

# Constitutional Law I

## Teaching Material

### **Developed By:**

- 1) **Sileshi Zeyohannes (LL.B, LL.M)**
- 2) **Dagnachew Asrat (LL.B)**

**Sponsored by the Justice and Legal System Research Institute**

**2009**



## Table of Contents

<b>Introduction</b> .....	1
<b>CHAPTER ONE: Basic Conceptual Framework</b>	
1.1. State as a Political and Juridical Concept.....	2
1.1.1 State as a Political Concept.....	2
1.1.2 Political Culture and Constitution.....	6
1.1.3 Configuration of Political Power.....	7
1.2 State as a Juristic Person.....	9
1.2.1 Sovereignty.....	11
1.2.3 Sovereignty in the Changing World .....	15
1.2.3.1 Forms of Sovereignty in International Law .....	17
1.2.3.2 Sovereignty as a Dynamic Concept.....	20
1.2.4 The Concept of Nationality.....	24
1.2.5 Democracy and Constitutionalism.....	26
1.2.5.1 Democratic Theory.....	26
1.2.5.2 Constitutionalism.....	29
1.2.5.3 The Concept of “Constitution”.....	31
1.2.5.4 Constitutional Democracy.....	36
1.2.6 Rule of Law.....	38
1.2.7 Sustainable Development, Good Governance and Constitutional Order...43	
1.2.7.1 Introduction.....	43
1.2.7.2 Sustainable Development.....	44
1.2.7.3 Constitutional Orders for Sustainable Development.....	45
1.2.7.4 Good Governance as an Element of Sustainable Development....	47

## **CHAPTER TWO: Creating Paradigms of State**

2.1 Development of State in the Paradigm of Western Civilization.....	49
2.1.1 The Rise of State without Nationhood.....	49
2.1.1.1 The Greek City-State.....	49
2.1.1.2. THE Roman City-State and Empire-State.....	51
2.1.2. Medieval State.....	53
2.1.3 The Renaissance State and the Effect of Industrial Revolution on Nation- State Formation.....	55
2.1.3.1 Development in England.....	56
2.1.3.2 Developments in America and France .....	59
2.1.3.3 Nationalism and Liberalism as Propelling Forces.....	61
2.1.3.4 The Second Half of the 19 <sup>th</sup> Century.....	64
2.1.3.5 The First World War.....	65
2.1.3.6 The Backlashes.....	67
2.1.3.7 World War II and its consequences.....	70
2.2 Developments in Ethiopia.....	73
2.2.1 Attempts in Developing the Ethiopian Nation-State.....	73
2.2.2.1 The 1931 Constitution: the Japanese Paradigm.....	79
2.2.2.2 The 1955 Revised Constitution: the Westminster Paradigm and the Aborted Reform thereof.....	81
2.2.2.3 The 1974 Revolution and the 1987 Constitution: the Soviet Paradigm..	84
2.2.2.4 The Transitional Charter: A Prelude to Federalism.....	92

## **CHAPTER THREE: Creating Paradigm of Constitution by Classification**

3.1. Making of a Constitution.....	101
3.2. What a Constitution should contain.....	115
3.3. Status of International Instruments under Ethiopian Constitutional Frame-work.....	116

## **CHAPTER FOUR: Making paradigm of Constitutions by Classifications**

4.1. Classification of a Constitution.....	119
4.1.1. By looking at the Nature of the Constitution itself: Traditional Approach... 119	
4.1.1.1. Written /unwritten, codified/uncodified.....	119
4.1.1.2. Rigid/flexible, Conditional/unconditional.....	121
4.1.2. By looking at the Nature of the State itself: Federal/Unitary classification... 122	
4.1.3. By looking at the nature of the Government itself: presidential/Parliamentary and Republican/Monarchical.....	124
4.1.3. 1. Presidential/Parliamentary.....	124
4.1.3.2. Republican/Monarchical.....	125
4.1.4. By looking at the Legislature.....	126
4.1.4.1. Unicameral/Bicameral/Tricameral/Tetracameral.....	126
4.1.4.2. The Upper House.....	139
4.1.4.3. Lower House.....	142
4.1.5. By looking at the nature of the Executive.....	143
4.1.5.1. Monosepalous Executive.....	144
4.1.5.2. Bicephalous Executive.....	145
4.1.5.3. Acephalous Executive (Dispersed Leadership).....	146
4.1.6. By looking at the Nature of the Judiciary: Prerogative/rule of law system.....	147
4.2. Reflections on the Ethiopian Constitution.....	147

## **CHAPTER FIVE: Forms of Government and Electoral systems**

5.1. The presidential system.....	153
5.1.1. Features.....	154
5.1.2. Merits and Demerits.....	156
5.2. Parliamentary System.....	160
5.2.1. Features.....	161
5.2.2. Merits and Demerits.....	164
5.3. Electoral systems.....	166
5.3.1. Meaning and features of election.....	167

5.3.2. Types and Features of Electoral systems.....	169
5.3.3. Majoritarian Representation systems.....	169
5.3.4 Proportional Representation system.....	171
5.4. Reflection on the Ethiopian Legal Regime.....	172
<b>CHAPTER SIX: Making the Constitution Adjustable</b>	
6.1. Interpretation of a Constitution.....	175
6.1.1. Methods of Constitutional Interpretation.....	175
6.2. Amendment of a Constitution.....	180
6.2.1. Amendment procedures.....	180
6.2.2. Form of changes to the text.....	182
<b>List of References.....</b>	<b>184</b>

## **Introduction**

The text is based on a *paradigm approach (modeling)*, for the study of this sort cannot be done in any one single approach. Its stores try modeling the state as a political-legal entity.

Then, it attempts to create a typology of state in the eyes of the law, followed by the various attributes of states' paradigms. It typifies it from a historical perspective. Formal, basic features of constitution are shown in comparative perspective.

Although the text is neither an original nor a compilation, we believe it provides a palatable platform for further works. In this regard, we, the developers, welcome suggestions.

We wish all a cheerful academic year and extend our heartfelt thanks to all those who take the venture as their own.

# Chapter One

## Basic Conceptual Framework

### 1.1 State as a Political and Juridical Concept

#### 1.1.1 State as a Political Concept

The sociology of law, as advocated by Duguit, the coherence of all associations, including that of the state, lies not in some mystic personality but in social solidarity, whose primary driving force may be attributed to collective security.

Society is the product of man's instinctive desire for association, which in turn is expressed in terms of an aggregation or assemblage of people having common interests and who unite together by the *consciousness* of those common purposes, be they religious, economic or political. When man finds himself in such a situation, then as aptly said by Aristotle, man becomes *a social animal*. It is said that social relations are threads of life and social institutions are the looms on which those threads are woven to make the social garment. The entire scheme of life is an interwoven state of affairs for the attainment of the various purposes of life, among which one is political life which itself necessitates the establishment of political institutions through which political actions are undertaken.

When such aggregates of people start living a settled life in a more or less definite territory and begin to realize their common, social purposes of life, man in such processes of activities ends-up in the creation of a state. Gabriel Almond's definition of the concept of state seems to be fitting here. He qualifies it as:-

*“..... that system of interaction to be found in all society which perform the function of integration and adoption (both internally and externally) by the means of the employment, or threat of employment of legitimate physical compulsion.”<sup>1</sup>*

The central notion in such human grouping or state is the existence of power relationship between and among individuals and institutions. It is this very relationship that is the



*raison d'être* of all political institutions. In this respect, institution should be taken as “*an idea of an undertaking<sup>2</sup> which is realized and which persists in a social environment*”. It is its endurance and permanence in a social matrix that makes an institution distinct from other social factors, for all social facts are not institutions. Institutions may take the form of either “*institutions personae*”;<sup>3</sup> i.e. groups of human beings and establishments; and “*institution of things and concepts*”. Hence, *concepts, principles, doctrines* become institutionalized; and, as such, are referred herein and hereinafter as “institutions”. Law, consisting all these elements, reflecting a legal system and attached to state, falls in the category of institutions. Law in the widest sense of the term may therefore be identified as “[t]he sum of the conditions of social life..... as secured by the power of the state through the means of compulsion.”<sup>4</sup>

Law may be a direct reflection of social, economic and political relationships of a society existing at a definite time and place. It may serve as an instrument of change or may be regarded as an agency of formal control. It may, more often than not, have any one of these or some or all of these. The point is that law is one among many institutions of social life. Constitution, as a foundation of political order, forms a separate department of law – a law that is supreme over other laws of the land in question.

For our purpose, one may start from the proposition that constitution is a mechanism by, or a channel through which political power is converted into an institution of the state, as a consequence of which power is structured.<sup>5</sup> Because of the nexus between and among state, power and law, a constitution does not only govern the relationship between the governed and the government (government understood as the agency or machinery of the state), but also lays down the basis and justification of state and government, as juridical concept and structure. Seen from this vantage point, a constitution is none other than the *institutionalization and legitimization of state power*, in accordance with which authority is exercised and the limitations of which is prescribed therein. Here again, when a constitution is seen from the latter point of view it is a means of establishing *controlled government*.

The study of the nature and functions of state is therefore shared among a number of disciplines, fields of studies. Political science, though a discipline in itself, yet, is closely

allied to law – public/private International/Domestic laws and International Relation; for all deal with theories, management of state power. It also partakes some aspects of anthropology and sociology for it is concerned with a particular type of human association; past and present, respectively. Law is also related to the study of Economics, for the latter is concerned with human material interest – interest of members of the society at large or those members at macro-, micro- and meso-levels. It has strong linkage with Ethics, History and such aspects of Psychology, particularly Social Psychology, Geography, which may in one way or another deal with expressions of Statehood. Political Science essentially deals with the development of the state; thus it deals with its origin, with its nature and organization, its purpose and functions and with theories of politics and possible patterns it may assume.

Constitutional Law can be said to be at a border line between Political Science and Law. Quite often, Law in general can be, among other things, an expression of policy perspective or may itself reflect political manifesto. Some policies may remain political for definite or indefinite time, yet a good number and aspects of policies are quite often articulated and brought down to earth by being reduced into legal instruments. A constitution is therefore, an interface of two disciplines; i.e. Political Science and the law of Constitution.

Students of Law of Constitution are to some degree concerned with all or some of these factors, which are essential factors of statehood and subjects of concern of Political Science.

The study of Political Science would be rendered naught if comparison is not made; so would it be the study of Constitutional Law. If comparative approach is found imperative, it would then be natural and logical to identify and sort out our own method of study. One can have no choice, as any inquiry into any social, but to use the historical, social-structural and/or functional paradigm approach (es).

Comparative Constitution, as a specialized field of study, is essentially the product of this/these approach (es). Thus, any courses of Law of Constitution cannot avoid making use of this approach.

The relative soundness of inferences and conclusion may only be tested by creating paradigms and drawing co-relations. Using these, one may arrive/formulate the relative validity of the hypothesis forwarded in the form of *legal proposition*.

Such proposition would look like, for instance:

- a. Framing a palatable definition of a particular system;
- b. Identifying the most important institution(s) in such a system; and
- c. Classifying and explaining the similarities and differences that characterize each set of system.

In such a way, one can arrive at a palatable paradigm to a given society under consideration.<sup>5</sup> One basic proposition that needs to be made in this respect relates to social behavior, particularly *political behavior*.

By such behavior we mean the array of social, economic, cultural, psychological and historical conditions within which a government operates, which pertain to the interests, beliefs, aspirations and goals of the communities' involved. In as much as one can talk of social behavior, one can, presumably, likewise conceive the existence of *institutional behavior*. Thus, a “*governmental action*”,<sup>7</sup> might be reflective of *institutional behaviors*. By “*governmental action*” we mean the type of decisions, the mechanism by which they are met and are carried out in specific political, state institutions and structures. In this respect, one may consider parties, the legislature, the executive, the civil service, the judiciary, and the like.

*Institutional behavior* becomes politically relevant only when it is addressed to governmental action – demanding it or trying to impede it.<sup>57\*</sup> While virtually every kind of behavior in a society may at any given time become politically relevant, only those, that are always politically relevant are designated “*political culture*” of the society in question.<sup>8</sup>

*Political Power* in this respect is therefore the capacity to influence, control or compel the political behavior of the other; i.e. government vs. people.

### 1.1.2 Political Culture and Constitution

The inner driving force of an existing *political culture* might have its roots in history. Anyway, the desire and the actual set-up of a state presuppose an acceptance of some basic rules and procedures on the part of any society, which serve it as the common denominator of its constituting elements. This is what we commonly and broadly designate as a constitution - i.e. a law that *constitutes* a polity and society.

Here, a constitution is not taken to mean a document. It rather signifies here the embodiment and existence of agreement as to what constitutes power and who does what and how. Where the agreement relates to “*what*”, we say this is an agreement on substantive matters. When it relates to “*how*”, we qualify it as an agreement on procedural matters. More often than not a constitution embodies agreement on both; the *what* and the *how*. Using these as yard-sticks one can formulate three broad sets of *paradigms* of political culture.

- i. Where society has reached a very comprehensive, stable agreement on both of these questions, one can characterize it as a *consensual society* which means “*nationhood*” has been attained by that state.
- ii. Where the agreement is fragile, not wide-spread and of temporary nature, we may characterize the society either as *non-consensual* or one with *low-level of consensus*; again depending on the depth, width and strength of the two criteria of agreements. Such a society, though has a state, is not yet a nation it is at developmental stage.
- iii. Where conflict is sharp, prevailing or erupting often times, one may well be justified to designate these types of societies, as outright dissensus though there is some sort of a state, there is clearly no ground for nationhood.<sup>8</sup>

The degree of consensus prevailing in society, then, is the most important trait of a political culture, which may relate to multiple arrays of orientations. Specifically the orientations involve the following:

- a) The degree and the extent to which the individual and groups value the government as an instrument through which they can satisfy their interests and demands.
- b) The degree and the extent to which the individual and groups consider that one can play an active role in promoting or impending policies that are favorable or unfavorable to governmental actions.
- c) As a result of these two orientations, the degree and the extent to which individual and groups rely, accept and abide by governmental actions.<sup>10</sup>

The ideal model of a consensual society, then, is one in which the people value, accept and use the government according to widely accepted and internalized rules. On the contrary, the model non consensual society has a government which operates either under no rule or under rules that are not as such valued or accepted. The 3<sup>rd</sup> model is one in which the individual either does not want to use or is unable to make use of or impede governmental actions for solving his problems. Here, there is no consensus, and therefore the state relies upon outright force.

In all societies at all times, one of the most prevalent phenomena is conflict concerning things people want or value. Generally interest relates to the allocation of scarce resources, the distribution of power, the fulfillment of expectations and the maintenance of things which are highly valued.<sup>11</sup>

### **1.1.3 Configuration of Political Power**

All these categories of interest are manifested in five forms of instrumentalities of conflicts; five modes of acquisition of power. The primary category is *class*. Here society is divided into two sections; one playing a dominant role, while the other is dominated. Quite often this results from control of property; movable/immovable, tangible/intangible, including stocks, securities and services. Within a class and usually cutting across classes, there is another prevalent form of conflict; that is *group conflict*. Group consists of people who have common interest. Interest can be envisaged as relating to only material interest. In its broader sense it relates to purpose. Since material concern without goals (purpose) are hardly ever found organized; and conversely, goals without

common material concerns can hardly sustain a group as a group for long, interest should better be understood as a common set of material interests and common goals.<sup>12</sup>

What concerns students of Political Science, Sociology and Law is not to identify only the source of conflict, but primarily to study the manner in which it is resolved. Both concerns have to take note of the fact that interest in general, group actions, in particular, are then interwoven with *political culture*. Where interests have been socially acknowledged, as proper interests helpful to realize common goals in a manner compatible with the rest of values and procedures of a given society, then this becomes part of the *political culture*.<sup>13</sup>

Interests are articulated and realized by groups and/or associations. Hence, groups and associations are *dramatist persona* of politics; i.e. leaders of these groups are dramatists on the stage, not for applause, but in matters of political interest the goal is to influence others to compel the will of others.

Influence, reduced to its simplest form, is the ability to make somebody do what you want him to do or make somebody pay the price, which you ought to have paid.

If power, then, is influence that one has over others, then it is most important and phenomenal aspect of political science that stems from wealth, status, control of the means of coercion and support (mandate).

Status, wealth, the control of the instruments of coercion – the three most common ingredients of power – began to be undermined by the middle of the nineteenth century. The growth of population and the rise of new occupational groups spurred by Industrial Revolution began to weaken the control of the landowning aristocracy and the wealthy. The slogan of the French Revolution and the success of the American Experiment provided important ideological weapons to the new social groups. These groups demanded access to politics. In some countries they were excluded, but in other they were grudgingly admitted. Soon the mass of industrial workers began to press upon the stage. It was at this juncture (somewhere between 1870 and 1910), that political organization and massive political participation began to delineate the present-day source

of political power – support (mandate). Leadership shifted to those with the ability to command the support of large groups of people.<sup>14</sup>

The system of the transition from the old status groups to popular support took place gradually. It owes its power to *consensual political couture*, in which support has become fountain and main source of power.

The dominant institution through which the people give to and with-hold their support became to be known as *political party*. Political parties represent interest, aggregate, mobilize, provide compromise between or among competitors, covert platforms of interest into policies and finally recruit the political leaders, who, when they assume control of government offices translate these politics into governmental action.

Party is thus like a train, interests and demands, feed the engines which convert these into energy and drives to a pre-determined goal. The engine is government, through and by which political power is actualized.<sup>15</sup>

## **1.2 State as a Juristic Person**

Where a state is appreciated from historical point of view, we can spring from the postulate that it is a historical category a socio-economic construct. From this paradigm approach, a birds' eye view of the growth of state is presented in Chapter II in the form of a proposition.

From the point of Political Science, the concept of state comprises three fundamental elements

- (1) a community of people,
- (2) with a definite territory, and
- (3) a political power.

State, in Political Science, is a quality attached to a community of people(s) inhabiting a definite territory, under a political authority; i.e. a *body politic*. The term state is

sometimes interchangeably used with *nation*. The term nation puts more emphasis on the quality of the community of people than on the politicality of the entity; i.e. the state.

The territory nexus, on the other hand, makes state much more concrete, because it presupposes authority exercised by an entity – *government* – over that limited territory. Government again is interchangeably used with *state*. Government, conceptually, is a sub-set of a state. Functionally, it is the motor, the machinery or the nucleus, wherein and by which political power is actualized. It is the use of legitimate force within the boundaries of a state that characterizes government, and the power is of a monopoly quality.

Power, as monopoly possessed by a state, is actually entrusted to and realized by and through the various agencies of government. Essentially these agencies or department of government, which can be categorized into three departments, namely: the *Legislature* (law making), the *Executive* and the *Judiciary*. In some systems, one may find organs of control placed aside from or infused with the executive, as a 4<sup>th</sup> governmental department.

It is the existence and the exercise of this legitimate monopoly power that places state in characteristically differentiated position from any association(s). Association(s) may make statutes (by-laws) and exercise limited power, while government power is of coercive nature (force). This is the very essence of political power exercised in the context of political culture.

Thus state is not a mere association of people, nor is it solely a territorial corporate sole, for U.N. is one, while the A.U. or the E.U., .. is another. Thus, the use of force through and by its instruments of coercion is the basis of and the bridge that connects both Political Science and Constitutional Law.

With regards to issues of the nature of state and power, some writers, by attributing government as qualifying characteristics of state, try to typify state in the following manner:



*There are, therefore, four conditions which must be fulfilled for the existence of a state. There must first, be a people – an aggregate of individual who live together as a community, though they may belong to different ethnic, creed, cultures or be of different colors.*

*There must, second, be a territory on which the people are settled; although there is no strict rule that the frontiers of a state must be fully demarcated and defined; they may still be disputed. But it matters not whether the country is small or large, or may consist, as in the case of city-states, only the expanse of and by such cry.*

*Thirdly, there must be a government, which acts on behalf of the people and governs according to the law. A state calls for a community to be organized as a political unit – a distinguished polity from, say, a tribe. But, once a state is established as an entity, interruption of the effectiveness of its government temporarily, as in the cases such as a civil war or occupation, would not necessarily amount to the non-existence of the state.*

*Lastly, there must be a sovereign government. Sovereignty is supreme authority, which at the international plane means not legal authority over any other state, but rather legal authority which is not dependent on any other sovereignty; in the strict and narrowest sense of the term, it implies, therefore, independence all around, within and with out the borders of the country.*

### **1.2.1 Sovereignty**

The capacity to monopolies on the use of force (state power) over a given political community of within a given territory is known as sovereignty. Sovereign state is, therefore, defined by Blacks Law Dictionary, as a state whose citizens are in the habit of obedience to it and which is not itself subject to any other (or paramount) state in any aspect. These powers, seen from two perspectives – i.e. external and in internal –

constitute sovereignty. Sovereignty should, therefore, be appreciated as a cluster of power consisting of external and internal aspects; each aspect having multiple qualities and facets.

In respect of the external aspect of sovereignty, the basic principle was elaborated by the Charter of the UN in the following terms.

*All states enjoy sovereign equality. They have equal rights and duties and are equal members of the international community notwithstanding differences of an economic, social, political or other nature.<sup>25</sup> In particular, sovereign equality includes the following elements:-<sup>26</sup>*

- a. States are judicially equal;*
- b. Each state enjoys the rights inherent sovereignty in full;*
- c. Each state has the duty to respect the personality of other states;*
- d. The territorial integrity and political independence of the state are inviolable;*
- e. Each state has the right to freely to choose and develop its political, social, economic and cultural systems;*
- f. Each state has the duty to comply fully and in good fully with its international obligation and to live in peace with other states.*

State is an institution itself; and it is also a composite of institutions, which, in order to secure certain common purpose, unites under a single authority, the inhabitants of a clearly marked territorial area. The single authority pertains to sovereignty which can not be exercised until and unless it is related to the notion of jurisdiction, which may not, necessarily, be congruent with that of sovereignty. Although the relationship between them is close, state power to exercise jurisdiction rests in sovereignty; state jurisdiction, on the other hand, essentially concerns the extent of each state's power to regulate conduct or the consequences of events. State territory is the space which is normally under the exclusive authority of the state. Territory is, therefore, that defined portion of the globe which is subject to sovereignty of a state. A state without territory is not conceivable. State territory is primarily an object of International Law. It is as well an object of Domestic Law, particularly that of constitutional, which can vividly be seen in Article 2 of the 1995 FDRE Constitution: “[t]he territorial jurisdiction of Ethiopia shall

*comprise the territory of the members of the federation and its boundaries shall be as determined by international agreement.”*

### **Questions that matter**

Are issues of border the primary concern of the member states of the federations of Ethiopia?

The principle laid by International Law is that wherever a person or a thing is on or enters into that territory, the person or the thing is, *ipso facto*, subject to the jurisdictional authority of the state. Conversely, other state(s) may not exercise its (their) power within the boundaries of the home territory. International treaties may, however, restrict the jurisdictional sovereignty of a state in the exercise of its sovereignty. There should exist on one and the same territory only one, full sovereign state; i.e. the rule of the exclusiveness of a single sovereignty over the same territory.<sup>28</sup> The first and perhaps the true exception in this respect is the so-called *state-condominium*, where more than one state exercises sovereignty conjointly.

By consent, a territory may well be vested in and under the sovereign power of a state other than the home-state, as mandate trusteeship and the like do also fall in this bracket of exception.

Federalism may seem to present a conflicting picture. On the one hand, the federal state (U.S.A) is itself a state side-by-side with each and every member state, while, on the other hand, competence is shared between member states and the federal state – but this is strictly on domestic matters or affairs. On international level, member states of a federation are not particularly singularly subject of International Law. A few federal state constitutions had by their constitution, allowed member states to sign international treaties and participate in the works of international organizations. This was the case with a few Republics of the former U.S.S.R.; and on permission, the former F.R. of Germany. The cantons of Switzerland’s federation do have such powers, even now.

States may be linked together in various ways. This linkage may create one single international entity or, despite the linkage, the linked entities may still remain to be recognized as separate i.e. be considered as subjects of International Law. Typical points in this respect are unions/leagues and confederations. In all of them, the components maintain their international status of statehood. Thus, under International Law, *confederations* are separate entities.

In federation the incidence of linkage is intense (and pervasive) when compared to confederation. On the other hand, the organ of power created to manage a union or confederation has no authority on the individual citizen of constituent/member states. Among other things, this seems to be the most important distinguishing feature between *Federation* and *Confederation*; in the former, the federal state has, in some aspect, authority over the individual on top, along or besides the government of the member state and, as such, a federal state is endowed with a legal personality in the eyes of International Law; whereas the general typology presents a different picture in the case of *confederation*.

The fact that the laws made by member states can derogate the law made by the center is one other fact that generally characterizes *confederation*.

### **Questions that matter**

1. Is Palestine presently a state in terms of territoriality, community of people, sovereignty?
2. Consider also *Collapsing/Rogue States*? What does it mean (see concluding remarks of this Chapter).
3. Do you think one way of solving the vigorous claims of both parties over Jerusalem can be *state-condominium*?
4. What are the attributes of the European Union, which may prompt one to characterize it as *confederation*?

### 1.2.3 Sovereignty in the Changing World

The content and range of matters which are within the sovereignty of a state are determined by the functions attributed to state sovereignty in a specific period of time and by principles imposed by International Law.

The principle of sovereignty has long served as the backbone of Public International Law. Its prominent status was established with the Treaty of Augsburg (1555) and the peace of Westphalia (1648) which, in the wake of wars of religion, gave birth to the system of sovereign states. Often, it is referred to as the *Westphalia State System* and which no longer recognized the supreme authority of the Pope (Emperor) of Rome over the states.

Initially, in Europe, state sovereignty was often associated with the *absoluteness* of a state's political power, which, at the time was vested in a king, emperor or tsar, which were allocated with almost unlimited powers and freed from the observance of the law (*prince's legibus solutus*).

The French philosopher Jean Bodin (1530-1596) was the first to present a comprehensive concept of sovereignty. He rejected claims of superiority by the Pope and Emperor and advocated a general theory of the responsibility of exercising public power, under the title *republica*.<sup>30</sup> In his doctrine of sovereignty, written against the backdrop of civil wars, the sovereign ruler was still the highest absolute authority (*summa potesta*) within a given territory; one, who could decide and legislate, unrestrained by law and without appeal, on behalf of the state, community.

Grotius was one of the first international lawyers who linked the notion of sovereignty to certain principles of Natural Law. In his *De Jure Belli ac Pacis* (1625), he acknowledged the absolute powers of the king as a sovereign ruler, but argued that the king should be guided by principles of Natural Law in exercising them.<sup>31</sup> In his view, the state was built upon a universal human society which exists already in nature: *the state is an association of free men, joined together for the enjoyment of rights and for their common interest*. According to Grotius, the *law of nations* should, as far as it's appropriate, maintain and supplement the Law of Nature in matters of mutual interest of nations, either through

observance of customs common to many nations or through particular treaties and contracts. His concept of sovereignty was very much a *Eurocentric* one – a concept considered to be applicable to Christian States only, not covering the newly discovered territories.<sup>32</sup>

Emerich de Vattel elaborated Grotius' notion of sovereignty in his treatise – *Droit des Gens* (1758). He based it on *positive law*, as exemplified in treaties and state practices, rather than on *natural law*.<sup>33</sup> He emphasized the principles of sovereign equality, the independence of all sovereign nation states and on the consent of nations as the determining criterion for what is the rule of International Law. Thus, he introduced a new concept of International Law in which the sovereign state is the sole and only subject of the *law of nations* i.e. the individual being only its object,<sup>34</sup> even that, indirectly.

Various writers, in particular French philosophers, have elaborated on these ideas. They gave rise to a wide variety of theories, which inspired and were in turn influenced by the revolutions spreading over Europe in the 18<sup>th</sup> and 19<sup>th</sup> Centuries. Locke, in his *Two Treatises on Government* (1689), was the first writer to introduce the doctrine that state itself is the original sovereign, and that all supreme powers of the government are derived from the sovereignty of the state.

In contrast, Rousseau stated in his *Du Contrat Social* (1762) that the only legitimate sovereign are the people, while the state is the result of a revocable contract concluded between the people and those who exert power in the state. The basis of this ideology has had an important influence on modern state formation, both in *developed* and *developing* economies. It is also echoed in such popular slogans as *the state should serve the people and not the other way around* and *the state is for man, not man for the state*.

Marx and Engels also focused their political ideas on the nature of state and sovereignty. On the one hand they further developed the notion of the *independent state* on the idea of *sovereignty of the people*. As regards the latter, they stressed that one should first identify different classes of people; at a certain stage of its development, the state should exclusively identify itself with the interests of a certain class, i.e. those of the *proletariat*. They introduced the concept of *Proletariat State* as opposed to *Bourgeois State*. Thus,

the *proletariat* becomes the class representative of the nation. So, internally, sovereignty thus meant *proletarian supremacy*. Externally, it meant *independence from capitalism*. Consequently, in the *soviet* perspective, only socialist states could be truly sovereign. In order to maintain this status all socialist states could be truly sovereign. Moreover, in order to maintain this status, all socialist states should have a close alliance with the then USSR (even if, at times, this amounted to forcefully compelling a sister country to *limit its sovereignty*).

No matter whether we deal with the Western *Bourgeois State*, the *Socialist/Proletarian State* or with that of the *Third World or newly independent states*,<sup>34</sup> sovereignty of states has evolved as the grand rule of Public International Law and is the dominant feature of the organization of the international system. It is now commonly understood that the sovereignty of the state does not arise from any divine power, status strength, but from delegation of power by the people to the state. In modern political systems, state power is balanced by separation of powers, increasingly in the form of a constitutional state along the line of Montesquieu's doctrine. An interesting debate is currently underway about whether or not the right and duty to democracy is emerging under International Law.<sup>35</sup>

### **1.2.3.1 Forms of Sovereignty in International Law**

Sovereignty is a multifaceted concept. Schwarzenberger<sup>36</sup> discussed six main forms of sovereignty:

#### **a. Internal or Territorial Sovereignty**

At present, (apart from some international areas, such as the high seas, the deep sea-bed and perhaps Antarctica) our planet is legally divided into approximately 200 sovereign states. Within its own territory, each of these states is exclusively sovereign, in the sense that it has "*exclusive competence*" or "*domestic jurisdiction*" and the *monopoly of power* over its territory and nationals. It was observed that sovereignty, in regard to a portion of the globe, is the right to exercise therein the functions of state, to the exclusion of any other state i.e. territorial sovereignty involves the exclusive right to display the activities of state.<sup>37</sup>

## **b. External Sovereignty**

The state is externally sovereign, in the sense that it is not subjected (against its will) to another state or to any higher authority. International Law, however, imposes certain limits to both the internal and external aspects of sovereignty of states. The most important ones are formulated in the UN Charter and the 1970 Declaration on Principles of International Relations.<sup>38</sup> They include the obligation that states, in their international relations, shall refrain from threatening or using force, oblige to co-operate with one another, abide by the principles of equal rights and self-determination of peoples.

## **c. Sovereign Equality**

All states are juridically equal, in the sense that, formally they have identical rights at the international level. Both the League of Nations and the United Nations have been established as inter-governmental organizations based on the sovereignty of the member states. The main aims of these two organizations were, in fact, the protection of political independence of their members and, thus, maintain the *status quo*. In the U.N. Charter, this is enshrined as its very first principle,<sup>39</sup> despite the fact that the U.N. Security Council,<sup>40</sup> acting under Chapter VII, can impose binding decisions on member states even against their will.

## **d. Extraterritorial Sovereignty**

In the 19<sup>th</sup> Century, some Asian and African states were forced to sign *capitulation treaties* with European states, whereby European nationals and their property were made immune from local authority and jurisdiction. In this way, the European states could directly protect the lives and properties of their nationals abroad. Thus, European states deprived African states of accomplishing one of their international functions; which is that of protecting the life and the property of nationals of other states within their territories.



Whereas the days of this kind of *capitulation* are definitely over, some African states have tried in recent years to impose their home policies on foreigners and their properties. Reference can be made to Anti-Trust Laws and Export Administration Regulations. Through these laws, the U.S., for instance, seeks to extend its jurisdiction to foreign subsidiaries of U.S. companies. This has seldom caused friction with other (sovereign) states. An example is the so called *Russian pipeline affaire*, [the 2003 *French fries affaire*. After the invasion of Afghanistan by the former U.S.S.R. in December 1980, the U.S.A. sought to prevent subsidiaries of American companies in a number of European countries, including the Federal Republic of Germany, and the Netherlands took a different stand, which led to conflicts of jurisdiction.<sup>43</sup>

#### **e. Permanent Sovereignty over Natural Resources**

It is a well-established principle of International Law that every state can freely dispose of the natural wealth and resources within its territory a principle which is commonly known as *permanent sovereignty over natural resources*.<sup>44</sup> From this principle some important state rights arise, including the right to regulate entry and operations of foreign investors and the right of the state to pursue its own social-economic and environmental policies.<sup>45</sup> Yet, it is increasingly recognized by the principles of international law that these rights have duties as their corollaries. These entail, among wealth and resources, due care for the environment, and equitable use and management of trans-boundary resources.

In comparison with the 1919 Covenant of the League of Nations, the UN Charter gave rise to a dilution of some aspects of sovereignty. Reference can be made to:

- a) decision-making by a qualified majority in both the General Assembly and the Security Council (Arts. 18 and 27 of the Charter) as opposed to the *Unanimity Rule* of the League (cf. Art. 5 of the Covenant);
- b) the allocation of permanent seats and the right of veto to the five *Great Powers* in the Security Council;
- c) the *collective security system*, by which the UN Security Council, acting under Chapter VII, can impose binding decisions on member states, even against their will; and

- d) the duty of states to co-operate for the achievement of respect for human rights, social-economic development, etc. (cf. Chapter IX) notwithstanding the *domestic jurisdiction* clause as included in Article 2, Paragraph 7.<sup>46</sup>

To sum up, more attributes of states can be and is, more often than not, supplied with further designating attributes such as national flag, national anthem, national emblem, national currency and other national symbols. The whole purpose is designation of a state in the international community and signifying the creation of nation-statehood in the heart and minds of people. It is as well a mechanism of reaction enhancement and/or assertion of the feeling of nationalism, the significance of which the lowest denomination is the individual, be that physical or juridical.

### **Questions that matter**

1. Nation-state and country – do they mean one or different things? Why was it named League of Nations? Why not League of States or United States, Instead of United Nations?
2. The United States of America as a state and its member States – is there any difference? Why all this equivocation? Is it inescapable?
3. How do you understand *nation*, *nationalities* and *peoples of Ethiopia*? Particularly is the reference “*peoples*” a separate entity or is the reference made to all Ethiopians? (Read the Preamble and Article 39(5) of F.D.R.E. Constitution.)

### **1.2.3.2 Sovereignty as a Dynamic Concept**

The changes in the theory and practice of sovereignty, as they evolved in the past, are a reflection of the changing functions attributed to sovereignty and the state in a given period. Historically, for example, attempts to impose order on Western Europe led to assertive interpretations of sovereignty. They altered during periods of peace, allowing more democratic versions of state sovereignty to take root. In the same vein, the United Nations was established in 1945 as an organization based on sovereign equality of all states, albeit some states were ‘more equal’ than others.

However, soon efforts were made to promote a gradual evolution of the United Nations from an organization based on sovereignty of states towards an organization representing the common interests of all states and peoples,<sup>25</sup> as exemplified in among other things the human rights codification movement. However, as a result of Cold War rivalry and the decolonization process, sovereignty maintained its predominant place in international relations.

For the socialist countries sovereignty served in their relations with the non-socialist world as the underlying principle of sovereign equality and non-interference.<sup>26</sup> In socialist international relations it provided the legitimization for close alliance with and support to USSR, and for maintaining, if necessary by armed force (Hungary, Czechoslovakia, Afghanistan), a cordon sanitaria of communist regimes on the USSR border.<sup>27</sup> For colonial peoples and newly independent states it served as the legitimization of their struggle against metropolitan states and as a legal shield behind which they could develop their societies as they wished. Glory calls this particular function of sovereignty 'son role protector' and 'un instrument de defense'.<sup>28</sup> Western States also cherish their sovereignty and prove to be anxious to maintain essential parts of it in integration processes such as the European Union (E.U.). Especially illustrative is the search for a balance of power between the EU and its member states on the basis of the 'principle of subsidiary', according to which the factions are complementary to those of lower levels.

At normative and practical levels states have accepted many restrictions. By ratifying or acceding to the Non-proliferation Treaty or the chemical weapons convention, states have accepted certain limitations to their freedom of armament and obligations relating to arms control and disarmament. The human rights covenants and related human rights instruments, as well as customary international law, prescribe for states a certain standard of treatment of their citizens. Compliance with such human rights standards is no longer a matter within the domestic jurisdiction of a state but widely recognized as an obligation *erga omnes*. In the field of international environmental regulation, law-making has progressively developed, as may be illustrated by the number of treaties concluded in recent decades.<sup>29</sup> A central principle, embodied in the well-known principle 21 of the Stockholm Declaration, is the sovereign right of states to exploit their own environmental policies. However, it is qualified by the obligation not to cause any extraterritorial

environmental harm (*sic utere tuo ut alienum non leadas*). In nearly identical words this is repeated in principle 2 of 1992 Rio Declaration. This and other principles reveal that sovereignty does not only give rise to state rights but to state obligations and responsibilities as well.

Conclusions and final observations made since the mid-1970s demonstrate the factual erosion of the traditional concepts of state sovereignty. Thus, equated as it is with non-interference, domestic jurisdiction and discretion in the legal sphere has become increasingly real, as it is interdependent on many different levels; thus, effectively eroding – in practice and perhaps even legally – the sovereignty of states.

Dependence matches in many respects independence, its counterpart. Economic and energy crises, pollution, accidents with nuclear energy plants, desertification, deforestation, trans-boundary acid rain and damage to the ozone layer, all provide compelling evidence of the fact that states are no longer masters of their own destiny. As a result of the completion of the decolonization process, the revolutionary developments in Eastern Europe and the détente in East-west relations, the political climate has become more conducive to recognizing and responding to such facts. It also provides a room for creative thinking on the relevance of the principle of self-determination in a non-colonial context.<sup>30</sup>

Interdependence requires new rules of international law, regulating inter-state relations in terms of efforts to co-operate towards the solution of global problems. This introduces the notion of ‘relative sovereignty’ discarding ‘absolute sovereignty’,<sup>31</sup> while others refer to ‘fundamental’ or even ‘planetary sovereignty’ or ‘global sovereignty’.<sup>32</sup>

Is sovereignty losing relevance in practice and is centralized authority going to be vested in transnational institutions? Such a conclusion seems to be too farfetched. On the contrary, there is every reason, in a world in turmoil and with a poor level of international organization, to emphasize the continued value of the principle of sovereignty of states for the organization of national political and economic life and as the framework for accountability of states at the international level. The challenge is to ensure human rights, good governance and the duty to pursue sustainable development at national and

international levels, and in this way to best serve the interests of the present and future generations of humankind.<sup>33</sup>

This might well lead to re-interpretation of some of the traditional connotations of state sovereignty. It can no longer be equated with unfettered freedom of action and is bound to become interpreted in functional sense.<sup>34</sup> Layers of international law, especially in the field of human rights and environmental protection, increasingly crisscross territorial boundaries.

Consequently, international law and organization are progressively developing into a direction where Article 2.7 of the UN charter (range of ‘matters which are essentially within the domestic jurisdiction of any state’) is becoming increasingly qualified. At the same time, it is obvious that sovereignty will not wither away. Ever since the peace, sovereign states continue to be the principal actors in international relations, will be essentially different in the next century.) It is not the existence of sovereignty as principle of international law which is at stake, but rather what sovereignty represents in changing world.

Can we then say the politics exercised over the individual is an important factor in the determination of statehood? If you say yes even with a certain degree of reservation then your proposed world naturally newer to appraise the basic prickles bent on behind the law of nationality and citizenship.

### **Questions that matter**

1. What is Nation-State? Country? Multi-National State? Do they mean the same or different? Why was it named League of Nations? Why not League of States or Untied States?
2. United States of America as a State and its member States – no difference? Why all this equivocation? Is it inescapable?
3. How do you understand *nation*, *nationalities* and *peoples of Ethiopia*? Particularly look at the last reference to “peoples”. Is it a separate entity or

is the reference made to all Ethiopian people? (Read the Preamble and Art. 39(5) of FDRE Constitution.)

#### 1.2.4 The Concept of Nationality

Nationality of an individual is his quality of being a subject of a certain state. Hence, it is one of the attributes given to a physical person. It owes its origin in the notion of allegiance given by the subject to the king. Accepting the protection of a state actually required owing allegiance to it.

It is not for International Law but for the Domestic Law of each state to determine how one is given the status. While it is for each state (state – as understood in international law) to determine under its own law who are its nationals; such a law can only be recognized by other jurisdictions only in so far as it is consistent with international conventions, customs and to the principles of law generally recognized with regard to nationality. The following succinctly illustrates this dictum:-

*“Although it is for the international law of each state to determine who is and who is not a national of the state<sup>2</sup> it is nevertheless of legal and practical interest to a certain how nationality can be acquired under such laws. The five most common modes of acquiring nationality are birth, naturalisation, reintegration, annexation and cession.<sup>3</sup> No state is obliged to employ all five, but in practice they usually do so. § 384 Acquisition of nationality by birth Nationality is normally acquired by birth; the vast majority of people acquire nationality by birth, ... Some states make parentage alone the decisive factor (ius sanguinis), so that a child born of their nationals becomes ‘ipso facto’ by birth their national likewise, be the child born at home or abroad; under such a rule illegitimate children usually acquire the nationality of their mother. Other states make the territory on which birth occurs the decisive factor (ius soli).<sup>1</sup> According to this rule, every child<sup>2</sup> born on the territory of such a state, whether the parents be citizens or aliens becomes a national of such state, whereas a child born abroad is foreign although the parents may be nationals. Many states including the United Kingdom<sup>3</sup> adopt a ...”\*\*Openh*

This does not, however, imply that such a status will be recognized by all states; nor can it be challenged by international tribunals. What one can say in this respect is that the document issued by the state, evidencing nationality, exerts a very strong presumption, debatable though.

State domestic law may also make distinction between and among different kinds of nationals. Those who enjoy full personal and political rights may, on these accounts be designated as citizens – as is the case in the U.S.A. and India. Nationality is, thus, a legal quality that connects the individual to the state. It also links the individual to international law, as these cases fall under Private International Law (conflict of laws).

### **Questions that matter**

To what do you attribute the Ethiopian Law of Person – making distinction between and among domiciliary, permanent and temporary residences and the like? Similarly, what does the law attribute to corporate bodies – i.e. Ethiopian State and Government, political parties, churches, mosques, civil associations including NGOs and properties with specific destination like endowments and trusts; and business and commercial organizations?

Just as international law applies to individuals by virtue of the bond created between nationals – he or she – and the state, corporate entities too have nationality. The basic principle as articulated by ICJ is that the right of corporate entity that is attached to the state under the law of which it is incorporated and in whose territory it has its registered office. Of recent the instance of substantial connection and such similar considerations have however been found diffusing determination of jurisdiction solely on the basis of the principles of incorporation and registration may will be regarded as the traditional rule. It is perhaps no more than a *prima facie* pre-emptive yard stick which affords a convenient starting point for inquiry in any particular case. Attributes of states can be and is, more often than not, supplied with further designating attributes such as national flag, national anthem, national emblem, national currency and other symbols. The whole purpose is designation of a state in the international community and reaction of statehood in the

hearts and minds of people; it is a mechanism of reaction enhancement and/or assertion of the feeling of nationals, the significance of which will be discussed in Chapter II. Nationality, as such is an attribute of personality. It is also a quality of the state as consisting of a community of people of which the lowest denomination is the individual, be that physical, juridical, etc...

### **1.2.5 Democracy and Constitutionalism**

Democratic theory is based on a notion of human dignity; dignity taking the central and highest value worthy of respect. And adults ought to be endowed with a large degree of political autonomy – a status principally attainable by being able to share in the governance of the state they belong to. Because direct rule is not feasible, people can engage themselves in self-government only by delegating authority to freely chosen representatives. Thus, what justice – Hugo L. Black expressed – is a critical tenet of democratic theory is very much true: “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which [the]...must live.”

Constitutionalism enshrines respect for human worth and dignity as its central principle, too. To protect that value, citizens must have a right to political participation, and their government must be hedged in by substantive limits on what it can do, even when perfectly mirroring the popular will. What constitutionalism insists on is having limited government. Predictability of governmental actions is also a characteristic feature of its typology. Its opposite is capriciousness or unpredictability – the hall-mark of tyranny. Hence, the 1<sup>st</sup> paragraph above postulates democracy as *majoritarian politics*, whereas the 2<sup>nd</sup> paragraph relates to *counter-majoritarianism*. The one pertinent question that has to be dealt with is whether the *marriage* between them is *oxymoron*?

#### **1.2.5.1 Democratic Theory**

The social and economic conditions supporting a viable representative democracy are complex. The following institutional conditions need obtain: a) popular election of representatives; by universal adult suffrage in districts of approximately equal population



for limited terms, to institutions that allow those representatives to govern; b) free entry of citizens to candidacy for electoral office; and c) freedom of political communication and association.<sup>50</sup> These, of course, require a plethora of ancillary rights. All of them create a nearly open market to political ideas to allow the people to form groups (parties) to express common interests, and to choose candidates.

It is this process that makes governmental action morally binding - i.e. the people's freely choosing representatives, those representatives' debating and enacting policy and later standing for reelection, and administrators' enforcing that policy. Democracy, therefore, tends to embrace both positivism and moral relativism. *"The claim (representative democracy) becomes persuasive not in terms of what the people know, but in terms of who they are. They are the subjects of the law, and if the law is to bind them as free men and women, they must also be its makers."*<sup>51</sup>

Here, reliance on Aristotlian simple claim is clearly viable i.e. that the people's collective wisdom will exceed that of any simple person or small group. Few democratic theorists assume citizens possess equal capacity to understand the options or, as a whole, will always understand the issues. A coherent theory of reprehensive democracy must, however, posit that most sane adults can usually cope with political problems to the extent of being able to recognize their own self-interest join with others who share those interests, and choose among candidate. There is a good deal of faith at work, here, as well.

The chief democratic theorists posit against tyranny is that the people will not tyrannize themselves. As Jefferson asserted, it is the *"mass of citizens"* who are the safest depository of their own rights.

Thus, democratic theory stems from popular participation not only for its positive effect of expressing individual autonomy, but also for its negative effect of deterring governmental incursions into individual rights.

Because voters need to be informed to protect their interests, democrats advocate freedom of communication, as the U.S. Supreme Court reiterated.

*“the basic right of free expression is one of the principal human rights ... For a free, democratic order it is a constituent element, for it is free speech that permits continuous intellectual discussion, the battle of opinions [sic] that is its vital element... In a certain sense, it is the basis of any freedom... the matrix, the indispensable condition of nearly every other form of freedom.”<sup>52</sup>*

Yet, communication and voting are not sufficient for forming and expressing *“the will of the people.”* Democratic theory also demands a right to act in concert with others. Although the U.S. Constitutional text does not specifically protect a general right of association, the Supreme Court has held it “beyond debate that “the freedom to engage in association for the advancement of belief and ideas is an inseparable aspect of the *liberty* assured by the Due Process Clause.”

FDRE Constitution explicitly states that “[e]veryone has the right to freedom of expression without any interference...” In respect of freedom of association, Ethiopia’s constitution declares that “[e]very person has the right to freedom of association for any cause or purpose. ...”

The constitutional texts of Canada, India, Italy, and Japan contain similar provisions specifically protecting association alone with speech and peaceful assembly. And these countries all have well developed bodies of case law interpreting this provision to protect the specific rights involved.

Many theorists find an effective second check in the way democratic politics operates in a large, diverse nation. They contend that most people have small concern for most political issues. This low level of involvement allows coalitions of minorities to form temporary alliances, trading support among themselves on different issues. These theorists claim that political cleavages are not often cumulative. Hence an interest group is not likely to be continually allied with one set of group against another in permanent coalition.

Democratic theorists do not assert that these checks always protect liberty or even prevent public officials from acting independently to create public policy mounting

slowly to tyranny. Rather, they argue that, overall, such checks push public officials to mediate among interests, broker, not adjudicate public officials to mediate among interests, to broker, or involve in-winner-take-all struggles. In sum, officials will be wary of oppressing any group; for such group may become part of tomorrow's winning coalition. At a deeper level, democracy may cause people to accept and respect for competing interests not only because it is lawful but more importantly, as it *itself [is] a form of accepted norm of doing things in politics*.

Other proponents perceive Rousseauian as limitation; i.e. the popular will its representatives reflect, will generally be overwhelming. A valid law cannot simply reflect prejudices against minorities by imposing burdens only on them or principally on them. Such a limiting principle flows from the premise that the people as a whole are sovereign and majority rule is no more than a decision- making arrangement. This principle raises interesting questions about how to determine when a law makes distinctions and discriminations; and who shall make such determinations – the people, their elected representatives or non elected officials? An inquiry into any or all of this or these questions will lead us to the appreciation of the *nation of constitutionalism*.

### **1.2.5.2 Constitutionalism**

Despite some basic agreements, the two theories – i.e. democracy and constitutionalism differ significantly. Constitutionalists tend to be more pessimistic about human nature, fearing that people are sufficiently clever to oppress without hurting themselves. Constitutional theorists do not deny the importance of institutional checks but see those as insufficient. They are constantly concerned with the human propensity to act selfishly and abuse power. Instead of taking the [presumed/pre-supposed] element of human innate behavior as yardstick in the determination of the qualities of democracy, it is much better to characterize democracy as a system in a large array of political culture, as modeled by the developers at the beginning of this Chapter. Constitutionalism, too, is a political system. If it presupposes the existence of some sort of constitution at all, then it must be in the sense where constitution is taken as a political institution. In either of its aspects, the concept of constitutionalism must first be dealt with before one does that to the constitution.

To delineate constitutionalism, one has to recognize that it has two connotations, closely connected, though. In one of its senses it indicates the striving of codification of the organization of state and power. On the other hand, constitutionalism may refer equally as well to the ideals, particularly political ideals regarding the organization of the state. The first sense inclines more to the organization of the state and functions by legal means, which is the essence of constitution. The second pertains to Political Science; one of its achievements or end products is democracy, which is majoritarianism.

Democracy is taken as essentially referring to being governed by duly elected representatives, of which the group which won the majority becomes the ruling party, and wherein decisions are normally made by majority vote. Does *Rule by Majority* guarantee the security and wellbeing of minorities and that of the individual? is the question that democracy and theories of democracy have not yet fully answered. The whole question seems to revolve around putting-up of restraint on governmental actions. The restraints may aim at protecting the individual's or group rights and freedoms against governmental interference. This is the substantive and actually the substantial aspect of constitutionalism. In contradistinction to this, the formal constraints pertain to the organizational aspects of constitutionalism.

Constitutionalism, therefore, pertains to two kinds of relationships. The relationship between government and nationals/citizens, residents/ is the first category – the substantive. The second (the formal) refers to the appraisal of one branch of government vis-à-vis the other; and to their inter-relationship. It is these two aspects of constitutionalism which are the quit-essentials of a constitution, be that written, rigid, flexible, etc...

Constitutionalism and democratic theory raise questions about the concept of a constitution and the relationship of any particular constitution to those theories

### 1.2.5.3 The Concept of “Constitution”

To *constitute* means to make up, order, or form. Thus a nation’s constitution should pattern a political system. Some texts implicitly proclaim themselves to be supreme law and many do so explicitly. Still, a document’s bearing the title, *a constitution* and declaring its own control over all other political acts may not mean very much. We need to distinguish between the authorities a text asserts.

Constitutional texts may reflect spectra of qualities. At one extreme there have been a number of sham constitutions. At the other end there are those whose provisions are fully operative; but no constitutional text operates with complete authority. Its description of processes may be misleading. For example, the British North America Act of 1867, which served for more than a century as Canada’s principal constitutional document, asserted that the British Queen, not a Canadian cabinet and Prime Minister responsible to Canadian parliament, in turn responsible to a Canadian electorate, governed. Seemingly conscientious officials may ignore or skew express commands, and prohibitions; U.S. presidents and legislators have never taken seriously their document’s requirement that “*a regular statement and account of the receipts and Expenditures of all public money shall be published from time.*” So, too, for almost a hundred years, legislators, presidents, judges, and the mass of voters pretended that states were fulfilling their obligation under the fourteenth amendment to accord *equal protection of the laws* to blacks and women. The prevalence of deviations from the text indicates the complex nature of a state (of conditions) the society thereof; the allocation and the management of same. Thus, when we speak of *authoritative constitutions*, we are talking about those that are only *reasonably authoritative*.

A constitution as sham/cosmetic or real, has a principal function. A sham constitutional text is there, may be to deceive. Yet, even reasonably authoritative texts may have to play a cosmetic role, allowing a nation to hide its failures behind ideals. But, in so far as a text is authoritative, it renews nationals/citizens/ as better selves.

A Constitution as a Charter for Governments:<sup>54</sup> At minimum, an authoritative constitutional text would more often sketch the fundamental modes of legitimate

governmental operations. Who its officials are, how they are chosen, what their terms of office are, how authority is divided among them, what processes they must follow, and what rights, if any, are reserved to citizens. Such a text need not proclaim any substantive values, beyond obedience to itself; if it does proclaim values, they might be those of Nazism or Stalinism – anathema to constitutional democracy.

A constitution as a guardian of fundamental rights: If a text is authoritative, for it embodies democratic theory, it must protect rights to political participation; and if it is authoritative and embodies constitutionalism, it must protect substantive rights by limiting the power of those even freely chosen representatives.

The constitution as covenant, symbol, and aspiration: In so far as a constitution is a covenant by which a group of people agree to (re) transform themselves from mere *state* into a *nation*, it may function for the founding generation like a *marriage* consummated through the pledging partners; consenting to remain a nation – for better or worse, through prosperity and poverty, in peace and war.

If that is not so, say, for later generations, a constitution may operate more as an *arranged marriage* in which consent is passive, for the degree of choice had been limited. Even where cancellation of a contract is a recognized right, exit from a membership of such an association is unlikely to offer viable alternative. Revolution becomes a legal right only if it succeeds and transforms revolutionaries into founders. Otherwise, a system usually endures only by bringing into and then binding many groups into its forms.

The myth that *peoples' forming themselves into a nation* presents a problem not unlike that between chicken and egg. To agree in their collective name to a political covenant, individuals must have already had some meaningful corporate identity as are “*a*” people. Thus the notion of constitution as covenant should, therefore, be one which formalizes or solidifies rather than invents an entity anew. Such Constitutions should rather solemnize a previous alliance into a more perfect union.

The engine behind a formative constitution, like the one we tried to show varies from country to country and time to time. One can plausibly argue that if the French have been

under monarchies, military dictatorship, and assorted republics, then they must have been under different people at different times. In like manner, Germans have been under the Kaiser, the Weimar Republic, the Third Reich, as well as West and East German states and finally as a reunited Federal Republic of Germany. In polyglotted societies such as Canada, India, and the United States, there may be no other basis for union as nation particularly where there are of so many disparate groups. *A constitution may, thus function as a uniting force the only principle of order, for there may be no (other) shared moral or social vision that might bind together a nation.* It is difficult to imagine what has united the supposedly united states more than the political ideas of the declaration of Independence and the text of 1787 Constitution.

Reverence for the constitution may transform itself into a holy symbol of the people themselves. The created “*Tabot*” may become (the people’s) own mythical creator. This symbolism may help show how, sometimes, constitutional text transforms itself into a *semi-sacred covenant, serving the unifying function of a civil relation.* In America, that is exactly what happened to the verbal inspiration which gave the constitution of unquestionable authority.

In a related fashion, a constitution may serve as a binding statement of people’s aspirations for themselves as a nation. A text may silhouette the sort of community its member would like to become: not only their governmental structures, procedures, and basic rights, but also their goals, ideals, and the moral standards by which they want others, including their own posterity. In short, a constitutional text may guide as well as *express hopes* for peoples themselves as a society. The ideals, the words enshrined in their constitutions, the processes they describe and the actions they legitimize must either help to change the citizenry or, at least, reflect their current values.

What does “*the constitution*” include?

Almost every nation now has a document labeled a constitution. But to have a constitution, a nation need not have a social, economic and political text. Nor does the existence of a constitutional document mean that any particular nation’s constitution is

coextensive with that socio-economic-political reality. What a constitution includes is a problem, not a datum.

The most obvious candidate is the whole text and nothing but the text. The late Justice Hugo Black and former Attorney General Edwin Meese III were among the most notable Americans to take that position. Such people stressed the “*writtenness*” of the U.S. Constitution qualified their textualism with a commitment to “*original intent*” or “*understanding*” - additions to the text.

Anything less than the full text would sound a less attractive option, but every constitutional document drawn up in a free society is likely to reflect a bundle of compromises, necessary to obtain approval from the *drafters* and *ratifiers*, that, perhaps, are not mutually compatible. As one solution, the German Constitutional Court has proposed reconciliation through structural interpretation:

*An individual constitutional provision cannot be considered as an isolated clause and interpreted alone. A constitution has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit, a constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate.*

On another occasion, the constitutional court divided 4-4 on the validity of an amendment; the Supreme Court in India has several times voided constitutional amendments; and the California Supreme Court has once done so.<sup>55</sup> Moreover, many U.S. Presidents, legislators, judges, and commentators have tried to exclude portions of their constitutional text from the canon. Many commentators who assert that the text’s principal function is to serve as a charter for government may undermine, as an empty rhetoric, the preamble’s statement of purposes, especially its dedication to the *establishment* of “Justice.”

A quest for original understanding or intent raises enormous mythological, theoretical, and practical problems. After a few years have gone by, interpreters can pursue originalism only through documents, which are fraught with all the hermeneutic problems of the text itself.



In the United States, the most robust would be the second paragraph of the Declaration of Independence and The Federalist. The Declaration justified the creation of a new nation and set out its founding principles:

*We hold these truths to be self-evident, that all men are created equal; that they are endowed by their creator with certain unalienable rights that among these are life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed. That whenever any form of Government becomes destructive of these ends, it is the Rights of the people to alter or abolish it ....*

The case for the Federalist, essays by John Jay, James Madison, and Alexander Hamilton urging ratification of the newly drafted constitutional text, would be that those who ratified that document accepted these views as authoritative and, therefore, they form part of the original understanding.

Some practices might become so settled as to be fused into the constitution. One would expect common-law systems, with their sensitivity to prescription, the doctrine that long and unchallenged usage confers legal title, would be hospitable to such a concept.

Most fundamentally, governmental practice often violates the basic text or its underlying principles. Does a long violation effect a constitutional change? If *the constitution* is devoid of normative content beyond obedience to specified procedures, the answer might well be yes. If, however, *the constitution* entails normative political theory, the issue becomes far more complex. The minimum standard he would use to test a practice's legitimacy is congruence with both the document and tradition.

Interpretations trigger similar disputes. Although not every interpretation has a serious claim to be part of the canon, some interpretation mold into the larger constitution. The U.S. Supreme Court's jurisprudence of judicial review provides the most striking example. As one of the courts opponents asked at the time, "Is it not extraordinary that the high power was in intended, it should where appear (in the text)?"

Culture forms the second element in (a country's) *political chemistry*. A *constitutional text* that requires that its officials support it can forge a moral bond. Much of the text may thus become part of the nation's custom. Children may learn about it in school as the "*proper*" way of politics, and later on, as prescribing rules for a just society.

#### **1.2.5.4 Constitutional Democracy**

To enjoy reasonably effective, but still limited governance, many countries have adopted a mix of *constitutionalism* and *democratic theory*. Most so-called democratic systems, such as those of Australia, Austria, Canada, Germany, India, Italy, Japan, Spain and the United States, would be more accurately classified as *constitutional democracies*. Each of these *polities* have provided for a wide measure of political participation and simultaneously restricted the peoples' *over-governance* by putting in place a variety of institutional means. Each of them, again, has distributed the power to the *Legislative, Executive, ..* and adjudicate among the three departments of government; everyone of them has a version of bi-cameralism and includes a *Bill of Rights*. In addition to these, Austria, Canada Germany, India, and the United States use federalism to further diffuse power. To splinter this diffused power of *majorities*, the United States employs stiffened elections for its legislature and indirectly elects its president. Each also authorizes politically independent judges to invalidate legislative and executive actions they believe violate "*the constitution*".

To constrain power by means of a paper (word) – that is what a constitution really is – may sound foolish. Yet a *political chemistry* may turn *sheets of paper* into *hoops of steel*. First, by prescribing institutional structures and deregulating power among different offices, a document can push officials to co-relate their interest with those of their office, and jealously guard those interests against punitive incursions by other officials. Further, by drawing vague divisions of authority, a document can make it likely that no set of officials can do much that is politically important not without arousing the jurisdictional imperative of other officials. Thus, a constitutional text can dispense/disperse power and protect liberty by putting an ambition against another and one power against another power.

In so far as a constitution is a collection of rules, establishing and regulating the system of government in a state, we can, as shown above, discern a formal and substantive aspect of a constitution.

These are the *quit-essentials* of modern constitutions, to which may, of recently, be added *sustainable development* and *good governance* with their entire corollary.

Herein above, we have defined constitution as a collection of rules. Here, the term “*Rule*” requires to be appreciated in terms of “*Institution of Law*” – institution, understood as an idea of an undertaking, which persistently exists in the social environment.

Hence “*rule..*” as an “*Institution of Law*”:<sup>56</sup>

*“.. are first precepts attaching definite consequences to definite factual situations. Secondly, there are principles, which are authoritative points of departure for legal reasoning in cases not covered by rules. Thirdly, there are conceptions, which are categories to which types or classes of transactions and situations can be referred and on the basis of which a set of rules, principles or standards becomes applicable. Fourthly, there are doctrines, which are the union of rules, principles and conception with regard to particular situations or types of cases in logically interdependent schemes so that reasoning may proceed on the basis of the basic scheme and its logical implications. Finally, there are standards prescribing the limits of permeable conducts, which are to be applied according to the circumstances of each case,”*

For all practical reasons “*rule*” means standard, on the basis of which conduct, transaction (relations), situations are judged. The *realness* of principles, concepts and doctrines is self-evident. What is not clear is the function of principles, concepts and doctrines. In short, their primary pursuits is the provision of rationale for rules or standards As the *rule quality* of every provision or even improvisers such are savings and excepting clauses, of any provision’s law, let alone those of a constitution is a legal propositions of rule (standard) which again is self-evident.

If these propositions are found acceptable, the following exposition is an attempt to identify and explain some pertinent provisions of the 1995 FDRE constitution, behind which basic concepts principles and doctrines of modern constitution have been embodied.

First of all, we have said earlier that constitutionalism presupposes the existence of a higher law; not in a sense of “*Grund norm*” as Kelsey<sup>56</sup> has envisaged, but constitution, written or unwritten-constitution, as “*a collection of rules (standards), establish and regulate*” the system of government in a state.

### **1.2.6 Rule of Law**

The same have been designated as the substantive, the formal aspects of constitution. Of the formal/elements aspects of constitutive aspects, *rule of law* stand out as the most comprehensive and vital doctrine, principle and/or concept (hereinafter referred to as principle) of modern constitutions.

In the sense of Lon Fuller’s view of the “*inner morality*” of law, *Rule of Law* is not treated in its general sense of *government under law*, but in much more specific, comprehensive manner. According to Fuller yet

“... a comparison can be made between the internal morality of law and the natural law of carpentry; which the carpenter has to follow whether his aim is to build a hideout for thieves or an orphanage. The internal morality is to be distinguished from the external morality or the substantive aims or values that particular legal rules (standards) seek to promote. In other world (he] developed a conception of the Rule of Law, not by appealing to moral values drawn from the external morality, (which will, of course, vary with different legal rules and systems and from natural school perspective to other schools of jurisprudence), but by spelling out the values that underlie the concept of law itself.”

These values are characterized as the *eight desiderata*. These identified eight elements of law, recognized as necessary for a society aspiring to institute the *Rule of law* state as follows:-

1. Laws must exist and those laws should be able to win obedience.
2. Laws must be published.
3. Laws must be prospective in nature so that the effect of the law may only take place after the law has been passed. Laws should be written with reasonable clarity to avoid unfair enforcement.
4. Law must avoid contradictions. (intelligibility)
5. Law must not command the impossible. ( Non self-contradictoriness)
6. Law must be general.
7. Laws must stay constant through time to allow the formalization of rules; however; law also must allow for timely revision when the underlying and political circumstances have changed.
8. Official action should be consistent with the declared rule. (Congruency)

Standing alone, these eight elements may seem clear and understandable. But they are actually difficult to implement in the real world because governments are often compelled to prioritize one goal over another to resolve conflicts in a way that reflects society's political choice. For example, making too many laws that are too detailed and specific may make the legal system too rigid. Inflexibility could cause the particular case. Additionally, instead of only applying prospectively, few laws, under limited circumstances are meant to apply retroactively, or to past conduct, because they were passed with the specific intent of correcting the conduct in question. Fuller recognized these conflicts and suggested that societies should prepare to balance the different objectives listed above.

*Fuller's Criteria* is helpful in understanding *rule of law*, because it outlines the types of rules; of formal constraints that societies should develop in order to approach legal problems in a way that minimizes the abuse of the legal process and political power.

*Rule of law*, however, extends beyond mere regulation and is also shaped by the so-called *institutional constraints* on government implied in *Fuller's elements*. One such

*institutional constraint* is the existence of an independent judiciary; another is developing ways of promoting *transparent governance*. *Informal constraints*, such as local culture or traditions that may encourage citizens to organize their behavior around the law, also help constrain the government, prompt liberty and, therefore, define the rule of law.

Although still seemingly vague, *rule of law* may be most concretely defined as a theory of governance relying upon a series of law, which may be most concretely designed to encourage order and to prevent arbitrary and unreasonable exercise of government power. Multilateral institutions such as the World Bank and many policymakers throughout the world believe that the *rule* promotes economic development.

Modern economic development often comes with the introduction of a *market economy*; or, an economy based on private enterprise that does not rely on *government-planned* production. Max Weber, a famous sociologist and economist, has commented that the capitalistic order, upon which a market economy is based, is organized upon a rationale of *law-bound state*. Market economy brings buyers and sellers to the market for complex transaction from many, different parts of the world and on international scale.

Law is important to the market economy because it is the common basis on which parties can make agreements; it provides parties with confidence that disputes can be resolved efficiently and fairly. For this reason, the *predictability* and *order* that the rule of law promotes in substantive laws is viewed as the stabilizing force behind much economic developments. Rule of law helps set the *rule of the game* in critical areas such as investment, property, and contract.

Rule of law also serves as an important assurance of social rights and government accountability. Government restraint is especially critical for many transitioning economies where a previously planned economy is to be transformed into one that is market base. When the government is no longer the sole owner of land, capital, and labor, rule of law guarantees that the crucial elements of the economy will be free from arbitrary *government will*, adopt a hands-off approach to investment and production, allowing those participating to fully exercise their rights in relations to land, labor and capital.

## **A. Important Components of Rule of Law Reforms**

### **I. Court Reforms**

The efficiency of the courts is an important component in rule of law reforms as the existence of a judiciary is a fundamental aspect of downfall of law. For the newly independent states established after the downfall of the U.S.S.R., for example. Providing an efficient means of dispute resolution was crucial to meeting the demands of an increasingly privatized economy. At the most basic level, this simply meant that courts needed to be available to adjudicate disputes and enforce resolutions. For countries that are further along in the reform process, more complex structural reforms that strengthen court capacity “(i.e., training judges), independence, and transparency are needed.

To increase accountability and transparency, information technology systems may be installed to provide greater public access. To increase independence of the courts, the government can provide them with funding that will allow them to make their own financial and administrative decisions. Furthermore, for countries that have already established these structural reforms to encourage the adoption of the rule of law, court performance should be evaluated on a periodic basis.

Independence, accountability, efficiency, access, affordability, alternative dispute resolution mechanisms, and the quality of professionals are some of the characteristics that may provide an accurate measurement of the system’s success.

An example of success in this area of rule of law reform is the arbitress courts in Russia. Established to hear solely economic disputes, the arbitress courts underwent legislative reforms in 1991/1992, and 1995. Those reforms led to personnel and procedural safeguards, as well as the establishment of a higher-level appellate court. The immediate result of the reforms was an increase in the number of cases filed in the arbitress court system. Moreover, it was shown that despite Russia’s corruption and localism problems, the ability of the arbitress courts were able to resolve basic commercial disputes in a timely manner.

## II. Developing Legal Rules and Legal Systems

Another important goal for rule of law reform is to develop the legal rules first and foremost as Fuller stated, “*law must exist*”, before one begins to talk about rule of law. Economic reforms have generated a large number of new economic laws in developing countries. Between 1990 and 1995, 45 developing and former socialist countries enacted new investment laws which were passed to liberalize the existing investment regime in their countries, by offering clear and broad legal protection for all types of investments.

To encourage additional country-specific development, in the early 1990s, the World Bank and the International Monetary Fund (IMF) began conditioning financial assistance on the implementation of the rule of law in recipient countries. These organizations provided aid to support initiatives in legislative drafting, legal information, public and legal education, and judicial reforms, including alternative dispute resolution.

The very term *Rule of Law* suggests that the law itself is the sovereign, or the ruler, in a society. As an idea, the rule of law stands for the proposition that no person or particular branch of government may rise above rules made by selected political officials. These laws reflect the morals of a society, and in a Western Democracy they are supposed to be pre-established, formalized, neutral, and objective. Everyone is subject to their dictates in the same way. The rule of law, therefore, is supposed to promote equality under the law. Thus, *rule of law* should be clearly differentiated from *rule by law*; *i.e.* the latter does not necessarily mean that the law is legitimate for it might not satisfy most of the *desideratas*.

The term *legal transplantation* describes the phenomena of importation of legal rules from other countries. Academic debates often center on the moral and practical implications and, by extension, the imposition as rule by law. Many Developing Countries, including Turkey, Ethiopia and Japan had incorporated a good number of laws of foreign essence since World War II, despite having a variety of legal traditions of their own. When developing countries such as these adapt laws from other countries, the rules borrowed may not fit the underlying tradition, culture, and social context. Thus, in legal transplantation, countries should strive to *adopt* rather than simply adapt laws so as the



newly introduced law fully complements and is reflective of their respective legal, economic, and social systems.

## **Questions that matter**

### **Discuss:**

1. *Internal morality vis-à-vis external morality* necessary for institutionalizing *rule of law*
2. *good governance vis-à-vis bad governance*
3. *adaption vis-à-vis adoption.* (Refer to FDRE Constitution, Articles 8 to12, 13, 37, 39, 62, 78, 79, 82, 83, 84, 100 and the Preamble.

## **1.2.7 Sustainable Development, Good Governance and Constitutional Order**

### **1.2.7.1 Introduction**

The essence of sustainable development has been described as a process of change in which the exploitation of resources, the direction of investment, the orientation of technological development and institutional change are all in harmony and enhance both current and further potential to meet human needs and aspirations. Sustainable development means in essence the human endeavor to meet the needs of the present without compromising the resources, opportunities of future generations to meet their own needs with due regard to essential needs of the present; without compromising the ability of the future generations to meet their own needs – with due regard to essential needs of the world's poor, consideration of existing social, organizational, environmental, technological, etc. limitations influencing the needs of present and future generations.

Sustainable development consists of a chain of minor and major events which are supposed to characterize and direct a process of gradually merging developmental considerations and environmental concerns in the long term perspective of re-constituting the World Order to the effect that humankind in all its parts will be given a lasting opportunity to survive in justice and peace. This raises fundamental questions of the constitutional order and its development or evolution both on national and international

levels. Good governance means qualification of constitutional order as being conducive to sustainable development.

### **1.2.7.2 Sustainable Development**

Bridging the glaring gap in terms of economic performance between the developed and the developing states, measured by whatever criteria, was considered to be an economic affair of transfer of financial and technical resources from North to South. Economic growth was identified with development.

But, a key word introduced not long ago, namely NIEO (New International Economic Order), began to be institutionalized in UNCTAD since 1964 (U.N. Conference on Trade and Development).

The NIEO process follows development strategy is applied from top-down, without questioning the stage of development and social structures of the states concerned and its available capacities. Little or no attention at all was paid to the involvement of the non-state sector – the civil society and to the increasing relevance of the informal sector with its record of self-organization and spontaneous institution building. The NIEO process was largely governed by a development strategy following the modernization theory, in its western or eastern version. Development was understood as a linear process of replicating modernity; i.e. European statehood on a world wide scale.

However, the belief in the simple export of European, N. American, history and experiences of modernization to the Third World appears today as one major cause for the failure of the development strategy pursued in the NIEO process. Top-down social and legal engineering, according to a preconceived blueprint of development, was not sufficient to allow for sustainable development, as it did not reach down to the development of the so-called hidden resources, hidden in the socio-political heritage and normative culture of the developing states themselves.

Developing hidden resources means human centered development. It means developing locally available skills, in particular, in the sense of social, political and economic

capacity building, including decentralization of government and strengthening local authorities and the so-called third dimension; bottom-up development of the informal sector. It embraces promoting the private sector and letting the informal and non-governmental sectors of the civil society to have their optimal social role in developing and sustaining a genuinely democratic system. It means developing favorable social and legal means of instituting good governance as an element of sustainable development to the sector.

So, to achieve a sustainable development, a *bottom-up-approach involving the people at the grass-roots and the so-called hidden resources, support the top-down governmental and state-centered strategies*. The question is not either/or, but how to accommodate both within the legal structures of constitutional orders.

The transition from the concept of development, underlying the NIEO-process creates expectations in an all-embracing development strategy, addressing itself as much to governments as to people; at times depending on the support of both – national and, where relevant, international.

### **1.2.7.3 Constitutional Orders for Sustainable Development**

Constitutional Order should help address the State's Constitution and the existing social reality. The latter is especially relevant in respect to constitution and institution building in developmental context and should allow to capture and to understand better the evolutionary potential inherent in its socio-political sub-stratum.

Sustainable development requires an interaction between government and its people; for that matter, it requires a sufficient degree of clarification and identification of the civic and interest group leaders and active promoters, service providers of the private and governmental civil services, representatives, the elite and the polity.

Developing societies usually lack properly structured social organization just as they suffer from weak statehood. Under structured means that there is a gap of communication

and interaction between government and people, due to, among other things, lack of sufficiently developed mediational organization i.e. a properly organized civil populace.

As Ethiopia is and still will remain to be a country of traditional people, lack of such properly organized civil societies significantly hinders orderly and secure good governance. Thus, it seems there is a public concern on the issue of '*developing constitutional order*' – especially on the national level, but also on the international.

In developing national constitutional order and promotion of good governance the issue of *participatory development* matters. So, entitlement of civil organization in the process of developing the *constitutional order* is much sought for. In case popular organizations or so-called intermediary groups cannot claim a legal status under their national legal order, they might resort to seek other avenues to legitimize their claim. (Like, assistance under international law from other parts of the international community?)

On the national level, the question seems to be whether there is any law that governs all others beyond the actual sovereignty of the country itself? Some might resort to question whether the *order* to be set admits participation, ensures legal pluralism and in the final stage, when it becomes practical, will be founded to a reasonable degree on the concepts of law.

On the level of *international constitutional order* the problem constantly addressed is how to reduce, what is usually denounced as high transaction costs of law making and implementing them in newly emerging fields, demanding an immediate regulation. The need to overcome the rigidities inherent in an international legal order, the logic of which derives from the doctrine of state sovereignty, reciprocity and consent, is responded to by the increasing recourse to the so-called soft law in order to come to terms with newly emerging threats and developmental demands. New constellations and forms of the interaction between state, society and law, international and national, will need support also on the level of the international constitutional order, so as to allow for the optimal promotion of good governance through a well structured interaction between the governmental and the non state sector.

A concept of law, embracing both national and international law, which derives its intrinsic information from the notion of sovereignty of states can hardly suffice in the face of the existing under structuredness of constitutional orders of the greater number of the states and in view of the fact that weak statehood still is a common feature of the international community. However, as long as the international constitutional orders of the greater number of the states and in view of the fact that weak statehood still is a common feature of the international community. However, as long as the international constitutional order still is perceived in theory and practice in light of the doctrine of state sovereignty, reciprocity and consent, the international legal order and the potential for evolutionary legal order lacks the openness and the cotangential for evolutionary change, which is ever more needed in the face of increasing environmental threats and developmental domains. Therefore, the important question is how to re-conceive the relations between society, law and states so as to secure the interaction between national and international constitutional orders, necessary for appositive evolution in terms of sustainable development.

At this stage strengthening the basis, legal and theoretical, for promoting the self-organization of peoples becomes topical in the larger context of the international legal structures and their evolution toward a higher state of social organization. An effective policy of sustainable development requires that good governance will be institutionalized in constitutional orders both on national and international levels.

#### **1.2.7.4 Good Governance as an Element of Sustainable Development**

Governance means the management of the relations between government and its populace within a given constitutional order. Good governance is the opposite of poor or bad governance, which reaches from denial of political and civil as well as economic, social and cultural rights, administrative inefficiency and corruption, to deficient legal protection and political repression, and ultimately to mass violations of human rights and tyranny. It entails waste of human power and natural resources; it leads to environmental degradation and prevents sustainable development. Good governance is called for to de-legitimize and to overcome governmental and administrative malpractices and non-democratic structures withstanding the realization of sustainable development.

The practical meaning of good governance will vary according to the socio-economic and political particularities and the concrete state of development of the constitutional order involved. As a matter of principle it means promoting limited government through string thinning public accountability inter alia by way of promoting popular participation in development and resource management. In substantive terms, ensuring good governance requires that the working of the political system is made transparent, that the political leaders are held publicly accountable, that fairness and equality before the law prevail and that access to and distribution of assets, mainly land, are regulated in an equitable manner. In operational terms the realization of good governance requires that key sectors of society and the people participate, as much as possible in cooperation with the government, in shaping governance. Intermediary group's i.e. popular movements, non-governmental and community/ grass-roots based organizations often were and still are the most significant elements in promoting political freedoms and democracy as elements of sustainable development. Through popular participation the promotion of democracy will thus occur on the basis of the interaction among states, key sectors of society and people i.e. in a new partnership between government and people.

The promotion of good governance as a process of democratization from bottom-up on the level of national constitutional orders can be frustrated or supported on the level of the international constitutional order, i.e. in the context of bilateral and multilateral development diplomacy, conducted now-a-days under the name of constructive policy dialogues between governments. However, it will need above all the support of the community of the non-governmental developmental organizations.

The realization of good governance calls for action and raises questions both on the level of national and international constitutional orders. According to the Charter of Arusha, the realization of popular participation will take place on four levels: the level of the people, of governments, of the international community and of the NGOs, with the primordial objective of governments yielding space to the people. Promoting popular participation as a matter of promoting good governance implies in the first place limiting governmental powers.

## Chapter II

### Creating Paradigms of State

#### **2.1 Development of State in the Paradigm of Western Civilizations**

Here, *constitution* is understood in the much broader sense, as a frame of political organization, expressed through and by laws (i.e. as expression of customs and practices) and as a force, in which we see the establishment of relatively permanent institutions with recognized functions. When we say *constitutional state*, we mean, therefore, an entity in which the powers of the government have been made relatively stabilized. This sort of state (the germ of the fetus of state) was observable, as far back as ancient Greek. The same sort of state continues to evolve, but without changing its typology up until Renaissance, more particularly until after the Industrial Revolution; wherein and there after developed the *modern nation-state*.

#### **2.1.1 The Rise of State without Nationhood**

##### **2.1.1.1 The Greek City-State**

It is true that political separatism had been a marked characteristic of Greek socio-political life. Indeed, it was almost the religious devotion of the Greeks in the principle of antinomy of the liberty of the group which finally engulfed them. But they knew only the city – state. The whole political outlook of the Greek was determined by this fact so that even the most brilliant political philosophers, whom Greek produced were incapable of looking beyond this conception of a state. Aristotle, in laying down what he conceived to be the physical limit of a true state, said that it should be large enough to be economically self-sufficing and small enough to permit all the citizens to meet together in one place.

A Greek citizen was actually and in person a soldier a judge and a member of the governing assembly without a limitation of territory and of numbers, such as the Greek city-state implied the personal discharge of a citizen's responsibility which would have been impossible otherwise. This personal service, moreover, pre-supposed another institution i.e. slavery. The ancient Greek was placed in a best position to be an active

citizen, because the means of existence were produced by slaves who were outside of the pool of citizenship.

One may also attribute philosophy to flourish for this same factor. When Aristotle for example, used the term state, he comprehended it as a spiritual bond, not a mere piece of governmental machinery. The state exists, said Aristotle, not merely to make Life possible, but to make life good. State was a divine entity, an ideal of self (commonly) realization.

To Greek philosophers like Plato and Aristotle, there was opposition between the individual and the state. The state was, in fact, the individual's only means of realizing his own best ends. The test of good citizenship, for such thinkers, was observance of the laws. The law represented a fixed universal good, which was a safeguard against individual caprice. Thus, both Plato and Aristotle emphasized the importance of political education for only through an informed citizenship could the state be preserved from anarchy.

Plato's solution, as outlined in the Republic lay in an aristocracy of political intellect, a body of "Guardians" qualified to rule through a rigid system of training which should lead up to the creation of the ideal state. His attempt was to escape from the tyranny of the mob, rule by the people (democracy). He wanted to stake a mean between the unrealizable best and the intolerable worst.

But neither of these solutions was capable of saving the Greek city-state from extinction. The only possible way of perpetuating the liberty of Greek as a whole was one which never occurred to Greek thinkers. One practical attempt was made to bring about a wide political union. This was attempted when Athens first formed a league of equal states called the Confederacy of Delos, but when she attempted to convert this into Athenian empire in which she was in effect to hold the hegemony over the rest, other states, headed by Sparta, rose against her. She was, because she thus threatened to demolish what was conceived then as not only the very basis of the free states, but also the sole ground of true happiness i.e. city-state life.



What Greek political constitutionalism lacked was something, which is vital to the continued existence of such a form of government, namely one which has the ability to move with the changing times and to meet new needs as they manifest themselves. Although the political existence of the Greek city-state was thus slipped into abysmal, her political idealism remained alive to present political organizations, at least, as classical example.

#### **2.1.1.2. The Roman City-State and Empire-State**

Rome too was a city-state in its beginning. But encircled and threatened right from the beginning of its earliest years by hostile states, it was driven into a policy of expansion which did not cease until the Roman Empire came to be coterminous with the civilized world. The importance of Rome in the history of constitutional law lies in the fact that its constitution played in the ancient world a part comparable to that played by the British constitution in the modern world.

The constitution of Rome was first quite determinate instrument of the government. Yet like that of Britain, it was made up of “mass of precedents” carried in memories or recorded in writing, of dicta of law or statement, of customs, usages, understanding and beliefs which all have bearing upon the methods of government, supplied with a few number of statutes.

At first Rome was a monarchy, but later the kings were driven out and the Republic began clearly to emerge. In this republican constitution, there were three elements of government, which were supposed to balance and check one another. First, the monarchical element (transformed from the original kings) manifested itself in the office of the Consuls, of whom there were two, elected annually, each with the right to veto the other. Secondly, the aristocratic element was embodied in the senate, an assembly with, at one time, great legislative powers. Thirdly, the democratic element existed in the meetings of the people and three sorts of conventions were made according to the division of land or people (curies, centuries or tribes). The theory of this triple division of power lasted till the fall of the empire. But, as Rome expanded, it necessarily ceased to be intact.

The Roman State lasted in a certain sense, for two centuries, and during that time many changes took place in its constitution. The Roman constitution, too, it must be remembered was a city-state. Rome ceased to be a city-state and became world-state; then the republican form of government became inconsistent with the reality on the ground, for here again, we observe the absence of the two indispensable conditions or presupposition of modern constitutionalism: namely, representative democracy and nationalism. The democracy of Rome, like that of the Greek City-states, was direct primary democracy, and the idea of representation was foreign to the one as to the other. The Roman method was to destroy nascent local feeling by the system of divide and rule, for it could not give its subject-peoples a share in the government without introducing the notion of representation; and this it never did. Thus, the old republican constitution fell in to disuse. The conception of it as a nice balance mechanism of monarchical, aristocratic and democratic forces was no longer tenable.

Yet, this is easy a fact which had an important influence on later political theory and to some extent on present institution. In reality from this time what was called the Roman Republic was nothing more than the rule of the senate. Yet always the postulate even then remained that all political powers were ultimately derived from the people. There had always been a saving clause in times of crisis. The saving close permitted the establishment of a temporary dictatorship in order to cover it with a constitutional cloak. The despotic – recognizing its own importance – the Emporium in fact, if not in name, was born.

The theory of the '*Roman Imperial Power*' can be gathered from the Institutes and Digest of Emperor Justinian War, the great codifier of the Roman law. The supreme legislative authority, according to the code, still rested with the Roman people. The rights of the Emperor were the result of the people's delegation of power. The powers of the people were never formally abolished at any period in the history of the Empire, but fell gradually into oblivion. It was the peculiar flexibility of the Roman constitution which made possible this fiction, i.e. delegation even where there were none of the nature of mandate.

The Emperors were, according to this fiction, simply magistrates, who concentrated in their hands the various offices of the old republic, because the Roman magistrates had a great power, given to them by the constitution in the great days of the Republic.

The senate, too, by continuing deliberation, gave the appearance of the existence of a republic form of government. But the Senate became totally enfeebled in the later days of the Empire and degenerated into a mere administrative of the Emperor's will. Thus, the Roman constitution began as a happy blend of monarchical, aristocratic and democratic elements, but ended as irresponsible autocracy.

National feeling was entirely absent in the Roman Empire. The subject, i.e. the various peoples knew nothing of the rights and duties attributed to nationals and to citizens other than mere belongingness to the Roman Republic under a constitution, but Rome was a city and Romans were always that of a city, and this made the growth of autocracy all the more easier.

### **2.1.2. Medieval State**

All over Europe then rapidly developed the phenomenon of feudalism. This was a kind of medieval constitutionalism, since it was to some extent systematized into generally accepted form of social and political organization. Its essential feature was a division of land into small units, the general principle of which was that "every man must have a lord. This added to the shadow claims that society developed its own hierarchy not a permanent institution but as a fact, as a pyramid, at the apex of which stood the Emperor, who was in turn, regarded as *God's vassal*.

The evil of feudalism lay in the inordinate power it gave to the great barons, in proportion to their strength. The day was thus delayed when a state, as a unit could emerge. We, therefore, find that the strong kings of the Middle Ages were those who endeavored to concentrate power in their own hands only to systematically put in place a centrally controlled unit. The control was, however, dependent on the baronial supremacy.

In this way feudalism seemed to have been an inevitable growth to bridge the gulf between the chaos of early medieval times and the order of the modern state. In England and France particularly, and to a less extent in Spain, the policy of the kings was to concentrate power in their hands, and to control and finally destroy the great feudal fiefs. And it is precisely in these countries that we may look for the first faint emergence of the two principles which we have described as the necessary condition of the growth of modern constitutionalism, namely, nationalism and representative democracy. Moreover, it was in these two countries that the assembly containing representatives of estates, with less than the baronial ones, first appeared

The sense of nationalism in Spain grew out of different sets of circumstance. On the other hand, in Germany and Italy, where the conception of the Holy Roman Empire was much more generally accepted, feudal anarchy continued to operate into much later date than in the three states.

The other matter of constitutional interest which emerges from this long period of internecine struggle was the experiment generally known as the Conciliar Movement. This followed the scandal of the great schism which divided Western Europe into two religious allegiances under different popes. The second Charlemagne was attempted to revive an earlier institution for the government of the church namely, the General Council, to which the pope was to be forced to submit, The Council of Pisa followed by the council of Basel, were attempts made to put the Pope under a control of some kind, but from that time onward the councilor system, as a method of church government, disappeared.

Though the councilor movement was itself a failure, it had considerable significance in the history of constitutionalism in two ways. First, the organization and procedure of the councils acknowledged the national divisions into which Europe was now falling. Secondly, the councilor movement gave rise to much speculation as to the methods by which a General council might be made to represent the views of the whole body of the Faithful, as distinct from those merely of church dignitaries.

Towards the end of the middle Ages, then, in the whole of Western Europe, we find a fever of political speculations which arose out of the abuses of the Catholic Church and whose object is to give that church a new constitution. In England, France and Spain, we find at this time, the actual germs of the modern constitutional state for in these states practical politics outstrode legal theories and the ghost of the Holy Roman Empire. In Germany and Italy it continued to stalk for many years.

### **2.1.3 The Renaissance State and the Effect of Industrial Revolution on Nation-State Formation**

The process of the breaking-up of medieval institutions, which we have been tracing, was given a tremendous impetus by the great revival of antique culture of the 15<sup>th</sup> century, which with all its consequences is generally called the renaissance. The general effect was at once one of atomization and one of integration: it atomized the medieval world but integrated individual states.

In England, France and Spain it affected a more closely integrated state on nation lines. In Germany and Italy the process of integration went on, but over much more confined areas, so that in the scoundrel (end) many little states arose. But in many respects the renaissance undid the good work that had been going on in the three western states.

The Renaissance state was not a truly constitutional, much less democratic. Its essential quality was external sovereignty, which implied a strong general authority maintaining itself at any cost, chiefly with a view to strengthening the state against all its neighbors.

The statesmen of the renaissance, indeed, caught little of the spirit of antique political philosophy, whereas Greek autonomy was conceived as the only means of assuring the good life to the individual. In short, the Renaissance monarchs were concerned with politics and not in the least with ethics.

The political effect of the religious reformation of the 16<sup>th</sup> century was to give to the Renaissance state a divine sanction. The theological attitude logically implied complete toleration of religious opinions. This was not feasible arms only, but when Luther came

he made a perfect prince. It was thus possible for elector of Saxony to establish a state church.

Such a church was bound to become as exclusive and intolerant as the one it had superseded. Thus the political consequence of Luther's doctrinal onslaught upon the papacy was to atomise the world still further, and to add to the prerogative of the renaissance sovereign.

In France, Prussian and Austria despotism became complete. In France the State General, from the time of the Renaissance, met less and less frequently and it was not convened at all until the eve of the revolution. The two great characteristics of this type of despotism were a professional army and profession bureaucracy drawn generally from the middle class of bourgeoisie.

Thus the only unifying force was the crown, which sought no aid from any representative body; and so the organs of a properly constituted body politics failed to thrive by activity. That was the reason why, on the continent, the full development of constitutionalism was delayed until the 19<sup>th</sup> Century, and when it did come, it took a series of revolutions to achieve it. In England alone, Renaissance monarchy was not allowed an unchecked despotism.

### **2.1.3.1 Development in England**

England, too, had its period of despotism in the Renaissance time, but peculiar circumstances prevented it from becoming strengthened and fixed as it did on the continent. Yet there was the occasion for the setting up of the monarchy which is sometimes called the Tudor Despotism.

That, however, is a term which requires a good deal of qualification. The Tudor Despotism had three organs of government only one of which can be compared to the highly-trained bureaucracy which became a marked feature of despotic government on the continent. This was the council, which was the monarch's tool in the executive department. Its inordinate power was checked by the existence of the other two, namely,

parliament and the justices of the peace. It is true that parliament sanctioned, with the aid of the council, but the important point is that it continued to meet and to approve all legislative proposals.

Undoubtedly, the Tudor parliaments were mostly subservient, but this was because three of the five Tudor monarchs voiced the will of the nation. When the monarchs no longer embodied that will, parliament, with its entire machinery readily revolted.

The *Justices of Peace*, who locally administered the policy of the central government, were not, like the local administrators unpaid workers drawn from the landed gentry.

The insularity of the country, which freed it from the constant need of armed defense against foreign aggression and which cut it off from those forces which continued to strengthen the continental autocracy, made it possible to blend the despotism of the monarch with the deeply-rooted principle of local and central self-government.

The isolation of the state also strengthened its sense of nationalism, and this was enhanced by a series of events in the Tudors period. The first was the reformation, which transferred the headship of the church from the Pope to the English monarch and thus preserved it completely from papal interference. The second was the defeat of the Spanish Armada.

The civil war (1642-49) really destroyed whatever chance there was of establishing in England the type of enlightened despotism. The Stuart autocracy had attempted, under Charles II and James II, to raise its head once more, but it was so utterly overthrown by the Revolution of 1688-89 that any future attempt to revive the royal power was bound to fail.

Here it is necessary to emphasize two great facts connected with the Revolution of 1688. The first is that the control of affairs was effectively transferred from the king to the "*king in parliament*". The second is that this change was placed in on a statutory basis. Before this time there was no statutory law of the constitution. What was there was only customs and convention, for Magna Charta was hardly a statute. In any case, most of its

provisions became obsolete with the passing of the feudal age which produced it, the commons were glad enough to quote it as a precedent, though.

Under the Commonwealth and protectorate fully written constitutions were produced, but they passed away with the restoration. Certain financial provisions connected with the restoration had statutory force. But in any case they were included in the general revolutionary settlement.

The various statutes passed at the time of the Revolution of 1688-89 placed the sovereignty of the British state irrevocably in the hands of parliament, for the Bill of Rights and the Mutiny Act gave parliament the control of the army. By the simple device of annual supplies of money for its up-keep produced an effective prevention of tyranny. Yet this was only general legislative supervision which existed in the hands of the king and his ministers. Yet in the course of the 18<sup>th</sup> Century, by a purely conventional and finally by the end of the century, there was one added power to parliament, i.e. the control of the executive.

Meanwhile, the legal history of the state had fixed the principle known as "*the Rule of Law*" which means the equality of all citizens of whatever rank before the law. Statutes like Habeas Corpus and the Act of Settlement had secured, on the one hand, the immunity of the citizen from false imprisonment, and, on the other, the immunity of the judge from royal interference. Again, judicial decisions like that in connection with John Wilkes achieved simultaneously the security of the citizen from wrongful arrest and the subjection even of ministers of the crown to the ordinary processes of law.

Thus, by the second half of the 18<sup>th</sup> Century, Britain was a constitutional, though not a democratic, state. By conventional growth and by a series of statutes her three organs of government: legislative, executive and judicial were properly constituted and related in such a manner as to ensure the absence of tyranny.

The principle of representation was deeply rooted in this system. But no ideas of franchise extension had yet come to be accepted as practical politics. For this, the country had to wait for the combined effects of the French and industrial Revolutions.



The Britain Constitution was the result of a slow, conventional growth, not, like the others, the product of deliberate invention, resulting from a theory. Yet, though its development was not the result of a theory or theories, it was made the starting point of the political speculation which characterized the 17<sup>th</sup> and 18<sup>th</sup> centuries. Britain was thus the only constitutional state in the world. It was inevitable, therefore, that this system should become a model for the later constitutional development of other states.

### **2.1.3.2 Developments in America and France**

The political tyranny, which the Renaissance had produced and the persistence of religious intolerance which the Reformation had done nothing to ally, gave rise to an explanation of the kind of state which was to hold the field until the dawn of the 19<sup>th</sup> century. This was what is generally known as the social contract theory.

The contract theory, argues that the state is born out of compact made among a number of men who come to gather to end an intolerable state of nature. By the compact men abandon certain of their natural rights, but only those necessary for the establishment of a civil condition of society. The object of political society is, therefore, to secure that the rights not so abandoned continue to be guaranteed to the citizens. If the establishment of government is contractual, it follows that when government becomes tyrannical it breaks the contract. Citizens of such a state would, therefore, have the right to remove such a government.

The compact, according to Lock, was made between the subjects and the monarch to establish a common organ for the interpretation and execution of mans rights, as existing before the political condition was established.

In his social contract, Rousseau made a brave attempt to build up a logical and even in controvertible defense of democracy. If men were born free and yet were everywhere in chains, said Rousseau, the only means of rendering the slavery legitimate lay in the retention of the sovereign power in the hands of the individuals who had made the

contract. The contract secured equality, thereby each giving himself up to all **gave him up to none.**

This theory was literally the forerunner of two great revolutions which occurred at the end of the 18<sup>th</sup> century, one in America, and the other in France. The revolution in America was not confined to the war of Independence. It took also the form of a series of democratic changes in each of the thirteen colonies and the drafting of state constitutions which were collected and published in 1781.

The collection was translated into French and had a considerable bearing on the constitution – making, which marked the revolutionary period in France. But the influence of the war of American Independence itself and its consequences on the history of modern constitutionalism was even more striking.

The war resulted from an economic regime which the American colonists regarded as tyrannical. Their slogan was “*no taxation without representation.*” The representation of the American colonies in the parliament at Westminster at that time was a manifest impossibility. So, the American war of independence broke out and ended in the establishment of a new political entity known as the United States of America founded upon a constitution promulgated in 1787. This constitution embodied the principles enunciated in the Declaration of Independence. This is the beginning of modern documentary constitutionalism.

It would not, perhaps, be possible to assert that Rousseau’s influence was directly felt by the Americans. It would be nearer to the truth, probably, to say that the fathers of the constitution were continually informed by the same spirit as that which inspired Rousseau’s political philosophy. But, Rousseau was directly behind those who led the early movements of the French Revolution.

When the bankrupt government of France in 1789 resorted to the expedience of recalling into existence the Estates General, which had not met since 1614, it carried into the forum all the idealistic dogmas of Rousseau and his followers, and thus brought them in to practical conjunction with the promulgation of a political constitution.

The national assembly of 1789 thus drew up the “*Declaration of the Rights of Man and of Citizen*” before coming to its proper business of making a constitution. This document was saturated with the dogmas of the contractual origin of the state, sovereignty and of individual rights

The constitution, which followed in 1791, and to which this declaration was prefixed, did not last, because the legislative Assembly to which it gave birth was unaided to deal with the state of anarchy that developed within France and the state of war without.

Nevertheless, this is the second great stage in the development of modern documentary constitutionalism as the American Revolution is the first. The French ideals became what had never been in its British or even in its American form a challenge to every constituted government which did not recognize and embody the sovereignty of the people.

### **2.1.3.3 Nationalism and Liberalism as Propelling Forces**

Paradoxically, the Napoleonic regime and its consequences in Europe did the rest, for now that the principle of democracy had been fairly launched on the Continent. All that was required to give effect to the spread of constitutionalism was a sufficiently vital sense of nationalism among the various oppressed communities, to which it was addressed.

The nationalism of which we spoke in connection with the Renaissance was a vague and largely unconscious development. The nationalism, which followed the failure of the Napoleonic conquest of Europe, was a mighty fire, which first consumed the incendiary, and then smoldered, to burst into flame edifices of the old regimes. Not for nothing was the battle of Leipzig called the “Battle of the Nations” though the royal and aristocratic diplomatists who made the Treaties of 1814-15 failed to grasp the true purport of the movement, which had engulfed the pretensions of Bonaparte.

Those treaties restored, in most countries, the ancient despotisms, which the Revolution had sought to overthrow and revived most of the pre-war frontiers. Where this was not done, they cut away added areas and populations from their old allegiances and placed

them under new ones according to the dictates of power, policy or the right of the victor. The result was that the universal emergence of the national constitutional state was postponed, though it was not possible to say it was dead. Another result was that the zeal of the reformed was driven underground and burst into occasional revolts.

The diplomats who were supposed to have been in charge of the peace of Europe were concerned rather to crush this revolutionary spirit, wherever it appeared, but their hold weakened with time. In the year 1830 there was a serious revolution in most continental states. As usual, it began in France, where the restored Bourbon dynasty was overthrown and a still more limited monarchy was introduced under Louis Philippe. But this was the only movement which was attended by success at the time, with the exception of that in Belgium which led to the establishment of a new independent state under a constitutional monarchy.

Another series of revolutions in 1848 much more serious than that of 1830, showed once more the weakness of a mere liberalizing movement not founded upon national unity of the constitutions promulgated at that time. Only those of France, Sardinia, the Netherlands and Switzerland survived the reaction. Of these, the first was soon lost in the establishment of the Second Empire under Louis Napoleon, while the second persisted but feebly until it came to be associated with the unifying movement in Italy. So it was said that "*whenever French sneezes, Europe catches cold.*"

After the failures of 1848 therefore, a new turn was taken by the aspiration of the liberal reformers. Besides the obvious fact that the revolutionary method had failed, a new and very important factor was working towards the peaceful settlements of political problems. This was the effect of that vast series of changes which we call the Industrial Revolution. When this economic revolution began to work itself out in England, it was inevitable that it should have a series effect upon the political situation. It destroyed forever the preponderant weight of the agricultural classes in the community and brought into being a new middle class, the capitalists, who year by year became more insistent in their demand for political recognition

The Reform Act of 1832 granted emancipation to this class. This Act swept away many of the abuses which had accumulated through the centuries, redistributed parliament seats so as to destroy the representation of areas which had outlived their former political significance, and gave parliamentary representation to the new urban areas which had developed through the industrial changes. In doing this it enfranchised the new capitalist, though by no means introduced a complete system of democracy. It was the first step towards it, and in the right line of constitutional development, as opposed to revolutionary method.

The enfranchisement of the middle class, indeed, strengthened the cabinet system, i.e. the control of the executive by parliament, already firmly founded during the 19<sup>th</sup> century, by changing the center of political gravity from the lords to the commons and by bringing into existence a new division of parties on which the maintenance of a real cabinet system depended.

This great movement, arising from the Industrial Revolution inevitably spread to the continent. As it did so, it brought in its train consequences, which strengthened the tendency to changes on constitutional lines, for it effected an alliance between existing governments and the new capitalists who wanted above all benefits, peace and order. Moreover, it gradually tended to intensify the existing sense of nationalism by prompting a policy of economic protection.

But these industrial changes also brought into existence vast urban agglomerations of wage – earners who, in their turn, demanded political rights. In England, this led first to a working class movement known as Chartism, whose purpose was to bring pressure to bear upon the government to grant, among other things, franchise reform. When this had worked itself out without success, there came the two reform Acts of 1867 and 1884, the general effect of which was to enfranchise lodgers in the towns and agricultural laborers. But in most countries, before the political machine could be so adjusted as to grant such rights revolutionary theories were already being propounded whose object was to overthrow existing governments and establish a new form of society.

### 2.1.3.4 The Second Half of the 19<sup>th</sup> Century

The second half of the 19<sup>th</sup> Century was the heyday of documentary constitutions. With the exception of those of Great Britain and the United States, no existing constitution was older than the 19<sup>th</sup> century ones. Most of those which existed in the first half of that century have since then either entirely disappeared and replaced by new ones or so fundamentally amended and revised as to be in effect new ones.

This great surge of constitutionalism originated in the unifying movements in Italy and Germany, which were, in their turn, largely responsible for the republican constitution promulgated in France after the war of 1870 in Italy. The Sardinian Constitution was one of the only three that survived the catastrophe of 1848 Revolution. Between the years 1859 and 1870 by a series of revolts and wars the various states were amalgamated with Sardinia, and each came into the Union. The constitution of Sardinia was made to apply this Union, thus finally forming the kingdom of Italy.

In Germany, again after the failure of 1848, the pre-existing system was revived, but by means of three wars fought between 1864 and 1871, engineered and executed by the genius Bismarck. Denmark was defeated and lost the Duchies of Schleswig and Holstein; Austria was expelled from the German Confederation and the second Empire was overthrown in France.

In this way four new constitutional states emerged. In Denmark, in 1864, the Crown was forced to accept a parliamentary system, in Austria and Hungary new constitutions were drawn up in 1860, under a union of the Crowns. In Germany, the German Empire was established in 1871; and in France the Third Republic was finally constituted in 1875. Each of these constitutions adopted parliamentary institutions, which were copies, more or less revised forms of the British model. Each of them contained democratic elements but the powers of parliament were not yet such as to satisfy all the demands of liberal reform. Moreover, nationalism had triumphed only up to a point.

Nationalism became the battle – cry of the Balkan peoples, who were still oppressed under the heel of Turkey. As a result of a war between Russia and Turkey and the interest

taken by the then powers in the conflict at the congress of Berlin, two new. i.e. states Serbia and Rumania were established. Montenegro, which had maintained its independence through many centuries, was doubled in size. Greece had already secured her independence in 1832 and was being governed finally under a constitution in 1864. Abdul Hamid had proclaimed a constitution for the whole Ottoman Empire, but it had been abrogated within two years. The Young Turn Party successfully revived this constitution and made Turkey a constitutional monarchy. Taking advantage of these Turkish disturbances, Bulgaria declared her complete national independence.

Thus, under the influence of western Liberalism, the south East corner of Europe, so long oppressed by the oriental despotism of the Turks, had, by the first decade of the 20<sup>th</sup> century, adopted, at least, a form of political constitutionalism. In each case, a new state was established based on emancipation.

In no case were national aspirations fully satisfied and this fact led to the Balkan wars. Nevertheless, the second half of the 19<sup>th</sup> and the opening years of the 20<sup>th</sup> century, should how widespread the hope that national democracy might prove to be the most satisfactory ground, on which to build the progressive constructional state.

#### **2.1.3.5 The First World War**

By the eve of the first world war, in 1914, then, the national constitutional experiment was, in some form or another, being tried in every state in Europe, with the exception of Russia where attempts at constitutionalism had gone no further than the establishment of partially elected Assembly (the Duma), which from its inception in 1906 became weaker rather than stronger. Nor was constitutionalism confined to Europe, the United States and the British self-governing Dominions. It had spread also to many outlying parts of the earth, south America, Japan, and even to China.

This constitutionalism was always molded either on the British model or on the variant form of which adopted by the United States. This is to say it established representative institutions and made the nation the basis of the state. Where a nation could not be said to exist, as in China, the constitutional trend nurtured the growth off nationalism and used it

as a political platform. Yet, political constitutionalism had in most cases still further to go in the matter of representative democracy and nationalism.

If history proved, as it seemed, that nationalism was the only firm foundation for constitutional rights, the sole question was whether the so far unfulfilled dreams of national unity could be realized by peaceful means or whether it would require a catastrophe to bring their realization. At all events, whether the catastrophe was necessary or not, it dubitably occurred when war broke out in 1914. Moreover, there were some states in which, though they possessed a constitution, the political organization could not be called democratic, especially in the absence of popular control of the executive, which was particularly true of Germany,

It is not surprising, therefore, that a war fought, as Woodrow Wilson said, to make the world safe for democracy, should have had, as one of the most marked features of its aftermath, a rich harvest of constitutionalism. The victors asserted that a lasting peace could be founded only on the basis of the self – determination of peoples, which meant that the suppressed nationalities should so far as this was practicable establish themselves as independent bodies on a national basis. The application of this principle involved the partial or complete break-up of four great Empires; Germany, Austria, Russia, and Turkey which the war itself had already achieved.

The peace treaties created new sovereign states like Finland, Estonia, Latvia, Lithuania, Poland, and Czechoslovakia; dismembered others like Germany and Austria; and Enlarged yet others like Serbia ( called Yugoslavia in its enlarged form ) and Rumania. A new documentary constitution in each case cropped up from these changes. Personal liberty, popular sovereignty and nationality were the characteristics of the constitutions of all these constitutions. They all had without exception adopted the British plan of parliamentary control of the executive with certain variations, though many of them even went further in matters of universal suffrage. So far as could be achieved, democracy had certainly triumphed. With due regard to the exigencies of strategy and economic stability, nationality may also be said to have triumphed.



A yet further development of constitutionalism which was born out of the result of the First World War is the establishment of the League of Nations. Here, for the first time in history was an organization of many states under a definitely constituted body of rules and set of organs. The League was at once empirical and experimental in the constitutional practice of the states that formed it. We call it a constitutional experiment, not because it was an independent body with sovereign powers, (for that it certainly was not) but because it aimed, by constitutional means, at preventing or peacefully settling conflicts between the sovereign bodies that were its members. It was, therefore, in line with the constitutional progress that had up to then been achieved by most western states.

### **2.1.3.6 The Backlashes**

In the immediate post-war period, it seemed that nationalism, representative democracy had joined to achieve an almost universal victory for the rights of man and the rule of law, and that the lessons of political constitutionalism were to be at last successfully applied to the solution of the problem of world peace.

Unfortunately it was soon to be forcibly demonstrated that political charters of themselves are not enough, unless the will to make them work is not present among the people for whose benefit they are designed. Unconstitutional practices will inevitably be adopted to nullify them. Therefore, it was that in the years following the settlement of the First World War, an authoritarian reaction against democratic constitutionalism occurred in several European states.

The Russians were the first to repudiate political constitutionalism. The Russian Revolution of 1917 passed through two phases. First the political or liberal revolution in March, which destroyed the Tsarist autocracy and established a republic constitution with a parliament (Duma) and cabinet modeled broadly on the French pattern. Secondly, the October or Bolshevik Revolution, overthrew the Duma and establish the Worker's Republic.

In 1918, Lenin had produced a constitution, which was prefaced by a "*Declaration of the Rights of the Laboring and Exploited peoples*" a phrase that clearly indicated the nature

of the Russian Brand of Western constitutionalism. As an application, of the doctrines of Marx, the new regime in Russia was concerned with establishing not the constitutional rule of the majority but the Dictatorship of the Proletariat, which Stalin, elaborating the original thesis of Lenin characterized as the “*dictatorship of the Communist Party as the force which guides the Proletariat*”.

There was thus in Soviet Union two elements which distinguished it from constitutional State, as we had been informed of so far – first, a political dictatorship through the dominance of a single party to the exclusion of all others. Second, a totalitarian system, which is meant to use the political machine to control and direct every aspect of the economic, social and even religious life of the people. These features of dictatorship and totalitarianism characterized Mussolini’s regime in Italy and Hitler’s Third Reich in Germany.

In October, 1922, when the Fascist militia marched on Rome, the king, to avoid civil war, invited Mussolini to form a cabinet. The cabinet having been formed, the Chamber of Deputies, to save itself from immediate dissolution granted Mussolini special powers. From that moment on Mussolini gave himself the high-sounding title of Duke, gradually undermining the constitutional system under which Italy had lived for more than half a century. The electoral law was modified so as to produce an artificial Fascist majority in parliament and soon all other parties were suppressed and the Fascist Grand Council, which embodied the Duke’s will became the only effective organ of government. At the same time, Mussolini abolished all associations whether social political or cultural, which did not subscribe to the theory and practice of Fascism.

In Germany, Hitler and the National Socialism came into power in January, 1933. Here again the plot to overthrow the parliamentary system was at first covered with a constitutional cloak. Till then Germany had been governed under the constitution of the Weimar Republic, founded in 19...

Hitler accepted the chancellorship-i.e., the Office of Prime Minister at the hands of the President of the Republic. At no time did Hitler denounce that constitution but using the plenary powers granted to him by the Reichstag and approved by the President, rapidly

destroyed the foundations of the constitutional state. He forcibly dissolved all other parties, excepting his own, i.e., the National Socialist Party. The many employer's associations and trade unions were dissolved and were replaced by the state-controlled Labor Front. All independent opinion was suppressed and the press became the tool of the Nazi Party.

To justify the regime, the whole fabric of Hitler Germany was bolstered by a pseudo-philosophy of the state which argued that the Nazi Party was synonymous with the German Nation, and the Western Democracy was an outworn creed. But in truth, Nazism, as one of Hitler's renegade followers said, was nothing more than "*a doctrine [with] less nihilism*".

The success of dictatorship in Italy and Germany had a disastrous effect on the political constitutionalism of neighboring states. And this was especially true of Spain, where in 1932, only a year before Hitler's assumption of power, a new constitution had been promulgated.

It was against this constitution that General Franco revolted in 1936, and for three years Spain was a prey to civil war. Franco finally crushed the Republicans in the spring of 1939 and established his dictatorship.

In almost all States of Europe, there were cells of Nazi propaganda, and it was only with the greatest difficulty that, in the few years of a precarious peace, such states as Belgium and the Netherlands, Denmark and Czechoslovakia could maintain their parliamentary institutions. Most of the others succumbed to Hitler's force or cajolery and allowed their constitutional safeguards to be whittled away by some form of dictatorship. Then Hitler began his series of open aggression, which in 1939 brought the western democracies into arms against him, and the Second World War began.

## **2.1.3.7 World War II and Thereafter**

### **2.1.3.7.1 Consequences of the Second World War**

The political consequences of the Second World War are proving to be even more complex and disruptive than those of the first. The result is a complete shifting of the centers of world power. Control has passed from western and central Europe into the hands of two super-powers, the United States and Russia. In this new situation remarkable constitutional changes have already occurred and are still taking place.

In Europe, the defeat of Germany and Italy ended the Nazi and Fascist regimes, although it did not succeed in wholly eradicating the disturbing authoritarian systems in Spain and Portugal. The liberation of the Nazi-occupied countries by the confuering armies from west and east had strangely different results in various parts of the continent. In the west, north and south it led to the restoration of parliamentary democracy in France (first under the fourth Republic, and later modified under the fourth Republic), in Italy (where a republic replaced the monarchy), in the Netherlands, Belgium, Norway, and Denmark (where the royal families were reinstated). In the centre, German was divided into four zones each controlled by one of the occupying powers: the United States, Britain and France in the west and soviet Russia in the East. Later, the three western powers agreed to the establishment in their zones of the Germany Federal Republic, with a parliamentary constitution and the occupation virtually ceased. At the same time, Russia, in her zone, established the German Democratic Republic, which, however, she continued to dominate.

The peculiar circumstances and timing of the two- way confutes of Hitler's Europe made Russia the liberator of the lands on her western border. These were Poland, Czechoslovakia, Hungary, Rumania, and Bulgaria. Here was an opportunity to spread the communist power which Russia could not miss. In each of these countries, therefore, she gave armed support to communist minorities and was thus able to force on all them a communist regime with a constitution largely based on the Soviet model.

While the former U.S.S.R. was using its newly-found strength to establish its communist domination of Eastern Europe, the U.S.A by means of the Marshall plan, helped democratic notions of the west to recover economically from the effects of the war. These moves led to a drawing together of European democratic nations of the west to recover economically from the effects of the war. These moves led to a drawing together of European democratic states in various international organizations. Of these, probably the most significant is the European Economic Community, or common market, because it has political and constitutional implications.

Another vital consideration in the new world situation arises from the fact that the states of western Europe which had established Empires overseas were so weakened by the two waves that they have lost, or are steadily losing their former hold on their colonies or dependencies, with the result that new independent states, with their own political constitution have arisen or soon will emerge in Asia and Africa as well as in the Caribbean. These movements, taken together with those inspired by the militant nationalism of the peoples of the Middle East, are creating constitutional factors of incalculable import in a rapidly changing world.

The attempt to apply constitutional method to international relation after the First World War had failed to prevent a second world war. The end of the Second World War offered the victors a new opportunity to attempt to find the means of maintaining world peace and security through a permanently constituted international organization. Here again, however, we should think rather in terms of the cumulative effect of the two wars. The charter of the United Nations clearly derived a good deal of inspiration from the covenant of the League of Nations.

## **Summary**

What, then, emerges from this historical sketch? First, that constitutional politics cannot possibly be understood without reference to the respective and related histories. Every epoch that we have touched has supplied its quota to the existing whole. Greek constitution gave political philosophy and its inspiration opened men's minds to the finer purpose of political organization. Roman constitutionalism gave western world the reality

of law and the ideal of unity. Feudalism bridged the gulf between the chaos following the fall of the Roman Empire in the west and the emergence of the modern state. The progress of centralization through the crown in England, France and Spain during the Middle Ages was necessary to destroy the evils of feudalism and to lay the foundations of a national policy, while the growth of partially representative institutions in those countries marked in Western Europe the first faint beginnings of the democratic state.

The Renaissance carried forward the centralizing process in the west of Europe and planted yet more securely the seed of nationalism there. English constitutionalism supplied a continuity of life to liberal institutions through many centuries where they were dead or had never lived, permitted the growth of its own institutions among those communities in all parts of the world of which England herself was the mother and supplied the pattern of a constitution when the moment came for any newly-liberated community to found one.

The American and the French Revolutions gave the modern world the first examples of documentary constitutions, thus finding an immediate way of reconciling liberty and authority, the rights of man and organized movement. The 19<sup>th</sup> century saw the ideals of liberal reform and nationalism struggling for recognition, and their partial retaliation in political forms. The industrial Revolution intensified both nationalism and constitutional reform, first by fostering the policy of economic protection and then by extension of the franchise and the organization of national parties. The first World War gave a tremendous incentive to constitutionalism by destroying the illiberal governments, by creating new states out of hitherto oppressed nationalities, by establishing constitutions on the basis of nationalism and democracy and finally by creating the will to international peace of constitutional lines through the establishment of the League of Nations. But in the succeeding years there was a violent reaction against political constitutionalism, and the Russian Revolution of 1917 was followed by the fascist outbreak in Italy, the Nazi upheaval in Germany, and the victory of Franco over the Republicans in Spain, while the nations of Eastern Europe generally tended under Nazi and Fascist influences, to sacrifice the constitutional safeguards they had so recently won. The Second World War left a complex and menacing situation for the national democratic constitutionalism of the west

which has to meet not only the challenge of communism but the danger of a resurgence of fascism and the incalculable effects of emergent Afro Asian nationalism.

The second fact which should emerge from this sketch is that national democratic constitutionalism, ancient though its origins may be, is still in an experimental stage and that if it is to survive in competition with more revolutionary types of government, we must be prepared constantly to adopt it to the ever-changing conditions of modern society.

The basic purpose of a political constitution is, after all, the same whatever form it takes to secure social peace and progress, safeguard individual rights and promote national well-being.

## **2.2 Developments in Ethiopia**

### **2.2.1 Attempts in Developing the Ethiopian Nation-State**

Society is the product of man's instinctive desire for association. Association, in turn is expressed in terms of an aggregation or assemblage of people having common interests and uniting together by "*consciousness of the wind*," They establish functional institutions for the realization of those common purposes, be they religious economic or political. When man finds himself in such a situation, then as aptly said by Aristotle, man becomes "*a social animal*." It is said that social relations are threads of life and social institutions are the looms on which those threads are woven to make the social garment. The entire scheme of life is an interwoven state of affairs for the attainment of the various purposes of life, among which one is political life, which itself is a political institution and by which political actions are undertaken.

When such aggregate of people start living a settled life in a more or less definite territory to realize these purposes of life, man in a way becomes "*a political animal*." the activity culminates in the creation of a state. Gabriel Almond's definition of the concept of state seems to be fitting here, he defines it as,

*“ ....that system of interaction to be found in all independent society which perform the function of integration and adoption (both internally and externally) by means of the employment, or threat of employment of legitimate physical compulsion.”*

The central notion in such human grouping or state is the existence of power relationship between and among individuals and institutions. It is this very relationship that is the *raison d'être* of all political institutions. In this respect institution may be defined as “an idea of an undertaking which is realized and which persists in a social environment”.<sup>3</sup> It is its endurance and permanence in a social matrix that makes an institution distinct from other social factors, for all social facts are not institutions. Institutions may take the form of either “*institutions personnes*”, i.e. groups of human beings and establishment; and “institution of things and concepts. Law, as an institution, attached to state falls in the latter category. Law in the widest sense of the term may be identified as “*The sum of the conditions of social life .... as secured by the power of the state through the means of external compulsion.*”<sup>5</sup>

Law may be a direct reflection of social, economic and political relationships of a society existing at a definite point of time and in a particular place. It may, as well, serve as an instrument of change or may be regarded as an agency of formal control. It may, more often than not, have any one of these or some or all of them. The point is that law is one among many institutions of social life. Constitution, as a foundation of the political order, forms one department of law-in fact the supreme law.

For our purpose one may start from the postulate that constitution is a mechanism by or a channel through which political power is converted into an institution of the state, as a consequence of which power is structured. Because of this nexus between state, power and law, constitution does not only govern the relationship between the governed and the government (government understood as the agency or machinery of the state), but also lays down the basis and justification of state and government, as juridical concept and structure<sup>6</sup>. Seen from this vantage point, a constitution is none other than the “*institutionalization of power*”, in accordance with which authority is exercised and whose limitations are those set down by itself.



The nineteenth century Ethiopia was marked by the era of princes. Each region having its own kind, ruler or chieftain had been in a state of war with one another as much with the authority of imperial power of the centre. In fact, as one goes from the centre to the periphery, power of the centre seems to fade away gradually. The imperial authority of the centre was subject to the perennial tendency of certain regional warlords to become endowed with an aura of legitimacy in their own right, which poses a central theme in Ethiopian politics, i.e. persisting dualism-centralization and regionalism.<sup>2</sup>

The tendency towards centralization and the formation of nation-state picked up pace in the second half of the nineteenth century.<sup>12</sup> Parallel to this, another set of events was at its full swing-colonialism. By the beginning of the twentieth century all the surrounding areas had fallen under the different colonial powers<sup>13</sup>. Both as counter-reaction and as a power in her own right, Ethiopia expanded through conquest to more than half of her original size. The eastern, southern and a portion of the western regions of present-day Ethiopia were thus incorporated, into the Empire. If colonialism has not influenced Ethiopian social political and legal institutions it can be said that it has done so to a significant degree, at least by default, as, for instance, the territorial definition of Ethiopia.<sup>13</sup>

In 1896, the Italian attempt to colonize Ethiopia collapsed at the battle of Adwa. The socio-economic system prevailing at that time in Ethiopia can safely be characterized as aristocratic and patriarchal, at national, village and family levels. In 1929 there were patches of urban and communal way of life. The people living in the most of the newly conquered areas have been dispossessed of their lands and were reduced to the status of tenancy. In the rest of the country, i.e. in the North and central Ethiopia, land- lordism was grafted on family joint land ownership system in the form of curfew, tribute or tax. The social and economic condition which typifies this period was dualism small and very few urban areas on the one hand and enclaves of modern agricultural undertakings upon which a huge rural subsistence sector was super-imposed on top of which the imperial house, the nobility and the high clergy formed the optic of the power structure. It was not a simple, dualism, though. Varying degrees of disengagement of political social, and economic activities from divergent traditional social structures and processes of

production have resulted in a wide variety of physical, political, social, economic, technological and legal distance between and among individuals, groups, and regions. Blood relationship with Christ in the House of David,<sup>19</sup> all the promises of the Bible and the honor of being a chosen nation (Israel) were, thus inherited by Ethiopia and for the Solomonic Dynasty, it legitimized its rule and helped inculcate its divinity and supremacy in the minds of its subjects so much so that it served as a powerful unchallenged source of authority for nearly two thousand years as the most venerated institution compared may be only to the Emperor of Japan.<sup>20</sup>

The imperial omnipotence was beautifully elucidated by an Ethiopian historian in the following words:

*“The kings of Abyssinia<sup>21</sup> are above all laws, they are supreme in all causes, ecclesiastical and civil, the land and persons are equally their property -----if (one) bears a high rank it is by the kings gift”<sup>22</sup>*

The super-human virtue attributed to him by the royal ideology manifested itself in the belief that his mere presence guaranteed order by virtue inherent in the person of the king. The person of the Emperor provided also a common symbol for national unity. The nobility, as a class and individually were totally dependent on the Emperor for the acquisition, of land, office and title, which confer status and dignity – highly cherished things in Ethiopia. So was the continued possession of them made contingent on the sovereign’s caprice.

The Emperor’s position at the pinnacle of power was so pervasive that he was the sole arbiter and source of governmental action, whatever this may constitute. In short, “Flowed from and was maintained by the grace of the emperor and from his subjects he “received habitual obedience”<sup>23</sup> in the same line Burke, the protagonist of tradition, supported institution of this kind by the following remarkable paragraph.

*“The science of constructing a commonwealth, or renovating it, or reforming it as like every other experimental science, not to be though a prior:-----it is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purpose of society----”<sup>24</sup>*

The point is not traditional institutions ought not to be destroyed, but to underscore the importance of the role that such institutions play in the process of nation building for that matter in the emergence and development of legal institution.

If monarchy is a typical form of government in traditional society, the nobility and landed gentry are the concomitant adjunct of the ruling block.

### **A. The Nobility**

As shown above, the mere presence of the king was seen as a precondition for civil order, the existence of the “*Mekuanent*” and the “*Kahenat*” (the nobility and the clergy, respectively) was, likewise, upheld as another significant factor for the maintenance of the status quo. The class of nobility consisted of the royal nobility,<sup>25</sup> landed gentry and the high clergy. Like the king, their power was all encompassing with respect to the particular material and local jurisdiction.

Status was made dependent on the possession of three dimensional factors, i.e. land governmental office and honorific title, which inclined to reinforce one another. More importantly, they were vassals of the king, whose benefices could be withdrawn *inter vivo* or *morti causa*, at his pleasure.

Thus titles were made and unmade by the traditional prerogative of the Emperor known as “*Shum-Shir*” (appointee demotion) a very counter productive practice which goes against the principle of permanency and stability. Conversely, however, it was a blessing in disguise, for room was left for the nobility to become a closed, hereditary estate capable of forging a corporate identity of its own.

One other contingent class of the nobility was the high office of the clergy<sup>25</sup> whose attribute can better be observed with another basic traditional institution of the Ethiopian polity, i.e. the church.

## **B. The Church**

Constitutionally, church and state were, in form and in essence, one and the same thing in traditional Ethiopian polity. Their respective source of authority was different. The king's authority emanated from Solomoic, king David and Jerusalem, whereas that of the "Abuna", the patriarch, was appointed by the patriarch of Alexandria,<sup>27</sup> Egypt. All the same, the fortunes of the Solomonic Dynasty were interwoven by historical associations and mutual interest with those of the church. The Emperor and the church working together "provided the unifying elements which continually countered the centrifugal forces of geography, ethnicity and aristocracy".<sup>28</sup>

The patriarch sat in "*solemn significance*" upon the Emperor's right hand at all public occasions. He alone could crown the Emperor, though, he makes his submission immediately after his most import functions were completed; this includes blessing the altar, ex-communicating<sup>29</sup> rebels, commanding obedience, tendering oath for allegiance to the Emperor and intervening for clemency.

For restoring the Solomonic Dynasty from usurpation, the church was awarded one third of the land in perpetuity to the emissary, Saint Tekla Haimanot for the maintenance of his office, the support of the church and the clergy. This may be too much, because of the fact that a good portion of the arable land was owned by the church is not so for contributed authoritatively. All these go to show that the high clergy constituted a sub-class of the nobility; and the church was an inalienable institutional partner of the crown. The problem stated: unlike the kings of England or France, the monarchy of Ethiopia, which claimed at least two thousand years of more or less unbroken rule, actually failed to build up any kind of administrative framework, though.

The first attempt made in this direction was the establishment of ministerial office in 1908 and the promulgation of the 1931 constitution. It is the latter which deserves consideration here.

### 2.2.2.1 The 1931 Constitution: the Japanese Paradigm

The Meiji Constitution was conceived as a benevolent gift of the Emperor of Japan to his people. The emperor embodied the state itself and was the source and repository of all state power. The myth of legitimating claimed that ruling Japan had been entrusted to the Emperor through his ancestors from Amaterase Omikami, the son Godess.<sup>4</sup>

The most novel aspect of the Meiji constitution was its bi-cameral nature. The House of peers, the Upper House, consisted of members from the imperial nobility, marques, lower nobility, the imperial Academy and high taxpayers. The House of Representative was popularly elected from constituencies<sup>5</sup>. The Emperor had veto power over any executive acts and enactments.

The Emperor had the prerogative to determine the organization of all organs of administration, pursuant to which the cabinet<sup>6</sup> headed by the prime Minister was appointed by the Emperor on the advice of elder statesmen. Judicial authority was, in similar manner, vested in the sovereign power of the Emperor.

The social-structure and the corresponding political configuration of Japanese society at the close of the 19<sup>th</sup> century were very much in line with that of Ethiopia as can be abstracted from the above bird's eye-view exposition.

There were some very few foreign educated men who had limited access to the ears of the Emperor. One such person<sup>7</sup> was entrusted with the responsibility of drafting a constitution, which he did, relying heavily on the aforementioned constitution of Japan, which was provided for him by the Japanese legation. <sup>8</sup>The Emperor with the advice of the nobility promulgated what is aid to be the first written constitution of Ethiopia.

The first and foremost political dynamics of that period was centralization with a view to build a nation–state. Naturally, that was what was sought from the model. Japan with homogenous people, speaking the same mother tongue, by and large following one religion and with strong affinity to tradition can be nothing, but an ideal paradigm for Ethiopia for extrapolation. And that was what the constitution did. The constitution was

meant to serve as an instrument of centralization under the Emperor, reflecting the traditional institution of absolute imperial power without any limitation and modification. The point to take notice of for student of law is primarily the fact that the constitution laid down the formal basis for the process of centralization and for the institutionalization of administrative machinery. The constitution was not intended to serve as an instrument of modernization, albeit the establishment of parliament, which had, but only the power of discussion.

All said, this constitution is nothing less or nothing more than a mere confirmation of the powers and prerogatives of the Emperor, which he would, in any case have exercised.

At this particular historical juncture, where there was little of modernism and yet so much was wanting, the Italians invaded the country forty years after their first attempt had failed. This time they got Ethiopia all in shambles.<sup>9</sup> Yet, the people put up a fight – protracted guerrilla warfare. After five years of occupation, Italy was defeated with the support of the Allied forces.<sup>10</sup>

After the war of liberation two trends were set in motion-the continuation of the process of modernization and the reorganization of the status quo. As regards the former, the legal order was established, new laws were enacted and the corresponding political structures were either reorganized or new ones were established. The powers and duties of the various organs of government were better articulated and administrative units redefined. Parallel to this, the old order was renovating and institutionalizing itself in the direction of constitutional monarchy.

The train of events in favor of modernization was further enhanced by the federation of Eritrea with Ethiopia by the Resolution of United Nations. The inadequacies of the 1931 constitution became more than apparent; rather it became glaringly clear in the face of the new political climate.

Hence, if the 1931 constitution was a benevolent gift of the Emperor, the revised constitution of 1955 was largely the cumulative and resultant effect of external and internal pressure that was brought to bear on the status quo.

The fact that power is the control over resources taken to encompass all sorts of political, economic and cultural spheres of social life have been reiterated as a basic postulate and were dealt with above. The other element that may be introduced at this juncture is the question of the *elite*. Purpose, is the emergence, development and the role of “*traditional*” and the “*new*”, in the centre of the political structure.

By the 1950s there were a good number of educated elite in Ethiopia. Most of them were oriented towards Western Europe type of democracy. Together with this and sometimes standing against this group, there were the traditional elites, who stood for the maintenance of the old order – the crown, the church, the land system and Ethiopianism – isolation and independence. The compromise was sought in the English system of government to which both members of the *old* and the *new elite* turned their eyes.

#### **2.2.2.2 The 1955 Revised Constitution: the Westminster Paradigm and the Aborted Reform thereof**

The West Minister model is a political theory and a constitutional framework brewed and distilled on the English soil and operating to date in the United Kingdom and mainly in the commonwealth<sup>12</sup> countries.

In the background of the model, there is, politically speaking, the belief or commitment in non-violent evolutionary or gradual development. The model itself composes the following basic elements. Firstly, they continued devolution of power to formulate governmental policy from the sovereign body to the various departments of government. The sovereign body here means the Crown in parliament, and parliament, in turn, constitutes the House of lords, composed of the Crown appointees and the house of commons, an elected body. Secondly, is an elected government coming out of party, holding a majority seat in parliament and constituting a cabinet of which the Prime Minister is the Head of Government Thirdly, popular will expressed., not only formally through parliament, but also through other agencies of interest articulation, which are a *faci* for political expression and association. Finally, all theses are accompanied by a strong and independent judiciary, which does not only interpret laws, but also sets down

new laws by way of predicament. The hybrid intelligential brooding under the Emperor thus managed to hatch a constitution modeled after the British Government.

The ruling body did not want to declare a new constitution for obvious reason. Instead, they christened the 1931 constitution as the Revised Constitution of 1955. This constitution, like any other constitution, defined and distributed powers, rights and obligations within the Empire, notably between the Emperor who had the most *self sufficient* source of political authority, on the one hand, the rest of branches of government (which enjoy derivative power, either or both from the crown and the people), on the other, and finally the constitution had also incorporate, the basic tenets of fundamental human and political rights from the united Nation Universal Declaration of Human Rights<sup>13</sup> to which Ethiopia was, then a signatory, which did not matter much, for it was a mere declaration, not a convention.

The Emperor held a pre-eminent place in the constitution.<sup>14</sup> He stood apart from other agencies of government and at the same time, he was the embodiment of them all; and as such he enjoyed a lot of executive, legislative and judiciary prerogatives. There were others with respect to which he shared power also. The provision among others, which prompted the writer to make assertion of this kind, runs as follows:

*“the sovereignty of the Empire is vested in the Emperor and the supreme authority over all the affairs of the Empire is exercised by him as a Head of state, in the manner provided for in the present constitution”<sup>14</sup>*

This time his power seemed to have been circumscribed by the terms of the constitution, nominally, though. The Emperor is most closely connected with the executive, with respect to which he had power to appoint and dismiss all officials including the prime Minister and members of the cabinet, for they owe their position and were answerable to him and to him only. The power to determine the organization and jurisdiction of government departments, as well as to constitute the civil service belonged to him. He had wide discretionary power concerning foreign policy.



Although the cabinet and the members had some limited constitutional powers in their own right, the office of the Prime Minister and that of the ministers were adjuncts of the Emperor with no organic linkage to the legislative body.

The legislative body was bi-cameral: Senators were appointed from the nobility and a few from the commons for their meritorious achievements, while the Deputies were directly elected from equally populated constituencies. Election was made purely on personal basis, for there was none in the nature of political party. Member of Parliament enjoyed, constitutionally, some privileges such as free debate, immunity from arrest<sup>14</sup>. They had also the power only to call the prime Minister or other ministers to answer questions concerning the conduct of government affairs or legislative proposals. Essentially, the cabinet, particularly the Prime Minister stood between the Emperor and the Parliament-stood may be as liaison officer.

The judiciary was appointed by the Emperor, subject to a special law, which was yet to come and which was supposed to regulate manner of selection, tenure, appointment and dismissal. Judges were to submit to no other authority”, but to the law- law in the absence of contrary stipulation, presumably included the constitution.<sup>44</sup> The Emperor had also judicial function, in the capacity of final appellate court of equity,<sup>45</sup> may be comparable to that of the Queen’s Bench. Other than this, the Emperor had a sort of umbrella power of “maintaining justice through courts”.<sup>15</sup>

Finally, the constitution was declared to be the supreme law of the Empire and as such, acts or enactments which were found inconsistent with the constitution were rendered null and void.

In the annals of Ethiopian history, it was this constitution, which for the first time, articulated the power structure of the Ethiopian polity and it was this same document which spelt out fundamental rights of citizens. None the less, it was prerogatives and other powers of the emperor which, even his over appointee, felt intolerable and which the people found too heavy to shoulder.

1. The 1960 failed *coup des etats* had been a clear sign for the reform of his government, but He believed He has done away with the actors as well as the effects.
2. Some attempted reforms were however taken. One such attempt was to empower the Prime Minister as per Order 44, to nominate the members of his cabinets; yet, he had to get the approval of the Emperor. This too failed to meet the needs of the time.
3. In the eyes of the then elites one of the primordial needs of the time was the establishment of parliamentary form of government maintaining the Crown as a symbol.
4. By early 1974, events started to take a different course; the entire cabinet of Aklilu Habtewold resigned and a creeping coup was set in motion.
5. A new cabinet was established under Endalkachew Mekonnen, which was, among other things one major step, established a *constitution revision commission*. The commission managed to come up with a draft, which appeared in one of the daily papers.
6. The draft was modeled after what could be characterized as Constitutional Monarchy of Western Democracy with separation of power and controlling mechanisms. The Emperor as Head of State had only one effective power only – Commander-in-Chief of the army. The draft was not ratified; instead a new government was established by September of the same year – the P.M.A.C.

### **2.2.2.3 The 1974 Revolution and the 1987 Constitution: the Soviet Paradigm**

The given system could have been saved, had the appropriate reform measures been taken, like for instance, making the prime Ministers accountable to the Parliament and introducing economic reforms, more particularly, agrarian reform. These and other measures supplanted by the political legitimacy the monarchy enjoyed would have had ameliorated some of the major problems that beset the society.

Eritrea had been reduced to a mere provincial status from a federal unit by imperial order secessionist forces were out in the field picking up arms. In the southern part of the country the conflict between landlords and tenants had escalated to a point of bursting

into flame. There was general discontentment among the urban population and in particular among the disenchanting intelligentsia. In short class contradictions were polarized. Conflicts were escalating. Yet, the Ethiopian ruling class, including its head, the Emperor stood blind of the smoldering volcano that lay beneath their feet and on which they rested quite assured. Ethiopia was thus on the brink of bursting into revolution.

*“Equality, liberty and fraternity”* was the motto of the French Revolution: *“Down with Tsarism”* was the Russians. In Ethiopia the slogan was *“Down with Feudalism, up with Socialism”*. The slogan against feudalism meant the destruction of the imperial order – the crown, the nobility and the landed gentry. Socialism, on the other hand, meant land to the peasants, right of nations and nationalities to self determination. In general it was a cry for equality, equal opportunity and access to resources.

The lower rank of the new elite constituting the professionals, vocationals, workers and students together with the lower ranks and non commissioned officers took up the political stage, headed by the military; the Provisional Military Administration.<sup>47</sup> It was said then: *“The Revolution has been hijacked”*.

Rural and urban lands were nationalized. All production and distribution, private enterprises, including rental houses were brought under the ownership and control of the state. The Emperor, along with ministers, governors, the high nobility and the top brass were executed, the rest were detained. *Red Terror* was unleashed against opposition and even against individual dissenters. In short, the Russian model of revolution and socialism were in the making; what made different the Ethiopian case was that military dictatorship was combined and commingled with totalitarianism of the Soviet type.<sup>48</sup> In line with the soviet system, but which is said to be more appropriate for a socio-economic system of our kind, the military adopted *Revolutionary Democracy* and then *Peoples Democratic Republic*.<sup>49</sup>

By the vigor of the locomotive of history or by sudden and unexpected turn of events the Socialist Revolution took place, for the first time in the history of the world on the soil of Russia. To this extent and in addition to what had been supplied by Marxist ideology

itself, Socialism, as reflected in the Soviet model, had considerable imprints of the political and social structure of Tsarist Russia contrary to what many would like to view it. Unfortunately, however, Soviet socialism is to a degree, a continuum of the past. Tsarism represented in history as one of the most absolute and pervasive form of autocracy, ever existed, whose role had been assumed by the totalitarian soviet socialist state. The Russian Orthodox Church was the mainstay of the monarch, provider of ideology, and stakeholder in the semi- feudal, semi-capitalist economic structure of Tsarist Russia, a role which was “no rule of law”, neither was there a trace of separation of power. Under socialism there is no rule of law, but socialist legality”,<sup>51</sup> no separation of power, but unity of state power. Although the above assertion suffers from all sorts of weaknesses that are associated with all gross generalizations, but to have an over all view of the two systems, it does help to look at the contrast the socialist state presents vis-à-vis the state under Tsarism.

Soviets were organizational cells formed at factory and local levels and served as a focus of the Russian Revolution. After the Revolution, the Soviets were structured and institutionalized. Both the 1918 and 1924 Constitution of Russia envisaged Soviets as the creators of the Soviet state and in which the concentration of the entire and complete authority was manifested. The soviets were the organ of the proletarian dictatorship, which meant that they were organs of the Communist Party of the U.S.S.R. Soviet of workers deputies were, ipso facto, the prototype of the soviet authority-that is to say state authority. The guiding principles of soviet states were embodied in socialist legality, from which the nature and function of soviet law could be deduced. The following paragraph articulates this very basic interrelationship:

*“In Soviet law such a single and general principle is that of socialism – the principle of a socialist economic and social system resting on socialist property, distribution in proportion to labor...”<sup>52</sup>*

The content of Soviet Law was made up, not of *corpus juris Remani*, but out of revolutionary legal consciousness, which depended on the interest of the people. From this, three fundamental propositions have to be brought to the forefront for better understanding of the soviet political and legal typology.

1. In the Soviet system one observes the progressive elimination of civil legal relationship and the broadening of the horizon of public law. This policy had been articulated and underscored as early as 1922. Lenin declared that “(we) *acknowledge nothing as private. For us everything in the province of economic is the domain of public law...*”<sup>53</sup> The object of public law was the study of legal norms and institutions which reflect, confirm and develop the state and the social order, the principle that governed the interaction as well as the definition of the rights and duties of the individual both in relation to state and to one another.<sup>54</sup> Generally speaking Soviet public law used to study the socialist order – the order that governed the society and the state. More precisely it did not only study the juridical nature of the state, but the socio-economic nature as the foundation and determinate of the juridical properties and the peculiar institutions of public law itself. In this sense, it was taken to mean all branches of law; more specifically, it meant the constitution. In the main, the constitution of the U.S.S.R. defined the state and the state structure, which would lead us to the second proposition.
2. The second most important postulate enshrined in the Soviet conception of laws is the unity and totalitarian nature of the Socialist State.  
Modern constitutional theorists invariably hold that the doctrine of the separation of power is the single most important aspect of democratic institutional arrangement of the political structure. Montesquieu assumed that there are “three sorts of power in government: the legislative (law making), the judiciary (interpreting dispute settling, and the executive (foreign relation, public security and law enforcing).<sup>55</sup> As to how separate they should be is something that was not contemplated by Montesquieu. The framers of U.S. constitution took it to mean a government where the three branches exercise control over each other through a system of check and balances among and between the president, the congress and the courts. In France, the expression was taken in a more literal sense of the word- i.e. keeping the three organ of government more insulated from each other. Courts are not for instance, allowed to exercise any jurisdiction to review the legality or constitutionality of legislative enactment, nor are they to condemn, acts of the executive as unconstitutional.

3. The third category of concept which served as a foundation upon which the entire edifice of the Soviet polity was built is socialist property relationship. The *corpus jurist Romani*, according to Vishinski, is the gospel of capitalist society which rests on private property. After and by the revolution the hitherto existing property relations had been completely transformed. Among the relationship individual ownership constituted the widest possible right that one can have i.e. *uses, fructus* and *abusus*. The entire property relation and in particular individual right was, thus completely annihilated. The panacea for exploitation was thought to be achieved by the total abolishment of private property and its replacement by socialized property and labor relationship. Consequently, the main form of property relationship in socialist society was state ownership.<sup>57</sup> The state as a corporate body represented the proletariat. Individual persons and corporate bodies might have “use-right” over land for instance, but no one except the state would have ownership right, as conceived in the true sense of the word. The concept referred to as “use-right” is analogous to what is known as usufruct in private economies and it is devoid of or shorn off the right to dispose. The right to dispose of a property is a manifestation of the highest degree of the will of the individual. In socialism, the contrary was true.

Society is an organism and it becomes, according to Marx and Engels, real organism in a system where property and labor are socialized and the distribution of commodities was supposed to follow the well known maxim, “from each according to his ability, to each according to his work.”<sup>58</sup>

All taken together, the concepts of law, constitution included, were essentially different from those conceived in capitalist society. The soviet model provided for one party, i.e. a vanguard party, one state-the workers state and that state had oneness characteristic in contradiction to separation of power. Finally, all these superstructures were built upon the social ownership of property and the progressive development of society into communism, i.e. the ideal paradigms of the model.

When a country becomes soviet satellite it means, therefore, that the economic, political and social structure of that country would have to conform or progressively made to conform to the line of development set by the soviet system. Depending on the degree of development attained in this direction and measured against the bar of the ladder which the U.S.S.R. has managed to ascend; countries were categorized as followers of “*non-capitalist-road*”, “*Socialist oriented states*” and “*people’s democracies*”. By the end of the nineteen seventies, Ethiopia had been categorized as falling between people’s democratic states and socialist oriented ones.

Whatever is the case, by the seventies Ethiopia had ended up being a full-fledged soviet satellite state. After ten years of revolutionary practice, Ethiopia was said to have managed to set up a government modeled after Hungary, Romania, Vietnam and that was what exactly was reflected in the 1987 constitution.

Since 1974 a new social order was in the making. The Provisional Military Administration was also in the process of reconstituting itself. To legitimize itself within and abroad it had, at least, to take off the uniform and appear in a civil dress. The Military Council presented itself for elections through a new party- the workers Party of Ethiopia. The party became the vanguard communist party. The Head of the Military council became the president. Naturally, the country became the Peoples Democratic Republic of Ethiopia. The 1987 constitution in its very first Article, therefore, declared as follows:

*“The People’s Democratic Republic of Ethiopia is a state of the working People founded on the alliance of worker and Peasants and the Participation of the intelligentsia, the revolutionary army, artisans and other democratic section of the society.”*<sup>59</sup>

Having overthrown the monarchy and the nobility and having identified itself with the working class, the military did not take time to declare that the alliance would henceforth constitute the vanguard of the toiling masses. Indeed, it was declared in the constitution that:

*“The Workers Party of Ethiopia, which is guided by Marxism-Leninism is (the) vanguard party dedicated to serve the working people and protect their interest.”<sup>69</sup>*

The party took upon itself to change the political, economic and cultural life of the country. The new elite brought under its control all resources – power, economy and culture. All production and distribution enterprises had been nationalized. The rural and urban lands were under state ownership. Rented houses were transferred to the government. Truly, the government by the 1980’s was in full control of the economy.

The new order represented a new social order, a new set of values. The Ministry of Education and the Ministry of information could for instance better be understood as ministries of national guidance-ministries which are entrusted with the responsibility of educating the present society and molding the coming generation with the ideals of socialism. As regards the role of the party in social and cultural respect it was stipulated that the state:

*“Shall ensure the expansion of education and other means of enriching knowledge in order to develop a new culture and lay the foundation for socialism by enhancing citizens intellectual and physical development as well as their capability for work”<sup>61</sup>*

Be it in Ethiopia or anywhere else under socialist system, one of the primordial tasks of party-state is to develop a new culture in line with official creed. In Ethiopia there was a degree of cooperation at the first stage of the Revolution; but later on it was confronted with intense resistance, and some times back-lashes.

The organ of state machinery was also curved out from socialist countries. The national “Shengo” (Parliament) was modeled after the Supreme Soviet of the U.S.S.R. It had a standing body, the Council of state, which was acting as executive committee of the parliament. The president of the council was also the president of the Republic. The power to interpret the constitution and the constitutionality of other laws were given to this body. This is a contradiction in terms, for the council itself was the mainstay of parliamentary and presidential powers.<sup>62</sup>



The president enjoyed a lot of power. He was the Head of State and had no less power than any head of Government. He had the power to present the Prime Minister, and through him members of the council of Minister to the Parliament, as well as the power to ensure that the council of Ministry discharged its responsibilities, and presided over the council as necessary.<sup>63</sup> Upon the occurrence of compelling circumstances, the President had the power to dismiss and appoint the Prime Minister and other ministers.

Judges were elected, recalled and dismissed by the parliament and more interestingly the term of their office was made to be congruent with that of the parliament. Although judges were in those days, as in the past, to be guided by “no other authority than the law”, it was clear more than ever before that the judiciary was under the double yoke of the executive and the parliament. On top of this socialist legality required the construction of laws in accordance with “revolutionary legal consciousness”.<sup>64</sup> Unfortunately, revolution knows very little of law.

The constitution does not merit so much discussion because it was dead well before it was born. It was only there for four years before it was buried. Soviet communism too collapsed. The Berlin wall was brought down to the ground. The wall was a symbol of the cold war. Its fall did also symbolize a new era – on the international front it meant unipolar globalization, at national level it meant capitulation.

Marx and Engels had envisaged “*the withering away of the state*”. After seventy years of exercise the whole structure of the U.S.S.R. disintegrated-in a way it withered away. The fifteen republics, including Russia the nucleus of the Federation rebelled. All what remained was Michael Gorbachev with his ministers in Kremlin. It was he himself who ignited the collapse. He could not cope with the inertia he set loose. He had to leave and that he did.

In 1991 the same thing happened in Ethiopia. The entire people revolted and war engulfed the capital city. Eritrea declared her independence. Mengistu Haile Mariam had to leave. He left for Harare, Zimbabwe.

Cuban socialism is certainly in its death-bed along with the aging Fidel Castro. Korean socialism is faltering and only the Chinese brand seems to be surviving the challenges of the new era.

For many, socialism was a vision, for some others represented a panacea still for others, it was a nightmare. In the history of Soviet socialism, it has, at least, done one major thing, i.e. fair allocation of economic resources, unequalled anywhere in the capitalist world. But, economic equality alone did not bring about democracy. In this respect the Marxist paradigm has, to a great extent been disproved. What is not yet established is what democracy would actually constitute.

#### **2.2.2.5 The Transitional Charter: A Prelude to Federalism**

The P.D.R.E. Constitution was a short lived one. The Transitional Period Charter of 1991 replaced it. The Transitional Period Charter has completely changed the structure of the State, i.e., from a unitary to a federal structure. Although there was no mention of federal arrangement in the Charter in an explicit manner, it can be inferred from the Charter itself and from the subsequent proclamations that the forthcoming constitutions would make the Country a federal one. Party pluralism has also been an innovation of the Charter.\*

The Transitional Period Charter came to force immediately after the downfall of the P.D.R.E. Government, which was the extension of the military administration. The Charter declared that the provisions of the Universal Declaration of Human Rights were respected fully.

#### Article 1

*Based on the Universal Declaration of Human Rights of the United Nations of December 10, 1948, Individual Human Rights shall be respected fully and without any limitation whatsoever. Particularly every individual shall have*

- a) *The freedom of conscience, expression, association and peaceful assembly;*

- b) *The right to engage in unrestricted political activity and to organize political parties, provided the exercise of such right does not infringe upon the rights of others.*

The Charter in its preamble declared the overthrow of the military dictatorship that has ruled Ethiopia for seventeen years. It presented a historical moment and opened a new chapter in Ethiopia in which freedom, equal rights and self-administration of all the peoples shall be the governing principles of political, economic and social life. The Charter also guaranteed each nation, nationality and peoples the right to administer its own affairs within its own defined territory and effectively participate in the central government on the basis of freedom, and fair and proper presentation.

Although the Charter mentioned nothing about federalism, from the rights given to the “*nations, nationalities and peoples to exercise their self-determination up to independence if they are convinced that their rights to preserve their identity, promote their culture and history*” clearly indicated that the envisaged structure of state was federal. The National/Regional Transitional self-governments established by Proclamation No. 7 of 1991 were mainly based on ethno-linguistic boundaries. The proclamation further stated that, “*National/Regional Transitional Self-Governments shall have legislative, executive and judicial powers in respect of all matters within their geographical areas ...*” It was considered that the Transitional Period Charter has served as a precursor to the 1994 F.D.R.E. Constitution.

Ethiopia has a long history of feudal monarchy. Theoretically, it has always been a centralized unitary state. In reality, it had been a centralized state only under strong emperors. More often than not, each region was part of the empire only by name.

The extent of empire even at its lowest ebb and its mountainous and broken topography, its lack of effective communication, its numerous ethnicities, and above all its quarrelsome regional feudal lords all conspired to perpetuate a backward and inefficient governmental system. At one point known as the *Era of the Princes*, Ethiopia reached the comico-tragic climax of six ‘*Emperors*’ all claiming simultaneously to be supreme rulers of the same country. With the emergence of strong emperors from the middle of the

nineteenth century onwards, centralization was given full rein at the expense of the many ethnic groups, large and small, around the country, who craved some autonomy. Centralization was carried a step further with the overthrow of the monarchy and the emergence of the Derg. The regional autonomy of certain regions, that was later proclaimed, was never really put into practice. It was only after years of destabilization and destruction due to war, drought, famine, and mass migration that a new effort was made to build up a viable system.

The point of departure for the National/Regional Self-Government set-up during the transitional period July 22, 1991 to August 21, 1995 is the Transitional Period Charter of Ethiopia proclaimed by the Peace and Democracy Conference convened on July 1-5, 1991 in Addis Ababa.

The Charter in its preamble having declared the *”starting of a new chapter in Ethiopian history in which freedom, equal rights and self-determination of all peoples shall be the governing principles of political, economic and social life,”* went on in Article 2, to affirm the right of nations, nationalities, and peoples to self-determination. To this effect, Article 2 (b) guaranteed *“each nation, nationality and people the right to administer its own affairs within its own defined territory and effectively participate in the central government on the basis of freedom, and fair and proper representation.”*<sup>2\*</sup>

With respect to the central government, the Charter having stated that the Transitional Government shall exercise all legal and political responsibilities for the governance of Ethiopia, proceeded to establish the Council of Representatives, which exercised legislative functions and oversaw the work of the Council of Ministers. Further, legislation of the Council of Representatives, namely Proclamations No. 1 and 2 of 1991 provided in detail for the powers and functions of the President of the Transitional Government as well as the Prime Minister and Council of Ministers – all of these institutions having been already established by the Charter.

The establishment of National Regional Self-Government was provided for in Proclamation 7 of 1991 by the same title. Article 3 of the proclamation enumerated 63 identified nations, nationalities, and peoples<sup>3\*</sup> and established 14 regions. Eight of these

regions were composite regions embracing from 3 up to 13 identified nations, nationalities, and peoples. Four regions had one identified nation each and greater Addis Ababa with its amalgam of urban and rural peoples formed a region by itself.

The proclamation provided for 48 of the identified nations, nationalities, and peoples to be able to establish their own National/Regional Self-Governments at the Wereda or above level. Moreover, it provided that these Self-Governments of these adjacent nations, nationalities, and peoples may, by agreement, jointly establish a larger Regional Self-Government within any of the 14 regions specified.

The remaining 17 nationalities and peoples having small-sized population – and therefore less than 50% of the population of the Self-Government wereda – were incorporated in it. These nationalities and peoples with small-sized population, and known as “*minority nationalities*”, nevertheless, were provided with appropriate representations in the Wereda Council.

It is clear that, in the Charter, ultimate power rests with the central government. In the language of the Charter “*The Transitional Government shall exercise all legal and Political power for the governance of Ethiopia.*” In no unequivocal manner the Proclamation also stated “*National /Regional Transitional Self-Governments are, in every respect, entities subordinate to the Central Transitional Government.*”<sup>5\*</sup> Moreover, the National/Regional Council, which was “*the repository of overall political power regarding the internal affairs of the region*”<sup>6</sup> was made “*accountable to the people elected to the Council of Representatives of the Central Transitional Government.*”<sup>7\*</sup>

A somewhat ambiguous and less precise language was introduced in Article 9(1) of the Proclamation, which seemed to indicate that except for specifically enumerated powers of the Central Government, all other powers including residual powers belonged to the National/Regional Self-governments. Article 9(1) stated, “*National/Regional Transitional Self-Governments shall have legislative, executive and judicial powers in respect of all matters within their geographical areas except ..*” This, however, was immediately negated by not only specifying nine major areas “*reserved for the Central Transitional Government because of their nature,*” and including in them broad concepts such as

*'economic policy'*, *'establishing and administering major development establishments'* and *'building and administering major communications network'*, but enclosing the whole enumerative section by the phrase *'such matters as .. and the like,'* which indicates that such enumeration was not exhaustive.<sup>8</sup> To add to it, it was immediately provided by the proclamation that powers and responsibilities of ministries, authorities, and commissions of the central government were to be proposed by the Council of Representatives of the Central Government. This provision provided that the proposal of the Council of Ministers be consistent with the powers and duties of National/Regional Self-Governments. But the ultimate arbiter was the Council of Representatives of the Central Government.<sup>9</sup>

The special powers of the National/Regional Self-Governments were enumerated in Article 10 of the Proclamation. The Article, having been stated as a caveat "*subject to the provisions of Article9,*" went on to enumerate these special powers in ten sub-articles. These special powers and duties were economic, fiscal, and administrative in nature. The economic and fiscal powers dealt with the right to:

- 1) borrow from domestic sources and levy duties and taxes;
- 2) prepare, approve and implement their own budget;
- 3) plan, direct and supervise social and economic development programmes;
- 4) establish, direct and supervise social and economic development programmes;
- 5) administer, develop and protect the natural resources of the Region[al State];  
and
- 6) be the owner of the properties of the Self-Government, acquire ownership of  
and transfer property.

With respect to the structure of the Self-Government, the proclamation provided seven organs, namely:-

- 1) The National/Regional Council,
- 2) The National/Regional Executive Committee,
- 3) The Judicial Organ,
- 4) The Public Prosecution Office,
- 5) The Audit and Control Office,
- 6) The police and Security Office, and

7) The service and development Committee.

The most important of these organs was the Council, which had four regular meetings yearly and whose powers were enumerated in Article 15 of the Proclamation. The Council, as the legislative organ of the Self-Government was the repository of overall political power regarding the internal affairs of the Region State. As such it had the following special powers.

- 1) To issue the constitution and laws of the Self-Government;
- 2) To elect the Executive Committee and the Chairman and Secretary of the Council from among its membership;
- 3) To determine the seat of government and the working language of the Self-Government;
- 4) To negotiate and approve agreements concluded with adjacent Self-Governments with respect to national and border matters;
- 5) To establish the various organs of the Self-Government, define their responsibilities, appoint their officers and supervise their activities; and
- 6) To generally exercise the economic, fiscal and budgetary powers granted to the Self-Government.

The highest executive organ of the National/Regional Self-Government was the Executive Committee of 11 to 19 members elected by and from the National/Regional Council. The executive Committee was accountable both to the Council of Ministers and to the Council that elected it.

With respect to the Court structure, the Proclamation envisaged a wereda and a superior court system. The Proclamation also referred to the Central Government's court system. Thus, it envisaged two parallel court systems.

Some remarks are in order, now that we have seen what the Charter and the Proclamation provide with respect to the establishment of National/Regional Self-Government. The first striking point is that nowhere does the Charter and the Proclamation employ the term '*federalism*' in either their preambles or specific legal provisions. And yet it is quite clear by any standard that what is envisaged is nothing short of federation. Indeed, both the

Charter and the Proclamation go to the extent of guaranteeing each nation, nationality and people the right to exercise its right to self-determination of independence, if it is convinced of its rights to preserve its ..<sup>10</sup>

One can not stop wondering why the term '*federation*' has not been used. Another interesting point that emerges is the emphasis given to the concepts of nation, nationality and peoples. Nations, nationalities and peoples, and not geographical regions are the point of departure of the Self-Government. Some may argue that this is a carry-over from ideological thinking. It must be pointed out, however, that the psychological make-up of the Ethiopian people contains a heavy dose of emphasis of ethnic background. The spontaneous ethnic political grouping so strongly reflected in the Council of Representatives is a good example. In a free political process, aiming at a democratic society, ethnicity seems the inevitable stepping-stone to political maturity.<sup>11</sup> Some fear that the risk for political disintegration and violence are too great. Others point out, taking negative examples from recent Ethiopian history that an *iron-fetters* policy, which denies the recognition of ethnicity, actually results in disintegration. The achievement of peace and stability within the short period under the Charter is remarkable and this augurs a bright future for Ethiopia.

It is somewhat difficult to characterize the Ethiopian National/Regional Self-Government set-up either as a complete or an incomplete federation, though federal it clearly is. The residue of power rests with the Central Government, but with strong and authoritative recommendation that the Self-Governments be encouraged to handle their own affairs fully as much as possible. The Proclamation specifically enumerates both the powers of the Central Government as well as those of the Self-Governments. Gray shady areas of power are naturally going to remain, and the legislator that initially demarcated the power boundary between center and region as well as the final arbiter, where questions arise, is the Council of Representatives of the Central Government. In light of this, the best way to characterize the Self-Government set-up of the Provisional Government is an evolving federal process.

The Charter and the Proclamation have set in motion a new experimental process for the governance of Ethiopia. The broad demarcation lines are clear, but the system will



require legislative and structural fine-tuning to make it work. Indeed the Proclamation mentions various important areas which are to be determined by law. These include:

- a) the adoption of Regional Constitutions,
- b) the collection and utilization of revenue by the Self-Government,
- c) the jurisdiction of Regional Courts,
- d) the administration of the regional judiciary,
- e) the assignment of duties to the Regional Prosecutor,
- f) the powers and duties of Kebeles and Highers and similar areas.

The issuance of some of the laws is clearly provided for in the Proclamation as being within the competence of National/Regional Councils. Others necessarily fall within the competence of the Council of Representatives of the Central Government. Obviously, the Council of Ministers may issue regulations and directives for implementation of certain laws. And the Executive Committee of Self-Government would issue directives for proper implementation of same.

Making the Council of Representatives of the Central Government the final arbiter and focal point for delimitation of power boundary and settlement of issues is worth some comment. First, it is interesting to note that within the Central Government is the Council of Representatives and not some other institution(s) that has final say. Where issues arise between two Self-Governments, the arbiter will be the Council of Representatives. Of course, one could imagine other alternatives within the existing constitutional set-up of impartiality on the side of the Council of Representatives on issues it is a party to or has shown special interest in.

Secondly, that the Self-Government set-up does not provide for a constitutional court is worth reflecting upon. Most federal systems provide for a constitutional court that is separate from the ordinary system of court and empower it to handle center-region legal issues.<sup>12</sup>

In conclusion, it must be pointed out that the National/Regional Self-Government is a new chapter in Ethiopian history and the Transitional Government seems to be introducing it carefully and experimentally. In due time as the process unfolds, the

experience gained and the feedback mechanism will, no doubt, enable both the Constituent Assembly and the new Constitution to incorporate the ideas that will emanate from this existing experiment.

### **Questions that matter**

1. Can you make sense of the distinction made between *states* per se (state without nationhood) and *nation-state*? Discuss the validity of this distinction.
2. City-states:-
  - a) For Greek was a mythical entity created for and by citizens,
  - b) For Romance, it was a realm of God on Earth,
  - c) After Industrial Revolution, it has been a product of an agreement – a partnership. Discuss the validity of these statements.
3. Where are we heading? (I.e. Liquidation of states? Growth of world confederation? Growth of world federation? )

## Chapter Three

### **3.1. Making a Constitution**

To start with, it is a truism that countries make a new constitution when they wish to make a fresh start, mostly for compelling political reasons. This can be evidenced from the fact that the making of a new constitution or amendment of the existing ones usually, if not always, involves a significant re-allocation of political or other powers.

In order to address the ‘how can a country make constitution?’ question, it is imperative that we refer to the question of how politics are founded as the manner in which the constitutions will be made hinges on the nature of the polity.

Political scientists identify three basic models of political founding and organization, namely, polities founded by conquest in which political organization is hierarchical; politics which evolved organically out of more limited forms of human organization and which over time concretize power centers which govern their peripheries and polities founded by design through covenant or compute in which power is shared through a matrix of centers formed by the government of the whole, on the basis of federal principles.<sup>16</sup>

In hierarchical polities, constitution making is essentially a process of handing down a constitution from the top, the way medieval kings granted charters. In organic polities, the process of constitution making is also an organic one, consisting of a series of acts negotiated among the established bodies that share in the governance of the polity. (Whether medieval states, territorially based groupings or other mediating social and political institutions, which speak for the various segments of society represented in the center), reflect their interests, and can negotiate among themselves to resolve constitutional questions as they arise.<sup>17</sup> In such polities constitutions are rarely written

---

<sup>16</sup>

<sup>17</sup>

and are even more rarely replaced. Rather constitutional making and change come in bits and pieces - on a piecemeal basis.

In polities founded by convent or compact,<sup>18</sup> the process of constitution making involves a convention of the partners to the pact, or their representatives. The American and Swiss models are perhaps the best examples of the constitution as covenant.

### **Related Readings:**

*The following is excerpted from Daniel J. Elazar, Covenant Tradition in Politics, Volume 3, Introduction*

#### *The Idea of Covenant*

#### *Covenant and Constitutionalism: The Great Frontier and the Matrix of Federal Democracy*

*What we can learn from history is that great transformations rest on the combination of great ideas, great movements, and great actions, and occur when all three come together. Thus at the very beginning of the history of covenant there was the great idea of biblical covenantal monotheism whereby humans were envisaged as entering into morally grounded pacts with God out of which came, inter alia, the covenant with Noah binding all of humanity and that with the people Israel formed through the Exodus from Egypt and the Sinai experience. In the sixteenth century Protestant Reformation, a new theology of covenant gave rise to Reformed Protestantism and the theo-political transformation that followed in countries such as Switzerland, the Netherlands, Scotland, and England.*

What the combination of covenant theology, religious reformation, and local or national political transformation did for the sixteenth century, was a revolution in political philosophy, a series of more or less radical movements culminating in the British Isles and British North America as Whiggism, which in turn led to the Glorious Revolution of 1688-89, and the formation of the American colonies across the Atlantic on a Reformed

---

18

Protestant base during that same period. The same was done for the seventeenth century. In the eighteenth century the great wave of ideas derived from the Enlightenment brought about the two great revolutions of the modern epoch, the American and the French, and the invention of Federalist and Jacobin democracy, modern constitutionalism, the United States of America and modern democratic republicanism on both sides of the ocean.

*Here we must remind ourselves of the three forms from which all polities are derived and through which all are organized: hierarchical, organic, or covenantal -- as The Federalist put it in Federalist #1: force, accident, or reflection and choice. Polities in the hierarchical model are generally founded by conquest in some form, either external or internal (palace revolt, coup d'etat), and are organized as power pyramids more or less in the manner of military formations. The ruler or rulers sit at the apex of the pyramid commanding those below, who are organized into "levels" of authority and power, each level subordinate to the one above it. In hierarchies, administration takes precedence over politics. Politics takes the form of court politics, i.e., the struggle for the ear and favor of the ruler. All of this is rarely constitutionalized, but if it is in some form, the constitution consists of a charter granted by the ruler to those subordinate to him. An army is the apotheosis of this kind of political organization.*

*Polities founded and organized on the organic model seemingly grow "naturally," and as they develop, the more powerful or otherwise talented leaders form a political elite at the polity's center that rule over the vast majority in the polity, who are relegated to the peripheries. Thus the model of the organic polity is that of two concentric circles, center and periphery, with those at the center ruling those in the periphery, even if the latter have a role in selecting who is in the center. Power, if not both power and authority, is concentrated in the center, and those in the center determine the connections between center and periphery. In the organic model, politics come first but they are the politics of the club. Administration flows from those politics and, indeed, the heads of the administration also have to be members of the club. The constitution, insofar as there is one, is the traditional body of accepted rules regarding the workings of the club and the administration that is dependent on it. The apotheosis of this model is Westminster-style parliamentarism with the parliament sovereign and dominated by those who have been*

able to enter the club; the administration is also led by club members but subordinate to parliament.

The covenantal model functions on an entirely different basis, characterized schematically by a matrix, a group of equal cells framed by common institutions. Its founding comes about because equal individuals or individual entities join together through a covenant or political compact as equals to unite and establish common governing institutions without sacrificing their respective integrities. For the matrix model, the constitution is preeminent since it embodies the agreement that joins the entities or individuals together and establishes agreed-upon rules of the game which all have to observe. The politics that flows from that constitution is a politics of equals based on negotiation and bargaining and designed to be as open as possible, where all the actors will know what is happening. Administration is dependent upon the constitution for its authority and politics for its powers. This system is not hierarchical, even if hierarchies are sometimes organized within it. Nor does it have a single center. Rather it is based upon multiple centers, each constitutionally protected. Its apotheosis is a federal system in which the constituent units are represented in the framing government and also preserve their own existence, authority, and powers in those areas which are not delegated to the framing institutions.

While hierarchical and organic polities can merge because they are on the same continuum, federal polities are located on an entirely different continuum. Table 1 portrays and contrasts the three models. The struggle between or synthesis of the three has continued throughout history. It took some new turns in the modern epoch.

<i>Structure of Authority:</i>	<i>Hierarchy</i>	<i>Center-Periphery</i>	<i>Frame and cells</i>
<i>Mechanisms of Governance (in rank order):</i>	<i>Administration-Top down bureaucracy</i>	<i>Politics-club-oligarchy</i>	<i>Constitution-written</i>
	<i>Politics-court</i>	<i>Administration-Center outward</i>	<i>Politics-open with factions</i>

	<i>Constitution-charter</i>	<i>Constitution-tradition</i>	<i>Administration-divided</i>
<i>Apotheosis:</i>	<i>Army</i>	<i>Westminster system</i>	<i>Federal system</i>
<i>Excess:</i>	<i>Totalitarian dictatorship</i>	<i>Jacobin state</i>	<i>Anarchy</i>

---

### ***The New World Experience***

*In the last third of the fifteenth century, in the period between the failure of the councillor movement in the Catholic Church and the inauguration of the Reformation by Martin Luther in 1517, the Europeans discovered the New World. While Columbus is the official "discoverer," his voyages were part of a larger movement involving scientists and navigators, Spanish, Portuguese, Italian and Jewish; the first inventing the instruments to make it possible and the second conducting the voyages of discovery in the Western Hemisphere, around Africa, and across the Indian Ocean or into the Pacific.*

*Those explorations launched what Walter Prescott Webb, the Texas historian, described 450 years later as "the great frontier" whereby Europe embarked on an expansion that made Europeans and their descendants the rulers of the world for 500 years. That great frontier was seen by most of those involved in it as a great opportunity for beginning again. It launched a movement of migration and colonization unprecedented in the history of mankind until then. It transformed people of high and low station, empires, societies, economies, and technologies in unprecedented ways, but as both Catholics and Calvinists -- the two main religious groupings among the settlers discovered, the discovery of new worlds did not eliminate "the old Adam."*

*The human beings who discovered and settled in the new worlds brought with them their old habits and standards, good and bad, enlightened and benighted, gentle and cruel, whether by nature or by culture. The Europeans soon proved to be far more aggressive than the natives wherever they settled, even though in many cases the natives could manifest cruelty even beyond what was accepted by the Europeans. Five hundred years*

*later it is very difficult to issue score cards balancing civilization and barbarism for the parties involved. We have long since given up European triumphalism and a monochromatic Euro-centered history of the discovery, conquest, and settlement of those new worlds. The pictures we draw today are drawn in subtler hues. There are swirls, zig-zags, and broken lines making the tapestry more complex. Still, as a general rule, we can draw some conclusions with which to begin our exploration of the covenant tradition in the new worlds.*

*First, the New World was indeed a beginning again, but the beginning from the first was as flawed as life in the Old World and had to be transformed by human will, that even when it seemed to be, beginning again was not simply a matter of letting nature take its course. Second, for that human will to be thrust in a moral direction, humans had to covenant and compact with one another to specify that the liberty they sought in the New World would be federal liberty -- the freedom to make and keep one's covenants under God and to live according to their terms and not merely natural liberty -- the freedom to do what one pleases limited only by nature or one's neighbor -- and to require that this be the standard for all. Third, the spell, one probably should say the romantic spell, of the New World environment led many -- in the new world and the old alike -- to believe that the return to the natural would enable humans to eliminate the corruptions of civilization a la Europe. Indeed, even realists saw the future design of progress in the implementation of natural law and natural right, stripped of the encumbrances of a corrupt or corrupted civilization and society.*

*These ideas were no more than romanticism unless concrete ways and means were developed to achieve these dreams. Those ways and means were developed through constitutionalism, a modern reinterpretation of the covenantal tradition that gave it flesh and blood and enabled it to become the instrument of liberty, equality, justice, and democracy that it did. Thus, for all of its flawed beginnings and flawed history, where Europeans were able to implant the covenantal tradition, the New World did indeed offer an opportunity, if not an entirely unambiguous one, for beginning again. Where that tradition was not or could not be implanted, the barbarisms and abominations of the Old World were doomed to be repeated.*



*This, then, is our story in this volume -- how certain parts of the New World were settled by those who brought the covenant tradition with them, how that tradition was reinforced by the settlers' New World experiences in founding new societies, and, with all of the flaws in that experience, how those settlers pioneered the development of modern democracy or, more appropriately, modern democratic republicanism, or, still more accurately, modern federal democratic republicanism, using "federal" not only in its later governmental sense of federalism but in its original political sense of covenantal. It is the story of the human pacts of modernity, made "under God" rather than with the Supreme Being, to establish ordered liberty under the law involving the combination of self-rule and shared rule that made modern democracy possible.*

*We begin with the New World experience because it actually preceded the Old World philosophizing about it. While Hobbes, Spinoza, Locke, and their contemporaries were the ones who formulated the modern expressions of covenantalism through their ideas of the political compact and civil society and as such have become generally recognized as the founders of the new or modern science of politics based upon modern ideas of natural right rooted in human psychology rather than moral principle, in fact the people who came to the New World, especially the Puritans among them, had begun building institutions based upon neo-covenantal models a generation earlier and, by the time that the great seventeenth century political philosophers began their work, were already well along modifying those institutions in light of both the New World and modern conditions, so that what were intended to be Puritan commonwealths in the New World, and indeed were established in that manner, were within two generations transformed into something else, that something else which the political philosophers in the Old World named "civil society," but which, even more than in the Old World, retained its covenantal roots. Indeed, one might say that the apotheosis of the modern experience in the United States was based upon the synthesis of and tension between biblical covenantalism as filtered through Reformed Protestantism and modern ideas of political compact and civil society. In many respects the modern epoch brought with it a secularization of the covenant tradition as the aspirations to achieve a covenantal commonwealth gave way to the aspiration to achieve a civil society. Indeed, as the modern epoch progresses, the covenantal commonwealth even began to be forgotten in the pursuit of civil society as*

*liberal democracy. This not only suited the modern temper but the modern environment, one that was far more legitimately heterogeneous than earlier environments.*

*Because of the major, if not dominant, role of Reformed Protestantism in establishing the United States and the other New World polities derived from similar roots, the original covenantalism of the Bible reached the New World primarily through the Reformed Protestant, usually Calvinist, filter. There it was transformed into a set of operational principles, institutions, and practices. What had been primarily an ideological expression of a grand theory became a fundament of culture, a shaper of institutions, and a major influence on political and other behavior. In the process it was modified by modernity, a modification that ultimately was to have consequences far beyond those intended at the beginning of the modern epoch. Nevertheless, the covenantal foundations remain and manifest themselves in those polities even in unexpected ways in every generation.*

### ***Covenant, Compact, Contract***

*A covenant is a morally-informed agreement or pact based upon voluntary consent and mutual oaths or promises, witnessed by the relevant higher authority, between peoples or parties having independent though not necessarily equal status, that provides for joint action or obligation to achieve defined ends (limited or comprehensive) under conditions of mutual respect which protect the individual integrities of all the parties to it. Every covenant involves consenting, promising and agreeing. Most are meant to be of unlimited duration, if not perpetual. Covenants can bind any number of partners for a variety of purposes, but in their essence they are political in that their bonds are used principally to establish bodies political and social.*

*Covenant is tied in an ambiguous relationship to two related terms, compact and contract. On the one hand, both compacts and contracts are derived from covenant, and sometimes the terms are even used interchangeably. On the other hand, there are very real differences between the three which need clarification.*

*Both covenants and their derivative, compacts, differ from contracts in that the first two are constitutional or public and the last private in character. As such, covenantal or*

*compactual obligations are broadly reciprocal. Those bound by one or the other are obligated to respond to one another beyond the letter of the law rather than to limit their obligations to the narrowest contractual requirements. Hence, covenants and compacts are inherently designed to be flexible in certain respects as well as firm in others. As expressions of private law, contracts tend to be interpreted as narrowly as possible so as to limit the obligation of the contracting parties to what is explicitly mandated by the contract itself.*

*A covenant differs from a compact in that its morally binding dimension takes precedence over its legal dimension. In its heart of hearts, a covenant is an agreement in which a transcendent moral force, traditionally God, is a party, usually a direct party, to or guarantor of a particular relationship; whereas, when the term compact is used, a moral force is only indirectly involved. A compact, based as it is on mutual pledges rather than the guarantees of a higher authority, rests more heavily on a legal though still ethical grounding for its politics. In other words, compact is a secular phenomenon. This is historically verifiable by examining the shift in terminology that took place in the seventeenth and eighteenth centuries. While those who saw the hand of God in political affairs in the United States continued to use the term covenant, those who sought a secular grounding for politics turned to the term compact. While the distinction is not always used with strict clarity, it does appear consistently. The issue was further complicated by Rousseau and his followers who talked about the social contract, a highly secularized concept which, even when applied for public purposes, never develops the same level of moral obligation as either covenant or compact.*

*Covenant is also related to constitutionalism. Normally, a covenant precedes a constitution and establishes the people or polity which then proceeds to adopt a constitution of government for itself. Thus, a constitution involves the implementation of a prior covenant -- an effectuation or translation of a prior covenant into an actual frame or structure of government. The constitution may include a restatement or reaffirmation of the original covenant, as does the Massachusetts Constitution of 1780, but that is optional.*

*Although perhaps more difficult than tracing covenantal ideas expressed in political thought, covenant as ideology is more easily identifiable since ideology is a very public form of theory. Covenant-as-culture persists even when it is not necessarily recognized as such, while covenantal ideology had its ups and downs in the modern epoch. It was strong in the mid-seventeenth century in the British Isles, the Low Countries and in the American colonies, again at the time of the American Revolution, and periodically thereafter in covenant-based civil societies, but never again during the modern epoch did it achieve the same status.*

*One of the tests of the presence of the covenantal dimension is to be found in the institutions that developed within the covenantal matrix, particularly in matters of their institutional governance and culture. These, indeed, can be identified throughout the epoch. Even if the larger environment is less covenantal, institutions remain carriers, at least until some massive change comes to transform them. Thus the behavior of people functioning within those institutions, particularly their political behavior, is a clear manifestation of covenant where it exists. Less easy to identify than institutions, nevertheless political behavior can be studied sufficiently well in most cases.*

*Covenant entered the modern epoch as a manifestation of Reformed Protestantism and in every respect it was tied to the rise and fall of Puritanism and the residues Puritanism left in certain parts of the world. Reformed Protestant had two principal sources: one was in Huldreich Zwingli, Heinrich Bullinger and their colleagues and disciples in Zurich and the Rhineland, principally in the German-speaking territories of Switzerland and western Germany. The other was the product of John Calvin and his associates and students in Geneva. Calvin came on the scene after Zwingli had been killed and Calvin's doctrines rapidly became the most influential in the Reformed Protestant world.*

*These influences affected the Huguenots in France, the Netherlanders, the Scots, and the English Puritans as well as the Puritans in British North America. In matters theological, Calvinism was the stronger influence, but in matters political the influence of Zwingli and Bullinger was the greater. While every nation influenced by Reformed Protestantism developed its own synthesis of the two, the most influential synthesis in the world was that formed by the English Puritans. In no small measure, this was because of the power of*

*first England and then its successor, Britain, as the greatest power in the world from the beginning of the eighteenth century until nearly the end of the modern epoch, with influence that stretched far beyond its tight little island. That influence was further increased by the fact that the Puritans fought, and in the short term won, a civil war in England itself which not only brought them to power in their own country, but enabled them to conquer Scotland and Ireland. Even prior to that, they settled a good part of British North America and the deep Southern Hemisphere as well.*

*Religious-based covenantal thinking undoubtedly reached its most sophisticated level of development under Reformed Protestantism and most particularly Puritanism, finding major expression on the European continent, in the British Isles, and in New England where it had lasting impact on subsequent generations, even after the Puritan commonwealths had passed from history, to be replaced by modern, secularized civil societies. Only at major historical intervals has a movement had as much impact as Reformed Protestantism has had on the history of the world.*

*Nevertheless, the kind of integral society that was required to maintain Reformed Protestantism came under great assault in the seventeenth century. It ultimately was brought down in favor of a far more heterogeneous world view, in part because the demands of Puritanism, and Reformed Protestantism in general, on individuals were too high. For better or worse, most people did not want to live Puritan lives, seeing Puritanism as far too serious, demanding, and unsatisfying. Moreover, those who saw Puritanism as an appropriate way of life often could not personally sustain its demands and hence were perceived by others to be hypocrites.*

*Thus we had a paradox. On the one hand, Reformed Protestantism developed very important and compelling theories, ideologies, and cultures supporting liberty and equality, two of the principal political aspirations of the modern epoch, but the Reformed way to achieve them required institutions insufficiently broad or free and behavior of an impossibly high standard to be realized by the vast majority of people. It remained for the new science of politics and its developers and exponents, who began with a very secular, if equally pessimistic, approach to human nature (the development of which Reformed Protestantism actually facilitated) to provide not only a bridge but a more satisfying*

*framework for political theory and practice, both of which drew on covenant ideas in new ways.*

*The climax of the modern drive for civil society actually came when the two principles of commonwealth and civil society came together and was intertwined in the birth of the United States of America, both as an independent polity and as a constitutional regime. The generation that achieved the Declaration of Independence, fought the Revolutionary War, and established the United States under its new constitution was led by two groups: one coming out of the older religious tradition, primarily the covenantal tradition of Reformed Protestantism who saw the imperatives of their tradition leading in the direction of a federal democratic republic under God, and the second group who came out of the Enlightenment, influenced primarily by the Scottish Enlightenment which was part of the covenantal tradition one step removed, who sought a federal democratic republic in North America as the way to actualize civil society. The great achievement of the Americans in their revolutionary era was that the moderates from both camps found a common language and a common program upon which to agree, while the extremists in both camps were pushed aside, thereby enabling the United States to be born as a synthesis of the two conceptions of humanity, society, and polity, thereby enhancing the strengths and moderating the weaknesses of each.*

### ***Covenantal and Hierarchical Models***

*The modern epoch witnessed a major conflict between covenantal and hierarchical models of polity. Indeed, modern European statism was based upon the hierarchical model or, as it was democratized, its transformation into a center-periphery model. Thus, as parliaments acquired power from kings, they modified the monarchic pyramids in such a way as to establish parliamentary centers of power while the rest of the polity remained on the periphery, at most selecting who would be in the parliamentary "club." Moreover, as kings become weaker those committees of parliament originally chosen to advise the monarch became cabinets or governments. Either way, the models resembled military formations or exclusive clubs rather than open societies.*

*The hierarchical models were generally founded in conquest, either internal or external, and organized as power pyramids with the ruler or rulers at the apex of the pyramid and commanding those below who were organized into levels of authority and power, each level subordinate to the one above it. Administration took precedence over politics and the latter existed primarily in the form of court politics, i.e., the struggle for the ear of the ruler. If these hierarchies had to be constitutionalized, they were constitutionalized by the ruler granting a charter to the subjects. Indeed, this had been the formal pattern of medieval constitutionalism and medieval regimes generally. It was made even more draconian in the early modern epoch as the hierarchies more fully took military form.*

*Where modified by a center-periphery model, the political elite was able to take control of the country's center, essentially by forming a club. Indeed, their politics, which precede both administration and the constitution, was and is the politics of a club. Their administration is tied to that politics and its heads also had to be members of the club. A constitution, for them, tends to be a traditional body of rules. Westminster-style parliamentarism is the apotheosis of this model, with the politically sovereign parliament as the club of clubs.*

*In contrast to both of these models, associated with modern statism is the covenantal model associated with modern federalism. Although developed in concept and theory even earlier, its complete modern theoretical development and successful practical application came in the United States at the end of the eighteenth century. The covenantal model consists of a matrix of equal cells framed by common institutions. The matrix is founded by individuals or individual entities who join together as equals through a covenant or political compact establishing their common governing institutions without sacrificing their respective integrities and retaining a fair measure of their independence. Because of the very nature of the model, the constitution is preeminent since it embodies the agreement that specifies the linkages and establishes agreed-upon rules of the game for all.*

*The politics that flows from that constitution is a politics designed for people of equal status based upon negotiation and bargaining among them which is designed to be as open as possible. Administration is dependent upon the constitution for its authority and*

*the politics of equals for its powers. The system is not hierarchical even if small hierarchies may form within it for reasons of efficiency. Also, it is multi-centered. No single center can come into existence because the multiplicity of centers is constitutionally protected. In its most complete form it is a federal system with a separation of powers, in which the common institutions have only those powers delegated to it by the constituent entities.*

*The Federalist, the finest modern theoretical formulation for this model, describes these three forms of polity as, respectively, produced by force, accident, or reflection and choice. Indeed, the first Federalist paper makes the point that all regimes prior to the United States had to rely upon force and accident and that it has been given to the Americans to be able to construct a regime based on reflection and choice, showing that the American founders were very much aware of the fundamental difference between federal polities and others.*

*The Europeans who came to the New World did not see themselves as directly influenced by its indigenous inhabitants whom they came to know as "Indians," and who are now referred to as "Native Americans." Those Native Americans, however, contributed more to successful European settlement in North America than the Europeans perceived at the time, not only in new products -- potatoes, corn, chocolate, tobacco, and many others -- but also in new techniques of confronting what for Europeans was a new world. Without making too much of it, in many cases they also were organized on a federal basis with tribal confederacies and leagues from coast to coast. The most prominent of those leagues was the League of the Iroquois, the precursor to the Iroquois Confederacy. It had as its proximate founder an Onondaga named Hiawatha, and an expatriate Huron (the Iroquois' principal enemies) known as "Peacemaker." The sacred story of how they did so is one of the three great elements of Iroquois cosmology (the others are the creation myth and the Code of Handsome Lake which founded a new religion for the Iroquois at the end of the eighteenth century based upon a synthesis of traditional Iroquois beliefs and attempts to harmonize the new realities of the times). The Constitution of the Five Nations includes both mythic and historical elements. The League was held together by the condolence ceremony that reasserted and then disposed of the collective grief of the members when death occurred. The entirely native-originated League of the Iroquois was*



*replaced in the seventeenth century by the Iroquois Confederacy which already was influenced by contact with the Europeans.<sup>1</sup>*

*The Creek Confederacy in the south central part of North America was another example. North of it was the Illinois Confederacy between the Great Lakes and the Mississippi. Other leagues and confederacies linked tribes in various other parts of the country. With the exception of the Iroquois Confederacy which had a certain influence on Benjamin Franklin and those of his compatriots who sought broader union for the British colonies in North America, these indigenous American arrangements essentially stand as testimony to the federal qualities of the country rather than as examples for the white men.*

*To describe certain peoples or civil societies or cultures as covenantal is only to suggest that their dominant ideologies and modal personalities are covenantal. These may encompass a majority of the population or a key minority in key positions that shape the cultures, peoples, or civil societies. We know that most historical movements are generated and achieve whatever they achieve through such key minorities. In that sense it can be said that most people at all times and in all places are the same, desiring only to achieve pleasure and avoid pain in small, conventional ways, but they do not set the tone. It is the key minorities that do, and if they are covenantal, then the societies become covenantal.*

*On the other hand, this does not mean that covenantal attributes are not to penetrate deeply into the culture where they exist, and are not found among people who would not have the slightest awareness that they had them. If all peoples have hierarchical, organic and covenantal leanings, in covenantal cultures and polities, those are the elements that the key minorities have featured and fostered in one way or another.*

### **3.2. What a Constitution should contain**

As to the question what goes into a constitution, since the major purpose of a constitution is to establish the main organs of a government and ensure appropriate power division among them and also to control the exercise of governmental power, especially as affects

the rights and interests of individual citizens and those of different communities in a multiethnic community, the constitution is supposed to set standards against which governmental actions could be measured.

It should also reflect or take good account of the country's geography and history, its legal system, and existing form of government and the culture of the people. Is the country homogeneous or multi-ethnic? What are the units of social organization and the importance given to customary rights? And how are individual rights reconciled with group rights? are few of the questions that need to be addressed by the constitution?

Finally, when we come to the question whether the public should be involved in the constitution – making, it seems quite obvious to see public participation as much as possible. This depends very much on the method of constitution making. The open process of decision-making and referendums are optimal methods for ensuring public participation.

### **Review Question**

How do you rate the importance of public participation in the process of making constitution?

### **3.3. Status of International Instruments under Ethiopian Constitutional Framework**

Under this topic we will try to locate the place of international agreements to which Ethiopia is a party in the hierarchy of laws in Ethiopia. Pursuant to Art 9(4) of the FDRE constitution, international agreements ratified by Ethiopia make an integral part of the law of the land.

In fact, some people argue that international treaties are not laws, despite ratification, unless they are published in the federal Negarit Gazette by virtue of Art 71(2) of the FDRE constitution. But this agreement doesn't hold water as what is stated in this specific sub article is not to be taken as having an effect of rendering international treaties not published in the Negarit Gazette invalid. This is because the provision doesn't clearly

state that international treaties will not become laws unless published. It only tries to indicate the formal requirements, the non-fulfillment of which doesn't necessarily render that particular instrument non-binding as much as the failure and/or refusal of the president to put his signature on the draft bill doesn't stop it from becoming a binding law.

Moreover, as states cannot invoke their laws as defense for failure to conform to international commitments they have entered into, adhering to the earlier arguments would not take us any further since ratification alone would elevate their status from mere agreements to binding laws. Thus, it would be naive to argue that these treaties do not have binding effect for they are not published in the federal Negarit Gazette as the latter is no more than a matter of formality.

Coming back to the main issue at hand, can we say, as international treaties to which Ethiopia is a party will arguably become part and parcel of the law of the land once ratified by an organ authorized to do so, i.e., the House of Peoples' Representatives<sup>19</sup>, that they will have greater or equal status with the constitution? To put the question differently, if international instruments are regarded as part and parcel of the law of the land, what is their hierarchy in the Ethiopian legal system?

To begin with, it is provided under Article 9(1) of the FDRE constitution that the constitution is the supreme law of the land and any law (emphasis added) contradicting with the constitution is null and void.

As international agreements which are ratified by Ethiopia will become an integral part of the law of the land by virtue of Article 9(4) of the constitution and the phrase "any law" in sub-article 1 of Article 9 includes international treaties, one can have the audacity to conclude that international treaties are subordinate to the constitution as much as other subsidiary legislations are.

But, it is provided in Article 13(2) of the FDRE Constitution that the third chapter shall be interpreted in a manner conforming to (emphasis added) the principle of the Universal

---

19

Declaration of Human Rights, International Conventions on Human Rights and international instruments adopted by Ethiopia.

What one can discern from the above article is that international instruments are not always subordinate to the constitution, at least, partly. Pursuant to the aforementioned article, where never there arises the need for interpretation of any of the provisions under the third chapter of the constitution, resort should be made to relevant international instruments such as the UHDR and other human rights instruments to which Ethiopia is a party.

Thus, as long as the application of any of the provisions under the third chapter of the constitution meshes well with the spirit of those international instruments and there is no need for interpretation, all international instruments ratified by Ethiopia are subordinate, in hierarchy, to the constitution.

### **Review Question**

What is the rationale behind making a distinction between the provisions in the third chapter of the constitution from other provisions?

## **Chapter Four**

### **Making paradigm of Constitutions by Classifications**

#### **4.1. Classification of Constitution**

##### **4.1.1. By looking at the Nature of the Constitution itself: Traditional approach**

###### **4.1.1.1. Written /unwritten, codified/uncodified**

It is generally agreed that the written /unwritten dichotomy is false distinction as there is no constitution which is entirely unwritten and nor is there a constitution which is entirely written. What is meant by a written constitution is, therefore, one that is reduced into a form of a document having special sanctity. The term written constitution, according to C.F. Strong, also designates a rather complete document/instrument in which the framers of the constitution have attempted to arrange for every foreseeable contingency in its operation.

Unwritten constitution on the other hand is one which has grown up on the basis of custom rather than of written law. Notable in this regard is the United Kingdom. But then, there is a great deal of statute law that could properly fit into the realm of constitutional law, and much of it treats fundamental political institutions in the same way as “written” constitution does. For instance, the 1689 Bill of Rights, the various Franchise Acts of the 19<sup>th</sup> and 20<sup>th</sup> C. especially the 1911 and 1949 Acts which curtailed the power of the lords to amend or reject bills passed by the commons, statutes that provide for the limitation of the power of the sovereign, for succession to the throne and for regency, statutes that deal with the House of Commons, the parliament as a whole, with the established church, with judiciary, with the Armed forces, with local governments, and with citizens are akin to those in the constitutions.

Nevertheless, this is not to undermine the fact that the important aspects of constitutional practice in the United Kingdom are governed by major judicial decisions of the past (precedents), by generally accepted rules of conduct and procedure (convention) and by the guidance of such eminent authorities as Dicey, Jennings, and others.

Researchers indicate that only a handful of Middle Eastern states and the kingdom of Bhutan are states without a written constitution. Israel affords a unique example of an “evolving” and “uncodified” constitution, but not as is often claimed of an “unwritten” constitution. On the other hand, the United States constitution offers an example of the most completely written constitution.

To restate what has been said at the beginning of this section, the classification of constitution on the basis of whether they are unwritten or written is illusory. But we can adopt this classification as a valid classification by considering it as dealing: First- with the degree of codification, second- with the degree of written detail, and thirdly- with the origin of the written text of the documents.

The degree of codification could be established only if an agreed list of ‘basic constitutional constituents’ were accepted, as it is only with such a bench mark that one could have a measure. Many constitutional texts deal only with the skeletal outlines of topics, leaving the details to be regulated by organic laws or ordinary statutes. But there are some constitutions that display enough detail that one usually expects to find in subsidiary legislations. Indian and Mexican constitutions are good examples in this regard.

The origin of the constitutional text may supply descriptive classifications as “organic”, or “evolved” and “resolved”. The distinction roughly corresponds to that drawn in England and the United states, between common law and statute law, or to the Roman distribution between *jux* and *lex*. Some are natural growths, unsymmetrical both in their form and their contents. They consist of a variety of specific enactments or agreements of different dates, possibly proceeding from different sources, intertwined with customary rules which rest only on tradition or precedent, but are deemed of practically equal authority. Other constitutions are works of conscious art, the result of a deliberate effort to lay down once and for all a body of coherent provisions under which a government shall be established and conducted.

### ***Review Question***

What factors do you think affects the degree of detail of a given constitution? (Clue: lack of unity or instability within a state).

#### **4.1.1.2. Rigid/flexible, Conditional/unconditional Classification**

The true ground of division by virtue of the nature of the constitution itself is whether it is flexible or rigid. A written constitution is a standard of reference for classifying constitutions as rigid or flexible as unwritten/uncodified or non-documentary constitution cannot be other than flexible, and it is possible for codified/documentary constitution to be either flexible or rigid. The most important question, here, would then be what is it that makes a constitution rigid or flexible?

The rigidity or otherwise flexibility of a constitution hinges on whether or not its making is identical to the making of other ordinary laws. Accordingly, if the amendment or alteration procedure of a constitution is not made to depend on some conditions or special procedures, then it may be called flexible constitution. If some conditions or a special procedure has to be met before the amendment of a constitution, then it is a rigid constitution. In the case of Great Britain for instance, the same procedure is followed to amend an ordinary law or the constitution. This renders it a flexible.

Thus, flexible constitutions have elasticity as they can be bent and altered in form without any need to fulfill some conditions while retaining their main features. Rigid constitutions, on the other hand, are those whose lines are hard fixed.

K.C.Wheare points out a possible objection to the original use of the term 'rigid' and 'flexible' as the former designating a constitution which, because it contains legal obstacles, is hard to alter and is seldom altered and the later designating a constitution which is easy to alter and is often altered.

Nonetheless it should be noted, as argued by many constitutional Law scholars including Wheare, that the ease or frequency with which a constitution is amended depends not

only on the legal provisions which prescribe the method of change but also on the predominant political and social groups in the community and the extent to which they are satisfied with or acquiesce in the organization and description of political power which the constitution prescribes.

Other scholars also stress the same danger as it is argued that the stability of any constitution depends not so much on its form as on the social, economic and political factors.

This misunderstanding/danger may be resolved by using separate terms for the legal procedures; for this we can use the term conditional or unconditional. For ease and frequency of actual change, the terms rigid and flexible could be retained.

In a nutshell, although a constitution may be much written; there is every opportunity for it to be flexible. In fact, that the constitution contains various provisions passed at various times is proof enough for the flexibility of written constitutions. On the other hand, the constitutions of the Third, Fourth and Fifth French Republics which were all written are all rigid as they required special procedure for amendment. In a similar vein, the US constitution is so rigid that it can't be amended unless a special procedure is fulfilled. In short, a constitution, according to C.F. Strong, that cannot be bent without being broken is a rigid constitution.

#### **4.1.2. By looking at the Nature of the State itself: Federal/Unitary classification**

The legislature being the most important machinery in a modern constitutional state, constitutions can be classified on the basis of the nature of the legislature. Some states need a bicameral legislature by virtue of their federalism and yet others such as New Zealand, Denmark, and Finland may find that they can fully achieve their legislative purpose with a unicameral parliament. This renders classifying legislatures on the basis of chambers useless. According to C.F. Strong, it is wise to adopt a triple approach to the classification of constitutions from the perspective of the legislative.



First, he says, we may divide legislatures on the ground of electoral system by which voters, by virtue of either universal adult suffrage<sup>20</sup> or qualified adult suffrage, choose the member of the lower House, or of the only House in unicameral systems.

Secondly, we may divide constitutions on the ground of the nature of the upper house (in bicameral systems) whether it is elective or non-elective or partially elective.<sup>21</sup>

Thirdly, we must note that several contemporary constitutions give the electorate direct popular checks on the activities of the legislative which can be exercised by a referendum or plebiscite<sup>22</sup> or recall<sup>23</sup> and that in other states the electorate do not have such rights.

In a nutshell, the classification of constitutions into federal, unitary and confederate is based upon the principle by which the powers of government are distributed in the constitution between the government for the whole country and governments which may be established for its constituent part. In other words, the classification of constitutions as federal /unitary constitution relates to the method by which power is divided between the two tiers of governments i.e., government of the whole country and local governments which exercise authority over parts of the country.

In a federal constitution, powers of governments are divided between government for the whole and governments for parts of the country in such a way that each government is independent and none is subordinate to the other, and legislature in both cases have limited powers.

In a unitary constitution on the other hand, the legislature of the whole country is the supreme law-making body and it has the mandate to allow other legislatures to exist and exercise their powers while reserving the right to overrule them as they are subordinate to it.

---

If the government of the whole country is rather subordinate to the governments of the parts, the constitution of such state would come to have another name - a confederate constitution. These are not very convenient terms though. They are often used as words tantamount to the words “federation” or federal, as the Swiss constitution which is federal describes itself officially as ‘*constitution federal de co confederation Suisse*’ while it is customary in Canada to speak of the union of the provinces as confederation.

Despite all these difficulties the word confederation may be used to describe a form of association between governments whereby they set up a common organization to regulate matters of common concern but retain to themselves, to a greater or less degree, some control over this common organization.

#### **4.1.3. By looking at the nature of the Government itself: Presidential/Parliamentary Classification and Republican/Monarchical Classification**

##### **4.1.3. 1. Presidential/Parliamentary Classification**

It goes without saying that it is up to the executive to formulate policies and execute same upon gaining the sanction of the law through legislature. This in turn calls for checks or limitation upon the executive as misuse/abuse of power might arise in the absence of control. Thus the executive should necessarily be answerable to somebody whether this somebody is the legislature or the public at large (through periodic election).

But the question that needs closer attention, at this juncture, is in whom is the immediate responsibility confided? This question takes us to the crux of the matter, i.e. to dividing constitutional states into two classes: States with parliamentary executive and those with presidential executive.

If the executive is immediately answerable to the parliament, then it can be called parliamentary executive. But if it is immediately responsible at definitely arranged intervals to some wider body and is not amenable to removal by the action of the legislature, then it is called presidential executive. Differently stated, in constitutions that provide for presidential executive, there is a rigid separation of institutions from the

bottom upwards. Hence the president and his subordinates may not sit in the congress (legislature). In constitutions that provide for parliamentary executive, although the great majority of the members of the executive (civil servants and office holders) are excluded from the parliament, the heads of department and ministers may sit in the parliament and hence may be accountable to the parliament. As a rule a country which has presidential executive will have that form of government embodied explicitly in its constitution and in a country where has parliamentary executive prevails, it may be either embodied in the constitutions as in Ireland, India, Australia and South Africa or assumed and permitted and largely regulated by custom and by ordinary law as in New Zealand or Canada, Holland, and Belgium, or the Scandinavian monarchies. <sup>24</sup>

*N.B.* These points will be discussed in greater detail in the forthcoming sections of this material.

#### **4.1.3.2. Republican/Monarchical Classification**

A constitution can be classified as republican or monarchical though such classification has a lesser significance nowadays. The classification on the basis of this distribution is so less significant that it means little more than that where the head of state is a president, then that state is a republic, and where the head of state is a king, that state is a monarchy or a kingdom.(i)

In fact, the distinction between a republican and a monarchical constitution once had considerable meaning and importance as it stood for the difference between what may be called popular/democratic government and absolutism, autocracy, or dictatorship.

A monarch, as the name implies, was the sole ruler responsible to himself alone. But it is difficult today to find examples of such absolute monarchies.(ii)

The transformation of absolute monarchies into constitutional or limited monarchies all the more diminishes the significance of the distinction. The transformation has brought about the position that whenever monarchies exist today, with a few possible exceptions,

---

the contribution provides for democratic or popular government. Modern monarchies have come to resemble closely what a republic was intended to be; republican constitutions on the other hand illustrate almost every system of government from democracy to dictatorship. (iii)

#### **4.1.4. By looking at the Legislature**

##### **4.1.4.1. Unicameral/Bicameral/Tricameral/Tetracameral**

###### **(i) Unicameralism**

**Unicameralism** is the practice of having only one legislative or parliamentary chamber. Many countries with unicameral legislatures are often small and homogeneous unitary states and consider an upper house or second chamber unnecessary.

A view in favor of unicameral legislatures is that if an upper house is democratic, it simply mirrors the equally democratic lower house, and is therefore duplicative. A theory in favor of this view is that the functions of a second chamber, such as reviewing or revising legislation, can be performed by parliamentary committees, while further constitutional safeguards can be provided by a written constitution.

In many instances, the governments that now have unicameral legislatures were once bicameral and subsequently eliminated the upper chamber. One reason for such a change is because an elected upper house has overlapped the lower house and obstructed passage of legislation, an example being the case of the Landsting in Denmark (abolished in 1953). Another reason is because an appointed chamber has proven ineffectual, one example being the case of the Legislative Council in New Zealand (abolished in 1951).

Other nations, such as the United Kingdom and Canada, have technically bicameral systems that function much as unicameral systems, because one house is largely ceremonial and retains few powers. Thus, in the United Kingdom, control of the House of Commons determines control of the government, and the unelected House of Lords has the power only to delay legislation and to recommend amendments. Although there is

widespread agreement that the House of Lords needs to be reformed, there is little support for simply abolishing it.

Supporters of unicameralism note the need to control government spending and the elimination of redundant work done by both chambers. Critics of unicameralism point out the double checks and balances that a bicameral system affords, forcing a greater level of consensus on legislative issues. A feature of unicameralism is that urban areas with large populations have more influence than sparsely populated rural ones. In many cases the only way to get sparsely populated regions on board a unified government is to implement a bicameral system (such as the early United States). Supporters say this is an advantage, as they see it provides better apportionment while opponents see giving more power to rural regions as a goal in itself.

Unicameral legislatures were and are also common in Communist (like People's Republic of Poland, People's Republic of China and Cuba) and former Communist states (like Ukraine, Moldova and Serbia), since under Socialist point of view the institution of Senate was seen as conservative, elitist and pro-bourgeoisie by nature. In the United Kingdom, the devolved Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly are also unicameral.

Virtually all city legislatures are also unicameral in the sense that the city councils are not divided into two chambers. Until the turn of the 20th century, bicameral city councils were common in the United States.

In a non-binding referendum held on July 10, 2005, voters in the U.S. territory of Puerto Rico approved changing its Legislative Assembly to a unicameral body by 456,267 votes in favor (83.7%) versus 88,720 against (16.3%). If both the territory's House of Representatives and Senate approve by a 2/3 vote the specific amendments to the Puerto Rico Constitution that are required for the change to a unicameral legislature, another referendum will be held in the territory to approve such amendments. If those constitutional changes are approved, Puerto Rico will switch to a unicameral legislature as early as 2009.

**List of countries with unicameral parliament:**

- The Azgayin Zhoghov of Armenia
- The Jatiyo Sangshad of Bangladesh
- The Narodno Sabranie of Bulgaria
- The National People's Congress of the People's Republic of China
- The Legislative Yuan of the Republic of China (Taiwan)
- The Sabor of Croatia
- The National Assembly of People's Power of Cuba
- The House of Representatives of Cyprus
- The Folketing of Denmark
- The Parlamento Nacional of East Timor
- The Riigikogu of Estonia
- The Eduskunta of Finland
- The Parliament of Gibraltar
- The Vouli ton Ellinon of Greece
- The National Congress of Honduras
- The Althing of Iceland
- The Council of Representatives of Iraq
- The Knesset of Israel
- The Landtag of Liechtenstein
- The Seimas of Lithuania
- The National Assembly of Mauritius
- The Parliament of New Zealand
- The Storting of Norway (may divide into two chambers for some purposes)
- The Congreso de la República of Peru
- The Assembleia da República of Portugal
- The Narodna skupština of Serbia
- The National Assembly of Seychelles
- The Parliament of Singapore
- The Gukhoe of South Korea
- The Parliament of Sri Lanka
- The Riksdag of Sweden (since 1971)
- The Büyük Millet Meclisi of Turkey

- The Verhovna Rada of Ukraine
- The Pontifical Commission of Vatican City State
- The Asamblea Nacional of Venezuela

**(ii) Bicameralism**

Although the ideas on which bicameralism are based can be traced back to the theories developed in Ancient Sumer and later ancient Greece, ancient India, and Rome, recognizable bicameral institutions first arose in medieval Europe where they were associated with separate representation of different estates of the realm. For example, one house would represent the aristocracy, and the other would represent the commoners. The Founding Fathers of the United States also favored a bicameral legislature, though not based on class distinction. As part of the Great Compromise, they invented a new rationale for bicameralism in which the upper house would have states represented equally, and the lower house would have them represented by population.

The bicameral legislature of the United States is housed in a capitol building with two wings. The north wing houses the Senate while the south wing houses the House of Representatives.

In subsequent constitution making, federal states have often adopted bicameralism, and the solution remains popular when regional differences or sensitivities require more explicit representation, with the second chamber representing the constituent states. Nevertheless, the older justification for second chambers — providing opportunities for second thoughts about legislation — has survived. A trend towards unicameralism in the 20th century appears now to have been halted.

Growing awareness of the complexity of the notion of representation and the multifunctional nature of modern legislatures may be affording incipient new rationales for second chambers, though these do generally remain contested institutions in ways that first chambers are not. An example of the political controversy regarding a second chamber has been the debate over the powers of the Canadian Senate.

The relationship between the two chambers varies; in some cases, they have equal power, while in others, one chamber is clearly superior in its powers. The first tends to be the case in federal systems and those with presidential governments. The latter tends to be the case in unitary states with parliamentary systems.

Some political scientists believe that bicameralism makes meaningful political reforms more difficult to achieve and increases the risk of deadlock (particularly in cases where both chambers have similar powers). Others argue strongly for the merits of the 'checks and balances' provided by the bicameral model, which they believe helps prevent the passage into law of ill-considered legislation.

Some countries, such as Argentina, Australia, Belgium, Brazil, Canada, Germany, India, Malaysia, Mexico, Pakistan, Russia, South Africa, Switzerland, and the United States link their bicameral systems to their federal political structure.

In the United States, Australia, Mexico and Brazil, for example, each state is given the same number of seats in the legislature's upper house. This takes no account of population differences between states — it is designed to ensure that smaller states are not overshadowed by more populous ones. (In the United States, the deal that ensured this arrangement is known as the Connecticut Compromise.) In the lower houses of each country, these provisions do not apply, and seats are allocated based purely on population. The bicameral system, therefore, is a method of combining the principle of democratic equality with the principle of federalism — all citizens are equal in the lower houses, while all states are equal in the upper houses.

In Canada, the country as a whole is divided into a number of Senate Divisions, each with a different number of Senators, based on a number of factors. These Divisions are Quebec, Ontario, Western Provinces, and the Maritimes, each with 24 Senators, Yukon, Northwest Territories, Nunavut, each with 1 Senator, and Newfoundland and Labrador has 6 Senators, making for a total of 105 Senators.

In the German, Indian, and Pakistani systems, the upper houses (the Bundesrat, the Rajya Sabha, and the Pakistani Senate respectively) are even more closely linked with the



federal system, being appointed or elected directly by the governments of each German Bundesland, Indian State, or Pakistani Province. (This was also the case in the United States before the 17th Amendment.) The Indian Upper House does not have the states represented equally, but on the basis of their population.

There are also instances of bicameralism in countries that are not federations, but which have upper houses with representation on a territorial basis. For example, in South Africa, the National Council of Provinces (and before 1997, the Senate) has its members chosen by each Province's legislature.

In Spain the Spanish Senate functions as a *de facto* territorial-based upper house, and there has been some pressure from the Autonomous Communities to reform it into a strictly territorial chamber.

The European Union maintains a bicameral legislative system which consists of the European Parliament, which is elected in general elections on the basis of universal suffrage, and the Council of the European Union which consists of members of the governments of the Member States which are competent for the relevant field of legislation. Although the European Union is not considered a state, it enjoys the power to legislate in many areas of politics; in some areas, those powers are even exclusively reserved to it.

In a few countries, bicameralism involves the juxtaposition of democratic and aristocratic elements. The best known example is the British House of Lords, which includes a number of hereditary peers. The House of Lords represents a vestige of the aristocratic system which once predominated in British politics, while the other house, the House of Commons, is entirely elected. Over the years, there have been proposals to reform the House of Lords, some of which have been at least partly successful — the House of Lords Act 1999 limited the number of hereditary peers (as opposed to life peers, appointed by the government) to 92, down from around 700. The ability of the House of Lords to block legislation is curtailed by the Parliament Act. Further reform of the Lords is planned. Another example of aristocratic bicameralism was the Japanese House of Peers, abolished after World War II and replaced with the present House of Councilors.

Many bicameral systems are not connected with either federalism or an aristocracy, however. Japan, France, Italy, the Netherlands, the Philippines, the Czech Republic, the Republic of Ireland and Romania are examples of bicameral systems existing in unitary states. In countries such as these, the upper house generally exists solely for the purpose of scrutinizing and possibly vetoing the decisions of the lower house.

In some of these countries, the upper house is indirectly elected. Members of France's Senate, Ireland's Seanad Éireann are chosen by electoral colleges consisting of members of the lower house, local councillors, the Taoiseach, and graduates of selected universities, while the Netherlands' First Chamber is chosen by members of provincial assemblies.

In some countries with federal systems, individual states (like those of the United States and Australia) may also have bicameral legislatures. Only two such states, Nebraska in the US and Queensland in Australia, have adopted unicameral systems.

However, in early United States history, unicameral state legislatures were not totally uncommon even though twelve of the original thirteen States (Pennsylvania being the only exception) had a bicameral legislature at the time of the Philadelphia Convention; some of the new States didn't immediately adopt such system. It was not until 1836, for example, that Vermont finally created a Senate.

During the 1930s, the Legislature of the State of Nebraska was reduced from bicameral to unicameral with the 43 members that once comprised that state's Senate. One of the arguments used to sell the idea at the time to Nebraska voters was that by adopting a unicameral system, the perceived evils of the "conference committee" process would be eliminated.

A conference committee is appointed when the two chambers cannot agree on the same wording of a proposal, and consists of a small number of legislators from each chamber. This tends to place much power in the hands of only a small number of legislators.

Whatever legislation, if any, what the conference committee finalizes must then be approved in an unamendable "take-it-or-leave-it" manner by both chambers.

During his term as Governor of the State of Minnesota, Jesse Ventura proposed converting the Minnesotan legislature to a single chamber with proportional representation, as a reform that he felt would solve many legislative difficulties and impinge upon legislative corruption. In his book on political issues, *Do I Stand Alone?*, Ventura argued that bicameral legislatures for provincial and local areas were excessive and unnecessary, and discussed unicameralism as a reform that could address many legislative and budgetary problems for states.

In Australian states the lower house was traditionally elected based on the one-vote-one-value principle, whereas the upper house was partially appointed and elected, with a bias towards country voters. In Queensland, the appointed upper house was abolished in 1922, while in New South Wales there were similar attempts at abolition, before the upper house was reformed in the 1970s to provide for direct election. Nowadays, the upper house is elected using proportional voting and the lower house through preferential voting, except in Tasmania, where proportional voting is used for the lower house, and preferential voting for the upper house.

A 2005 report on democratic reform in the Arab world by the US Council on Foreign Relations co-sponsored by former Secretary of State Madeleine Albright urged Arab states to adopt bicameralism, with upper chambers appointed on a 'specialized basis'. The Council claimed that this would protect against the 'tyranny of the majority', expressing concerns that without a system of checks and balances extremists would use the single chamber parliaments to restrict the rights of minority groups.

In 2002, Bahrain adopted a bicameral system with an elected lower chamber and an appointed upper house. This led to a boycott of parliamentary elections that year by the Al Wefaq party, which said that the government would use the upper house to veto their plans. Many secular critics of bicameralism were won round to its benefits in 2005, after many MPs in the lower house voted for the introduction of so-called morality police.

## Nations with bicameral legislatures

**Parliament** in Australia, which consists of the House of Representatives and Senate; all of the state parliaments except Queensland's are also bicameral.

- The Parliament in Austria, which consists of the Nationalrat and the Bundesrat; all of the *Bundesländer* have unicameral parliaments.
- The **Congresso Nacional** in Brazil which consists of the Senado and the Câmara dos Deputados; all of the 26 state legislatures and the Federal District legislature are unicameral.
- **In the parliament** in Canada, which consists of the House of Commons and the Senate; all of the provincial legislatures are unicameral.
- **The Parliament** in the Fifth French Republic consists of the Assemblée Nationale (National Assembly) and the Sénat (Senate)
- The **Bundestag** and Bundesrat in Germany form two distinct bodies not framed by a comprehensive institution; all of the *Länder* have today unicameral parliaments.
- **The parliament** in India, which consists of the Lok Sabha (House of the People) and the Rajya Sabha (Council of States); some of the states also have bicameral legislatures namely Vidhan Sabha (Legislative Assembly) and Vidhan Parishad (Legislative Council).
- The **Parliament** in Italy, which consists of two chambers that have same role and power: the Senato della Repubblica (Senate of the Republic, commonly considered the *upper house*) and the Camera dei Deputati (Chamber of Deputies, considered the *lower house*) with twice as many members as the Senate.
- The **Diet** of Japan is bicameral, consisting of the House of Representatives as the lower house and the House of Councillors as the upper house.
- The **Oireachtas** of the Republic of Ireland which consists of Dáil Éireann (the House of Representatives) and Seanad Éireann (the Senate)
- **The parliament** in Malaysia, which consists of the *Dewan Rakyat* (House of Representatives) and the *Dewan Negara* (Senate); all of the state legislatures are unicameral.
- The **Netherlands States-General**, which consists of the Tweede Kamer (Second Chamber) and the Eerste Kamer (First Chamber)

- **The parliament** in Pakistan, which consists of the National Assembly and the Senate; all of the provincial assemblies are unicameral.
- In Spain, the **Cortes Generales**, with the Congreso de los Diputados (Congress of Deputies) and the Senado (Senate)
- **Parliament** in South Africa which consists of the National Assembly and the National Council of Provinces; all of the provincial legislatures are unicameral.
- The **Federal Assembly** in Switzerland, which consists of the National Council and the Council of States; all of the cantons have unicameral parliaments.
- The **Federal Assembly** in Russian Federation, which consists of the State Duma and the Federation Council; all of the provincial parliaments are unicameral.
- **The parliament** in the United Kingdom, which consists of the House of Commons and the House of Lords
- The **Congress** of the Philippines consists of a Senate and a House of Representatives
- **The congress** in the United States, which consists of the Senate and the House of Representatives; all of the state legislatures except Nebraska are also bicameral.

### **(iii) Tricameralism**

**Tricameralism** is the practice of having three [legislative](#) or [parliamentary](#) chambers. It is contrasted to [unicameralism](#) and [bicameralism](#), both of which are far more common.

The term was used in [South Africa](#) to describe the [Parliament](#) established under the [apartheid](#) regime's new [Constitution](#) in [1983](#). Other instances of tricameral legislatures in history include [Simón Bolívar](#)'s model state. The word could also describe the [French States-General](#), which had three 'estates'.

### **South African tricameralism**

In 1983, [South Africa](#)'s [apartheid](#) government put forward a constitution providing for a tricameral legislature. On [2 November](#), around seventy percent of the country's white population voted in favour of the changes — black South Africans were not consulted,

and under the proposal they continued to be denied representation since in theory they were citizens of independent or autonomous [bantustans](#).

The South African tricameral parliament consisted of three [race](#)-based chambers:

- **House of Assembly** — 178 members, reserved for whites
- **House of Representatives** — 85 members, reserved for [Coloured](#), or mixed-race, people
- **House of Delegates** — 45 members, reserved for [Asians](#)

The creation of the tricameral parliament was controversial on two fronts. On the one hand, many white conservatives disliked the idea of non-whites participating in Parliament at all. The dispute was a factor in the creation of the [Conservative Party](#), a breakaway from the dominant [National Party](#). On the other hand, many coloureds and Asians rejected the system as a sham, saying that the chambers reserved for them were powerless.

The tricameral parliament was not particularly strong. The 1983 constitution significantly weakened the powers of parliament, and abolished the position of the Prime Minister. Most authority was transferred to the [State President](#), including the ability to appoint the Cabinet. This was seen by many as an attempt to limit the power of coloureds and Indians — not only were the 'non-white' Houses of Parliament less powerful than the 'white' one, but parliament itself was subordinate to a white President.

### **Bolivar's tricameralism**

[Simón Bolívar](#), the [South American](#) revolutionary leader, included a tricameral legislature as part of his proposals for a model government. Bolivar described the three houses as follows:

- **Chamber of Tribunes**, holding powers relating to government finance, foreign affairs, and war. The tribunes would, unlike the other two houses, be popularly elected.
- **Senate**, an apolitical body holding powers to enact law, supervise the judiciary, and appoint regional officials. Bolivar believed that the senate should be

[hereditary](#), saying that this was the only way to ensure its neutrality. There are parallels between Bolivar's Senate and other houses such as the [British House of Lords](#).

- **Censors**, a group who would act as a check against the powers of the other two. Bolivar described them as "prosecuting attorneys against the government in defense of the Constitution and popular rights". He also said that they should ensure that the executive was functioning satisfactorily, perhaps having powers of [impeachment](#).

Bolivar intended his model government to have a [presidential system](#), and so the tricameral parliament was not expected to govern. Bolivar was explicit that the legislature should not have an active role in administration- it merely made law and supervised other branches of government.

Despite Bolivar's huge influence in South America, no country employs his tricameral parliament. Early attempts to implement the model, such as in [Bolivia](#), were not successful, although the chaos of the period was likely a factor in this outcome.

### **French tricameralism**

Some historians view the [French States-General](#) as an example of a tricameral legislature. The States-General evolved gradually over time, and provided advice on various matters (including legislative issues) to the [King](#). The three Estates were simply labeled [First](#) (consisting of [clergy](#)), [Second](#) (consisting of [nobility](#)), and [Third](#) (consisting of [commoners](#)).

There are problems regarding the States-General as a tricameral legislature, however. Firstly, the States-General never had any formal powers to legislate, although at times, it played a major role in the King's legislative activity. Secondly, the division between the three estates was not always maintained — the estates sometimes deliberated separately, but at other times, they deliberated as a single body, undermining the idea of tricameralism.

## Other examples

### Isle of Man

The parliament of the [Isle of Man](#), the [Tynwald](#), is sometimes called tricameral, but this description is not universally accepted. The two commonly accepted houses of the Tynwald are the [House of Keys](#) and the [Legislative Council](#), but according to some, the [Tynwald Court](#) (consisting of the members of both houses meeting together) counts as a third house. Others disagree, saying that as there are no members of the Court who are not also members of the other houses, the Court should not be considered separately. (By comparison, in Australia and Switzerland deadlocks between the two Houses can sometimes be resolved by a joint sitting, but experts would not classify either of those countries as "tricameral").

### (vi) Tetracameralism

**Tetracameralism** (Greek *tetra*, four + Latin *camera*, chamber) is the practice of having four legislative or parliamentary chambers. It is contrasted to [unicameralism](#) and [bicameralism](#), which are far more common, and [tricameralism](#), which is rarely used in government.

Medieval Scandinavian [deliberative assemblies](#) were traditionally tetracameral, with four estates; the nobility, the clergy, the burghers and the peasants. The Swedish and Finnish [Riksdag of the Estates](#) maintained this tradition the longest, having four separate legislative bodies.

Finland, as a part of [Imperial Russia](#) had [tetracameral system](#) until 1906, when it was followed by the then most modern legislature, the unicameral [Parliament](#) with [universal suffrage](#).



#### 4.1.4.2. The Upper House

An upper House is one of two chambers of a [bicameral legislature](#), the other chamber being the [lower house](#).

##### (i) Features

An upper house is usually distinct from the lower house in at least one of the following respects:

- It is given less power than the lower house, with special reservations, e.g. only when seizing a proposal by evocation, not on the budget, not the house of reference for majority assent.
- Only limited legislative matters, such as constitutional amendments, may require its approval.
- 'Houses of review', in that they cannot start legislation, only consider the lower houses' initiatives. Also, they may not be able to outright veto legislation.
- In [presidential systems](#), the upper house usually has the sole power to try [impeachments](#) against the [executive](#) following enabling resolutions passed by the lower house.
- Composed of members selected in a manner other than by popular election. Examples include hereditary membership or Government appointment.
- Used to represent the [states](#) of a [federation](#).
- Fewer seats than the lower house (or more if hereditary).
- If elected, often for longer terms than those of the lower house; if composed of peers or nobles, they generally hold their hereditary seats for life.
- Elected in portions for staggered terms, rather than all at once.

In [parliamentary systems](#) the upper house is frequently seen as an advisory or "revising" chamber, for this reason its powers of direct action are often reduced in some way. Some or all of the following restrictions are often placed on upper houses:

- Lack of control over the [executive branch](#).
- No absolute [veto](#) of proposed legislation (though suspensive vetoes are permitted in some states)

- A reduced role in initiating legislation.
- It cannot block or modify [supply](#) (Though see the [Australian Constitutional Crisis of 1975](#) for an example of an upper house blocking supply).

It is the role of a revising chamber to scrutinize legislation that may have been drafted over-hastily in the lower house, and to suggest amendments that the lower house may nevertheless reject if it wishes to. An example is the [British House of Lords](#), which under the [Parliament Acts](#) may not stop, but only delay bills. It is sometimes seen as having a special role of safeguarding the [Constitution of the United Kingdom](#) and important [civil liberties](#) against ill-considered change. By delaying but not vetoing legislation, an upper house may nevertheless defeat legislation: by giving the lower house the opportunity to reconsider, by preventing it from having sufficient time for a bill in the legislative schedule, or simply by embarrassing the other chamber into abandoning an unpopular measure.

Nevertheless, some states have long retained powerful upper houses. For example, the consent of the upper house to legislation may be necessary (though, as noted above, this seldom extends to budgetary measures). Constitutional arrangements of states with powerful upper houses usually include a means to resolve situations where the two houses are at odds with each other.

In recent times, Parliamentary systems have witnessed a trend towards weakening the powers of upper houses relative to their lower counterparts. Some upper houses have been abolished completely (see below); others have had their powers reduced by constitutional or legislative amendments. Also, [conventions](#) often exist that the upper house ought not to obstruct the business of government for frivolous or merely partisan reasons. These conventions have tended to harden with the passage of time.

In [presidential systems](#), on the other hand, the Upper House is frequently given other powers to compensate for its restrictions:

- It usually has to sign off on appointments the executive makes to the [cabinet](#) and other offices.
- It frequently has the sole authority to give consent to or denounce foreign [treaties](#).

## (ii) Institutional structure

There is a great variety in the way Upper House members are assembled. It can be directly or indirectly elected, appointed, selected through hereditary means, or a certain mixture of all these systems. The [German Bundesrat](#) is quite unique as its members are members of the [cabinets](#) of the German [states](#), in most cases the state [premier](#) and several ministers, they are just delegated and can be recalled anytime. In a very similar way the [Council of the European Union](#) is composed by national ministers.

Many upper houses are not directly elected, but appointed either by the [head of government](#) or in some other way. This is usually intended to produce a house of experts or otherwise distinguished citizens, who would not be returned in an election. For example, members of the [Canadian Senate](#) are appointed by the [monarch](#) on the direction of the prime minister.

The seats are sometimes hereditary, as still is partly the case in the British [House of Lords](#), and the Japanese [House of Peers](#) (until this house was abolished in 1947).

However, it is also common that the upper house consists of delegates who are indirectly elected by state governments or local officials, for example, in the [United States Senate](#) until the passage of the [Seventeenth Amendment](#) in [1913](#).

In addition, the upper house of many nations is directly elected, but in different proportions to the lower house - for example, the Senates of [Australia](#) and the [United States](#) have a fixed number of elected representatives from each state, regardless of the population.

Many jurisdictions, such as [Denmark](#), [Sweden](#), [Croatia](#), [Peru](#), [Venezuela](#), [New Zealand](#), and most [Canadian provinces](#), once possessed upper houses but abolished them to adopt unicameral systems. [Newfoundland](#) had a [Legislative Council](#) prior to joining [Canada](#), as did Ontario when it was [Upper Canada](#). [Nebraska](#) is the only state in the United States to

have a unicameral legislature, which it achieved when it abolished its lower house in [1934](#).

The [Australian](#) state of [Queensland](#) also once had a legislative council before abolishing it in 1922; at this time members of the Legislative Council (the formal name of the state parliament) were not elected by the citizenry and so the council was found to be undemocratic and thus unconstitutional. As this was a purely internal matter, all other Australian states continue to have bicameral systems.

### **(iii) Common terms**

- [Senate](#) - By far the most common
- [Legislative Council](#)
- Council of States (in a Federation) - [Federation Council](#) ([Russia](#)), [Bundesrat](#) ([Germany](#), [Austria](#)), [Council of States](#) ([Switzerland](#)), [Rajya Sabha](#) (or "Council of States," [India](#)), [Sangi-in](#) (or "House of Councillors," [Japan](#)).
- [Supreme Soviet](#) - as in the ex-[Soviet Union](#).

### **4.1.4.3. Lower House**

A Lower House is one of two chambers of a [bicameral legislature](#), the other chamber being the [upper house](#). Despite its theoretical position "below" the upper house, in many legislatures worldwide the lower house has come to wield more power. The supremacy of the lower house usually arises from special restrictions placed (either explicitly by legislation or implicitly by convention) on the powers of the upper house, which often can only delay rather than veto legislation or has less control over [money bills](#). Under [parliamentary systems](#) it is usually the lower house alone that designates the [head of government](#) or [prime minister](#), and may remove them through a [vote of no confidence](#). There are exceptions to this however, such as the [Prime Minister of Japan](#), who is formally selected with the approval of both houses of the [Diet](#). A legislature composed of only one house is described as [unicameral](#).

### **Common attributes**

In comparison with the upper house, lower houses frequently display certain characteristics:

- Given greater power, usually based on restrictions against the upper house.
- Directly elected ([apportionment](#) is usually based on population).
- Given more members.
- Elected more often, and all at once.
- Given total or original control over budget and monetary laws.
- Able to override the upper house in some ways.
- In a [presidential system](#), given the sole power to impeach the executive (the upper house then has to try the impeached).

Many lower Houses are named in the following manner: House/Chamber of Representatives/the People/Commons/Deputies, i.e. Deputies, Chamber, House, Commons, House, Legislative, and [National Assembly](#) (hence also [Bundestag](#), German for *federal assembly*)

#### **4.1.5. By looking at the nature of the Executive**

The foregoing discussion must have brought home to the student the fact that unitary, federalism, any of the mix of or for that matter even confederation is, essentially an attribute of state. Once a state is designated as federal or unitary then, it would not be inappropriate to call the respective government thereof as federal or unitary or confederal government. Where one wants to create a typology of government, however, the appropriate designation should be parliamentary form of government and presidential form of government or a mix of the two.

It was by using this mechanism that we were able to classify constitution in terms of these topologies. Following the same train of logic we can further create topologies of constitutions by looking at the nature of the executive. When we create a typology of the executive, we have to take into consideration the fact that the quantum, quality and configuration of power assigned to the executive is a function of variety of factors. By taking this multiple factors in the Wight, they may bear upon the system which one may

characterize as (a) mono cephalous, (b) bicepalous and (c) acepalous or dispersed leadership.

The word “cephalous” finds its origin in Greek to refer to multiple headed Gods. Now, it has been found a useful way of characterizing various types of executive.

#### **4.1.5.1. Monosepalous Executive**

The best typology in this respect is the kind of executive we find in Britain parliamentary or cabinet form of government (executive). Although in this form of government, the executive is drawn out of the parliament, particularly from that of the House of Commons, once it did so, it's no more an adjunct of the parliament, rather it's an independent entity. This entity consists of two separate, distinct, and yet connected offices: the Office of Prime Minister and that of the Counsel of Ministers. The two offices are connected by the person of Prime Minister for he is the chairman of the Council of Ministers.

The Prime Minister is not a mere spokesman of the Council of Minister, but its leader. As a leader, it is the Prime Minister who determines the agenda of the Council of Ministers. This means the power to determine the priority of governmental action at any one time is in his hands.

It's the Prime Minister who initially organizes the Council of Ministers, i.e. most of the ministers form the party or coalition of parties in government; and in this party or coalition of parties he must have been the chairman of the party which own the largest seat in the House of Commons. Even in this circumstance, he has ‘the party whip’ in his arm which means he can bring party loyalty to bear upon his party members.

In addition to this, the Prime Minister is assisted by numerous experts of various professions in the office of the secretariat. On top of this, the hierarchies of administration of agencies of the executive are manned by professionals appointed, promoted etc, on the basis of civil service law. This and many other factors have

contributed to the single headedness of the British government, despite the fact that the parliament is the supreme authority overall governmental affairs.

In general the system of government we find in the USA is, in a way, a hybrid of that of Britain. The basic difference is the executive does not owe its origin to parliament. Itself is elected and is accountable to the people. Here, it's the President who is elected by the people and his secretaries, including the vice president owe their position to the President.

Despite the fact that in the American system the Judiciary enjoys a lot of power and there is a system of check and balance between and among the three departments of government, all this will not enable anyone to conclude political power in the USA is dispersed. Rather a close observation shows that the Head of the Executive, the President, stands out clearly as the top manager of the state. Hence, the US government is monosepalous as in Britain.

#### **4.1.5.2. Bicephalous Executive**

The 1958 reformulated constitution of France has created an executive with two heads, i.e. the President and Prime Minister. The President is elected for seven years and has a lot of executive power. The Prime Minister, on the other hand, is appointed by the president for five years. The president is required to appoint the Prime Minister who owns the largest vote. Thus, the Prime Minister owes his position primarily to electorates which makes him a contending power owner. This becomes clear, where the President and the Prime Minister come from different parties. This usually happens after the five year of term of office of the Prime Minister is over and a fresh election is held for the premiership. In such a situation the president will be compelled to appoint a prime minister from a party which has been in opposition. For the remaining two years of the presidency, there will certainly be two heads of government in France. This was deliberately made by the 1958 constitution to avoid the appearance of such a single handed leadership as Charles De Gaul. Hence; this structure of the executive can, therefore, be characterized as Bicephalous.

#### **4.1.5.3. Acephalous Executive (Dispersed Leadership )**

When the Fundamental law of Western Germany (The constitution) was being framed under the auspices of the Allied powers, particularly the USA, Britain and France, they had to make sure that no one single leader like Hitler will come on the political arena of Germany. The Chancellor, although holds the top executive Office, shares a lot of his power with a number of other institutions among which the most notable one is the Central Bank of Germany.

The Governor of this Bank is independent for he leads the countries money industry and commerce. He sets interest rates on loan and saving and determines the exchange rate of the national currency (Deutschmark). This and a lot of other powers of the government place him in no less a position with the chancellors in the governance of the economic life of Germany. Such power sharing in Germany has been characterized as acephalous executive or dispersed leadership.

We observe the same kind of arrangement having been put in place in Japan and Italy but for different reasons. In Japan, even where one party owns the office of the Premiership, the prime minister has little executive power to execute by himself for he shares his power with group leaders within the same party. A party in Japan is characterized with strong function which often looks like contending parties. Due to this reason, the powers of the Prime Minister are actually shared between and among these group leaders thereby giving a picture common to acephalous leadership.

Since the Second World War, the same kind of tendency can be observed in Italy, but again for different reasons. In Italy this happens due to the proliferation of parties as a result of which let alone one, not even two parties have been able to capture the office of the premiership practically for the last half century. The powers of the Prime Minister have, therefore, been shared among a number of parties in coalition. This gives a clear picture of acephalous executive or of dispersive leadership. The constitution can, therefore, be classified on the basis of power configuration made available (by the terms of the constitution) to the Head of the Executive.



#### **4.1.6. By looking at the Nature of the Judiciary: Prerogative/rule of law system**

The judiciary, the third of the three great departments of the government, can be classified on various grounds such as whether the judiciary has the mandate to question and interpret the Acts of the legislature, as in the United States, and those which are but apply the acts without question as in the United Kingdom.

But the distribution we are interested in is based on the difference of legal systems. Thus, we can divide states into those in which the executive being subject to the operation of the rule of law (to be discussed later) and is unprotected - the common law states; and the prerogative states in which the executive is protected by a special system of administrative law.

#### **4.2. Reflections on the Ethiopian Constitution**

Under this topic, we will discuss the nature of Ethiopian constitutions (the pre-existing ones and the incumbent one) with special emphasis on the FDRE constitution.

Despite the existence of documents akin to constitution, in spirit, in traditional Ethiopia, no written constitution in the modern sense of the term formed the basis for constitutional process. Documents noteworthy in this regard include the Fetha Negest, which regulated the secular and religious aspects, the Kibre Negest which served the politico - religious needs of the day, the Serate Mengist of the nineteenth century which provided for certain administrative matters and protocol directives useful to the constitutional process.<sup>25</sup> But none of those documents were constitutions in the strictest sense of the term although they had served specific purposes in the constitutional process.

Thus, we can say that Ethiopia had no written constitution prior to 1931. But this doesn't signify, as per our discussion on written/unwritten constitution dichotomy, the absence of a constitution as Ethiopia had a sophisticated traditional unwritten constitution.<sup>26</sup>

Those unwritten constitutions embraced the ideals of monarchy, an imperial court system involving monarchy, the church, and the nobility in an intricate power relationship.<sup>27</sup> That succession to the throne hinges on two requirements-dynastic (Solomonic dynasty) claim and the monarchy's profession of the Orthodox Christian faith (the requirement of anointment by the church) - is sufficient proof for the existence of an unwritten principle (constitutional in essence).

We can also cite several other traditional constitutional principles such as the office of the Abun (head of the Ethiopian Orthodox church), male succession to the throne etc are proof enough for the existence of traditional (unwritten) constitution.

The Ethiopian constitutional history has it that the era of written (codified) constitution began as early as 1931, during the regime of emperor Haileselassie. The 1931 constitution is a written and codified document outlining the powers and prerogatives of the emperor, manner of succession to the throne, the rights and duties of the nation, the nature of the parliament, the judiciary and related matters.

As the constitution doesn't say anything about amendment, it is difficult to say the constitution is rigid or flexible if we base our analysis on the existence or otherwise of stringent legal requirement in the constitution dictating the mode of amendment.

Nevertheless, as the law alone cannot tell us how "rigid" a particular constitution really is and other factors, particularly, political forces play an equally important role and the existence of a legal procedure may in itself act as a political brake restraining impetuous changes; we can have the audacity to dub the 1931 constitutions as a flexible constitution. We can give two reasons for this: for one thing, there is no provision in the constitution providing for an avenue for amendment let alone making it difficult to amend by putting in place a special procedure. For the other, the constitution is rather a grant<sup>28</sup> by the emperor or a royal document particularly tuned to safeguard the interest of the emperor and the royal family thereby bestowing upon the emperor the power to do everything he wishes as he is the ultimate law maker (see Art 46 of the constitution). He is the Head of

---

State and Government and he is the ultimate umpire as the “Zufan chilot” or crown court, wherein the Emperor is the presiding judge, can reverse the decision of the Supreme Court. Thus, we can conclude that the emperor can amend/charge the constitution if he so wishes. The then State was also unitary in that the empire under the imperial rule of the emperor. Hence a monarchial form of government was in place.

It should also be remembered that the constitution acknowledges a bicameral parliament namely: the Chamber of the Senates (yehig Mewosseigna Mikirbet) and the Chamber of Deputies (“Yehig memria Mikirbet”)<sup>29</sup>

The constitution institutionalizes the ministerial system wherein collective and individual ministerial responsibilities resided in the person of the emperor thereby rendering the centralization of power inevitable.

When we come to the judiciary, the 1931 constitution belongs to the second category, i.e., the prerogative state in which the executive is under the protective shield of a special system of administrative law, as the constitution in its Art. 54, clearly states that suits related to administrative affairs are entertained by a special court staffed by judges withdrawn from the jurisdiction of other courts.

More or less, we can say the same thing about the 1955 constitution except that the country adopted a federal form of government as of the federation of Eritrea to Ethiopia by the resolution of the UN General Assembly on the 2<sup>nd</sup> of Dec. 1950.

This constitution also aims at centralization and attempts to attract the loyalty of those who gained their livelihood from relatively modern economic activities or who were better educated than most Ethiopian, and thereby strengthen the national government.

The emperor also had the power to appoint or dismiss anyone in the various branches of the government including the prime minister and other ministers, judges and diplomats. He also had a co-legislative power as he had veto power on legislation. This makes the emperor an absolute monarch who has the ultimate say in every walk of life.

Thus, the level of centralization is so immense that every decision should get the blessing of the emperor. The destruction of the federation in 1962 was an additional measure of centralization. Such devolution of power in the hands of the emperor, obviously, puts the fate of the constitution at the mercy of the emperor.

The 1987 PDRF constitution is also written and codified constitution rendering the country a unitary state in which all nationalities live in equality.<sup>30</sup> The constitution had conferred ultimate state power on the National Shengo and its Standing Council. It also endorses a unicameral parliament, the National Shengo which along with the Council of State, the president of the Republic, Commissions of the National Shengo, the Council of Ministers, the Supreme Court, the Procurator General, Shengos of higher administrative and autonomous regions, and mass organizations, has the right to initiate legislation.

Unlike the preceding constitutions, this constitution dedicates an article for amendment procedure of the constitution. According to Art 119 of the constitution, a special procedure has to be gone through prior to deciding in favor/against amendment. Accordingly, a three fourth majority decision of members of the National Shengo has to be obtained in order to amend the constitution. This, therefore, renders the constitution rigid. But, it should be remembered, once again, that other factors play a major role in such decisions.

It is utterly impossible for us to say the constitution is perfectly rigid by looking at just this article as the extent to which power is centralized might force us to consider other options. For instance, the Secretary General of the sole political party, the Workers Party of Ethiopia, was also the executive president of the Republic, the Chairman of the National Shengo, and the commander-in-chief of the armed forces.

According to Fasil Nahum “this set up is reminiscent of the monarchial absolutism of Ethiopian history during both the written and unwritten constitutional epochs in spite of the empire having changed into a republic and the emperor into a president”.

Therefore, although the constitution stipulates/provides for a special procedure for amendment, it is not as simple as it looks on the surface to conclude the constitution is a rigid constitution.

### ***Review Question***

Why would it be difficult, if at all, for us to be bold enough to call the PDRF constitution a rigid constitution so long as there is a provision requiring the fulfillment of a special procedure?

Coming back to the 1995 FDRE constitution, in much the same way as its predecessors, this constitution is a written and codified document having 106 articles.

Just like the PDRE constitution, the incumbent constitution provides for a republican form of government although the former provides for a unitary single-party system and the later provides for a federal multi-party system.

The 1995 constitution establishes a parliamentary democracy.<sup>31</sup> The constitution also provides for a bicameral/two-chamber parliament, namely the House of Peoples' Representatives and the House of Federation both of which are federal houses.

It also provides for a one chamber State Council at State level which is the highest organ of State authority as much as the House of Peoples' Representatives is the highest authority of the federal government.

The other chamber, i.e., the House of Federation which is composed of representative of nations, nationalities and peoples is entrusted with the power to interpret the constitution and to decide on serious constitutional concerns such as the right to secession.

When we come to the amendment procedure of the constitution, we find it to be a rigid constitution as it puts in place a stringent requirement for amendment.

Just like any other federal system, the FDRE constitution's amendment procedure involves both regional and federal legislative organs. Thus the initiation could be made by either of the two tiers of governments. Where the initiatives come from the regions, one third of the state council must support the proposal by simple majority vote<sup>32</sup>

Amendment under the FDRE constitution is categorized into two: that is, ordinary constitutional amendment which requires two-third majority vote in a joint meeting of the federal houses as well as a majority vote in two-thirds of state councils and amendment dealing with provisions related to fundamental rights and freedoms enshrined in the constitution for which a more stringent requirement is put in place as the Federal Houses must each accept the proposal by a two-thirds majority and all State Councils must pass the draft by majority vote.<sup>33</sup>

### ***Review Question***

Assess the degree of amenability of the four constitutions to amendment.

---

## Chapter Five

### Forms of Government and Electoral systems

Generally, there are two forms of governments: these are presidential and Parliamentary forms of governments.

#### **5.1.1. The presidential system**

The presidential system, also called the congressional system, is a system of government where an executive branch exists and presides (hence the name presidential) separately from the legislature. Under this political system the president is both the Head of State<sup>34</sup> and the Head of Government.<sup>35</sup> The incumbent for the position of presidency is elected nation - wide at a time that has been predetermined in the constitution.<sup>36</sup>

Thus in the presidential system, the president is said to enjoy a direct mandate from the people and hence is not accountable to the parliament and the latter cannot dismiss him have on exceptional grounds through a process known as impeachment.<sup>37</sup>

The United States, Philippines, South Korea, Indonesia, Mexico, Nigeria, Most South American States, as well as many of African States and the central Asian Republics (which is the pioneer) are some of the countries with a presidential form of government.<sup>38</sup> Countries that have presidential form of government are not the exclusive users of the title of president. For instance, a dictator who may or may not have been popularly or legitimately elected may be and often is called a president. Likewise, many parliamentary democracies are formally styled republics and have presidents, a position which is largely ceremonial. Notable examples include Israel, the Czech Republic, Germany and Ireland.

---

34

35

36

37

38

### 5.1.1.1. Features

Although presidential governments in different countries have certain differences, nearly all presidential systems share the following features.

In a presidential system, there is no distinction between the positions of the Head of State and Head of Government both of which are held by the president. That is, the president is the Head of State and the Head of Government and hence the chief executive. He has the mandate to administer the country and appoint or remove executive officers and thus can effectively control government department. Heads of government departments, ministers, commissioners, or secretaries are under the president.

The president enjoys ultimate power decision and, therefore, has complete political responsibility for all executive actions.

In such systems the president appoints secretaries who are heads of his executive departments. In other words, the executive branch is uni-personal. Members of the cabinet<sup>39</sup> serve at the pleasure of the president and must carry out the policies of the executive and legislative branches.

However, the presidential systems frequently require legislative approval of presidential nominations to the cabinet as well as various governmental posts such as judges. In most of the presidential systems either the president or any of his ministers/secretaries can be a member of the legislative organ. A member of the legislative can join the executive only after resigning his membership in the legislature.

The president doesn't propose bills. However, in systems such as that the United States, the president has the power to veto acts of the legislature and in turn a super majority of legislators may act to override the veto. This practice is derived from the British tradition of royal assent in which an act of parliament cannot come into effect without the assent of the monarch.

---

39



In presidential system, the executive branch, headed by the president, is distinct from other branches of the government which are all independent from one another. This separation of power serves to check and balance the powers of the three branches of government. While members of the legislature are elected, the members of the cabinet are appointed by the president and may require the confirmation or consent of the legislative branch. The formulation, amendment, and review of legislations are under the sole purview of the legislature .However, on many occasions, the executive could endorse a legislative agenda for consideration and veto a bill that was passed in the legislature although the latter could overturn it via a two-third vote.<sup>40</sup>

The president has a fixed term of office/tenure and his government has a fixed tenure. Thus, he cannot be removed or dismissed from office before the expiry of his term unless under highly unusual and exceptional process of impeachment.<sup>41</sup> the president can be removed from office only through death, resignation, inability to discharge his responsibilities, or by congressional impeachment and conviction on charges of treason, bribery, or other serious crimes.

The president could be elected directly by the people or by an electoral college, a system of electing a president or another representative or leader by a group of persons who are elected from the people for the purpose of electing the president or another leader.

The president is not accountable to the legislature. Instead, he is accountable to the constitution. Presidential governments make no distinction between the positions of head of state and head of government both of which are confided in the person of the president.

---

40

41

### **5.1.1.2. Merits and Demerits**

#### **(i) Merits**

The first advantage of presidential government is the fact that the executive is stable by virtue of a fixed term. Since the existence of the executive doesn't depend on parliamentary whim, it is more stable than a prime minister (in parliamentary form of government) who can be dismissed at any time.

As the president is directly chosen by the people, it is argued by the supporters of this system that there is a high tendency for the system to be more democratic than a leadership chosen by a legislative body, even if the legislative body was itself elected, to rule.

By way of making more than one electoral choice, voters in presidential system can more accurately indicate their policy preferences. In the United States, for instance, some political Scientists interpret the late cold war tendency to elect a Democratic Congress and a Republican President as the choice for a Republican foreign policy and a Democratic domestic policy.

The existence of separation of powers is another advantage of this system. The fact that a presidential system separates the executive from the legislature is sometimes considered as an advantage, in that each branch may scrutinize the actions of the other.

The other advantage of this system is that the president can recruit ministers of highest caliber as he can appoint his ministers from people who do not belong to the legislature. This is so because the president selects persons of greater competence and integrity without any need to make political considerations or party affiliations.

Here, we don't mean that people of the highest caliber and integrity are not available in the legislature. Instead we are saying that as the president is at liberty to choose from outside the legislature, he stands a greater chance of securing the services of highly competent and qualified personnel.

The fact that elections are fixed in a presidential system is considered to be a welcome “check” on the powers of the executive, contrasting parliamentary system, which often allows the prime minister to call election whenever he sees fit, or orchestrate his own vote of no confidence to trigger an election when he cannot get a legislative item passed.

The presidential model is said to discourage this sort of opportunism, and instead force the executive to operate within the confines of a term he cannot alter to match his own needs. Theoretically, if a president’s positions and actions have had a positive impact on their respective country, then it is likely that they or their party’s candidate will be elected for another term in office.

As party discipline in the legislature is loose in a presidential system, members of the legislature enjoy considerable freedom to oppose or support any proposal even though it may be part of the president’s program. Members of the parliament are guided by their conscience rather than a strict party discipline. This could enable them to express their feelings with greater freedom.

### **Review Question**

In a presidential system since the president is the executive, he makes important executive decisions. Do you think this has any advantage?

### **(ii) Demerits**

Although the president’s fixed tenure has its own advantages, it has disadvantages as well because it brings with it the difficulty in removing an unsuitable president from office before his/her term has expired. In addition it is believed that it breaks the political process into discontinuous and rigidly demarcated periods leaving no room for the continuous readjustments that events may demand.

The reason for saying this is that political governance is a continuous process, which introduces changing circumstances into the system in an uninterrupted manner. This system to some extent has the effect of arresting this continuous process.

President John Taylor, who only became president because William Henry Harrison had died after thirty days and refused to sign Whig legislation, was loathed by his nominal party, but remained firmly in control of the executive branch. Since there is no way to remove an unpopular president, many presidential countries have experienced military coup to remove a leader who is said to have lost his mandate.

Had it been in the parliamentary system, it would have been very easy for unpopular leaders to be quickly removed by a vote of no confidence, a procedure which is reckoned to be a “pressure release valve” for political tensions.

### **Review Question**

It has been said that since the president in a presidential system has a fixed tenure in office, the legislative organ can hardly remove him/her from office before the expiry of his/her term of office. Do you think that this can lead presidents to abuse their power?

The president’s leadership is much looser than that of the prime minister in a parliamentary system mainly because the president has no power to dissolve the legislative organ or to participate in legislative deliberations. He rarely has at his disposal the legislative majority which is available to the government in a parliamentary system. He doesn’t have the means available to the prime minister to enforce disciplined voting along party lines.

The president, unlike the prime minister, cannot directly ensure that the measures which he desires will be enacted by the legislature. This may happen even when the president and the majority in the legislative organ belong to the same party. But lack of coordination between the executive and the legislature in a presidential system may be heightened if the president and the majority in the House belong to different political parties as it happens quite often.

The other criticism staged against this system of government is that presidential form of government has the tendency towards authoritarianism as winning presidency is a winner-take-all, zero sum game. A prime minister who does not enjoy a majority in the legislature will have to either form a coalition or, if he is able to lead a minority government, govern in a manner acceptable to at least some of the opposition parties. Even if the prime minister heads a majority government, he must still govern within (perhaps unwritten) constraints as determined by the members of his party.

On the other hand, once elected, a president can not only marginalize the influence of other parties but can also exclude rival factions in his own party as well, or even leave the party whose ticket he was elected under. The president can thus rule without any allies for the duration of one or possibly consecutive terms, a worrisome situation for many interest groups. Juan Linz argues that:

*The danger that zero-sum presidential elections pose is compounded by the rigidity of the president's fixed term of office. Winners and losers are sharply defined for the entire period of the presidential mandate.....losers must wait four or five years without any access to executive power and patronage. The zero-sum game in presidential regimes raises the stakes of presidential elections and inevitably exacerbates their attendant tension and polarization.*<sup>28</sup>

In presidential systems, the legislature and the president have equally valid mandates from the public. There is often no way to reconcile conflict between the branches of government when the president and the legislature are at logger heads and the government is not working effectively, there is a powerful incentive to employ extra-constitutional maneuvers to break the deadlock.

Ecuador is sometimes presented as a case study of democratic failures over the past quarter-century. Presidents have ignored the legislature or bypassed it all together. One president had the National Assembly tear-gassed, while another was kidnapped by paratroopers until he agreed to certain congressional demands.

From 1979-1988, Ecuador staggered through a succession of executive-legislative confrontations that created a near permanent crisis atmosphere in the policy.

In 1984 president Leon Fabres Cordero tried to physically bar new congressionally appointed Supreme Court appointees from taking their seats. In Brazil, presidents have accomplished their objectives by creating executive agencies over which congress had no say.

Presidential governments are blamed for loose accountability when compared with parliamentary systems as it is easy for either the president or congress to escape blame by the other.

Describing the US, former Treasury secretary C.Douglas Dillon said, “the president blames congress, the congress blames the president, and the public remains confused and disgusted with the government in Washington”.

The increase in the federal debt of the US during the era of President Ronald Reagan is a good example. Arguably, the deficits were the products of a bargain between President Reagan and the speaker of the House of Representatives, Tip O’Neill, who agreed not to oppose Reagan’s tax cuts if Reagan would sign the Democrats’ budget. Each side could claim to be displeased with the debt, plausibly blame the other side for the deficit, and still tout its own success.

On the other hand, many observers believe that federal budget surpluses of the late 1990s in the US were a direct result of divided government. A republican congress refused to allow Democratic President Bill Clinton to increase domestic spending, while Clinton refused to allow congress to cut taxes.

## **5.2. Parliamentary System**

A parliamentary system also known as parliamentarianism or parliamentarism, is a system of government in which the executive is dependent on the direct or indirect

support of the legislature (often termed the parliament) often expressed through a vote of confidence.<sup>42</sup>

A parliamentary system of government is a government that is led by a party or a coalition of parties that has the largest number of seats in the parliament. Absence of clear-cut separation of power between the executive and the legislative is the main characteristic of this system.

But they usually have a distinct heads of state and head of government, the former vested in the person of the president elected either popularly or by the parliament or by a hereditary monarch (often in a constitutional monarchy) and the latter in the person of the prime minister or premier.

It should be remembered, however, that parliamentarianism does not necessarily imply rule by coalition of different parties as multi-party arrangements are usually the outcomes of an electoral system known as proportional Representation.<sup>43</sup>

### **(i) Features**

The British system is one of its kind in setting an example for the rest of the World. In fact, not all parliamentary systems in different countries are identical although many of them share common features. The following are some of the features of parliamentary forms of governments:

In parliamentary system, there is a water – tight division between the office of the prime minister (the head of executive) and that of the president /king/queen (the head of state in this system, it is the prime minister who has effective control over the executive as he is the chief executive. He/she deals with the day-to-day political activities.

The head of state, on the other hand, has such roles as symbolic role, chief diplomatic officer, nominal chief executive officer, chief appointments officer, legislative role

---

<sup>42</sup>

<sup>43</sup>

(formality-signing on bills passed by the legislature), and other prerogative such as pardon/amnesty and granting various titles and other honors.

In parliamentary system, ministers are members of the parliament although not the case in all countries. In some countries (e.g. the United Kingdom, and India/ all ministers are members of the parliament but in others (e.g. Ethiopia), ministers may not necessarily be members of the parliament as the prime minister could appoint / recruit cabinets from outside the parliament.

Another important feature of the parliamentary system is that a political party or coalition of parties, as the case may be, which has the largest seat in the parliament will constitute a government. The leader of the party which has won the majority seat in the parliament will become a prime minister and the latter would, then, form his/her cabinet by nominating either from among the parliamentarians or from outsiders whom he believes are competent enough to discharge their responsibilities.

In the parliamentary system, the government has no fixed tenure as the parliament can dismiss it by declaring vote of no confidence with respect to the policies and programs of the governing party.

Under such circumstances, the governing party would lose its majority resulting in the loss of power and right to lead the executive. In this case, the chief executive may either resign or refuse the president to invite political parties to form a coalition government or the House may be dissolved and a new election will be conducted.

But this is a very rare occurrence as party discipline is very strong in this system although the executive is answerable to the parliament, a parliamentary system's cabinet may be able to make use of what is known as party 'whip'/parliamentary 'whip'<sup>44</sup> and dominate the parliament.



Parliamentary systems have collective or collegial executives<sup>45</sup> (e.g., a council of ministers, an organ which incorporates the prime minister and his cabinet). The executive in a parliamentary system is responsible to the legislature: the legislature conducts control over the executive's function nearly on a day-to-day basis. Members of the council of ministers may be required to report, respond to questions, etc... to the legislature whenever they are requested to do so.

A parliamentary government, though directly responsible to the assembly (House), is only indirectly responsible to the electorate. The government as a whole is not directly elected by the voters but is appointed from amongst the representatives whom they elect to the assembly. In fact, they are elected by the voters as candidates for the assembly in an ordinary way not as members of the government.

### **Review Question**

Why do you think is the prime minister politically stronger than the president in a parliamentary system.

In our case also, the current government follows a parliamentary form where in the prime minister assumes important political powers as provided for under Art 74 of the FDRE constitution.

In Ethiopia, the Prime Minister elects people for ministerial posts from both Houses and from outside the Houses as long as they possess the required qualification. Thus, members of the executive can, at the same time, be members of the executive.

In much the same way as any other country which follow parliamentary form of government, a party that has the majority seat in the parliament ERDF- a coalition of political parties, forms the executive by virtue of Art. 56 of the FDRE constitution.

The vote of confidence or no confidence is one very important tool by which the legislative controls the executive. Although this theoretically mandates the

---

45

parliamentarians to decide on the destiny of members of the executive it is employed less and less.

By the same token, it is provided under Art. 55 (17) and (18) of the FDRE constitution that the House of Peoples' Representatives can call and question the prime minister and other officials and it can at the request of one –third of its members, discuss any matter pertaining to the powers of the executive.

In fact, pursuant to Art. 60 of the constitution, the prime minister can, with the consent of the House, cause the dissolution of the House before the expiry of his term. i.e., 5 years,<sup>46</sup> in order to hold now electron. But this cannot be taken as a power that counters the power of the House to control the executive as this procedure itself depends on the consent of the House. Thus, the prime minister can not at will dismiss the House when the house passes vote of no confidence against him.

In some parliamentary systems, when the government finds itself in difficulties, following repeated defeats and disagreements with its majority it is sometimes forced to resign without any vote of no confidence.

### **Review Question**

Given the aforementioned facts and owing to the fact that it is a rarity, in many countries, can we say that vote of no confidence is an effective tool of controlling the government?

#### **5.1.2.2. Merits and Demerits**

##### **(i) Merits**

As we have stated in our previous discussion, since a party or coalition of parties which has won majority vote in the parliament forms government, it is argued that the executive- legislative relation is one of co-ordination. The executive is better placed to

execute the legislations passed by the House and deliberations are not stringent as the ministers can effectively influence the course of the discussion.

This system, therefore, is preferable for countries with an infant democracy as it allows coordination of the executive and the legislative which could in turn result in an effective implementation of the programs and policies of the executive.

Another advantage of the parliamentary system, according to some scholars, is that it is a lot easier to pass legislations; this is because the executive branch is dependent upon the direct or indirect support of the legislative branch and often includes members of the legislative. Thus this would amount to the executive (as the majority party or coalition of parties in the legislative) possessing more votes in order to pass legislation.

In presidential system, on the other hand, the president will have hard time trying to properly implement his/her platform/manifesto as he is elected independently and the parliament might be controlled by a party to which he doesn't belong.

On top of the ease for quicker legislative action, parliamentarianism has attractive features for nations that are ethnically, racially, or ideologically divided.

In presidential system, all executive power is vested in the president. In parliamentary system, however, with a collegial executive, power is more divided.

In the 1989 Lebanese Taif Agreement, in order to give Muslims greater political power, Lebanon moved from a semi-presidential<sup>47</sup> with a strong president to a system more structurally similar to classical parliamentarianism<sup>48</sup>.

Iraq similarly disdained a presidential system out of fears that such a system would be equivalent to Shiite domination; Afghanistan's minorities refused to go along with a presidency as strong as the pashtuns desired.<sup>49</sup>

---

47

48

49

A good number of scholars such as Juan Linz, Fred Riggs, Bruce Ackerman and Robert Dahl claim that parliamentarianism is less prone to authoritarian collapse.<sup>50</sup> The scholars point out that since World War II, two-third of Third World countries establishing parliamentary governments successfully made the transition to democracy. By contrast, no third world presidential system successfully made the transition to democracy without experiencing coups and other constitutional breakdowns.<sup>51</sup>

## **(ii) Demerits**

The fact that the Head of Government is not directly elected is one of the critiques staged against this form of government. In parliamentary system, unlike the presidential system where the president is elected by the public, the prime minister is elected by the legislature often under strong party influence.

Absence of clear distinction /separation of power between the executive and the legislative is another criticism. That there is no truly independent body to oppose and vote legislations passed by the parliament and therefore, no substantial check on legislative power disrupts the balance of power. In other words, lack of inherent separation of powers places too much power in the executive.

### ***Review Question***

Compare the presidential system with the parliamentary system and identify the similarities and differences between the two.

## **5.2. Electoral systems**

Before we delve into discussing this topic, it is imperative that we reflect on some basic concepts and issues related to election/voting.

---

50

51

### **5.2.1. Meaning and features of election**

To begin with the meaning of election, it refers to a procedure whereby all or some of the members of a given nation choose a smaller number of persons or one person to hold office of authority in the nation.

An election is a decision making process by which a population chooses an individual to hold formal offices. It is the usual mechanism by which modern democracy fills offices in the legislature, sometimes in the executive and judiciary, and for regional and local governments.

As Montesquieu points out in Book II, chapter 2 of “The spirit of Laws”, in the case of elections in either a republic or a democracy, voters alternate between being the rulers of the country as well as being the subjects of the government. By the act of voting the people operate in a sovereign (or ruling) capacity, acting as “masters” to select their government’s “servants”. The unique characteristic of democracies and republics is the recognition that the only legitimate source of power for a government of people, by the people and for the people is the consent of the governed-the people themselves.

In order for an election to be democratic the authority of the government in democracies should derive solely from the consent of the governed which will be translated into government authority through election.

According to Jean Kirkpatrick, scholar and former United States Ambassador to the United Nations, “Democratic elections are not merely symbolic..... they are competitive, periodic, inclusive, definitive elections in which the chief decision makers in a government are selected by citizens who enjoy broad freedom to criticize government, to publish their citizens’ criticism and to present alternatives.

Democracy Watch (international) website, further defines fair democratic elections as “Elections in which great care is taken to prevent any explicit or hidden structural bias towards any one candidate, aside from those beneficial biases that naturally result from an electorate that is equally well informed about the various assets and liabilities of each

candidate. “This was more formally stated in 2000 by Chief Justice Marry Gleeson of the High court of Australia as “the democratic and lawful means of securing change if change be necessary, is an expression of the will of an informed electorate”.

The question of who may vote is a central issue in election as the electorate doesn't generally include the entire population: for instance, many countries prohibit insane (incapable) persons from voting and most countries require a minimum age for voting.

History also has it that some people have been excluded from voting. For instance, the democracy of ancient Athens, where elections are claimed to have been practiced in the 5<sup>th</sup> and 6<sup>th</sup> C BC, disallowed women, foreigners, or slaves to vote, and the original United States Constitution left the topic of suffrage to the states: usually only white male property owners were able to vote. Much of the history of elections involves the effort to promote suffrage<sup>52</sup> for excluded groups and it will continue to be a significant goal of voting rights advocates.

In a nutshell, suffrage is destined for citizens of the country so long as they meet the criteria for election. Some countries such as Argentina, Australia, Belgium, Brazil, China, Democratic Republic of Congo, Ecuador, Fiji, Lebanon, Liechtenstein, Nauru, Peru, Singapore, Switzerland (compulsory in the canton of Schaffhausen only), Turkey, and Uruguay, go to the extent of making voting compulsory on their subjects thereby making liable a citizen legible to vote but fails to cast a vote. In general, most countries have a citizenship requirement, age requirement, residency requirement, and perhaps, a non-felon requirement for legibility to cast votes.

### ***Review Question***

Can you think of other requirements for legibility to vote?

### **5.2.2. Types and Features of Electoral systems**

There are different types of elections corresponding to different layers of public governance or geographical jurisdiction. This includes: Presidential election, general election, primary election, by- election etc.

Electoral systems refer to a detailed constitutional procedures and voting systems which convert the vote into a determination of which individuals and political parties are recruited to a specific position of power.

Once the votes are cast they will be tallied and then the electoral systems determine the results of the election on the basis of the tally.

Electoral systems can be categorized as majoritarian, proportional and mixed representation system.

#### **5.2.2.1. Majoritarian Representation systems**

This is the oldest and simplest electoral system, dating back at least to the 12<sup>th</sup>C, in which a candidate in whose favor a majority of votes are cast is returned to office. There are many variants of the Majoritarian system, the most prominent of which is simple majority (relative majority) also known as First Past the Post (FPP) and Absolute Majority.

The term First Past the Post was coined as an analogy to horse racing, where the winner of the race is the first who gets past a particular point on the track and the rest runners automatically and completely lose the race.

In election, although there is no “post” for the candidates to get past, they need to secure the largest number of votes and the one who succeeds in this endeavor will be returned to office and the losers go home empty handed as the payoff is winner -takes -all.

This system is employed in 43 of the 191 countries in the United Nations including the United Kingdom, Canada, India, the United States, and many Commonwealth states for either local or national election.<sup>53</sup>

The FPP system envisages election of one person at a time by a relative majority. Thus candidates do not need to pass a minimum threshold of vote nor do they require an absolute majority as a simple majority can do.<sup>54</sup> Hence in seats where the votes split almost equally three ways, the winning candidate may have only 35% of the votes, while the other contestants get 33% and 32% respectively. Although 2/3 of the voters supported other candidates the one with 35% votes will be elected as plurality of votes is decisive.

In the case of absolute majority, however, a candidate will be declared a winner only if he/she gets an absolute majority of votes (50 percents +). If there is no candidate that has met this minimum requirement, a second round is held between the two candidates who get the highest number of votes and the one who gets the least number of votes will be excluded.

This system is used in 15 the 25 countries with direct presidential elections including Australia, Columbia, Finland and Russia. In the 1996 Russian presidential election, for instance, 78 candidates were registered to run for election out of which only 17 qualified for election. Boris Yelstin won 35.3% of the votes in the first round, with Gennady Zyuganov, the communist candidate with 32% and Alexander Lebed with 14.5% of the votes. After the other candidate dropped out, and Alexander Lebed swung his supports behind Boris yeltsin, the latter won the election by 53.8 percent votes against 40.3 percent for Zyuganov.<sup>55</sup>

### ***Review Question***

Compare the two systems and identify the practical difficulty, if any, in adopting these systems of election.

---

53

54

55



### 5.2.2.2. Proportional Representation system

Whereas the Majoritarian system focuses on governability in the sense that it aims to create a “manufactured majority”, i.e., to exaggerate the shares of seats for the leading party in order to produce an effective working parliamentary majority for the government, while simultaneously penalizing minor parties, especially those whose support is spatially dispersed, proportional systems focus on the inclusion of minority voices. It is meant to achieve real representation at the national level which the majority system of representation fails to accomplish.

Proportional representation is designed to reduce legislative bodies in which the number of seats held by any group or party is proportional to the number of votes cast for members of that group. In other words seats in a constituency<sup>56</sup> are divided according to the number of votes cast for party lists.

In fact, party lists could be open as in Norway, Finland, the Netherlands, and Italy, in which case voters can express their preferences for particular candidates from the list or they may be closed as in Israel, Portugal, Spain and Germany, in which case voters can only select the party, and the political party determines the ranking of the candidates.

Under Proportional Representation, political parties or candidates will have the percent of seats that reflect their support.

Proportional representation has such advantages as greater voter turn-out (typically 70-80%) owing to the more choices for voters which in turn lead to more diverse representation, cleaner campaigns run on the issues, and reduced effects of big money involvement in campaigns.<sup>44</sup>

Some form of proportional representation is used by most of the world’s major democracies including Germany, Sweden, Switzerland, Belgium ,Denmark, Holland, Greece ,Spain, Austria, Mexico, Portugal, Japan, Italy, Ireland, Israel, Poland ,Hungary,

---

<sup>56</sup>

New Zealand (1983), Iceland, Brazil, Nicaragua, Norway, Finland, Venezuela, South Africa (as of April 1994).

### **Review Question**

Do you think the proportional representation system is a fairer, more flexible, more modern electoral system than the winner-take-all majoritarian system?

### **5.3. Reflection on the Ethiopian Legal Regime**

Although Ethiopia had written constitution as early as 1931, members of two chambered parliament established by the constitution did not assume their seats by election.

Members of the upper chamber- the senate were handpicked/appointed by the emperor from among the nobility (*mekuanint*) and local chiefs ('*shumoch*') who served the empire as ministers, judges or military officers. Members of the lower chamber, on the other hand, were elected by the nobility and local chiefs.

It was only in 1955 that the idea of election was introduced by the revised constitution as members of the lower chamber began to assume seats through election. Since the coming into existence of the revised constitution, various laws meant to regulate the country election procedure were issued.

The first electoral law was issued on the 27<sup>th</sup> day of August, 1956. This law established a National Board for registration and elections and determined the powers and duties of the Board.

Later on, subsequent electoral proclamations were amended and consolidated into a new proclamation, proclamation No. 264/1969 which regulated elections in Ethiopia until the 1974 revolution. Then Proclamation No. 314/1987 which was meant to govern the process of election for the formation of the National Shengo was adopted.

In 1992, another electoral law ,a proclamation to provide for the establishment of the National, Regional, and Woreda council members election commissions, Proc. No. 11/1992, followed by Proc. No. 64/1993 was issued . In those electoral laws, a tendency of decrease in the age of voters and candidates was seen. The age of voters was reduced from 21 to 18 and that of candidates was reduced from 25 to 21.

Yet, another proclamation, Proc. No. 111/1999 as amended by Proc. No. 187/1999, was adopted with a view to make the country's electoral laws conform to the FDRE constitutions.

The proclamation defines election as popular elections held at representative levels for the formation of national and regional organs of state power and their corresponding substitutes. The proclamation established the National Electoral Board, which is accountable to the Council of Representatives of the transitional Government of Ethiopia or its successor, i.e. the House of People's Representatives.

### **Review Question**

It is provided under Art. 102(1) of the FDRE constitution that the National Election Board shall be established independent of any influence to conduct in an impartial manner free and fair election. On the other hand, it is provided under Proc. No. 111/1995 that the National Board is accountable to the House of Peoples' Representatives. Does such accountability jeopardize the board to the influence of the House? Does it in any way compromise the integrity of the Board? If so, does the proclamation violate the constitution?

Finally, when we come back to the system of election followed by Ethiopia, we find on Art. 13 of the Proclamation that:

1. Any election shall be based on free, direct, and popular suffrage.
2. A candidate with more votes received than that by other competitors within the constituency shall be declared the winner.

What one can easily discern from the reading of sub Article 2 of the above article is that the proclamation endorses the First-past-the-post system of election where in a candidate with plurality of votes will be returned to office.

### **Question**

Do you think this system is ideal to the situation of countries like Ethiopia with multi ethnic groups? Do you consider the proportional representation as an alternative, given the virtues it has?

## Chapter Six

### Making the Constitution Adjustable

#### 6.1. Interpretation of a Constitution

Constitutional interpretation, or constitutional *construction*, the term more often used by the Founders, is the process by which legal decisions are made that are justified by a constitution, although not necessarily correctly. Constitutional controversies are about whether an official act is consistent with, and authorized by, a constitution or constitutional statute or court decision. Since a constitution is a law, and the supreme law within its domain, and authorizes statutes and other official acts which have a textual expression, the principles of constitutional interpretation are essentially the same as the principles of statutory or judicial interpretation.

##### 6.1.1. Methods of Constitutional Interpretation

Most legal scholars recognize six main *methods* of interpretation: *textual*, *historical*, *functional*, *doctrinal*, *prudential*, *equitable*, and *natural*, although they may differ on what each includes, and there is some overlap among them.

1. **Textual.** Decision based on the actual words of the written law, if the meaning of the words is unambiguous. Since a law is a command, then it must mean what it meant to the lawgiver, and if the meaning of the words used in it have changed since it was issued, then textual analysis must be of the words as understood by the lawgiver, which for a constitution would be the understanding of the ratifying convention or, if that is unclear, of the drafters. Some Latin maxims: *A verbis legis non est recedendum*. From the words of the law there is not any departure. Meaning of words may be ascertained by associated words.
2. **Historical.** Decision based less on the actual words than on the understanding revealed by analysis of the history of the drafting and ratification of the law, for constitutions and statutes, sometimes called its legislative history, and for judicial edicts, the case history. A textual analysis for words whose meanings have changed therefore overlaps historical analysis. It arises out of such Latin maxims

as *Animus hominis est anima scripti*. Intention is the soul of an instrument. **Functional.** (Also called *structural*.) Decision based on analysis of the structures the law constituted and how they are apparently intended to function as a coherent, harmonious system. A Latin maxim is *Nemo aliquam partem recte intelligere potest antequam totum perlegit*. No one can properly understand a part until he has read the whole.

3. **Doctrinal.** Decision based on the prevailing practices or opinions of legal professionals, mainly legislative, executive, or judicial *precedents*, according to the meta-doctrine of *stare decisis*, which treats the principles according to which court decisions have been made as not merely *advisory* but as *normative*. Some Latin maxims are: *Argumentum à simili valet in lege*. An argument from a case avails in law. *Consuetudo et communis assuetudo ... interpretatur legem scriptam, si lex sit generalis*. Custom and common usage ... interpret the written law, if it be general. *Cursus curiæ est lex curiæ*. The practice of the court is the law of the court. *Judiciis posterioribus fides est adhibenda*. Credit is to be given to the latest decisions. *Res judicata pro veritate accipitur*. A thing adjudicated is received as true.
4. **Prudential.** Decision based on factors external to the law or interests of the parties in the case, such as the convenience of overburdened officials, efficiency of governmental operations, avoidance of stimulating more cases, or response to political pressure. One such consideration, avoidance of disturbing a stable body of practices, is also the main motivation for the doctrinal method. It also includes such considerations as whether a case is "ripe" for decision, or whether lesser or administrative remedies have first been exhausted. A Latin maxim is *Boni judicis est lites dirimere*. The duty of a good judge is to prevent litigation.
5. **Equitable.** Also called *ethical*. Decision based on an innate sense of justice, balancing the interests of the parties, and what is right and wrong, regardless of what the written law might provide. Often resorted to in cases in which the facts were not adequately anticipated or provided for by the lawgivers. Some scholars put various balancing tests of interests and values in the prudential category, but it works better to distinguish between *prudential* as balancing the interests and values of the legal system from *equitable* as balancing the interests and values of the parties. It arises out of the Latin maxim, *Æquitas est perfecta quædam ratio*

*quæ jus scriptum interpretatur et emendat; nulla scriptura comprehensa, sed sola ratione consistens.* Equity is a sort of perfect reason which interprets and amends written law; comprehended in no code, but consistent with reason alone.

6. **Natural.** Decision based on what is required or advised by the laws of nature, or perhaps of human nature, and on what is physically or economically possible or practical, or on what is actually likely to occur. This has its origin in such ancient Latin maxims as: *Jura naturæ sunt immutabilia.* The laws of nature are unchangeable. *Impossibile nulla obligatio est.* There is no obligation to do impossible things. *Lex non cogit ad impossibilia.* The law does not compel the impossible. *Lex neminem cogit ad vana seu inutilia peragenda.* The law requires no one to do vain or useless things. *Legibus sumptis desinentibus, lege naturæ utendum est.* Laws of the state failing, we must act by the law of nature. Within these methods, we can, by study of the writings of the Founders, and the writings they read, elicit such principles for interpreting the Constitution for the United States as the following:

1. **The Constitution is the written document.** Although it may be considered to include the understandings of its words as of the time of ratification, it does not include the subsequent body of practices or precedents upon which constitutional decisions might be based, which may or may not be consistent with it, or authorized by it. The written document refers to itself as "this Constitution", and provides for only four methods by which it may be amended, all of which apply only to the written document.
2. **The authority for provisions of the Constitution is the ratifications and state admissions.** Current consent or acquiescence, or lack thereof, to the Constitution or any practice, does not affect the original constitutive acts, and has no authority, unless expressed through adoption of amendments as provided in Article V.
3. **Provisions of the Constitution are mutually consistent.** There are no internal logical contradictions, except that a provision of an amendment inconsistent with a previous provision supersedes that provision.

4. **None of the words are without force and effect, except those superseded by amendments, unless such amendments are repealed.** Except for the statement of purpose in the preamble, every word was intended by the framers to be legally normative, and not just advisory, declaratory, aspirational, or exhortatory. *Verba intelligi ut aliquid operantur debent.* Words should be interpreted to give them some effect.
5. **Rights and powers are complementary.** Every right recognized by the Constitution is immunity, that is, a right against a positive action by government, and is equivalent to a restriction on delegated powers. Conversely, every delegated power is a restriction on immunities. An immunity may be expressed either as a declaration of the right, or as a restriction on powers.
6. **There are no redundancies within the original unamended Constitution.** However, amendments may be alternative ways of expressing equivalent content in the original unamended Constitution or previous amendments. More specifically, the Bill of Rights added no new content not implicit in the original unamended Constitution, except the twenty dollar rule of the Seventh Amendment.
7. **The Constitution was intended to define a functionally complete and harmonious system.** That does not mean, however, that all powers anyone might think the nation or any branch, level, office or department should have, were actually delegated.
8. **Original "intent" is functional, not motivational.** The private motives of the framers or founders are irrelevant and largely unknowable, and likely to have been diverse. The common law rule of interpretation understood by the founders was to discern the functional role of elements of the law, not the private purposes of the lawgivers.
9. **The ratification debates are the best evidence of original understanding.** The arguments of those opposed to ratification are not just the positions of the losers in the debates, which some might dismiss as not indicative of original understanding. As the debates proceeded, understandings evolved and clarified, and positions



changed. Most opponents were satisfied by adoption of a Bill of Rights and by assurances by the proponents concerning how the words of the Constitution would be interpreted, and those assurances must be considered part of the original understanding. That means that a construction to which the more significant "anti-federalists" would object is almost certainly incorrect.

10. **Powers are narrow, rights broad.** The entire theme and tenor of the ratification debates was that delegated powers were to be interpreted as strictly as possible, consistent with the words and rights as broadly as possible, with the presumption in favor of the right, and the burden of proof on those claiming a power. *Potestas stricte interpretatur.* A power is strictly interpreted. *In dubiis, non præsumitur pro potentia.* In cases of doubt, the presumption is not in favor of a power.
11. **Delegated powers cannot be subdelegated.** The U.S. Constitution vests all legislative powers in Congress, and all judicial powers in the Supreme Court and inferior courts, except as specifically expressed. Executive branch officials may subdelegate but must remain responsible for the actions of their subordinates. There can be no authority exercised that is not accountable through constitutional officials. *Delegata potestas non potest delegari.* A delegated power cannot be delegated.
12. **The power to regulate is not the power to prohibit all modalities of something.** It is only the power to issue prescriptions to "make regular", enforceable only by deprivations of property or privileges, not of life, limb, or liberty. There must always be some modality that is not prohibited.
13. **Implied powers are only to "carry into Execution" an expressed power and not to do whatever is necessary to achieve the intent for which a power might be exercised.** Delegation of a power is delegation of the right to make a certain kind of effort, not to do whatever is necessary to get a desired outcome.
14. **There can be no common law crimes.** They are in conflict with the prohibitions on *ex post facto* laws and bills of attainder.

15. **Rights may not be disabled or unduly burdened by legislative or executive process.** "Due" process is judicial only, involving the granting of a petition to disable a right of the defendant, with the burden of proof on the plaintiff or prosecutor, and with the defendant having at least those minimum protections that prevailed during the Founding, with similar disablements having similar standards of proof and protection.
16. **There is no right without a remedy.** *Ubi jus ibi remedium.* There must always be an accessible forum in which a complainant has *oyer* and *terminer* for any petition.

## 6.2. Amendment of a Constitution

An **amendment** is a change to the [constitution](#) of a nation or a state. In jurisdictions with "rigid" or "entrenched" constitutions amendments require a special procedure different from that used for enacting ordinary laws.

### 6.2.1. Amendment procedures

A flexible constitution is one that may be amended by a simple act of the legislature, in the same way as it passes ordinary laws. The 'uncodified' constitution of the United Kingdom (UK) consists partly of important statutes, and partly of certain [unwritten conventions](#). The statutes that make up the UK constitution can be amended by a simple act of Parliament. UK constitutional conventions are held to evolve organically over time. The [Basic Laws](#) of [Israel](#) may be amended by an act of the [Knesset](#).

The constitutions of a great many nations provide that they may be amended by the legislature, but only by a special, extra large majority of votes cast (also known as a [supermajority](#), or a "qualified" or "weighted" majority). This is usually a majority of two-thirds the total number of votes cast. In a bicameral parliament it may be required that a special majority be achieved in both chambers of the legislature. In addition, many constitutions require that an amendment receive the votes of a minimum *absolute* number of members, rather than simply the support of those *present* at a meeting of the legislature

which is in [quorum](#). For example, the [German 'Basic Law'](#) (the *Grundgesetz*) may be amended with the consent of a majority of two-thirds in both the [Bundestag](#) (lower house) and [Bundesrat](#) (upper house). The constitution of [Brazil](#) may be amended with the consent of both houses of Congress by a majority of three-fifths. An amendment to the [Australian Constitution](#) requires both a majority of the voters nationally and a majority of the voters in a majority of the States, i.e. the measure must be carried in four of the six States as well as nationally.

Some constitutions may only be amended with the direct consent of the electorate in a [referendum](#). In some states a decision to submit an amendment to the electorate must first be taken by the legislature. In others a constitutional referendum may be triggered by a [citizen's initiative](#). The constitutions of the [Republic of Ireland](#), [Denmark](#), [Japan](#) and [Australia](#) are amended by means of a referendum first proposed by parliament. The constitutions of [Switzerland](#) and of several States of the [United States](#) may be amended through the process of popular initiative.

Some jurisdictions require that an amendment be approved by the legislature on two separate occasions during two separate but consecutive terms, with a [general election](#) in the interim. Under some of these constitutions there must be dissolution of the legislature and an immediate general election on the occasion that an amendment is adopted for the first time. Examples include the constitutions of [Iceland](#), [Denmark](#), the [Netherlands](#) and [Norway](#). This method is also common in sub national entities, such as the US states of [Wisconsin](#) and [Vermont](#).

An amendment to the [United States Constitution](#) must be ratified by three-quarters of either the state legislatures, or of [constitutional conventions](#), especially elected in each of the states, before it can come into effect. In [Canada](#), different types of constitutional amendments have different requirements to be enacted. There are five amendment formulas included in the [Constitution of Canada](#), each relating to different elements of the constitution. In referendums to amend the constitutions of [Australia](#) and [Switzerland](#) it is required that a proposal be endorsed not just by an overall majority of the electorate in the nation as a whole, but also by separate majorities in each of a majority of the states or

cantons. In addition, if an Australian referendum specifically impacts one or more states then a majority of the electorate in each of those states must also endorse the proposal.

In practice, many jurisdictions combine elements of more than one of the usual amendment procedures. For example, the [French constitution](#) may be amended by one of two processes: either a special legislative majority or a referendum. On the other hand, an amendment to the constitution of the U.S. Commonwealth of [Massachusetts](#) must first be endorsed by a special majority in the legislature during two consecutive terms, and is then submitted to a referendum. Some states such as Wisconsin use the same process but do not require [supermajorities](#).

Some constitutions provide that their different provisions must be amended in different ways. Most provisions of the constitution of [Lithuania](#) may be amended by a special legislative majority but a change to the status of the state as an "independent democratic republic" must be endorsed by a three-quarters majority in a referendum. Unlike its other provisions, a referendum is required to amend that part of the constitution of [Iceland](#) that deals with the relationship between church and state.

### **6.2.2. Form of changes to the text**

There are a number of formal differences, from one jurisdiction to another, in the manner in which constitutional amendments are both originally drafted and written down once they become a law. In some jurisdictions, such as the Republic of Ireland, [Estonia](#) and Australia, constitutional amendments originate as [bills](#) and become laws in the form of acts of parliament. This may be the case notwithstanding the fact that a special procedure is required to bring an amendment into force. Thus, for example, in Republic of Ireland and Australia although amendments are drafted in the form of [Acts of Parliament](#) they cannot become law until they have been approved in a referendum. By contrast, in the United States a proposed amendment originates as a [joint resolution](#) of Congress rather than a bill and, unlike a bill, is not submitted to the [President](#) for his assent.

The manner in which constitutional amendments are finally recorded takes two main forms. In most jurisdictions, amendments to a constitution take the form of revisions to

the main body of the original text. Thus once an amendment has become law, portions of the original text may be deleted or new articles may be inserted among existing ones. The second, less common method is for amendments to be appended to the end of the main text in the form of special *articles of amendment*, leaving the body of the original text intact. Although the wording of the original text is not altered, the [doctrine of implied repeal](#) applies. In other words, in the event of conflict, an article of amendment will usually take precedence over the provisions of the original text, or of an earlier amendment. Nonetheless, there may still be ambiguity as to whether an amendment is intended to supersede an existing article in the text or merely to supplement it. An article of amendment may, however, explicitly express itself as having the effect of repealing a specific existing article. The use of appended articles of amendment is most famous as a feature of the United States Constitution, but it is also the method of amendment in a number of other jurisdictions, such as [Venezuela](#).

The [Constitution of Austria](#) is unusually liberal regarding the recording of constitutional amendments. Any piece of parliamentary legislation can be designated as "constitutional law", i.e. as a part of the constitution if the required supermajority and other formalities for an amendment are met.

## End Notes

### Books

1. Paradigm and Model has been inter-changeably used in the study of social science.
2. By 1941 the Italian occupation was finally annihilated.
3. Austin T. Turk, law as a weapon in social conflict, social problems. 23(Feb, 1970) pp 276-291. History.
4. R.W.M Dias, Jurisprudence, P. 442 (5<sup>th</sup> ed. Adytya Books Private Ltd., 1994).
5. Ibid.
6. Id., at 424.
7. Austine cited at mote3.
8. Ibid.
9. Levine, Wax and Gold, as quoted by James C.N. Paul and Christopher, Clapham, Ethiopian Constitutional Development, Vol. I, pp. 283-294 (H.S.I.U., Oxford University Press, A.A., 1967).
10. Emperor Theodros of Gondor, Emperor Yohannes of Tigray and Finally Emperor Menilik of Shoa were knots in the chain of development of this direction.
11. Some authorities claim that Ethiopia had written constitution extending back to the B.Cs. Some others assert that it had, in fact, written constitution since the beginning of the 14<sup>th</sup> century, where in Ethiopia adopted “Fetha Megast” (Justice of the kings) from Greco-Syria canonical laws.
12. Supra, note 9 at 283.
13. Ibid.
14. Ibid.
15. Ibid.
16. Mahatama Selassie, as quoted by James et la, Supra, note 9, at 287.
17. Ibid.
18. Edmund Burke, Reflections on the revolution in France, pp 58-59 (Everymans ed., 1960).
19. The Cabinet of Japan was established in 1885, whereas that of Ethiopia was set up in 1908. See the congruency in time perspective.
20. Bajirond (Exchequer) Tekla-Hawariat, Minister of Finance, one of the group of intellectuals known by some categories of scholars as “Japanisers”.

21. Emperor Haile Selassie fled and went to Geneva to appeal to the League of Nations.
22. The Emperor returned home in 1941 along with the Allied forces, in particular with the support of the British Army.
23. The Solutions proposed by the Commission are fully presented in “Report of the United Nations Commission for Eritrea”, General Assembly, U.N. Official Records: 5<sup>th</sup> session, Supplement N.G. (A/1285), Lake Success, N.Y. 1950.
24. *Supra*, note 9, at 310
25. The Universal Declaration of Human Rights was proclaimed by the General Assembly of the United Nation, on December, 1948.
26. Art. 26, Pro. Promulgating the Revised constitution of the Empire, Consolidated Laws, Vol. 1 No. 1 (1972).
27. *Ibid*.
28. In this lime, some cases invoking the question of constitutionality were brought before the regular courts.
29. ‘*Chilot* and ‘*Firid Mirmera*’ (the king court and court of investigation) were courts which were outside the ambit of the jurisdictional competence of regular courts. They were maintained by the Emperor.
30. Originally, it consisted of 120 members representing different groups and departments of the armed forces. The vast majority were consumed by their own Revolution, as it was said that “Revolution eats it own sons”, in the French Revolution.
31. When, I say totalitarian I mean a form of government which embraces, controls and guides and works of life.
32. According to the level of development attained and according to the nature of the government, states under soviet leadership were categorized as, in ascending order, non-capitalist, socialist-oriented, Peoples Democracies. Socialist and advanced socialist. This last rank was held by U.S.SR. itself.
33. Some equate it with the concept of “Rule of Law”. Some on the contrary see it as “Rule by Law”. For all purposes, it may be said to include all that which goes with obedience to the law, respecting the law and functioning in accordance with principle of socialist law.
34. Andrei Y. Vyshinkesy, *The law of the Soviet Union*, PP. 76ff (the Macmillan Company, N.Y. 1961).

35. Ibid.
36. Ibid.
37. Eeron de Montesquieu, *The Spirit of Law*, Vol. II, Ch. 6, as quoted by, *Supra*, note 11, at 46-52.
38. *Constitution (Fundamental Law) of the U.S.S.R* (Moscow, 1955).
39. Dias, R.W.M., *Jurisprudence* (5<sup>th</sup> ed., Adyta Book, Pr.Ltd., 1994).
40. Ewing, William H., (ed.) *Consolidated Laws of Ethiopia*, Vol I. (Artistic printers Ltd., A.A., 1972).
41. Levine, Wax and Gold, (Chichage, 1965).
42. Pankhurst, Richard, *An Introduction to the economic History of Ethiopia*, (London, 1961).
43. Pau, James C.N. and Clopham, Christopher, *The Constitutional Development of Ethiopia Vol. I & II* (Oxford university Press, 1967).
44. Perham, Margarit, *The Government of Ethiopia*, (London, 1948).
45. Shukla, V.N, *the Constitution of India*, (6<sup>th</sup> ed. By Mahednra P. Singh, (1994)
46. Vyshinsky, Andri Y. *The Law of the Soviet Union*, (Macmillon Company, N.Y., 1961).

## **II. Articles:**

1. Balkin, J.M. "The Constitution of Status", *Y.L.J.* Vol. 106 (1997).
2. Carder, Hugh, "Towards South-African Constitution". *M.L.R.*, Vol 57, No. 4 (July, 1994).
3. Cottrell, Jill "Making a new Constitution work: the Nigerian Courts", *A.L.J.*, Vol, III (1983).
4. Turk, Austion, T., "Law as a Weapon in Social Conflict, Social Problems (Feb., 1976).
5. Vanderlinden, Jaques, "An Introduction to the Source of Ethiopian Law", *Journal of Ethiopian Law*, Vol 3, No. 1 (1966).
6. Zianglo Peter, "A General Theory of Law as a Paradigm for Legal Research", *M.L.R.*, Vol. 51, No.5 (Sept., 1988).