Apprising Constitutional Amendment in Ethiopia: Vexing Questions and Qualms

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Abstract

The Federal Democratic Republic of Ethiopia (FDRE) Constitution sets forth procedures to guide actions concerning constitutional amendments. This study examines the nature of amendment procedures adopted under the Ethiopian legal system based on comparative and analytical approaches and finds that they are not clear and sufficient enough to guide the process. Moreover, the study demonstrates that the amending provisions of the Constitution has left many issues pertaining to constitutional amendments perplexing and unanswered, which in turn creates uncertainty in the process of formal constitutional changes. Finally the study strongly recommends the amending clauses of the FDRE Constitution to be revisited and a detailed law dealing with constitutional amendment procedures to be enacted, in order to correct the gaps on the issues of initiation, ratification, publication, timeline for actions, public participation and reversals.

Key words: Amendment procedure, constitution, Ethiopia, initiation, public participation, ratification

Introduction

A constitution is the supreme law of a state and embodies the fundamental

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choices made by the people on political life of the country. A constitution establishes the system of government and it also distributes and limits power, protects the rights of citizens and deals with various additional issues considered as foundational in the specific context of that particular country.[1]However, while a constitution is intended to be foundational, it is not projected to bind the country for all times to come. A constitution adopted at one time in a particular political context may be found insufficient in another time. As a result, there may be a need to change its provisions to make it suitable to the new changing circumstances and reality.[2]

Formal constitutional amendments which are carried out based on constitutionally stipulated rules and procedures are one of the mechanisms for such changes.[3] This enables each generation to acclimatize a constitution with the contemporary needs in a proper and peaceful manner without

[1] A.V Dicey, An Introduction to the Study of the Constitution, 10th edition, Universal Law Publishing Corporation, New Delhi,2008, pp. 1-39. England, Israel and New Zeland are the only countries without a written constitution in the sense that their constitutional principles are dispersed throughout ordinary legislations.

[2] Adrian Vermeule, Constitutional Amendments and the Constitutional Common Law, Public Law and Legal Theory Working Paper Series, University of Chicago, September 2004, pp.1-15.

[3] Besides the formal constitutional amendment mechanism, constitutional change can also be brought informally through constitutional interpretation and political adaptation. Constitutional interpretation brought gradual revision of the constitutional framework. By judicial interpretation, the existing provision of the constitution may get a new meaning without there being any formal amendment to the constitution. Besides, unintended revision of the constitutional framework can also be brought through political adaptation by the legislative and executive bodies. According to Donald Lutz, when we compared these modes of constitutional changes, political adaptation and judicial interpretation reflects declining degree of commitment to popular sovereignty. For more see; Donald Lutz, Towards a Theory of Constitutional Amendment, The American Political Science Review,Vol.88, No.2, June ,1994, pp.355-370.

recourse to a forcible revolution.[4] The principle of popular sovereignty[5] is one of the basic assumptions behind the existence of amendment rules for formal constitutional changes. This principle requires a constitution to be made based on the consent of the people. As long as the constitution emanates from the consent of the people, it is certain that the people themselves should amend and change its provisions.[6] Moreover, the nature of a human being also justifies the need for amendment procedures. As fallibility is part of a human nature, subsequently, amendment procedures need to be made to compensate flaws and limitations on the constitution that may be experienced through time and practice.[7] On this point of view, Sir. Ivor Jennings provides that "… *it is impossible for the framers of a constitution to foresee all the conditions in which it would apply and the problems which will arise. They have not the gift of prophecy.*" [8] Thus, the very nature of a constitution necessary requires formal procedures to be made for its amendment. As a result, constitutions explicitly provide an amendment procedure that would allow it to stand the test of time.

This article examines the formal amendment procedures adopted by the

[4] Ibid, See also: Vicki Jackso and Mark Tushet, Comparative Constitutional Law, Second edition, Cambridge University Press, New York, 2006, pp. 201-203 & 309-310.

[5] Popular sovereignty is one of the principles in constitutional law .This principle requires constitutions to be written by a popularly selected convention rather than the legislator and ratified through a process that obtained popular consent-ideally-in a referendum. The principle implies that all constitutional matters should be based up on some form of popular consent, which in turn implies a formal public process. Thus, the principle requires the making of a constitution as well as its change to be rested on popular consent.

[6] Vicki Jackson and Mark Tushet, Supra note 4 at pp.310-12.

[7] Ibid and see also; Donald Lutz, Supra note 3 at pp.357-359.

[8] Ashok Dhamija, Need to Amend a Constitution and Doctrine of Basic Features, Revised 1st edition, Wadhwa and Company Nagpur Law Publisher, New Delhi, 2007, pp. 13-14.

FDRE Constitution from a comparative perspective and highlights some issues worth considering. The first section presents constitutional amendment procedures adopted under the Ethiopian legal system. The second (and main) section, discusses dubious issues pertaining to amendment procedures. Under this section, doubtful and baffling issues relating to initiation and ratification of amendment proposals, public participation, timeline and publication, reversals and the nature of institutions engaged in the process are discussed thoroughly; thereafter, final conclusions are drawn.

1. Constitutional Amendment Procedures in Ethiopia: A Descriptive Approach

The FDRE Constitution under Article 104 and 105 sets forth the procedures for formal constitutional changes. These provisions, based on a multi-track approach[9], lay down rules which have to be observed in the process of constitutional amendments. Accordingly, Chapter Three of the Constitution, which deals with human rights and fundamental freedoms, and the amending clauses themselves, are amended with a two-thirds vote in both House of Peoples' Representatives (HPR) and House of Federation (HF) and the

[9] In a uni-track approach, the same procedures are used for amending all provisions of the constitution. Where as in multi track approach, different amendment procedures are used depending upon the subject matter of a proposed amendment. Then, all amendment issues have not been addressed based on the same procedure. One of the rationales for adopting such approach is to increase public attention and deliberation up on amendment of some political matters. By providing a stringent procedure, for amending such issues, the constraint increase public attention and improve deliberation up on the decisions. All these, in turn, promote the role of reason in the process of constitutional amendment, and create a delay that can give passions time to cool dawn. For more see: Rosalind Dixon, Constitutional Amendment Rules: A Comparative Perspective, The University of Chicago, Chicago Public Law and Legal Theory working paper No. 347, May, 2011, pp. 102-105.

support of all state councils with a simple majority.[10] Other provisions of the Constitution can be amended with a two-thirds vote at the joint session of both houses, and with the support of two-thirds of the state councils by a majority vote.[11] Moreover, the Constitution requires submission of the proposed amendment to the general public for discussion and decision.[12]

The same multi-track approach is employed in South Africa where the Constitution sets forth three sets of procedures for its amendment. Amendments that purport to change the constitutional principles found in Section 1 require the uphold of three-fourths of the members of the national assembly and six provinces in their national councils, which vote as a block.[13] The values of human dignity, non-racialism and non-sexism,

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[10] The Constitution of the Federal Democratic Republic of Ethiopia,1995, Article104 and 105, Proc. No. 1, Neg. Gaz. Year 1st , No.1 (Here in after the FDRE Constitution)

[11] Ibid.

The Ethiopia legislature consists of two houses, the House of Peoples' Representatives and the House of Federation which is the second chamber composed of representatives of Nations, Nationalities and Peoples. Moreover, the federal system consists of nine regional states; each has their own state councils, which is the legislative body at regional level.

[12] Article 104 of the FDRE Constitution.

[13] Article 74 of the South African Constitution is the amending clause which sets forth the procedures for constitutional amendments. This provision was debatable during the constitutional making process. The procedure agreed for the making of the new constitution required it to be passed by a 2/3 vote of the legislature and then reviewed by the constitutional courts to determine whether the constitution fully complied with the 34 basic principles. On the process of certification, the constitutional court provided that "the constitution did not sufficiently comply with the (34) principles. Among these, the court found that the constitution's provisions permitting parliament to amend the bill of rights provisions by a two thirds vote is not adequately sufficient to entrench those rights: something beyond a mere large majority in the ordinary parliament is required" and finally, the court refused to certify it and found that the draft constitution is not constitutional. Latter on the amending clause was reconsidered. For more details on the matter see: the Certification Case; in re-certification of the Constitution of the Republic of South Africa

supremacy of the constitution, the rules of law, universal adult suffrage, regular election, multiparty system, and the democratic character of the government are the principles which are amended in the aforementioned manner.[14] The second set of procedures is for changing Chapter Two of the Constitution, which deals with the Bill of Rights. This can be amended by a minimum two-thirds vote in the assembly and with the support of at least six of the provincial national councils.[15] The same procedure is also applicable if the amendment relates to matters that affect the national council of provinces, the boundaries, powers, functions and institutions of the provinces, and a provision that deals with the provincial matters.[16] If the change affects a specific province, it must be approved by the legislature of the province concerned.[17] Other provisions of the Constitution require the prop up of two-thirds of members of the national assembly without any further requirement.[18]

The Ethiopian and South African experiences suggest the existence of more than one procedure for amending constitutions, which signals the special protection accorded for certain provisions and indicates the wish of the

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1996, (4) S.A. 744, 776-79(Constitutional Court Sept. 6, 1996) South Africa. For more on the area see: Vicki Jackson and Mark Tushet, Supra note 4 at pp. 326-329.

[14] Article 74(1) of the South African Constitution (1996).
South Africa has a bicameral parliament consisting of the national assembly and the national council of provinces. The national assembly consists of 400 representatives elected on the base of proportional representation. The national council of provinces consists of 90 members representing the particular interests of the nine provinces and ensures that those interests are not seriously abrogated by the central government. (See: See Section60-72, 42(4) of the South Africa Constitution).

[15] See Section74(2) of the South African Constitution.

[16] See Section74 (3) of the South Africa Constitution.

[17] See Section74 (2) of the South Africa Constitution.

[18] See Section74 (2) of the South Africa Constitution.

framers to create a hierarchy among constitutional clauses according to their importance.[19] As a result, framers attached special protection for certain provisions through prescribing more stringent procedures for their amendment. In South Africa, the stringent procedure is the three-fourths majority requirement in the national assembly and two-thirds of province's support in the national council of provinces.[20] Therefore, those parts of the constitution amended in pursuance of these procedures are considered as having special protection under the South African constitutional system.

The same is true for the FDRE Constitution, which forwards more stringent procedures for amending Part Three of the Constitution dealing with the Bill of Rights and the amending clauses.[21] This stringency reveals that the framers of the constitution intended to accord special protection for those provisions recognizing fundamental rights and freedoms. In addition to this general connotation, the stringency used under the Ethiopian amending clauses has some specific implications. As the Minutes of the Constitutional Assembly that ratified the constitution reveals, the stringent procedures have been inserted to protect a provision which specifically deals with nations, nationalities, and people's right to self- determination to secession.[22] So, the

[19]Carlos Closa, Constitutional Rigidity and Procedures for Ratifying Constitutional Reforms in EU Member States, at WWW <http:// www.academia.edu>, (last acceded on 13 May 2013), pp.296-297.
[20] See Section74 (1) of the South African Constitution.
[21] Article 105 of the FDRE Constitution.
[22] Minutes of Constitutional Assembly, Volume 5, Unpublished, HPR Library, Addis Ababa, Ethiopia, 1994.

multi-track approach adopted by the FDRE Constitution on its amendment demonstrates the deep desire of the framers to accord special protection for human rights in general, and the rights of nations, nationalities and peoples in particular. Moreover, it also signifies that the human right provisions in general and the provision that deals with the rights of nations, nationalities and peoples in particular are the more important ones and they are at the first rank in terms of hierarchy when compared to other provisions of the constitution.

2. Troublesome Questions About Amendment Procedures in Ethiopia: Critical Observations

Some form of formal amendment procedures are a near-universal feature of contemporary constitutions. In consequence, for constitution makers, the relevant question is not so much whether there should be a provision addressing formal amendments, but what needs to be considered while drafting it.[23] As the study conducted by Dhamija revealed, amendment procedures, which are formulated as per the condition of the particular country, are different among constitutions. Nevertheless, whatever the difference may be in terms of its nature, a satisfactory amendment procedure demands at a minimum clear and understandable rules which must be certain, stable and reliable to guide actions concerning formal constitutional

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As the minutes indicate much of the debates during the constitutional making process were on the right of nations, nationalities and peoples self-determination to secession, which is incorporated under Article 39 of the current FDRE Constitution.

[23]Ashok Dhamija, Supra note 8 at pp. 7-17 & 281. The level of development, the heterogeneous or homogeneous nature of the society, the multicultural character, the past history, and the size of the population are important variables considered on designing the amendment formula of a country.

changes.[24]

Article 104 and 105 of the FDRE Constitution which govern the amendment process are designed to ensure an orderly constitutional change by reducing uncertainties on the process of constitutional amendment. Unfortunately, these provisions themselves create uncertainties and ambiguities. The procedures stipulated under these provisions are not sufficient to guide the course of action and therefore they do not give answers for many questions that might be raised on the route of constitutional amendments.

2.1 Rules for Initiating Constitutional Amendment Proposals

Although a rule of initiation that defines the organs legitimately authorize to kickoff the amendment bill is important component of an amendment procedure, it may not be necessarily provided and determined by constitutional provisions. In Germany and South Africa, for instance, the issue is not addressed through their constitutions.[25] In such cases, initiation of constitutional amendment proposal is assumed to be carried out in the same manner as to ordinary legislations. And consequently the parliamentary working procedures for amending ordinary laws will be applied.[26] However,

[24] Walter Dellinger, The Legitimacy of Constitutional Change; Rethinking the Amendment Process, Harvard Law Review ,Vol. 97:386, 1986, pp.386-432 ; Lynn A. Fishel, Reversal in the Federal Constitutional Amendment Process: Efficacy of State Ratifications of the Equal Right Amendments , Indiana Law Journal, Vol.49 Issue 1, article 8,1973, p.148.
[25] Carlos Closa, Supra note 19 at p. 291; Charles M. Fombad, Limits on the Powers to Amend Constitutions: Recent Trends in Africa and their Potential Impact on Constitutionalism, Paper Presented at the World Congress of Constitutional Law, Athens, Greece, 11-15 June, 2007, pp. 20-21.
[26] Ibid.

some like the United States of America (US) and the Indian Constitutions make available the issue of initiation under their texts. In such scenarios, proposing an amendment is carried out based on the rules set under the constitutional provisions.[27]

As the legislature is considered the representative of the people, a sufficient role has to be placed on it in order to ensure the indirect participation of the citizens in the process of initiating amendment proposals. In addition, the people may take part in the process directly by presenting before the national assembly a petition containing the proposals for an amendment.[28] Both of these means of initiations are squaring with the principles of democracy that demands the citizens to take an active role in the political affairs of their country.[29] Hence, constitutional amendment proposals may be initiated either by legislatures or directly by the citizens themselves.

In the US, for instance, the Congress with a two- thirds majority or a convention may initiate constitutional amendments.[30] Application for a convention is made by two-thirds of the states and Congress calls it for considering and proposing amendments.[31] The Indian Constitution also

[27] Article V of the US Constitution and Article 368 of the Indian Constitution.
[28] Carlos Closa, Supra note 19 at p. 291; Charles M. Fombad, Supra note 25 at pp. 20-21.
[29] Ibid.
[30]Article V of the US Constitution. In the USA, all the 27 constitutional amendments are proposed in this way.
[31] Ibid, Convention is a deliberative body capable of assessing, from a national perspective, the need for constitutional change, and drafting proposals for submission to the states for ratification. This Article V conventional method has never been used and many questions exist about the its use. Some of the questions related to the scope of the convention, the role of the congress, the relevancy of the method and the way how state applications can be entertained. Practically this method of proposing an amendment has never been used in the US. More on the area see: James K. Rogers, The Other Way to Amend the Constitution: the

provides that amendment can be proposed by either House of the Parliament.[32] As the US and Indian Constitutions demonstrate legislative initiation is the primary means for making constitutional amendment proposals. Some constitutions, as further examples, like that of Burkina Faso and Switzerland also use popular initiation as a means for initiating amendments. In Burkina Faso at least 30,000 citizens qualifying to vote can present before the national assembly a petition containing the proposals for an amendment of the Constitution.[33] The same is true for Switzerland, where the people may initiate a partial or complete revision of the Constitution by collecting 100,000 signatures.[34]

However, in federal countries whose constitutions represent an agreement between the various units maintaining the democratic principles of popular participation is not sufficient. The federalism principle should also be retained by enabling constituent units to initiate amendments.[35] In Brazil, for instance, amendment proposals may be initiated by more than half of the legislative assemblies of the states. In Spain, the legislatures of the constituent units have also the power to initiate amendments.[36] However, in some federations, the power to initiate proposals is not directly given for the

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Article V Constitutional Convention Amendment Process, Harvard Journal of Law and public policy, Vol. 30, No.3, pp. 1006-1022.

[32] Article 368 of the Indian Constitution.

[33] Charles M. Fombad, Supra note 25 at pp.6-20.

[34] Article 104 of the Switzerland Constitution.

[35] Anne Twomey, The Involvement of Sub National Entities in Direct and Indirect Constitutional Amendment with in Federations, at WWW http://www.camlaw.rutgerg.edu?statecon/workshop11 grecce97/workshop11/Twomey; pdf >, (last acceded on 12 May 2013).

[36]Article 60 of the Brazilian Constitution: See Section69 of the Spain Constitution.

constituent units. Rather it is given to the second chamber, which mostly comprises their representatives. In India, for instance, the council of the states that consists of representatives of the constituent units who are elected by their legislative assemblies has the power to initiate constitutional amendments.[37]

In Ethiopia, the rules on initiation of constitutional amendments are provided under Article 104 of the Constitution, while the organs having the power are not clearly apparent from it.[38] Much of the confusion comes from the ambiguous language of the constitutional provision. Although its title is about initiation of amendments, the content of the provision gives an impression that the power proclaimed under it is to vote on proposals, made by other bodies, for the purpose of submitting them to discussions and further decisions. The literal interpretation of Article 104 of the Constitution dictates that the House of Peoples' Representatives, the House of Federation and one-thirds of the state councils have the power to rule on (support or not to support) proposals made by others for the purpose of tabling them for discussion. This way of literal interpretation has been endorsed by some scholars. For instance Dr. Monga Fombad argued that the Ethiopian Constitution is silent on defining the bodies who can initiate constitutional amendments and then he concludes that the normal procedures for amending ordinary laws are applicable.[39]

However, this is not what was conceived by the framers of the Constitution

[37]Article 368 of the Constitutions of India.
[38]Article 104 of the FDRE Constitution.
[39] Charles M. Fombad, Supra note 25 at pp. 10-11.

who intended to give the power to initiate constitutional amendment for the HPR, HF and state councils.[40] Ironically, this intention has not been clearly reflected in the final text of the Constitution that has been, later on, replicated through the Joint Working Procedure Regulation, which empowers both the HPR and HF with a two-thirds majority to initiate constitutional amendments.[41] In addition, one thirds of regional state councils can also initiate amendments. Therefore, it is possible to conclude that in Ethiopia, the HPR, the HF or one-thirds of state councils of the regional states have the power to initiate constitutional amendments.

Another confusion on the rule of initiation results from the apparent discrepancy between the Amharic and English version of the constitutional provision.[42] In the English version of Article 104, HPR and HF are listed alternatively. The provision uses the conjunction 'or', which implies that either the HPR or the HF with a two-thirds majority vote can initiate amendment proposals. However, this alternative approach is not adopted under the Amharic version of Article 104 of the Constitution, which has the final legal authority.[43] The Amharic version uses punctuation (፡) which may substitute the coordinating conjunction 'and'. And consequently, it gives an impression that a cumulative vote of both HPR and HF is required for

[40] Minutes of Constitutional Assembly, Volume 5, Unpublished, HPR Library, Addis Ababa, Ethiopia, 1994.
[41] The House of People's Representatives and the House of Federation Joint Organization of Work and Session Rules of Procedure, 2008, Regulation, No. 2, Neg. Gaz. Year 14th, No. 2 (Herein after Joint Working Procedure Regulation).
[42] Article 104 of the FDRE Constitution.
[43] Article 106 of the FDRE Constitution. According to Article 106 of the Constitution, the Amharic versions shall have a final legal authority

initiating constitutional amendments. In other words, an amendment proposed by either of the institutions need to be supported by the other in order to be deemed as initiation and presented for further discussions. Hence, each house has a veto power against the other at the stage of initiation as per the Amharic version of the provision.

This part of the confusion is not merely speculative nor merely an academic exercise. Practically it was the cause of debate during the second constitutional amendment on Article 103(5) of the Constitution.[44] The amendment was initiated in the HPR and then the proposal was sent to the HF. On the floor of HF, there was a debate on the respective role of the members. Some of the members argued that since the HPR can by itself initiate amendments without the supporting vote of HF, there is no a need to debate and vote on the proposal made by HPR. This group argued that the process of initiation is completed at the floor of HPR and the proposal can be tabled for further actions without the vote of the HF. This group believed that the initiation stage had been accomplished by the vote of HPR alone and the next step should be ratification of the proposal which must be carried out at joint secession of the two houses as per Article 105 (2) of the Constitution.[45] The other group, on the contrary, argued that because HPR and HF are not mentioned alternatively under Article 104 of the Constitution (the Amharic version), the HPR alone cannot initiate an amendment without additional support from the HF. The proposal made by the HPR should also be supported by the HF with a two-thirds vote in order to be considered as a

[44] Minutes of the 2nd HF 1st Regular Secession at the 4th Working Year, Unpublished, the Archive of HF, Addis Ababa, Ethiopia, Sep. 19, 2004.
[45] Ibid.

full-fledged initiation of an amendment proposal and to be tabled for further steps and discussions.[46]

Finally, after a long and hot debate, the HF voted in favour of the second argument which understands the involvement of the two chambers as a cumulative requirement for initiating proposals and thereby rejecting the alternative approach envisaged by the English version of the provision. This way of interpretation has been recently endorsed by the Joint Working Procedure Regulation.[47] It has copied Article 104 of the Constitution by omitting 'or' from the English version of the provision and substituted it with punctuation (;). This may delete the discrepancy that exists between the Amharic and English version of the constitutional provisions. But mere omitting of the word 'or' does not create clarity on the matter and then, the regulation also sustained the confusion which surrounds the issue of constitutional amendment in general and initiation in particular.

As the history of Article 104 of the constitutional provision demonstrates, the framers intended to give each house the power to initiate constitutional amendments alternatively.[48] The English version of the provision is, therefore, in line with the intent of the constitutional framers. This way of

[46] Ibid.

[47] Article 9 of the Joint Working Procedure Regulation No.2/2008 which reads: In accordance with Article 104 of the Constitution the initiation of a proposal for constitutional amendment shall be in the following manner: when supported by a two–thirds majority vote in the House of Peoples' Representatives; when supported by a two – thirds majority vote in the House of Federation; or when one–third of the state councils of the member states of the federation, by a majority vote in each council have supported it.

[48] Minutes of Constitutional Assembly, Volume 5, Unpublished, HPR Library, Addis Ababa, Ethiopia, 1994.

interpretation is also inconsistence with the principles of democracy and federalism. The power to initiate is given for HPR based on the principle of democracy, in order to enable the people to take part in the process through their representatives. The power to proposing an amendment is also given for HF based on the concept of federalism, in order to enable regional states to take part in it through the second chamber, which is considered as their representative.[49] Thus, the framers tried to maintain both principles of indirect democracy and federalism by giving the power of initiation for both houses without cumulative requirement and so that either HPR or HF can propose amendments without one's power of blocking the move of the other.

2.1. Rules for Ratifying Amendment Proposals

In addition, rules for ratification are other components of an amendment procedure which are so crucial that proposals can be approved only by following methods provided under them. However, there is no a universally agreed rule for ratifying a proposed amendment. As a result, different constitutions endow with great varieties of rules for approving an amendment proposal.[50]

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[49] Article 61(1) of the Ethiopian Constitution provides that the HF is composed of representatives of nations, nationalities and peoples. However, since the Constitution defines the regional states in terms of ethno-linguistic identities, the claim that what represented are the nationalities is merely rhetoric and it is the regional states which are truly represented at the HF. For instance in (2001-2005) the seats of HF distributed as follow : Amhara 15, Harari 1, Somalia 4, SNNPR 51, Oromia 18, Benshangul-Gumuz 3, Gambela 3, Afar 2, Tigray 3. More on the area see: Assefa Fiseh, Federalism and Accommodation of Diversity in Ethiopia; A Comparative Study, 3rd edition, Netherland, Eclipse Printing Press, 2010, pp. 174-180.

[49] Carlos Closa, Supra note 19.

[50] Different scholars used different modes of categorization. Elster categorized them under 6 heads as absolute entrenchment, adoption by super majority, higher quorum than for ordinary

The FDRE Constitution also provides two different kinds of rules, each relating with different matters, for ratification of an amendment proposal. [51] Proposals relating with human rights and fundamental freedoms provided under Chapter Three of the Constitution and the amending clause itself can be ratified by the HPR and the HF, sitting separately, with a two-thirds majority vote at each house. Moreover, the Constitution requires such amendment proposals to be ratified by all regional state councils with a majority vote.[52] However, amendment proposals pertaining to other provisions of the Constitution can be ratified with two-thirds of majority vote at joint session of the two houses and with a support of two-thirds of the state councils with a majority vote.[53]

From this it is possible to understand that amendment proposal is ratified in a combination of the national legislature, which comprises of the HPR and HF, and the regional state legislatures. The two-thirds majority requirement used in the two houses is common and is also prevalent in other constitutions like

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legislation, delays, constituent units' ratification, and referendum. Hylland also categorized them under four heads as: Delays, confirmation by second decision, qualified majorities, and participation from other than the parliament. Lane also lists delay, referendum, confirmation by a second decision, qualified majorities and confirmation by sub-national government as mechanisms. On this point Lutz also pointed out legislative supremacy, intervening election, legislative complexity and referendum as ratification strategies. Dr. Ashok Dhamija, (Supra note 8 at pp. 252-281) also uses its own categorization which the author of this paper prefers than others to its simplicity and comprehensiveness. (For more detail on the area See, Bjorn Erik Rasch, Foundation of Constitutional Stability: Veto Points, Qualified Majorities and Agenda Setting Rules in Amendment Procedure, University of Oslo, Paper for Presentation at ECPR Joint Session of Workshops, Rennes,France,April11-16,2008 ; Donald Lutz, Supra note 3.

[51] Article 105 of the FDRE Constitution.

[52] Article 105(1) of the FDRE Constitution.

[53] Article 105(2) of the FDRE Constitution.

German and US.[54] As the comparative study demonstrates, the simple majority requirement used in state councils is also commonly used by other federal constitutions.[55]

However, the Ethiopian Constitution is unique and odd in its unanimity requirement on the number of regional state councils which need to support an amendment proposal relating with human rights and freedoms, and the amending clause itself.[56] It is not commonly found in other federal constitutions. As comparative study demonstrates, constitutions may require half, three-fourths or two thirds of the constituent units to ratify the proposed amendment. In order to ratify an amendment proposal no constitution demands unanimity, on the number of the constituent units. In federation, a majority or super majority of the constituent units' approval is sufficient for a valid constitutional amendment.[57] However, the Ethiopian Constitution requires the unanimous consent of all the constituent units of the federal system in order to ratify amendment proposals on Chapter Three of the Constitution and the amending clause itself.[58] As Delinger provides, this unanimity requirement is not associated with federal systems. Rather it is

[54] It is widely used in many constitutions like German, Chinese, Japanese, Latvian, Portuguese, Georgian, Croatian and Zimbabwean.
[55] Ashok Dhamija, Supra note 8 at pp.263-264.
[56] Article 105 (1) of FDRE Constitution.
[57]Canada may be an exception which requires the support of the legislative assemblies of each province for amending some fundamental issues like the office of the Queen, the amendment process and the composition of the Supreme Court of Canada. However, what makes the Ethiopian position to be the worst is that a bundle of issues like land ownership rights and electoral systems which related to party programme and ideology are subjected for such unanimity vote.
[58] Article 105(1) of the FDRE Constitution.

more closely related with confederacy.[59] Thus, the unanimity requirement gives a con-federal feature for the Ethiopian federal system.

Moreover in the ratification process each regional state is counted as one and the amendment provision does not provide votes to be weighted by population. It does not require regional states approving an amendment to contain even a bare majority of the national populace. For this reason, the number of population of the regional states ratifying a proposal is immaterial. Thus, the degree of national popular support is not a critical issue on the process of constitutional amendment in Ethiopia. For instance, an amendment proposal supported by the Amhara, Oromia, and Southern Nations, Nationalities and People's (SNNP) regional state councils, which totally represents more than 75% of the Ethiopian population, will not be approved if it is rejected by Tigray, Somalia and Harari regional state councils, which totally represents less than 25% of the national population.[60] On the contrary , on areas other than Chapter Three of the Constitution, amendment proposals supported by the six less populous regions will be valid even if objected by

[59] Walter Delinger, Supra note 24, at pp.301-302. In confederations, the central government is dependent on the will of the confederated units whose unanimous consent is important to pass decisions within the union. Similarly, the consent of every member state is needed to amend a confederate constitution. More on the features of confederal structure see: Ramesh D. Dikshit, The Political Geography of Federalism: An Inquiry in to Origins and Stability, Macmillan Company of India Ltd., India, New Delhi, 1975, pp.1-10

[60] The figures are computed based on the official 2007 National Population and Housing Census results.

the Amhara, Oromia and SNNP States that account more than three-fourth of the total population. [61]

These figures actually reflect the inevitable conflict between democracy and federalism.[62] On this point, the Canadian Constitution is helpful. It tries to balance federalism and democracy by requiring proposals to be approved by the majorities in both houses of the Canadian parliament and in the legislature assemblies of two-thirds of the provinces having in aggregate at least fifty percent of the Canadian population.[63] Thus, the Canadian Constitution requires the number of provinces which support the amendment to represent in aggregate at least 50% of the Canadian population. On the contrary, under the Ethiopian Constitution the principle of federalism is more pronounced on the amendment procedures and therefore, the ratification rules reflect equality of regional states, rather than equality of citizens.

2.2. Alternative Mechanisms for Initiation and Ratification

The US Constitution provides an alternative means for proposing and ratifying an amendment proposal by setting forth two kinds of procedures. The first method is congressional method. This method enables congress to propose amendments with the support of a two-thirds majority vote in both houses.[64] The second method is the "Article V Conventional" method. This

[61] Based on the 2007 National Population and Housing Census Result, the (6) less popular regional states- Gambella, Afar, Somalia, Harrari, Benishagul and Tigray together represents less than 35% of the National population of Ethiopia.

[62] Walter Dellinger, Supra note 24. The federalism principle requires equality of states, whereas, the democracy principle requires equality of individual citizens.

[63] See Section38 and 42 of the Canadian Constitution.
This procedure is known as 7/50 procedure since the requirement number of provinces is seven totally constitute more than 50% of the total population.

[64] James K. Rogers, Supra note 31 at pp. 1006-1022.

method requires congress to call a constitutional convention to propose amendments when two-thirds of the states apply for such a convention. All amendments proposed either through congress or conventions have to be ratified by three-fourths of the states.[65] Moreover in the US, Article V authorizes congress to choose the method of ratification. The options are ratification by ad-hoc conventions called by the states for the specific purposes of considering the ratification, or ratification by the legislatures of the states. However, the three fourths requirements are applicable in both instances.[66]

Thus in the US, amendments can be enacted without the involvement of the Congress's power of initiation, and the state legislature's power of ratification. It can be proposed by a national convention, up on the petition of two-thirds of the states, which is free of congressional control and can be ratified by conventions in each state, which is free of state legislature's control.[67]Hence, it is possible to reform congress through amendments proposed by national convention, and ratified by either legislatures or conventions in each state. Similarly, it is also possible to reform state legislatures through amendments proposed by congress and ratified by

[65] Ibid.

[66] Ibid, State conventions for this purpose have only been used once, which is on the ratification of the 21th amendment. More on the area see : Thomas H. Neale, The Article V. Convention to Propose Constitutional Amendments: Contemporary Issues for Congress, Congressional Research Service Report for Congress, Prepared for Members and Committees of Congress, July, 2012, pp. 2-32.

[67] Walter Dellinger, Supra note 24 at pp. 290-302.

conventions in each state.[68] Therefore, the US Constitution affords a significant possibility of reforming the existing powers of institutions which play a critical role in the amendment process.

In Ethiopia, an amendment proposal changing the powers of HF or HPR may be proposed by one thirds of state councils. And similarly changes on the existing powers of the state councils can be proposed by either HPR or HF. Thus alternative mechanisms for proposing amendments against the existing institutions which take part in the process can be made in Ethiopia. But when we come to ratification, unlike the US Constitution, the FDRE Constitution does not provide an alternative means for ratifying a proposal that allow amendments to be ratified over the opposition of both houses and state councils. Consequently it does not secure the possibility of a reform through constitutional amendment which restricts the existing powers of the HPR, HF and state councils. There is no alternative amendment ratification rule which is free from the control of both houses and state councils. An amendment reforming the powers of HPR, HF and state councils cannot be ratified without the participation of the institutions themselves. All of them are veto players on all kinds of constitutional amendments including those affecting their powers and interests. Therefore, the FDRE Constitution does not create a conducive environment to bring reform and change, which may run against the existing vested interest of HPR, HF and state councils and their members.

2.3. Rules on Reversal of Resolutions

As we have seen, particularly in federal states, a certain number of ratifications by state legislatures are required for the inclusion of the

[68] Ibid.

amendment proposal on the constitution. For instance, nine and six regional state ratifications are required in Ethiopia for amending Chapter Three and the amending provisions and the rest parts of the Constitution respectively.[69] In the US federal system the ratification of thirty eight states is necessarily required for adopting an amendment proposal.[70] When the number of state ratifications nearing the minimum required for adopting the amendment proposal, both opponents and proponents of it may exert pressure on state legislatures to reverse their previous ratification or rejection.[71] As a consequence, an amendment procedure must deal with the rules on reversals that determine the effect of a ratification which has been passed after a vote of rejection, and the effect of a ratification which a state is purporting to rescind.[72]

The issue of reversal has been more prevalent under the US constitutional system. The ratification process for the fourteenth, fifteenth and nineteenth constitutional amendments was marked with reversal issues by state legislatures.[73] During these ratifications, state legislatures fall under pressure from both opponents and proponents of the amendment proposal to reconsider their earlier ratifications and rejections. In the fourteenth amendment, for instance, states namely Ohio and New Jersey had passed a resolution to withdraw their previous ratifications. On the other hand, North

[69] Article 105 of the FDRE Constitution.
[70] Article V of the US Constitution.
[71] Lynn A. Fishel, Supra note 24 at p.148.
[72] Id, pp. 148-154.
[73] John R. Vile, A Companion to the United States Constitution and Its Amendments, 4th edition, United States of America, 2006, pp. 111-115.

Carolina and South Carolina had ratified the amendment proposal over prior rejections.[74] However, the amendment was declared as adopted with a resolution that includes Ohio, New Jersey, North Carolina and South Carolina under the list of ratifying states.[75] During the ratification process of the fifteenth amendment, New York had withdrawn its ratification and Georgia had ratified the amendment proposal despite its previous rejection. But the amendment proposal had been adopted, albeit the action by New York and Georgia, which was considered to be among states which ratified the amendment.[76] The nineteenth amendment was also adopted, although both Tennessee which claimed to have rescinded ratification and West Virginia which had ratified over prior rejection were tallied among the ratifying states.[77]

All these situations present important questions on the process of constitutional amendment and its procedures. How should the actions of states which change their previous decisions be treated? A state that once ratified an amendment proposal may rescind and pass a resolution for rejecting the amendment and a state that once rejected an amendment proposal may later re-consider its decision and pass a resolution in favor of proposal. Thus the effectiveness of the reversals by state legislatures of their earlier actions concerning an amendment proposal must be regulated to eliminate uncertainties on the process of constitutional amendments.[78] When we look at the amendment procedure in Ethiopia, it does not settle on the

[74] Walter Delinger, Supra note 24 at pp. 396-397.
[75] Ibid.
[76]Ibid.
[77] John R. Vile, Supra note 73 at pp.190-196.
[78] Lynn A. Fishel, Supra note 24 at pp.148-166.

effect of a ratification which has been passed after a vote of rejection, or the effect of a ratification which a regional state is declaring to withdraw.

As scholars in this area suggest, there may be three ways of dealing with the matter of reversal issues. The first view considers the initial action of the state legislatures as conclusive. It supposes both ratification and rejection so binding that cannot be reassessed again by the state legislatures.[79] The second view considers the initial action of state ratification as conclusive. But initial vote of rejection may not be regarded as final.[80] This view believed that the constitution creates only the positive power to ratify amendment proposals. Consequently, initial act of ratification by state legislature will exhaust that power granted under the constitution, but failure to ratify or rejection of the amendment proposal will leave the positive power to ratify which is granted by the constitution intact to be exercised again at any time with in the specified time limit provided under the procedure.[81] Thus ratification once given cannot be rescinded. However, as long as the rejection does not exhaust the positive power to ratify, it cannot be conclusive and then a state may cancel its previous resolution of rejection.[82] The third view provides that neither rejection nor ratification by state legislatures may be considered as final until the required numbers of states have ratified and the amendment adopted. This view enables state legislatures to be free to reverse their

[79] Id, pp. 148-155.
[80] Ibid.
[81] Ibid.
[82] Ibid.

previous positions whether it is rejection or ratification until the adoption of the amendment proposal.[83]

The second position which views ratification, but not rejection as conclusive is the prime view particularly in the US constitutional system. Although the US Supreme Court does not develop certain jurisprudence on the matter of reversal, congressional precedents during the fourteenth, fifteenth and nineteenth amendments are consistence with the view that ratification, but not rejection is binding and final.[84] During these ratification periods, congress did not invalidate the ratification of those states which had first rejected the amendments, and it did not also recognize the withdrawal of ratifications by state legislatures.

Unlike the US, the amendment procedure adopted under the Canadian constitutional system is so instructive that it clearly incorporates the concept of reversal. Accordingly, any ratification may be revoked at any time by the provinces, which are the constituent units under the Canadian federal system, before the issuance of a proclamation declaring the adoption of the constitutional amendment.[85] Similarly, a province which has rejected an amendment proposal may reverse its resolution and ratify the amendment proposal.[86] Accordingly, the Canadian system adopted the third view which considers both initial actions of ratification and rejection not conclusive until the adoption of the amendment proposal. However, the amendment

[83] Ibid.
[84] Ibid.
[85]See Section38 of the Canada Constitution Act. For more detail on the area see Walter Dellinger, Supra note 24 at pp. 299-300.
[86] Ibid.

procedure in Canada denies provinces the right to reversal of their positions after the adoption of the amendment proposal.[87]

The FDRE Constitution is so silent on the issue of reversal that the amendment procedures adopted does not deal with the matter and whether regional state legislatures have the power to reverse their prior actions of ratification or rejection is not clear. If we assume the regional state legislatures as having the power of reversal, the effect of a ratification which has been passed after a vote of rejection and the effect of a ratification which a regional state is purporting to withdraw remains controversial and doubtful. Furthermore, Ethiopia has no existing precedent in this area. Hence, all these make the issue of reversal inconclusive under the Ethiopian legal system.

2.4. Referendum and Public Participation

Referendum is the most effective way of ensuring that the citizens are actively involved in the process of constitutional amendment. It is a useful way to invite the people, and obtain their consent in the process.[88] Constitutions that prefer a national referendum to stimulate public participation recognized it as an additional or alternative means to parliamentary approval, or they may provide it as a sole method for amending the constitution. [89] For instance, in Australia a referendum is

[87] The procedure is silent on the issue whether it is possible to reverse after the adoption of the amendment. W. Dellinger argued the constitutional silence to be understood as denial of power to reverse after the adoption of the amendment.
[88] Ashok Dhamija, Supra note 8 at pp. 298-310.
[89] Ibid.

required in addition to parliamentary approval.[90] The same is true for Algeria, where the bill is submitted for a referendum after parliamentary approval.[91] However, in Malawi and Senegal it is provided as an alternative means for adopting constitutional amendments.[92] However, in some constitutions it may not have a binding nature, and used only for indicative purpose. Austria is typical example where voluntary referendum has been conducted in order to consult the people on matters of fundamental national importance.[93]

The Ethiopian Constitution under Article 104 requires a proposed amendment to be submitted for the general public. As the reading of the provision reveals, the purpose of this submission is for discussion and decision.[94] The provision states that "Any proposal for constitutional amendment… shall be submitted for discussion and decision to the general public…." [95] However, the phrase "… submitted for the general public for discussion and decision" is not understandable whether it denotes referendum or not. On this point although the Minutes of the Constitutional Assembly which ratified the final draft is not clear enough, it may give some clues to understand the spirit of the provision. At the discussion of constitutional making, the Chairman of the Constitutional Committee provided that *"as long as the houses are the representatives of the people, then the people- the general public- is not directly required to participate in the amendment*

[90] Article 128 of the Australian Constitution.
[91] Article 174-178 of the Algerian Constitution(as amended on Nov.28,1996)
[92] Article 195 -196 of the Constitution of Malawi and Article 103 of the Senegal Constitution
[93] Article 49(b) (1) of Austria Constitution. Also, see Anne Twomey, Supra note 35 at p. 11.
[94] Article 104 of FDRE Constitution.
[95] Ibid.

process." [96] *Other members of the assembly also argued that "the people have the right to be consulted on the amendment."* [97] From these and similar debates made at the time of constitutional making, what we understand is that the role of the people is not giving binding decision in the form of referendum. Rather their role is mere consultation and discussion on the proposed amendments so as to contribute significant inputs to the decision making bodies. Thus the FDRE Constitution has a tendency to invite the people to take part in the progression of constitutional amendment through consultation and discussion. However, their participation is limited in the sense that they have no power to give binding decisions and veto an amendment proposal. Therefore, a referendum as a means of giving binding decision is not envisaged under the Ethiopian Constitution.

Although the FDRE Constitution requires the people to be notified and consulted on the amendment proposals, the constitutional provisions as well as the subsequent working procedure regulations does not indicate the means through which discussion and consultation can be set. Who submits it to the general public? How it is submitted? When it is submitted? These are vexing questions which have no clear answers from the text of the Constitution and the regulations. As comparative constitutional law scholars in this area demonstrate, constitutions allow for public comments to be made on amendment proposals. The Constitution of Zimbabwe, Zambia and South Africa, for instance, require the text of the proposal to be published in the

[96] Minutes of Constitutional Assembly, Volume 5, Unpublished, HPR Library, Addis Ababa, Ethiopia, 1994.
[97] Ibid.

governmental gazette for public comment for thirty-days before the first reading in the legislature.[98] Furthermore, the South African Constitution provides that the person (committee) introducing the amendment bill must submit written comments received from the public and the provincial legislature to the speaker for discussion in the national assembly.[99] As these experiences suggest, publicizing the proposed amendments on the official governmental gazette and effectively disseminating it to the public at large is an important means of creating public awareness. Moreover, public awareness and consultation can also be created through electronic medias by using indigenous languages.[100] Moreover, it can also be created formally by holding indicative plebiscites at the national level.[101]

2.5. Publication and Timeline Requirements

Some constitutions require the amendment proposal to be published in the official governmental gazette, prior to tabling it before the legislature. This enables citizens to have knowledge of the proposal and to contribute meaningfully to the discussion on the matter.[102] Additionally, some constitutions prescribe a specified timeline which indicates a minimum period between which amendments could be introduced and approved. This timeline for carrying out different activities helps to check over hasty

[98] See Section52 of the Constitution of Zimbabwe, See Section79 (3) of the Constitution of Zambia and See Section74 of the South Africa Constitution.
[99] See Section74 (6) of the South African Constitution.
[100]John Hitchard, Muna Ndulo, & Peter Slinn, Comparative Constitutionalism and Good Governance in the Common Wealth: An Eastern and Southern African Perspective, Cambridge University Press, 2004, pp.44-54.
[101]Article 49 (1) of the Austria Constitution.
[102] See Section52 of the Constitution of Zimbabwe, See Section79(3) of the Constitution of Zambia and See Section74 of the South Africa Constitution require the text of the proposal to be published in the governmental gazette for public comment for thirty-days before the first reading in the legislature.

constitutional amendments and give enough time as well as opportunity for the citizens to add their contributions to it.[103]

In South Africa, for instance, the proposal amending the Constitution may not be put to the vote in the national assembly within thirty days of its introduction.[104] In Botswana, a strict set of time lines are also provided for all constitutional amendments dealing with the Constitution. A bill containing a constitutional amendment may not be put into the parliament before thirty days of its introduction. There should be also a thirty days gap between the first and the second reading.[105] The experiences of South Africa and Botswana suggest that the specified timelines stimulate the creation of public awareness and used to ensure that constitutional amendments are not hastily carried out without enough time and opportunity being given to the people along with concerned bodies which need to be consulted.[106] Therefore, the requirement of publication and timelines provided in the amendment procedures are crucial to control constitutional changes that can be made swiftly without full knowledge and active involvement of the public.

The FDRE Constitution does not provide specified time lines for each action that need to be done in the amendment process. Besides it does not require the proposal to be published on the official governmental gazette for

[103] Charles M. Fombad, Supra note 25 at pp. 5-6; John Hitchard etl., Supra note 100 at pp. 52-53.
[104] Article 74 (5) of the South African Constitution.
[105] See Section89 of the Botswana Constitution (1966). Such specified timeline requirements are also required under the Constitution of Algeria, Ghana, Mozambique and Swaziland.
[106] Charles M. Fombad, Supra note 25 at pp. 5-6; John Hitchard etl., Supra note 100 at pp. 52-53.

disseminating it to the general public for discussion and comments. As a result, in Ethiopia there is a possibility of making hasty amendments which are beyond the knowledge of the general public. Practically, this was also observed during the first constitutional amendment on article (98) of the Constitution.[107] The process was so speedy that it was completed within two months. Some decisions were made successively without giving enough time for parliamentary members and the public for discussion.[108] On the other hand, the second constitutional amendment that is made on article 103(5) of the Constitution relatively took a long period of time which is more than two years.[109] Both of these amendments are beyond the knowledge of most of the general public.

The Ethiopian Constitution also does not give a timeline for the ratification of the proposed amendment by state councils. The same is actually true in India and US. In India, no specific time limit for the ratification of an amendment bill by state legislator is laid dawn. However, the resolution

[107] Proclamations, Discussions and Resolutions made by the FDRE HPR, vol.2, Unpublished, the Library of HPR, 1997. The first constitutional amendment changes the spirit of concurrent power of taxation in to revenue sharing which allows the specified taxes to be determined and administered by the federal government while the constituent units share the proceeds from it. The proposal was tabled for discussion on March 6, 1997 and approved unanimously on April.10, 1997 at the joint session of the two houses.

[108] Ibid, as the parliamentary working procedures requires, at a minimum an ordinary bill may take sixty working days to be a law. Then from this what can we understand is that the constitutional amendment which is the supreme law is expected to need more times at least longer than ordinary legislations.

[109] The second constitutional amendment which is made on Article 103(5) extended the period for conducting National population census to more than 10 years. It was initiated on the last of 2003 and approved on Sep. 25, 2005. Proclamations, Official Discussions and Resolutions made by the 2nd HPR at its 3rd Working Year , Volume 8, Un published, The Archives of HPR , Addis Ababa, Ethiopia, 2003 ; Proclamations, Official Discussions and Resolutions made by the 2nd FDRE HPR at its 5th Working Year ,Volume 1, Unpublished, The Archives of HPR, Addis Ababa,Ethiopia,2005.

ratifying the proposed amendment should be passed before the amending bill presented to the president for his assent.[110] In the US Constitution, Article V does not prescribe any time limit for ratification of amendment proposals by state legislatures. But the US Supreme Court held that the ratification must be within a reasonable time after the proposal. However the court refused to determine what reasonable time is since it believed that the issue is a political question that must be determined by congress.[111] Later, congress specifies that the amendment must be ratified within seven years after being proposed in order to become effective.[112] On this point, the Canadian Constitution is clear. Accordingly, amendments once initiated, it remains open for ratification or dissent of provinces at least for a year. This period of time runs from the application of the amendment within the province. A proposed amendment will be dropped unless it is not ratified by the required number of provinces' assemblies within three years of its initiation.[113]

2.6. Institutions Involved in the Amendment Process

Amendment procedures provided in constitutions mention the bodies that are competent to exercise the amending power. A typical amendment procedure

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[110] Paylee M V, Constitutional Amendment in India, Universal Law, New Delhi, 2003, p. 250.

[111] The seven-year requirement was incorporated in the body of the amendment in the 18th and 20th through 22th amendments. For subsequent amendments, congress concluded that incorporating the time limit in the amendment itself "cluttered up" the amendment. Consequently, the 23rd through 26th amendments placed the limit in the authorizing resolution, rather than in the body of the amendment. See: James K. Rogers, Supra note 31 at pp. 1012-1015; Thomas H. Neale, Supra note 66 at pp. 1-5.

[112] Walter Delinger, Supra note 24.

[113] Id, p. 299.

always nominates such a body that can exercise the power of amendment. The body nominated may consist of one or more institutions which concurrently exercise the power in association with one another. However, the nature and the number of institutions involved on the amendment process are different across constitutions. The participation of the national parliament on amending the constitution is almost a universally accepted trend. Most commonly, the national legislature is considered as the appropriate institution to debate and consider constitutional amendment issues. As a result, in most of constitutions, the national legislature that has never been excluded is concerned in the process of the amendment.[114]

The principle of federalism also requires constituent units to play a critical role in the process of constitutional amendment which is considered as one of the common features of federations.[115] However, their mode of participation is different across federations. As the experiences of federal countries reveal constituent units can engage in the amendment process directly through their legislative assemblies or indirectly through the second chambers.[116] In the US, for instance, they have an active role in the process of ratification which

[114] Carlos Closa, Supra note 19 at pp. 287-289, 298; Vicki Jackson and Mark Tushet, Supra note 4 at pp. 319-322.

[115] Rigidity is one of the common features of a federal constitution which requires the participation of both the federal government and the states for its amendment. Since the federal constitution contains the basic principles governing the relationship between the two levels of governments and the authority of both derives from it, then, the constitution should not be subject to unilateral alteration by either order of the government alone. Both the federal government and the states must participate in the amendment process in order to maintain their 'federal bargain' which is enshrined in the document. More on the area see: Assefa Fiseh, Supra note 49 at pp. 106-146.

[116] Carlos Closa, Supra note 19.

is directly exercised by the state legislatures.[117] Whereas in Germany, the constituent units participate in the process through the second chamber that voted in block up on their instruction to approve a constitutional amendment proposal.[118]

The head of the state is also taking part on the course of action, although, in most of the cases, its role is so nominal that it is required to give formal assent to the amendment bill.[119] In the US, for instance, the president has no role in the formal amendment process and cannot veto an amendment proposal or ratification.[120] However, there are some constitutions which give more formal and direct power to the head of the state on the issue of amendment. France is a typical example in which the president has the power to initiate amendment, and determine the appropriate place of its ratification.[121]

In Ethiopia, different institutions engage on the process of constitutional amendment. The HPR is the first institution which participates on the

[117] Article V of the US Constitution. An amendment proposal needs to be ratified by three-fourths of the state legislatures.

[118] Article 79 of the German Basic Law.

[119] Ashok Dhamija, Supra note 8 at p. 252.

[120] Holling Sworth V. Virginia, 3 U.S. (3 Dall) 378 (1798) was a case in which the United State Supreme Court ruled early in Americans history that the president of the United States has no formal role in the process of amending the US Constitution.

[121] Article 89 of the French Constitution. Article 89(1) provides that: The President of the Republic, on the recommendation of Prime Minister, and members of parliament, alike has the right to initiate amendments to the Constitution.

89(3) … a government bill to amend a Constitution is not submitted to referendum where the president of the Republic decides to submit it to parliament convened in Congress…

initiation as well as ratification stages of the process.[122] Moreover, regional states have also mixed up on the process of constitutional amendments directly through their state councils and indirectly through the HF, which is assumed as representing their interests.[123] However the relevance of this dual participation of the constituent units was debatable during the constitutional making process. A significant number of members believed the ratification of the House of Federation as sufficient to protect the interest of regional states. Others, on the other hand, argued in favor of direct participation as it enables those nations, nationalities and peoples which have no representation in the HF to take part on the process of constitutional amendment.[124] Moreover, they argued that it will increase and improve deliberation and subsequently enhance the quality of the process.

Thus, in Ethiopia, the House of Peoples' Representatives, the House of Federation and regional state councils are primarily institutions for amending the constitution. However, there is no specific clear provision like India and South Africa, which empowers the head of the state to proclaim the ratified amendment on the official Negarit gazette. Nevertheless, the president has the power to proclaim ordinary laws on Negarit gazette.[125] As long as the ratified amendment bill is deemed as law, albeit a higher law, then, the power to proclaim may also extend to cover the constitutional amendment bills. However, this power of the president is not as such critical that determines the destiny of the bill since the analogy to ordinary legislation dictates that it

[122] Article 104 and 105 of the FDRE Constitution.
[123] Ibid.
[124]Minutes of Constitutional Assembly, Volume 5, Unpublished, HPR Library, Addis Ababa, Ethiopia, 1994.
[125] Article 71 (2) of the FDRE Constitution.

will be published anyway even if the president does not sign it in two weeks time.

Furthermore, an ad-hoc joint committee also involve on the process of constitutional amendment. The function of the committee is to prepare a final draft law of the amendment and submit it to the HPR for publication, in the Negarit gazette.[126] Therefore, the HPR, the HF, the state councils, the president and the ad-hoc joint committee are important institutions playing a role in the amendment process. Among these, the involvement of HPR, HF and state councils is so mandatory that failure to comply with it may cause the process to be irregular and unconstitutional.

Concluding Remarks

Most constitutions have an amending clause setting forth procedures concerning constitutional amendments. In Ethiopia Articles 104 and 105 are the amending clauses designed to ensure an orderly change to the Constitution. As the experiences of different countries and scholarships on the area suggest a satisfactory amendment procedure at minimum must be clear, understandable, reliable and stable to guide such a process. When judged by such a standard, it is possible to conclude that the procedure in Ethiopia is not sufficient and clear enough to guide actions concerning amendments. More specifically, the existing amendment clauses have problems relating with ambiguity, gaps, lack of details, and the failure to

[126] Article 9 (7) of the Joint Working Procedure Regulation No. 2/2008.

strike balance between democracy and federalism which will negatively impact the legitimacy of future constitutional reforms.

Firstly, the issue of initiation is not clear from the reading of the Constitution. Although the framers intended to give such power to HPR, HF and state councils, their intention is not clearly reflected particularly in Article 104 of the Amharic version of the Constitution as well as in the practice of constitutional amendments which demands the involvement of both HPR and HF as a cumulative requirement. Therefore, it is imperative to clarify and understand the provision in accordance with the English version that allows each (HPR, HF and state council) without cumulative requirement to propose constitutional amendments.

Secondly, the issue of public participation is not clearly regulated under the Ethiopian legal system. Although the Constitution requires amendment proposals to be submitted for the general public for decision, the law has said nothing about the nature of the decision, the mode of submission, the manner of decision making and the body mandated to carry out the responsibility. Hence, this author recommends that the public participation envisaged under Article 104 of the Constitution to be understood as mere consultation without giving binding decision on amendment proposals. In addition, a clear legal provision regulating issues of public participation should be put in place by enacting a detail law dealing with amendment procedures.

Thirdly, the amendment procedure does not provide a time table for carrying out different actions of the amendment. As a result, the procedure is not conducive to prevent hasty and untimely constitutional amendments.

Furthermore, the amendment procedure does not specify the time limit for ratification of an amendment proposal by state legislatures. Therefore, it is the firm belief of this author that it is important to set a time table for each action that would be carried out on the process of constitutional amendments by enacting a detail law dealing with amendment procedures. This helps to avoid untimely constitutional amendments and enables each actor involved in the process to carry out enough debate on draft bills. More importantly, a reasonable time limit for ratifying an amendment proposal by state councils has to be clearly set.

Fourthly, the amendment procedure in Ethiopia does not provide an alternative means for ratifying proposals aiming at reforming the existing institutions which play a critical role in the amendment process. This will hold back future attempts of reforming these institutions through constitutional amendments. The author of this piece recommends that it is important to afford an alternative way of ratification by reconsidering the amending clause of the Constitution based on the US experiences so as to create the possibility of reforming the existing powers of HPR, HF and state councils.

Fifthly, the amendment procedure is silent and the issue of reversal has not yet been settled under the Ethiopian legal system. Consequently, whether regional states are allowed to ratify amendments that they previously rejected and whether they will be able to rescind ratifications still remains controversial. Thus, this author critically supposes that the reversal issues

must be regulated by enacting a detail law dealing with amendment procedures. On this point, the author recommends the view that deems rejection final, albeit ratification to be endorsed.

Lastly, the amendment procedure requires the unanimity support of regional states for amending Chapter Three of the Constitution. This unanimity requirement is unique for Ethiopia and it increases the confederal feature of the Ethiopian federal system. Moreover, the rule of ratification does not take into account the democratic principle of national population support for ratifying an amendment proposal. It is highly dominated by the federalism principle and for this reason the number of population supporting or rejecting a proposal is irrelevant in the process. Thus, the author of this paper found that the amendment procedure fails to strike balance between federalism and democracy. As a result, it is recommended that the rule of ratification, which requires unanimity on the number of regional states under article 105(1) of the Constitution, be reconsidered with a qualified super majority requirement particularly three fourths on the number of regional states. Additionally, it should be amended to take the democracy principle, which takes the national populations' support towards a constitutional amendment into account based on the experiences of Canada.