

# Constitution as Social Contract in Contemporary Ethiopia: The Need to Re-construct Political Arrangements

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## Abstract

Constitutions represent social contracts that accommodate subjective interests of groups within the framework of impersonal shared interests among citizens of the society at large. This article examines the contemporary social contract theory in relation to the constitutional making process in Ethiopia. The lawmaking process of Ethiopia's 1995 Constitution does not fulfil the procedural legitimacy of social contract because important sections of the society were neglected. The institutions created by the FDRE Constitution denote the subjectivist approaches to social contract theory thereby ignoring the impersonal interests of the society. To accommodate both the subjective ends and impersonal interests of the society, the Constitution should be reconstructed in light of the dualist contemporary social contract theory. This article argues that Ethiopia's contracting actors should consider both the *subjective* and *impersonal* interests of society. The article examines the conditions that make constitution a social contract. It also discusses the controversies concerning Ethiopia's Constitution in light of the theory of social contract, and tries to show what the Constitution should fulfil as a social contract in contemporary Ethiopia.

## Key terms:

Social Contract · Constitutional Making · Subjectivist · Objectivist · Dualist

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## 1. Introduction

The *social contract theory* –as a theory of the state– attempts to provide philosophical basis for ordered society and justifications for political obligations; and it binds individual persons together into a single polity by setting fundamental rules.<sup>1</sup> Hence, the very idea of constitutions must originate from the people through which they establish government structures, limit government powers, and entrench human rights.<sup>2</sup> It requires adequate representation of the society during the making of this social contract. It is contended that Ethiopia’s Constitution has not been able to establish a feasible constitutional system, where the interest of many is represented.<sup>3</sup>

Important sections of the society did not participate in the constitutional making process of the 1995 FDRE Constitution.<sup>4</sup> In this regard, Theodore M. Vestal notes:

In the process of drafting, debating, and ratifying the new constitution, the EPRDF/TGE lacked the most basic agreement necessary –the agreement to disagree. In order to make the constitutional decision genuine, the decision must be reached after mature deliberation of all parties who should participate in the decision. By confusing opposition with rebellion, the TGE [Transitional Government of Ethiopia] prevented key players from participating in deliberation.”<sup>5</sup>

This article argues that, as a result of omission of representation of the interests of many sections of the society, there has not been a credible political settlement in Ethiopia that has been able to create a healthy relationship between citizens, community groups, and the state. As a result, the original legitimacy of government power has always been contested.<sup>6</sup> There are several questions in the country that are related with

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<sup>1</sup> Jacob T. Levy (2009), “Not So Novus an Ordo: Constitutions without Social Contracts”, *Political Theory*, Volume 37, Issue 2, pp. 191-217.

<sup>2</sup> W. Elliot Bulmer (2014), “What is a constitution? Principles and concepts.” *International IDEA Constitution-Building Primer*, p. 5.

<sup>3</sup> See Alemante Gebreselassie (2015), “The Case for a New Constitution for Ethiopia”, *International Journal of Ethiopian Studies*, Volume 9, Issue 1 & 2, pp. 1-36.

<sup>4</sup> Theodore M. Vestal (1996), “An analysis of the new constitution of Ethiopia and the process of its adoption.” Volume 3, Issue 2, *Northeast African Studies*, pp. 21-38.

<sup>5</sup> *Id.* at 26

<sup>6</sup> Gedion T. Hessebon (2013), “The Precarious Future of the Ethiopian Constitution,” *Journal of African Law*, Volume 57, Issue 2, pp. 215-233; Tsegaye Regassa (2010), “The making and legitimacy of the Ethiopian constitution: towards

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political, economic, social and cultural issues which require urgent solution. This, it is argued, requires a strong desire for the re-construction of the political order, importantly based on a social contract between citizens and the state, which this article refers to as the *fight for constitution*.<sup>7</sup>

It is contended that the constitution making process of the FDRE Constitution only involved groups with similar or identical ideas and goals in spite of their different strategies.<sup>8</sup> There are three ways of looking at this issue: the first is by looking into the historical background of the making of the FDRE Constitution. In this regard, “the making of the Ethiopian Constitution had its beginnings in the transitional period ...”<sup>9</sup> whereby ethnically affiliated groups had played the key role in drafting the founding documents for the Constitution, which is the Transitional Charter. As Tsegaye Regassa stated, the Charter “...was more like a pact negotiated between ethno-nationalist liberation fronts that, through armed struggle, toppled the regime that was in power until May 1991. As such, it was primarily a peace document, an accord.”<sup>10</sup>

Secondly, it was noticed that there was lack of participation by those who were not supporters of the Ethiopian People Revolutionary Democratic Front

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bridging the gap between constitutional design and constitutional practice”, *Afrika focus*, Volume 23, Issue 1, pp. 85-118; Teguada Alebachew (2011), “When Constitution Lacks Legitimacy In The Making: The Case Of Ethiopia”, LLM Thesis, Addis Ababa University. Available at: <https://chilot.me/wp-content/uploads/2013/05/when-constitution-lacks-legitimacy-in-the-making-the-case-of-ethiopia.pdf>

<sup>7</sup> The Ethiopian *fight for the constitution* steamed in the past, particularly in modern history of Ethiopia. The modern history of Ethiopia starts with Emperor Tewodros II, followed by Emperor Yohannes IV, Emperor Menelik II and Emperor Haile Selassie I. The main reason to consider these periods is: first, a strong centralization process has been initiated and consolidated during this period; second, there was a strong aspiration to modernize the country<sup>7</sup>; third, most of the modern government structure was rooted at this period. See Teshale Tibebe (1995), *The making of modern Ethiopia: 1896-1974* (The Red Sea Press) p. 31; Solomon Gashaw (1993), “Nationalism and ethnic conflict in Ethiopia,” *The rising tide of cultural pluralism: The nation-state at bay*, p 156; Jan Záhorkík (2013), “3 Ethnicity and Regime Change in Ethiopia,” *Regime Change and Succession Politics in Africa: Five Decades of Misrule* 9: 48; Patrick Gilkes (1975), *The dying lion: Feudalism and modernization in Ethiopia* (New York: St. Martin's Press).

<sup>8</sup> Tsegaye, *supra* note 6, at 99 and Vestal, *supra* note 4.

<sup>9</sup> *Ibid*, Tsegaye, *supra* note 6.

<sup>10</sup> *Ibid*.

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(EPRDF) or members in the constitutional making process.<sup>11</sup> Thirdly, even those who got the opportunity to represent non-ethnic interests, could not get their ideas across due to the domination of voting by EPRDF.<sup>12</sup> At the legislative process of the Charter, the representatives of ethnic affiliated groups were unwilling to accommodate the interest of others. As a result, the impersonal interests of the society were not represented, since the representatives were only motivated by their subjective ends. This renders the Ethiopian constitution a *subjectivist* social contract, thereby missing out on agents who were motivated by *impersonal* interests.

This article argues that the recent political trend in Ethiopia envisages a new political arrangement through social contract. Hence, since a constitution is a social contract, the contracting actors of Ethiopia should consider both the subjective and impersonal interests of the society. In so doing, this article analyzes the conditions that make the constitution a social contract. Moreover, it examines the controversies with regard to the constitution in Ethiopia in light of the theory of social contract. Finally, it tries to show what the Constitution should fulfill as a Social Contract in Contemporary Ethiopia.

## 2. Contemporary Social Contract through the Lens of Competing Theories

Despite their various forms, contemporary social contract theorists support the idea that *agreement* serves as a framework of justification for certain political arrangements.<sup>13</sup> The theory provides the rationale behind creating political arrangements, espoused at a discrete moment in hypothetical time, which is derived from the consent of members in the political arrangement, where the form and content of this consent derives from the idea of mutual agreement.<sup>14</sup> However, even if they agree on the importance of agreement to establish a political arrangement, contemporary social contract theorists have different understanding of the means and method of achieving that.<sup>15</sup>

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<sup>11</sup> Interview with Negasso Gidada (4 January 2012) by Theodore M. Vestel cited in Vestel, *supra* note 4.

<sup>12</sup> Tsegaye, *supra* note 6, at 102.

<sup>13</sup> Greg Hill (1995), "Reason and will in contemporary social contract theory", *Political Research Quarterly*, Volume 48, Issue 1, pp. 101-116.

<sup>14</sup> Jason Neidleman (2012), "The social contract theory in a global context", *E-International Relations Publishing*. Available at: <https://www.e-ir.info/2012/10/09/the-social-contract-theory-in-a-global-context/>.

<sup>15</sup> Hill, *supra* note 13.

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In this regard, they are generally divided into three main categories.<sup>16</sup> From the perspective of constitutional making, the difference within contemporary social contract theorists depends upon their characterization of the parties to the agreement and their justification to reach an agreement.<sup>17</sup> A distinction is thus drawn between the *subjectivist (personals)* and *objectivist (impersonals)* as well as the alternative theory, which has an element of both (*dualist*).<sup>18</sup>

The fundamental principles of constitutions essentially derive from the various interests of individuals and groups of the society. It is these interests that should lead to concluding a social contract by which the principles and institutions governing the divergent interests of various sections of the society are agreed upon. Thus, the parties involved in the social contact and their justificatory problems and needs that necessitate the social contact are very important relating to the conclusion about what kind of political arrangements should be created.

*Subjectivist* social contact theorists, such as Buchanan<sup>19</sup> and Gauthier<sup>20</sup>, believe that the parties to the contract are usually moved by their own *subjective interests* without the need to look at the interest of others impersonally.<sup>21</sup> Consequently, they seek to justify political institutions by showing what they would agree upon as a rational means of advancing each person's subjective ends.<sup>22</sup>

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<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> Fred D'Agostino, Gerald Gaus, and John Thrasher (2019), "Contemporary Approaches to the Social Contract", *the Stanford Encyclopedia of Philosophy*, Edward N. Zalta (ed.), available at <https://plato.stanford.edu/archives/fall2019/entries/contractarianism-contemporary/>

<sup>19</sup> James M Buchanan (1975), *The limits of liberty: Between Anarchy and Leviathan*, No. 714, University of Chicago Press.

<sup>20</sup> David Gauthier (1986), *Morals by agreement*, Oxford University Press on Demand.

<sup>21</sup> David Gauthier specifically, in his work 'Hobbes's Social Contract', makes a strong argument that Hobbes was right in saying both politics and morality as founded upon an agreement between exclusively self-interested yet rational persons. See David Gauthier (1988), "Symposium Papers, Comments and an Abstract: Hobbes's Social Contract", *Nous*, Volume. 22, No. 1, pp. 71-82.

<sup>22</sup> Gauthier, *supra* note 20; Binmore, K. G. (1994), *Game theory and the social contract: just playing* (Vol. 2), MIT Press; Buchanan, *supra* note 19; Brennan, Geoffrey, and James M. Buchanan (2008), *The reason of rules: Constitutional political economy*, Cambridge University Press.

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They argue that people are motivated solely by their own self-interest and their purpose is always to maximize their want and desire.<sup>23</sup> As a result, they rationally assess the best strategy to attain their subjective ends, which will lead them to act morally and hence consent to social contact.<sup>24</sup> They strongly believe that anything short of their self-interest would undermine their interest. Thus, their aim is to discover the most efficient political arrangement for serving each other's personal antecedent without worrying about the interests of others impersonally.<sup>25</sup> The most important element here is that contactors in this category do not consider interests other than their own while bargaining terms of the social contract.

*Objectivist* theorists, on the other hand, envisage an agreement reached by parties who are moved exclusively by *impersonal interests and concerns*, without reference to their particular personal interests.<sup>26</sup> They aim to justify principles of right and political institutions by showing that they would be agreed upon by persons who are thought to share certain fundamental moral interests.<sup>27</sup> Rawls, the prominent theorist in this category, seeks a set of principles –which he calls '*irreducible moral ideas*'– in terms of which free and equal citizens can justify their institutions on the grounds that everyone can affirm.<sup>28</sup>

The moral ideas suggested by Rawls are incorporated in the original position under the condition imposed by '*veil of ignorance*' where one is denied any particular knowledge of one's circumstances, such as gender, race, particular talents or disabilities, age, social status, particular conception of good life, or the particular state of the society in which one lives.<sup>29</sup> Hence, according to Rawls, the task of social contract is to make people's principles

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<sup>23</sup> *Ibid.*

<sup>24</sup> Jessica Hawkins (2011), "Annotated Bibliography on 'Exploring a 'social contract's approach to the politics of poverty reduction'," *CPRC Working Paper 217*, Institute for Development Policy and Management School of Environment and Development, the University of Manchester, July 2011.

<sup>25</sup> James M. Buchanan (2003), "Politics as Tragedy in Several Acts", *Economics & Politics*, Volume 15, No. 2, pp. 181-191.

<sup>26</sup> Nicholas Southwood (2013), *Contractualism and the Foundations of Morality*, OUP Oxford; Gerald Gaus (2010), *The order of public reason: A theory of freedom and morality in a diverse and bounded world*, Cambridge University Press; John C. Harsanyi (1976), *Essays on ethics, social behaviour, and scientific explanation*, Volume 12, Springer Science & Business Media.

<sup>27</sup> *Ibid.*

<sup>28</sup> Samuel Freeman (2009), *Justice and the social contract: Essays on Rawlsian political philosophy*, Oxford University Press.

<sup>29</sup> John Rawls (1971), *A Theory of Justice*. Cambridge, MA: Harvard University.

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of right and political arrangements mutually acceptable to one another.<sup>30</sup> Under this conception, the contracting parties do not focus on what political arrangement will advance their subjective ends. Instead, parties to a social contract should give primacy to the principles that might serve as a basis on which we can justify our institutions to one another.

These two interpretations of contemporary social contract theory represent different perspectives. Subjectivists seek principles that would be reasonable from everyone's position, whereas objectivists go after principles that would be chosen under a setting of ignorance of one's position (i.e. without taking one's identity, social status, etc. into account). Thus, while subjectivists focus on accommodating different point of views, objectivists target at a rational choice.

When we see the aforementioned two approaches to contemporary social contract theory, they are not self-sufficient to solve the current political controversies. Nor is either approach less important than the other. Rather, both are very important, subject to the *caveat* that it will be a significant limitation if either of the approaches is taken as a sole foundation of social contact in contemporary political discourse and constitutional lawmaking. This necessitates reference to other contemporary social contact theories, which can accommodate both interests.

In this regard, an alternative contract view has emerged, as advocated by Nagel and Scanlon, which envisions an agreement reached by persons who are partisan to their own interests, but willing to impartially consider the claims of others.<sup>31</sup> This 'dualist' approach evaluates the principles and institutions by asking whether they would be accepted by persons who are moved by particular concerns, but who are willing to consider their commitments equally alongside the interests of others.<sup>32</sup> In this regard, dualists opt for the social contracts which are driven by both subjective and impersonal standpoints.

In criticizing the subjectivist approach, both Nagel and Scanlon contend that parties in the contract have the capacity to consider their interests from

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<sup>30</sup> John Rawls (1980), "Kantian constructivism in moral theory", *The Journal of Philosophy*, Volume 77, No. 9, pp. 515-572.

<sup>31</sup> Thomas Nagel (1995), *Equality and Partiality*, Oxford University Press; Thomas M. Scanlon (1982), "Contractualism and utilitarianism", in. Amartya Sen und Bernard Williams (Hg.), *Utilitarianism and Beyond*, Cambridge, p. 110; Thomas Scanlon (1998), *What We Owe to Each Other*, Cambridge: Harvard University.

<sup>32</sup> Hill, *supra* note 13.

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an impersonal vantage point, viewing their concerns impartially alongside the interest of others.<sup>33</sup> They argue that human beings, by their very nature, are able to see both their personal interests and the interest of others. In a hypothetical scenario where society is under the condition of not having justified political arrangement, the reasons for the society to conclude social contract are not only guided by the interests of individuals or groups, but participants in the social contract also have the ability and desire to make no reference to their particular wants and desires.<sup>34</sup> As Scanlon notes, “in an agreement, the parties might be both agent-relatives and agent neutrals; and no one can easily reject the impersonal stand point of agent-neutrals”.<sup>35</sup>

On the other hand, objectivists are criticized for their failure to recognize the fact that some moral considerations arise, not only from the impersonal standpoints but also from the very nature of our particularity. This is because human beings, by nature, legitimately view their own interest and commitments differently from the concern of others.<sup>36</sup> Therefore, dualists believe that feasible political institutions must be designed so that the requirements of impartiality can reasonably be met by individuals with strong personal motives.<sup>37</sup> It is argued that in the contemporary world, the dualist approach fits better than the two other approaches.

### 3. Social Contract in the Context of Constitutional Making

#### 3.1 Ethno-cultural politics and its challenges in social contract

At present, there are two alarmingly growing concerns in various societies. On the one hand, ‘ethno-cultural based politics’ is growing and becoming the mainstream political arrangement, especially in divided societies. And on the other hand, there is strong desire for the respect of individual human rights and promotion of democracy. While the former is based on subjective ends, the latter is, at least foundationally, based on impersonal standpoints, whereby the interests of every group and individual is best represented and accommodated. Ethno-cultural based groups in social contact would most likely bring their subjective concerns to the agreement. They have particular

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<sup>33</sup> Thomas Nagel (1986), *The View from Nowhere*, Oxford University Press, pp. 171-175; Scanlon, *supra* note 31, pp. 110-115.

<sup>34</sup> Thomas Nagel (1978), *The possibility of altruism*, Princeton University Press; Scanlon, *supra* note 31, at 110-115.

<sup>35</sup> Thomas M Scanlon (2014), *Being realistic about reasons*, Oxford University Press.

<sup>36</sup> Thomas Nagel (1987), “Moral conflict and political legitimacy”, *Philosophy & Public Affairs*, Volume 16, No. 3, pp. 215-240.

<sup>37</sup> Nagel, *supra* note 31.

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socio-political concerns, which lead them to subjective justifications to form a certain political arrangement. For them, the best political arrangement is one, which helps them achieve their particular ends by creating a strong bargaining power.

However, scholars like Will Kymlicka seem to pursue a liberal variant of ethno-cultural politics. In his book that discusses a liberal theory of minority rights,<sup>38</sup> Kymlicka argues that the liberal ethno-cultural politics is based on fundamental principle of justice, which provides tools with which liberal constitutionalism can formulate just and workable solution to racial, ethnic and cultural problems.<sup>39</sup> He suggests that individual freedom will be addressed through his/her participation in a ‘societal culture’ which provides meaningful ways of life across a full range of human activities, including social, educational, religious, recreational and economic life.<sup>40</sup> Nevertheless, the argument proposed by Kymlicka is only correct when we see individual freedom through the lens of cultural groups, in a liberal sense of its understanding.

The first problem with this kind of understanding is that the said workable solution is mostly feasible through liberal democracy. Otherwise, one cannot guarantee the respect of individual rights focusing on group rights for the latter mostly is a right held by a group (as a group) rather than by its members severally.<sup>41</sup> Kymlicka even said the “liberals can only endorse minority rights in so far as they are consistent with respect for the freedom or autonomy of individuals.”<sup>42</sup> Thus, the theory is unlikely to be practical in a society that lacks liberal democratic values (including institutions), that has limited resources and is highly divided along ethnic lines. The main reason is the high possibility of various ethnic groups to weaponize and politicize identity. This results in high competition for resources and political power, greater recognition of their distinctive identities, and greater freedom and opportunity to retain and develop their

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<sup>38</sup> Will Kymlicka (1995), *Multicultural Citizenship*, New York, Oxford University Press.

<sup>39</sup> Triadafilos Triadafilopoulos (1997), “Culture vs citizenship? A review and critique of Will Kymlicka's *Multicultural Citizenship*”, *Citizenship Studies*, Volume 1, No. 2, pp. 267 - 277

<sup>40</sup> *Ibid.*

<sup>41</sup> Peter Jones, (2014), “Group Rights”, *Stanford Encyclopedia of Philosophy*. Available at <https://plato.stanford.edu/entries/rights-group/>

<sup>42</sup> Kymlicka, *supra* note 38, at 75.

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distinctive cultural practices thereby causing a challenge for liberal democracies.<sup>43</sup>

Secondly, even though, one can argue that ethnically differentiated groups do have some impersonal claims such as justice, fairness and fair economic distribution of resources, they still are not able to look into the interests of other groups *impersonally* because those demands, by nature, are claimed for the members of the respective groups only. In addition, ethnically differentiated groups can still overlook the interest of certain individuals and groups within its own groups, such as: individuals with mixed identity and individuals with no sense of cultural identity.

The challenges under such settings include the contest for *populism* (constituency support) among political groups within the ethno-cultural group so that radical claims and promises that seem to attract most members of the ethno-cultural group would inevitably lead to further sectarian 'radicalism' thereby aggravating polarities against other ethno-cultural groups and the society at large. Moreover, it is to be noted that ethno-cultural politics mostly ignores intra group differences.<sup>44</sup> In this regard, the interest of different groups that would be asked in the social contract is often influenced by different dimensions of their identities as opposed to sole reference to their ethno-cultural identity.

For example, the interest of a certain ethnic group in the social contract and the interest of women as a large group (irrespective their ethnic identity) might be completely different; i.e., the need of women to be protected from harmful traditional practices might be in contradiction with a certain ethnic group's cultural interest, particularly, if there arises a need to sustain the practice as an expression of the group's cultural identity. As a result, the interest of women in the group would probably be ignored, which contributes to a tension among groups within groups.<sup>45</sup>

Therefore, the readiness of ethno-cultural groups to compromise their particular claims for the interests of others is questionable. Groupings in most circumstances may lead to the exclusion of others, which will eventually make the agreement unfair. In order to avoid this, some other impersonal interests must be represented and heard in the process of making

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<sup>43</sup> Raphael Cohen-Almagor (2018), "Between Individual Rights and Group Rights", *Academicus International Scientific Journal*, Volume 9 No 18, pp. 9-25.

<sup>44</sup> Kimberle Williams Crenshaw (1990), "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color", *Stanford Law Review*, Volume 43, pp. 1241-1299.

<sup>45</sup> *Ibid.*

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the social contract. For example, in the context of competing interests of ethnically affiliated groups *vis-à-vis* individuals that pursue humanitarian purposes, the former are likely to focus more on the interests of the ethnic group one is affiliated with. Thus, in the social contract, one would be agreeing on the terms, which is substantially beneficial for the group it represents. Under such settings, the individual who objectively pursues a wider conception of rights, fairness and justice espouses views and interests that are based on impersonal reasons of serving the larger society including other groups to meet their goals.

### **3.2 Common denominators between a constitution and social contract**

It is common practice that people usually consider a constitution as a social contract.<sup>46</sup> Yet, from the perspective of social contract theory, it is difficult to, conclusively say that constitution is a social contract. This is because the idea of social contract theory is based on a hypothetical understanding of the state of nature.<sup>47</sup> In other words, the whole theory, particularly the modern conception of social contract theory is based on the imaginary scenario of state of nature, where there is no law and order.<sup>48</sup> For that reason, the very idea of social contract theory presupposes the non-existence of social order, government and laws. Nevertheless, a constitution is based on the existing state structure as a new base of legitimacy of ruling.<sup>49</sup> In this regard, one may argue that it is erroneous to say constitution is a social contract.

However, even if the foundations of social contract theory and a constitution are different, there are plenty of reasons that enable us to consider a constitution as a social contract. The first reason is simply by understanding constitution as a more realistic view of social contract. In this regard, we should take constitution as a mechanism by which the ideas of social contract theory can be put into practice. The fact that social contract theory is based on hypothesis does not mean that the theory cannot, in any

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<sup>46</sup> Paul Lermack (2006), "The Constitution Is the Social Contract. So It Must Be a Contract... Right? A Critique of Originalism as Interpretive Method", *Wm. Mitchell L. Rev.*, Volume 33, Issue. 4, pp. 1403-1445.

<sup>47</sup> Manzoor Elahi Laskar (2013), "Summary of Social Contract Theory by Hobbes, Locke and Rousseau", *Locke and Rousseau*.

<sup>48</sup> Mark Whitehead, R. Jones & M. Jones (2007), *The Nature of the State: Excavating the Political Ecologies of the Modern State*, Oxford University Press.

<sup>49</sup> Richard H. Fallon Jr (2004), "Legitimacy and the Constitution", *Harv. L. Rev.*, Volume 118, pp. 1787-1853.

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way, be understood realistically since both are there to serve as instruments of legitimatizing ruling.<sup>50</sup> Legitimacy of the political authority is founded on the concept that legitimacy is the unique right of the State to impose binding duties to its subjects and to use coercion to enforce these duties so that the subjects comply with them.<sup>51</sup> So, if legitimacy is a right of the state to use coercion, the society must give consent to be coerced and determine the extent of coercion, which will be exercised by the sovereign.

The best way to put social contract theory and constitutions into harmony is by understanding social contract theory as the systematic way of understanding how social order under government was created; and constitution, on the other hand, as practical mechanism of how the social order should be ruled. Therefore, the former is a theory of how state is formed in the first place; and the latter is about how government assumes legitimate power after the state is formed. As a result, it is fair to say that both have the same goal.

The second reason that justifies considering constitution as a social contract is that they are both based on consent. The ultimate purpose of both social contract and a constitution is to legitimize government's power. Legitimate government results when individuals establish a government that secures their rights through their consent.<sup>52</sup> There are, however, differences among social contract theorists on the scope of legitimate power accorded to the government. Accordingly, Hobbes had supported a strong and absolute sovereign that can maintain peace and security.<sup>53</sup> On the other hand, according to John Locke, whenever any form of government becomes destructive, it is the right of the people to alter or abolish it, and to institute a new government.<sup>54</sup> Locke's idea has indeed influenced modern constitutions.<sup>55</sup>

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<sup>50</sup> Neophitos Economides (2018), "The Theory of Social Contract and Legitimacy Today", *Mediterranean Journal of Social Sciences*, Volume 9, No.5, pp. 19-28.

<sup>51</sup> A. John Simmons (1999), "Justification and legitimacy", *Ethics*, Volume 109, No. 4, pp. 739-771.

<sup>52</sup> Regina Queiroz (2018), "Individual liberty and the importance of the concept of the people", *Palgrave Communications*, Volume 4, Issue1, pp. 1-12.

<sup>53</sup> Sharon A. Lloyd and Susanne Sreedhar (2002), "Hobbes's Moral and Political Philosophy", *The Stanford Encyclopedia of Philosophy*.

<sup>54</sup> John Dunn (1982), *The Political Thought of John Locke: An historical account of the argument of the 'Two Treatises of Government'*, Cambridge University Press.

<sup>55</sup> R. J. Harrison and P. J. Harrison (1961), "Locke's Two Treatises of Government", *The Australian Quarterly*, Volume 33, No. 2, pp. 119-122.

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At present, most countries have constitutions that endorse the idea of limited government, at least in the text of their constitutional provisions.<sup>56</sup> Furthermore, the social contract theory and constitutions are both used by citizens to protect their private rights such as the right to life, liberty and property from the interference of others. Social contract theory, particularly John Locke's theory, suggests that all human beings are endowed with fundamental rights.<sup>57</sup> It is with the purpose of securing these rights that governments are instituted by the consent of the governed. Same as above, the very idea of the constitution is also to safeguard fundamental rights and freedoms to which citizens have given consent either directly by referendum or indirectly through their chosen representatives.

Both social contract and constitutions are based on consent. Social contract suggests that governmental power emanates from the people and rests on the consent of the governed.<sup>58</sup> Likewise, constitution is a mechanism by which citizens give their consent to the governing body to express some sort of control and power over them. The only difference in this regard relates to the imaginary *versus* realistic dichotomy because the consent by citizens in social contract is imaginary while the constitution is the manifestation of the consent of citizens. Therefore, just like social contract, constitution is the agreement between individuals of the same country and between the government and the individuals subject to collectively enforced social arrangements.

#### 4. Re-constructing Social Contract in Ethiopia

Ethiopia is in a critical historical period. Though, arguably, free and fair election has been conducted recently, past as well as recent political developments have shown us that the country's political crisis will not be solved merely by holding elections. This is because, the main goal of election is for the government to get legitimacy based on the existing constitution. Nonetheless, the existing constitution is a very contentious document. In this regard, the legitimacy of the constitution is questioned.<sup>59</sup>

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<sup>56</sup> José Luis Cordeiro (2008), *Constitutions around the world: a view from Latin America*, Maddex, Robert L. Constitutions of the World. Cq Pres.

<sup>57</sup> Patricia Sheridan (2011), "Locke's moral philosophy", *Stanford Encyclopedia of Philosophy*.

<sup>58</sup> Paul Lermack, *supra* note 46. Available at: <http://open.mitchellhamline.edu/wmlr/vol33/iss4/1>

<sup>59</sup> Gedion, *supra* note 6; Tsegaye, *supra* note 6; Teguada, *supra* note 6

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Even though most agree on the lack of original legitimacy of the FDRE Constitution, some believe that it can have a derivative legitimacy, for example through aggressive implementation.<sup>60</sup> This author strongly believes that the Constitution's derivative legitimacy is far from being realized. The due date to derivatively legitimize the Constitution has already passed due to lack of constitutional solutions for various claims of the society. The country's political division has already widened thereby showing that aggressive implementation of the Constitution would not bring appropriate solution.

Legitimizing the FDRE Constitution through comprehensive constitutional reform without touching the basic architecture and cornerstone of the constitution has also been suggested.<sup>61</sup> Nevertheless, this is also not attainable because most of the socio-political controversies in Ethiopia are on the issues believed to be the cornerstones of the constitution. As a result, it is better to attain original legitimacy of the constitution by reconstructing the political arrangements rather than attempting to derivatively entail the legitimacy of the constitution.

With regard to the lack of original legitimacy, the FDRE Constitution has been contested since it was enacted.<sup>62</sup> From the perspective of contemporary social contract theory, it is believed that the making process of the FDRE Constitution only represented groups with *subjective* interests.<sup>63</sup> As a result, the issue of inclusive representation has always been raised while contesting its legitimacy. In this regard, there are various groups who claimed that their interest had not been represented in the process of making the FDRE Constitution.<sup>64</sup> Some believed that the Constitution making process was dominated by certain groups from the initiation up to the deliberation stage thereby entailing weak original legitimacy.<sup>65</sup>

In this regard, many believe that the process of constitution making was not democratic because of the domination of one interest group and the ensuing flawed process.<sup>66</sup> As Negasso Gidada argued, the making of the draft and the adoption of the Constitution were dominated by one majority party (Ethiopian Peoples' Revolutionary Democratic Front (EPRDF)) and

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<sup>60</sup> Tsegaye, *supra* note 6

<sup>61</sup> Gedion, *supra* note 6

<sup>62</sup> Gedion, *supra* note 6; Tsegaye, *supra* note 6; Teguada, *supra* note 6

<sup>63</sup> *Ibid*

<sup>64</sup> Tsegaye, *supra* note 6; Vestal, *supra* note 4

<sup>65</sup> Tsegaye, *supra* note 6

<sup>66</sup> Vestal, *supra* note 4

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ethnically affiliated rebel groups.<sup>67</sup> The main institutions involved in the deliberation process, Council of Representatives and Constitutional Assembly were dominated by EPRDF.<sup>68</sup>

EPRDF was an ethnically organized party and the ones who participated were ethnically assembled parties who represented interests of their respective ethnic groups. Thus, it is fair to say that the making of the FDRE Constitution was dominated by groups with subjective interests, and various institutions mainly represented the subjective interests of ethnic groups. In this regard, Yonatan Tesfaye noted that, the Constitution “by adopting an institutional arrangement that represents a marriage between federalism and ethnicity, has provided practical effect to its act of recognition of [ethnic identity].”<sup>69</sup>

The political discourse that is prevalent to this day started immediately after the adoption of the 1995 Constitution. The debate is whether it has brought, through federal system of government, hope for peace, freedom, protection of human rights and multiculturalism. Despite its flaws, with the adoption of a new constitution that ostensibly protects human and democratic rights and the establishment of democratic institutions, an inspiring human and economic development were expected. However, expectations suffered various setbacks. In this regard, Assefa Fiseha stated that the Ethiopian federation experienced an entanglement with the ruling

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<sup>67</sup> In an interview with Addis standard on 11 March 2016, Dr. Negaso state that

‘In 1991, in the wake of the collapse of the military Derg, there were different national liberation movements which were very active all over the country. Among these the strongest ones were the Tigray People Liberation front (TPLF) and the Oromo Liberation Front (OLF). Others include West Somali Liberation Front (W.S.L.F), Ogaden National Liberation Front (O.N.L.F.), and the Sidama National Liberation Movement (SNLM). There were also several liberation movements or fronts that represented the peoples of Afar, Gambella, and Benshangul, among the few.’

“Ethiopia’s Constitution: Can it Stand the Test of Time?”, Addis Standard/All Africa Interview with Dr. Negasso Gidada, 11 March 2016. Available at:

<https://addisstandard.com/ethiopias-constitution-can-it-stand-the-test-of-time/>

<sup>68</sup> Tsegaye R Ararssa (2016), “Ethiopia’s Constitution: Fractured Legitimacy & the Urgency of Constitutional Transfiguration”, *World News/Africa/Commentary/Topic of the Month*, March 18 . Available at <https://addisstandard.com/ethiopias-constitution-fractured-legitimacy-the-urgency-of-constitutional-transfiguration/>

<sup>69</sup> Yonatan Tesfaye Fesha (2008), *Institutional recognition and accommodation of ethnic diversity: federalism in South Africa and Ethiopia*, Diss. University of the Western Cape.

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party, it relied on soft institutions of democracy, has narrow based institutions of power sharing, and limited role of the states to design policies that fit their local context.<sup>70</sup>

These problems worsened after the 2005 elections because the political space dwindled, and political persecution, inequality and competition for resource control intensified.<sup>71</sup> Consequently, various questions and protests started to emerge. The major political crisis after the protest following the result of the 2005 elections started in Oromia which was sparked by a government plan to expand the territorial and administrative limits of the city of Addis Ababa (capital of Ethiopia) into neighboring Oromia towns.<sup>72</sup> The protest later spread out to different parts of the country, particularly in Amhara region where the people shared the concern of their Oromia counterparts. As a result, the country's political turmoil continued until 2018, and ultimately brought about the new reform government that took control of the power by electing a new Prime Minister.<sup>73</sup>

The political reform, created hope and revival in the political discourse of the Country.<sup>74</sup> However, at the national and sub-national levels, there are unresolved political challenges that would call for a new political arrangement. Even if the political space is opened to all actors, the subsequent enjoyment of rights relating to freedom of peaceful assembly and association are polarized. Ethnic based youth associations are curbing freedom of association, participation and other rights such as equality, inclusiveness and non-discrimination.<sup>75</sup> As a result, various political issues that were previously boiling inside the pot, have now exploded to make the country's future more uncertain. For example, the civil unrest following two main incidents (withdrawal of security guards of a prominent Oromo activist Jawar Mohammed and the incidents that followed the killing of a famous

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<sup>70</sup> Assefa Fiseha (2012), "Ethiopia's Experiment in Accommodating Diversity: 20 Years' Balance Sheet", *Regional and Federal Studies*, Volume 22, No. 4, pp 435–473.

<sup>71</sup> International Crisis Group (2019), "Managing Ethiopia's Unsettled Transition", *African Report* 269.

<sup>72</sup> Jan Záhorský (2017), "Reconsidering Ethiopia's ethnic politics in the light of the Addis Ababa Master Plan and anti-governmental protests", *The Journal of the Middle East and Africa*, Volume 8, No.3, pp. 257-272.

<sup>73</sup> Paul schemm (2018), "Ethiopia chooses new leader from protest-hit region in break from past", *the Washington Post, Africa*. (March 18, 2018)

<sup>74</sup> International Crisis Group, *supra* note 71

<sup>75</sup> Ethiopia's factional politics (2020), Strategic Comments, 26:2, x-xii, DOI: 10.1080/13567888.2020.1762348.

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Oromo singer Hachalu Hundessa), had shaken the country's socio-political life and created suspicion on the government's ability to enforce law and order.

Even worse, there is military engagement between the Ethiopian National Defense Force (ENDF) and the previously dominant group who ruled Ethiopia since 1991 (TPLF).<sup>76</sup> The root causes of the crisis is clearly attributable to the exaggerated sentiments of ethno-nationalism. The major actors that have caused the ongoing political crisis are ethnic elites. These elites define and articulate their ethnic group rights, political cause or agenda and mobilize the public support from their own ethnic group.<sup>77</sup> They anticipate socio-economic and political entitlements of their ethnic group and compete for power.<sup>78</sup> Hence, formally or informally, they organize and lead the movements and unrests.

The other non-ethnic affiliated groups have largely been neglected from important socio-political claims in the country.<sup>79</sup> The problem emanates from the Constitution itself which allows ethnic affiliated groups to claim that they are the sovereign power holders in the country. It is argued here that the FDRE Constitution has missed out on an important element in contemporary social contract theory, i.e., the *impersonal* interests of the society. As a result, the unrepresented groups seek representation, while on the other hand the represented want to maintain and enhance their recognized subjective interests. This is unfolding in the midst of polarized controversies that seriously suggest the need for the reconstruction of the current political arrangement.

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<sup>76</sup> Tom Garner (2020), "How Abiy's Effort to Redefine Ethiopia Led to War in Tigray", World politics review, December 8, 2020. See also at Yohannes Gedamu (2020), "The politics of power and ethnic federalism has boiled over into conflict in Ethiopia", Quartz Africa, November 20, 2020, available at: <https://qz.com/africa/1936138/how-ethiopias-ethnic-power-politics-led-to-tigray-conflict/>

<sup>77</sup> Rozalia Kasleder (2011), *Semi-authoritarianism: the case study of Ethiopia*, Diss, pp 61. See also O. A. Agbu (2011), *Ethnicity and democratisation in Africa: challenges for politics and development*, Nordiska Afrikainstitutet, p. 19.

<sup>78</sup> Sarah Vaughan and Kjetil Tronvoll (2003), *The culture of power in contemporary Ethiopian political life*, Stockholm: Sida, pp. 107-110. See also Sarah Vaughan (2003), *Ethnicity and power in Ethiopia*, pp. 17-18.

<sup>79</sup> *Ibid.*

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## 5. The Demand for Public Consent-based Constitution

As discussed above, due to the missing out of the *impersonal* interests of the society, the legitimacy of the FDRE constitution has been the center of controversy in Ethiopian politics. As a result, there is an ongoing controversy to maintain the existing constitution on the one hand and to change it on the other hand (*'fight for the constitution'*).

The *fight for a constitution* is underway for many decades since it started with the process of nation building. At the time, the approach implemented by the force of unitary expansion was subject to serious opposition (both armed and peaceful); many believed that they are not adequately represented in the government and not allowed to self-rule.<sup>80</sup> Today, various views are forwarded with regard to the nation building process which range from considering the process as expansion, national oppression, to colonization.<sup>81</sup>

As a result, Ethiopia has never had the chance to make a social contract by drawing up fundamental principles for the foundation of the state that represents an agreement on the political arrangement through a constitution which establishes a united political society.<sup>82</sup> Hence, the unsolved differences and interests of various groups led to resentment and movements in the later stages of nation building. During the reign of Emperor Haile Selassie I, various questions started to emerge. The questions were prominently coined as nationality and class issues in the late 1960's and early 1970's by leaders of the student movement.<sup>83</sup>

The 1995 Constitution is clearly influenced by these issues, and it established a federal form of government based on ethnicity.<sup>84</sup> Accordingly, sovereign power is given to the nations, nationalities and peoples of Ethiopia, which are, *de jure*, the sole owners of the Constitution.<sup>85</sup> As a

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<sup>80</sup> Daniel Gemtessa (2014), "Abbyssinia/Ethiopia: State Formation and National State-Building Project Comparative Approach", *MS thesis, University of Oslo*.

<sup>81</sup> Bach, Jean-Nicolas (2014), "EPRDF's Nation-Building: Tinkering with convictions and pragmatism", *Cadernos de Estudos Africanos 27*.

<sup>82</sup> Simone Zurschmitten (2020), "The Time is Now: Ethiopia's Pathway Towards Reconciliation", *MA Thesis, NADEL, ETH Zurich*.

<sup>83</sup> Bahru Zewde (2014), *The Quest for Socialist Utopia: the Ethiopian Student Movement, c. 1960-1974*, Boydell & Brewer Ltd; Legesse Lemma (1979), "The Ethiopian Student Movement 1960-1974: a challenge to the monarchy and imperialism in Ethiopia", *Northeast African Studies*, Volume 1, No. 2, pp. 31-46.

<sup>84</sup> Federal Democratic Republic of Ethiopia Constitution, 1995, Proc. No. 1/1995, *Fed. Neg. Gaz.* No. 1, Articles 46 and 47.

<sup>85</sup> *Id.* art 8 and preamble.

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result, ethnicity in Ethiopia is being invoked in many instances, and most of the institutional and constitutional arrangements are under the direct influence of it.<sup>86</sup> As a result, even if it is contested in relation to its procedural legitimacy and various aspects of its content, this political arrangement pleased ‘*ethnic affiliated groups*’ and has at the same time seriously hampered the interest of other big interest groups in the country.<sup>87</sup>

The groups that are critical to the Constitution include ‘*non-ethnic affiliated groups*’ composed of people with mixed ethnic identity and people with single ethnic identity but identify themselves by other interests like religion, profession, and mixed ethnic origins. They identify themselves as individuals and do not want to identify with reclusive ethnic identities. On the contrary, such reclusive ethnic consciousness was, for example, purposefully entrenched through institutional schemes including statement of ethnic identity on Kebele residence ID Cards in Addis Ababa until this was duly rectified after the post-2018 reform.

There are some fundamental problems that arise on the issue of ethnic federalism from the perspective of social contract. Consequently, there are groups whose rights and interests have been neglected. There are also claims by some groups that their level of participation at the time of making the Constitution was insignificant. In other words, the assumption that all ethnic groups were represented in the making of FDRE Constitution is a mere presumption.

The controversial issue, from the perspective of contemporary social contract theory, in this regard, is about the recognition of Human Rights in the Constitution, which can serve as a platform for the impersonal interests of people who should be recognized. Accordingly, the collective *vis-à-vis* individual right dichotomy emerged in the political discourse of the country. This controversy is based on the fundamental principles upon which the political society was established. Some groups argued that the political society is formed based on the principle of representation, which is mainly manifestation of collective right. They claim that the preamble of the Constitution and the sovereignty clause have granted ownership of the

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<sup>86</sup> John M Cohen (1995), “Ethnic Federalism in Ethiopia”, *Northeast African Studies*, Volume 2, Issue 2, pp. 157-188.

<sup>87</sup> Yonatan Fessha (2019), “Ethiopia’s Ethnic Federalism: Part of the Problem or Part of the Solution”, *Verfassungsblog: On Matters Constitutional*.

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Constitution to ethnic groups.<sup>88</sup> They argue that individual oriented interests are either intentionally denied or vetoed by collective centered interests.<sup>89</sup>

The lack of institutional backing for the protection of fundamental rights and freedoms is also another setback of the 1995 Constitution with regard to representing the impersonal interests of the people.<sup>90</sup> As a result, it is currently noticeable that differences over political issues are getting wider; common shared values are deteriorating and sense of justice and belongingness are declining. As a caveat against such challenges, social contract theory suggests that the preservation of shared values and norms and entitlement to justice should be society's main objectives.<sup>91</sup>

It is fair to say that the FDRE Constitution lacks sufficient institutions to safeguard fundamental rights and freedoms that are embodied therein. In this regard, two instances can be taken as examples. The first is centered on the constitutional text itself because the FDRE Constitution does not provide an independent organ to interpret the Constitution.<sup>92</sup> Rather, it has given this important power, which is useful to safeguard the right and duties of citizens, to a political organ, the House of Federation (HoF).<sup>93</sup>

Contrary to the Ethiopian case, in most countries, the aforementioned power is granted either to an independent judiciary (courts)<sup>94</sup> or to a specially formed constitutional court<sup>95</sup>. This practice of most countries

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<sup>88</sup> Gedion, *supra* note 6.

<sup>89</sup> *Ibid.*

<sup>90</sup> Chi Mgbako, *et al* (2008), "Silencing the Ethiopian Courts: Non-judicial constitutional review and its impact on human rights", *Fordham Int'l LJ*, Volume 32, pp. 259; Minasse Haile (2005), "Comparing Human Rights in Two Ethiopian Constitutions: The Emperor's and the Republic's -Cucullus Non Facit Monachum", *Cardozo J. Int'l & Comp. L.*, Volume 13, No. 1.

<sup>91</sup> D'Agostino *et al*, *supra* note 18.

<sup>92</sup> Yonatan Tesfaye Fisseha (2005), "Who interprets the constitution: A descriptive and normative discourse on the Ethiopian approach to constitutional review", *Doctoral dissertation, University of the Western Cape*; Adem Kassie Abebe (2011), "Human Rights under the Ethiopian Constitution: A Descriptive Overview", *Mizan Law Review* Volume 5, Issue 1, pp. 41-71.

<sup>93</sup> FDRE Constitution, *supra* note 84, Art. 62(1)

<sup>94</sup> Jack M. Balkin (2015), "Constitutional Interpretation and Change in the United States: The Official and the Unofficial", *Yale Law School, Public Law Research Paper*, No. 542. Available at: SSRN: <https://ssrn.com/abstract=2594925> or <http://dx.doi.org/10.2139/ssrn.2594925>

<sup>95</sup> Dieter Grimm (2018), "Federal Constitutional Court of Germany (Bundesverfassungsgericht)", *Max Planck Encyclopedia of Comparative Constitutional Law*.

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safeguards constitutional issues from partisan political influence, as much as possible. In Ethiopia, the act of entrusting the HoF with the power to interpret the Constitution is based on the idea that the sovereign power is given to the Nation, Nationalities and Peoples<sup>96</sup> which reaffirms ethnic oriented politics in the country. Thus, even if the Constitution guarantees individual oriented fundamental rights and freedoms, the sovereignty of NNPs has paved the way for the institutions to be ethnic affiliated, and this renders respect of human rights a difficult task in Ethiopia.

The unsolved controversies in the past, passing on to generations have now created an even greater controversy, which are very difficult to solve. The nationality questions, the issue of collective *versus* individual rights and lack of institutional solution for people's respect of constitutional rights have led to series of resentments by the people. Recently, in various parts of the country, particularly in Oromia and Amhara regional states, strong resentment had been expressed in popular protests.<sup>97</sup> The popular protests that intensified challenged the EPRDF system which led to the post-2018 reform.

However, different groups still have claims to be addressed. The extremist features of these claims are usually polarized. This shows the growing need for change that accommodates economic and socio-political dimensions whereby the Ethiopian people can undertake political change to solve these problems. This necessitates genuinely addressing the main economic and socio-political issues of the recent movements, which are interrelated and rooted in the past.

## 6. Economic and Socio-political Issues to be Addressed

### 6.1 Economic and social Issues

The first economic issue that deserves concern and that also has social manifestations is the issue of unemployment. Accordingly, in Ethiopia, the rate of unemployment particularly youth unemployment is very high.<sup>98</sup> The

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<sup>96</sup> FDRE Constitution, *supra* note 84, art 8.

<sup>97</sup> Pinaud, Margaux, and Clionadh Raleigh (2017), "Data analysis: The roots of popular mobilization in Ethiopia," *IPI Global Observatory*.

<sup>98</sup> Nzinga Broussard and Tsegay Gebrekidan Tekleselassie (2012), "Youth Unemployment: Ethiopia Country Study", *International Growth Centre. Working Paper* 12(0592), pp 1-37; Getinet Astatike Haile (2003), "The Incidence of Youth Unemployment in Urban Ethiopia", *2nd EAF International Symposium on Contemporary Development Issues in Ethiopia*.

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ability of the youth to engage in productive activities has both social and economic consequences for the economy. In this regard, the high rate of youth unemployment in Ethiopia has wide ranging adverse consequences.<sup>99</sup>

Moreover, Ethiopia's rural youth are becoming landless and lacking job opportunities, which often leads to increased migration to urban areas, which in turn leads to cultural shock, furthering the already existing differences.<sup>100</sup> It is believed that there are huge differences between rural and urban dwellers in living style.<sup>101</sup> This creates controversies in understanding and interpreting the social fabric of the society. Since, the politics is largely based on ethnicity, individuals outside an ethnic group and who are outside their ethnic territory run the risk of exclusion from job opportunities, and other wage earning activities.<sup>102</sup>

The second manifestation of economic controversy in Ethiopia is the claim that everybody has not been benefiting fairly from economic fruits.<sup>103</sup> From social contract perspective, this claim is very important. This is because, both in past and present, it was/is only some segments of the society that are allegedly privileged to benefit from the economy.<sup>104</sup> And therefore, this contention has created serious distrust within the society, which is fundamental in the making of social contract. The distrust is manifested by the situation whereby the economically privileged segments of the society always supported the system that sustains their benefits.<sup>105</sup> However, individuals/groups who are not benefiting from the system often protested against the political order.

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<sup>99</sup> Udai L. Paliwal (2009), "Educated youth and unemployment in Ethiopia", *The Indian Journal of Commerce*, Volume 62, No. 1, pp. 55-62.

<sup>100</sup> Katrina Kosec, *et al.* (2018), "The Effect of Land Access on Youth Employment and Migration Decisions: Evidence from Rural Ethiopia," *American Journal of Agricultural Economics*, Volume 100, No. 3, pp. 931-954; Assefa Admassie and Degnet Abebaw (2014), "Rural Poverty and Marginalization in Ethiopia: a Review of Development Interventions", *Marginality*, Volume 269.

<sup>101</sup> Paul Dorosh and Emily Schmidt (2010), *The rural-urban transformation in Ethiopia*. No. 13. International Food Policy Research Institute (IFPRI).

<sup>102</sup> Jan Záhorský (2011), "Ethnicity and Nationalism in Ethiopia", *ALPPI Annual of Language & Politics and Politics of Identity*, Volume 5, pp. 91-108.

<sup>103</sup> Logan Cochrane (2019), *Ethiopia: Social and Political Issues*, Nova Science Publishers.

<sup>104</sup> Vaughan and Kjetil, *supra* note 78

<sup>105</sup> E. Van Veen (2016), *Perpetuating Power: Ethiopia's Political Settlement and the Organization of Security*, Clingendael, Netherlands Institute of International Relations, online Report.

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As land (both rural and urban) is the foundation of most economic activities, the land regime in Ethiopia is susceptible to rent gathering and corruption to the benefit of the political and economic elite rather than ensuring the tenure security of individual landholders at the grassroots. One of the major manifestations of subjective interests of ethnic-groups is clearly reflected in Article 40(3) of the FDRE Constitution which provides that "... [l]and is the common property of Nations, Nationalities and Peoples of Ethiopia and shall not be subject to sale or other means of exchange". This clearly gives primacy to subjective interest of NNPs rather than due attention to individual rights, tenure security and societal interest in enhanced agricultural productivity, land markets and supply of urban houses.

The aforementioned economic problems have seriously undermined the very purpose of the Constitution, in the form of social contract, to create one economic community.<sup>106</sup> In this regard, the very idea of creating one economic community is controversial in itself. This is mainly because of the absence of clarity about the meaning of one economic community. On the one hand, there are groups who believe that the goal of creating one economic community can be achieved only if the country is unified by giving less attention to communal differences.<sup>107</sup> On the other hand, there are other groups who believe that it can only be achieved by recognizing differences and accommodation of diversity.<sup>108</sup>

The Ethiopian political arrangement seems to be in favor of the latter claim through its recognition and empowerment of ethno-nationalist forces.<sup>109</sup> Both camps pursue extremes rather than balanced win-win solutions towards a new political arrangement that can accommodate both the interest of forces of unity and forces of diversity. The problem is attributable to the emphasis on subjective interests while overlooking the interests of others. These issues have to be debated and some political consensus should be reached to strike a balance between the two. This

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<sup>106</sup> FDRE Constitution, *supra* note 84, preamble.

<sup>107</sup> Leulseged Tadesse "Can Diversity be accommodated?" *Policy Issues in Federalism International Perspectives*: 3. Available at: [http://www.forumfed.org/libdocs/IntConfFed07/Volume\\_5/IntConfFed07-Vol5-Tadesse.pdf](http://www.forumfed.org/libdocs/IntConfFed07/Volume_5/IntConfFed07-Vol5-Tadesse.pdf)

<sup>108</sup> Alemseged Abbay (2004), "Diversity and state-building in Ethiopia", *African Affairs*, Volume 103, Issue 413, pp. 593-614.

<sup>109</sup> Assefa Fiseha (2012), "Ethiopia's Experiment in Accommodating Diversity: 20 Years' Balance Sheet", *Regional & Federal Studies*, Volume 22, Issue 4, pp. 435-473.

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should thus be done by re-constructing the political arrangement in the form of social contract.

## 6.2 Socio-political Issues

In Ethiopia, the issue of de-politicization of groups and individuals has been the main concern for so long.<sup>110</sup> In this regard, in the modern history of Ethiopia, political spaces were narrow; there was political persecution, inequality and competition for resource control.<sup>111</sup> During the last two decades, particularly after 2005 elections, these problems had intensified, which led to popular protest and then serious political turmoil.<sup>112</sup> The protest symbolized the determination of citizens to resist political persecution and their claim for more political power with the aim of participation in political decision-making process. Many believe that the protest marked the beginning of a new era in Ethiopian politics by introducing new transformational and reform politics.<sup>113</sup> The election of a new Prime Minister Abiy Ahmed created hope and revival in the political discourse.<sup>114</sup> However, at the national and sub-national level, there are unresolved political crises that call for interventions in the form of creating a new social contract.

From the perspective of constitution and social contract, the Ethiopian political crisis involves three issues that deserve attention. The *first* and the most prominent unanswered issue is the *individual versus collective dichotomy* that is underway since the beginning of modern history of Ethiopia. The issue of political recognition has always been associated with whether individuals or groups should be the center of recognition.<sup>115</sup> The FDRE Constitution, in this regard, has unduly opted for primacy to collective rights rather than individual rights. Although the FDRE

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<sup>110</sup> Lovise Aalen (2011), *The politics of ethnicity in Ethiopia: Actors, power and mobilization under ethnic federalism*, Brill; Veen, *supra* note 105.

<sup>111</sup> Jon Abbink (2006), "Ethnicity and conflict generation in Ethiopia: Some problems and prospects of ethno-regional federalism", *Journal of Contemporary African Studies*, Volume 24, Issue 3, pp. 389-413.

<sup>112</sup> Jon Abbink (2006), "Discomfiture of democracy? The 2005 election crisis in Ethiopia and its aftermath", *African Affairs*, Volume 105, Issue 419, pp. 173-199.

<sup>113</sup> Terrence Lyons (2019), *The Puzzle of Ethiopian Politics*. Lynne Rienner Publishers; Yoseph Badwaza and J. Temin (2018), "Reform in Ethiopia: Turning Promise into Progress", *Policy Brief*, September 2018 ; P. Fraioli (2020), "Ethiopia's factional politics", *Strategic Comments*, Volume 26, Issue 2.

<sup>114</sup> International Crisis Group, *supra* note 71.

<sup>115</sup> Messay Kebede (2013), "Ethnic Politics and Individual Rights: The Alternative Vision for Ethiopia", *ECADF Ethiopian News*. Available at: <https://ecadforum.com/2013/10/30/ethnic-politics-and-individual-rights/>

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Constitution embodies a long list of individual human rights under Chapter Three, it has failed to establish important institutions that enforce those rights, such as its failure to entrust the power of constitutional interpretation to courts or to a constitutional court.<sup>116</sup>

As opposed to many democratic constitutions, the current Ethiopian constitution recognizes groups (Nation, Nationalities and People) as the sovereign power holders. To this end, it has established the House of Federation as the house for NNP with the power of interpretation of the Constitution. As a result, protection of individual human rights are seriously undermined. The extreme focus on ethno-nationalistic groups has created many problems including widespread evictions due to political and ethno-religious crises and violence across the country.<sup>117</sup>

According to social contract theory, it is the *people* who ought to determine how they should be governed.<sup>118</sup> The word ‘people’, in this instance, does not only represent groups. Rather, individuals are also part and parcel of the people that have a say in the making of the social contract. Individual citizens form groups based on plenty of factors including and not limited to ethnic, religious or cultural identity. However, in Ethiopia, the ethnic nature of politics is predominant as a result of recognition of NNP as a sovereign power holder under the FDRE Constitution.<sup>119</sup> This is mainly attributable to the fact that the agents who participated during the making of the FDRE Constitution were only concerned about the *subjective* interest of the society they represented rather than *impersonally* balancing them with the interests of others.

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<sup>116</sup> Chi Mgbako, *et al* (2008), “Silencing the Ethiopian courts: Non-judicial constitutional review and its impact on human rights”, *Fordham Int'l LJ*, Volume 32, Issue 1, pp. 259-297.

<sup>117</sup> Lahra Smith (2007), *Political violence and democratic uncertainty in Ethiopia*. Vol. 19, United States Institute of Peace; Semir Yusuf (2019), “Drivers of ethnic conflict in contemporary Ethiopia”, *Institute for Security Studies Monographs* 2019.202 (2019): v-46; Bekalu Atnafu Taye (2017). “Ethnic federalism and conflict in Ethiopia”, *African Journal on Conflict Resolution* Volume 17, Issue 2, pp. 41-66.

<sup>118</sup> Celeste Friend. “Social contract theory. Internet Encyclopedia of Philosophy”, October 15 (2004)

<sup>119</sup> Vaughan, *supra* note 78; John Young (1996), “Ethnicity and power in Ethiopia”, *Review of African Political Economy*, Volume 23, Issue 70, pp. 531-542; Walle Engedayehu (1993), “Ethiopia: Democracy and the politics of ethnicity”, *Africa Today*, pp. 29-52.

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This has led to lack of workable political arrangement in the form of feasible constitutional system to create a healthy relationship between citizens and the state in the context of equal opportunity and political participation for every section of the society. Consequently, identity based politics is and has been the only possible way to seize power.<sup>120</sup> In this process, other important sections of the society have been neglected. As indicated earlier, this has adversely affected a significant number of citizens with mixed identity or who do not want to identify themselves to a certain group. Moreover, professional associations, civil societies and other non-ethnic movements have not been given the chance to give their consent to the social contract in the course of deliberations and consultations towards the preparation and endorsement of the FDRE Constitution.

The *second* unanswered political controversy (which has created polarized interpretations even within ethnic-based groups) relates to the issue of self-administration. Opposing views of self-determination have been projected by different ethnic groups. The first is the claim of some ethnic groups who claim that even if they are territorially recognized as a self-administering region, their true self-administering right is a sham. The other one is the implementation claim by some other ethnic groups who allege that their self-determination right is ripped off.<sup>121</sup> These particular groups are the ones which do not have territorial recognition. In other words, these groups do not have their own self-administering region, and are rather confined in one regional administration with other ethnic groups.

The *third* controversy is related with the working language of the federal government. There are more than 80 languages in Ethiopia. Among the languages, Amharic is, arguably, spoken, at least as a second language, by majority of the people in Ethiopia.<sup>122</sup> Afan-Oromo and other languages are also spoken by a large population in Ethiopia. Some languages are spoken in

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<sup>120</sup> Kidane Mengisteab (2007), "Identity politics, democratization and state building in Ethiopia's federal arrangement", *African Journal on Conflict Resolution*, Volume 7, Issue 2, pp. 63-92.

<sup>121</sup> L. Aalen (2011), "Identities or Resources at Stake? Controversies on National Self-Determination in Sidama and Wolayta" [in *The Politics of Ethnicity in Ethiopia*. Brill, Chapter 7, pp. 147-178]; Lovise Aalen (2006), "Ethnic federalism and self-determination for nationalities in a semi-authoritarian state: the case of Ethiopia", *International Journal on Minority and Group Rights*, Volume 13, Issue 2-3, pp. 243-261.

<sup>122</sup> Teshome G. Wagaw (1999), "Conflict of ethnic identity and the language of education policy in contemporary Ethiopia", *Northeast African Studies*, Volume 6, Issue 3, pp. 75-88.

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other neighboring countries as well. Such languages include the Somali, Tigrigna, Afan-oromo<sup>123</sup> and Afar languages. Nevertheless, while Amharic serves as a working language, Afan-Oromo and other languages are working languages of regional states only. This has created political and constitutional discontent for the last 4 decades.<sup>124</sup> For example, there are arguments that call for more working languages in Ethiopia.<sup>125</sup>

From the perspective of social contact theory, the representation of the subjective interests of the society during making of a constitution is believed to be the cause of the problem. For example, different groups who are living outside their assumed ethnic region and who do not speak the language of the region concerned have been denied to be governed and administered in a language they understand.<sup>126</sup> The problem, in this regard, is the absence of a constitutional rule, which obligates regional governments to have at least one additional working language in their administrative territory.<sup>127</sup> This would have easily provided the alternative for people who do not understand the language of the region concerned.

The challenges in this regard include budgetary constraints because adopting multiple languages has serious financial implication, which countries like Ethiopia are unable to shoulder.<sup>128</sup> However, based on bargains within the political elites and extensive study, some languages can be recognized as a federal language. In fact, from the perspective of social contact theory, it would have been an expression of recognizing the impersonal interests of the society. As a result, solving this issue by recognizing other languages as working languages of the federal government and obliging regional governments to recognize additional language in their

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<sup>123</sup> Translators without borders, language data. Available at <https://translatorswithoutborders.org/language-data/>

<sup>124</sup> Samuel Leykun and Tamiru Gari (2020), "Language Policy" in Ethiopia: Challenges and Opportunities in Current Trends of Afaan Oromoo, *Arabic Language, Literature & Culture* Volume 5, Issue 1, p. 1.

<sup>125</sup> See, for example, Mekuria Bulcha (1997), "The politics of linguistic homogenization in Ethiopia and the conflict over the status of Afaan Oromoo", *African affairs*, Volume 96, Issue 384, pp. 325-352.

<sup>126</sup> *Ibid.*

<sup>127</sup> South Africa is instructive in this regard.

<sup>128</sup> Fiseha Haftetsion Gebresilassie, "Choosing a Working Language in Multiethnic Nations: Rethinking Ethiopia's Working Language Policy", *Aiga Forum* 4. Available at: <http://aigaforum.com/articles/Paper-on-Ethiopia-Language-Policy.pdf>

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region are the controversies which have not been answered by the social contract in Ethiopia.<sup>129</sup>

## 7. The Missing Impersonal Element in the FDRE Constitution

The Ethiopian Constitution, as indicated above, mainly pursues the subjectivist social contract theory and has missed out the representation of agents who are motivated by impersonal interests in the constitutional making process. It also lacks the institutions that best serve the impersonal interest of the society. To understand whether the Ethiopian Constitution advances the subjectivist or objectivist approach of social contract theory, it is necessary to answer two important questions. The first question involves the interest (subjective or impersonal) of the parties during the constitutional making process. And the second issue relates to the principles and institutions that were the outcomes of the constitutional making.

To start with the first question, most scholars and opposition parties argue that the constitution making process in Ethiopia was a constitutional fiction by which important sections of the society were neglected<sup>130</sup> and excluded from the process. In this regard, the FDRE Constitution, as highlighted earlier, took ethnicity as a point of departure whereby the sole owners of the country are NNPs.<sup>131</sup>

Some may argue that the FDRE Constitution has represented the impersonal interests of the society by invoking the inclusion of Chapter Three. In this regard, the reading and literal understanding of the text of the Constitution would suggest the inclusion of impersonal interests of the society. However, by looking into the core elements of the Constitution, one can easily understand that the inclusion of Chapter Three is largely ineffective. Two arguments can be forwarded to support this claim. On the one hand, the historical account of the making of the Constitution suggests otherwise. For example, Article 39 of the FDRE Constitution is clearly Stalinist which advocates ethnic-centered interpretation of self-determination including secession. The Ethiopian Constitution, in this regard, advocates for both ethnic politics and the right to secession.<sup>132</sup>

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<sup>129</sup> In this regard, the Council of Ministers, announced had elevated four regional languages (Afaan Oromo, Tigrinya, Somali and Afar) to the status of working federal government languages.

<sup>130</sup> Vestal, *supra* note 4.

<sup>131</sup> FDRE Constitution, *supra* note 84, preamble *cum* art 8

<sup>132</sup> *Id.* art 39 (2)

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With regard to major ‘institutional outcomes’ of the Constitution, the fundamental rights and freedoms under Chapter Three cannot be respected under the institutional settings designed in the Constitution which includes constitutional interpretation. The institutions created by the FDRE Constitution denote the subjectivist approaches to social contract theory. We can see this from two perspectives: the politico-legal institutions and social institutions. As indicated earlier, the political and institutional outcomes of Constitution mainly target at protecting particular interests of NNPs and ethno-nationalist groups.

One of the institutionalized outcomes of the FDRE Constitution is the decision to make the federal arrangement to be ethnic-based. The foundation of the post-1991 political arrangement becomes apparent by raising a single question as to why, Ethiopia opted its federal arrangement to be ethnic in the first place. The most suitable answer is that ethnic politics was the narrative of the time because the groups who championed ethnic politics actually were able to conquer political power in 1991.<sup>133</sup> The Constitution has made NNPs the sovereign right holders thereby enabling ethnic based political groups to play dominant economic and political roles in Ethiopia. As a result, most institutions were filled with people with certain ethnic background. This resulted in the domination of politico-legal institutions by ethnic affiliated individuals, so that they could mainly serve the subjective interests of the ethnic group they represented.

An example worth considering in this regard is the electoral system. It is to be noted that *the first past the post system* is not the best option to represent impersonal interest of the society. In this regard, this writer argues that the demographic realities in Ethiopia have caused ethnic-based electoral regions whereby the seats (for a certain constituency) in the parliament are most likely to be dominated by one dominant ethnic group. This is because the ethnic mix in Ethiopia is scattered and the possibility of one dominant ethnic group in a particular area is very high. As a result, since the ethnic politics is led by elites, it is highly possible that the agents who represent the subjective concern of the ethnic groups in the election regions would be elected.

The other institutional outcome relates to constitutional interpretation, because as indicated earlier, the FDRE Constitution entrusts House of

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<sup>133</sup> Yohannes Gedamu (2019), in ‘A Changing Ethiopia: What is the Legacy of Ethnic Federalism?’ Panel discussion organized by US Institute of peace. Available at: <https://www.usip.org/events/changing-ethiopia-what-legacy-ethnic-federalism>

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Federation<sup>134</sup> with the most important power to safeguard rights and freedom. The House of Federation represents the NNPs. This can be easily observed based on the method of election of the HoF, which is conducted through election by the State Councils. Accordingly, the State Councils may themselves elect representatives or hold elections to have the representatives elected by the people directly.<sup>135</sup> Cumulative reading of the preamble and Article 61 of the FDRE Constitution show that the second chamber in Ethiopia (i.e. the House of Federation) is composed of Nations, Nationalities and Peoples, which cannot be the legitimate organ for constitutional interpretation that mostly involve individuals. The number of cases brought to the HoF (since the enactment of the 1995 FDRE Constitution) clearly show that only a few cases that involve NNPs have been submitted to it in contrast to thousands of cases that involve individuals.

Thus, the economic, social and institutional outcomes that are primarily based on ethnic politics were led by elites, without the proper representation of the impersonal concerns of the society. In this regard, the Constitution can be considered as the ‘constitution of the ethnic elites’ whereby subjective concerns of ethnically oriented questions was bargained and agreed. Other societal morals, customary values and universal moral principles, which are impersonal by their nature, have not been represented properly.<sup>136</sup>

## **8. Conclusion: What the Constitution Should Fulfill as a Social Contract in Contemporary Ethiopia**

At this time of turmoil and transition, there are various constitutional issues and controversies in Ethiopia. Partly, this is due to the absence of properly construed social contract in the form of a constitution. In this regard, it is expedient and logical to construe the modern state as the product of a covenant, a compact or social contract. In order to do that, the most important mechanism is using the constitution. This is because the constitution can/should be considered as a social contract. As indicated earlier, a constitution is a modern and more realistic view of social contract theory while social contract is hypothetical. Yet, analogous to the social contract, a constitution fulfills the purpose of creating certain political arrangements based on the consent of the people.

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<sup>134</sup> FDRE Constitution, *supra* note 84, art 62(1).

<sup>135</sup> *Id.* art 61(3).

<sup>136</sup> Alemante, *supra* note 3.

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Since the enactment of the FDRE Constitution in 1995, there are various issues raised by different agents, which suggest the need for reconstructing political arrangements in the form of social contract. Evaluation of the FDRE Constitution based on the three approaches of contemporary social contract theory (discussed earlier) shows that it is more of a *subjectivist* social contract theory and it has not involved agents who are motivated by *impersonal* interests in the constitutional making process. It also lacks the institutions that best serve the impersonal interest of the society.

Therefore, in order to accommodate both the subjective ends and impersonal interests of the society, the Constitution should be re-constructed in light of the *dualist* contemporary social contract theory. Indeed, reconstruction is necessary and timely. But, re-constructing the political arrangement by changing or amending the Constitution would not be an easy task since the issues and controversies, as discussed above, are very wide.

The manner in which the Constitution needs to be re-constructed (whether through amendments or making new constitution) is for the Ethiopian people to decide through their representatives. Yet, all elements that need reform and restructuring must be included in the making of the constitution in light of the dualist approach to social contract theory. Accordingly, the Constitution should accommodate both the subjective and impersonal interests of the society. Since the country is highly divided, differences are real and somehow wide. Various groups have various interests that can lead to conflict, fragility and graver problems if they are not solved timely and properly.

It is to be noted that the dualist approach in social contract calls for accommodation of diversity which requires all parties to impartially consider, recognize and respect the claims of others. The best way to handle this would be to allow every stakeholder to participate in the process and create platform for dialogue which in turn facilitates the opportunity for listening and mutual understanding. In this regard, two interest accommodation mechanisms must be employed. The first is political bargain by which agents' subjective ends will be bargained. For example, issues like self-administration of ethnic groups can be solved through the subjective approach; while due focus is equally given to 'consideration to societal and international norms' that are impersonal and objective. Representatives from civil societies, professional associations and the like see things from impersonal point of view and their participation entails the representation of impersonal interests of the society.

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Likewise, the institutional outcome of the Constitution must accommodate both the subjective and impersonal interests of the society. If a constitution is the result of political bargain by groups with strong subjective interests, the interest of other agents with impersonal interest would be undermined which most likely would cause other issues and controversies. As a result, the political arrangement created in the country by which people would agree on common interests and goals will be seriously hampered.

If, on the other hand, the institutions created by a constitution are merely based on the impersonal interests of the society, it is highly probable that the system might not work. This is because some moral considerations arise from the subjective interests of the society and different individuals/groups have variation in their respective interests and concerns. Due to this subjectivity, the claims and controversies of the society will not subside until it is resolved. Therefore, due attention must be given to 'institutional feasibility' with a view to accommodating the subjective and impersonal interests of the society whereby the requirement of impartiality can reasonably be met by individuals with strong personal motives.

In this regard, constitutions provide a system that enables a county to determine its system of government including political arrangements. Thus, constitutional reform in Ethiopia and the institutional outcomes thereof must accommodate both the subjective interests of ethno-cultural groups and impersonal interests of the society. To build a sustainable constitutional system, particular concerns of the units of the federation together with the impersonal interests of the society must be equally represented in the constitution making process and appropriate institutional mechanisms have to be designed. \_\_\_\_\_■

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