

The Constitutionality of the “Administrative boundaries and Identity issues commission Establishment Proclamation”

A legal discourse

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1. What happened (in the Parliament)?

A Draft Proclamation for the establishment of Administrative boundaries and Identity Issues Commission (herein after called Proclamation) was submitted to the House of Peoples Representatives (HPR), the lower house, for consideration and adoption. The consideration process of the Proclamation witnessed unusual heated debate in the HPR; some Members of the Parliament (MPs) aggressively challenged the constitutionality of the establishment of the Commission while some others passionately supported it. The dissenting MPs raised two key interrelated legal-political arguments in trying to halt the adoption of the Draft Proclamation. One of the contentions raised by the MPs is that the establishment of the Commission is inconsistent with the Constitution because it usurps the powers and functions of the House of Federation (HOF). The other argument they maintained is that the establishment of the Commission would be inconsistent with the powers of Regional States (States) enshrined in the Constitution. Simply put, the argument provided by these MPs entails that the establishment of the Commission would strip the HOF and States of their constitutional power. Thus, for the opposing MPs the draft proclamation should be discarded because in terms of article 9(1) 'a decision of an organ of state or a public official which contravenes the Constitution shall be of no effect'. After a fierce debate, the Proclamation for the establishment of the Commission (Proclamation) was adopted by majority vote with 33 opposition and four abstentions. Having observed the long tradition of the legislative organ, one might not reasonably imagine an issue that awakens the Parliament that has for long been in a mute mode. The situation shows the mounting importance of ethnicity and administrative boundaries in the Ethiopian political discourse. Indeed identity and administrative boundaries are such enthralling issues that divided not only the Parliament but also the ruling party. Although it is strange to hear question of constitutionality in a parliament that has for long been comfortable with draconian laws (such as the anti-terrorism proclamation and civil society proclamation) which are proved to be entirely conflicting with the Constitution as well as the international human rights treaties to which Ethiopia is a party, it would only be sound to argue in the normal legal mind that neither the parliament nor the executive should surpass the mandate entrusted to it by the Constitution. A genuine legal analysis should therefore avoid politicized views as much as possible and consider the subject matter only from a legal point of view and the overall context. In this regard, it would be imperative to evaluate the soundness of the arguments that have actually been raised by dissenting MPs setting aside the motive(s) behind the statements.

2. General context

Although Ethiopia has, following the appointment of Abiy Ahmed as Prime Minister, seen unprecedented changes bringing an end to the era of 'rule by law'[i] and opening an era of freedom[ii], issues of identity and administrative boundaries have resurfaced as the most important factors that threaten to undermine the reform process and the peaceful coexistence of peoples.[iii]

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Although several political measures have been taken on a case by case basis to cool down the widespread ethnic based violence and tensions in which modest progress has been registered in some areas, the overall situation in the country shows further deterioration[iv] hence requiring a comprehensive solution. The measures taken by the government have been criticized as insufficient to arrest the deteriorating situation calling for additional measure.[v] Government has been criticized for 'failing citizens' basic security'.[vi]

The draft Proclamation was tabled for the consideration and adoption of the HPR at a time when the impartiality and diligence of the HOF, the principal organ entrusted with the power to interpret the Constitution and to resolve interstate disputes, has been questioned more aggressively than any other time in history. Some have criticized the HOF for being too reluctant to deal with certain questions involving ethnicity and administrative boundaries and, at times, for being selective in dealing with such issues,[vii] a situation that feeds into the dominant legal assertion that 'the HOF lacks independence from the executive and thus cannot be trusted to adjudicate sensitive political matters involving the Constitution in an unbiased manner'.[viii] The sizeable criticism that is being raised against the HOF shows that the play of ethnic politics in Ethiopia has resulted in a diminished public confidence over governmental institutions. Unless timely addressed, the simmering intrastate and interstate tensions over questions of self-administration and boundaries coupled with the political standoff among relevant government officials has the potential to escalate into a large-scale conflict that may endanger not only the peace and stability of the concerned states but also the survival of the nation. It appears that unless the situation is arrested as early as possible, the rising hegemonic ethnocentrism that has resulted from the very design of the federal arrangement along ethnic lines in a manner that provides 'mother state' to certain ethnic groups may lead to secessionism.[ix] It is against these situations that the relevance of measures should be evaluated.

In this respect, the initiation of a law to establish a Commission that will undertake studies in a comprehensive and scientific manner and provide recommendations to the key government bodies mandated to decide on issues can be considered as part of the search for a solution to the perturbing situation. As measures that have been taken in terms of the existing laws did not bring the desired outcome, a legal reform is highly desirable.

Observing the alarming situation that has deeply troubled the people, one can commonsensically say that the consideration of the issue by the HPR was appropriate and well-timed, if not late. The fact that MPs should be guided by the will of the people means that they have to listen to the people, identify its concerns and take prompt action in line with the powers and functions entrusted to them by the Constitution. The initiation of the draft Proclamation is also consistent with government's constitutional duty to ensure the observance of law and order and to respect, protect and fulfil the fundamental rights of individuals and peoples.

For the proponents of the establishment of the Commission what is unconstitutional is not the establishment of the Commission but the reluctance and perceived ineffectiveness of the HOF to promptly address the ever rising ethnic and boundaries questions.

3. The legality of the initiation proces

As has been observed in several media outlets, some people have doubted the legality of the process of the initiation and submission of the Draft law. Two major points have been raised in support of such assertions: the idea that draft laws should have been initiated by the HOF and the assertion that 'meaningful consultation' has not been undertaken with the people before the adoption of the Proclamation.

Although the initiation of laws in Ethiopia is an area that requires clarity, the author of this article submits that in terms of the existing laws and the established practice of the government, the process of initiation and submission of the Draft Proclamation is lawful and desirable. In terms of article 6(2) of the House of Peoples' Representatives Working Procedure and Members' Code of Conduct (Amendment) Proclamation No. 470/2005 the government, the House of Federation, the Federal supreme Court, the MPs, the speaker, the Committees of the HPR as well as other government agencies accountable to the HPR have the mandate to initiate draft laws. Then the relevant standing Committees should submit recommendations and suggestions to the House. Having been initiated by the government and endorsed by the two relevant standing Committees - the Standing Committee on law Justice and democracy and the Standing Committee on Foreign relations and peace – the process of initiation and submission of the draft proclamation was consistent with the law. But one can challenge the process for failing to meet the standard of prior meaningful consultation with the people. This is however a general criticism that can be presented on the general law-making practice that has been in place in the long history of the nation. On the other side, a careful observation of the established practice of the incumbent government and the subsequent reaction of the people suggests that the Proclamation has indeed received better popular support than some of the laws that were literally imposed on the people by the government against the will of the majority of the people. Perhaps a comment that can be presented against the initiation process of the Proclamation is that the HOF could have been (one of) part of the initiation of the Draft as the issues involve it as well.

This line of argument seems sound and logical on its face but to insist that the HOF is the only relevant body to initiate the draft proclamation or that the HOF must be consulted in the initiation process would be an incorrect reading of the law and the established practice of the government.

In practice the HPR has been guided by its Rules of Procedure and Members' Code of Conduct Regulation No. 3/2006.[i] This regulation specifies a procedure that is different from Proclamation no. 470/2005. The Regulation states under its article 50 that government shall take the main responsibility of initiating laws. In the Regulation, the HOF is not explicitly mandated to initiate laws. But it does not totally prohibit it from initiating laws because article 50(1) (d) states that 'other bodies authorized by law have the power to initiate laws. In this case the HOF is authorized by the Proc No 470/2005. Nevertheless, it has to be noted that this regulation, although it is indicative of the government's long practice, is subordinate in hierarchy to the Proclamation, and therefore cannot overrule the issues stated in the Proclamation.

The fact that the Constitution specifies only the fundamental powers and functions of the HOF in a broader term and that specific powers and responsibilities of the HOF have been determined by the Proclamation enacted by the HPR (Proclamation No 251/2001) implies that within the broader framework provided for in the Constitution, the HPR can at any time decide on the details of the powers and functions of the HOF. This line of reading seems overextended on its face but it is a plausible legal argument. One may question the constitutionality of Proclamation No 251/2001 itself, but it is the core legal document of the HOF on which no constitutionality question has ever been raised by the government beyond the sparkling law school academic discourse on the issue.

Furthermore, another sound legal argument that has been made against the HOF's power to initiate laws suggests that allowing the same body that interprets the Constitution to initiate laws would bring 'the most undesirable outcome'.[ii] From this perspective, the exclusion of the HOF from the initiation process of the draft proclamation is indeed appreciable.

4. The constitutionality of raison d'être for the establishment of the Commission

The raison d'être for the establishment of the Commission can be inferred from the preamble part and the operative provisions of the Draft Proclamation. Instead of a separate analysis of each part, a combined but systematic exploration of the preamble, the objectives and the Explanatory Note would give a better picture of the need for the establishment of the Commission.

I. Strengthening the federal system to reinforce diversity of nations, nationalities and peoples

This objective creates a direct cause and effect relationship between the federal system and the diversity of NNP. It puts the federal system as an essential condition to further strengthen the diversity of NNP. Read in tandem with the explanatory note, it intends to strengthen the idea of 'unity in diversity.' One way the Commission can help strengthen the federal system is by providing professional recommendations on the vertical and horizontal intergovernmental relations which has been predominately undertaken through party structures. The establishment of the Commission itself shows the will to resolve intergovernmental differences as well as identity and boundaries issues through formal professional institutions rather than by party lines. This will be further discussed somewhere else.

II. Resolution of issues of administrative boundaries, self-government and Identity questions that repeatedly occur between regions nationally and for lasting;

This presupposes the presence of unresolved questions of identity, self-government and administrative boundaries between the existing regional states. The explanatory note states that the continuation of identity and boundary questions are hampering the process of establishment of one economic and political community. This reflects the actual fact on the ground in several part of the country. This objective also suggested that there is a desire to find a lasting solution to the issues of administrative boundaries and identity questions. The establishment of the Commission has been seen a good step towards this project. Finding a comprehensive mechanism by which issues can be resolved for lasting is the inherent duty of the government which is consistent with the Constitution. Furthermore, the establishment of the Commission reinforces the function of the HOF. The HOF is a body primarily established to address interstate and other constitutional disputes when a complaint is submitted to it. As the experience of the HOF shows, it exercised these functions on a case by case basis only when a complaint is submitted to it by concerned parties. The governing laws of the HOF encourage such individualistic approach through a strict adherence to the procedures provided for in them, hence discouraging it from following a comprehensive approach to find lasting solution to questions of identity, administrative boundaries. To this extent the Commission would complement and reinforce the function of the HOF by undertaking comprehensive studies that would help bring lasting solution to the concerns.

III. Prevention of Conflict and instability that may result from differences over administrative boundaries

Differences over administrative boundaries have the potential to escalate into a large-scale conflict. An inconsiderate playing of the game of the politics of ethnicity and local boundaries has been a major cause of intrastate conflicts in Africa.[i] Conflict prevention is a necessary undertaking demanded by the inherent/Constitutional duty of the government to ensure the observance of public peace and order and to protect the safety and security of citizens. Peace is a fundamental human right which is expressly enshrined under the international treaties ratified by Ethiopia.[ii] Public peace has got superior importance in the Constitution. This can be inferred from articles 26, 27, 30 and 93 of the Constitution where fundamental rights can be limited in the interest safeguarding public peace. In terms of article 52(2)(g) of the Constitution, States have the duty 'to maintain public order and peace within their territory'. However, the Federal government has the power to enact overall policies and standards to comprehensively deal with social, economic and development. Thus, the establishment of an organ that could serve as a comprehensive conflict prevention mechanism is not only prudent but part of the constitutional duty of the government as well. Even if whether the Commission could serve the desired purpose is yet to be seen, its establishment however is a step towards fulfilling constitutional obligations.

IV. A neutral, professional (supportive) body to peaceful solution of issues of identity and administrative boundaries?

This implies that Commission will be a 'neutral' professional body. Yet the fact that the Commission is responsible to the Prime Minister means the Commission's independence is not fully guaranteed. The idea of the neutrality should therefore be understood to refer to the Commission's functional autonomy and not a complete institutional independence from the government. This should be read consistently with the nature of Commission's function. The Commission's function is to assist the executive, the legislative and the HOF through professional research, and not to make binding decisions. Article 14 of the Draft Proclamation also strengthens the idea that the neutrality of the Commission is functional in its nature by saying that the Commission undertakes its work independently and impartially. In this context, the Commission has also been given under article 20 of the Draft Proclamation power to issue directives for the implementation of the Proclamation. Hence it has full autonomy to determine its working method, the areas of research, the outcome of its research and the recommendations it provides, while the decision-making organs to which the recommendation or report is submitted reserves the discretion to take or to not take the recommendations.

Furthermore, the fact that the Commission is responsible to the Prime Minister should not adversely affect the transparency of the work of the Commission and individuals and people's right to access to timely information. Like any other body, the Commission should disclose its working method and provide full information on the progress of the activities it undertakes.

5. The mandate of the Commission vis a vis the powers and functions of the House of Federation: Proving conformity

A careful reading of article 4 and 5 of the Draft Proclamation indicates that the mandate of the Commission is limited to investigating identities and boundaries issues, collecting opinion and inputs from the public and other stakeholders, facilitating ways in which Conflicts can be resolved, providing recommendations to the Prime Minister, the HOF and the HPR and initiating policy framework on administrative boundaries. This implies that the Commission's mandate is just recommendatory. The Draft Proclamation does not mandate the Commission to decide by its own on questions of identity and administrative boundaries which are primarily the power of the HOF. This was also cleared out during the adoption process of the Proclamation hence forming part of the legislative history. The Proclamation does not encourage the Commission to intervene in the substantive functions of these bodies; it only gives the Commission supportive and facilitation role. Nor does the proclamation impose any obligation on any government body to accept reports or recommendations submitted by the Commission.

In this regard, a major contentious issue worth analysis is whether the (Draft) Proclamation, by establishing the Commission, stripes the HOF of its power enshrined in the Constitution. The principal argument of the author is that the Proclamation does not usurp the power of the HOF, instead it pledges to reinforce the powers and functions of the HOF by establishing a supportive Commission which is set to undertake professional studies and provide workable recommendations on issues that the HOF has been proven ineffective. Neither the mandates of the Commission nor its organizational structure provided for in the founding Proclamation has any implication to grab the power of any other government body. Question of inconsistency and unconstitutionality do not arise in so far as the proclamation has explicitly stated that the HOF has the full discretion to accept or not to accept the recommendations of the Commission. The following sections further elaborate this legal reality.

For ease of understanding let us identify the relevant powers and functions of the HOF first. The powers and functions of the HOF are listed down under article 62. In the context of this article, the substantive powers of HOF can be summarized into three broad crosscutting categories; interpretation mandate, protection mandate, and promotion mandate. Activities such as making decision on complaints concerning violation of constitutional rights, the adjudication of constitutional dispute fall primarily within the domain of the protection mandate of the HOF.

. Interpretation of the Constitution falls within the domain of the interpretative mandate of the HOF. The establishment of the CCI falls within the interpretative and protection mandate of the HOF. Promoting and consolidating the equality and unity of NNP falls primarily within the promotion mandate of the HOF. Striving to find solutions to disputes or misunderstandings that may arise between States falls within its protective and promotion mandate. But in a broader sense it can be said that the interpretative and promotion mandates of the HOF deliver into the protection of the constitutional rights of individuals and NNPs.

The HOF has the exclusive mandate to interpret the Constitution. It undertakes its interpretative function through the assistance of the CCI and the ad hoc or permanent committee(s) that it establishes. It is therefore important to assess if the establishment of another body with the mandate to submit recommendations to the HOF is consistent with the Constitution in light of the powers and functions of the CCI provided for in the Constitution. This requires a clear understanding of the functions of the CCI and the Commission. The CCI is established to provide professional support to the HOF to efficiently undertake its Constitutional interpretation function. The establishment of the CCI is reasoned by the inherent gap of legal knowledge in the HOF because the HOF is essentially a political body composed of political appointees, not a court of law. This is partly recognition that the Constitution is also a legal document as much as it is a political document.

This implies that in terms of the Constitution, the power of the CCI is limited to Constitutional disputes and Constitutional Interpretation. These are primary the protective and interpretative functions of the HOF. The Constitution does not require the involvement of the CCI if there is no dispute over a Constitutional matter. While matters involving constitutional dispute should be considered by the CCI and submitted to the HOF for consideration and decision, the constitution does not require matters other than those involving constitutional disputes or interpretation to be primarily considered by the CCI. Thus, not all issues that fall within the domain of the HOF should be primarily considered by the CCI. It is implied under article 84(1) that not all Constitutional disputes require constitutional interpretation. If the CCI, up on consideration of an issue, does not find it necessary to interpret the Constitution, it does not have to submit recommendation to the HOF even if the issues are of serious concern to the people. In this case, the HOF should exercise its administrative/ political function where it can be assisted by another body. The relevance of the Commission can therefore be weighed from this perspective. In this case, there is no justifiable cause to say that the Commission participation will stripe the CCI of its advisory mandate provided for in the Constitution.

Like not every identity question falls under the protection mandate of the HOF, not every boundary issue is necessarily a constitutional matter. The fact that interstate boundaries have not been demarcated as per the present Constitution would strengthen the latter assertion. Be that as it may, identity issues have a great deal with the promotion mandate of the HOF enshrined under article 62 (4) of the Constitution. The promotion mandate of the HOF requires a broad range of tasks that require the participation of a multitude of stakeholders. Simply put, the HOF cannot effectively deliver on its responsibility to promote the equality and unity of NNPs alone. Although its primary function does not precisely fall within the promotion function of the HOF, the CCI can assist the HOF during promotion activities. Nevertheless, as far as the promotion mandate is concerned, there is no special condition that makes the CCI more relevant than other organs. Furthermore, the promotion mandate of the HOF entails multifaceted tasks that require professionalism. In this regard, the Commission could play an important role in supporting the function of the HOF. Perhaps a counter argument that one may raise, though distantly, against this proposition is through an imperfect reading of article 83(2) to mean that the HOF makes decision only up on receipt of reports or recommendation from the CCI. A thoughtful reading of the provision is important to identify what it exactly says and implies. Article 83(2) says that “House of the Federation shall, within thirty days of receipt, decide a constitutional dispute submitted to it by the Council of Constitutional Inquiry.” This does not mean that the HOF cannot collect information or receive reports from other organs. It only indicates the time frame within which the HOF has the obligation to decide on the DISPUTES submitted to it by the CCI while implying that it has the discretion to consider or not to consider a report that may be submitted to it by any other organ. This argument is supported by article 8 of Proclamation No. 251/2001 which underscores that even after receiving recommendations from the CCI, the HOF can collect additional information that it deems is relevant to the interpretation of the Constitution. In this case reports and recommendations of the Commission could be an important source of information.

The HOF is not and has never been the only government organ that deals with issues concerning ethnicity and administrative boundaries. Nor does the constitution say that the HOF is the only organ to deals with Inter-State disputes. In the previous years, the Ministry of Federal Affairs had been the most active organ in dealing with such issue.

[i]Furthermore at present the Ministry of Peace has the power to facilitate the resolution of interstate disputes without prejudice to article 48 and 62(2) of the Constitution.[ii] Thus, the HOF has the exclusive mandate to interpret the constitution and to give final determination on disputes, but it does not have exclusive rights to deal with issues of ethnicity and administrative boundaries.

6. Intergovernmental relations/the right to self-determination vis a vis the establishment of the Commission

Perhaps this is a suitable time to weigh the mechanism that the Ethiopian federal system provides to resolve the differences that have been observed between the federal government and regional governments. The absence of a comprehensive list of concurrent powers of the federal government and regional states in the Constitution coupled with the absence of independent judicial body to adjudicate differences through impartial interpretation of the Constitution has been a major gap of the Ethiopian federal system. This is what makes the present situation in Ethiopia is worrisome. It was due to the absence of a constitutional mechanism that specifies the vertical intergovernmental relationship that the Ministry of Federal Affairs was set to play active role in giving assistance to the regional states among other things to address identity and administrative boundaries issues.[i] The diminished legitimacy that the HOF has received at present and its institutional disorganization as well as proven ineffectiveness to timely address issues of identity and constitutional rights violations makes the current situation has worsened the situation.

Without giving a comprehensive regime of concurrent powers, the Constitution under article 52(2)(g) states that States have the power ‘to establish and administer a state police force, and to maintain public order and peace within the State’. On the other hand, it stipulates under its article 51 (1) that the federal government has the duty to defend and ensure the observance of the constitution in any part of the country. It has also the obligation to formulate overall policies on social issues including inter clan relations as per article 51(2). Thus, it can enact a policy or law that applies across the country. Besides states have residual power, meaning powers that are not expressly given to the FG are reserved to states.

In this case one has to assess the situation that is the subject matter to discussion to determine whether it falls within the competence of the regional states or not. Beyond the geographic territories in which a particular situation occurs, an assessment should also be made on the magnitude of the situation and its actual or possible effect on the nation. As highlighted in the previous sections, identity induced tensions, violence and conflicts have endangered not only the peace and stability of the regional states and the lives of the residents therein, but also the national order and security as well as the lives of non-residents. In some of the situations the prevailing political standoff among politicians has left the problems with no one to call into account.

In this context, it would be unsound and against the purpose of law and the Constitution to demand the federal government to sit hands folded. Neither is such a claim consistent with the previous practice of the government where the Ministry of Federal Affairs as well as the Prime Minister's Office through its department called Office of Regional Affairs were serving a function of intergovernmental coordination to resolve similar situations. The constitutional duty to ensure the observance of "law and order" in the country enshrined under article 77(9) also implies that the federal government shall fulfil its duty when the subnational self-administering entities are unable or unwilling to promptly address issues that have the potential to escalate into a large-scale conflict to threaten the national public order and the security of the people. In the present context, instead of demanding the Federal government to sit hands folded, what measure should the federal government take and how it should take the measures should be the subject of discussion.

The establishment of a body with a mandate to undertake studies and provide professional recommendations that would help address these challenges cannot in any form be considered as interference in the affairs of States. It is also unsound, at least legally, to argue that a commission with a role of facilitation and undertaking research would usurp the powers of State authorities or any other government organ. Moreover, the establishment of the Commission signals a shift from the long-existed tradition of reliance on party structures to address intergovernmental disputes to a formal institution mechanism. The tradition of heavy reliance on party lines has partly constituted to the political challenges that exist at present in relation to intergovernmental relation because it is apparent that the situation is the result of the split within the EPRDF. It is part of the institutionalization process.

Besides, the government can exercise its inherent power to establish any organ on any thematic issue as far as it is not inconsistent with the Constitution. Although it may not be explicitly provided for in the Constitution, under any circumstance government can establish any mechanism that it deems would help to effectively undertake its functions. The Commission is not the first government affiliate research body established in Ethiopia.

7..Exhaustion of Local Remedies: a legitimate justification?

The other contentious issue in dealing with issues of constitutionality is the interpretation and application of the requirement of exhaustion of local remedies. In a response to questions of 'identity and related constitutional rights' raised by the people who claimed to be Wolqayit and Tegede, the HOF referred the matter to Tigray state saying that such questions cannot be directly submitted to the HOF.[XVII]

Furthermore, in a response to the perceived reluctance of the HOF to act on the questions of ethnicity and administrative boundaries, the Speaker of the HOF raised the prerequisite of exhaustion of local remedies as a legitimate justification. In a televised discussion, the Speaker highlighted that the HOF cannot entertain issues involving ethnicity and administrative boundaries unless a complaint is submitted to it. The Speaker added that "What is being asked is the HOF while the matters fall within the jurisdiction of regional states." According to the Speaker, there is no way by which a complaint can be directly submitted to the HOF; The HOF can entertain cases only on the basis of 'appeal' on the decision of the concerned regional state.[XVIII] The Speaker's statement and the letter of the HOF has two meanings. First it implies that the HOF can deal with ethnicity and administrative boundaries only up on complaint. This means that the HOF cannot take proactive measures in relation to such issues. Secondly, even if a complaint may be submitted, the HOF cannot entertain the matter before the concerned state authority gives its determination or two years have passed without a decision. The latter assertion seems consistent with article 20(3)) of the Proclamation establishing the HOF.

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However, both of these assertions are inconsistent with the essence of the principle of exhaustion of local remedies and the fundamental principles of human and people's rights.

Firstly, it is a generally accepted legal principle that the requirement of exhaustion of local remedies is necessary only when it is not obvious that the procedure is 'unduly prolonged.' This means the requirement does not apply if the resolution of an issue takes unreasonable period of time for the primarily concerned party. The reasonable time provided for in the Proclamation is two years (article 20(3)). From a human rights perspective, the two years period provided for in the Proclamation goes beyond the normal limit of reasonable time. This has adverse impact on human rights as it widens the discretion of the concerned authorities. However, despite the two years period the concerned State should make the maximum effort to decide on the issue as fast as possible.

"the Commission's Proclamation serves a pivotal role in finding a comprehensive solution to the concerns raised by the people."

The two years period is meant the last unpassable deadline, and the concerned authority should not wait for this time frame.

Secondly, the purpose of exhaustion of local remedies should be understood to notify the concerned State authorities of the situation to give them the opportunity to address the concerns raised before being brought to the HOF. Concerned states should not wait for a formal petition to be made once the question of the people is clear. In the present situation in Ethiopia, the concerned states have had first-hand information about the situation and ample time to address the concerns or at least could own the situation. However, instead of trying to address the situation relevant state officials have been heard trying to externalize the cause of the problem and giving the questions unnecessary political meaning thereby discouraging peoples' from freely raising their concerns. This suggests the lack of political will on the part of the concerned regional states to solve the problem.

Thirdly, as the popular concerns have been known for several years causing large-scale unrest that are resulting in serious violations of rights of residents and threatening the national security, there is reasonable ground to conclude that the concerned regional states are either unable or unwilling to promptly address the problem. In this case, the HOF has no tenable legal ground to reject complaints concerning these issues on the ground of failure to meet the requirement of exhaustion of local remedies.

Fourthly, the HOF is not just an adjudicatory body; it is primarily a political body that should, in collaboration with relevant stakeholders, strive to find political solution to concerns raised in relation to matters that fall within its competence. In this respect it should participate in reducing the ever-rising tensions in collaboration with States and other stakeholders rather than forwarding the matter to States in its entirety.

Furthermore, the requirement of exhaustion of local remedies should not hold in case where 'the domestic situation of the concerned State does not afford due process of law for the protection of the right or rights that have allegedly been violated. A careful look at the situation areas in several parts of the Country show that due to the political sensitivity of the questions and the prevailing tensions as well as continues arrest and detention of individuals who raise identity questions, it is unrealistic to expect that the concerned states would afford due process of law for the protection of the right.

Finally, in the absence of conducive circumstance where individuals and the people can make use of the desired local remedies at State level, holding the requirement of exhaustion of local remedies is flawed.

On another note the Speaker raised that for the HOF to decide on questions of identity and related constitutional rights, the questions should be submitted in a democratic way and it should follow the procedure required by law. Although from a legal point of view an applicant should follow the procedure, strict interpretation of the laws and rigid adherence to the ordinary procedure may not be a prudent approach to address the simmering tension and ensure the protection of the rights of the concerned people. Nor is such interpretation consistent with the object and purpose of the Constitution and the other relevant laws of the land. The general objective of the law being maintaining peace and order as well as protecting the rights, safety and security of individuals and peoples, a flexible approach is advisable in dealing with the current intricate situation in Ethiopia. Generally, it should be understood that the requirement of exhaustion of local remedied is a principle that has numerous exceptions. Most of the prevailing ethnic based concerns in Ethiopia fall with the domain of the exceptions. The HOF, as a constitutional adjudicatory body, should apply judicial activism in interpreting and applying this principle. In this case, it should give priority to the fundamental human rights of individuals and groups before other considerations. In exercising its 'judiciary' function, the HOF should try to avoid political biases and decide on the complaints in an impartial manner. The HOF should also make the best possible effort to regain the trust and confidence of the people by making an impartial decision on major issues of popular concern through a professional and scientific investigation. In this regard, it would be quite important for the HOF to work in collaboration with the Identities and Administrative Boundaries Commission. It is observed that the existing legal framework has a restraining effect on the HOF. It discourages the HOF from acting proactively to the speed that the inbuilt dignity and rights of individuals demand. Yes, administrative issues cannot and should not, by any means, precede human and people's rights. It is implied in the structure and amendment procedure of the constitution that human rights should be given special consideration over other political matters.



8. Conclusion

The Constitutionality of the Proclamation is beyond question. Neither the law nor the established practice of the government in the quarter century prohibits the establishment of the Commission with its present mandate. Perhaps, the only plausible legal argument that may be forwarded on the proclamation is on the drafting style, not constitutionality.

The ultimate purpose of the law being protecting and serving the society, the interpretation and application of existing laws and actions being taken by the government should put the people at the center. In this regard, the Commission's Proclamation serves a pivotal role in finding a comprehensive solution to the concerns raised by the people. Criticisms that are being forwarded against the establishment of the Commission fail to show any other workable alternative to address the ongoing intricate situation in the country.

Instead of disputing the Constitutionality of the badly needed Proclamation, it is in the best interest of the peoples that the federal government, States and other stakeholders put a concerted effort to operationalize the Commission and enable it to effectively to deliver on its mandate. The government should put the necessary effort to operationalize the Commission as soon as possible, provide it with the necessary human, administrative and financial support. Once the Commission becomes operational the Prime Minister as well as other government bodies should respect its professional autonomy.

In any case, the door is open for any interested party who has reservation on the constitutionality of the Proclamation to submit a case to the consideration and decision of the HOF.

"The HOF, as a constitutional adjudicatory body, should apply judicial activism in interpreting and applying this principle. In this case, it should give priority to the fundamental human rights of individuals and groups before other considerations."

End Note:

[I] Abebe, A. (2012). Rule by Law in Ethiopia: Rendering Constitutional Limits on Government Power Nonsensical. <https://www.repository.cam.ac.uk/handle/1810/245111>

[II] The Guardian Jul 2018 'These changes are unprecedented': how Abiy is upending Ethiopian politics' <https://www.theguardian.com/world/2018/jul/08/abiy-ahmed-upending-ethiopian-politics>

[III] Yohannes Gedamu 'Rising ethnic violence undermines Abiy's reform agenda' African Arguments 02 October 2018 <https://africanarguments.org/2018/10/02/ethiopia-rising-ethnic-violence-undermines-reforms/> ; France 24 'Ethnic clashes challenge Ethiopia PM's reforms' <https://www.france24.com/en/20180810-ethnic-clashes-challenge-ethiopia-pms-reforms>;

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[XI] See generally, Paul D Williams War and Conflict in Africa (2nded) 2016; Yousif Takana 'The Politics of Local Boundaries and Conflict in Sudan The South Darfur Case' (2008)

[XII] See African Charter on Human and People's Rights, art 23.

[1] Proclamation No. 266/2001, art (11).

[XIII] Proclamation No. 1097/2018, art 13(1) (b).

[XVI] Proclamation No. 266/2001, art (11).

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