

# Innovations

## The Quest for a Legitimate Constitution in the Post-1991 Ethiopia: Sources of Constitutional Legitimacy Fracture

Semahegn Asmare

Department of Civic and Ethical Studies, Debre Tabor University, College of Social Sciences and Humanities,  
Debre Tabor, Ethiopia

\*Corresponding E-mail: [semahegnas@gmail.com](mailto:semahegnas@gmail.com)

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### Abstract

*Constitutional legitimacy refers the belief among a large number of people that the constitutional text needs to be obeyed by all or shows allegiance to the constitutions. The legitimacy of constitutions rest is determined by not only by the process, but also the content/substantive aspects. The purpose of this study is to identify and analyze the sources constitutional legitimacy problems in the 1995 constitution and the quest for a legitimate constitution in the post-1991 Ethiopia. To these ends, the study has employed a qualitative research approach. Documents and literatures are used as sources of data. The purpose of this article was to identify and examine the sources of the legitimacy problems in the 1995 FDRE constitution and the quest for a legitimate constitution in the post-1991 Ethiopia. Accordingly, the following conclusions were drawn. The current constitution of Ethiopia is, is being confronted with legitimacy problems. The sources of legitimacy problems stems from procedural and substantive aspects. Procedurally, the constitution was drafted and ratified without inclusion of all the relevant political actors in all of critical stages, lack of transparency in the appointment of the Drafting Commission, the lack of free and fair election to the CA members, the dominance of TPLF party, and the non-involvement of the public. As the process was flawed, the contents of the final document are subject to critics and contradictions with international norms and principles. Hence, the current constitution of Ethiopia is now facing legal, sociological and moral legitimacy problems.*

**Keywords:** 1.Constitution, 2.legitimacy, 3.Constitutional Legitimacy, 4.Ethiopia

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### Introduction

Democratization and constitution-writing are bedfellows. This is because of that the rise of democratic reform movements throughout the world has often been accompanied by pressure for constitutional reform (Bannon, 2007). Similar to this argument Hart has mentioned that, constitution making has become a part of many peace processes. New nations and radically new regimes, seeking the democratic credentials that are often a condition for recognition by other nations and by international political, financial, aid, and trade

organizations, make writing a constitution a priority (Hart, 2003). Constitutional-making or reform is also common even in those divided and/or post-conflict societies that emerged out of the protracted conflicts, where the tragedy and subsequent trauma of violent conflicts still reverberate. In these societies, constitution serves as an instrument of peace and pact between different warring groups (Regassa, 2010). In the same vein, Widner (2005:503) found that, between 1975 and 2003 nearly 200 new constitutions were drawn up in countries at risk of conflict, as part of peace processes and the adoption of multiparty political systems. The process of writing constitutions is considered to be very important to the chances of sustaining peace (Widner, 2005). Therefore, constitutional writing or re-writing plays a crucial role to maintain peace and promote unity of people for the present and future time.

Therefore, giving a due attention to the constitution-writing processes, as well as to its contents; are very crucial issues. Because, the constitutional making process or procedural choices followed, affect the legitimacy of the final document, and the overall contents of the constitution. As Bruce Ackerman (cited in Banon, 2007:1826) has noted, "*A workable constitution is worthless unless the framers can get it accepted.*" Constitutional legitimacy is not only about the way constitutions are made, but also the substance.

In Ethiopia, the history of constitutional writing and re-writing is traced back to the Imperial time. Ethiopia had four written Constitutions throughout its history. Prior to 1974, the monarchy represented the Ethiopian constitutional and institutional foundation in 1931(the first) and 1955 (the second). The 1931 Constitution was the first document in Ethiopian history. After 24 years, the 1931 constitution was revised constitution was replaced by the 1955 constitution. Again in 1987, Ethiopia had an opportunity to introduce another constitution- the 1987 Constitution of the People's Democratic Republic of Ethiopia (PDRE) (Regassa, 2010). Similarly, Ethiopia had another historical opportunity to adopt a new constitution in 1994, which came into force in 1995. However, the acceptability and legitimacy of the constitution among the various sectors of the society is still a work in progress(Ibid).

The purpose of this study is to uncover and analyze the sources of controversies (from procedural and substantive aspects); and justify the quest for a legitimate constitution in the post-1991 Ethiopia. To these ends, the study has employed a qualitative research approach. Literatures and documents were consulted for theoretical understandings and to gather data. The paper is organized into three parts. The first part of the study gives an overview of the theoretical issues that would help to analyze the question of constitutional legitimacy in Ethiopia. Part two examines of the practical constitutional making process 1995 constitution and its flaws. The third part deals about the questions related to the substantive/content aspect.

## 2. Theoretical Aspects

### Constitutional legitimacy

The term legitimacy connotes acceptability or getting the willingness of the people. It is about popular recognition and acceptance of a regime, laws or institutions. Similar to regime legitimacy, constitutional legitimacy refers the belief among a large number of people that the constitutional text needs to be obeyed by all or shows allegiance to the constitutions. Constitutional legitimacy as a matter of consent from the community or people, it is not a commitment which can be coerced -- however much people can be coerced into obedience to a particular regime (Elazar, 1985).

According to RH Fallon (2005), RS Kay (1984), and RE Barnett (2003), cited in Gedion (2013:216-217) constitutional legitimacy has three distinct forms. These are sociological legitimacy, legal legitimacy and moral legitimacy. Legal legitimacy depends on the legality of a norm. A constitution or a constitutional amendment will therefore have legal legitimacy if its adoption conforms to the existing and relevant norms of positive law. According to Fallon (2005), the moral legitimacy of constitutions is dependent on the constitution being morally defensible and in conformity with the moral criteria that society adopts. For Barnett(2003), legal constitutional legitimacy is just a product of procedural assurances that commands are not unjust". The sociological legitimacy constitutions is understood in terms of society's acceptance of the constitution as appropriate and justified (Gedion,2013).

Similarly, Ghai and Galli (2016) states that, constitution-building is an important issue that matters the legitimacy of a constitution. This is so, of course, because of the nature and orientation of the document that the process produces. But the process is important in other respects, as well, which have an impact on how the constitution is actually rooted. That means, The design of the process, that is, the institutions for the making of decisions and the method of making decisions, has a bearing on a number of factors such as which interests are articulated and which are excluded, how the views of participants are aggregated, and the congruence of the text with social realities (Ghai & Galli, 2016). The process is also relevant to the degree of public participation and consequently the benefits and costs of such participation. It is now increasingly believed that participation is essential to the legitimacy of the constitution and the ability of the people to understand and mobilize its provisions. The process may also promote a sense of common belonging and destiny critical for national unity.

For Regassa(2010), constitution's legitimacy emanates ultimately from the sovereignty of the people (the makers). The legitimacy of a constitution is rooted in the moral, legal, and sociological foundations. A constitution's legitimacy comes from its appropriate framing, the authority it commands, the justification it carries, the legality it endows, and the consent it refers to.

In the same vein, it is the way the constitution is made (Process), as well as what it says(content or text), are important factors to determine whether the constitution is democratic or not or legitimate. Because one of the most striking innovations in the constitution-making practice of recent decades is that norms of democratic procedure, transparency, and accountability that are applied to daily political decision making are now also demanded for constitutional deliberations. Participatory constitution making has become one criterion of a legitimate process (Hart, 2003).

In a nutshell, we can understand that constitutional legitimacy refers the popular acceptance of a constitution as a supreme, binding and common covenant of the people of a nation. To these ends, a constitution should be negotiated rather than being imposed. In other words, negotiations among the different factions and the people should be conducted on the process or the way the constitution is designed; the content or the substance it contains; and the context-socio-economic, political and cultural settings. These are also the determinant factors for the legitimacy and effectiveness of a constitution.

### **Steps in Constitution Making**

Unlike old times, constitutions at these days will virtually always be a negotiated document, a pact among its diverse communities and regions. Hence, the objectives and the process in the making of new constitutions should recognize the negotiated nature of the constitution. The objectives refer the very good reasons or

goals of a country embark upon the making of a new constitution. Equally, a constitution is a critical product of the process, since it serves several other important goals, and may have certain other functions – whether intended or not. – using the word. If so, then it is important to have an understanding about the processes of constitution making in these days.

***i. The Drafting Stage***

It is a stage to prepare the draft document. According to Regassa (2010:11), the drafting stage is a technical issue. Hence, until recently it would have been obvious that constitution drafting could not directly include wide segments of a nation's people. Contrary to this view, Tunshet(1984) argues that, although the stage as technical issue, must be representative of all the concerned stakeholders. That means he drafting body must be accommodative of all the concerns and be able to capture the visions of all the stakeholders.

***ii. The Deliberation Stage***

This is a stage in which the drafted document is open for discussions and to gather comments or ideas. According to Regassa, (2010:11), a genuine deliberation is characterized by for being an all-inclusive, participatory, free expression of ideas, and a two-way traffic. And the popular discussion can be done in the form of seminars, workshops, symposia, etc This clearly indicates that public deliberations should not be fictional, rather awareness should be created for the public in different mechanisms, the public should be free to give their comments on the drafts. Finally, public comments should be technically organized and incorporated in the draft.

***iii. The Adoption***

Is a stage that the initial proposal is revised and developed by incorporating comments and ideas gained through the deliberation process.

***iv. The Ratification***

Just like the adoption stage, this stage requires the dissemination of the proposal to the wider people for a better understanding. Ratification should be performed through a national referendum. The ratification referendum may result in the adoption or defeat of the proposed constitution. Often ratification defeats are described as failures, though the term may be inapt. A defeat may signal that the proposed constitution was not in fact well-suited to the nation as it then was, even though it might be well-designed for a nation that might have been transformed were the constitution to have been adopted (Tunshet, 1984:1999-2000).

## **2. The Making of Constitution of the 1995 and Its Flaws**

### **a) The Interim Arrangement**

After the demise of the military government, ethno-nationalist movements have assumed State power on 28 May 1991. Following this, the EPRDF convened the London national Conference in July 1991 which adopted the Transitional Period Charter. The EPRDF invited different political movements to take part in the July Conference and adopted the Charter.<sup>1</sup> Likewise, it is important to examine the main purpose and the nature

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<sup>1</sup> The EPRDF was the sole sponsor of the conference and agenda setter. Hence, the main purpose of the conference was securing the approval of its agenda, adoption of the charter and for the establishment of the transitional government. See Merera Gudina (). Ethiopia: A transition without Democracy.

of the conference, i.e., whether it was or not arranged for a genuine peaceful transition to democracy; and whether it was all-inclusive or not all. Regarding these, Alebachew (2011) has found that the Conference was attended by 27 (31 in some literatures) political and ethnic organizations which both contributed to the demise of Derg and others which were created for the sake of the Conference. Apart from OLF and EPRDF ethnic based member organization, organizations which claim to represent nationality interest take the lion share of the participant's number in the Conference. While some of them like, Afar Liberation Front, Ogaden Liberation Front, the Gambella People's Liberation Front, the Islamic Front For The Liberation of Oromia, the Oromo Abo Liberation Movement, the Sidama Liberation Front, the Western Somali Liberation Front, and the United Oromo People's Liberation Front were liberation fronts' which had a prior existence, others were those which didn't possess a pre-existed history and membership.

Due to EPRDF's announcement that any social or nationality groups as long as they managed to organize themselves and publicize their programs could join the Conference, various groups without a serious articulation of their program, political experience and garnering considerable public support from their respective nationalities appear overnight calming to represent nationalities interest in the conference(Ibid). The conference was not inclusive of some major ethnic groups. For example, Harbeson (1998) cited in the same source, has noted that the prominent Amharas' attended the Conference only on their individual capacity, though the major party formed to represent Amhara interest came in to being only after the Conference. Thus, the Amhara communities lacked an organized voice at this crucial Conference to press their prevalent oppositions to the EPRDF's vision of the post-imperial Ethiopia state. Furthermore, many of strong multi- ethnic factions were not part of the Conference. The Coalition of Ethiopian Democratic force (COEDF), comprising EPRP, MEISON, EDU and Tigray people's democratic movement (TPDM), which formed in April 1991, did not participated the July Conference (Alebachew, 2011:49-50).

From these findings, it is plausible to conclude that the conference was arranged by EPRDF with the dominance of TPLF; the party was also the agenda setter; the nomination of the conference attendants were done up on the will of the party; multi-ethnic political parties were purposively excluded from the conference; and some ethnic groups such as the Amharas were not represented in the conference. Despite these issues, the Conference was ended with the establishment of a Transitional Council of Representatives (COR)<sup>2</sup> with 87 members. As the conference agenda and the participants were decided by the EPRDF/TPLF, decisions regarding the allocation of seats for the 87 COR were manipulated in favor of the EPRDF by using the exclusive control of state power it has already assumed. The allocation was made on the basis of who contributed much in the fight against the Derg (Degefa, 2017). The Charter was adopted for the establishment of peace and stability through the dismantling of the repressive institutions of the preceding regime, and the urge to transit to a democratic order. (Regassa, 2010).

### ***b) The Drafting Stage***

The overall process of the making of the 1995 Constitution was carried out according to the provisions of the Transitional Charter. Particularly, the whole constitutional making process was guided by article ten and eleven of the Charter. These provisions states that;

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<sup>2</sup> Of the 87 members EPRDF took 32 seats and distribute the remaining seats for dozens political groups. From the remaining seats, OLF took 12 seats.

*“The Council of Representatives (COR) shall constitute the Constitutional Commission to draw up a draft constitution. The Constitutional Commission shall submit to the COR the draft constitution. The Council of Representatives shall constitute the Constitutional commission to draw up a draft constitution.” (Art.10)*

*“Upon adoption of the draft constitution by the Council of Representatives the constitution shall be presented to the people for discussion”(Art. 11)*

Based on these provisions, the Constitutional Draft Commission (CDC) was legally established via Proclamation no. 24/1992, up on its adoption by the COR. Accordingly, a CDC with 29 members was established by the COR. Members of the Commission were elected by the COR ‘*from among the various sections of the population*’ and the members of the COR- a license for domination by the EPRDF or its front organizations. The commission was organized into three panels as, a) Human Rights, b) Government Structure and Division of Powers, and c) Special Issues (including official languages and citizenship) (Vestal, 1996).

As it is discussed in the theoretical part, the drafting stage should embrace conventional ideas of the concept of participatory constitution drafting through broad representation in deliberative bodies, as well as some more unconventional claims about the need for popular involvement. This is because of the claim that more representative and open drafting processes are more conducive to peace. The case has been several real-world referents in countries such as Uganda in 1995, and in Kenya between 1997 and 2005, where a broadly representative commission held public hearings in the country’s districts before completing the initial text, and delivered its recommendations to a large national conference (Widner, 2005).

Contrary to the above notion, the case in our country has been to the opposite side. For example Regassa(2010), has explained that *“the CDC was given the mission to prepare the draft in conformity with the spirit of art 4 of the Charter”*. In other words, the constitution had been an instrument of advancing the aspirations of those who negotiated the Charter. To that extent, the draft constitution and the final constitution were an extension, or a natural historical outgrowth of the Charter. that, drafting the text, conducting seminars, symposia, and educational discussions, disseminating the draft Constitution to the public, gathering comments (especially from the regions and districts), explaining the draft to the public in the course of the discussions for ‘*incorporating comments*’, preparing the final draft, and submitting periodic reports to the COR were the main tasks of the CDC given by the proclamation. In similar fashion, Gudina thoroughly explained as it was the TPLF leaders in their lust for power and hegemony have transplanted the basic tenets of the political program of their own organization to the Charter and the draft constitution, and later to the National Constitution and much of the government policies thereof (Gudina,nd).

### ***c) The deliberation Stage***

After the draft constitution was prepared and presented to ‘foreign experts to share other countries experiences’, the CDC has tried to made the people part of the process by employing two mechanisms through which it can gather their views. The first were by arranging different Conferences for various groups like the elders representing various nationalities, religious leaders and organization, with women groups, journalists, with political and civic organizations, with professional associations, and scholars and with regional Committees conducting constitution related discussions.

On the other hand, the Commission prepares a paper describing the various constitutional choices to be discussed by neighborhood inhabitants in 22,320 kebele’s throughout Ethiopia (Alebachew, 2010). however,

the booklet prepared by the commission was criticized for being an expression of the ERPDF's ethnic policy and strong civics lesson in the primacy of the ethnic groups in the proposed constitution. Similar to this, Vestal has found that document was ERPDF's political ideology. Six months later, the CDC published the booklet "About Basic Concepts of Constitutions: Presented for Public Discussion" (in Amharic) in November 1993 as part of a nationwide civic education program. The TGE explained that the booklet included all ideas that might be contained in a constitution" without advocating "any particular style of government or political ideology. The work was permeated, however, with the ERPDF's ethnic ethic. Sections of chapters dealing with "basic concepts" of democracy and constitutionalism and "tribal and ethnic human rights" delivered a strong civic lesson in the primacy of ethnic groups in the proposed constitution (Vestal, 1996). In theory, the concept paper was to serve as the basis of discussion of what the people wanted in the constitution. Recommendations were solicited from (party-approved?) "community elders, religious leaders, representatives of women's groups and various sectors of the society." More widely publicized were two-day meetings held in January 1994 to discuss constitutional issues at regional, district, and *kebele* levels(Ibid).

More widely publicized were two-day meetings held in January 1994 to discuss constitutional issues at regional, district, and *kebele* levels. In arranging these gatherings, government offices were closed for the occasion, and workers were cajoled to appear at the *kebeles*. Citizen participation was encouraged by threats to the recalcitrant of cessation of sales of sugar, edible oils, soap, and salt at *kebele* shops- an especially effective inducement in the countryside. Similar subtle persuasions discouraged the hesitant in urban areas.

Despite the pressure of hype, firsthand observers estimate no more than "30 percent" of the citizenry participated throughout the nation. The government, on the other hand, reported "high turnouts in all the *kebeles*." "Discussions" at these gatherings were dominated by party liners of the ERPDF. Party pulpiteers preached to docile *kebele* choirs, while the best soloists did not show up for rehearsals or were not allowed to sing. On the basis of the predictable recommendations of participants in these meetings, the CDC was to draft the constitution (Vestal 1996).

Although Vestal has found the discussions with the public were two-day meetings, the minutes of the constituent assembly indicates that discussions held with the people was one day-meeting. Even the number of people who have attended the meeting were low in some districts and *kebeles*. The case was presented at the discussions of the constituent assembly by Mr. Daniel Belayneh (from region14) and Major Admassie Zeleke (from region 14).

"... in a district where 17,000 peoples resides only 119 peoples participated, in other district where 5,000 peoples resides only 32 of them attended the Conference." (**Major Admassie Zeleke**)<sup>3</sup>

As the minute records show that, the 'deliberations' process was conducted with the dominance and control of the ERPDF/TPLF party. The deliberation was not enough as it was performed with a very tight time and less commitment to undertake a considerable awareness raising campaigns, without a meaningful public discussion or debates to garner an articulated public views.

#### **d) The Adoption Stage**

As per of article 11 paragraph two of the Charter, the final draft (which means after 'incorporating public comments')was to be presented to the Constituent Assembly.

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<sup>3</sup> The Minutes of the Constituent Assembly, Vol. 1, October 27, 1995 at 3.(available at House of Peoples Representative Library).

*“The final draft shall be presented for adoption in the constituent assembly to be elected pursuant to the final draft of the Constitution.” (Article 11)*

***The process of the election: electoral systems adopted and the composition of the CA members***

On 5 June 1994, the first national election was held to elect the members of the Constituent Assembly, so as to “modify” and ratify the draft constitution. Out of the total eligible voters numbering about 23 million, nearly 15 million (64.5 per cent) registered to vote (Alebachew). Contrary to this number, Kassahun Birhanu has found that “the computation was made without considering millions of disenfranchised members of the former defense and security forces and the defunct Workers Party Therefore, the percentage of those who voted to the number of all eligible is only 57.3 percent. This is also an indicative of the low level of participation in the elections” (Berhanu, 1995).

As Vestal explained the case, having learned in 1992 how to run elections with effective opposition shut out and with a focus on the mechanics of voting, for the edification of astigmatic election observers, the TGE directed its perfected version of national elections. About 508 party candidates and 848 independent candidates were competed in the elections. “Independents” provided verisimilitude for the occasion, but many of such candidates were thought to be EPRDF stand-ins. The EPRDF and its surrogate parties won 484 out of 547 contested seats (Vestal, 1996). In the similar vein, Alebachew T(2011) has pointed out that the opposition parties which left the TGE earlier in 1992 and others which later joined their path like the Southern Coalition, Ethiopian National Democratic Party (ENDP), and other smaller parties left the people without choice. Henceforth, the EPRDF dominated election the overall election.

It means that both Vestal’s and Teguadda’s findings indicate that the election was held through an exclusion of some dominant parties and with EPRDF’s dominance. Despite the problems mentioned in the above, the elected CA immediately it has started the discussion on the final draft constitution. The discussions ended with the adoption of the final draft submitted by the Commission to the Constituent Assembly apparently after incorporating the comments in December 1994.

***e) The Ratification Stage***

The discussions on the draft constitution was conducted almost for two months and ended with the adoption of the final draft. With it ended the formal process of constitution-making in Ethiopia. Finally, the ratification was made by the Constituent Assembly without public involvement through referendum.

To sum up, the whole constitution-making in the post-1991 Ethiopia was dominated and manipulated by the EPRDF (particularly with the dominance of TPLF). Ultimately, the document was ratified without the consent of the people in general, and the negotiations and bargaining of the concerned political groups in particular. And this has been one of the grand sources of legitimacy deficit.

**3. The Contents of the Text**

As we have noted in the above section, the current Ethiopia is based on a federal constitution that come into existence in 1995. The whole processes of constitutional making in Ethiopia were flawed. Hence, the constitution lacks an original legitimacy. Although the content of the constitution is not often debated, some of its provisions are raised as politically divisive and to that extent as rendering the legitimacy of the constitution contested (Tesfaye, 2010). Accordingly, this section tries to raise some of the most important and questionable articles of the current constitution.

### I. “Sovereignty of the nations, nationalities and Peoples”

“All sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia” (Art. 8 (1)). Concerning this article, two major problems are often raised by politicians and academicians. The first problem stems from the ethnic terminologies which are not even clear in the Constitution. Although the Federal Constitution speaks about nations, nationalities, and peoples, but whom to label as nation and whom as nationality is not officially declared, even though these nuances may present a serious problem at the very local level (Zahorik, 2011). The second debate is about the sovereignty of the state. As it is clearly stated in the constitution, ‘sovereignty’ is entirely given to the nations, nationalities and peoples. Therefore, sovereignty is not given for the polity/ state.

### II. The “Rights of Nations, Nationalities, and Peoples”

“Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession” (Art. 39 (1)).

Against this constitutional provision, many scholars and politicians claim that, the recognition of the right of ‘secession’ would increase the risk of state fragility or disintegration. For instance Hailu M (1996), “the tribal groups in Ethiopia, armed with secession, will scuttle the central government just as the Nigerian tribal regions rendered the federal government an irrelevant debating society, even without the benefit of the right to secede.”<sup>4</sup> Furthermore, he asserts that, if the principal reason for the insertion of secession is to deter ethnic oppression and discrimination, those dangers cannot be avoided through secession, rather recognizing secession increases problems for societies, particularly for those Ethiopian societies without a national cohesion and ending injustice and discriminations.

### III. “Ownership of land”

“The right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested in the State and in the peoples of Ethiopia. Land is a common property of the Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or to other means of exchange” (Art. 40 (3)).

The ownership of land one of the most contested provision in the current Ethiopian constitution. According to this provision, land and natural resources are owned by the state or they are common property of the ‘nations, nationalities and peoples.’ As it is discussed in the preceding part, the terminologies ‘nations, nationalities and peoples’, are not clearly defined. Furthermore, according to this article, individuals are declared perpetual tenants of the state (Abbink, 1997 cited in Girmay, 2015).

### IV. The unusual powers of the House of Federation

“The House has the power to interpret the Constitution. It shall organize the Council of Constitutional Inquiry” (Art. 62(1 and2)).

“All constitutional disputes shall be decided by the House of the Federation. The House of the Federation shall, within thirty days of receipt, decide a constitutional dispute submitted to it by the Council of Constitutional Inquiry” (Art. 83 (1 and 2)).

“The Council of Constitutional Inquiry shall have powers to investigate constitutional disputes. Should the Council, upon consideration of the matter, find it necessary to interpret the Constitution, it shall submit its recommendations thereon to the House of the Federation” (Art. 84 (1)).

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<sup>4</sup> See Hailu Minassie (1996).

All these constitutional provisions signify that unusual powers are given to the House of Federation. In addition, the federation is given the power to interpret the constitution and to solve constitutional disputes. According to these provisions, the Council of Constitutional Inquiry is will be organized by the federation and it shall submit its findings to the federation. This implies that the 'constitutional court' has no a final say on constitutional disputes and constitutional interpretation. In other words, it is the only the federation that can serve as a constitutional court.

In a similar vein, the constitution gives other unusual powers to the federation. For instance, under article 39(1), the Federation is given the power to decide on secession. Article 62(9) also gives the power to order the federal government intervention in the States, without the consent of states that forms the federation.

#### **V. Absence of clear enforcement mechanisms and Derogation of non-derogable human and democratic rights provisions**

The constitution contains complex list of rights that looks impressive but lack clear mechanisms on what exactly the rights are and how the federal or regional governments should implement them. The constitution highly emphasizes on a single factor that is ethnicity and invisible procedural parameters to protect ethnic groups, particularly minorities, both at the federal and regional politico-structural developments (Abbink, 1997 and Frank, 2009 cited in Girmay, 2015:167). Since the Ethiopian constitution is preoccupied with ethnic issues, it ignores or fails to promote and protect civil liberties of citizens. As a result, there is no clear mechanisms to promote or guarantee those rights stipulated the constitution. At the same time, it fails to put limitations up on the powers of government to ensure both human and democratic rights.

Furthermore, the constitution also makes the important civil rights as derogable rights, which is against Ethiopia's obligations in international treaties and conventions, such as the 1966 ICCPR. According to the 1966 ICCPR, there shall be "*No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.*"<sup>5</sup> However,, article 93 (4) (b) of the FDRE constitution states that, "*the Council of Ministers shall have the power to suspend such political and democratic rights contained in this Constitution to the extent necessary to avert the conditions that required the declaration of a state of emergency.*"<sup>6</sup>

This constitutional provision implies that, human and democratic rights are subject to suspension and violation, without considering international conventions or treaties. Hence, the constitution clearly declared those civil rights as nugatory by creating central and local governments whose powers are not limited and making some important rights subject derogation (Hailu, 1996)."<sup>7</sup>

#### **Conclusion**

Constitution making is a crucial moment and part and parcel of for the transition of nations from undemocratic regimes to democracy. The way constitutions are made is a determinant for transitions. The constitutional-making process is vital for the future of a polity and for the legitimacy of the constitution itself. Constitutional legitimacy is a matter of acceptance of a constitution as a covenant and to obey it. There are different factors that determine the legitimacy of a constitution a state. Mostly, the legitimacy of constitutions is determined by the process/procedural and substantive/content aspects.

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<sup>5</sup> See article 2 of the 1966 International Convention on Civil and Political Rights (ICCPR)

<sup>6</sup> See article 93 of the 1995 FDRE Constitution

<sup>7</sup> See Hailu Minassie (1996). Pp. 84

The purpose of this article was to identify and examine the sources of the legitimacy problems in the 1995 FDRE constitution and the quest for a legitimate constitution in the post-1991 Ethiopia. Accordingly, the following conclusions were drawn. The current constitution of Ethiopia is ratified in 1995. However, the constitution is being confronted with legitimacy problems. The sources of legitimacy problems stems from procedural and substantive aspects. Procedurally, the processes in the making of constitution were totally flawed. The processes were criticized due to lack of inclusion of all the relevant political actors in all of critical stages, lack of transparency in the appointment of the Drafting Commission, the lack of free and fair election to the CA members, the dominance of TPLF party, and the non-involvement of the public. As the process was flawed, the contents of the final document are subject to critics and contradictions with international norms and principles. in its contents or legal provisions. As a result, the FDRE constitution is now facing legal, sociological and moral legitimacy problems and created the need for a legitimate constitution in the post-1991 Ethiopia.

### Disclosure Statement

The Author has no any conflict of interest.

### Notes on Contributor

**Semahegn Asmare** is a lecturer with MA in Political Science. Semahegn's research interest includes Constitution, Hydropolitics and Party politics. Semahegn lectures at Debre Tabor University at the Department of Civic and Ethical Studies.

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