

THE LAW MAKING PROCESS IN ETHIOPIA :

Post - 1974

Part Two

Law Making

Under the PDRE Constitution : Analysis and Proposal

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The process of making statute law is almost universally spelled out in the constitution of countries that have written constitutions. The process involves initiation, enactment, signing and publication. In some jurisdictions, another important stage- revision and coordination also exists.

It is the purpose of this article to probe into the relevant provisions of the Constitution of the PDRE which was adopted by the Ethiopian people by referendum held on February of 1987 and to find out the steps in the process of law making thereunder.

Initiation of legislation

The genesis of the process of making law is the stage of initiation. The relevant article of the PDRE Constitution on the initiation of legislation is Article 71. According to this Article, the following have the right to initiate legislation :

- the Council of State
- the President of the Republic
- Commissions of the National Shengo
- members of the National Shengo
- the Council of Ministers
- the Supreme Court
- the Procurator General
- Shengos of higher administrative and autonomous regions , and
- Mass organizations through their national organs.

The right to *initiate* legislation means not just the right to propose legislation, for this can be done by individuals or institutions not included in the list under Article 71. It rather is the right to present the draft legislation to the enacting organ be it the National Shengo, the Council of State, the President of the Republic , or the Council of Ministers. A concerned individual may, for example propose draft legislation on protecting the environment. Yet he does not have a constitutional right to have it included in the agenda of the National Shengo. He can, however , submit his proposal to any one of the organs specified in

Article 71 of the Constitution and should such be endorsed by any of the organs it can be submitted to the organs empowered to enact laws by the Constitution.

The initiated legislation could be of the type of law that has to be issued by the Shengo, in which case it becomes a *Proclamation*¹ or by the Council of State as Decree law² or *Special-Decree-law*³ or by the President of the Republic as Presidential Decree law⁴. It is also possible that initiated legislation may have to be issued in the form of regulations by the organ in whom the Constitution has vested the power to do so.

Enactment

The enactment stage in the law making process is when a bill or a draft law is authorized to become law. Under the Constitution of the PDRE the enactment of legislation is clear for certain types of legislation and is not so in the case of others.

This problem can perhaps best be treated if the types of laws under the Constitution are identified and discussed. Hierarchically, the types of law can be put as follows:

Type of law	Issuing organ
Proclamation	National Shengo
Decree	Council of State or the President of the Republic
Regulation	Council of Ministers
Derivative regulations	empowered organ

A significant omission in this list of laws is the Special Decree of the Council of State. This is law issued by the Council of State when the National Shengo is not in session and, as its name indicates, under «special» circumstances. The duration of the Special Decree is or should be the period between its issuance and submission to the next session of the National Shengo. Within this span of time the Special Decree is of equal standing with Proclamation, that is, the law issued by the Supreme organ of State power. Once the Special Decree is submitted to the National Shengo, it may be rejected, in which case, it ceases to exist; or accepted, in which case it has to be issued in the form of a proclamation by the National Shengo.

The other «type of law» which is not included in the above list is the Presidential Decree. The power to issue Decree is also vested on the President of the Republic by Article 87 of the Constitution. This power is to be exercised only when the Shengo is not in session. Presidential Decree is «law» by which the appointment or dismissal, by the President of the Republic, of officials electep by the National Shengo is publicized. Because of its very limited purpose and lack of substantive application in every day life, it will not be treated in here

Normally Proclamations are enacted by the National Shengo. Laws issued by the Council of State as Decrees or Special Decrees are enacted by the Council of State. The enactment of Presidential Decrees is done by the President of the Republic. The enactment of regulations is not as clear as the enactment of the types of laws discussed in the preceding paragraphs.

The word *regulation* is mentioned only in two Articles of the Constitution. In both cases it is mentioned in connection with the powers given to some state organs. It is first mentioned in Article 82(1) (c) and then in Article 92(1). The Council of State is given the power to «revoke *regulations* . . . issued by State organs accountable to the National Shengo» under Article 82(1) (c). Before we embark upon the full examination of this sub-article, a glance at the organs accountable to the National Shengo is in order. The State organs that are accountable to the National Shengo (other than the Council of State and the President of the Republic) are:

1. the Council of Ministers,
2. the Supreme Court,
3. the Office of the Procurator General,
4. the National Workers' Control Committee,
5. the Office of the Auditor General , and
6. Higher Shengos of Administrative and Autonomus Regions.

Among the above, the National Workers' Control Committee (unless one argues that it falls in the category of mass organizations) and the Office of the Auditor General are not even given the right to initiate legislation under Article 71 of the Constitution. What is more, while the Constitution gives some details on the structure and function of the other remaining organs, there is a complete black-out about the National Workers' Control Committee and the Office of the Auditor General. In Articles 63(3) (e) and (f) and 64(e) of the Constitution only their establishment and « election » of the heads of these organs are indicated

Let us now see whether or not all state organs that are accountable to the National Shengo have the power to enact *regulations*. The main and perhaps the only purpose of Article 82(1)(c) is to give power to the Council of State to revoke regulations and directives issued by the organs of state accountable to the National Shengo. We should note that all state organs accountable to the National Shengo do not have the right to issue regulations; but *should* they issue regulations (by whatever authority), said regulations can be revoked by the Council of State. The most one can say about this sub-article is that it *presupposes* the issuance of regulations and directives by state organs accountable to the National Shengo. Hence , one can rightly conclude that the Article cannot be taken as a source of authority for the issuance of regulations by state organs accountable to the National Shengo.

This argument can be strengthened by referring to Articles 92(1) and 97(2) and (4) of the Constitution. Article 92 (1), the second article of the Constitution in which the word *regulations* appears, reads in part:

The Council of Ministers shall have the following powers and duties:

- 1) . . . issue regulations and directives.

When, on the other hand, we look at Article 97(2), we see that Shengos of administrative and autonomous regions are given the power to issue *directives* only.

Thus the Council of Ministers has the Constitutional right to issue regulations. Shengos of Administrative and autonomous regions do not have similar right. To argue that Article 82 (1) (c) empowers shengos of administrative and autonomous regions to issue directives would (at least in the light of Art. 97(2)) be demanding something that the Article is neither expected nor intended to provide.

The other state organs, that is, the Supreme Court, the Office of Procurator General, the National Workers' Control Committee and the Office of the Auditor General, like the higher shengos of administrative and autonomous regions, do not have the Constitutional right to issue regulations.

On the other hand, it may be argued that had the full attributions of the institutions mentioned in the immediately preceding paragraph been treated in the Constitution; a provision on the making of regulations would have appeared. This, at best, is only a conjecture.

What is the meaning of the word «regulation» as used in the Constitution? Hierarchically, proclamation is of higher degree than Decree of the Council of State or Decree of the President of the Republic. In spite of this both are primary legislation. Similarly «*regulations*» as used in Article 92 (1) of the Constitution, is primary legislation though hierarchically lower than all the other primary legislation. Regulations issued pursuant to Article 92(1) of the Constitution is not *derivative* regulation. There will be no need to have a constitutional provision if the word «regulations» is to mean derivative regulations or executory acts deriving its power from some primary legislations—say a Proclamation or Council of State Decree. This would be better handled in the primary legislation that authorizes the issuance of the executory act itself.

It would be wrong to assume that the essence of the word «regulations» as used in Article 82(1) (c) is the same as the one discussed in respect to Article 92(1). The revocation of any regulation, be it derivative or not, that is contrary to laws enacted by the National Shengo, the Council of State or the President of the Republic, lies within the competence of the Council of State. Besides, since the Council of State is the organ that is also given the power to interpret the Constitution and other laws, (Art. 82(1) (b)), it would be illogical to hold that the power to revoke regulations (Art. 82(1)(c)) is limited only to the type of regulations specified in Article 92(1) of the Constitution.

To conclude, the power to enact non-derivative regulations which actually fall within the group of primary law is only vested in the Council of Ministers by the Constitution. Other state organs that are accountable to the National Shengo do not have the constitutional authority to issue such regulations.

The power to issue derivative regulations or executory acts can be vested in these organs or other institutions like ministries by a primary legislation. Perhaps the only problem that calls for serious consideration would be that of nomenclature-what name is to be given to derivative regulations to be issued by state organs? It can be given a descriptive name-derivative or executory regulations.

Signing

Signing is another stage in the law making process. Signing comes after ratification and then follows publication. *Signing is not a discretionary power*, if at all it is a power. *It is only an attribute-a duty* that has to be automatically discharged once it is made sure that the steps preceding it are taken. As can be seen below, this is in line with the laws and practices of many socialist countries. The constitutions of some countries include a provision on the maximum duration an approved law can stay without being published in the official gazette. For example, in Albania, laws must be published in the official gazette « not later than 15 days after their approval» by the legislative organ.⁵ Laws adopted by the National Assembly of Bulgaria must be published in the state gazette not « later than 15 days after their adoption.»⁶ The same can be said about the law and practices of the German Democratic Republic⁷ and Romania.⁸

In the constitution of some countries the organs that sign laws are clearly indicated. In the Soviet Union «laws of USSR, decrees and other acts of the Supremes Soviet are published in the languages of the union republics over the Signatures of the Chairman and Secretary of the Presidium of the Supreme Soviet of the USSR.»⁹ The Grand National Assembly laws of the Socialist Republic of Romania are signed by the President of the Republic.¹⁰ The Chairman of the state council and its Secretary sign laws enacted by the Sejm (Polish peoples' Assembly).¹¹ In Cuba, it is the President of the National Assembly of Peoples' Power that is vested with the task of signing laws adopted by the National Assembly.¹² The laws passed by the Hungarian Parliament are signed by the Chairman and Secretary of the Presidium of the Hungarian People's Republic.¹³

The constitution of the PDRE is silent on the matter. Perhaps the only clue one gets about it is in Article 86(5) of the Constitution. This Article reads in part:

The President of the People's Democratic Republic of Ethiopia, shall, in accordance with this Constitution and other laws exercise the following powers and duties: *Promulgate*, in the *Negarit Gazetta*, laws

enacted by the National Shengo, the Council of State and the President of the Republic. (Emphasis added.)

Signing for verification of the correctness of the law as enacted by the peoples' assembly and signing for the purpose of publication in the official gazette are two distinct duties. The first duty is almost invariably discharged (in socialist jurisdictions) by the speaker or the presiding officer of the assembly. The latter is discharged by the Chairman of the Presidium of the Council of State.

Since promulgation of laws is intertwined with the signing of laws, it would be logical to argue and suggest from Article 86(5) that the *signing* of laws issued by the National Shengo, the Council of State and the President *shall be done* by the President of the Council of State - i.e., the President of the Republic.

This is only a partial answer to the issue of signing. The President of the Republic, according to Article 86(5) and the above interpretation, signs only Proclamations, Decrees and Special Decrees of the Council of State and Decrees and Special Decrees he issues. There are, as indicated in the first part of the Article, other *regulations* issued by the Council of Ministers and derivative regulations issued by organs empowered to do so by a law of higher degree. Since the laws to be promulgated by the President of the Republic are specified by the Constitution and since it would be incompatible with the post of the presidency to sign laws issued by lower organs of state, it is recommended that regulations issued by the Council of Ministers shall be signed by the Prime Minister who is the Chairman of the Council of Ministers. The head of the organ empowered to issue derivative regulations should sign the same.

Publication

The last stage in the law making process is that of publication of the enacted laws in the gazette established for this purpose. The whole purpose of this stage is to make the law known to the general public.

Publication of laws, like the signing of laws, is something that has to be routinely done- *it is not a power but only an attribute*. The organ charged with this responsibility shall, having ensured that the law has been enacted and signed by the appropriate organ, promulgate it in the gazette set up for this purpose.

Under the Ethiopian Constitution, publication of laws is not vested in one organ or individual. The President of the Republic is given the attribute of promulgating «laws enacted by the National Shengo, the Council of State and the President of the Republic».¹⁴ This takes care of Proclamations, Council of State Decrees and Special Decrees and Presidential Decree and Special Decrees. But in the list of laws we saw earlier, there are « regulations» issued by the Council of Ministers and there are derivative laws or executory regulations issued by state organs empowered to do so. These, like the other laws, must be published in the *Negarit Gazeta*. Naturally, the question of who is to promulgate these

regulations in the *Negarit Gazeta*, follows. My suggestion is that the Prime Minister, in the case of regulations enacted by the Council of Ministers and the head of the state organ issuing in the case of executory regulations, should promulgate such regulations.

Finally, since in order of importance, most of the laws would be in the form of Proclamation, Council of State Decree and Presidential Decree, it is suggested that the *Negarit Gazeta* be administered by the Office of the President of the Republic who is empowered to promulgate these laws.

Revising and Coordinating

In the process of enacting statute law, the revising and coordination stage comes after the initiation stage. It has been intentionally postponed this late in the discussion. The reason being that I intend to recommend some measures in respect to it and I did not want to mix it with the earlier technical discussion.

Before we go into a survey of the experiences of some selected countries on the matter, a glance at what revision and coordination involves is proper. At this stage of the law making process each draft law is examined and evaluated in light of:

1. its compatibility with the constitution, policy and programmes of the government (and party);
2. conformity with legislative drafting techniques and norms;
3. conformity with the standard format set for the particular type of law;
4. the elimination of internal and external discrepancies and;
5. ensuring the existence of provisions geared at solving the evil intended to be avoided by the (draft) law.

Any draft law that passes through this process will, needless to say, have most, if not all, of its defects corrected.

To show the experience of other countries with respect to this vital stage in the law making process is of importance to academics as well as to policy makers.

In Poland there is a legal Commission at the Office of the Council of Ministers that discharges the above functions.¹⁵ In France the coordination and revision is carried out by the Counsel d'Etat.¹⁶ And in Federal Germany the Ministry of Justice fills this gap.¹⁷

In Ethiopia, under *Derg*, the Legal Committee of the Council of Ministers was the organ that did the coordination and revising of draft law.¹⁸ Under the

Derg practically every piece of legislation was initiated by or passed through the Council of Ministers. The situation is not the same under the PDRE. Laws are, as we have seen earlier, initiated by organs not directly accountable to the Council of Ministers. This makes the Legal Committee of the Council of Ministers incapable, for lack of jurisdiction, to carry out the function of coordination and revision of all legislation. Assuming that the Legal Committee will continue to exist under the new Council of Ministers, laws emanating from this organ will or can perhaps be revised and coordinated as before.

This will leave the coordination and revising of (draft) laws initiated by other organs specified in Article 71 of the Constitution without an office to discharge this badly needed task. To create an organ to do the coordination and revising of laws emanating from the rest of the organs under Article 71 is possible; but in the opinion of the author, it is a luxury that the country may not afford taking the acute shortage of legal cadres presently available into consideration. Further it may be a duplication of the function of the Legal Committee of the Council of Ministers unnecessarily.

The above argument leads us to venture a proposal towards the establishment of a legislative centre and abolishing the Legal Committee of the Council of Ministers. The competing candidates to act as the Centre would be:

- . the Council of State,
- . the Office of the President of the Republic,
- . the Council of Ministers, and
- . the Ministry of Justice.

The Council of State is, under the Constitution, the focal point for legislative activities. Its position as the standing organ of the National Shengo, the supreme legislative organ, its power to issue Decrees combined with its being the interpreter of the Constitution and other laws, and its power to revoke regulations and directives issued by state organ accountable to the National Shengo are some of the important reasons to be put in support of proposing that the Council of State be the legislative centre.

In contrast to the above let us consider the reasons in favor of other competing organs. The Office of the President of the Republic acting as the legislative centre arises mainly because of two factors. One, because of the President's power to issue decree-law and secondly because it is his office that is given the responsibility of promulgating primary laws.

The argument for proposing that the Council of Ministers be the legislative centre has to depend only on the volume of legislation to be initiated by this organ. Since most state activities fall within the jurisdiction of ministries and other organs of state, and a great majority of laws to be issued will originate in the Council of Ministers, it may have a reason in its favor for having the said centre under it.

The last candidate in the list indicated above is the Ministry of Justice. The first argument in proposing this Ministry as a legislative centre rests on the assumption that the expertise is or should be readily available there. The other argument is that the task the Centre is expected to carry out is closely related to the functions assigned to the Ministry under Article 36 of proclamation No. 8/1987. These functions, as stated under sub-articles 1 and 2 of the above cited Article, are that of "assist (ing) in the preparation of draft laws when requested by other ministries, government organs or mass organizations" and that of "undertaking codification works".

Among all the above and considering the reasons given in favour of each I propose that the Council of State should be responsible for the legislative centre.

In light of this proposal some words on technical details are in order. Draft laws may be referred to the legislative centre from several sources. In order to facilitate an efficient performance of the job we suggest that a *Committee* be established to revise and coordinate *all* draft laws before they are sent to the enacting organs. The Committee has to be composed of persons who are representative as well as knowledgeable in the details of legal drafting.

It is recommended that the membership be composed of persons from:

- . the Council of State,
- . the Council of Ministers,
- . the Ministry of Justice,
- . the Office of the Procurator General,
- . the Organ sponsoring the draft law under consideration; and
- . not more than 3 (three) persons knowledgeable in legal draftmanship.

It should be noted in conclusion that the suggestions given in this Article are not based on Ethiopian experience. The reason for this is obvious- the Constitution was hardly a year old at the writing of the Article. This may be a disadvantage. On the other hand, it has its own virtues. It has given me complete freedom to, by drawing up on the experience of other countries, point out some problem areas that need to be concentrated upon. It is hoped that the Article would help all concerned to take appropriate measures early.

Foot Notes

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1. Art. 63 of the Constitution
 2. Art. 82(3), *ibid.*
 3. Art. 86(4), *ibid.*
 4. This is not a subject that can be dealt with in a paragraph or two. Art. 83. of the Constitution is one of the many controversial articles that will attract a lot of reseach by students of constitutional law.
 5. Art. 74 of the Constitution of the People's Republic of Albania
 6. Art. 84(1) of the Constitution of the People's Republic of Bulgaria.
 7. Art. 65(5) of the Constitution of the German Democratic Republic.
 8. Art. 57 of the Constitution of the Socialist Republic of Romania.
 9. Art. 116 of the Constitution of the USSR.
 10. Art. 57 of the Constitution of the Socialist Republic of Romania.
 11. Art. 25(2) of the Constitution of the Polish People's Republic .
 12. Art. 79 (d) of the Constitution of the Republic of Cuba .
 13. Art. 26 of the Constitution of the People's Republic of Hungary
 14. Art. 86(5) (a) of the Constitution.
 15. R.Orzechowski, "The System and Mode of Creating Law in the Polish People's Republic *The Law in Poland*", 1978. pp. 7-38.
 16. W.Dale, *Legislative Drafting: A New Approach* pp. 334-335.
 17. *Ibid.*
 18. Shiferaw W.M., "The Law Making process in Ethiopia. Post 1974, Part One, Law Making under the Provisional Military Government of Ethiopia, see above, at p.