Ethiopia

Introductory Notes

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I. Origins and Historical Development of the Ethiopian Constitution

Ethiopia is the only African country that successfully resisted European colonization after foiling successive waves of Italian aggression. The recorded history of Ethiopia dates back more than 2,000 years. Myth extends the birth of the former Abyssinian kingdom to more than 3,000 years ago. Throughout its history, the kingdom has been ruled by several emperors and a small number of empresses, all claiming descent from the legendary Solomon of Israel, with a few interruptions. The leaders claimed divine power, and hence were absolute monarchs. They were the law makers, the executives, and the judges, with no concept of separation of powers. It is therefore unimaginable to have had constitutions that limited the power of these absolute monarchs. There were some unwritten monarchical rules, but they barely limited the power of the leaders.

The boundaries of the modern Ethiopian state were carved at the end of the 19th century, after several wars of conquest. It was about half a century before the first written Ethiopian Constitution was adopted in 1931, just after Emperor Haile Sellasie (formerly known as Ras Teferi) was enthroned. This Constitution, however, did no more than codify and fortify the absolute powers of the monarch. A new (revised) Constitution was adopted in 1955 in reaction to, among other things, international developments, and to accommodate the federation of Eritrea with Ethiopia in 1952. Just like its predecessor, the Revised Constitution played little in the role of limiting the power of the state and the monarch. It was meant to serve as a camouflage for pure authoritarianism.

Two of the main historically recurring constitutional themes—feudal land ownership and the issue of ethnicity—were left unaddressed by the early efforts of constitutionalization. This led to several riots throughout the country, led particularly by the farmers. The riots forced the Emperor to agree to revise the Constitution, with the aim of appeasing the widespread unrest. However, it was too little, too late for the Emperor. In 1974, the last Ethiopian monarch was beheaded following the largest successful revolution in Ethiopian history. The revolution led to the creation of a military junta called the Dergue (literally, 'Committee'), which led the country for 17 years until 1991. The communist overtones of the Dergue meant that the feudal land system was abolished once and for all. The revolution therefore extinguished one of its major flames: the question of feudal land ownership. The second main issue—the question of ethnicity—was, however, not addressed in any meaningful way, as the Dergue emphasized a strong Ethiopian national identity. Hence, the struggle continued. Several liberation movements were established and operated along ethnic lines. In reaction, the Dergue regime unleashed one of Ethiopia's darkest historical experiences—the 'Red Terror'—which claimed thousands of young lives and forced others to flee their families, homes, and country. The Red Terror was a reaction to the 'White Terror', which was orchestrated by the rebellion and targeted and killed some of the senior government officials of the Dergue. There was no proper constitution to regulate the

behavior and activities of the members of the Dergue. It was only in 1987, after 13 years of constitutional lacuna, that mounting pressure forced the Dergue to adopt the Constitution of the Peoples' Democratic Republic of Ethiopia. The new Constitution did not, however, save the regime; the ultimate downfall of the Dergue in 1991 was accelerated by the subsiding of the Cold War, which meant little or no support for the Dergue from the USSR.

The current Ethiopian Constitution has its beginnings from right after the fall of the Dergue through the adoption of the Transitional Charter, which served as the 'supreme law of the land' (hence, an interim constitution) during the transitional period of 1991–1995.[1] The Charter was agreed upon by the several warring factions that together overthrew the Dergue military junta. Thus it was 'primarily a peace document, an accord'.[2] The Charter recognized several human rights, including the right to self-determination of ethnic groups to 'independence' when the nation/nationality or people (essentially, ethnic group) concerned was convinced that its 'rights [were] denied, abridged, or abrogated'. The Charter most importantly provided for the establishment of a Constitutional Commission, with the mandate to draft a constitution. Once the draft was finalized, the Commission had to submit it to the Transitional Council of Representatives (TCR), composed of representatives of liberation fronts and professional organizations, which was to then present the draft for popular discussion. Once the draft was adopted by the TCR, a Constituent Assembly, to be elected in accordance with the provisions of the final draft of the Constitution adopted by the TCR, was to ratify the Constitution.

The Constitutional Commission was constituted in 1992. According to the enabling proclamation, the Commission comprised a 29-member General Assembly (GA), an Executive Committee, and various other expert committees. The GA was composed of seven members from the TCR, seven representing various political parties, three from trade unions, two from teachers' associations, two from lawyers' associations, two from health professionals' associations, three from the Ethiopian Chamber of Commerce, and three members representing women. The Commission drafted the Constitution and it was adopted more or less in the manner prescribed by the Charter.

Ashenafi has noted that foreign constitutions were consulted for comparative purposes, while at the same time certain autochthonous procedural and institutional structures were invented. Foreign and local experts were also consulted. Ashenafi, however, concluded that the process was dominated by powerful political parties and was not 'fully participatory'. She noted that[3]

> debates were lively. The chairperson of the Commission encouraged decisions by consensus, though it was not always possible to reach a unanimous decision. The diversity of the Commission members meant that a great number of interests were represented. Informal lobbying and negotiations were part of the process. Nonetheless, the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF), the ruling party, always dominated when an issue came to a vote, as it had the largest delegation.

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[1] For a detailed consideration of the making of the Ethiopian Constitution, see T Regassa, 'The Making and Legitimacy of the Ethiopian Constitution: Towards Bridging the Gap between Constitutional Design and Constitutional Practice' (2010) 23(4) Africa Focus 98–104.

[2] Ibid 99.

[3] M Ashenafi, 'Ethiopia: Processes of Democratization and Development' in A An-Naim (ed), *Human Rights under African Constitutions: Realizing the Promise for Ourselves* (University of Pennsylvania Press, Philadelphia, 2003) 32.

Paul similarly noted that[4]

> none of the political and ethnic forces which make the opposition to [the EPRDF] had participated in the Constitutional making. All opposition parties, most importantly, those representing the Amhara and Oromo groups (38 and 35% respectively) withdrew from the electoral competition. The new constitution is therefore supported politically and ethnically only by the Tigrayan minority which counts less than 10% of the population.

Markakis also observed that the process was rushed:[5]

> It is fair to say that not many Ethiopians who live in the countryside have a clear notion of what federalism means, or had the opportunity to express an opinion on its merits. There was simply no time to form a national consensus on the legitimacy of the new political system.

Nonetheless, the draft was submitted in 1994 by the Constitutional Commission to the TCR, which discussed each provision for a month. Most of the discussions were televised nationally. After adoption by the Council, the Commission presented the adopted draft to the people for popular discussion. Regassa, however, noted that the 'turnout was low'.[6]

Members of the Constituent Assembly were elected and constituted according to the draft Constitution adopted by the TCR. The Assembly discussed the draft again and ratified it on 8 December 1994. The Constitution entered into force on 21 August 1995.[7] The Constitution was not subjected to referendum.

II. Fundamental Principles of the Constitution

The Preamble of the Constitution outlines its major aim: 'building a political community founded on the rule of law and capable of ensuring a lasting peace, guaranteeing a democratic order, and advancing ... economic and social development'. The Constitution conditions the success of this sacred goal on the full respect of the fundamental rights and freedoms of individuals and the people, to living together on the basis of equality and without any sexual, religious, and cultural discrimination, and on rectifying historically unjust relationships and promoting shared interests.

The Ethiopian Constitution charts several fundamental principles to implement its objectives (Chapter Two is dedicated to prescribing these principles). These principles include:

- Sovereignty of the people
- Supremacy of the Constitution

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[4] CN Paul, 'Ethnicity and the New Constitutional Orders of Ethiopia and Eritrea' in Y Ghai (ed), *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-ethnic States* (Cambridge University Press, Cambridge, 2000) 189.

[5] J Markakis, 'Federalism and Constitutionalism in the Horn of Africa' in *Constitutionalism and Human Security in the Horn of Africa* (Inter-Africa Group, Addis Ababa, 2007) 48.

[6] Regassa (n1) 104.

[7] Abbink observes that '[t]he Constitution was published on 12 December 1996, with the imprint "21 August 1995" (the date of inauguration of the FDRE [Federal Democratic Republic of Ethiopia]' although 'the reason for the delay is not known'. J Abbink, 'Ethnicity and Constitutionalism in Ethiopia' (1997) 41(2) Journal of African Law 166.

- Human and democratic rights
- Separation of state and religion
- Transparent and accountable government

A. Sovereignty of the nations, nationalities and peoples (ethnic groups) (Article 8)

The Ethiopian Constitution is unique compared to most other constitutions in general, and to those in Africa in particular, in one basic respect: the Preamble commences with the expression '[w]e the nations, nationalities and peoples of Ethiopia'—essentially, ethnic groups. It is therefore clear from the outset that the Constitution is not a social contract between the individuals of Ethiopia as such, but amongst the nations, nationalities, and peoples of Ethiopia. The Constitution affirms this in bold terms by declaring that 'all sovereign power resides in the nations, nationalities and peoples of Ethiopia'. This sovereignty is expressed in the Constitution as well as through the representatives elected in accordance with it and through their direct democratic participation. The ethnic-based federal structure of government is but a reflection of the colossal importance attached to ethnicity. Moreover, although the Constitution selects one language, Amharic, as the working language for the federal government, it recognizes all Ethiopian languages equally. It furthermore allows each regional state to determine its own working language.

B. Supremacy of the Constitution (Article 9)

The Constitution unequivocally asserts its supremacy and hence serves as the supreme law of the land. As a consequence, '[a]ny law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect'. Any contradictory law or practice is therefore *void ab initio* (void from the beginning). As an expression of its supremacy, all citizens, organs of state, political organizations, and other associations, as well as their officials, are required to ensure the observance of the Constitution and to obey it. Most importantly, the Constitution serves as the only source of government power. It is therefore prohibited to assume power through any means other than, and contradictory with, the manner prescribed in the Constitution itself.

C. Human and democratic rights (Article 10)

According to the Ethiopian Constitution, human rights emanate from humanity and do not owe allegiance to any other source. The Constitution reaffirms that it is merely reproducing, and not creating, the rights it guarantees. As clearly indicated in the Preamble, full respect of individual and people's fundamental freedoms and rights is an essential precondition for the achievement of the goals set out in the Constitution. Hence, human rights and freedoms are inviolable and inalienable guarantees. The human and democratic rights of citizens and peoples must be respected. For further discussion on the human rights provisions of the Constitution, see Section III below.

D. Separation of state and religion (Article 11)

Prior to 1974, during the time of the Emperors, religion (more specifically, the Ethiopian Orthodox Church) played a significant role in social and political governance and other affairs of the state. Support from the church was in fact a precondition for power. During the Dergue regime, however, the socialist tendencies of the regime meant that religion was discouraged and undermined. The current Constitution takes a middle approach, in that it claims to have completely separated state and religion. Thus the state may not interfere in religious matters, and vice versa. Logically, the Constitution overrules any possibility of adopting a state religion.

The Constitution, however, allows the establishment of institutions for religious education and administration, and also the setting up of religious courts, which may adjudicate on family and personal matters based on the consent of all parties.

E. Transparent and accountable government (Article 12)

Accountability and transparency are the essential tenets sanctioned by the Constitution to guide the conduct of government and government officials. All government affairs must be conducted transparently. Public officials and elected representatives are accountable for any failure in their official duties. In cases where elected representatives do not deliver on their promises, resulting in the loss of confidence of voters, the people have the right to recall them. The writer is, however, not aware to date of any instance where this right to recall has been exercised for this reason.

F. Other principles and objectives (Article 85)

The Constitution also incorporates several national policy principles and objectives designed to direct social, political, economic, and every other aspect of life and governance. These principles guide the implementation of the Constitution and other laws and policies by all organs of the federal and state governments. These principles include the following.

1. Principles of external relations (Article 86)

The sovereignty of the nation and the national interest must guide the state in promoting foreign relations. As a consequence, international agreements should be observed only to the extent that they ensure respect for Ethiopia's sovereignty and are not contrary to the interest of its peoples. The state must also promote mutual respect for and the sovereign equality of other states and non-interference in the internal affairs of other states. The Constitution also requires the state to seek and support peaceful solutions to international disputes. Forging and promoting 'ever growing economic union and fraternal relations' with Ethiopia's neighbors and other African countries is also an essential policy guideline.

2. Principles of national defense (Article 87)

The armed forces represent the powerhouse for state control and administration. Hence, the Constitution provides that the armed forces of Ethiopia should be composed in such a way to reflect the equitable representation of Ethiopia's ethnic groups. The army should, in particular, respect and obey the Constitution. The Minister of Defence should be a civilian. Most

importantly, the armed forces are required to be free of any partisanship to political parties or organizations. The armed forces are primarily responsible for protecting the sovereignty of the state and any other duty as may be assigned to them under a state of emergency declared in accordance with the Constitution. There is, however, no explicit constitutional guidance should the armed forces refuse to enforce a state of emergency if they do not agree on the constitutionality of the emergency declaration.

3. Political objectives (Article 88)

The central objective of the Constitution and the state it establishes is to ensure the self-determination of the diverse ethnic groups of Ethiopia. The promotion and support of this self-rule based on democratic principles is therefore the guiding political objective. The identity of ethnic groups must be respected by the government, which must also strengthen ties of equality, unity, and fraternity amongst the ethnic groups. To be precise, unity in diversity is the underlying political mantra of the Ethiopian Constitution.

4. Economic objectives (Article 89)

The Constitution obliges any government to formulate policies to exploit resources in a way that benefits all Ethiopians. The creation of equal opportunities to improve economic conditions, as well as the equitable (re)distribution of wealth to all Ethiopians, is an essential policy goal. A precondition for this is the participation of the people in the formulation of national development policies and programs, as well as support for the development initiatives of the people. For these purposes, land and natural resources, the basics of development, should be held and deployed by the state on behalf of the people for common benefit and development. As such, land is state-owned and may not be sold privately. The economic policy principles also recognize the special needs of some economically and socially disadvantaged groups—primarily women—and least advantaged nations, nationalities, and peoples (ethnic groups) for special assistance. Women are also guaranteed equal participation in economic and social development efforts. The protection and promotion of the welfare, health, and living standards of workers forms another basic economic guide. The government should, moreover, take precautionary measures to avert man-made as well as natural disasters, and provide support to victims if and when a disaster occurs.

5. Social objectives (Article 90)

The social objectives set out in the Constitution require government policies to aim to provide all Ethiopians with access to public health, education, clean water, housing, food, and social security, to the extent that resources permit. Education should also be free from any form of religious, political, or cultural prejudice and influence. This is surprisingly similar to the provision in Chapter Three on fundamental rights, which requires the state to allocate ever increasing resources to achieve these goals (Article 41). Therefore the social objectives are rights as well.

6. Cultural objectives (Article 91)

To the extent compatible with fundamental rights, human dignity, democratic norms and ideals, and the provisions of the Constitution, the government should support the growth and enrichment of Ethiopia's diverse indigenous cultures and traditions on the basis of equality. All Ethiopians and the government are further required to protect the country's natural endowment and historical sites and objects. Supporting the development of arts, science, and technology to the extent that resources permit is also another essential government duty.

7. Environmental objectives (Article 92)

A clean and healthy environment is an essential prerequisite to life. Therefore, the government is constitutionally required to work towards ensuring that all Ethiopians live in a clean and healthy environment. It is thus incumbent on the government, as well as on all Ethiopians, to protect the environment. It is set out in the Constitution that development programs and projects should not damage or destroy the environment. Full consultation and expression of views in the planning and implementation of environmental policies and projects is constitutionally recognized as a right of the people who are directly affected.

III. Fundamental Rights Protection

The Ethiopian Constitution incorporates several human rights in its Chapter Three. This recognition ranges from traditional civil and political rights, to socio-economic rights, and to group or solidarity rights. The emphasis on human rights is further reflected in the separate and more stringent amendment procedure for the constitutional human rights provisions as compared to the rest of the provisions of the Constitution.[8]

A. Civil and political rights

The Constitution vigorously enshrines several civil and political rights, most of which are verbatim copies of the provisions of the Universal Declaration of Human Rights (UDHR). The list includes the right to life, which outlaws the deprivation of life except as a punishment for a serious offence determined by law;[9] to security of the person; to liberty, which prohibits arbitrary arrest and deprivation of liberty; and protection against cruel, inhuman, or degrading treatment or punishment, including the banning of slavery and trafficking in human beings for whatever reason, and forced or compulsory labor.[10]

The Constitution also includes guarantees that are pertinent to the criminal justice system. The rights of arrested persons to remain silent, to be promptly informed, in a language she or he understands, of the reasons for their arrest, to be brought before a judge within 48 hours, and to *habeas corpus* are entrenched.[11] The Constitution also overrules and excludes confessions or

[8] Compare art 105(1), governing amendment of the human rights provisions, with art 105(2), governing amendment of the rest of the Constitution.
[9] This clearly allows the imposition of the death penalty. It does not, however, define a 'serious crime'. It is apparently left to the untrammelled discretion of the legislator to determine for which crimes the death sentence may be imposed.
[10] Arts 14–18.
[11] Art 19.

admissions obtained through coercion,[12] and establishes the right to bail.[13] In a similar vein, accused persons have the rights to a public trial in an ordinary court within a reasonable time; to be informed of the particulars of the charge; to the privilege against self-incrimination and the presumption of innocence until proven guilty; to access and challenge evidence presented against them and to adduce evidence on their behalf; to be represented by legal counsel of their choice and, if they cannot afford to pay for such counsel and if miscarriage of justice would result, to be provided with one at the expense of the state;[14] and to appeal to a competent court.

Persons in custody have the right to treatment that respects their human dignity. They also have the right not to be held incommunicado and hence to be visited by their spouses or partners, close relatives, friends, religious councilors, medical doctors, or their legal counsel.[15] The retroactive application of criminal laws is also prohibited and hence unconstitutional.[16] It is, however, unclear whether this guarantee applies to both substantive and procedural criminal laws.[17] The Constitution also prohibits double jeopardy in the form of re-trial or punishment for an offence upon which a final conviction or acquittal has been entered as per criminal law and procedure (Article 23).

The Constitution also guarantees the right to equality and equal protection of the law (Article 25); the right to privacy, which may only be limited if 'compelling circumstances' exist in accordance with law (Article 26); the right to freedom of religion, belief, and opinion (Article 27); the right to freedom of thought and expression, including access to information of public

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[12] Note that evidence obtained through other illegal means, or involving procedural irregularities not involving coercion—such as the failure to inform the arrested person of his right to remain silent—is not required to be abandoned under the Constitution.

[13] See art 19(6), which provides that '[p]ersons arrested have the right to be released on bail. In exceptional circumstances prescribed by law, the court may deny bail or demand adequate guarantee for the conditional release of the arrested person'. This constitutional provision concerning bail is not sufficiently clear as to whether the law will prescribe the general standards to be applied by the courts in each case involving individual determination, or whether the law will prescribe the specific cases as to when bail may be legitimately denied (for example, dependent entirely on the sentence attached to the crime with which the suspect is charged). The Ethiopian Criminal Procedure Code adopts two standards: for crimes that may entail 15 years or more imprisonment, no bail is available; if the sentence is less than 15 years imprisonment, the courts will consider each case on its own merits to determine whether bail should be granted. Criminal Procedure Code of Ethiopia, Proclamation No 185/1961, arts 63(1) and 67. Similarly, corruption offences that entail ten or more years of imprisonment are non-bailable offences. The Council of Constitutional Inquiry has ruled that the legislature has the power to create non-bailable offences in addition to prescribing general standards to be applied by courts. See Recommendation of the Council of Constitutional Inquiry on whether the law that precludes bail in corruption cases is constitutional (2003).

[14] The phrase 'miscarriage of justice' is very crude and has generally been determined on the basis of the possible punishment the charge may entail.

[15] Art 21. This provision also means that arrested persons may not be (or at least do not have the right to be) visited by others who are not included in the provision, such as foreign diplomats or the media. This provision has provided justification for the government to preclude the visit by foreign diplomats to Birtukan Mideksa, a prominent political prisoner.

[16] Art 22. This relates to criminal laws which either create a new crime, or impose more severe penalties for existing crimes. Exceptionally, retroactive application of criminal laws is permitted if this benefits the accused, for example by decriminalizing a previously criminal act or by reducing the penalty for such act.

[17] Substantive criminal law refers to those laws that create new crimes, or aggravate the punishment for existing crimes; procedural criminal law relates to other criminal laws that do not create crimes but are detrimental to the accused, such as those that retroactively exclude bail. In the first case, retroactivity is prohibited. But would a law that retroactively excluded bail be unconstitutional?

interest;[18] the right of assembly, demonstration, and petition;[19] the right to association for any cause or purpose (Article 31); and the right to freedom of movement, including the right to reside anywhere within the national territory as well as the right to leave and return to Ethiopia (Article 32). The rights to nationality, to change it at one's will, and not to lose it for the mere reason of marriage to a foreign national are also recognized.[20]

Marital, personal, and family rights, with equal rights for both sexes when entering or during marriage, or at the time of divorce,[21] and the rights of women to equality, protection from harmful customary and religious practices, to maternity leave, to acquire property, to equal employment opportunities, and to access to family planning, education, and information are also protected. These rights are further supplemented by the right to affirmative action.[22] The rights of children to name and nationality, and to be free from corporal punishment or cruel and inhuman treatment in schools and other institutions responsible for the care of children, are also enshrined.[23] The best interests of the child is the primary guiding principle. Juvenile offenders must be detained separately from adults,[24] and children born in and out of wedlock enjoy equal rights.

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[18] Art 29. New legislation to give effect to this provision has been enacted: The Mass Media and Freedom of Information Proclamation No 590/2008.

[19] Art 30. Legislation has been enacted to give effect to this right: Proclamation to Establish the Procedure for Peaceful Demonstration and Public Political Meeting No 3/1991.

[20] Art 33. Implementing legislation has been adopted: see Proclamation on Ethiopian Nationality No 378/2003 for further detail.

[21] Art 34. The Constitution, however, allows the establishment of religious or customary courts, such as Shari'a Courts (arts 34(5) and 78(5)). These provisions authorize the adjudication of family and personal law disputes in accordance with religious or customary laws, with the consent of all parties. The application of Shari'a laws, for example, might lead to unequal treatment between men and women in marriage or during divorce. This contradicts the equality guarantee under the Constitution's arts 25 and 34(1), and art 35(7), which guarantee equal treatment in the inheritance of property. The House of Federation (HoF) missed a golden opportunity to rule upon whether decisions of customary and religious courts are appealable to regular courts when it rejected an appropriate case for want of standing. The case was submitted to the Council of Constitutional Inquiry by the Islamic Affairs Supreme Council in October 1999 and decided by the Council of Constitutional Inquiry on 25 January 2000.

[22] Art 35. The Constitution (art 7) moreover declares that provisions stated in the masculine gender also apply to the feminine gender. There is no similar counter-right to family planning education and information for men. Regarding affirmative action, the Constitution does not make it clear whether and when it may cease.

[23] Art 36. The Constitution does not, however, ban corporal punishment in a family setup. Moreover, even the principle of the best interests of the child does not apparently apply to decisions taken by the family—it only binds 'public and private welfare institutions, courts of law, administrative authorities or legislative bodies'. This interpretation is supported by the Federal Revised Family Code Proclamation No 213/2000, which authorizes courts to intervene in decisions of the parents concerning children only when the parents fail to privately settle the disagreement (art 266(2)). The Cassation Division of the Federal Supreme Court, whose decisions are binding precedents, has however ruled that the provisions of the Federal Revised Family Code may only be applied to the extent they are in compliance with the best interest of the child: *Miss Tsedale Demissie v Mr Kifle Demissie*, File 23632, Judgment of 6 November 2007. The principle of detention as a last resort and to the minimum extent possible with regard to child offenders is also not guaranteed (compare art 37(b) of the Convention on the Rights of the Child, and rule 5 of the Beijing Rules, UN Doc A/40/53/1985). There is therefore a need to employ the interpretation provision of the Constitution (art 13(2)) to refer to international and regional human rights instruments to fill these gaping chasms in the Constitution.

[24] Note, however, that there is currently only one Juvenile Rehabilitation Centre for the whole of Ethiopia, which is situated in Addis Ababa, the capital. Hence, juveniles are in practice detained with adults, especially in other parts of the country.

Individuals and groups have the right to access to justice to obtain a decision or judgment over any justiciable matter in a court of law or other competent body with judicial power.[25] The right to vote and be voted for is guaranteed to all Ethiopians of age (Article 38); similarly, the right to property is entrenched for the benefit of Ethiopians.[26]

B. Economic, social, and cultural rights

The Ethiopian Constitution also incorporates certain entitlements as economic, social, and cultural ('ESC') rights. Every Ethiopian has the right to freely engage in any economic activity; to choose his or her means of livelihood, occupation, and profession; and to equal access to publicly funded services. The Constitution further requires the state to allocate ever increasing resources[27] to provide social services; to provide funds for the rehabilitation of persons with disabilities, the aged, and children without parents or a guardian, subject to available means; and to pursue policies aimed at expanding job opportunities for the poor through undertaking public programs and works projects. The Constitution also imposes a duty on the state to protect and preserve historic and cultural legacies, and to contribute to the promotion of arts and sports.

The Constitution also entrenches several labor rights: the right to association, including the right to form trade unions for collective bargaining purposes; the right to strike; equal pay for equal work; reasonable limitation of working hours; leisure, rest, paid leave, and a healthy and safe work environment are all included.[28]

However, the way the ESC rights provisions are formulated is far from being a replica of the UDHR, or the International Covenant on Economic, Social and Cultural Rights (ICESCR). One major difference between ESC rights and most civil and political rights in the Constitution is that ESC rights are guaranteed only for the benefit of Ethiopians.[29] Also, the ESC rights provisions often create government obligations, rather than individual or collective rights, in a similar way to the state policy principles and objectives.

The Constitution also guarantees several socio-economic rights as part of the National Policy Principles and Objectives.[30] It should be noted that the Constitution does not expressly declare

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[25] Art 37. The Constitution does not, however, provide criteria for determining, nor a definition of, the 'justiciability' of a matter. It is therefore arguable whether, for instance, the policy principles and objectives of the Constitution are justiciable. Some suggest that what is justiciable is more or less well recognized: F Nahum, *A Constitution for a Nation of Nations: The Ethiopian Prospect* (Red Sea Press, Lawrenceville, NJ, 1997) 150. This, however, ignores the difference in domestic approaches on what constitute justiciable disputes.

[26] Art 40. The right does not, however, extend to the right to own land.

[27] Note that 'ever increasing resources' does not necessarily mean maximum available resources.

[28] Art 42. Note that the Constitution does not recognize the right of employers or employers' associations to lockout. However, art 157(2) of the Labour Proclamation No 377/ 2003 recognizes the right to lockout. This arguably raises questions of constitutionality. In any case, however, the Constitution places the right to lockout at an inferior position to the right to strike, as the procedure for amendment of ordinary legislation is loose compared to the procedure for amending the Constitution.

[29] See art 41. This is in line with art 4 of the ICESCR, which allows developing states to determine the extent to which the rights will benefit non-nationals.

[30] See arts 89–91. These provisions are generally similar in formulation to art 41 (the ESC rights provision), but they are more descriptive. See Section II.F.4.–6. for a discussion of these principles.

the non-justiciability of the provisions of the National Policy Principles and Objectives.[31] Hence, the principles may be applied as binding undertakings, or at least used to guide the interpretation and understanding of the fundamental rights and freedoms.[32]

C. Group or solidarity rights

One essential feature of the Ethiopian Constitution is the recognition of what are called third generation or group or solidarity rights. The right to self-determination, including secession, the right to development, and the right to a clean and healthy environment are clearly enshrined.[33]

The right to development is recognized for the benefit of the peoples of Ethiopia as a whole, as well as in the form of a right to participation to each Ethiopian national. The right to environment similarly recognizes the right for the benefit of all persons; as such, it appears more like an individual guarantee which accrues to everyone. The Constitution also recognizes the right to commensurate monetary or alternative means of compensation for individuals when *state programs* entail displacement or adversely affect their livelihood.[34]

The Ethiopian Constitution is the only one of its kind in Africa which recognizes the right to self-determination, including secession, to its constituents, referred to as 'nations, nationalities and peoples' (ethnic groups).[35] The right to self-determination includes the right to speak, write, and develop their language; to express, promote, and develop their culture; to preserve their history; and to self-government and equitable representation in the regional state and federal governments.

The preconditions for secession are listed under Article 39: a two-thirds majority support of the Legislative Council of the nation, nationality, and people concerned, and a simple majority vote in a referendum to be organized in a maximum of three years from the time the demand has been espoused by the relevant Legislative Council, and when transfer of power and division of assets

[31] The 1999 Nigerian Constitution, s 6(6)(c), and the 1950 Indian Constitution, s 37, both unequivocally declare the non-justiciability of the provisions in the respective constitutions that deal with state policy principles and guidelines.

[32] In India, for instance, the Supreme Court has read the Directive Principles of State Policy (DPSP) into the justiciable guarantees of the Constitution, despite an explicit declaration of non-justiciability. At the same time, the DPSP are employed to insulate certain measures from attack based on the violation of certain justiciable rights. See eg *State of Kerala v N M Thomas* (1976) 2 (SCC) 310, where it was held that the fundamental rights and the DPSP are complementary, 'neither part being superior to the other'; and *Keshavananda Bharati v State of Kerala* (1973) 4 SCC 225, where it was held that '[i]n building up a just social order it is sometimes imperative that the fundamental rights should be subordinated to directive principles'. See generally 'Justiciability of ESC Rights: The Indian experience', Circle of Rights – Economic, Social and Cultural Rights Activism. **[http://www1.umn.edu/humanrts/edumat/IHRIP/circle/justiciability.htm]**

[33] See arts 39, 43, and 44, respectively.

[34] The right to compensation, however, only relates to state programs. Apparently the protection does not accrue if the displacement or the adverse effect is a consequence of non-state programs. See, however, the discussion on the environmental objectives in Section III.F.7.:the Constitution requires that development activities of any sort should not damage the environment.

[35] This, it should be noted, is a natural extension of the sovereignty conferred on the nations, nationalities, and peoples of Ethiopia (art 8(1)). Art 39(5) defines a 'Nation, Nationality or People' as 'a group of people who have or share a large measure of common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory'.

has been effected. This process is conducted entirely under the auspices of the House of Federation.[36]

In conclusion, the Ethiopian Constitution has a progressive list of rights compared to its predecessors. Special commendation should be given to the recognition given to Ethiopia's ethnic diversity and the willingness to accommodate it through the right to self-determination.

D. The distinction between 'human rights' and 'democratic rights'

The Ethiopian Constitution unusually classifies the fundamental rights and freedoms provisions into two types: human rights (Articles 14–28) and democratic rights (Articles 29–44). The difference is, however, not obvious from the text of the Constitution. Article 10 creates the impression that human rights are those that emanate from the nature of mankind, and democratic rights as those inherent in democracies.[37] The preparatory work for the Constitution, moreover, suggests that human rights are those rights that a person is entitled to merely because he or she is a human being, and democratic rights are those conferred only on citizens.[38] This was, for example, what the Minister of Justice argued during a preliminary debate on the draft bill of the Ethiopian Civil Society Law.[39] This argument is, however, inconsistent with the plain tone of the Constitution. The Constitution clearly limits the application of a right to Ethiopians whenever it deems it necessary with regard to each right.[40] Furthermore, limiting the application of rights to citizens will, on the face of it, be inconsistent with international human rights instruments adopted by Ethiopia. The International Covenant on Civil and Political Rights (ICCPR), for example, applies to all persons within the territory or jurisdiction of ratifying states.[41] Hence, no substantive distinction should be made merely on the ground of whether a right appears under the 'human rights' or 'democratic rights' section of the Constitution.

E. Who is entitled?

These rights are generally guaranteed on behalf of every individual, including foreign nationals, with some exceptions.[42] Women and children, inter alia, are additionally entitled to some specific

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[36] Art 62(3), and Proclamation to Consolidate the House of Federation No 251/2001, art 19. The House of Federation is composed of representatives of ethnic groups.

[37] Some commentators criticize this as artificial and confusing, as what are traditionally called human rights are also found in the part dealing with democratic rights. See SA Yeshaneh, 'The Justiciability of Human Rights in the Federal Democratic Republic of Ethiopia' (2008) 8(2) African Human Rights Law Journal 275, 276.

[38] See Minutes of the Discussion on the Draft Constitution at the Council of Representatives, May 1994 and T Regassa, 'Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia' (2009) 3(2) Mizan Law Review 303.

[39] Ethiopian television, Jan. 2009. The Minister made reference to this in justifying the exclusion of foreign and domestic non-governmental organizations (NGOs) that received more than 10% of their budget from a foreign source from engaging in issues touching upon, even tangentially, human rights and good governance.

[40] Thus, the right to vote and to be voted for, ESC rights, the right to nationality, the right to property, and the right to development are clearly only granted to Ethiopians. Freedom of expression and the right to association are, however, granted for the benefit of everyone, though they are positioned in the part of the Constitution dealing with democratic rights. The attribution of citizenship to other rights without an internal citizenship limitation, simply because they are shelved under the 'democratic rights' catalogue, is therefore inconsistent with the Constitution.

[41] Art 2(1) ICCPR.

[42] Art 33 (the right to nationality), art 38 (the right to vote and be voted for), art 39 (the right to self-determination), art 40 (the right to property), art 41(economic, social, and cultural rights), and art 43 (the right to development to the

rights, as discussed in Section III.A. It is not clear if the rights were also meant to apply to legal persons. However, the Constitution defines human rights and freedoms as emanating from the nature of mankind, excluding their possible application to legal entities. Nevertheless, there are certain guarantees that clearly apply to specific categories of legal entities. An example is Article 29(3), which provides:

> Freedom of the press and other mass media and freedom of artistic creativity is guaranteed. Freedom of the press shall specifically include the following elements:
> a. Prohibition of any form of censorship.
> b. Access to information of public interest.

This guarantee clearly applies to legal entities involved in the press, such as media houses. Nevertheless, only the press benefits from this guarantee, and hence the provision may not on its face apply to other legal entities.

F. Who is bound?

A cursory reading of the application provision of the Ethiopian Bill of Rights suggests that only federal and state legislative, executive, and judicial organs at all levels have the responsibility and duty to respect and enforce the human rights provisions of the Constitution. Hence, the human rights only have a vertical application. Nonetheless, a broader reading of Article 9(2), which applies to all the provisions of the Constitution and not just to the human rights chapter, requires, inter alia, all citizens and political organizations and other associations to ensure observance of the Constitution and that they obey it. As such, it is possible to understand this provision as also establishing a horizontal application of all the provisions of the Constitution, including the human rights chapter. This is nonetheless debatable, given that the human rights chapter only expressly establishes a vertical application (which might imply that the drafters intended to exclude horizontal application of the rights).[43]

G. Remedies in case of alleged violations

The Ethiopian Constitution does not have a provision that deals with remedies that may arise from the resolution of constitutional disputes. However, Article 37(1) entitles everyone to access the courts or other competent bodies to obtain a decision or judgment concerning any 'justiciable matter'.[44] The orders and remedies will therefore have to be determined by the House of Federation (HoF)[45] in each case. There is no explicit duty on the HoF to declare the invalidity of a law or practice inconsistent with the Constitution, although the Constitution deprives effect to

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totality of the peoples of Ethiopia, and to nationals) all establish rights only for Ethiopians. Hence, foreigners cannot as a right claim the benefits flowing from these rights.

[43] Also, the principle that 'the special prevails over the general' might have similar implications of excluding horizontal application of the human rights provisions, as the application provision for the Bill of Rights only expressly establishes a vertical application of rights.

[44] As indicated earlier, there is no clear definition of a 'justiciable matter'.

[45] The HoF is the organ in charge of interpreting the Constitution and resolving all constitutional disputes. See Section VI below.

any law, customary practice, or a decision of an organ of state or public official in contravention of it.[46]

The legislation enacted to define the powers of the HoF, however, has some relevant provisions on the effect of its decisions. Any decision and remedy applies only prospectively, unless otherwise conspicuously indicated in the decision.[47] This is apparently incompatible with Article 9 of the Constitution, which denies effect to inconsistent acts or omissions from the beginning (*void ab initio*), which necessitates a retrospective application of remedies.

The legislation also authorizes the HoF to grant a grace period of up to six months to the federal or the state legislative body to amend or repeal a law in question before a final decision on its unconstitutionality is taken.[48] This is a novel approach that gives the HoF a rather mediatory role between disputants. There is, however, no provision authorizing the suspension of the decision of invalidity once it has been taken, for different reasons.[49] This would have been used, for example, to avoid legal gaps in the interim between a declaration of invalidity and the adoption of new or amended legislation by giving the legislative body the chance to address the inconsistency that resulted in the declaration of invalidity. It is, moreover, not apparent whether the House may grant any other remedy, such as compensation, in addition to declaring the unconstitutionality of the defective act or omission.[50]

The legislation also introduces the principle of severability, which limits the effect of a declaration of invalidity to parts of a given law which are inconsistent with the Constitution unless otherwise necessary to completely invalidate the entire law.[51] Hence, if the rest of the law can be given effect without the flawed provision, the law remains valid but without the incongruent provision.

H. Status and hierarchy of international human rights instruments

The status in the Ethiopian Constitution of international instruments in general, and human rights instruments in particular, is not definite and is subject to substantial scholarly debate. Article 9(1) declares the supremacy of the Constitution. Hence, a literal reading of this provision clearly

[46] Art 9(1). Note that the Constitution states 'shall be of no effect', implying that the inconsistent act or omission is *void ab initio*.
[47] Consolidation of the House of the Federation and Definition of its Powers and Responsibilities Proclamation No 251/2001, art 16(1). Compare the South African Constitution of 1996, s 172(1)(b)(i), which authorizes courts to limit the retrospective effect of the declaration of invalidity (without such limitation, the order will have retrospective application). See eg *Occupiers of Olivia Road v City of Johannesburg et al*, Case CCT 24/07 [2008] ZACC 1 para 52, where the Constitutional Court excluded retroactive application of its orders.
[48] Proclamation No 251/2001, art 16(2).
[49] The South African Constitutional Court does not have a mediatory role per se. It does, however, have the right to suspend its declaration of invalidity whenever considered just and equitable: South African Constitution, s 172(1)(b)(ii).
[50] This however seems to be unlikely, as the bare role of the House of Federation or the Council of Constitutional Inquiry is to ascertain whether the challenged act or omission is constitutional. It is essentially an abstract review that does not require a concrete case. Moreover, the fact that decisions may in principle have prospective effect means that compensation may not be granted unless the HoF explicitly intends the decision to have retrospective effect.
[51] Proclamation No 251/2001, art 12. The South African Constitution similarly states 'invalid to the extent of its inconsistency' (s 172(1)(a)).

indicates that international instruments, which are made part and parcel of the laws of the land upon ratification under Article 9(4), are subordinate to the Constitution. Since human rights treaties are also part of a special kind of international agreement, they should also be understood to be subordinate to the Constitution.

However, under Article 13(2) of the Constitution, the fundamental rights and freedoms guaranteed in Chapter Three (the human rights chapter) must be interpreted in a manner conforming to the principles of the UDHR, international covenants on human rights, and international instruments adopted by Ethiopia. This has led some scholars to conclude that international human rights instruments that have been adopted (and not just ratified) have a status higher than, or at least equal to, the Constitution itself.[52] Nevertheless, the Constitution only refers to the 'principles', rather than the provisions, of international instruments; it also broadly refers to hard as well as soft instruments. Most importantly, conformity is required only when there is need for interpretation, which excludes cases where there are clear differences between the Constitution and international instruments, as well as cases of mere application of the Constitution. As such, even international human rights instruments have a status subordinate to the Constitution. It is facile to conclude that the drafters intended to subordinate the Constitution even to soft international principles and instruments.

The status of such instruments in regard to domestic parliamentary enactments is also not clear. However, given that international instruments are adopted and ratified in a similar fashion (signing by the executive and ratification by parliament) to parliamentary statutes (bills are presented, inter alia, by the Council of Ministers and adopted by the House of People's Representatives (HPR)), it can be concluded that international instruments only have a status equal to parliamentary statutes (referred to in Ethiopia as proclamations). As regards human rights, however, the duty to interpret the Constitution in line with international instruments can be extended to also require that domestic legislation should also be interpreted in line with international human rights instruments adopted by Ethiopia. This is exactly what the Cassation Division of the Federal Supreme Court did in the 2007 case concerning child rights when it relied on the Constitution as well as the Convention on the Rights of the Child (CRC).[53] In such instances, international human rights instruments can be considered to have a status higher than domestic legislation.

I. Limitation and derogation

Most human rights are not absolute. There may therefore be certain limits to the exercise of those rights. Limitations refer to infringements or encroachments on guaranteed rights under narrowly defined permissible circumstances.[54] There are different approaches to the limitation of rights in constitutions: some constitutions and international instruments include internal individualized

[52] I Idris, 'The Place of International Human Rights Conventions in the 1994 Federal Democratic Republic of Ethiopia Constitution' (2000) 20 Journal of Ethiopian Law 113.
[53] *Miss Tsedale Demissie v Mr Kifle Demissie*, Federal Supreme Court Cassation Division, File 23632, Judgment 6 November 2007. The Court interpreted the Family Code in line with the Constitution as well as with the CRC.
[54] They generally require legality, necessity, rational connection between the limitation and its stated purpose, and proportionality.

limitation clauses within each particular right, set out in different detail;[55] others have adopted general limitation clauses whose application cuts across all provisions.[56] Still others adopt a combined approach in that in addition to a general limitation clause, certain provisions may include their own internal limitation clauses.

The Ethiopian Constitution contains claw-back clauses within most of the protected rights. Some of the internal limitations simply refer to those limitations determined or established by law,[57] while others are more detailed and require compelling circumstances and specific laws necessary to safeguard public security, peace, the prevention of crimes, public morality, and the protection of the rights and freedoms of others.[58] There are therefore different standards of limitation depending on which right the Constitution purports to limit. The problem posed by the claw-back clauses is exacerbated by the absence of a more sweeping general limitation clause in the Constitution that would have ensured uniformity of standards in scrutinizing the conformity of limitations of rights with the basic tenor of the Constitution.

Several problems can be identified concerning the possible limitation of rights in the Ethiopian Constitution: first, there is no requirement in some cases, such as the right to life and liberty, that the limitation be necessary, proportional, and rationally connected with the purpose it aspires to achieve—so long as the limitation is established or determined by law, there is no inquiry into the fairness and justness of the law (that is, it only adopts the legality requirement).[59] The minimum threshold for restraining fundamental rights and freedoms is significantly low. For instance, it is not clear whether a law that imposes capital punishment on children will stand the test of constitutionality.[60] There is, furthermore, no definition as to what 'law' means: does it include parliamentary statutes only? Or does it also include regulations, directives, or even rules and codes of conduct of administrative agencies? Moreover, should it be a law of general application: clear, precise, and accessible, allowing predictability?

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[55] For example, the ICCPR and the Ethiopian Constitution. The African Charter on Human and Peoples' Rights also does not have a general limitation clause, although the African Commission on Human and Peoples' Rights has used art 27(2) as a general limitation clause: see eg *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 68.

[56] See eg UDHR art 29(2), and the South African Constitution, s 36(1).

[57] For example, the rights to life, liberty, and bail (arts 15, 17, and 19 respectively).

[58] The rights to privacy, freedom of religion, belief and opinion, freedom of expression, and assembly and association (arts 26, 27, 29, 30, and 31).

[59] For the principles that should guide limitation and derogation of rights, see the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, United Nations, Economic and Social Council, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Annex, UN Doc E/CN.4/1985/4 (1985) ('Siracusa Principles').
The Indian Supreme Court, during its initial stages, accepted all limitations so long as they were established by law, without any inquiry into their fairness. For example, it approved preventive detention so long as it was provided by law: *A K Gopalan v State of Madras*, AIR 1950 SC 27. This understanding was later rightly overturned in favor of the requirements of guarantees of non-arbitrariness, reasonableness, and fairness implicit in the provisions protecting human rights in the case of *Maneka Gandhi v Union of India*, AIR 1978 SC 597.

[60] There is, however, a provision in the Ethiopian Criminal Code Proclamation No 414/2004 which prohibits the imposition of the death penalty on persons under the age of 18 at the time of the commission of the crime (art 117(1)). But this is only an ordinary guarantee by an ordinary piece of legislation which may be reversed through an amendment or modification in an ordinary procedure at any time. This problem poses an imminent danger because, for example, the new anti-terrorism proclamation imposes the death penalty and does not have an express exception to children who are convicted on that basis. See, however, art 36 of the Constitution, which guarantees the right to the life of the child (without any clear form of limitation).

The Ethiopian Constitution also recognizes exigent possibilities that may require the suspension of protected rights.[61] Derogation clauses relate to provisions that permit the temporary suspension of the application and enjoyment of rights in response to emergency incidents that threaten the life of a nation.[62] Derogations do not, however, confer absolute discretion on the executive to act only on its whims; there are substantive as well as procedural requirements that are thinly tailored to govern such ineluctable emergency phenomena.[63] There are, moreover, certain rights which may not be suspended even in threatening situations, although there is often no uniformity as to which rights any constitution classifies as such. These preconditions are designed to screen possible abuses of human rights on the pretext of emergencies, while at the same time authorizing states to secure, maintain, and ensure the sustenance of fundamental national and international interests from a lurking evil.

Article 93 of the Constitution prescribes the requirements—both procedural and substantive—for derogation from rights. The only circumstances that may justify derogations are the occurrence of an external invasion, a breakdown of law and order which cannot be controlled by the regular law enforcement agencies and personnel, or a natural disaster or epidemic.

The Council of Ministers of the federal government has the power to declare a state of emergency if any of the above situations transpires. The regional states are also allowed to declare states of emergency to avert a natural disaster or an epidemic within their respective territories. The ultimate power to approve or annul the declaration of emergency by the Council of Ministers lies, however, with the HPR. The approval has to be made within 48 hours if the HPR is in session, or within 15 days if the HPR is not in session at the time of the emergency declaration. If approved by a two-thirds majority vote of the HPR, the state of emergency may remain for up to six months, subject to renewal for up to four months on each occasion through the same procedure.[64] If annulled, the declaration will be repealed forthwith.[65]

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[61] Art 93.

[62] See the Siracusa Principles (n59) and the Paris Minimum Standards of Human Rights Norms (International Law Association, 1985); RB Lillich, 'The Paris Minimum Standards of Human Rights Norms in a State of Emergency' (1985) 79 American Journal of International Law 1075.

[63] FN Aolain, 'The Emergence of Diversity: Differences in Human Rights Jurisprudence', 19 Fordham International Law Journal 101.
The African Charter on Human and Peoples' Rights does not, however, contain any derogation clause. The African Commission on Human and Peoples' Rights has interpreted this omission as a prohibition of derogation from the Charter provisions. See eg *Commission Nationale des Droits de l'Homme et des Libertes v Chad* (2000) AHRLR 66 (ACHPR 1995) para 21; *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998) para 67, implying that all the rights in the African Charter are essentially non-derogable. Some however argue that this should not be the case: see F Ouguergouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (Martinus Nijhoff Publishers, The Hague, 2003); C Heyns, 'Civil and Political Rights in the African Charter', in M Evans & R Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2000* (Cambridge University Press, Cambridge, 2002) 139.

[64] Note that the Constitution does not set a maximum period for the state of emergency; it may therefore last for as long as it remains approved by the HPR.

[65] This implies that the annulment has only prospective effect. This is particularly worrisome in cases where the HPR is not in session, but annuls the declaration of emergency later, as damage may already have been done within the 15 days. Hence, the procedure might leave victims helpless and without remedy.

The Constitution authorizes the possible suspension of most of the fundamental human rights and freedoms to 'the extent necessary', with a handful of exceptions.[66] The only non-derogable rights are the prohibitions against cruel, inhuman, and degrading treatment or punishment, slavery or servitude, and trafficking (Article 18), the right to equality and equal protection of the law (Article 25), and the right to self-determination including secession (Article 39).[67]

The Constitution requires the HPR to establish, at the same time as the approval of the state of emergency, an ad hoc State of Emergency Inquiry Board, consisting of seven members chosen and assigned by the HPR from among its members and from legal experts.[68] This body, among others, monitors and follows up the emergency situation to ensure that no measure taken during the state of emergency is inhumane, and ensures the prosecution of perpetrators of inhumane acts during and after the emergency situation has subsided.

It is worth noting that the Constitution does not provide for the duty of the Council of Ministers or the HPR to publish the state of emergency declaration and ensure its accessibility to the people. Moreover, it does not reaffirm the duty of the state to inform, inter alia, member states to the ICCPR.[69]

IV. Separation of Powers

The Ethiopian Constitution creates a parliamentary system of government whereby the head of government is elected from among the elected members of parliament.

A. Appointment and powers of the head of state

The President of the Federal Democratic Republic of Ethiopia serves as the head of state. He or she is nominated by the HPR. The nomination will be accepted only if a two-thirds majority vote of a joint session of the HPR and the HoF approves the nomination. The President, upon appointment, must take an oath declaring loyalty to the Constitution and the peoples of Ethiopia before the joint session. There is no requirement that the President be an elected representative. However, if any elected representative is appointed President, he or she has to vacate their seat. The President serves for six years and is eligible to be re-elected for only one further term.

The President does not wield strong powers; most are indeed merely ceremonial. The President's constitutional powers include (Article 71):

- opening joint sessions of the HPR and HoF;
- proclaiming laws and international agreements ratified by the HPR in the Federal Negarit Gazeta (the official law gazette) after signing. However, if the President refuses to sign a

[66] This is a significant internal limitation that exacts necessity and proportionality which relates to the severity, duration, and geographical scope of the application of the emergency declaration.
[67] The other provision which is non-derogable is the federal and democratic structure of the state. See art 93(4)(b) and (c). The constitutional list of non-derogable rights clearly differs from the list of non-derogable rights in the ICCPR (art 4)—the right to life and the prohibition of retroactive application of criminal law are, for instance, missing in the constitutional list.
[68] See art 93(5). The proportion between the number of members of the House and legal experts is left to the discretion of the House—there is no minimum requirement.
[69] Art 4 of the ICCPR requires states to inform other member states when declaring emergencies.

law within fifteen days from the date he or she received the law from the HPR, the law comes into force without the President's signature;
- appointing ambassadors and other envoys to foreign countries and receiving foreign ambassadors and special envoys; and
- granting pardon and commuting death sentences to life imprisonment, except in relation to crimes against humanity.

B. Appointment and powers of the Head of Government and the Council of Ministers

The highest executive powers are vested in the Prime Minister (PM) and the Council of Ministers. The PM serves as the Chief Executive and hence the Head of Government. The PM is elected from among the members of, and is responsible to, the HPR. The term of office of the PM coincides with the duration of the mandate of the HPR: there are therefore no term limits on the re-election of a person to the office of PM. The Deputy PM is appointed by and responsible to the PM. A political party which has the majority in the HPR or, if no single party has the required majority, a coalition thereof, assumes the power of government. The Council of Ministers is composed of ministers nominated by the PM. The nominees may or may not be members of HPR or the HoF. Since Ethiopia has a parliamentary system, members of the HPR who have been appointed ministers do not have to vacate their parliamentary seats. The nominations for ministerial positions have to be approved by the HPR. The Council is responsible to the PM and the HPR.

1. Main powers and functions of the Prime Minister (Article 74)

The Prime Minister:
- is the Chief Executive, the Chairman of the Council of Ministers (that is, leads the Council of Ministers, coordinates its activities, and acts as its representative), and the Commander-in-Chief of the national armed forces;
- follows up and ensures the implementation of laws, policies, directives, and other decisions adopted by the HPR;
- exercises overall supervision over the implementation of Ethiopia's foreign policy;
- selects and submits for approval to the HPR nominations for posts of Commissioners, the President and Vice-President of the Federal Supreme Court, and the Auditor General;
- submits to the HPR periodic reports on work accomplished by the executive as well as its plans and proposals; and
- may, upon consent of the HPR, dissolve the HPR before the expiry of the term to hold new elections.

2. Powers and functions of the Council of Ministers

The Council of Ministers:
- ensures the implementation of laws and decisions of the HPR;
- decides on the organizational structure of ministries;
- draws and implements the budget upon approval by the HPR;
- ensures the proper execution of the financial and monetary policies of the country, administers the National Bank, decides on the printing of money and minting of coins,

borrows money from domestic and external sources, and regulates foreign exchange matters;
- formulates and implements the social, economic, and development policies and strategies;
- may declare a state of emergency; in doing so it must, within the time limit prescribed by the Constitution, submit the proclamation declaring a state of emergency for approval by the HPR; and
- submits draft laws to the HPR, including draft laws of declaration of war.

The Constitution does not grant legislative powers to the Council of Ministers. However, the HPR may delegate its legislative powers (the power to make regulations) to the Council. This is often done by authorizing the Council to regulate particular aspects on specific issues in the proclamations enacted by the HPR (primarily statutes).

The Council submits the draft budget to the HPR for approval. After the submission of the budget, the Minister of Finance and Economic Development should appear before the HPR and make a speech regarding the draft budget. Following deliberation on the budget speech, the draft budget is referred to the Finance and Budget Standing Committee.[70]

There is no special procedure for the impeachment of the Prime Minister. However, as with any other member of parliament, he or she may be subjected to warning (oral or written), suspension (for up to 24 days of meeting), or expulsion.[71] Suspension or expulsion may only follow when a member is 'found guilty of serious or repeated offences' by the HPR. The law governing the working procedure and code of conduct of members of parliament also contains provisions that regulate votes of no confidence in the Council of Ministers.[72] Hence, any member of the HPR may move a motion of no confidence in the Council of Ministers. Such a motion will be submitted to the HPR's Business Advisory Committee through the Speaker two days prior to the sitting of the HPR. If the Advisory Committee considers the motion appropriate, it will be presented to the House. If the motion does not gain the support of a third of the HPR, the motion will be rejected. If a third of the HPR supports the motion, the Speaker will fix a date for deliberation and voting upon it within fifteen days.

C. Parliament

The Constitution establishes two federal houses of parliament: the House of Peoples' Representatives and the House of Federation. Ethiopia thus has a bicameral parliament under the Constitution. However, a close look at the powers of the two Houses reveals that the HoF barely has any legislative capacity.[73] Hence, if bicameralism is measured in terms of the law-making power of the Houses, Ethiopia de facto has a unicameral parliament. Even the budget of the HoF is, in fact, approved by the HPR. Article 55(1) of the Constitution more specifically states that

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[70] See Chapter Ten of the House of Peoples' Representatives of the Federal Democratic Republic of Ethiopia Rules of Procedures and Members Code of Conduct Regulation No 3/2006 ('HPR Rules').
[71] See Chapter Seventeen HPR Rules.
[72] Arts 93 and 94 HPR Rules.
[73] Arts 78 and 79. For more on this point see A Fiseha, 'Federations and Second Chambers' (2005) 39(3) Indian Journal of Politics 87–128.

the HPR exclusively exercises the legislative functions assigned to the federal government. It states: 'The House of Peoples' Representatives shall have the power of legislation in all matters assigned by this Constitution to Federal jurisdiction'.

Members of the HPR are elected directly by the people every five years. To ensure fair representation in the HPR of minority ethnic groups, special representation is arranged. The HPR can have a maximum of 550 seats, on the basis of population. Currently, it has 547 seats. Of this number, at least 20 seats must be allocated for ethnic minorities.[74] The members of the HPR represent the peoples of Ethiopia as a whole. The HoF, on the other hand, consists of members that represent nations, nationalities, and peoples of Ethiopia. Each ethnic group must have at least one representative, plus one more for each additional one million people. The members of the HoF are elected by the Regional State Councils. The State Councils are free to conduct the nominations themselves or to organize elections to have the representatives elected by the people directly. The term of mandate of the HoF is five years. Simultaneous dual membership in the HPR and HoF is prohibited.

The Constitution does not contain any impeachment procedure for members of the HPR. The law regulating the conduct of HPR members includes, however, a detailed procedure for warning (oral or written), suspension (for up to 24 days of meeting), or expulsion of a member of parliament.[75] Suspension or expulsion may only follow when a member is 'found guilty of serious or repeated offences' by the HPR. A member against whom a penalty is imposed may apply for review. The decision made by the HPR after reconsidering the matter on its own or by examining the proposals referred to it by a committee is final and non-appealable. Members may not be subject to prosecution on account of any vote they cast or opinion they express in the House. Nor may they be subjected to administrative measures. Also, members may not be arrested or prosecuted without the permission of the HPR, except in cases of *flagrante delicto*.

A bill may be submitted to the Speaker of the HPR by any member of parliament in writing if supported by signature of at least 20 members of parliament. In addition, the Council of Ministers has the right to submit draft legislation to the HPR. The Speaker then notifies the HPR of the content and essence of the bill and itemizes it in the agenda for preliminary reading.[76] There is no requirement under the law that there should be public (including civil society) consultation on draft legislation. In practice, however, brief public consultation is conducted in relation to major legislation.

1. Powers and functions of the HPR (Article 55)

The House of Peoples' Representatives:

- legislates on all matters that fall within the federal jurisdiction;
- declares a state of emergency and state of war;
- approves general policies and strategies of economic, social, and development, and the fiscal and monetary policy of the country;

[74] Ethnic groups with a population ranging from 10,000 to 100,000 are entitled to one representative in the HPR.
[75] See Chapter Seventeen HPR Rules.
[76] See art 3, House of Peoples' Representatives Legislative Procedure Proclamation No 14/1995.

- determines the organization of national defense, public security, and a national police force. If the conduct of these forces infringes upon human rights and the nation's security, it shall carry out investigations and take necessary measures;
- ratifies international agreements concluded by the executive;
- approves the appointment of federal judges, members of the Council of Ministers, Commissioners, and the Auditor General; and
- establishes the Human Rights Commission and Institution of the Ombudsperson.

The HPR controls the executive primarily through its power to call and question the Prime Minister and other federal officials and to investigate the executive's conduct and discharge of its responsibilities. Accordingly, the Prime Minister should present reports regarding the general operation of the government to the House twice a year. The HPR has the power, at the request of one-third of its members, to discuss any matter pertaining to the powers of the executive, and to take decisions or measures it deems necessary. The several standing committees of the HPR may also conduct visits to different federal entities to evaluate their performance.[77] The committees also receive and examine performance reports quarterly, and hear reports annually.[78]

The HPR generally has the power to supervise and follow up on the activities of all federal government organs on the basis of reports and information submitted to it by government organs, committees, the public, and non-governmental organs.[79] Mechanisms of supervision and follow-up include:

1) requiring government organs to submit a report in person directly to it or the relevant standing committee concerned at least once a year;
2) requiring the Prime Minister and Ministers to appear in person before it to question them;
3) if necessary, ordering government organs to be audited; and
4) calling institutions, witnesses, and experts to appear before it, as well as conducting investigations.

2. Powers and functions of the HoF (Article 62)

The House of Federation:

- interprets the Constitution and resolves all constitutional disputes;
- decides on issues relating to the rights of nations, nationalities, and peoples to self-determination, including the right to secession;
- strives to find solutions to disputes or misunderstandings that may arise between the states;
- determines the division of revenues derived from joint federal and state tax sources and the subsidies that the federal government may provide to the states;
- determines civil matters which require the enactment of laws by the HPR; and

[77] Currently, the HPR has 9 standing committees: the Legal Affairs Standing Committee, the Budget Affairs Standing Committee, the Economic Affairs Standing Committee, the Defence and Security Affairs Standing Committee, the Foreign Affairs Standing Committee, the Social Affairs Standing Committee, the Administrative Standing Committee, the Media and Cultural Affairs Standing Committee, and the Women's Affairs Standing Committee.
[78] Art 155 HPR Rules.
[79] Chapter Eleven, HPR Rules.

- orders federal intervention if any regional state, in violation of the Constitution, endangers the constitutional order.

D. The judiciary

The Ethiopian Constitution establishes a federal state. Thus there are two levels of government. The judiciary follows the federal structure. There are, therefore, Supreme Courts, High Courts, and First Instance Courts, both at the federal and regional level. The Constitution establishes an independent judiciary and vests all judicial power in the judiciary. There is, however, no standard for determining what constitutes 'judicial power'. But the Constitution certainly makes an intrusive exception to this by excluding constitutional interpretation from the scope of the judiciary. This makes the Ethiopian judiciary the weakest branch of government.

The Constitution provides that the judiciary is independent and it prohibits any form of interference from any source. Judges are to be guided and directed solely by the law. The main mechanism adopted to ensure the institutional independence of the judiciary is the Federal Supreme Court's power to draw up its budget and directly submit the proposed budget to the HPR for approval. Once approved, the power to administer the federal budget also lies with the Federal Supreme Court.

As regards the personal independence of judges, the Constitution provides for a very strict procedure for their removal. A judge may only be removed from his or her function before the legally stipulated retirement age if:

a) the Judicial Administration Council[80] decides to remove him or her for violation of disciplinary rules or on grounds of gross incompetence or inefficiency; or

b) the Federal Judicial Administration Council decides that a judge can no longer carry out his or her responsibilities on account of illness; and

c) the HPR approves by a majority vote the decisions of the Federal Judicial Administration Council.

Moreover, the Constitution prohibits any possibility of extending the retirement age of judges.

It should, however, be noted that the above guarantees only apply to the removal of judges and do not cover cases of, for example, their transfer or suspension, thus leaving a gaping chasm that potentially endangers the independence of judges.

The power to interpret the Constitution and resolve all constitutional disputes lies with the HoF and the Council of Constitutional Inquiry. However, the Constitution does not require that members of the HoF, who are representatives of ethnic groups, be independent while

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[80] The Federal Judicial Administration Council is composed of the President (who serves as Chair) and Vice-President the Federal Supreme Court; three members of the HPR; the Minister of the Federal Ministry of Justice; the President of the Federal High Court; the President of the Federal First Instance Court; a judge selected by all the Federal Judges; a lawyer appointed by the Council from those practicing in the Federal Courts; a law academic appointed by the Council from a recognized higher educational institution; and a distinguished citizen appointed by the Council. See art 4 of the Amended Federal Judicial Administration Council Establishment Proclamation No 684/2010. The Proclamation requires efforts to be made to ensure representations of women in the Council.

adjudicating over constitutional issues. Similarly, there is no constitutional provision that requires the independence of members of the Council of Constitutional Inquiry. Moreover, the Judicial Administration Council does not have any constitutional role in appointing members of the Council of Constitutional Inquiry.

V. Federalism/Decentralisation

The current Ethiopian Constitution establishes a federal form of government, primarily on ethnic lines.[81] The concept and formal practice of federalism was officially introduced into the Ethiopian legal system through the Transitional Period Charter[82] which established national/regional self-governments, each with their own legislative, executive, and judicial powers within their territorial bound (note, however, the *de jure* federal structure between Ethiopia and Eritrea in 1952). Although the Charter did not use the terminology, the country was divided along federal lines and clearly provided the foundation for the current constitutional division of power.

There is no clear principle that governs the legislative, executive, and judicial division of powers between the central and regional governments. The Constitution simply sets out the areas upon which the federal government will have exclusive or concurrent legislative, executive, and judicial power, and leaves the residual power to the regional states. The federal government is, moreover, allowed to delegate some of its federal powers to the regional states. The Constitution seems to have adopted an implied principle in that it authorizes the HoF to determine civil laws that are 'necessary to establish and sustain one economic community' for the HPR to enact. Hence, the powers that are necessary for the creation of a single economic community are granted to the federal government, and other civil law areas that are unique to the regions and irrelevant to this goal are left to the regional states.

The Constitution adopts a general principle to govern the division of revenue: essentially, revenue must be shared with consideration of the federal structure of government. It requires both levels of government to bear their respective financial expenditures that are necessary to carry out all the responsibilities and functions assigned to them by law. The Constitution provides a separate regime of division of powers of taxation, distinct from the allocation of other powers.[83] The Constitution stipulates separate powers of taxation for the federal government, another separate list for the states, and concurrent powers of taxation for both governments. The Constitution also leaves undesignated powers of taxation to be decided by a two-thirds majority vote in a joint session of the federal Houses (the HPR and the HoF). Therefore, neither level of government has residual taxation power. It is not clear which level of government will in the interim, prior to the decision of the joint session, exercise taxation power over tax sources that are undesignated in the Constitution, but in practice it is the federal government.

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[81] Art 46(2) provides the criteria for delimiting the regional borders: states shall be delimited on the basis of the settlement patterns, language, identity, and the consent of the people concerned. In practice, however, the primary standard is ethnicity.

[82] The Transitional Charter was adopted immediately after the downfall of the Dergue in 1991. It guided the adoption of and gave way to the current Constitution.

[83] While arts 51 and 52 stipulate that the federal government has enumerated powers and grants residual power to the states, this technique is not to be applied in the regime of fiscal federalism because the Constitution expressly provides for a different principle under arts 94 to 99.

The Ethiopian Constitution recognizes the right of all ethnic groups to self-determination and, hence, self-government. As such, local communities are allowed to organize themselves at various administrative levels—Kebele (the smallest unit), Woreda (district), Zone (precinct), and Region—and, upon fulfillment of the constitutional preconditions, may secede to create their own independent state.

VI. Constitutional adjudication

All judicial power rests with an independent judiciary and courts which are subject only to the law.[84] The Ethiopian Constitution establishes two parallel judicial structures: one at the federal level, which hierarchically consists of the First Instance Court, the High Court, and the Federal Supreme Court, and one at the state (regional) level, consisting of First Instance (Woreda) Courts, High (Zonal) Courts, and Regional Supreme Courts.[85] However, the power to interpret the Constitution lies with the HoF, which consists of representatives of Ethiopia's nations, nationalities, and peoples.[86] Apparently, the Constitution either does not consider adjudication of constitutional disputes a judicial role, or it has made an insidious exception to the judicial power of courts. The granting of the power of constitutional interpretation to the HoF is intended to reinforce, and is a direct implication of, the conferring of sovereignty on the nations, nationalities, and peoples of Ethiopia. Since members of the HoF are not legal technocrats, the Constitution establishes the Council of Constitutional Inquiry, composed predominantly of legal experts, to assist the HoF in determining whether there is need for constitutional interpretation and if so, to provide recommendations to the HoF for a final decision.[87]

The jurisdiction of the HoF is very broad, and extends to 'all constitutional disputes' over the constitutionality of federal or state laws.[88] 'Law' has been defined very broadly, to include proclamations issued by the federal or state legislative organs, regulations and directives issued by federal and state government institutions, and also international agreements.[89] Some scholars consider this over-stretched definition of 'law' to be an unconstitutional encroachment over the implied residual jurisdiction under the Constitution of ordinary courts to consider the constitutionality of, for example, directives, regulations, and executive actions, as well as international agreements.[90]

[84] Arts 78 and 79.

[85] Note also that the Constitution authorizes the adjudication of personal and family disputes in accordance with customary and religious laws upon the consent of both parties (art 34(5)). Consequently, Shari' a Courts have been established all over the country.

[86] See art 62(1). This is atypical of most other systems where such power is often vested in either ordinary courts or a special court established solely for such purpose.

[87] Arts 62(2) and 82 to 84. The Council has 11 members, consisting of both legal experts and politicians: the President and Vice-President of the Federal Supreme Court, six legal experts appointed by the President of the Republic upon recommendation by the House of Peoples' Representatives, and three persons appointed by the House of Federation from among its members.

[88] See arts 83(1) and 84(2).

[89] Art 2(2) of Proclamation No 251/2001. Note that there is a difference in the definition of the scope of 'law' in this proclamation and the Council of Constitutional Inquiry Proclamation No 250/2001—the later definition does not include directives of state or federal institutions (see art 2(5) of Proclamation No 250/2001).

[90] See, eg, A Fiseha, 'Federalism and the Adjudication of Constitutional Issues: The Ethiopian Experience' (2005) 52 Netherlands International Law Review 1 and I Ibrahim, 'Constitutional Adjudication under the 1994 FDRE Constitution' (2002) 1(1) Ethiopian Law Review 62.

There is no requirement that the HoF or the Council be independent when pronouncing on constitutional issues. In fact, since the HoF is a political body representing the interests of the ethnic groups, it is contradictory to expect political representatives to be independent. Otherwise, the members would have to abandon the interests of the ethnic group that voted them into the House. Moreover, the Constitution does not require members of the Council of Constitutional Inquiry to be independent. In fact, even the Federal Judicial Administration Council is not constitutionally mandated to select nominees for appointment as members of the Council.

Although there is some debate over the role of courts in Ethiopia in constitutional adjudication, it is utterly limited to the referral of cases to the Council whenever constitutional matters arise in the course of their day-to-day activities.

VII. International Law and Regional Integration

The Constitution incorporates all international treaties into Ethiopian law upon ratification. However, in practice, international agreements may not provide the basis for a cause of action until they have been domesticated upon publication under the signature of the President of the Republic. Also, the general understanding is that the courts may take only take judicial notice of those instruments that have been published in the Federal Negarit Gazeta.[91] Treaties are negotiated, concluded, and signed by the executive but need to be ratified by the HPR upon signature. Since treaties are adopted in the same way and procedure as ordinary domestic legislation, they have status equal to ordinary parliamentary legislation (referred to as Proclamations). As far as the status of international human rights instruments, specifically, is concerned, see Section III above.

The Ethiopian Constitution does not mention customary international law. Nor has the status and relevance of customary international law thus been a subject of any judicial determination. The position is therefore not clear.

One of the basic principles that guide Ethiopia's foreign relations is the forging and promotion of economic union and fraternal relations with neighbors and other African countries. This might involve ceding some of Ethiopia's sovereign powers to any regional union that Ethiopia might be a part of with a view to facilitating economic integration.

VIII. Concluding Remarks: Current challenges to constitutional development

The predominant current challenge to constitutional development in Ethiopia is probably that of the political dominance by one single political party since the adoption of the Constitution (that is, the political party that adopted the Constitution has enjoyed uninterrupted power since 1991). Similarly, as the ruling party is a coalition of ruling parties from the regional states, disputes between the federal government and the regional states which could spur constitutional adjudication and development have never arisen. This has created a situation whereby constitutional reform issues have never really been seriously considered. The academic community should also be partly blamed for not spearheading discussions on possible

[91] For a further discussion on the status of international instruments in the Ethiopian Constitution, see I Idris, 'The Place of International Human Rights Conventions in the 1994 Federal Democratic Republic of Ethiopia Constitution' (2000) 20 Journal of Ethiopian Law 113.

constitutional development and reform agenda. The weakness of political opposition parties and civil society organizations has also meant that the constitutional adjudication process has yet to create any meaningful jurisprudence on any constitutional issue, leaving the Constitution as a mere academic document with little authoritative elaboration or insight as to its content. Resort to constitutional litigation has also not been inviting, due to perceptions of impartiality of the organs in charge of constitutional interpretation. Recent regressive legislative reforms that particularly targeted organizations working on issues related to human rights and good governance have further diminished hopes of major constitutional development and reforms, further exacerbating the dearth of constitutional adjudication.[92]

[92] Charities and Societies Proclamation No 621/2009. According to this proclamation, civil society organizations receiving more than 10% of their funding from foreign sources cannot engage in issues of human rights and good governance.

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