law that establishes it.<sup>59</sup> Subsequently, constitutional silence in European model of judicial review implies lack of competence to rule on the matter of constitutional amendments.<sup>60</sup>

Distinct from the examples provided above, in France, for instance, the Constitutional Council, which is the umpiring body, believed that its jurisdiction is strictly defined by the Constitution. Consequently, it deems itself incapable to rule on cases other than those expressly provided by the provision of the Constitution.<sup>61</sup> As constitutional amendment issues are not specifically given, the Council in France restrained itself from reviewing them. As a result, in France constitutional amendment bills are not subjected to judicial review.<sup>62</sup> Similarly, the Hungarian Constitutional Court ruled that its jurisdiction is confined on examining the constitutionality of laws without being extended to review the constitutionality of constitutional amendments.<sup>63</sup> All these scenarios, therefore, rightly demonstrate that under the European model the review of constitutional amendment is not possible if there is no express provision authorizing the constitutional court to do so.

However, some constitutional courts in countries adopting the European model of judicial review declared themselves as competent to rule on constitutional amendments. The base for their argument is the broad interpretation of the provision which empowers the constitutional court to review the constitutionality of laws.<sup>64</sup> They understand the term ‘law’ so broadly that it includes constitutional amendments, and then assume jurisdiction over reviewing their constitutionality. The German and Austrian Constitutional Courts are typical examples for this, although some authors like Kemal Gozler criticized their views as “ill founded.”<sup>65</sup>

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<sup>57</sup> Lynn Fishel, *Reversals in the Federal Constitutional Amendment Process: Efficacy of State Ratifications on the Equal Rights Amendment*, 49 INDIANA L. J. 147, 149-152 (1973).

<sup>58</sup> *Id.* The political question doctrine has reserved certain constitutional questions to be ultimately decided by the political branches. This doctrine requires certain matters like federalism and constitutional amendments as the proper spheres for the political organs. And thus the court proclaimed itself as incompetent to examine such kinds of questions.

<sup>59</sup> JACKSON & TUSHNET, *supra* note 3, at 467-75.

<sup>60</sup> GOZLER, *supra* note 15, at 12-17.

<sup>61</sup> Denis Baranger, *The Language of Eternity: Judicial Review of the Amending Power in France Or The Absence Thereof*, 44 ISRAEL L. REV. 389, 389-399 (2001).

<sup>62</sup> *Id.*

<sup>63</sup> GOZLER, *supra* note 15, at 16-17.

<sup>64</sup> *Id.*, at 20-25.

<sup>65</sup> *Id.*

In addition, some courts also invoke the existence of eternity clauses within the constitution as a means for justifying their authority to review constitutional amendments.<sup>66</sup> The argument is that when un-amendable provision exists within the constitution, their judicial enforceability is self-evident so as to give effect for their protective functions that would be undermined in the absence of judicial enforcement.<sup>67</sup> Therefore, judicial review is considered as a natural mechanism for protecting eternity clauses in the constitution. This position can be best illustrated by the Czech Republic Court's decision.<sup>68</sup> The Court assumes jurisdiction to review constitutional amendments based on Article 9 of the Constitution that provides "the essential requirements for a democratic state governed by the rule of law are protected from constitutional amendments." From this provision, then the Czech Republic Court inferred its authority to review constitutional amendments.<sup>69</sup> The Court on its decision stated that the protection envisaged under this provision of the Constitution "is not a mere slogan or proclamation, but an actually enforceable constitutional provision."<sup>70</sup>

As this brief comparative constitutional study demonstrates, most of the constitutions are silent on the issue of review of constitutional amendments. However courts mostly construe the constitutional silence as an authorization to rule on constitutional amendments. As a result, they assume jurisdiction to review the constitutionality of constitutional amendments.

## **B. The Scope of Review**

Reviewing the constitutionality of constitutional amendments is possible and practiced in most countries in the world. Nevertheless the scope of the review varies across constitutions. As a result, constitutions set different standards for reviewing the constitutionality of constitutional amendments.

### **1. Formal (Procedural ) Grounds**

A constitutional amendment can only have effect if it has been enacted in accordance with the procedures set forth in the constitution. For this reason, it is natural that a body having the authority of constitutional review examines whether these requirements have been fulfilled or not.<sup>71</sup> Amending laws that do not meet these procedural requirements laid down in the constitution may not produce the intended result of revising the constitution.<sup>72</sup> Thus, the body having competence to rule on a constitutional amendment must examine its formal and procedural

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<sup>66</sup> Eternity clauses are constitutional provisions setting forth immutable principles which cannot be touched through the amending power. They articulate the founding myth of the system and define the identity and the foundation of the constitution expressly. See; Peuss, *supra* note 15, at 440.

<sup>67</sup> Roznai, *Supra* note 42, at 185-87.

<sup>68</sup> Yaniv Roznai, *Legisprudence Limitations on Constitutional Amendments? Reflections on the Czech Constitutional Court's Declaration of Unconstitutional Constitutional Act*, 8 INT. CON. L. J., 29, 33-36 (2014).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Barak, *supra* note 15, at 334; See also: Carlos Bernal, *Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine*, 11 Int. J. CON, 339 (2013).

<sup>72</sup> Peuss, *supra* note 15, at 448.

regularity. It looks at the conformity of a constitutional amendment with the conditions of form and procedure. Besides it declares the amendment as ‘unconstitutional’ when amendments are found to be violating the procedural requirements stipulated under the constitution.<sup>73</sup> For instance, in the US, the Supreme Court has reviewed the procedural requirements of constitutional amendments in a number of cases.<sup>74</sup> Later on, however, in *Coleman V. Miller*, the Supreme Court refused to review the issue of constitutionality of constitutional amendments by invoking the political question doctrine.<sup>75</sup>

## 2. *Substantive Grounds*

The body having jurisdiction can also review constitutional amendments based on substantive grounds particularly when the constitution contains expressly provided eternity clauses.<sup>76</sup> For instance, the German Constitutional Court, on a number of occasion review constitutional amendments based on substantive grounds and mostly the court gives reasons based on eternity clauses.<sup>77</sup> As Peruss pointed out, judicial review is a means for enforcing eternity clause which provides “legal teeth” for it.<sup>78</sup> However, the mere existence of eternity clause by itself may not guarantee judicial review based on substantive grounds. For instance, although the 1982 Turkish Constitution contains eternity clauses, it clearly prohibits review based on substantive grounds, and confines the power of review on formal reasons only.<sup>79</sup> Thus, courts usually enforce eternity clauses through review on substantive grounds in the absence of clear prohibition to that effect.

Moreover, it is also possible to examine constitutional amendments from substantive grounds without eternity clauses. India is typical example for such kind of practice. Even though the Indian Constitution does not contain eternity clauses, the Supreme Court examines constitutional amendments based on substantive grounds in a number of occasions.<sup>80</sup> The Court has examined

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<sup>73</sup> GOZLER, *supra* note 15, at 52-60.

<sup>74</sup> *Hollings Worth v. Virginia* (3 U.S. 378 (Doll) (1798), *National Prohibition Cases* (253 U.S. 350 (1920), *Dillon v. Gloss* (256 U.S. 368 (1921) and *United Sates v. Sprague* (282 U.S 716 (1931). For more on the area see: Barak, *Supra* note 15, at 329-331; GOZLER, *supra* note 15, at 28-32.

<sup>75</sup> *Coleman v. Miller* (307 U.S 433(1939). The case involved a question about the validity of the Kansas legislatures’ ratification of the child labor amendment. The Kansas legislature originally rejected the proposed amendment in 1924 but reversed itself in 1937 and ratified the amendment. The Kansas state senators, who voted against ratification in 1937, sued arguing that by reason of previous rejection and failure of ratification within reasonable time, the proposed amendment had lost its vitality. And the second ratification vote in 1937 was invalid. The court held that congress, not the court had the final authority to determine the validity of amendment ratification based on the political question doctrine.

<sup>76</sup> Jacobsohn, *supra* note 18.

<sup>77</sup> Barak, *Supra* note 15, at 328-330; GOZLER, *Supra* note 15, at 52-62. *Klass Case* (BverfGE 30, 1 (1970), *Land Reform I Case* (BverfGE 84, 90 (1991), *Land Reform II Case* (BverfGE 94, 12 (1991), *Asylum Cases* (2BvR1938/93; 2BvR2315/93) and *Acoustic Surveillance of Homes Case* (1 BvR 2378/98, 1 BvR 1084/99) are instances in which the court review amendments based on substantive grounds.

<sup>78</sup> Preuss, *supra* note 15, at 447-48.

<sup>79</sup> GOZLER, *supra* note 15, at 3-5

<sup>80</sup> DHAMIJA, *supra* note 11, at 330, 340,341-360. The Supreme Court in *Minerva Mil Ltd V. Union of India Case* (AIR 1980 SC 1789) declared the 42th amendment unconstitutional and void. The Supreme Court held that since the Constitution has conferred a limited amending power on the parliament, the parliament cannot under the exercise of that limited power enlarge that very power in to an absolute power. Indeed a limited amending power is one of the basic features of our Constitution, and therefore, the limitations on that power cannot be destroyed. In other words, parliament cannot under Article 368 expand its amending power so as to acquire for itself the right to repeal or

constitutional amendments based on the basic structure doctrine which is an implied limitation upon the amending power. Accordingly, the basic structure of the Indian Constitution cannot be changed through constitutional amendment.<sup>81</sup>

As the comparative scholarships and court practices demonstrate, those umpiring bodies having the competence to rule on the constitutionality of an amendment can examine it based on formal and/or substantive grounds. The substantive grounds may be expressly written on the constitution in the form of eternity clause or can be inferred from the entirety of the constitution as an implied limitation against the amending power like India. So, the authority to scrutinize the constitutionality of constitutional amendments can be exercised from the perspective of formal and/or substantive grounds.

### C. (Judicial) Review of Unconstitutional Constitutional Amendments in Ethiopia

The 1995 Ethiopian Constitution under Article 53 establishes a bicameral House composed of the House of Peoples' Representatives and House of Federation. The House of Federation which is the second chamber in the Ethiopian context is a political organ composed of representatives of nations, nationalities and peoples.<sup>82</sup> This House is unique with regard to the powers assigned to it. Firstly, it does not have legislative function. Unlike second chambers of other federations, it is not involved in the law making process.<sup>83</sup> Second, it has the power to umpire constitutional issues. It engages on constitutional interpretation and rulings on the constitutionality of statutes.<sup>84</sup> The rationale for this is that the Constitution is considered as a political contract of the nations, nationalities and peoples. As long as it is the political contract of them, the nations, nationalities and peoples who are represented in the House should be the ultimate interpreter and guardian of it.<sup>85</sup> These factors make the Ethiopian second chamber (HoF) unique from other contemporary second chambers.

Although the HoF has the power to interpret the Constitution as well as to rule on the constitutionality of statutes, it is not specifically authorized to determine the constitutionality of constitutional amendments.<sup>86</sup> Besides, although Article 2(2) of Proclamation No. 251/2001, which is made to consolidate the power of HoF, defines the term 'law' broadly, the definition

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abrogate the Constitution or to destroy its basic and essential features. The doctrine has been further applied in several subsequent cases such as *Waman Rao V. Union of India* Case AIR 1980 SC 1789, *Shri Kumar Padama Prasad V. Union of India* (1992) 2SCC 428: AIR 1992 Sc 1213, *Supreme Court Advocates-on-record Association V. Union of India* (1993) 4SCC 441: AIR 1994 SC268, *Pudyal V. Union of India* (1994) SUPP 1SCC324, and *KIhoto Hollohan V. Zachillhu* AIR 1993 SC 412: 1992 SUPP (2) SCC651.

<sup>81</sup> *Id.*

<sup>82</sup> THE FDRE CONSTITUTION, *Supra* note 1, Art. 62.

<sup>83</sup> *Id.* It is obvious that the HoF participates in the constitutional amendment process. However this, strictly speaking, does not amount to taking part in the law making process.

<sup>84</sup> ASSEFA, *supra* note 45, at 123 -144.

<sup>85</sup> Assefa Fiseha, *Constitutional Interpretation: The Respective Role of Courts and the House of Federation (HOF)*, *Proceeding of the Symposium on the Role of Courts in the Enforcement of the Constitution*, (2000); See also; Assefa Fiseha, *Constitutional Adjudication in Ethiopia: Exploring The Experience of the House of Federation (HoF)*, 1 MIZAN L. REV. 1 (2007).

<sup>86</sup> FDRE CONSTITUTION, *supra* note 1, Arts. 62 & 84.

does not include constitutional amendments.<sup>87</sup> As the Ethiopian system of judicial review inclined to the European model, based on Kemal Gozler's analysis<sup>88</sup>, it is possible to understand that the HoF has no power to rule on the constitutionality of constitutional amendments as long as the power is not specifically granted to it.

As per this author's view, however, this argument is weak and unsound. Modern constitutions in democratic countries necessarily include the principle of constitutional supremacy and both the US and European models of judicial review are based on this notion of the supremacy of the constitution.<sup>89</sup> As the constitution is the supreme law of the land, any act contrary to it may not have any effect. Thus, the natural and logical consequence of the inclusion of supremacy clause in the constitution is that there must be a body authorized to enforce it through making laws null and void when they contradict with the constitution.<sup>90</sup> As a result, by enforcing the supremacy clause, the umpiring body protects the constitution from being undermined by any act of legislation.<sup>91</sup>

The same would be true in Ethiopia, where the supremacy of the Constitution is recognized, and any law which contravenes the Constitution would be deemed null and void by the HoF, which is considered as a guardian of the Constitution.<sup>92</sup> Nevertheless, ordinary legislations are not the only means of undermining the Constitution. Constitutional amendments can also be used to undermine the Constitution. For instance, in Honduras President Manuel Zeleña attempted to amend the Constitution to remove term limits for the President. Similarly, the President of Chad, Gabon, Guinea, Namibia, Togo and Uganda amended their Constitutions to make a third term possible.<sup>93</sup>

Thus, HoF, as a guardian of the Constitution must protect the document not only from ordinary legislations, but also from constitutional amendments. As a 'guardian of the Constitution,' it must make sure that the supremacy of the constitution has been maintained in all aspects, be it constitutional amendments or ordinary laws. Thus, the author of this piece believes that the HoF can assume jurisdiction to examine the constitutionality of constitutional amendments, at least on procedural grounds, even if there is no an express statement authorizing it to do so.

The HoF, though have competence to rule on the constitutionality of amendments, is placed in a very difficult situation which make it practically impotent to effectively exercise its function of reviewing constitutional amendments. First, the HoF is one of the veto players on constitutional amendments. It is involved in the process of amendment at the stage of initiation

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<sup>87</sup> *The Proclamation to Consolidate the House of Federation of the Federal Democratic Republic of Ethiopia and to Define its Powers and Responsibilities*, Proclamation No. 251/2001, FED.NEGARIT GAZETA 7<sup>th</sup> Year No. 41, Addis Ababa, 6<sup>th</sup> July 2001.

<sup>88</sup> GOZLER, *Supra* note 15, at 5-10.

<sup>89</sup> JACKSON & TUSHNET, *supra* note 3, at 456-487.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> FDRE CONSTITUTION, *supra* note 1, Arts. 9, 62 & 82.

<sup>93</sup> Dante B. Gatmaytan, Can Constitutionalism Constrain Constitutional Change? Available at: [https://works.bepress.com/dante\\_gatmaytan/8/](https://works.bepress.com/dante_gatmaytan/8/) (accessed on May 11, 2015).

and ratification. In consequence, any act of ruling on the constitutionality of constitutional amendment will make the HoF a judge on its own case. Second, as members of the HoF are at the same time active members within the regional governments and ruling party leadership, the HoF lacks complete independence from the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF) and the executive branch of the government.<sup>94</sup> Consequently, the HoF is not expected to rule against the government and the interest of the ruling party when adjudicating constitutional disputes in general and constitutional amendment matters in particular. As a political organ under the influence of the executive and the ruling party, the HoF may not decide sensitive political issues like constitutional amendments in fair and unbiased manner. Therefore, practically the HoF may not be a sound institution to rule on the constitutionality of constitutional amendments.

Moreover the Ethiopian Constitution denies regular courts the power either of interpreting constitutional provisions or of reviewing the constitutionality of legislations.<sup>95</sup> The constitutional framers viewed the judiciary as undemocratic and conservative. They also believed that constitutional adjudication is a political function. This fear of judicial activism and the political question doctrine persuaded the framers to deny courts the power of judicial review.<sup>96</sup> Constitutional amendment is more of a political process than ordinary legislation making. On this point, Justice Black who was a judge at the US Supreme Court said that a constitutional amendment is "a political question: the process is political in its entirety, from submission until an amendment becomes part of the constitution."<sup>97</sup> Preuss, complementing this position, provided that the idea of constitutional amendment is a political rather than juristic concept.<sup>98</sup>

Thus, under the Ethiopian legal system ordinary courts are not expected to rule on such very political matter. As the intent of the framers and the spirit of the Constitution reveals, it is difficult to think that courts, which are not trusted even for ordinary legislations, to rule on the constitutionality of constitutional amendments. Therefore, neither HoF nor courts may review the constitutionality of amendments under the Ethiopian legal system. The system lacks an appropriate institution to rule on un-constitutional constitutional amendments, which undermines the Constitution.

## V. CONCLUDING REMARKS

The 1995 Ethiopian Constitution has been amended twice in the past twenty years. Critical observation on these amendments aptly revealed that the practice disregards important procedural

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<sup>94</sup> ASSEFA, *supra* note 45, at 163-197.

<sup>95</sup> Assefa Fisseha, *New Perspective on Constitutional Review in Ethiopia*, 1 ETH. L. REV, 1, 3-11 (2002).

<sup>96</sup> *Id.*

<sup>97</sup> The justice Black was a judge at the Supreme Court of the USA. In *Coleman v. Miller*, 307 U.S 433(1939) Case he wrote as "Article V grants power over the amending of the Constitution to Congress alone....the process itself is political in its entirety, from submission until an amendment becomes parts of the Constitution. And it is not subject to judicial guidance, control, or interference at any point." See: Barak, *Supra* note 15, at 330-31.

<sup>98</sup> Preuss, *supra* note 15, at 448.

requirements stipulated under the Constitution. Institutions which have not been assigned a role at the phase of initiation are participated in the process of proposing constitutional amendments. For instance, the Ministry of Finance and Economic Development, which initiated the first constitutional amendment, has no constitutional power to propose amendments. In addition, the first and the second amendment proposals were not also submitted to the general public for discussion and consultation as required by the Constitution. The practice also undermines the role assigned for State Councils of the member states of the federation. This was more apparent on the first constitutional amendment which is not approved by Regional State Councils. Thus, the practice of constitutional amendment disregards substantial procedural requirements demanded by the Constitution which in turn renders the first and the second constitutional amendments unconstitutional, though their constitutionality has not yet been challenged before any umpiring organ.

Although the Constitution does not specifically authorize HoF to rule on the constitutionality of constitutional amendments, as a guardian of the Constitution, it may assume jurisdiction to examine the constitutionality of constitutional amendments. But practically, this would be impossible due to the fact that HoF itself is one of the veto players in the process of constitutional amendment. Consequently, its review would be investigating the constitutionality of amendments made by itself. Besides, its impartiality is also doubtful to rule on such sensitive political matters. As the Constitution denies courts the power to adjudicate on constitutional issues, it is difficult to think them as an institution capable of scrutinizing the constitutionality of constitutional amendments, which is more of a political act. As a result, neither the House of Federation nor ordinary courts may have practical power to rule on the constitutionality of constitutional amendments. This indicates that judicial review as a means of safeguarding the Constitution against unconstitutional constitutional amendments has no significant place under the Ethiopian legal system.

Therefore, despite the un-constitutionality of the practice, the State lacks an appropriate institution to watch and review the process of constitutional amendment. Judicial review as a means of safeguarding the Constitution from unconstitutional constitutional amendment is not well recognized and developed under the Ethiopian legal system. As a result, the amending power can also be used to undermine the Constitution. Hence, it is imperative to revisit the Constitution so as to (re-)organize an institution that would examine the constitutionality of constitutional amendments in Ethiopia. This recommendation can be effective through re-considering the powers of the existing institutions like HoF and courts or establishing a new organ like constitutional court based on further study.

In addition, it is aptly indicated in this article that both the first and the second constitutional amendments have not yet been published in the *Negarit Gazeta*, which is an official news-sheet for publishing federal laws. Although publication is not a matter having a negative consequence on the validity of the amendments, it is important from practical point of view so as to maintain the comprehensiveness of the written Constitution. Therefore, it is the firm belief of this author that amendments made on Articles 98 and 103(5) of the Constitution should be published on the official *Negarit Gazeta*. The Office of speaker of the House should take the responsibility of

publishing the amendments. Moreover the amended texts have to be included on the official copies of the Constitution. The precedent used in USA may be instructive. Accordingly, amendments may be included as supplementary provisions at the end of the Constitution. It is also possible, for instance, to include amendments in each provisions of the Constitution, specifically indicating when it was amended or do it as we did for amendments to ordinary laws. This point, therefore, may require further study of all the options. However, it is inescapable that, at the publication of new copies of the Constitution, the amended provisions have to be included.

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