

BIRTH-DEFECTS OF A CONSTITUTION AND ITS IMPACTS ON OUTCOME: REFLECTION ON ETHIOPIAN CONSTITUTION- MAKING EXPERIENCE

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ABSTRACT

In their struggle to restrain the destructive exercise of power of their governments, quite a big number of countries have made one constitution after another with little or no success. Some are still in a situation of perpetual quest for constitutionalism. The main argument in this article is that the process of making a constitution will have significant impact on the life and performance of a constitution. Ethiopia is one such country where a number of constitutions have been made but the quest for constitutionalism still an unanswered. With such a long history of independence and four constitutions within six decades, why has Ethiopia failed to build a stable democratic constitutional order? This article attempts to find out the possible explanations for the failure of the past Ethiopian constitutions to bring about a sustainable democratic order. But the particular focus of the article is to examine the process of making the 1995 FDRE Constitution with a view to determine the extent to which the process of making the Constitution was flawless or blemished with the birth-defects that has led to the demise of the earlier constitutions. The extent to which the defects in the process have affected the actual performances of the 1995 Constitution has been explored. In the assessment of the 1995 FDRE Constitution-making process the main requirements that are imperative for making a modern democratic constitution have been taken into account. The relevant literature has also been surveyed to show what others scholars in the area have written concerning the process of making modern democratic constitution. The finding of the assessment will help all those concerned to rectify the wrongs made during the process of making the constitution so that it may not face the fate similar to the past Ethiopian constitutions.

Key Terms: *birth -defects, constitutionalism, constitution- making, Ethiopia, federalism, post-conflict society.*

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1. INTRODUCTION

In its struggle to curb the destructive exercise of state power, human society has designed a tool known as constitution with the intention to use it as a shield against arbitrary and harmful exercise of state power. As shown by the experiences of so many countries of the world, the need for constitutions has evolved as a reaction to the destructive exercise of state power. The history of constitutionalism itself has always been the struggle of human society for the limitation of the destructive exercise of power by power holders.¹ In their struggle to restrain the destructive exercise of power of their governments, quite a number of countries have made one constitution after another with little or no success. Considerable number of countries is still in a situation of perpetual quest for constitutionalism.

Ethiopia is one such countries where a number of constitutions have been made but the quest for constitutionalism has not yet answered. Ethiopia was formed initially through conquest and has been sustained by force of arms since then. Although Ethiopia claims to have a long history of independence, in terms of constitutional development, he remained stagnant. In fact the hitherto history of Ethiopian power politics indicates that all the past successive regimes assumed power through force of arms and removed from power by force of arms. The country's more than eight decades of constitutional history shows that every regime first seized State power and then suspended the earlier constitution and made a new constitution to be viewed as legitimate regime. None of the past three Ethiopian constitutions has survived the regimes under which it was made.² As a consequence, Ethiopian people are still in perpetual quest for constitutionalism and genuine democratic governance.

One may wonder why with such a long history of independence and four constitutions within six decades, Ethiopia has not succeeded to build a stable democratic and constitutional polity? The objective of this article is to look into the possible explanations for the failure of the past Ethiopian constitutions to

¹Loewenstein K., Political Power and Governmental Process (Chicago: University of Chicago, 1965).

² The 1931 and the 1955 constitutions are referred to as Imperial or Haile Sellassie's. The 1987 PDRE Constitution as the Derg's Constitution and the 1995 FDRE Constitution is referred to as the EPRDF's constitution by some.

create a sustainable democratic State. The article aims at identifying the birth-defects of the past constitutions which led to their fatal outcomes. The process of making the 1995 FDRE Constitution has been examined with a view to determine whether or not the process was free from the birth-defects that led to the demise of the earlier constitutions. The extent to which the defects in the process of making the 1995 FDRE Constitution have affected the performances of the Constitution has also been explored.

The article begins with an introductory part dealing with significance of constitution-making process in building a democratic state. The impacts of flaws in constitution-making process would have on the performances of a constitution will be looked at next. The pre-1991 Ethiopian constitutional experiences have been explored to show the impacts defects in the processes of making the constitutions have made on the performances of the constitutions. Establishing the extent to which the process of making the 1995 FDRE Constitution was flawed or not and revealing the consequences thereof will be the main focus of the article. Conclusions drawn from looking at the process of making the 1995 FDRE Constitution will be given at last.

2. SIGNIFICANCE OF CONSTITUTION-MAKING PROCESS

Modern constitution-making is a democratic process which aims at representing the will of the people, achieving “a consensus on the future of the state, and to ensure respect for universal principles such as respect for human rights and democratic governance”.³ In post-conflict societies, a new constitution lays foundation for the state by way of changing the post –conflict society from force-based to consensus-based thus giving legitimacy to the state and the government. In a post-conflict society, constitution-making is a process of recreating the state based on consensus and equality. In its short-term goals, constitution-making in post-conflict societies contributes to peace-making and conflict resolution but in its long-term goals, it contributes to building democratic constitution and inclusive and sustainable state institutions.⁴

³ Benomar, J., *Constitution Making and Peace-building and National Reconciliation: Lessons Learned from the Constitution-Making Processes of Post-Conflict Countries* (New York: United Nations Development Program, 2003), P3.

⁴Widner, J., *Constitution Writing in Post-conflict Settings: An Overview*, William and Mary Law Review 49 (2008), Pp.1513-1537.

In a post-conflict society that intends to create stable democratic arrangement, the tasks of a new constitution is to establish a political community and lay down rules for the allocation and exercise of state power. A political community here doesn't necessarily mean a homogenous society with one language and culture. In the context of multi-ethnic societies that have been kept under repressive regimes, a political community implies consensus-based society where the diverse ethnic groups have agreed to live together and have developed shared beliefs/aspirations enshrined in a collectively made constitution. If such diverse ethnic groups constituting the population of a state hold divergent viewpoints capable of tearing the polity apart in opposing directions, writing of a constitution alone cannot artificially fuse such diverse groups into a political community.⁵

In the context of a diverse and post-conflict society, constitution -making should go beyond mere writing of the document and establish a political community with shared visions. Constitution-makers need to know the difference between mere writing of a constitutional text and constitution-building. Constitution-building goes beyond the text and encompasses all the phases of constitution-making process from having a written constitution up to building inclusive state institutions with effective performance. Constitution-building aims at building a sustainable political community and guarantees the observance of the values enshrined in a constitution. Constitution-building implies constitutional reality that sustains the constitution.⁶

For a post-conflict pluralistic society where the diverse people have been under successive repressive regimes, the making of a new constitution is like a fresh start where the constitution will serve as a means of bringing political stability and sustainable democracy.⁷ For any war-torn society intending to establish a new political community constitution making is an instrument for rebuilding of the society on new foundations by rectifying past historical wrongs and establishing sustainable and democratic constitutional order. Constitution-making is a fully participatory institution-building project that lays down constitutional foundation for sustainable democratic state. What constitution-

⁵ Ghalli, Y. & G. Galli, *Constitution-Building Process and Democratization: Lessons Learned*, International IDA (Hong Kong: University of Hong Kong, 2006).

⁶ Widner, *Supra* note 4.

⁷ Samuels, K., *Post-Conflict Peace –building and Constitution making*, Chicago Journal of International Law 6 (2006), Pp. 663-669.

makers do or fail to do during the constitution making process are crucial in determining the effects and outcome of the resulting constitution.⁸

3. IMPACTS OF CONSTITUTION-MAKING PROCESS ON THE OUTCOME

Where constitutions are made following civil conflict or successive authoritarian rule, constitution-making process would significantly impact the value of the resulting constitution, state institutions and transition to democracy.⁹ To begin with, democratic constitution-making and the establishment of sustainable democratic constitutional order are inseparable. Without undertaking proper democratic constitution-making process, a democratic state, a sustainable constitution with democratic content, and inclusive state institutions cannot be established and nurtured. If a certain constitution-making process is undemocratic, neither can the content genuinely be democratic and nor can one expect democratic practice.¹⁰

A democratic constitution is judged by the extent to which it reflects the values, shared norms, beliefs and ideals of the people which would require that the constitution be authored by the people. This means the constitution-making process has to be inclusive and fully participatory. In order to gain legitimacy and be enduring, a constitution has to be made, approved and adopted with free and full participation of the people through democratic procedures reflecting popular will.¹¹

In the process of making a constitution, there are flaws that would have grave effects on the contents and sustainability of a constitution. Constitution-makers need to know these flaws and take the necessary precaution to avoid these defects which may otherwise result in fragility of a constitution and lack of legitimacy. Without effective and extensive public participation during its

⁸ Benomar, *Supra* note 3; *See also* Ghalli & Galli, *Supra* note 5.

⁹ Samuels, *Supra* note 7.

¹⁰ Saati, A., How Participatory Constitution-Building Affects the Quality of Democracy, (2011); Available at www.diva-portal.org/smash/get/diva2:759746/FULLTEXT01.pdf
< Accessed on December 21, 2017>

¹¹ Benomar, *Supra* note 3.

making, a constitution would lack the required public support and legitimacy.¹² If the making of a certain constitution is fully participatory and inclusive, the people will have feeling of ownership of the constitution and become loyal.¹³

Full and effective public participation in constitution making process would result in “increased legitimacy, improved knowledge about the political system, avenue towards reconciliation, and a sense of ownership over the document”¹⁴. Here it is good to note that the merits of participation depend on whether or not participants actually had real influence over the final decisions.¹⁵ There are cases where public participation is nominal with no actual influence on the final outcome.¹⁶

Along with effective participation, another key issue is the extent to which constitution –making process includes or excludes the relevant social and political actors, before, during and after the making of the constitution. The outcome of constitution-making will have wider support and sustainability only where those who have experienced injustices in the past are included in all phases of constitutional deliberations.¹⁷ Inclusion of all segments of the population in the making of a new constitution will provide all groups equal opportunity to address past wrongs and determine future directions collectively.¹⁸

In his study of some selected countries, Benomar has shown that inclusive constitution-making process and extensive deliberation among key groups contributed to the “longevity of the constitutions and the durability of the state institutions”¹⁹ Hence, when making a democratic constitution, the main concern of constitution- makers should always be how to make it command the loyalty,

¹² Ginsburg, T. Elkins, Z & Blount, J. *Does the Process of Constitution Making Matter?* Annual Review of Law and Social Science, Vol.5 (2009), Pp 201-233.

¹³ Benomar, *Supra* note 3.

¹⁴ Saati, *Supra* note 10, P8.

¹⁵ *Ibid.*

¹⁶ Arnstein, S. R. “A Ladder of Participation,” In *The Participation Reader* (ed). A Cornwall (New York: Zed Books, 2011), 3-18; See Also Pateman, C. *Participation and Democratic Theory*, (Cambridge: Cambridge University Press 1970).

¹⁷ Hart, V., *Democratic Constitution-making* (United States Institute of Peace, 2003); Available at <http://www.usip.org/files/resources/sr107.pdf> < Accessed on March 13, 2015>

¹⁸ Saati, *Supra* note 10.

¹⁹ Benomar, *Supra* note 3, P.11.

obedience and confidence of the people. They have to make sure that the constitution is free from serious birth- defects. Exclusion of key players from constitution-making process is the most common and fatal defect leading to fragility of a constitution.²⁰ If those involved in constitution-making fail to take the necessary precaution, they will end up in producing a constitution with fatal birth-defects destined to have short duration.²¹

When a constitution is made, the entire constitution- making phases should be seen as an important forum for dialogue where the struggle between different political forces over issues of distribution, redistribution, and limitation of power are publicly and soberly discussed and determined.²² In view of that, constitution-makers should avoid rushing the constitution through hastily without sufficient time for deliberation and negotiations. All those who take part in the making of the constitution need to have ample time and sobriety so that they may be able to make critical reflections on all issues, negotiate and arrive at genuine consensus. As it deals with fundamental issues of the given polity, constitution-making by its nature would require sober mind-set and well-considered approach to all the issues. A constitution not based on shared views, values and aspirations of all the people will be disowned by the people and be short-lived.²³

A constitution and the institutions it establishes should not be imposed by a certain group or regime on the people from above. A constitution is not dictated, it is a negotiated and compromise document. As seen from constitutional experiences of many countries, there have been cases where constitutions have been made by the ruling regimes and imposed on the people. But the life -spans of these constitutions have not been longer than the regimes. If a constitution is a dictated one, neither can it get the required loyalty, obedience and confidence from the people nor can it have legitimacy.²⁴

In a post-conflict society, in the entire process of making a new constitution, all those taking part in the constitution-making have to work towards harmonizing

²⁰ Ginsburg *et al.*, *Supra* note 12.

²¹ Widner, *Supra* note 4.

²² Benomar, *Supra* note 3.

²³ Hart, V., Democratic Constitution Making, United States Institute of Peace, 2003 <http://www.usip.org/files/resources/sr107.pdf> < Accessed on March13, 2015>

²⁴ Benomar, *Supra* note 3; see also Ginsburg *et al.*, *Supra* note 12.

their conflicting viewpoints through negotiations and dialogue in order to come up with a compromise document. Constitution-makers should identify and agree on the main constitutional concerns and problems of the society which the constitution should address. In the process, the fundamental differences which exist between the major national political forces have to be acknowledged and commonly addressed. Mutual- trust and compromise are the essence of a democratic and sustainable constitution. Especially when a new constitution is being made for a divided post-conflict society with diverse interest groups, there is a need to give concessions to potential spoilers who may possibly be able to exploit and mobilize the excluded interests and endanger the stability of the constitutional arrangement.²⁵ For such a society, an inclusive and fully participatory constitution-making process will serve as an instrument that brings about peace and reconciliation between conflicting communities.²⁶

4. CONSTITUTION-MAKING IN PRE-1991 ETHIOPIA AND THEIR OUTCOMES

Modern Ethiopian Empire State came into being through Menelik's war of conquest at the end of the 19th Century. The different groups of people incorporated into the Empire have been brought together by force of arms and kept together by force. There has never been consensual-basis for Ethiopian State which gives it legitimacy. The past successive rulers of the Empire have uncompromisingly and persistently been engaged in their attempts to forge a nation- state out of the multi-ethnic Empire. As a result, the diverse ethnic groups have been forced to remain under the Empire thus making Ethiopia a prison-house of nationalities.²⁷

The assimilationist nation-building project of Ethiopian rulers has been facing series of resistances all along from the various subjugated peoples that have been forcibly brought under the Empire-State. But the successive rulers of the Empire continued their forcible assimilationist strategy in total disregard of the resistances and revolts of the subjugated people. With the initial lack of consensual-basis at birth, the subsequent drive by the successive ruling regimes

²⁵Samuels, K. and Wyeth, V.H. *State-building and Constitutional Design after Conflict* (New York: International Peace Academy, 2006).

²⁶ Ginsburg et al., *Supra* note 12.

²⁷ Markakis, J. *Ethiopia: The Last Frontiers* (New York: James Currey, 2011).

of the Empire to forcibly maintain the multi- ethnic Empire has served as a seed-bed for perpetual constitutional crises in Ethiopia. The centralist nation-building project of the successive rulers has been facing fierce resistances and revolts from the diverse subjugated people of the Empire from the very outset and has drawn Ethiopia into endless upheavals for several decades.²⁸

In Ethiopian constitutional history, the 1931 Constitution of Haile Sellassie was the first written constitution adopted and used by Ethiopian ruler as an instrument to create a modern nation –state out of multi-ethnic Empire. The Emperor made the Constitution on his own initiative with the sole objective of reducing the political power of the nobility and to consolidate his absolute power.²⁹ The Constitution made Emperor Haile Sellasie's hereditary rule that was alleged to have descended from King Solomon incontestable. According to Thomas Paine (1954), hereditary rule and government by their nature are tyrannical since inheriting a government simply amounts to inheriting the people "as if they were flocks or herds"³⁰.

The 1955 Revised Constitution of Haile Sellassie has made considerable departure from the 1931 Constitution in terms of content and structure, but in their essence, both pursued the same assimilationist strategy of building a nation-state out of multi-ethnic Empire and consolidating Haile Sellasie's absolutist rule. Since both constitutions were given /granted/ by the Emperor, they could not restrain the exercise of power of the Emperor in any way.³¹ The two Imperial constitutions have failed to build the desired nation-state but they have succeeded in creating a strong predatory state with exclusive and fragile state institutions. During his half a century imperial rule, there were more than enough signals and demands for change³². But rather than considering reconstituting the Empire-State on consensual- basis, Haile Sellassie's regime continued its assimilationist

²⁸ Merera Gudina, Ethiopia: Competing Ethnic Nationalisms and the Quest for Democracy, 1960-2000 (Addis Ababa: Chamber Printing Press, 2003).

²⁹ Paul, J. C. N. & Clapham, C., Ethiopian Constitutional Development, Vol. 1 (Addis Ababa: Faculty of Law 1972).

³⁰ Thomas Paine, Rights of Man: Being an Answer to Mr. Burke's Attack on the French Revolution, (London: C.A. Watts & Co. 1954), P144.

³¹ Brietzke, P. H., *Ethiopia's Leap in the Dark': Federalism and Self Determination in the New Constitution*, Journal of African Law 39(1) (1995), Pp.19-38.

³² The 1960 coup, the peasant revolts of Bale, Gojam, Sidama, the Eritrean Liberation struggle, Ethiopian students' movement, (see Gebru Tareke, The Ethiopian Revolution: War in the Horn of Africa (Yale University, 2009).

policy with hegemonic and authoritarian rule. Ultimately, the popular uprisings and revolts made by the diverse subjugated people of the Empire led to the 1974 removal of the Emperor from power with disgrace.³³

After overthrowing Emperor Haile Sellassie and suspending the 1955 Revised Constitution, the Provisional Military Administrative Council (PMAC) known as the *Derg*, constituted itself as a provisional military government. In taking that move, Ethiopian military deprived Ethiopian people the opportunity history has offered them as a result of the demise of more than four decades of Haile Sellassie's feudal and autocratic rule. The *Derg* ruled the country without a constitution for 13 years. The 1987 Peoples Democratic Republic (PDRE) Constitution was the third constitution for Ethiopia and it was the first to constitutionally declare the country a Republic. But the Constitution was made merely to serve as a camouflage for the *Derg*'s naked rule by force.

Except for the change in its name and form, in its essence, the 1987 PDRE Constitution endorsed the previous Imperial assimilationist approach and declared Ethiopia a centralized unitary State. Instead of being responsive to the continuous, deepening and legitimate demands of the diverse subjugated people of Ethiopia for equality, the *Derg* regime became more centralist, authoritarian and assimilationist than Emperor Haile Sellassie. The centralization efforts made by the architects of the Empire- state were taken to climax by the *Derg*'s over-centralization of the State and the economy.³⁴ In terms of democratic constitutional development, the *Derg* regime abolished hereditary rule of Haile Sellassie and changed the name from Empire to a "republic". Other than that, the *Derg* regime had perfected and used (rather in a more refined way) the hegemonic, predatory and repressive features of all state machineries that have been put in place and used under the Imperial regime.

Paul Brietzke has characterized the *Derg*'s style of governance as "unitarist in the extreme"³⁵ In trying to make multiethnic Ethiopian polity centralist and unitarist in the extreme, the *Derg* regime worsened the fragility of the predatory and authoritarian state it took over from the Emperor. Ultimately, the *Derg*'s extreme assimilationist strategy and hegemonic rule generated ethnic backlash

³³ Gebru Tareke, *Supra* note 32.

³⁴ Brietzke, *Supra* note 31.

³⁵ Brietzke, *Supra* note 31, P.2.

and led to the emergence of different armed insurgent groups which brought about the downfall of the regime in 1991. In terms of durability, from its adoption in 1987, the PDRE Constitution lived barely for four years. According to Widner, if a certain constitution is suspended within five years of its ratification, it is considered a “failed effort”³⁶.

Overall, when one looks into the pre-1991 Ethiopian constitutions, they all have failed to build sustainable democratic constitutional state with inclusive state institutions. Rather, what they have established was an authoritarian culture of power that nurtured and promoted hegemonic mind-set among the power elites from the ruling regimes. This class of ruling elites always aimed at the control of central state power and accessing the country’s resources, most importantly land. The kind of Ethiopian State that was crafted was predatory in its nature and impervious to democratic values. Ultimately, since the constitutions, the state and the institutions the regimes created have all been elite-driven, exclusivist and not consensus-based, and owing to their inherent fragility, they all disappeared with the regimes.³⁷

5. THE TRANSITIONAL PERIOD: STAGE-SETTING FOR THE MAKING OF THE 1995 FDRE CONSTITUTION

5.1.CONTEXT AND BACKGROUND

The fall of the Derg regime in the year 1991, conclusively proved the total failure of attempts to build a nation-state out of multi-ethnic Empire –State and the fragility of Ethiopian polity as a state.³⁸ It revealed more than ever before that the legitimacy of Ethiopian state and the authority of the rulers were under uninterrupted challenge. The pre-1991 constitutional experiences of Ethiopia have shown the need for a fresh start with a radical departure from the past.³⁹

In May 1991, the Derg regime was removed from power by force and the Ethiopian People’s Revolutionary Democratic Forces (EPRDF) assumed power

³⁶ Widner, *Supra* note 4, P.1526.

³⁷ Acemoglu, D. & Robinson, J. A., *Why Nations Fail: Origins of Power, Prosperity, and Poverty*, (New York: Crown Publishers 2012); See also Markakis, *Ethiopia: The Last Frontiers* *supra* note 27; See also Sarah Vaughan & Kjetil Tronvoll, *The Culture of Power in Contemporary Ethiopian Political life*, (Stockholm: SIDA, SIDA Studies, 10 2003).

³⁸ Merera, *Supra* note 28.

³⁹ Markakis, *Supra* note 27.

through force showing that power has once again assumed by force. With the downfall of the Derg regime, the diverse subjugated ethnic groups and people in Ethiopia have been provided with another opportunity to make a fresh start and re-constitute a consensus-based democratic state. The first opportunity was in 1974 which according to Eshetu Chole “turned out to be a bitter ‘harvest of sorrow’”.⁴⁰ At the time, many thought the opportunity could be used by Ethiopian people to establish an enduring constitutional system with sustainable and inclusive State institutions. In view of the fact that Ethiopia was a post-conflict society struggling to come out from decades of authoritarian rule into democratic system, hoping for a new constitution that could rectify historical wrongs and addressed the perennial constitutional problems was justifiable optimism.

After the downfall of the Derg regime by joint forces of ethnic-based liberation movements in the year 1991, the dream of those who have strived much to build a nation- State out of the Empire -State was shattered. In 1991, after more than four decades futile attempt of trying to prevent Eritrean secession, Eritrea seceded from Ethiopia and declared its independence. The events which took place in 1991 were conclusive evidences as to the need to transform Ethiopia from prison-house of nations to a consent-based multilingual and multicultural federal state. No genuine Ethiopian constitution-maker could have missed the need for making a fresh start by reconstituting Ethiopia based on consent through fully-negotiated new constitutional arrangement.

With a brief transitional period from 1991 -1995, the FDRE Constitution was adopted in 1995 as a fourth constitution in Ethiopian constitutional history. Now, more than eighty-seven years after the 1931 Constitution and almost a quarter of a century after the 1995 FDRE Constitution, can one comfortably say Ethiopian people have used the opportunity offered to them in 1991 or was it a missed opportunity once again? To what extent had the efforts made during the making of the 1995 Constitution gone beyond mere constitution-writing and became constitution-building by producing a political community with sustainable democratic State and inclusive institutions? Have the diverse subjugated people of Ethiopia who were forcibly brought together through conquest and kept

⁴⁰ Eshetu Chole, Ethiopia at the Cross Roads: Reflections on the Economics of the Transition Period (*Dialogue*, 3rd Series, 1(1) Addis Ababa, 1992).

together by force succeeded in building the quested for consensus-based political community capable of nurturing democratic values and institutions?

The extent to which the 1995 FDRE Constitution was made in such a way as to gain the loyalty, obedience and confidence of the people and thus gained legitimacy will be looked at hereunder starting with the transitional Charter. The article has attempted to pin- point some of the conspicuous birth-defects which have affected the outcome and legitimacy of the 1995 FDRE Constitution.

5.2.THE TRANSITIONAL PERIOD CHARTER

Having controlled state power by force of arms, the EPRDF convened a National Conference held in July 1991 which adopted the Transitional Charter on the basis of which the governance for transitional period was established and the 1995 FDRE Constitution was prepared. The EPRDF invited different political movements to take part in the July Conference most of which were small ethnic parties created after 1991. At the end of the Conference, the participants have agreed upon and came up with a Transitional Charter and the Transitional Council of Representatives (COR) which had 87 members. The Charter stressed and recognized the right to self determination of ethnic groups to independence. The move to make ethnic self determination was dictated by the political setting and the nature of the political force which came to power at the time. Since ethnic problem was the cause that led to the emergence of the liberation movements and the downfall of the Derg, the EPRDF-led Government could no more disregard ethnic issue.

After the overthrow of the Derg regime, when the EPRDF formed coalition government with a number of liberation movements, things appeared to be moving towards reconstituting Ethiopian State on consensual basis. But, in the course of time, events proved that the EPRDF had no intention of sharing power.⁴¹ Ethiopian constitutional history so far shows that every successive regime modified or changed the previous structure but “each time with a view to raising its efficiency as an instrument of control and raising revenue”⁴²

⁴¹ Vestal, T. M., *An Analysis of the New Constitution of Ethiopia and the Process of Its Adoption*, North East African Studies, 3(2) (1996), Pp. 21-38.

⁴² Markakis, *Supra* note 27, P12.

When one looks at the stage-setting period preceding the making of the new constitution, starting from the very determination of participants taking part on the July Conference and the allocation of seats for the 87 COR members; the EPRDF dominated the political landscape by virtue of the state power it already controlled and because of the partisan military supremacy it had. The EPRDF introduced a battle-field formula during the Transitional Charter to apportion the 87 COR seats. Based on the formula, the power positions of the liberation movements were determined by taking into account the role played by the liberation movements in the fight to defeat the Derg regime. This battle-field formula placed the EPRDF in an incontestably dominant position with effective control of the stage-setting and the making of the 1995 FDRE Constitution.⁴³

As seen from the constitutional experiences of various countries, when governments preceded constitutions and took part in the making of the constitutions, the governments on power dominated the processes and influenced the outcomes in ways that favored them.⁴⁴ In principle, since it is a constitution that is supposed to create the government and gives it legitimacy, a constitution should be antecedent to government.⁴⁵ In the 1991 Ethiopian situation, the fact that the EPRDF already assumed power and was in total control of power all along enabled it to make use of its political and military leverage to dominate the Transitional process. The EPRDF's exclusive control of state power has enabled it to dominate the entire constitution-making process and the outcome thus creating legitimacy deficit for the 1995 FDRE Constitution.⁴⁶ Consequently, the whole transitional process and the subsequent constitution-making process became the exclusive affair of the EPRDF and those allied to it.⁴⁷

6. THE MAKING AND OUTCOME OF THE 1995 FDRE CONSTITUTION: AN APPRAISAL

EPRDF's exclusivist approach and dominance of the whole process has been condemned by the different opposition groups excluded from the transitional

⁴³ Vestal, *Supra* note 41.

⁴⁴ Benomar, *Supra* note 3.

⁴⁵ Thomas Paine, *Supra* note 30.

⁴⁶ Vestal, *Supra* note 41.

⁴⁷ Abbink, J. *The Ethiopian Second Republic and the Fragile Social Contract*, Africa Spectrum, 2009, 44 2(3) 3-28; See also Markakis, *Supra* note 27; Lyonns, T., *Closing the Transition: The May 1995 Elections in Ethiopia*, The Journal of Modern African Studies, 1996, 34 (1) 121-142.

Conference and the subsequent constitution-making process. All the same, the 1995 FDRE Constitution was drafted by a commission which was formed after several representatives of the opposition have boycotted.⁴⁸ The few remaining opposition groups who were part of the EPRDF-led TGE were removed.⁴⁹ The Commission consisted of 29 members designated as the General Assembly.⁵⁰ Ethiopian oppositions have even gone to the extent of calling for the resignation of the Commission declaring their rejection of the Commission and the legitimacy of the constitution.⁵¹ Despite this, the draft Constitution prepared by the Commission was submitted for discussion to the Constituent Assembly elected on the basis of the draft constitution, ratified on Dec 8, 1994 and entered into force on 21st August 1995.⁵²

A participatory constitution-building process is an all inclusive exercise where all stakeholders are required to make full and effective participation. According to Meaza Ashenafi (2003), one of the key participants in the making of the 1995 Constitution⁵³, although the “debates were lively nonetheless, the EPRDF- the ruling party, always dominated when an issue came to a vote as it had the largest delegation.”⁵⁴ Evidently, in the absence of important political forces, there could be no serious debates and negotiations among different political forces on important and controversial issues. In effect, this would mean issues relating “ethnicity, self-determination and federalism were never adequately

⁴⁸ The credible opposition parties left out or boycotted the process were; The Agew Peoples Democratic Union, the All Amhara People’s Organization (AAAPO), the Coalition of Ethiopian Democratic Forces (COEDF), the Council of Alternative Forces for Peace and Democracy(CAFPDE), the Ethiopian Democratic Action Group, the Ethiopian Democratic Union Party(EDUP0, the Ethiopian Medhin Democratic Party, The Ethiopian National Union Party (ENUP), the Ethiopian People’s Revolutionary Party(EPRP), the Gurage Peoples Liberation Front, the Islamic Front for the Liberation of Oromo, , the Oromo Liberation Front (OLF), the Somali Liberation Front, and the Southern Ethiopia Peoples Democratic Coalition (SEPDC). Names of those parties boycotted the 29 member Commission were EDU ENUP OLF Southern Coalition

⁴⁹ Abbink, *Supra* note 47.

⁵⁰The General Assembly of the Commission was composed of 7 members of the TCR, 7 representatives various political parties, 3 from trade unions, 2 from teachers association, 2 from lawyers association 2 from health professionals association, 3 from Chamber of commerce and 3 represented women.

⁵¹ Benomar, *Supra* note 3.

⁵² Vestal, *Supra* note 41.

⁵³ For detail of the process of the making of the 1995 FDRE Constitution, see Vestal, 1996.

⁵⁴ Meaza Ashenafi, Ethiopia Process of Democratization and Development, In: A. A. An-Naim (ed.) Human Rights under African Constitutions: Realizing the Promise for Ourselves (Philadelphia: University of Pennsylvania Press 2003), P32.

deliberated.”⁵⁵ This would in effect mean the outcome of the 1995 FDRE constitution-making process was dictated by the EPRDF, not negotiated among all political forces.

Although the exclusivist approach pursued by the EPRDF had created resentments and led to tensions and violent conflicts among political groups, with the help of its political and military power the EPRDF was able to dominate the political landscape making the constitution-making process unwelcoming to consensus and democratic dialogue. Eventually, “what had begun with a noisy diversity of views among a broad array of political organizations ended quietly with the clear hegemony of the EPRDF.”⁵⁶

John Abbink maintains that there is “historically engrained authoritarian/hierarchical tradition in Ethiopian politics.”⁵⁷ Having studied Ethiopian nation-building project for many decades, John Markakis stated that “The analysis of succeeding crises along the route highlights the structural fault in its design, which is the centre’s monopoly of power.”⁵⁸ This historically engrained authoritarian tradition which generates and nurtures hegemonic mind-set has been the main impediment to participatory and inclusive constitution-making in Ethiopia. Owing to this engrained hegemonic and authoritarian mind-set which always haunted them, the ruling power elites could not be accommodative by renouncing their longstanding hegemonic drive.

As revealed from the constitutional experiences of various countries, when making a new constitution, the role of a government in power during the constitution-making process need to be regulated and defined. In view of the fact incumbent governments have actual interests in the outcome of the process; such incumbent governments in many countries have negatively influenced the outcomes of the processes by using the state machinery and the military power they controlled. In the same vein, in Ethiopia, the EPRDF assumed control of state and military power before the making of the constitution which enabled it to dominate the whole constitution-making process and the outcome. This has

⁵⁵ Benomar, *Supra* note 3, P.7.

⁵⁶ Lyonns, *Supra* note 47, P121.

⁵⁷ Abbink, *Supra* note 47, P173.

⁵⁸ Markakis, *Supra* note 27, P355

happened because there was no mechanism to prevent any possible manipulation or influence coming from the powerful ruling party.⁵⁹

In South Africa the constitution-makers first laid down negotiated rules and principles in the interim constitution to equally govern all parties.⁶⁰ But in Ethiopia, there was no such arrangement or mechanism in place to prevent the EPRDF from dominating the transitional process and from influencing the process and outcome of the 1995 FDRE constitution-making. The monopoly over the stage-setting enabled the EPRDF not only to determine who could take part in the constitution making processes but it enabled the ruling party to exclude the vanquished and all others opposed to the regime.⁶¹

In terms of form and contents, the FDRE Constitution generally has resemblance with many modern federal democratic constitutions. Looking at the nicely - worded text, one may be misled and conclude that it is a democratic constitution. Regarding forms and contents of modern constitutions, almost all countries have constitutions which consist of set of rules structuring and defining powers of governments and almost all contain provisions that purport to recognize and protect most of the fundamental human rights. But of all these countries, a significant number of them have a well-written constitutional text but without constitutionalism or constitutional practice.⁶²

For modern dictators, a written constitution has nowadays come to serve as a camouflage for deception. The fact that there is a formal written constitution with provisions that purport to recognize and protect fundamental human rights cannot be taken as conclusive evidence that the governments are constitutional. In fact, any government with the intent to sidestep a constitution will have several extra-constitutional means to make the well-written constitution irrelevant as it has been the case in many developing countries. In view of that, in judging the merits of modern constitution one should not be deceived by the form and contents of the constitutions which also applies to the 1995 FDRE Constitution.⁶³

⁵⁹ Vestal, *Supra* note 41.

⁶⁰ Benomar, *Supra* note 3.

⁶¹ Vestal, *Supra* note 41.

⁶² Loewenstein, *Supra* note 1.; See also Nwabueze, B. O. *Constitutionalism in Emergent States* (London: C. Hurst & Co., 1973).

⁶³ Vestal, *Supra* note 41.

Overall, when looked at in terms of gaining the loyalty, obedience and confidence of the people and earning legitimacy, the 1995 FDRE Constitution making process had fatal defects. Effective participation and inclusiveness are essential requirements for making a democratic constitution. But these essential requirements were lacking in the making of the 1995 FDRE Constitution which has made the process seriously flawed. The ruling regime wielded control of the whole process of making the federal constitution by totally excluding all opposition political forces. The federal arrangement was not fully negotiated among the key political forces. This has made Ethiopian federal arrangement a dictated and imposed one. Ultimately, what prevailed was the traditional centralized command governance style under the guise of federalism.

Regarding legitimacy of the 1995 FDRE Constitution, one issue often raised is the possibility of gaining legitimacy later on which has been lacking in the beginning. According to Tsegaye Ararsa, the 1995 FDRE Constitution had a weak original legitimacy but could have earned derived legitimacy through consistent implementation.⁶⁴ Surely, as rightly put by Tsegaye, where legitimacy may be weak originally, it can be gained through practice. This could have been done through opening the political space to those excluded when the Constitution was made. In fact, the EPRDF did not have the intent to be inclusive at the time of the making of the Constitution. In view of the fact that it lacked original intent, expecting that it will act towards gaining the intent to be inclusive will be remote. In due course, what we have come to observe during the last 25 years is the fact that the EPRDF has narrowed the political space more and more.

One may wonder whether the 1995 FDRE Constitution can still gain legitimacy under the ongoing reform measure of the EPRDF. On this issue, I generally agree with the following statement of Gedion. In his view, “instead of adopting a new constitution, the current constitution’s lack of legitimacy can be remedied by comprehensive constitutional reform that would still maintain the basic architecture and cornerstones of the current constitution.”⁶⁵ But in my view, the problem would still be the EPRDF once again exclusively remaining in control

⁶⁴ Tsegaye Ararsa, *The Making and Legitimacy of the Ethiopian Constitution Towards Bridging the Gap Between Constitutional Design and Constitutional Practice*, Afrika Focus, (1) 2010, Pp. 85-110.

⁶⁵ Gedion.T Hesseon, *The Precarious Future of Ethiopian Constitution*, Journal of African Law, 57 2 (2013), P. 215.

of the ongoing reform. If the EPRDF is sincere about the current reform, if it abandons its exclusivist disposition and ready to share power, the possibility of the Constitution gaining legitimacy cannot be ruled out.

7. CONCLUSION

In close to a century Ethiopian peoples' quest for constitutionalism, the single-most persistent problem remains to be lack of consensual-basis which is a prerequisite for building a political community with inclusive and sustainable state institutions. Whoever wants to genuinely address this perennial problem of the diverse Ethiopian people has to accept that Ethiopian people have not as yet built a consent-based political community. To the extent that it was not consent-based at the start and to the extent that the diverse Ethiopian people are still being kept together by force alone, the legitimacy of Ethiopian state and the authority of the rulers continue to be contested.

In the context of constitution-building, one bitter truth which should be acknowledged by any prudent Ethiopian constitution-maker is that the formation of Ethiopian polity was based on force and its survival was maintained simply by force. This is the main reason why legitimacy of Ethiopian polity and authority of its successive rulers have been contested all along. A multiethnic-Empire constituted by conquest and maintained by force cannot build a political community and establish sustainable constitutional system without renegotiating and reconstituting the state on the basis of consent.

All the past constitution-making processes in Ethiopia have failed to recognize the need for reconstituting Ethiopian polity with a view to make it consensus-based. Constitution-building in post-conflict society aims at re-building the society with a view to create a political community that can serve as foundation for sustainable democratic and constitutional order. This assumes that the existence of historical wrongs and injustices that have to be rectified. In the case of Ethiopian power elites who have taken the lead in making the constitutions, there has been reluctance to break with the past by way of recognizing historical wrongs and being ready to rectify them.

If one looks at Ethiopian constitutional history as a whole, under the Imperial rule of Haile Sellassie, the constitutions were meant to consolidate the absolutist rule of the Emperor which was feudal-based and inherently impervious to

democratic values. Besides, the Imperial constitutions were imposed on the people from above by the Emperor and opposed to democratic principles in their declared intent. But the Imperial constitutions have succeeded in building repressive, exclusive and predatory state institutions. The 1987 PDRE Constitution of the Derg regime was made with a view to give a legal cover to its overt rule by force. In so doing, the Derg changed the name of the State from unitary Empire to unitary “Democratic Republic” but with more repressive and authoritarian style of governance. Instead of democratizing the Empire, the Derg pursued Haile Sellasie’s assimilationist policy and centralist state structure in its most extreme form which back-fired and brought about the fall of the Derg in 1991.

The downfall of the Derg regime had opened a new opportunity for the diverse oppressed people of Ethiopia to reconstitute the polity and build a political community capable of sustaining a democratic state with inclusive institutions. The 1995 FDRE Constitution was greatly expected to bring about the consensus and the state legitimacy that has been lacking since the formation of the Empire-State and rebuild Ethiopia on new solid foundation. The expectation among many was that the constitution will not only be the means of legitimizing the government but it was also expected to recreate and legitimize Ethiopian State.

The main argument of this article was that there is direct correlation between constitution-making process and its outcome. If the process of making a constitution is not democratic, one can hardly have a genuine democratic constitution with legitimacy. It is only where the constitution-making processes are made fully participatory and inclusive that it be considered democratic, ensures the peoples’ ownership of the constitution and earns legitimacy. The process of making the 1995 FDRE Constitution was elite-driven and non-participatory which put in danger the survival of the Constitution. As it has been the case under the successive rulers of Ethiopia, the main problem was the traditional hegemonic mind-set of the ruling elite who always wanted to have exclusive control of state power and thus have free access to resources from the centre.

In turning the constitution-making into an affair of a few ruling elites and excluding the majority, the EPRDF restored the old hegemonic culture of power established by architects of the Empire and pursued by successive Ethiopian rulers. Lack of mechanism to prevent possible influence from the government on

power allowed the EPRDF to exclude key players without any restraint which resulted in frustrating the much expected democratic transformation. Ultimately, in the power relationship, the new constitution maintained the subordinate position of the people who have been brought under the Empire through conquest. Without changing the initial power relationship established by the architects of the Empire, the new constitution has camouflaged the old structure and gave it the name federal.

In a war-torn society like Ethiopia where the people have been kept for so long under successive repressive and predatory regimes and authoritarian culture of power, building mutual trust between the diverse people of Ethiopia should have been taken as a matter of utmost concern to the constitution-makers. At the time of making of the 1995 FDRE Constitution, instead of negotiation, what resurfaced was the old hegemonic and authoritarian culture of power. Instead of taking moves towards trust- building between different ethnic groups and oppositions, the EPRDF acted like a victor and excluded the vanquished and the oppositions.

Besides, to judge the merits of the 1995 FDRE Constitution, one can as well go beyond the text and look at the promises and performances of the Constitution twenty- two years after its adoption. Obviously, the Constitution has changed the name of the state from unitary democratic republic into Federal Democratic Republic. But still the Constitution-makers have ensured that command over the country's vital resources including land remain under the control of the central government. With vital resources under effective control of the central government and the EPRDF controlling the Regions through its party structure, in practice, there is a centralized federal state which almost operates as a unitary state under the guise of a Federal Democratic Republic.⁶⁶

In effect, despite the existence of such a well-written constitutional text with good contents, the past authoritarian culture of power and “the tendencies that uphold the politics of command are very much alive today, as they were during imperial and revolutionary times.”⁶⁷ This command can be seen from the reluctance of the ruling party to loosen the exclusive monopoly it assumed over the political and

⁶⁶ Aalen, L., *Ethnic Federalism in a Dominant Party State: The Ethiopian Experience 1991-2000* (Bergen: Cgr. Michelsen Institute, 2002).

⁶⁷ Kassahun Berhanu, *Party Politics and Political Culture in Ethiopia*, In: Mohammed Saleh M.A. (ed.) *African Political Parties* (London:-Sterling, VA: Pluto Press 2003), P142.

economic power by force. The Ethiopian state and its institutions have remained as extractive, exclusive and as unsustainable as they were during the past successive regimes.

Eighty-eight years after the first written constitution and twenty- four years after the fourth constitution, Ethiopia still has not succeeded in creating a consent-based democratic constitutional State with sustainable constitution and inclusive state institutions. What we can learn from the experience of the past eighty-eight years is that there is a need to renegotiate and reconstitute Ethiopian polity and make it consent-based. The mass protests of the years 2014 to 2018 have amply shown that legitimacy of Ethiopian state and the regime has gone beyond being contested and forcefully condemned. According to Markakis, the only way out of these perpetual crises is for Ethiopian power elites to “make a clean break with the past, renounce centre hegemony and accept equitable power-sharing with the periphery”.⁶⁸

⁶⁸ Markakis, *Supra* note 27, P357.