# UNIT FOUR

**CONSTITUTION AND CONSTITUTIONALISM**

## 4.1. The Concept of Constitution

Constitution can be defined as: a frame of political society, organized through and by law, that is to say one in which law has established permanent institutions with recognized functions and definite rights. Again, a constitution possibly said to be a collection of principles according to which the powers of the government, the rights of the governed, and the relations between the two are adjusted. Constitution is the aggregate of laws and customs under which the life of the state goes on. In other words, constitution is a state book of fundamental political principles, and establishing the structure, procedures, powers and duties, of a government, which help the government to guide the nation/state. To be brief, we know that State, like any other organization, requires a set of laws to govern itself. Thus, a constitution is a body of laws that determines the nature of the State. It is a fundamental document according to which the government of the State functions. A constitution is, therefore, the basic law which defines and delimits the powers of various organs of the government and it also enumerates the basic rights of the citizens.

## Meaning of Constitutionalism

Constitution is a set of rules or norms creating, structuring and defining the limits of, government power or authority whereas constitutionalism is the idea that government can and should be legally limited in its powers. Constitutionalism is a legal and practical limitation on government. It is the anti-thesis of arbitrary rule. To say that there is constitutionalism in one country:

-There should be democratic constitution and this democratic constitution must be

Implemented

-The entire system of government must be governed by the constitution.

-The constitution should only be modified and changed through the people's will.

-There must be horizontal separation of power, and an independent judiciary.

## Major Features of a Constitution

A constitution has distinctive features that distinguish it from any other laws. The following are some of the major features of a constitution.

* **Generality**: a constitution provides the general principle of a state and carry on foundation and sets out general framework of the law and the government. Other laws provide the details of the subject for which they are created. Constitutional principles are a guideline for others laws. Any law that contradicts the constitutional provision will be null and void. In this case, constitution only states the general principles. Thus, this makes constitution different from other laws that may found in a given country.
* **Permanency**: unlike other laws, constitution is made for undefined period of time. That means constitution serve for a long lap of ages. It is purposely made to be stable and permanent. One of the mechanisms to ensure this permanency is through constitutional amendment. Judicial interpretation is also another ways of making a given constitution adaptable. Thus, constitutional stability is one of the factors for creating a durable peace in a society. Unstable constitutional environment mostly indicates a socio-political instability.
* **Supremacy**: a constitution is a supreme law of the land. As a mother of law, it is original law by which the system of government is created, and to which the branches of government must look for all their powers and authority. It is original because it is directly made by the people as the direct expression of the will of the people. To ensure supremacy, the constitution needs to have a supremacy clause. This provision commands that individuals, government institutions, and private institutions must observe the constitution. 
  1. **Fundamental Constitutional Principles**
* **Popular Sovereignty:** The concept of sovereignty is one of the most complex in political sci­ence, with many definitions, some totally contradictory. Usually, sover­eignty is defined in one of two ways. The first definition applies to supreme public power, which has the right and, in theory, the capacity to impose its authority in the last instance. The second definition refers to the holder of legitimate power, who is recognized to have authority. When national sovereignty is discussed, the first definition applies, and it refers in particular to independence, understood as the freedom of a collective entity to act. To this end, sovereignty implies the power to have a final say on an issue. The preamble of the Ethiopian Constitution for instance says, “We the Nations, Nationalities and Peoples... adopted….this Constitution”, expressly providing the doctrine of popular sovereignty, or rule by the people. Article 8 of the Constitution is more explicit in providing that ultimate political authority resides not in the government or in any single government official, but rather, in the Nations, Nationalities and Peoples of Ethiopia.
* **Separation of Power:** In order to promote accountability of government, hinder corruption and protect the fundamental rights of citizens, it is essential to keep separate the Parliament’s power to make laws, from the Executive’s power to administer laws, and from the Judiciary’s power to hear and determine disputes in accordance with the law. This separation is designed to protect the people from a concentration of power in the hands of some individuals, and to fight individuals or groups who try to manipulate government for personal gain and to ignore the will of the people. Separation of power is, therefore, an essential feature of constitutional government. Further, constitutionalism ensures that the principal powers of government-legislative, executive, and judicial-were not monopolized by any single branch.
* **The Rule of Law:** There are two aspects of the rule of law that are important: First, the law should govern the people and the people should obey the law, and second, the law must be capable of being obeyed (good laws). This made the rule of law different from ‘rule of men’, where the people were ruled by ‘bad’ laws. In order to maintain the rule of law, an institution, independent from the legislative or executive or other forces, impartial and free from interference or influence is required. In this case, the rule of law is the principle under which a government exercises its authority in accordance with clear, objective, and publicly disclosed laws. Laws must be adopted and enforced through established procedure and incompliance with international recognized standards. The rule of law is a key component of a social order grounded in consistency, predictability, and transparency. It is the foundation of a democratic society-the means by which people protect their liberty in a society of equals. The principle is intended to be a safeguard against arbitrary rule.
* **Independence of the Judiciary:** Although judicial independence seems on its face to be an obviously essential ingredient to any just and fair legal system, a precise definition of the scope of the principle may be difficult in a world of diverse cultures and legal systems. Simply stated, judicial independence is the ability of a judge to decide a matter free from pressures or inducements. Additionally, the institution of the judiciary as a whole must also be independent by being separate from government and other concentrations of power. The principal role of an independent judiciary is to uphold the rule of law and to ensure the supremacy of the law. If the judiciary is to exercise a truly impartial and independent adjudicative function, it must have special powers to allow it to “keep its distance” from other governmental institutions, political organizations, and other non-governmental influences, and to be free of repercussions from such outside influences.
* **Judicial Review:** Judicial review is another major principle of a democratic constitution. It is a process of striking down the acts of parliament and executive decision as invalid when it is found to be inconsistent with constitutional rules. But which institution of government is suited for judicial review? Although there are debates at the normative level, in practice almost the all democracies the task of judicial review, particularly constitutional interpretation, is given to courts, regular or specialized.
* **Secularism:** Secularism is mostly understood to mean separation of state and religion. Secularism asserts the freedom of religion, and freedom from the government imposition of religion upon the people, and absence of state privileges or subsidies to religions.

## Major Purposes and Functions of Constitution

Among the usually recognized purposes of constitutions the following are the major ones:

**A constitution is charter of government**: Government derives its whole authority from the governed. The constitution sets out the form of the government, creates the branches of government and determines their powers and authorities. It specifies the purpose of the government, the power of each department of the government, the state-society relationship, the relationship between various governmental institutions, and the limits of the government.

**Put limits on the powers of government and grants civil rights:** Constitutional provision could be enforcing or empowering whose objective is giving powers to government. But there must also be ‘Negative Clause’ or ‘No Clause’, so that a constitution could be a guardian of fundamental rights. Negative clauses, by putting specifically what governments must not do, will limiting and tie the hands of those who exercise powers. Otherwise, the people will certainly be exposed to various kinds of abuses of power.

**A constitution is a commitment device**: In a democratic state, the constitution binds not only the government, but also the people. Through the constitution, the people collectively commit to certain institutional procedure for managing public affairs and resolving social conflicts. Thus, the constitution not only limits the arbitrary power of the government, it also prevents public administration from being poisoned by people's short-term temper and passions. Through the constitution, the people collectively commit to be abiding by the terms of constitution.

**A constitution as covenant, symbol, and aspiration**: In so far as a constitution is a covenant by which a group of people agree to transform themselves in to a nation, it may function for the founding generation like a marriage concluded through the pledging partners’ positive and active consent to remain a nation for better or worse, through prosperity and poverty, in peace and war. A constitution may serve as a binding statement of a people’s aspirations for themselves as a nation.

**4.6 Modern Classification of Constitutions**

The basis of our constitutional classification should be found under the following heads: the nature of the state to which the constitution applies i.e. whether unitary or federal; the nature of the constitution whether written or unwritten and flexible or rigid; the nature of the legislature; the nature of the executive; and the nature of judiciary. Accordingly, in this section we will try to see the characteristic features of written or unwritten, flexible or rigid and finally unitary or federal constitutions.

### Written Vs Unwritten Constitution

A constitution may be written or unwritten. A written constitution is always enacted while an unwritten Constitution is evolved. A written constitution is one which is framed at a given time and comes into practice on a fixed date. An unwritten constitution on the other hand is a result of evolution, it is given by history. It is never framed by any Constituent Assembly. It is based on conventions, customs and statutes that grow over the centuries. The British Constitution is the best example of an evolved and unwritten constitution.

The strength of a written or enacted con­stitution is that it is clear and definite. When the constitution is in the form of a docu­ment, people have a clear understanding about the powers of the government. In a written constitution the rights of the people are secure. In a federal State like Ethiopia, there are two sets of governments: Federal Government and State Governments. The written constitution mentions clearly the division of powers between those levels of government.

The weakness of a written constitution is that it fails to adapt itself to changing conditions easily. Generally, the process of amending or changing a written constitution is comparatively complex. It is generally said that written constitution is helpful in providing solid government, but this viewpoint can also be disputed. For example, England is a well administered country though its constitution is unwritten.

A written constitution has its own advantages for example it gives clarity; it is easily accessible and so on. On the other hand, the disadvantage of written Constitution may be the following: the first is that, the implementation of a written constitution usually involves interpretation. In some instances such interpretation leads to dispute between branches of the government. It is also not possible to absolutely define the extent of devolution of power among different levels of governance in a country. Further, written constitution is not easily adaptable to changing circumstances to make this real, written constitutions need to be continuously amended or modified.

In contrast, one of the major advantage of unwritten constitution is, relatively speaking it is more flexible. However, it is disadvantageous because there is no single document that clearly states the fundamental rights and duties of citizens and of governments. In this case, it would be difficult to quickly determine which aspects of the constitution is violated and when. Since there is no legal restraint and because it is not accessible to public, it can easily be distorted or even changed without the consent of the people. As a result there may arise difference in society regarding which conventions or custom is acceptable and which is not, since there could exist different conventions and customs in a country. Because of its inaccessibility, it is nearly impossible to create awareness through education on the fundamental constitutional rights and freedoms, duties, and obligations of citizens.

### Rigid Vs Flexible Constitution

Constitutions may also be classified as rigid or flexible. A rigid constitution is one in which amendment is very difficult, requiring special procedures to be employed before any changes can be made. Where constitutions were devised by their founders as a complete statement of arrangements for the future, it will generally be difficult to amend them. For this reason it is particularly difficult to amend a written constitution: it is ‘rigid’, rather than ‘flexible’ in nature. Example, the Constitutions of the United States of America, Switzerland and Australia are considered as rigid constitutions. On the contrary, a flexible constitution is one which can be amended easily by an ordinary legislative process. It can be amended without any special procedure. For example; the Constitution of England is flexible because any provision can be changed by an act of Parliament.

The strength of a rigid constitution is that it is a guarantee against quick changes. It is stable, whereas a flexible constitution is unstable. Moreover, the fundamental rights of the people and the interests of the minorities are more secure under a rigid constitution. A flexible constitution, however, is considered progressive in nature and helpful in the development of the nation as it changes easily and adapts to the changing circumstances. A rigid constitution, on the other hand, may not be easily changed according to the changing conditions.

### Unitary Vs Federal Constitution

The constitution which provides all the powers for the central government is called unitary constitution. Unitarianism in the political sense was the habitual exercise of supreme legislative authority by one central power. The best example of unitary state is the United Kingdom. Of course, in the case of the United Kingdom, local government is strong, but the central government can take all those powers of the local government at any time.

A federal constitution will state either the rights that are to be retained by the federating units or the rights that the federal authority takes over. In either case it stands to reason that neither the ordinary legislature of the individual states nor the legislature of the union can have the power to alter the constitution without some special means being adopted for discovering the views of the constituent members. These means in federal country, the constitution will define which powers are exercisable by the central/federal government, and which powers are exercisable by the constituent parts of the federation, usually known as states. In a federal state power is diffused rather than concentrated in any one body. The constitu­tion has overriding force and any conflicts between the federal government and state governments will be determined according to the constitution. Clearly, in federal countries the constitution is seen as a covenant. Thus, the constitution is serving as the fundamental laws of a country. This is one of the essential characteristics features of a federal state.

## The Ethiopian Constitutional Development

### Traditional Constitution of Ethiopia

Ethiopia had sophisticated traditional unwritten constitution, which included the major principles of the monarchy, as well as the exclusive right of the imperial court, the church, and the nobility. There was constitutionally significant document. The following are the most prominent constitutionally significant traditional documents.

**A. The Kibre Negest** (**the Glory of Kings**), strongly dealt with the legend of a *Solomonic* Dynasty and thus served certain political-religious needs of the time in the constitutional process. Beyond that, it gave the Ethiopian state a legitimizing basis.

**B. The*Fetha Negest* (The law of the Kings)**

The basic content of the *Fetha Negest* was the religious ethics of Christianity, then common in nearly the whole Christian world. It basically dealt with religious, civil and criminal affairs. It was used as a traditional law in Ethiopian church starting from 16thc, depicting the fact by stating that every subject must submit to the authority of the ruler, since he is appointed by God and God has given them authority; one who opposes the ruler and rebels against him, rebels against his creator. Thus, it was essentially a codex of law providing for secular and spiritual and legal provisions rather than a constitution.

**C. *Serate Mengest:*** which was a document coded of the 19thc which dealt with administrative protocols within the government institutions.

**Major Foundations of the Traditional Constitutions**

Some of the major constitutional philosophy and foundation of the monarchy were as follows:

**⮱The Dynastic claim**: the legend of the Solomonic Dynasty, disseminated by church and state, served as a powerful source of legitimization by the subsequent Ethiopian monarchs. According to this story, the monarchs of the Axumite Kingdom were descendants of the “Solomonic Dynasty.”

**⮱Absolute membership to the Ethiopian Orthodox Church**: since legend of Solomonid Dynasty in the 10th c, Solomonic genealogy and Christianity religion remained the core twin foundation of legitimacy until 1974. Certainly the connection between the emperor and the church is strong. The emperor is not only required to be believer of the ancient Orthodox Christianity, but also to defend it.

**⮱Male succession of the throne**: *Kibre Negest* established the legitimacy of Solomonic throne by stating that, ‘no one except the male seed of David, the son of Solomon the king, shall ever reign in Ethiopia” the exceptions were Yodit, the usurper of state power of the traditional constitution, and Zewditu, due to extended regency.

**⮱The principle of imperial supremacy**: as we saw earlier, the *Fetha Negest* portrayed the fact that every subject must submit to the authority of the king, as he is God’s appointee. The kings’ power was considered as personal, unaccountable and unlimited.

### 4.6.2 Modern Constitutions in Ethiopian History

### The 1931 Written Constitution

Ethiopia has little experience with written constitutions. The coming in to power of Emperor Hailesilasse heralded the period of written constitution. This era starts with the promulgation of the first written constitution in 1931. The Constitution can be considered as more of a formal agreement between the monarchy and the feudal lords. A two chamber parliament was founded, and was given the power to discuss laws, except those on subjects including government organization, the armed forces and foreign affairs, which were reserved to the Emperor; the Senate was appointed directly by the Emperor, and the chamber of Deputies was elected by the nobilities in the Upper House. The constitution had two motives: One of the most important historical goals of the Constitution was to breakdown the powers of the regional lords by bringing them under powerful centralized state machinery. This Constitution strengthened the traditional position of the emperor by weakening the role of nobility. Thus, consolidation and centralization of power was the sole motives of the first written constitution**.** Secondly, its major purpose was modernization**.** The entrance of Ethiopia to the League of Nations directed to introduce a series of political reforms on the basis of advices from the League. Ethiopia was expected to show to the rest of the world that civilized.

The most interesting aspect of the constitution was its provision for the establishment of a Parliament of two Houses-the Senate and the Chamber of Deputies. The senate was composed of members appointed by the Emperor from among the nobility (*Mekuanent*), who have for a long time served Him as Princes or Ministers; Judges or high military officers.

The functions of Parliament as a law-making body were limited. Legislative initiative was the monopoly of the Emperor though Deputies could ask his permission to deliberate on subjects suggested by themselves. He could veto any law proposed by the chambers. He had the right to draw up their procedure and to dissolve them. The work of the Parliament from its creation to the time of the Italian invasion is very little. The Emperor continued to issue his own decrees and the reserve of absolute power lay in his hands with the principle “Divine Rights of Kings”.

### The 1955 Revised Constitution

On the silver Jubilee of his coronation, Haile Selassie proclaimed the “Revised Constitution” which outdated the 1931 Constitution. Similar to its predecessor the revised Constitution solidified the absolutism of the monarchy.

Apparently, it was the federation of Eritrea (with its liberal constitution) with Ethiopia which necessitated the revised Constitution. However, this constitution nowhere mentions of the federal arrangement. The constitution recognized universal adult suffrage but it puts property qualification to be eligible for election. Meanwhile the veto power of the Emperor was still there. Moreover, the Emperor can use his power to legislate by decree, under article 92. All the tax legislation of the first five years of the life of the revised constitution and most other economic measures have been regulated by decrees.

There is a new ring about the provision regarding the Judiciary, which makes a positive declaration, that "judicial power shall be vested in the courts established by law and shall be exercised by the courts in accordance with the law . . ." The courts are "a Supreme Imperial Court and such other courts as may be authorized or established by law . . .” In actual fact the Emperor's *Chilot* still functions. Thus, the new constitution brought Haileselassie’s power to better and higher heights, and to consolidate the absolutism of the monarchy.

### The 1987 PDRE Constitution

In February 1974 the oldest monarchy was overthrown and replaced by military or Derg regime. A popular revolution involving peoples from all sections of the society succeeded in overthrowing the ancient imperial regime. The Provisional Military Administrative Council otherwise known as the Derge replaced the monarchy and started to take revolutionary measures immediately. After the suspension of the Revised Constitution the country was run by pieces of legislations and proclamation.

The PDRE constitution starts by making “the Working People of Ethiopia” owners of the Constitution. It goes on at the preamble to note the fact that Ethiopia is a multinational state with various nationalities and diverse communities with essential unity created by cultural intercourse, migration and commerce. Moreover, the equality, respectability and development of all languages are clearly asserted with a rather pragmatic concession to Amharic as the working language of the country.

In PDRE the organization and functioning of the organs of state is based on the principles of democratic centralism. The preamble states that all organs of state power, from the lowest to the highest shall be established by election. Decision of higher organs shall be executed by lower organs accountable to the higher organs. As per the constitution, all organs of state mass organizations, and other associations and officials shall observe socialist legality.

According to the Constitution the National *Shengo* was the supreme organ of the state power in the country. Candidates to the National *Shengo* were nominated by organs of the Workers' Party of Ethiopia, mass organizations, military units and other bodies. The terms of the *Shengo* would be five years. The members in the *Shengo* were elected from their electoral districts in the country. In the absence of opposition party, the National *Shengo* functioned on the basis of strict party discipline and socialism.

President of PDRE was elected by the National *Shengo* and answerable to it. He was the head of state, represented the Republic at home and abroad. His major roles include: ensuring the implementation of domestic and foreign policy, commander-in-chief of the armed forces, appoint members of the Defense Council, conclude international treaties, and perform other roles assigned to him by the National *Shengo*. The Council of Ministers was the highest executive and administrative organ of the PDRE and was accountable to the *Shengo* and between the sessions of the *Shengo* it was accountable to the Council of the State and the President. The Judiciary branch consisted of the Supreme Court, Courts of Administrative and Autonomous Units and other courts established by law. President, vice president and judges of the Supreme Court were nominated by the president and approved by the *Shengo* for five years term. Other judges were to be elected and recalled by the *Shengo* in the respective levels.

### The 1995 FDRE Constitution

The Constitution of the Federal Democratic Republic of Ethiopia (FDRE) came into force in August 1995 after passing through drafting and series of deliberations by bodies set up by the Transitional Government. The text of the Constitution which gives the ownership of the same to “Nations, Nationalities and Peoples of Ethiopia” established a federal state by dividing and sharing power between the federal and state governments. Reducing the number of states recognized by the Transitional Charter by five the Constitution enumerates nine states constituting Federal Democratic Republic of Ethiopia

In line with federal traditions the Constitution stipulated two layers of legislative, executive and judicial organs. Accordingly a parliamentary government is set up at the federal level with bi-cameral Parliament, the upper chamber is the House of the Federation and the lower chamber is the House of People’s Representatives. Members of the upper chamber are elected by the states’ parliamentary assemblies, whereas members of the lower chamber are elected by popular vote. All recognized national groups are guaranteed representation in the upper house; representation in the lower chamber is on the basis of population, with special set-asides for minorities.

Legislative power is vested in the House of People’s Representatives. Also an executive organ led by a Prime Minister whose office is accountable for the House of Peoples Representatives (HPR) is set up. The executive branch includes the President, Prime Minister, Council of State, and Council of Ministers. The president is elected by both legislative chambers for a six-year term. The leader of the largest party in the lower chamber becomes Prime Minister, who submits cabinet ministers for the chamber’s approval. All ministers serve for the duration of the legislative session. Executive power is in the hands of the Prime Minister, who is also the commander in chief of the armed forces. Similarly an independent judiciary with the supreme federal judicial authority vested in the Federal Supreme Court is established.

Likewise, states have the State Council (with legislative power), State administration (highest organ of state executive) and judicial power vested in courts. The judicial branch is composed of federal and state courts. The Federal Supreme Court is the highest court and exercises jurisdiction over all federal matters; lesser federal courts hear cases from the states. The president and vice president of the Federal Supreme Court are recommended by the Prime Minister and approved by the lower chamber of the legislature.