

The Scope and Limitation of the Amending Power in Ethiopia: Thinking beyond Literalism

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Abstract

The amending power is crucial to enable each generation to adapt a constitution to newly changing realities. However, the power has also the risk of bringing radical change on it by modifying the core elements of the document. Based on comparative and analytical approaches, this study examines the scope of the amending power under the Federal Democratic Republic of Ethiopia (FDRE) Constitution. The findings suggest that although the Constitution does not contain an express substantive limitation, the theoretical parameters of the Constitution, the purpose for which it was framed, the concept of political self-defense and the structural interpretation of the Constitution gives life to the thesis of implied limitation against the amending power. As a result, the principles of democratic order, the rights of Nations, Nationalities, and Peoples, the inalienability and inviolability of human rights, secularism, accountability and transparency of the government, the supremacy of the Constitution and federalism are the basic features of the FDRE Constitution that cannot be fundamentally changed through constitutional amendments. Finally, the study recommends these implied substantive limitations to be taken into account and enforced through the concerned bodies during constitutional amendments.

Key words: amending power, constitution, Ethiopia, implied limitation, substantive limitations, structural interpretation

Introduction

Although every constitution has at least one provision that deals with the issue of constitutional amendments, the scope of the amending power recognized under such provision has varied across countries. Some constitutional framers accord such an unlimited power to institutions engaged in the task of amendment that they could alter a constitution as they wish. Consequently, these institutions acquire an absolute license to change the document in

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accordance with the will of the majority. However, such unlimited power to change the constitution has the risk of replacing it with a new one by eroding its basic features and foundations. Consequently, some political forces may change the constitution to the extent of remaking it by using the amending power provided under the constitution itself. Therefore, the power to amend the constitution poses the following important questions: Are there any substantive limitations on the ability to amend constitutions? Is the scope of the amendment power sufficiently broad to permit any amendment at all, even one that violates fundamental rights? Are there any constitutional principles so fundamental that they cannot be amended?

In this Article, the author intends to answer these and related questions by examining the scope of the amending power in Ethiopia based on comparative and analytical approaches. The article comprises four sections. In the first section, constitutional law scholarships and debates on the dilemma of the amending power is offered briefly. The second section focuses on the nature of limitations imposed against the amending power. This section evaluates the constitutional framework of different countries comparatively and lays a base for discussions in the subsequent sections. The third section explores the dilemma of the amending power in the Ethiopian context with regard to the FDRE Constitution. Fourthly, the article centers on the scope of the amending power in Ethiopia and discusses the nature of limitations against it. Finally, the article ends with some concluding remarks.

1. The Dilemma on the Power of Constitutional Amendment

The amending power provided under the amending clauses of constitutions epitomizes a dilemma that raises important questions.¹ On one hand, it is important to make the constitution adaptable to new changing circumstances and reality. In such circumstances, amendment helps to make institutional adjustments to new changing realities and in turn secures durability and sustainability of a constitution.² This contributes a lot for the continued existence of the document by allowing it to be open for all kinds of potential future adjustments. So, amending power may be used as a means for “perfecting the imperfections” of a constitution that may be experienced

¹ Ulrich K. Preuss, *The Implication of Eternity Clauses: the German Experience*, Israel Law Review, Vol. 44 (2011), pp. 433-455

² *Ibid*

through time and practice.³ In support of this view, Roznai considers the power as a “healing principle” that would allow a constitution to stand the test of time.⁴

However, the amending power has certain risks. It may be used to destroy a constitution and democratic order by amending its core elements including the institutional set up of the polity.⁵ The power may be invoked for revising a constitution to the extent of creating a completely new one through substantial alteration of its fundamental elements. Consequently, the amending power potentially endangers a constitution, since it has no inherent stop rule that prevents a constitution from being re-made under the guise of amendment.⁶ For instance, the recent experience of Hungary has shown that the tools of constitutional amendment can be used to replace the existing Constitution. In Hungary, the Fidesz Party that won a two-thirds majority in the Hungarian legislature began moving towards radical constitutional reform through amendment after winning the 2010 national election.⁷ Moreover, some presidents may appeal to constitutional amendment to extend or abolish presidential term limits in order to stay in power indefinitely. For instance, presidents in Tunisia (2002), Chad (2006), Uganda (2005), Azerbaijan (2009), Venezuela (2009), Yemen (2011) and Burundi (2015) tried and succeeded in circumventing term restrictions by abolishing relevant provisions through constitutional amendments.⁸ Therefore, all these practices demonstrate the situation in which the amending power may be exercised to undermining the Constitution and the democratic order of the state.

2. Constitutional Protections Against Disruptive Amendments

As the preceding discussion illustrates, the amending power may be used to undermine constitutions and the democratization process of a state. As a

³ *Ibid*; See also Vicki Jackson and Mark Tushnet, *Comparative Constitutional Law* (2nd ed., 2006), pp. 202-203

⁴ Yaniv Roznai, *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers* (unpublished, 2014), The London School of Economics and Political Science, Department of Law), pp. 10-11

⁵ Jackson and Mark Tushnet, *supra* note 3

⁶ *Ibid*

⁷ David Landau, *Abusive Constitutionalism*, University of California, Vol. 47 (2013), pp. 208-210

⁸ Democracy Reporting International, *Preventing Dictatorship: Constitutional Safeguards Against Anti Democratic Consolidation of Power* (Briefing Paper 29, July 2012), pp. 1-3

result, constitutional framers design different kinds of holding back mechanisms against the threats of the power of constitutional amendment. However, there is no unanimity among the way-outs adopted by drafters and each constitution uses its own mechanism to constrain the amending power. Generally, studies on constitutions and decisions of different courts identify three forms of safeguarding mechanisms or approaches- procedural, expressed substantive, and implied substantive limitations.

2.1. Procedural Constraints

Constitutions set forth procedural requirements for their own amendment and in the normal course of affairs, states amend their Constitutions in accordance with the procedures spelled out in their constitutions.⁹ These amendment procedures regulate issues pertaining to initiation, debate, adoption, ratification and promulgation of amendment proposals.¹⁰ As Richard Albert explains, they typically identify the bodies authorized to propose and subsequently seek ratification of an amendment to the existing constitution. In addition, they also prescribe a certain threshold or the methods required whenever certain kind of modifications is essential.¹¹

The German Basic Law, for instance, sets forth its own amendment procedure and accordingly, it can be amended by a statute made with the consent of two-thirds of the members of the House of Representatives (the *Bundestag*) and two third votes of the Senate (the *Bundesrat*).¹² In the United States of America (US), the Constitution stipulates procedures that enable Congress to propose amendments with the support of a two-thirds majority vote in both houses or to call a constitutional convention to propose amendments when two-thirds of the federated states apply for it.¹³ All amendments proposed either through Congress or conventions has to be ratified by three-fourths of the states.¹⁴

These procedures are mandatory requirements that must be observed on the process of constitutional amendments and in order to be valid, an amendment

⁹ Richard Albert, *Non-constitutional Amendments*, Canadian Journal of Law and Jurisprudence, Vol. XXII, No. 1 (January 2009), pp. 13-14

¹⁰ Kemal Gozler, *Judicial Review of Constitutional Amendments; A Comparative Study* (2008), pp. 27-28

¹¹ Albert, *supra* note 9

¹² Art. 79 of the German Basic Law

¹³ Art. V of the US Constitution

¹⁴ *Ibid*

has to be carried out in conformity with the requirements.¹⁵ Thus, the authority to amend the Constitution is not free and it is subject to procedural constraints like conditioning approval of the amendment on super-majority support in both chambers of the national legislature and super-majority ratification by all sub-national legislatures.¹⁶ These kinds of procedural hurdles put the power to change the Constitution beyond normal legislative procedures by creating some barriers to the amending power, and thereby prevent any unwise measure from creeping in to the constitution.¹⁷ Consequently, they may have the effect of fending the Constitution off from hasty and intrusive hands. As they make the amendment process to be longer and more participatory of different institutions than the ordinary legislation, an amendment proposal will be sufficiently subject to discussion and would involve various political forces.¹⁸

However, constitutional law scholars have some doubts as to whether the purely procedural limitations on the amending power are sufficient to effectively protect a constitution against political forces that want to replace it under the guise of amendment.¹⁹ For instance, David Landau, Steven Levitsky and Lucan Way argue that the formal rules are relatively unimportant to control abusive constitutional changes since the rules that are designed to constrain the amending power may be circumvented and manipulated.²⁰ Even in those systems that have stringent procedures for constitutional amendment, the actual rigidity of a constitution, that is, the difficulty to change it in practice is conditional up on extra-legal circumstances.²¹

More importantly, the system of political parties is an essential variable in this regard. The strong party discipline and a widespread culture of coalition among political parties may render a super-majority requirement to be

¹⁵ Gozler, *supra* note 10, pp. 27-28; George D Skinner, *Intrinsic Limitations on the Power of Constitutional Amendment*, Michigan Law Review, Vol. 18 (1999-1920), p. 214

¹⁶ Art.79 of the German Basic Law and Art. V of the US Constitution

¹⁷ Skinner, *supra* note 15, P. 214

¹⁸ *Ibid*, p. 214

¹⁹ Aharon Barak, *Unconstitutional Constitutional Amendments*, Israel Law Review, Vol. 44 (2011), p. 434

²⁰ Landau, *supra* note 7, pp. 210-213

²¹ 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. 205-208

attainable without difficulty.²² Consequently, an electoral majority that is lucky enough to fulfil the majority requirement could change the substance of an existing constitution by meeting the procedural requirements.²³ Moreover, the party having the required majority may amend the procedure for its own political benefit and to disempowering its political competitors.²⁴ For example, in Japan, the Liberal Democratic Party (LDP) announced that it would pursue constitutional change on the amending clause itself to reduce the required majorities for constitutional amendment from two thirds of the Diet to a simple majority.²⁵ Since the LDP has massive legislative majority in the Diet, it will likely be able to succeed on this proposal, which, would serve to undermine the Constitution as well as democracy by allowing the powerful LDP to push through, unilaterally, any kinds of changes it might want in the future.²⁶

As the procedural difficulty can be diluted by other factors like party system and party domination, hence, the party or party coalition that acquired slightly more than the required majority of the seats, may in due procedural form, change the Constitution radically and substantially from one system to another. Therefore, it is possible to argue that procedural limitations may not effectively prevent the amending power from being misused to change the identity of a constitution.

2.2. Express Substantive Constraints

In addition to the procedural limitations, some constitutions place substantive constraints on amendments through a clause that prohibits changes on certain provisions. Those constitutions expressly set forth immutable principles that cannot be fundamentally touched through the amending power.²⁷ However, the nature of these restrictions on the power varies across countries depending on the level of development, the complexity and the heterogeneous characters

²² *Ibid*

²³ Barak, *supra* note 19, p. 434

²⁴ *Ibid*

²⁵ Landau, *supra* note 7, p. 192

²⁶ *Ibid*

²⁷ Gozler, *supra* note 10, p. 55

of the society, the number and nature of the major communities, the history, the size and population of the country.²⁸

Nevertheless, comparative study conducted by Ashok Dhamija demonstrates that the republican nature of the state, the fundamental rights and freedoms guaranteed to citizens, human dignity, the rule of law, democratic nature of the state, territorial integrity of the state, separation of powers, independence of courts, popular sovereignty, political pluralism, official language, sovereignty of the state, and amending clauses are the common subjects for which express substantive limitations are placed.²⁹

In Germany for instance, constitutional amendments affecting the division of the federation into *Landers*, the participation of *Landers* in the legislative process, the inviolability of human dignity, the political and social structure of Germany such as rule of law, republicanism, democracy, social state, and federalism are prohibited.³⁰ Accordingly, these principles cannot be modified through constitutional amendments. As these provisions reveal, the German Constitution incorporates the idea that certain core elements should remain un-amendable, even by following the appropriate procedures of constitutional amendment. These stipulations were designed to exist forever, and consequently, such provision is usually referred to as the “*eternity clause*” of the Basic Law.³¹

The past German experience was the main force behind the eternity clause. The history of Germany was characterized by “democratic-suicide”³² that is, the

²⁸ Ashok Dhamija, *Need to Amend a Constitution and Doctrine of Basic Features* (revised 1st ed., 2007), pp. 290-296. More on the nature and the contents of unamendable provisions, see Yaniv Roznai, *Un-amendability and the Genetic Code of the Constitution*, New York University Public Law and Legal Theory Working Papers, No. 154 (2015), pp. 10-13

²⁹ *Ibid*

³⁰ Art. 79 of the German Basic Law

³¹ Preuss *supra* note 1, pp. 440-441

The idea of militant democracy played a major role in the framing of the German Constitution. Accordingly, the immutability of the principles laid down in the eternity clause marked out a normative core that defines the constitutional identity of the polity. Thus, these principles cannot be altered without destroying this very identity of the Constitution

³² This is because the system was unable to defend itself. The Nazi regime for instance came to power constitutionally and transformed itself to dictatorship by using the Constitution itself. More on the concept of Militant democracy, see Geovanni Capoccia, *Militant Democracy: The Institutional Bases of Democratic self-Preservation*, Annual Review of Law and Social Science (August 2013).

elimination of constitutional democracy by the institutional means of that very democracy.³³ The provision dealing with eternity clause therefore aims at protecting the Basic Law against any self-destructive process. This political self-defense is the main justification for the existence of the provision of eternity clause and it marks the stop rule of the amending power for constitutional change in Germany.³⁴

Likewise, the US Constitution imposes an express limitation against the amending power whereby the states' right of equal representation in the Senate is un-amendable. Accordingly, an amendment, which deprives any state of its equal representation in the Senate, may not be adopted.³⁵ This prohibition was a safeguard demanded by smaller states, which feared the possibility of larger ones using the amending power to crush them out and absorb their powers.³⁶ However, the limitation is not absolute in the sense that it can be dispensed with after obtaining the consent of the state concerned.³⁷

The Brazilian Constitution also incorporates the federal structure of the country, the periodic election, separation of power, and individual rights and freedoms as substantive limitations on the amending power.³⁸ As a result, no resolution is discussed concerning an amendment proposal, which tend to change them. This substantive restraint is the direct result of Brazilians' experience of dictatorial government that continued on power for twenty years. For this reason, the Brazilians express their commitment and desire to constitutionalism and democratic future through prescribing unamendable provisions in their Constitution.³⁹

In addition to these liberal values, some constitutions protect the monarchical and Amir (Islamic) form of government.⁴⁰ In some countries, the religious character and the socialist nature of the states are also placed beyond the reach of the amending power. For instance, Afghanistan and Morocco protect Islam as the state's religion; while others like Ecuador and Mexico protect the

³³ Preuss, *supra* note 1, p. 440

³⁴ *Ibid*

³⁵ Art. V of the US Constitution

³⁶ Skinner, *supra* note 15, p. 213

³⁷ Art. V of the US Constitution

³⁸ Art. 60 of the Brazilian Constitution

³⁹ Dhamija, *supra* note 28, p. 20

⁴⁰ The Constitution of Bahrain (1973), Cambodia (1993), Kazakhstan (1993), Morocco (2011), and Kuwait (1962)

Roman Catholic Apostolic.⁴¹ Cuba and Armenia also explicitly prohibit amendment against their socialist foundations.⁴²

These principles which are protected by the eternity clause are not declared to be eternally valid and may not be held convincing forever. Rather the implication of the clause is that they cannot be changed through constitutional means.⁴³ This means that they may be changed by extra-constitutional powers of the people such as revolution or constitutional replacement⁴⁴ Therefore, the existence of eternity clause does not deny the extra constitutional power of the people to change the principles stipulated under constitutions.⁴⁵ However, some scholars are against such un- amendable provisions of constitutions as they consider eternity clauses as not desirable since they may be causes for a revolutionary upheaval to change the principles categorized as un-amendable.⁴⁶ The argument is that since it aims to prevent future generations from amending certain parts of the constitution; therefore, it has the effect of compelling the present and future generations to be ruled by the 'dead hand' of their ancestors which in turn might lead to revolutionary means in order to change them.⁴⁷

Although making certain subjects immune from amendment gives protection for a constitution, the existence of such expressly provided substantive limitations is not the feature of all constitutions.⁴⁸ The amending clause of some constitutions may not have such limitations. For instance, the South African Constitution does not impose an express substantive limitation on the amending power. Instead of imposing eternity clauses, it requires higher supermajority for amending fundamental constitutional principles.⁴⁹ Similarly, the Indian Constitution, which prescribes an easy procedure for constitutional

⁴¹ The Constitution of Afghanistan (2004), Morocco (2011), Ecuador (1869), and Mexico (1824)

⁴² The Constitution of Cuba (1976) and Armenia (1995)

⁴³ Preuss, *supra* note 1, pp. 440-41

⁴⁴ *Ibid*

⁴⁵ *Ibid*

⁴⁶ Dhamija, *supra* note 28, p. 297; Barak, *supra* note 19, pp. 446-447

⁴⁷ More on the criticism of unamendable provisions, see Roznai, *supra* note 4, pp. 210-220

⁴⁸ Dhamija, *supra* note 28, p. 8; Roznai, *supra* note 28, pp. 252-283. According to the study conducted by Roznai, out of total 735 examined constitutions, only 206 constitutions, it is around 28%, have such eternity clauses. Similarly, the study made by A. Dhamiji demonstrates, among 110 constitutions covered by his study only 32 contain express limitations on their amending powers, which is about 29%.

⁴⁹ Art. 74 of the South African Constitution

amendment, does not have any expressly provided substantive constraints up on the amending power; albeit the Indian Supreme Court has developed the ‘basic features doctrine’ as a limitation against the power to change the Constitution.⁵⁰

2.3. Implied Substantive Constraints

Most constitutions have not placed substantive express limitations on their amending power⁵¹ and there is no unanimity in the opinion of scholars towards the implications of this absence of express substantive limitations on the text of the constitutions. Some believe that when a constitution does not provide for eternity clause, the silence amounts to an empowerment to modify all provisions of the constitution.⁵² Therefore, in countries where there are no substantive limits written in the text of a constitution, the amending power is so unconstrained that it may change every provision of such constitution.

As discussed in the subsequent paragraphs, however, some scholars like Walter Murphy, Carl Schmitt, William Murbury, Ahron Barak and George Skinner argue for implied limitations against the amending power. These scholars are not satisfied with listing the substantive limits written in the text of a constitution and they go much further, and try to find other substantive limitations through interpretation.⁵³

Walter Murphy is one of those scholars who argue in favor of implied substantive limitations against the amending power. He argues based on the etymological root of the word ‘amend’, which comes from the Latin *emendare* meaning to correct. For this strong reason, amendment corrects the system without fundamentally changing its nature.⁵⁴ Thus, he contends the power of constitutional amendment has been exercised within the theoretical parameters of the existing constitution and any amendment that changes the central aspect of it would lie outside the authority granted by the constitution.⁵⁵

⁵⁰ Art. 368 of the Indian Constitution

⁵¹ Dhamija, *supra* note 28, pp. 252-283; Roznai, *supra* note 28, p. 8

According to the studies conducted by Yaniv Roznai and Ashok Dhamija, around 70% of the constitutions have no express substantive limitations.

⁵² Gozler, *supra* note 10, pp. 76-77

⁵³ Sudhir Krishanaswamy, *Democracy and Constitutionalism in India* (2009), pp. 165-225

⁵⁴ Walter Murphy, *Constitutions, Constitutionalism and Democracy*, in Douglas Greenberg *et al* (eds.), *Constitutionalism and Democracy: Transitions in the Contemporary world* (1993)

⁵⁵ *Ibid*

Carl Schmitt is another scholar who supports the existence of implied substantive limitation. He argues based on the concept of inner unity, identity, or spirit of a constitution and notes that every constitution has its own identity and spirit.⁵⁶ He further claims that as an amendment assumes the continued existence of a constitution so that the amending power may not ruin the inner identity and spirit.⁵⁷ For Schmitt, the authority to amend a constitution does not entail the authority to establish a new one and thus, such power should be understood under the presupposition that the identity and continuity of a constitution as an entirety is preserved.⁵⁸

William Marbury, who wrote on the US Constitution, also argues that the power to amend the constitution was not intended to include the power to destroy it.⁵⁹ He argues that the term ‘amendment’ employed in the Constitution implies such a change within the lines of the original instrument that improves the purpose for which it was formed.⁶⁰ The essence of Marbury’s argument is that as unlimited amending power has the risk of destroying the system, then, the power has to be limited by the purpose of the instrument. As a result, any amendment, which has the tendency of destroying the purpose of the Constitution, should be held void.⁶¹ Similarly, Aharon Barak suggests that the very use of the term ‘amendment’ has substantive meaning and connotation. Consequently, the amending power may not be used as a means to establish a new constitution by changing the basic structure of the document.⁶² Thus, a constitution impliedly determines the continued existence of a number of fundamental principles that cannot be changed with the amending power.⁶³

All these constitutional scholars demonstrate that every constitution has implied limitations. Consequently, amending power may not be used to create a new constitution through changing its basic and fundamental structure.

⁵⁶ Barak, *supra* note 19, p. 328 and Preuss, *supra* note 1, p. 433

⁵⁷ *Ibid*

⁵⁸ *Ibid*

⁵⁹ William L. Marbury, *The Limitations up on the Amending Power*, Harvard Law Review, Vol. 33 (1919), pp. 223-235

⁶⁰ *Ibid*

⁶¹ *Ibid*; He argued that as the purpose of the framers of the US Constitution was to create a perpetual union of the states, then amendments that take away legislative power of the states has the tendency to destroy the states and then should be void.

⁶² Barak, *supra* note 19, pp. 334-348

⁶³ *Ibid*

Nevertheless, recognition of an implied substantive limitation regarding the fundamental structure of a constitution requires a determination of its boundaries. This is because not every amendment may fall within the definition of fundamental structure of a constitution.⁶⁴ Besides, the nature of implied limitation also varies across constitutions. Every constitution has its own fundamental principles and core elements that can be understood from the interpretation of the constitution in light of its history, values and the supra constitutional principles that surround it as well as from the main societal values that characterize the society.⁶⁵

For instance, George Skinner argues that the character and identity of a government is the fundamental element of a constitution, which should not be touched through amendment.⁶⁶ Similarly, in France the respect for human dignity, non-discrimination and solidarity, pluralism, and the principle of separation of powers are identified as fundamental principles of the Constitution.⁶⁷ In India, the list of the fundamental features of the constitution includes, *inter alia*, the supremacy of the Constitution, rule of law, the principle of separation of powers, federalism, secularism, and freedom and dignity of individuals.⁶⁸ Therefore, we can conclude that every constitution has its own fundamental and basic features, which may be used as the source of implied limitations on the power to change it.

This concept of implied limitation is not confined within theoretical and academics discussions. It goes beyond the theoretical discourse and has some practical endorsement through different court decisions. The Indian Supreme Court, for instance, affirmed the assertion of implied limitations in *Minerva*

⁶⁴ *Ibid*

⁶⁵ *Ibid*

⁶⁶ Skinner, *supra* note 15, P. 214

⁶⁷ Gozler, *supra* note 10 , p. 72

⁶⁸ Dhamija, *supra* note 28, P 331-332, 433. The exhaustive list of all the basic features of the Constitution have not been provided by the judiciary. However, the supremacy of the Constitution, the rule of law, the principle of separation of power, the objectives specified in the Preamble to the Constitution, judicial review, Article 32 and 226, federalism, secularism, the sovereign, democratic and republic structure of the country, freedom and dignity of individuals, unity and integrity of the nation, the principle of equality, the parliamentary system of the government, the principle of fair and free election, independence of the judiciary, access to justice, power of the Supreme Court are considered as some of the basic features of the Constitution.

Mills Ltd v Union of India.⁶⁹ In this seminal case, the Court held that there are certain basic features of the Indian Constitution that cannot be destroyed through amendment. Therefore, the amending power in India is not absolute in as much as the basic features of the Constitution could be derogated during such amendments.⁷⁰ However, the Court failed to give an exhaustive list of all the basic features of the Constitution. On this point, the Court said that the question would be decided on a case-by-case basis.⁷¹

The same is true in Turkey and Germany, where the respective Constitutional Courts ruled that the amending power is limited by implied limitations, which are not expressly provided with in their Constitutions.⁷² In the US, however, the Supreme Court in the *National Prohibition* case (1920) rejected the thesis of implied limitation against the amending power.⁷³ Following this case, although the debate continued among scholars in the US legal system, no other case has been invoked before the Supreme Court and it has not ruled on the issue again.⁷⁴

⁶⁹ The Supreme Court in *Minerva Mil Ltd v Union of India* Case AIR 1980 SC 1789 declared the 42nd amendment unconstitutional and void. The Supreme Court held that since the Constitution has conferred a limited amending power on the parliament, the parliament could not, under the exercise of that limited power, enlarge that very power in to an absolute one. Indeed a limited amending power is one of the basic features of our Constitution, and therefore, the limitations on that power cannot be destroyed. In other words, parliament cannot, under Article 368, expand its amending power to acquire for itself the right to repeal or abrogate the Constitution or to destroy its basic and essential features. The doctrine has been further applied in several subsequent cases such as *Waman Rao v Union of India* Case AIR 1980 SC 1789, *Shri Kumar Padama Prasad v Union of India* (1992) 2 SCC 428: AIR 1992 Sc 1213, *Supreme Court Advocates-on-record Association v Union of India* (1993) 4SCC 441: AIR 1994 SC268, *Pudyal v Union of India* (1994) SUPP 1SCC 324, and *Kihoto Hollohan v Zachillhu* AIR 1993 SC 412: 1992 SUPP(2) SCC651. (See Dhamija, *supra* note 28, pp. 336-340 and Gozler, *supra* note 10, pp. 88-89)

⁷⁰ Dhamija, *supra* note 28, pp. 330,340,341-360

⁷¹ *Ibid*

⁷² Gozler, *supra* note 10, p. 84

⁷³ *Ibid*, pp. 78-80. *National Prohibition Case*, 235U.S. 350 (1920) In this case it was argued that the substance of the 18th amendment is contrary to the Constitution. The argument is based on the assertion that the amendment deprived the states of their police powers secured by the 10th amendment and there by altered the Constitution so fundamentally as to be not an amendment. However, it is a first step towards destruction. The Supreme Court clearly rejected this argument and announced that the 18th amendment is within the power to amend which is reserved by article V of the Constitution.

⁷⁴ *Ibid*

However, one thing that should be clear is that this thesis of implied limitation does not deny the legitimacy of radical constitutional change. It does not also block off the people's ability to change the basic structure of the constitution through revolution or constitution making process. Rather, what the thesis provides is that such a radical constitutional change should not be justified under the guise of constitutional amendment.⁷⁵ Thus, when the need arises to change the basic structure of a constitution amendment should not be the path.⁷⁶

The other point that should be clear is that this thesis is not free from critics. The thesis of implied limitation is criticized as lacking textual base within constitutions. Besides, the concept is so vague that the lists of the 'fundamental principles' cannot be objectively determined.⁷⁷ On this point, Kemal Gözler claims that the supporters of the thesis of implied limitation do not agree and each of them draws a different list according to his/her own perceptions. Therefore, the doctrine is censured as it is guided by practical necessities and philosophical considerations without finding its source in the text of constitutions.⁷⁸

3. The Amendment- Remaking Discourse in Ethiopia

The dilemma of constitutional amendment is not purely imaginary under the Ethiopian political system. There were political parties in Ethiopia who promised to amend certain provisions of the Constitution, if elected. For example, in the campaign for the May 2005 National Election, the Coalition for Unity and Democracy (CUD) has had a manifesto in which it mentioned that there are provisions of the FDRE Constitution it seeks to change should it assume power.⁷⁹ The provisions often referred to were Article 39 and 40, which deal with the self-determination rights of Nations, Nationalities and Peoples up to secession and on the state ownership of land respectively.⁸⁰ The

⁷⁵ Preuss, *supra* note 1, p. 203; Barak, *supra* note 19, p. 338

⁷⁶ *Ibid*

⁷⁷ *Ibid*; Dhamija, *supra* note 28, pp. 340-360. On this point, Kemal Gözler also identified certain limitations on the doctrine. See Gözler, *supra* note 10, pp. 66-74

⁷⁸ *Ibid*

⁷⁹ CUD Manifesto, available at: [http:// www. Kestedamena. Org](http://www.Kestedamena.Org) . (last visited on Sep. 19, 2012); See also Tegaye Regassa, *The Making and Legitimacy of the Ethiopian Constitution: Towards Bridging the Gap Between Constitutional Design and Constitutional Practice* , Afrika Focus, Vol. 23, No. 1 (2010) pp. 85-118

⁸⁰ *Ibid*

manifesto proposed a series of constitutional amendments that CUD claimed would enhance individual rights. In addition, the coalition leaders repeatedly criticized the ethnic-based federalism throughout the campaign as a threat to the unity of the Ethiopian state.⁸¹ The CUD claimed to favor decentralization and the recognition of ethnic diversity, but made known its intention to change the ethnically based regional boundaries.⁸²

Moreover, some significant political parties like the Ethiopian Democratic Party (EDP), which contested lawfully, also have questions on some constitutional matters. Among these, the preamble of the Constitution (We the Nation, Nationality and the Peoples...), the ethnic based federal system, the right of secession, the constitutional distribution of power, and the amending clause itself are areas the party (EDP) criticizes and promises for amendments.⁸³ The United Ethiopian Democratic Forces-Medhin, the Unity for Democracy and Justice (UDJ) and All Ethiopian Unity Party (AEUP) are among other parties that disclosed their belief in the 'birth defect' of the FDRE Constitution, which, they believe, contained irrelevant provisions for addressing the problems of the country.⁸⁴ Amendment is, therefore, often suggested by these groups of parties as a medication to cure the Constitution from what they believe as 'the defect' it inherently has in its making and hence, they have proposed for a number of provisions including Article 39 to be changed.⁸⁵

Discontentedly, the Union of Ethiopian Democratic Forces (UEDF) deems the FDRE Constitution as a reflection of the ideological program of the ruling party- the Ethiopian People's Revolutionary Democratic Front (EPRDF) and it claims that the rigid amendment procedure adopted by the Constitution deprives of the people's right to change it. Therefore, the party proposed for the re-constitution of the country by establishing a transitional government that, apart from performing regular governmental duties, prepares multi-party election and publicly honored democratic constitution.⁸⁶

⁸¹ Leonardo R. Arriola, *Ethnicity, Economic Conditions, and Opposition Supports: Evidence From Ethiopia's 2005 Elections*, Northeast African Studies, Vol. 10, No. 1 (2008), p. 121

⁸² *Ibid*

⁸³ Lidetu Ayalew, መድሐኑ- በኢትዮጵያ አከራካሪ የፖለቲካ ጉዳዮች (2002 E.C.), pp. 282-330

⁸⁴ Teguada Alebachew, *When Constitution Lacks Legitimacy in the Making: The Case of Ethiopia* (unpublished, 2011), Addis Ababa University, pp. 74-75

⁸⁵ *Ibid*

⁸⁶ *Ibid*

Nevertheless, the ruling party, EPRDF, has not hailed these ideas and proposals of the opposition parties. It is also claimed that it instead considers most of the oppositions' promises of amendment as undemocratic and condemns them as an attempt to destroy the constitutional order of the country.⁸⁷ The claim further goes to state that EPRDF often tags political parties that oppose the Constitution as illegal and undemocratic actors, although it is legitimate for parties to hold opposing views on the Constitution and seek its amendment in a democratic struggle.⁸⁸ For instance, EPRDF officials portray CUD leaders as antiquated nationalists and decry the CUD's proposal to amend the Constitution as corresponding to demolishing it.⁸⁹ Thus, EPRDF accuses CUD of attempting to abrogate the Constitution by electoral process.

Therefore, in Ethiopia, the Constitution yet remains to be a point of difference among political parties and conspicuously, there is a gulf of views between the ruling party EPRDF and most of the oppositions towards the existing constitutional framework. As a result, the Constitution has become a document, which the opposition associates with EPRDF and then struggle for its substantial change through amendment, while the EPRDF that shows a sense of having an exclusive ownership on it struggles for its preservation.

All these facts have significant implications towards the prevalence of a dilemma on the amending power of the Constitution under the Ethiopian political system. Most of the provisions proposed for amendment by the opposition political parties are core elements of the FDRE Constitution. The unconditional right to self-determination including the right to secession granted to every Nation, Nationality, and People, the state ownership of land, and the ethnic-based federal structure of the state were the most controversial issues even in the whole drafting process of the FDRE Constitution.⁹⁰ These

⁸⁷ Abegaz Belete, *Is EPRDF Sincere to Build a Free Democratic Nation?*, May 11, 2005, at www.Ethiomedias.Com (last visited on January 5, 2016); See also: Teguada, *supra* note 84, pp. 74-75

⁸⁸ *Ibid*

⁸⁹ *Ibid*; See also International Crises Group, *Ethiopia: Ethnic Federalism and its Discontents* (Africa Report No. 153, September 4, 2009, Nairobi/Brussels), pp. 9-10

⁹⁰ Minutes of Constitutional Assembly, Vol. 1-6 (unpublished, 1994), HoPR Library, Addis Ababa, Ethiopia); See also Seyoum Mesfin, *Issues and Challenges in Federal Constitution Making Process in Ethiopia*, in Alem Habtu (ed.), *Ethiopian Federalism: Principles, Process and Practice*, Prepared for the 5th International Conference on Federalism, Addis Ababa (2010) pp. 43-57

and related issues which are the subject of the proposed amendments by the oppositions are considered as foundational principles and pillars particularly by EPRDF, who was the main architect of the Constitution.⁹¹ They reflect the basic political and philosophical bases, which form the Constitution's foundational substance. As the Constitution is structured upon these basic principles, it no longer remains the same without them. Consequently, amending any of them may have the impact of bringing radical change to the FDRE Constitution.

When the amendment power, as most of the opposition political parties proposed, changes these essential principles of the Constitution including Article 39 and the ethnic based federal structure, the Constitution will substantially be varied from the purpose for which it was originated. Thus, the power no longer amends the Constitution but creates a completely new one. Moreover, UEDF-Medhin, in particular, proposes to change a number of provisions including Article 39 through referendum, although it is not provided as means for constitutional amendment in Ethiopia.⁹² This plan to use referendum as a tool for constitutional change would not be considered as amendment. Rather it would be denoted as constitutional replacement or remaking of a constitution.⁹³ Therefore, in Ethiopia, the amending power has the potential risk of replacing the existing Constitution with a completely new one, although it has a plausible advantage of perfecting the existing imperfections of the Constitution.

4. The Scope and Limitations of the Amending Power in Ethiopia

Noticeably, the FDRE Constitution consists of provisions on its own amendment under Article 104 and 105.⁹⁴ Apart from procedural matters, these amending clauses do not deal with issues of substantive limitations. The literal understanding of them would show that the amending power is unlimited; that is with no substantive limitations. However, the theoretical parameters of the Constitution, the purpose for which it was framed, the

⁹¹ *Ibid.* EPRDF was the main player in the constitutional making process.

⁹² Teguada, *supra* note 84

⁹³ The use of referendum to change the constitution had been practiced in a number of Latin America countries such as Colombia, Ecuador, Venezuela and Bolivia. For details on the issue, see Landau, *supra* note 7, pp. 200-210

⁹⁴ The Constitution of the Federal Democratic Republic of Ethiopia, 1995, Proc. No. 1, Neg. Gaz. Year 1st, No. 1, Articles 104 and 105

concept of political self-defense and the structural interpretation of the Constitution suggest some implied limitations against the amending power.

4.1. Procedural Limitations in Ethiopia

The amending clauses of the FDRE Constitution set forth rules and procedures for initiation and approval of amendment proposals. Accordingly, the proposal for amending the Constitution can be initiated by a two-third majority vote of House of Peoples Representative (HoPR), House of Federation (HoF) or with the support of one -third of the regional state councils.⁹⁵ Besides, the Constitution requires the proposal so initiated to be submitted for the public for discussion.⁹⁶ The Ethiopian Constitution adopts two distinct procedures of approving amendment proposals: one relating to Chapter Three of the Constitution and the amending clauses, and another for the rest of the Constitution.⁹⁷ Proposals to alter Chapter Three of the Constitution and the amending clauses may only be approved when all the regional state councils endorse the proposed amendment; and when the HoPR and the HoF, in separate sessions, approve the proposed amendment by a two-third majority vote.⁹⁸ Other provisions of the Constitution may be amended if the HoPR and the HoF in a joint session approve the amendment by a two-third majority vote, and when two-third of the regional state councils approve the proposed amendment by majority vote.⁹⁹

All these demonstrate that the amending power under the FDRE Constitution is subject to procedural limitations. As a result, those institutions having the power to amend it can only formally change the Constitution. Moreover, the amendment must be carried out in compliance with the threshold requirement provided under the procedures. Any attempt to amend the Constitution by an institution other than HoPR, HoF and regional state councils, and in the manner that disregards the majority requirements provided on the procedures will be unconstitutional.¹⁰⁰

⁹⁵ *Ibid*, Art. 104

⁹⁶ *Ibid*

⁹⁷ *Ibid*, Art. 105

⁹⁸ *Ibid*, Art. 105(1)

⁹⁹ *Ibid*, Art. 105(2)

¹⁰⁰ A constitutional amendment, which fails to comply with the relevant procedural requirements, would be held unconstitutional. See Gray Jacobsohn, *Unconstitutional Constitution? A Comparative Perspective*, International Journal of Constitutional law, Vol. 4, No. 3 (2006)

Obviously, the procedure adopted for altering Chapter Three of the FDRE Constitution which deals with human rights is more rigid than the others.¹⁰¹ From this, one can conclude that human rights are fairly entrenched, and this marks the fact that human rights are more valuable in the Ethiopian legal system.¹⁰² Therefore, instead of making the sacred provisions of the Constitution un-amendable like the German Basic Law, the FDRE Constitution prefers to make them amendable albeit with stringent procedure. Nevertheless, the existence of stringent procedures *per se* may not cause the amendment process to be rigid in practice. The actual rigidity of a constitution is dependent on other variables particularly the party system.¹⁰³ This variable dilutes the stringent procedure prescribed under the constitution and consequently, renders the constitutional system entirely vulnerable to the vices of amending power which may be used for its destruction.

For instance, in the existing parliamentary system of Ethiopia, which is characterized by dominant (hegemonic) party system and strong party discipline, the strictness of the procedures is immaterial to protect the sacred provisions of the Constitution.¹⁰⁴ As long as the EPRDF, together with its affiliate parties, controls all the parliamentary seats of the federal and regional legislatures, it is easy for the ruling party to get the supermajority vote, which is required to amend every provisions of the Constitution. In practice, the existing ruling party or any would- be ruling party may enjoy more than enough majority to effect any constitutional amendment including changes to the human right provisions of the Constitution.

Practically, the FDRE Constitution has been amended since its adoption. The first amendment is on Article 98 of the Constitution that deals with concurrent taxation powers of the Federal Government and the Regional States. The amendment changes the spirit of concurrency of taxation power in to revenue sharing, which allows the specified taxes to be levied and administered by the Federal Government while the constituent units share the proceeds from it.¹⁰⁵

¹⁰¹ Adem Kassie, *Human Rights Under The Ethiopian Constitution: A Descriptive Overview*, Mizan Law Review, Vol. 5 No. 1 (Spring 2011), p. 44

¹⁰² *Ibid*, pp. 63-65

¹⁰³ Dixon, *supra* note 21

¹⁰⁴ The ruling party, EPRDF, won more than 99.6 per cent of the seats in HoPR in the May 2010 and 2015 national elections. The members and affiliates of the EPRDF each control the regional states as well.

¹⁰⁵ House of Peoples Representatives, *Proclamations, Official Discussions, and Resolutions of the 1st Term House of Peoples Representatives*, Vol. 2 (1989 E.C., unpublished), HoPR Library, Addis

The second amendment relates Article 103(5) of the Constitution that requires the National Population Census to be conducted every ten years. The amendment changes the ten years time table and allows for possible postponing of the period by the joint decision of both houses-HoPR and HoF- when necessary.¹⁰⁶

These constitutional amendment processes disregard important procedural requirements that the Constitution provides. For instance, the Ministry of Finance initiated the first constitutional amendment made on Article 98.¹⁰⁷ However, the Constitution under Article 104 does not give the executive the power to initiate amendments. This amendment was approved only by the joint session of the two Houses and State Councils of the member state of the federations did not take part at the stage of amendment approval, although the Constitution requires their participation under Article 105(2).¹⁰⁸ Moreover, both of the amendments were not submitted for the public. Consequently, public discussions along with consultations were not held on them. As the minutes indicate, the process was directly from initiation to approval without inviting the people to participate in any manner as per article 104 of the Constitution.¹⁰⁹ In addition, they have not yet been published in the *Negarit gazette*, which is an official *gazette* for publication of federal laws in Ethiopia.¹¹⁰ These practices of constitutional amendment show that procedural limitations whether it is rigid or not can be easily eluded, and even be disregarded by the party having dominance on the legislative bodies. Although Article 98 and 103

Ababa, Ethiopia. To understand the concept of concurrent power of taxation and revenue sharing, see Solomon Neguise, *Fiscal Federalism in Ethiopian Ethnic-Based Federal System* (revised ed., 2008), pp. 63-67 and 212-214

¹⁰⁶ House of Peoples Representatives, *Proclamations, Official Discussions, and Resolutions of the 2nd Term House of Peoples Representatives*, 5th Working Year, Vol. 1 (1997 E.C., unpublished), HoPR Library, Addis Ababa, Ethiopia

¹⁰⁷ House of Peoples Representatives, *supra* note 105

¹⁰⁸ *Ibid*

¹⁰⁹ *Ibid*; See also HoPR, *Proclamations, Official Discussions and Resolutions of the 2nd Term House of Peoples Representatives*, 3rd Working Year, Vol. 8 (unpublished, 1995 E.C.), HoPR Library, Addis Ababa, Ethiopia) and the FDRE House of Federation, *Minutes of the House of Federation on Its 2nd Term, 4th Working Year, 1st Regular Secession*. (October 6-7, 1996 E.C., unpublished), HoF Library, Addis Ababa, Ethiopia)

¹¹⁰ Interview with Ato Mohamed Ahmed, Senior Legal Advisor to the Speaker of HoPR and Former Member of the House of Peoples Representatives, on 15 April 2013; Interview with Ato Seifu G/Mariam, Senior Legal Researcher of the House of Peoples Representatives, on April 15, 2013.

are not parts of the fundamental elements of the Constitution, the practice illustrates how procedural limitations cannot protect the sacred provisions of the Constitution from being radically changed through the amending power. Relying on them to curb the amending power in Ethiopia is not tenable due to the hegemony of the ruling party-EPRDF and its strong party discipline.

4.2. Express Substantive Limitations in Ethiopia

Conspicuously, substantive limitation upon the amending power is not expressly provided under the Ethiopian Constitution. The amending clauses of the FDRE Constitution are so general that they give power to the HoPR, HoF and the regional state councils to amend the Constitution without any exception whatsoever.¹¹¹ Had the Constitution been intended to save certain matters from the operation of the amending power, it would have been perfectly easy for the framers to make that indication clear by adding a proviso to that effect. Consequently, the literal meaning of the amending clauses suggest that every provision of the Constitution can be amended by following the process prescribed there under and hence, it is possible to understand that there are no matters under the Ethiopian Constitution that have been provided to be beyond the reach of the amending power.

This position is also clearly purported by historical interpretation of the Constitution. The Minutes of the Constitutional Assembly that ratified the final draft reveals that the framers did not intend to create eternity clause under the FDRE Constitution.¹¹² During constitutional making discussions, some centralist members of the Assembly were in favor of adopting an easier mode of amending procedure for constitutional changes.¹¹³ These members supported flexible amendment procedures in order to enable the future generation to change the Constitution, particularly Article 39, without difficulty. This was challenged seriously by a significant number of members of the Assembly, who argued for a stringent amending procedure. This group, which was pro-federal in view wanted the stringent procedure for safeguarding human right and freedom provisions provided under Chapter Three of the Constitution in general and the rights of Nations, Nationalities and Peoples

¹¹¹ FDRE Constitution, *supra* note 94, Art. 104 and 105

¹¹² Minutes of Constitutional Assembly, Vol. 5 (1994, unpublished), HoPR Library, Addis Ababa, Ethiopia), pp. 5-20

¹¹³ *Ibid*

provided under Article 39 of the Constitution in particular.¹¹⁴ On this point, one prominent member of the assembly argued that “*the requirement of unanimity vote of state councils is inserted in the amending clause in order to make the amendment of human right provisions burdensome and impossible.*” He further stated, “*anyone who wants to change Article 39 of the Constitution can do the same when it acquired full control at all state councils, House of Peoples Representatives and House of Federation.*”¹¹⁵

From these discussions of the Assembly, it is possible to conclude that the framers preferred to prescribe stringent procedures to amend the Constitution and they did not envisage immutable provisions. Therefore, the literal as well as historical interpretation discloses that the power to amend the Ethiopian Constitution is not restricted based on ‘substantive’ grounds.

4.3. Implied Substantive Limitations in Ethiopia

As discussed above, no immutable provision is clearly provided in the Constitution. However, absence of substantive grounds in the text of a constitution does not necessarily imply unrestricted power to amend the constitution. As the comparative study and some foreign court practices suggest, the amending power may not be used to change the fundamental principles of the constitution.¹¹⁶ For instance, the study conducted by Yaniv Roznai demonstrates that the global trend is moving towards accepting the basic structure doctrine, even in those countries like Ethiopia where Constitutions lack un-amendable provisions.¹¹⁷

For instance, the concept of implied limitation has migrated from India to its neighbors Bangladesh and Pakistan to guard the salient features of their Constitutions from being changed through the amending power.¹¹⁸ The same idea was also endorsed in Africa where the idea of the basic feature doctrine influenced court decisions. For instance, in Kenya (2004) the High Court rejected the claim that the amendment power includes the power to make

¹¹⁴ *Ibid*, these members were represented from EPRDF, which was the main player on the overall constitutional making process. They were the prominent figures in the party. For instance Ato Kuma Demeksa and Ato Alemseged G/Amlak were among those who argued for such stringent procedures.

¹¹⁵ *Ibid*

¹¹⁶ See the discussion on Section 2.3.

¹¹⁷ Roznai, *supra* note 4, p. 79

¹¹⁸ *Ibid*, p. 60

changes, which amount to the replacement of the Constitution.¹¹⁹ Similarly, various courts from different legal traditions such as Asia, Africa, Europe and Latin America have identified a set of basic constitutional principles, which form the constitutional identity that cannot be abrogated through the constitutional amendment process.¹²⁰ The same would make sense in Ethiopia where the theoretical parameters of the Constitution, the purpose for which the Constitution was framed, its structural interpretation, and the concept of political self-defense divulge some implied limitations against the amending power.

4.3.1. Theoretical Parameters and Purpose of the Constitution

The 1995 FDRE Constitution came in the aftermath of a successful military revolution of the regionalist liberation fronts, particularly the champion EPRDF, mostly inspired by the 1960 Ethiopian Student Movement that focused on the ‘national oppression thesis,’¹²¹ against a centralist military regime.¹²² As an incidental result of the Ethiopian Student Movement, EPRDF, which was the main force on the constitutional making process, had reflected its leftist nationalist discourse on the process of constitutional making in terms of the ‘national oppression thesis as opposed to other competing interpretations of Ethiopian Imperial periods.’¹²³ Therefore, the Ethiopian Student Movement’s ‘nationalities question’ and the ‘national oppression thesis’ are the main political and philosophical backgrounds of the newly made FDRE Constitution.

¹¹⁹ *Ibid*, p. 65

¹²⁰ *Ibid*

¹²¹ ‘National Oppression’ came in to the Ethiopian political vocabulary with the spring of the Ethiopian Student Movement in the 1960, which was inspired by Marxism- Leninism. The Movement ‘echoed’ the term as part of its struggle for social justice and ethnic equality. Thus, the national oppression thesis understands the past of Ethiopia as a host of oppressed nations and nationalities who were politically and economically marginalized and culturally and linguistically dominated. The colonial thesis and the nation-building thesis, which mostly propagated by the Oromo and Amhara elites respectively, are also the other ways of understanding the past imperial periods of Ethiopia. EPRDF’s perspective on the Ethiopian politics was based on the national oppression thesis and thereby its political goal was to create a federation that accommodates unity and diversity. See Merera Gudina, *Contradictory Interpretations of Ethiopia History: the Need for a New Consensus*, in David Turton (ed.), *Ethnic Federalism: The Ethiopian Experience In Comparative Perspective* (2006), pp. 119-128

¹²² Assafa Endeshaw, *Ethiopia: Perspectives For Change And Renewal* (2002), pp. 71-83

¹²³ Jean-Nicolas Bach, *EPRDF’s Nation Building: Tinkering with Convictions and Pragmatism*, *Cadernos De Estudos Africanos* (December, 2014), pp. 105-106

As a new Constitution, it aims to represent a new era on the constitutional history of the country by reacting to past events of centralization and oppression. The Constitution, therefore, introduces the establishment of an ethnic-based federal form of government that sets it to be different from its predecessors, which provided for an overly centralized form of government.¹²⁴ Besides, the Ethiopian Constitution is unique in respect to the place it accords to Nations, Nationalities, and Peoples. The Preamble commences with the expression 'We the Nations, Nationalities, and Peoples of Ethiopia' to indicate that they are the building blocks of the federation.¹²⁵ The Constitution glaringly reaffirms this by declaring that all sovereign power resides in the Nations, Nationalities, and Peoples of Ethiopia.¹²⁶ Thus, the Constitution defines Ethiopia as a multicultural state whose internal situation is characterized by ethnic and cultural diversities. Consequently, it makes federalism as a necessary form of political organization to resolve the 'nationalities question' by accommodating diversities.¹²⁷

For this reason, the FDRE Constitution sought a magnificent break from the previous approaches of organizing Ethiopia as a centralized unitary form of government without recognition to ethno-linguistic groups.¹²⁸ It intended to transform the political structure of the country radically by introducing federalism and the self-determination rights of Nations, Nationalities, and Peoples. Therefore, federalization of the country is the main purpose of the FDRE Constitution.¹²⁹ This is also reaffirmed on the state of emergency clause that makes the nomenclature of the state and the right to self-determination up to secession, non-derogable.¹³⁰ Unlike the Indian Constitution that allows the federal structure of the state to be suspended during state of emergency, the FDRE Constitution requires it to be maintained even when there is an actual and imminent danger against the life of the nation.¹³¹ This shows the value

¹²⁴ Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative study* (2006), pp. 70-100

¹²⁵ *Ibid*

¹²⁶ FDRE Constitution, *supra* note 94, Art. 8

¹²⁷ Assefa Fiseha, *The Theory Versus Practice in the Implementation of Ethiopia's Ethnic Federalism*, in David Turton (ed.), *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective* (2006), pp. 131-132

¹²⁸ *Ibid*

¹²⁹ CUD Manifesto, *supra* note 79, pp. 107-108

¹³⁰ FDRE Constitution, *supra* note 94, Art. 93(4)(c)

¹³¹ Article 356 of the Indian Constitution

given for federalism, and the self-determination rights of Nations, Nationalities, and Peoples under the Ethiopian constitutional system. As an amendment must operate within the theoretical parameters of the existing Constitution, any proposal to transform them and create other kinds of system would lie outside the authority to amend the Constitution.¹³² As a result, federalism and the self-determination right of Nations, Nationalities, and Peoples are the main theoretical parameters and central aspects of the Constitution within which the amending power must be exercised.

Moreover, the FDRE Constitution declares itself to have established a democratic state and specifically it establishes a parliamentary democracy that assumes the exercise of freely and fairly contested periodic elections and representative assembly or assemblies that are the expression of popular will and hold power of a mandated period.¹³³ The democratic nomenclature cannot be suspended even during the state of emergency and this shows the special value given for the democratic nature of the state in the Ethiopian constitutional system.¹³⁴ The recent comparative constitutional law literature on militant democracy has converged on the principle that democracies have a right to defend themselves against their ‘enemies’ that are designed to undermine the democratic nature of the state.¹³⁵ In contrast to past practice, where authoritarian regimes were generally formed through military coup or other unconstitutional practices, political leaders now and again use constitutional rules for consolidating their powers. More importantly, regimes are increasingly turning towards constitutional amendment as a tool to erode the democratic nature of the state.¹³⁶

The recent experiences of Hungary, Ecuador, Venezuela and Bolivia suggest that the tools of constitutional amendment can be used to undermine the democratic order of the state.¹³⁷ Moreover, the amending power is also invoked to eliminate or prolong term limits to enable powerful incumbent presidents to remain in power without limitation, which is contrary to the principle of democracy.¹³⁸ Therefore, the concept of militant democracy that

¹³² Jackson and Mark Tushnet, *supra* note 3, p. 302

¹³³ FDRE Constitution, *supra* note 94, Art. 1, 45 and 54

¹³⁴ *Ibid*, Art. 93(4)(C)

¹³⁵ Capoccia, *supra* note 32, pp. 213-214

¹³⁶ Landau, *supra* note 7, pp. 195-196

¹³⁷ *Ibid*

¹³⁸ *Ibid*

requires democracy to defend itself dictates the amending power to be limited to save the destruction of the democratic and constitutional order of the state. Failure to limit this power leads to ‘political or democratic suicide.’¹³⁹ On the same vein, the amending power in Ethiopia must be constrained based on the notion of ‘democratic order’ that is articulated as a common objective by the constitutional framers on the Preamble of the Constitution.¹⁴⁰ Consequently, the constitutional amendment power may not be construed to defeat the essence of democracy in Ethiopia.

4.3.2. Structural Interpretation

Certainly, every constitution has its own spirit and a founding myth. However, this spirit and myths of the constitution may not be always understood from the plain reading of a certain provision in the constitution.¹⁴¹ In addition, it may be grasped through careful reading and studying of the whole document through structuralist approach that views the constitution in totality, based on its philosophy, spirit and purpose.¹⁴² In support of this position, the German Constitutional Court provided that; “*an individual constitutional provision cannot be considered as an isolated clause and interpreted alone. A constitution has an inner unity, and the meaning of any one part is linked to that of other provisions. Taken as a unit, a constitution reflects certain overarching principles and fundamental decisions to which individual provisions are subordinate.*”¹⁴³

The structuralist approach dictates the meaning of an individual constitutional provision to be discerned through examining the entire constitution.¹⁴⁴ It does not focus on specific constitutional provision in an isolated manner and it somewhat tries to ascertain the meaning through examining the interaction of a specific constitutional provision with the whole text and political order of the country.¹⁴⁵ According to this approach, the meaning of one provision is linked to that of the other provisions and when taken as a whole, the constitution reflects certain basic principles to which individual provisions are

¹³⁹ Capoccia, *supra* note 32

¹⁴⁰ FDRE Constitution, *supra* note 94, the Preamble

¹⁴¹ Barak, *supra* note 19, pp. 336-337

¹⁴² *Ibid*

¹⁴³ Preuss, *supra* note 1, pp. 199-201

¹⁴⁴ Donald P. Kommers, John F. Finn and Gary J. Jacobsohn, *American Constitutional Law: Essays, Cases, and Comparative Notes* (2010), pp. 31-49, 74-76

¹⁴⁵ *Ibid*

subordinate.¹⁴⁶ The amending clause, which is the source for the amending power, as an individual provision in the constitution, is also subordinate to these fundamental principles grasped through structuralism. Therefore, the amending power may not ruin fundamental principles, which are extracted through the structural interpretation of the constitution.¹⁴⁷

4.3.2.1. The Preamble to the Constitution

A preamble is the part of the constitution that best reflects the constitutional understandings of the framers.¹⁴⁸ It presents the history behind the constitution's enactment, as well as the nation's core principles and values.¹⁴⁹ Similarly, the framers of the FDRE Constitution articulated the main core values of the Constitution as: "building a political community founded on the rule of law, right to self-determination, human right protection, equality, lasting peace and democracy."¹⁵⁰ Furthermore, the Preamble affirms that the Constitution is intended to rectify historically unjust relationships and promote shared values of Nations, Nationalities, and Peoples.¹⁵¹ Thus, self-determination rights of Nations, Nationalities, and Peoples, the democratic order, rule of law, equality and fundamental rights and freedoms are the main principles behind the making of the FDRE Constitution. They are the main constitutional faiths upon which the whole system rests.

These stated principles have some legal implication since the preamble of the constitution is so controlling that it has a role as a guide for constitutional interpretation.¹⁵² This interpretive role of a preamble is practically endorsed in several court decisions. For instance, South Africa's Constitutional Court has confirmed the preamble's status as a guide when interpreting the Bill of Rights. In Ireland, similarly, the courts have been invoking the preamble to interpret the Irish Constitution, and as a guidance in understanding its spirit.¹⁵³ The use of preambles as a tool in constitutional interpretation is commonly invoked in

¹⁴⁶ *Ibid*; Krishanaswamy, *supra* note 53, p. 201

¹⁴⁷ Gozler, *supra* note 10, p. 69; Barak, *supra* note 19, p. 337

¹⁴⁸ Liav Orgad, *The Preamble in Constitutional Interpretation*, International Journal of Constitutional Law, Vol. 8, No. 4, I•CON Vol. 8 No. 4 (2010), p. 175

¹⁴⁹ *Ibid*

¹⁵⁰ FDRE Constitution, *supra* note 94, the Preamble

¹⁵¹ *Ibid*

¹⁵² Kommers *et al*, *supra* note 144, pp. 723-726

¹⁵³ *Ibid*

Ukraine and Germany as well.¹⁵⁴ The Preamble of the FDRE Constitution that embodies in a solemn form the ideas and aspirations of the Nations, Nationalities, and Peoples has such an interpretive role to determine the scope of the amending power. Accordingly, the power must be construed in the light of the principles incorporated under it and thereby the Constitution must not be amended in such a way as to go against its spirit.

4.3.2.2. Fundamental Principles (Chapter Two)

Moreover, the Ethiopian Constitution sets forth certain principles, such as the sovereignty of Nations, Nationalities, and Peoples, the supremacy of the Constitution, the inalienability and inviolability of human rights, secularism, accountability and transparency of the government, as fundamental.¹⁵⁵ These five principles reflect the transformative nature of the Constitution in the sense that they bring ideas not known on the constitutional history of Ethiopia. Uncommonly, the Constitution marks a departure from the past by conferring the sovereign power in the Nations, Nationalities, and Peoples of Ethiopia.¹⁵⁶ In pursuing this idea of sovereignty, the Constitution recognizes an ethnic-based federal structure and the right to self-determination, which includes the right to autonomy regarding language, history, culture, self-rule and representation.¹⁵⁷

The principle of constitutionalism is also enshrined on the Constitution. Accordingly, political power must be assumed and exercised in accordance with it.¹⁵⁸ In this regard, the Constitution spelled out a departure from Ethiopia's constitutional past in which force, religion and tradition, not law as such, were the sources of legitimacy.¹⁵⁹ Moreover, the Constitution incorporates the principle of constitutional supremacy that places the Constitution over all other laws or practices. Consequently, all laws, decisions and practices that are incompatible with the Constitution may not have effect.¹⁶⁰

¹⁵⁴ *Ibid*

¹⁵⁵ FDRE Constitution, *supra* note 94, Art. 8-12

¹⁵⁶ *Ibid*, Art. 8

¹⁵⁷ Getachew Assafa, *Ethiopian Constitutional Law: with Comparative Notes and Materials* (2012), p. 21

¹⁵⁸ FDRE Constitution, *supra* note 94, Art. 9

¹⁵⁹ Tsegaye Regassa, *Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia*, *Mizan Law Review*, Vol. 3, No. 2 (Sep. 2009), pp. 300-305

¹⁶⁰ FDRE Constitution, *supra* note 94, Art. 9

The FDRE Constitution marks a departure from that of the past regimes with regard to human rights as well.¹⁶¹ The Preamble states that full respect for individual and peoples fundamental freedoms is considered as an essential precondition for the achievement of the goals set out in the Constitution.¹⁶² In congruence with this, it devotes more than one third of its content to provisions on fundamental human and people's rights.¹⁶³ Besides, the Constitution stipulates the inviolability and inalienability of fundamental rights and freedoms of humankind as one of the fundamental principles of the Constitution.¹⁶⁴ This provision is the foundational base of the Ethiopian human right system that establishes the idea of inherence, universality, indivisibility and inviolability of human rights.¹⁶⁵ The FDRE Constitution made a different approach from the past, which gave the Ethiopian Orthodox faith the status of state religion, by incorporating the principle of secularism that separates state and religion, and thereby overruling any possibility of adopting a state religion or a religious state.¹⁶⁶ Moreover, accountability and transparency are essential creeds endorsed by the Constitution to guide the conduct of government and government officials.¹⁶⁷ Accordingly, all government affairs must be conducted transparently and public officials and elected representatives must be held accountable for any failure in their official duties. In addition, the people have the right to recall their elected representatives in cases where they do not deliver on their promises.¹⁶⁸

All these five fundamental principles were alien to Ethiopia's constitutional past and were introduced by the FDRE Constitution as a breakthrough. However, the Constitution does not articulate the legal implication and relation of these provisions towards the amending power. The collective effect of these five fundamental principles is that they create conducive environment for a better democratization of Ethiopia.¹⁶⁹ They define the innate features of the Constitution that mark its divergence from the past constitutions. These five fundamental principles provide a framework for exercising power within

¹⁶¹ Tsegaye, *supra* note 159, p. 296

¹⁶² FDRE Constitution, *supra* note 94, the Preamble

¹⁶³ *Ibid*, Chapter Three

¹⁶⁴ *Ibid*, Art. 10

¹⁶⁵ Tsegaye, *supra* note 159, p. 301

¹⁶⁶ FDRE Constitution, *supra* note 94, Art. 11; See Getachew, *supra* note 157, pp. 300-305

¹⁶⁷ *Ibid*, Art. 12

¹⁶⁸ *Ibid*

¹⁶⁹ Tsegaye, *supra* note 159, p. 302

the system and it is within this framework that the detailed rules of the Constitution make sense. Thus, they have the effect of shaping, influencing and controlling the behavior of legal and political actors exercising power in Ethiopia.¹⁷⁰ This is also true at the juncture of using the amending power for bringing change on the Constitution. They collectively indicate the parameters for exercising the power of constitutional amendment in Ethiopia and thus, the power should be exercised squarely with them.

4.3.2.3. Policy Objectives and Principles (Chapter Ten)

Mostly, constitutions consist of the policy objectives and principles reflecting a set of goals that are ingrained in a constitution to be achieved by a state.¹⁷¹ These policy objectives and principles represent a list of instructions and directions on the governance of the country.¹⁷² However, they do not always occupy a significant portion of the constitutional document and they may be found in different parts of the constitutional text including the preamble.¹⁷³ The South African Constitution is a notable example that does not have separate provisions relating to directive principles.¹⁷⁴ The Indian Constitution, on the other hand, consists of directive principles in the areas of social, economic, political, administrative, environmental, and peace and security matters.¹⁷⁵ These directive principles do not give rise directly to legal rights and therefore are not justiciable.¹⁷⁶ However, they are important in the governance of the country in the sense that they impose a duty on the federal, state and local governments to apply them when they make laws and discharge their official responsibilities.¹⁷⁷ Therefore, they serve as guiding principles on the making, implementation and interpretation of laws including the Indian Constitution.

¹⁷⁰ *Ibid*

¹⁷¹ Getachew, *supra* note 157, pp. 82-83

¹⁷² G. N. Okeke and C. Okeke, *The Justiciability of the Non-Justiciable Constitutional Policy of Governance in Nigeria*, IOSR Journal of Humanities and Social Science, Vol. 7, Issue 6 (2013), pp. 9-10

¹⁷³ Getachew, *supra* note 157, pp. 82-83

¹⁷⁴ *Ibid*

¹⁷⁵ Part Four of the Indian Constitution

¹⁷⁶ Art. 37 of the Indian Constitution

¹⁷⁷ Abdi Jibril and Kwadwo Appiagyei-Atua, *Justiciability of Directive Principles of State Policy: The Experience of Ethiopia and Ghana*, Ethiopian Journal of Human Rights, Vol. 1 (March 2013), pp. 4-8

The Constitution of India has influenced many constitutions in Africa including the FDRE Constitution, which provides national policy principles and objectives on political, economic, social, cultural and environmental matters.¹⁷⁸ Departing from the Constitution of India, which clearly stipulates their non-justiciability, the Ethiopian Constitution is silent on the issue in the sense that it does not state whether they are justiciable or not.¹⁷⁹ However, the Constitution clearly accords a ‘guideline’ status for these national policy principles and objectives.¹⁸⁰ As a result, they must guide the implementation of the Constitution, laws, and policies. This has its own implication on the amending power, which must be directed by them as well. For instance, the political objective requires the government to be guided by democratic principles. Moreover, it also requires the government to respect people’s self-rule right and the identity of Nations, Nationalities, and Peoples.¹⁸¹ These objectives and principle have some effect upon the bodies having the power to change the Constitution in the sense that they are required to be guided by them as an organ of the government at the federal as well as regional state levels.¹⁸² These guiding principles dictate how the amending power must be exercised to bring constitutional changes in Ethiopia. In other words, the HoPR, HoF and Regional Sate Councils need to keep these principles in mind when amending the Constitution.

Therefore, the declarations provided under the preamble, amending clause, state of emergency clause, Chapter Two, and Chapter Ten of the FDRE

¹⁷⁸ FDRE Constitution, *supra* note 94, Chapter Ten

¹⁷⁹ Abdi and Kwadwo, *supra* note 177, pp. 30-38. Abdi and Kwadwo argue for the justiciability of these directive principles, and they severely criticize the argument of ‘non-justiciability’ as very weak on the following grounds. First, such arguments seem to have been based on the experience of states whose constitutions expressly provide that directive principles are non-justiciable. Second, the silence of article 85 on justiciability of national policy objectives and principles does not make them non-justiciable because the Constitution as a whole is a justiciable document like any other law. Third, reading silence of the Constitution as a prohibition of its enforcement will lead to an absurd conclusion that declares all laws that do not make reference to their enforcement in courts or before quasi-judicial organs would be non-justiciable, albeit it is not necessary for laws to include a provision on their enforceability in order to be justiciable. Lastly, as all laws are made to guide the government and the citizens, the provisions that the government shall be guided by Chapter 10 of the Constitution cannot be understood as prohibiting their enforcement.

¹⁸⁰ FDRE Constitution, *supra* note 94, Art. 85

¹⁸¹ *Ibid* Art. 88

¹⁸² *Ibid*, Art. 85

Constitution together gives a comprehensive view of the fundamental values and principles of the Ethiopian Constitution. These values and principles are not mere cosmetic constitutional declarations without any legal significance. Rather, they would control the width and the extent of the amending power in the sense that the power may not be exercised in a manner that transcends them. As a result, the constitutional amendment power exercised by HoPR, HoF and regional state councils would necessary be shaped and controlled by these principles, which define the character, the end for which the Constitution was established and the nature of the constitutional system.

Concluding Remarks

As the comparative study demonstrates, constitutions use different approaches to cope with the dilemma of constitutional amendments. Some Constitutions like that of South Africa prescribe a stringent amendment procedure for protecting certain fundamental principles of the Constitution. However, some Constitutions like that of Germany, Brazil, and the US set forth certain provisions as un-amendable and subsequently put them beyond the reach of the amending power. The Indian experience is different from the above two approaches. The Constitution prescribes neither stringent procedure nor substantive limitations against the amending power. Somewhat the concept of implied limitation, which had been developed by the Indian Supreme Court, played a significant role to protect the fundamental and core elements of the Indian Constitution.

This Article reveals that the dilemma of constitutional amendment is also prevalent in Ethiopia. The FDRE Constitution is the main debatable area among political parties. The prominent opposition groups like UEDA and CUD associate it with EPRDF and additionally, they have stated “constitutional change” as one ambition in their political struggle. Others like EDP, UDJ and AEUP also planned a number of provisions for constitutional amendment including Article 39 and the ethnic based federal structure of Ethiopia. Most of the constitutional provisions the opposition parties promised to amend are so fundamental that a substantial alteration on any of them would bring radical change on the FDRE Constitution to the extent of creating a new one. Therefore, in Ethiopian the Constitution is an area of battle between political parties that struggle tenaciously for its ‘replacement’ under the guise of amendment.

It is also revealed that The FDRE Constitution prescribes a stringent amendment procedure for protecting some sacred provisions of the Constitution. This approach, however, does not effectively mark out the stop rule of the amending power. It does not successfully protect the Constitution from radical and substantial changes because the actual severity of the procedures may be attenuated by extra-legal factors like party system and party discipline.

The literal as well as historical interpretation of the Constitution suggests the absence of express substantive constraints against the amending power. However, it is aptly indicated in this Article that the absence of substantive limitations on the text of the FDRE Constitution does not mean the amending power is so plenary that it can change all provisions of the Constitution. It is argued that the theoretical parameters of the Constitution, the purpose for which it was framed, the concept of political self-defense and the structural interpretation of the Constitution, which examines the amending clause in relation with the Preamble, the state of emergency clause, the second and tenth Chapter of the Constitution entail an implied substantive limitation against the amending power. This way of interpreting the amending clauses of the FDRE Constitution would protect fundamental and core elements of the Constitution from being destroyed under the guise of constitutional amendment. In view of this, the democratic order, the rights of Nations, Nationalities, and Peoples, the inalienability and inviolability of human rights, secularism, accountability and transparency of the government, the supremacy of the Constitution, and federalism are identified as the basic principles, which should not be fundamentally tampered with through the amending power. Therefore, the power to amend the Ethiopian Constitution is restricted based on these 'implied substantive' grounds.