

# Federalism

Teaching Material

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**Prepared under the Sponsorship of the Justice and Legal  
System Research Institute**

**2009**

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**Acronyms and Glossary**

ANDM	Amhara National Democratic Movement
ANDF	Afar National Democratic Front
ARDF	Afar Revolutionary Democratic Front
ARDUF	Afar Revolutionary Democratic Unity Front
Awraja	An administrative unit below the province
BGPDUF	Benishangul-Gumuz People's Democratic United Front
BverfGE	Decision of the German Federal Constitutional Court
Bund	Federal Government (Germany)
Bundesrat	Second Chamber (Germany)
Canton	Name for the twenty-six constituent units in Switzerland
CCI	Council of Constitutional Inquiry
COEDF	Coalition of Ethiopian Democratic Forces
CUD	Coalition for Unity and Democracy
Derg	Literally 'Committee,' widely used to denote the regime in power from 1974-1991
ECSC	Ethiopian Civil Service College
EDP	Ethiopian Democratic Party
EDUP	Ethiopian Democratic Union Party
ELF	Eritrean Liberation Front
EPDM	Ethiopian Peoples Democratic Movement
EPLF	Eritrean Peoples Liberation Front

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EPRDF	Ethiopian Peoples Revolutionary Democratic Front
ESDL	Ethiopian Somali Democratic League
ESM	Ethiopian Student Movement
EPRP	Ethiopian Peoples Revolutionary Party
FDRE	Federal Democratic Republic of Ethiopia
EWP	Ethiopian Workers Party
Fetha Negast	Law of the Kings
HoF	House of Federation, the second or upper chamber
HoPR	House of People's Representatives
Kibre Negast	The Glory of the Kings that narrates the origins of the Solomonic dynasty
Land	Name for the sixteen units of the German federation (plural Länder)
Lij	Title generally reserved for sons of the royal family
MEISON	All Ethiopian Socialist Movement
MLLT	Marxist Leninist League Tigray
Nationality Question	An issue that divided the ESM in the 1960s. Its exact scope and content remains unclear. For some it refers to considering Ethiopia as a multicultural state in which there is an equal recognition of the nationalities to their culture, religion and language. For some others it includes the right to self-determination which would again

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	mean the right to self-rule for the nationalities and for yet others it includes secession.
Negus	King, title of the provincial lords of high birth or special merit
Neguse Negast	King of kings, emperor
OFDM	Oromo Federalist Democratic Movement
OLF	Oromo Liberation Front
ONC	Oromo National Congress
ONLF	Ogaden National Liberation Front
OPDO	Oromo People's Democratic Organization
PDRE	Peoples Democratic Republic of Ethiopia
PMAC	Provisional Military Administrative Council
Ras	Literally head, the highest traditional politico-military title under <i>negus</i>
Region	The name for the constituent units within the Ethiopian Federation
SALF	Somali Abo Liberation Front
SEPDC	Southern Ethiopian People's Democratic Coalition
SEPDF	Southern Ethiopian People's Democratic Movement
Shengo	Parliament
SNNPRS	Southern Nations, Nationalities and Peoples' Regional State
TGE	Transitional Government of Ethiopia
TPLF	Tigrayan Peoples Liberation Front

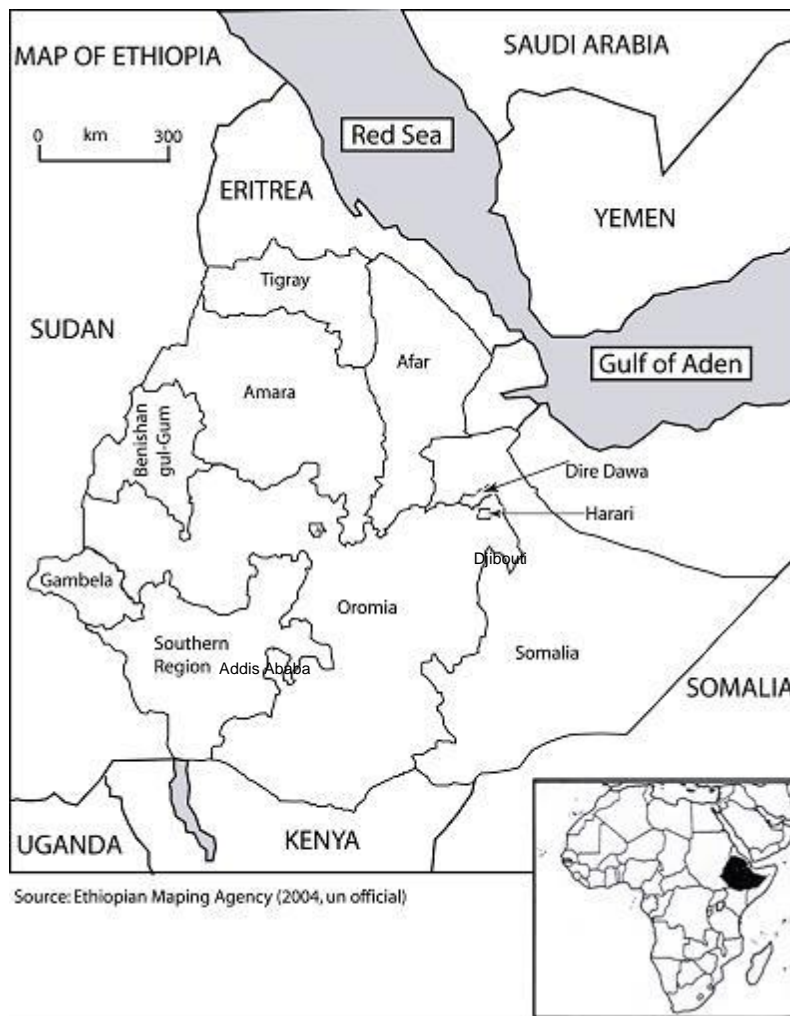


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UEDF	United Ethiopian Democratic Forces (some fifteen opposition forces)
WPE	Workers Party of Ethiopia
WSLF	Western Somali Liberation Front
Zemene Mesafint	The age of the princes, roughly 1769-1855

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**Map showing the constituent states  
of Federal Ethiopia**



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### **Introduction**

### **Background**

Ethiopia is situated in the Horn of Africa bordered by Kenya in the South, Somalia in the South East, Djibouti in the East, the Sudan in the West and Eritrea in the North. It is the third most populous country in Africa, after Nigeria and Egypt, with a population approximating seventy million according to latest estimates and with more than eighty ethno-linguistic groups. Ethiopia is also the major contributor (more than 86 per cent) of the *Abay* (Nile) River, upon which life in Egypt and the Sudan mainly depends. Its cultures, diversity and religions form a microcosm of Africa.

Ethiopia boasts a landscape of extraordinary beauty and varied climatic conditions convenient for a variety of flora and fauna. It contains some of the highest mountain ranges in Africa with Ras Dashen over fifteen thousand feet above sea level and the lowest depression on earth, the Dallol depression. This is the area where several scientific discoveries over a period of time indicated that Ethiopia is the cradle of mankind. Lucy, otherwise known by her Ethiopian name *Dinknesh* or by her scientific name *Australopithecus Afarensis* was found in 1974 in the Afar land. In June 2003 a team of Ethiopian and American scientists discovered other fossil remains indicating the African origin of mankind in Afar, the same eastern part of Ethiopia.

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During the scramble for Africa by European powers at the end of the 19<sup>th</sup> century, Ethiopia successfully defeated Italian colonial forces at Adwa in 1896.<sup>1</sup> This combined with the heroic and successful resistance of Ethiopian patriots when Italy returned for revenge (1935-1941) was inspirational for the anti-colonial struggle in many parts of Africa. The long years of survival as an independent state ushered in the country's many unique features. Ethiopia has its own domestic official language and hosts many other local languages. It also has its own calendar and its own distinct alphabet and numerical system. As can be gathered from historical records, it had its own hey-days and civilization. It is also known for its fascinating historical and cultural heritage. The grand obelisks standing and fallen at Axum symbolize the monarchy of a pre-Christian era testifying the great Ethiopian civilization that flourished in antiquity. The rock-hewn churches of Lalibela built in the twelfth century represent the wonders of ancient Ethiopian architecture. The walled city of Harar represents an interesting mix of cultures and civilization of African and Middle Eastern origin. The castles of Gondar, the stele of Tiya are some of the old prints of Ethiopian civilization, the result of joint consummation of its diverse peoples, inscribed in the world heritage list, thus becoming not only Ethiopian and African but also of outstanding universal value.

Ethiopia is also a founding member of the United Nations, as it was of the now defunct League of Nations, and home to and a leading member of the African Union. Emperor Haile Selassie made a moving address to the League in 1936 when his country was attacked by Italy, asking the organization to choose between support for collective security or international lawlessness, but despite his early warning nobody took his appeal seriously and the world was soon afterwards to face a disaster for itself.

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<sup>1</sup> Colonialism has not been, however, without its impact even on Ethiopia. Italian occupation from 1890-1942 of the northern province, the present-day Eritrea, is the sad legacy, although not exclusively, of colonialism. Although Eritreans share the same language, culture and history with the people south of the border, colonialism, state policy and foreign intervention served to fuel the shaping of a new identity, down playing at least for some time, religious splits and ethnic diversity in Eritrea.

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Despite its rich history, principally under a monarchy that served as a pillar of unity and a political system established on a balance of powers between centripetal and regional forces that ensured its long survival, Ethiopia in the last century regrettably went into the abyss of history, went backwards when the rest of the world was moving forwards. The formation of the modern Ethiopian state parallel to the scramble for Africa at the end of the 19<sup>th</sup> century did not result in a happy outcome. Although it is home to a mosaic of various diverse groups, the Ethiopian state did not incorporate these groups into the political process and many thought there was ‘national oppression,’ the state serving only part of the community. Thus begins the series of claims and counter-claims born out of the cycle of crises. It is very difficult to explain the whole of this crisis and indeed there does not seem to be consensus among writers on its nature but one has to attempt and venture into this dark historical period in order to understand the present political dynamic.

### **The Central Issues for Discussion**

In the last decade or so there appears to be emerging a consensus that given the existing diversity and sad legacy of concentrated power, the best way to ‘hold Ethiopia together’ is by adopting one of the variants of federalism. It seems that it is no more a choice from alternatives but something destined for the country to be, in other words, a matter of necessity, a long overdue project. The constitutional arrangement, which has officially taken the form of a federal structure since 1995, tries to address the concern of the various ethno-linguistic and religious groups. This thesis deals with several interrelated sub-issues but the main question addressed is:

*how best to accommodate the various ethno-linguistic groups in Ethiopia and how has the existing federal system fared in this regard?*

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A related matter is:

*how best to divide power- mainly legislative, executive and judiciary between the federal and state governments*

In order to address this question we need to address a number of other issues as well.

- What are the historical antecedents of federalism in Ethiopia and how do they contribute to an analysis of the present situation?
- Is it useful to take the nation-state federations such as the United States and Germany as a model for the multicultural reality in Ethiopia?
- What lessons can be drawn from other multicultural federations?

This in turn entails an investigation not only of whether the federal system as it exists in form is optimal but also its limitations in practice.

- How are the legislative and executive powers between the federal and state governments divided and what does this indicate on the centralization trend that was prevalent in the last decade?
- Is the centralization tendency something that emanates from the constitution or is it something that evolved from the political practice?

For a careful observer, it is evident that the Ethiopian federal system although it shares some common characteristics with other federations does not carefully craft the proper balance that should exist between self-rule and shared rule. Of particular concern is

- Whether the federal system provides sufficient means for guaranteeing shared functions to the constituent units?

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- In this regard what is the role of second chambers in legitimating federal government and the process of policy-making?
- A related matter is whether the federal system is entrenched with relevant institutions for enforcing federal laws and policies through out its territory?

These are the questions, which will be dealt with in subsequent chapters the outline of which is briefly indicated in the course syllabus.

### **Scope and Method**

‘Federalism’ as the title suggests, is not a comprehensive study of some six federal systems. Nor is it a random selection, or as some would call it an adventurous study of arbitrarily selected federal systems. Nigeria, Ethiopia, India and Switzerland, despite several differences among them, are multicultural federations that aim at accommodating different forms of diversities based on religion and/or language that are not necessarily national minorities. There is thus much to gain from each of the countries’ experiences with a view to learning how the different federal systems are coping with the notion of accommodating their diversities. We gain a lot of insight into how the same challenge is being addressed by the different federal systems.

The German federal system, which operates in an entirely different setting, also, makes its own contribution. Firstly, despite some historical roots within the German experience itself, it is a federal system which resulted from the political process that followed WW II. The Allied Forces had their big share in the process of shaping the federal process. This challenges in a way a widely held view that all ‘imposed federations’ are doomed to fail. Indeed, the German federal system has survived another

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wave of significant political development: unification of Germany. The same Basic Law still now serves as the constitution for the unified Germany.

Secondly, Germany's second chamber, set in a parliamentary federal system stands to challenge another widely held view, to wit that second chambers in parliamentary systems tend to be weaker than their counterparts in presidential systems. Indeed if one focuses more on the similarities than on the differences among the federal systems, it is fascinating to see that the German *Bundesrat*, otherwise not in a multi-ethnic context, represents a unique feature in the sense of representing Länder interests, much more than second chambers in multicultural federations. Thus, a different form of diversity is well protected, sometimes too much!

Thirdly, the second chamber in Ethiopia, the House of Federation (HoF), is an organ empowered to interpret the Constitution and to review the constitutionality of laws, and the laws issued to define the powers and responsibilities of the CCI and the HoF are influenced by the experience of the German Constitutional Court. By coincidence or design, the HoF happens to play a role similar to the *Bundesrat* of the 19<sup>th</sup> century German Confederation.

Thus for all these reasons the German federal system has then an important contribution to make to the study of the Ethiopian federal experience in particular and to the overall discourse on federalism in general.

The United States federal system has influenced many other federal systems so much so that the techniques for dividing powers between the federal and state governments in Ethiopia are very similar to those of the United States Constitution. In a way, modern federalism as we understand it today is America's unique contribution.



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However, we need to add a precaution here. As chapters one, four and five demonstrate, the US and German federal systems have not much to offer as far as federalism and the accommodation of diversity is concerned.

By and large, an attempt has been made in all the chapters to stipulate the legal framework of each of the federal systems, to identify areas of similarities and differences and then to draw lessons and implications for the Ethiopian federal system are considered.<sup>2</sup>

There is a question which deserves explanation here. It has been pointed out that federal systems in particular and constitutional law in general are no convenient topics for comparison. There is an allegation that ‘federal deals’ represent ‘complex package deals’ and these deals are likely to be the result of ‘specific, historically contingent compromises, ...less amenable to trans-national understandings.’<sup>3</sup> There is a well-documented study pointing to the fact that federalism as a principle of self-rule and shared rule manifests itself differently depending on several factors. It is no ‘one size fits all’ situation. Ronald Watts, a prominent and contemporary expert in the field of comparative federalism, argues that federalism has been applied in different ways to fit different circumstances.<sup>4</sup> Federations have varied and continue to vary in many ways: in the character and significance of the underlying economic and social diversity, in the

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2 Many suggest that a comparative study serves a diverse array of functions: one may seek for the most perfect system, identify aspects inherent in all systems, seek to identify an alternative that best fits one’s own system, or seek to learn more about the legal process itself. See Daniel Foote, ‘The Roles of Comparative Law: Inaugural Lecture for the Dan Fenno Henderson Professorship in East Asian Legal Studies,’ *Washington Law Review* 73 (1998): 27; for more on comparative law see K. Zweigert & H. Kotz, *An Introduction to Comparative Law*, 3<sup>rd</sup> ed. (Oxford: Clarendon Press, 1998); Pierre Legrand and Roderick Munday, eds. *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge University Press, 2003); Andrew Harding and Esin Orucu, eds. *Comparative Law in the 21st Century* (The Hague: Kluwer Academic Publishers, 2002).

3 Vicki Jackson, ‘Comparative Constitutional Federalism and Transnational Judicial Discourse,’ *I. Con.* 2:1 (2004): 102; another notable author also stated comparative law is of little significance when problems of political significance are under investigation as it depends on the mentality of the governors and those whom they govern, and on the social, political or economic phenomena which may induce the governed to submit to a regime which they might, in other circumstances, be disinclined to accept. H.C. Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study and Research*, 2nd edn. (Cambridge: Cambridge University Press, 1971): 29.

4 Ronald Watts, *Comparing Federal Systems*, 2<sup>nd</sup> edn. (Montreal & Kingston School of Policy Studies Queen’s University, 1999): 2.

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number, wealth, degree of asymmetry and size of the constituent units, in the scope of federal and state powers, the nature of the federal and state institutions, in the manner the constituent states influence policy-making at the center, on the nature and scope of the institutions that adjudicate federal issues and so on. However, as long as we keep these factors in mind there may be genuine value in comparing one form of federal system with another.

Even if it is true that one should exercise precaution when comparing federal systems, there are also some general trends that one may observe among federal systems. There are also some practical and theoretical reasons why one may venture into the field of comparative federalism. Since K.C. Wheare published his impressive book on Federal Government in the 1940s so much has been written about federalism comparing two or more federal systems.<sup>5</sup> Indeed, there is now an international conference on federalism every two years since 1999. For example in chapters two and three we will be able to discern the fact that despite the wealth of differences among the federal systems, all combine self-rule for some purposes and shared rule for other purposes or combine unity with diversity. Often there is the federal government and the states between which power is divided, the pact enshrined in a written constitution which is supreme, and each exercising direct authority over the people. Commonly it is understood that unity is achieved through the exercise of power by the federal government in relation to the polity as a whole while diversity represents the exercise of power by the constituent states over a portion of the population, generally territorially identified. As the division of power is never neatly done, the constitution is interpreted and enforced by a court or tribunals. Yet despite such general features, the balance of power that exists between the forces of unity and diversity in every federal system is never as clear as we would want it to be. It is often assumed to have some shape or other but as

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<sup>5</sup> One is just recommended to refer to the wealth of materials referred to in the footnotes of this study and the bibliography.

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federal history reveals the balance might tilt at one time towards unity and at another time towards diversity. The Ethiopian federal system adds to these confusing dynamics because it silently passes over the issue of the matrix of the relationship between unity and diversity.

Given the comparability of federal systems many references to the federal systems of other countries will be made in chapters two and five with a view to gaining insight as to how the federal system in Ethiopia should evolve at this crucial moment in its history.

Certainly there is no attempt to judge the federal system in Ethiopia by values of other federal systems. Yet there are practical reasons why a comparative method is adopted throughout the study, apart from the point mentioned already that despite differences federal systems share some general features. In this regard, it is interesting to mention that even the United States Supreme Court which was cautious for decades about the relevance of federal experience elsewhere, has recently referred to the decisions of other courts.<sup>6</sup> As far as the federal system in Ethiopia is concerned, very little has been written. Besides as will be argued extensively in chapter one, it was introduced in the aftermath of the collapse of a very centralized state structure. Thus when there are a few indigenous precedents to draw from, it would be unwise to ignore relevant federal experiences of other countries. As one notable writer stated: ‘The reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home, but only a

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<sup>6</sup> *Atkins v. Virginia*, 122 S. Ct. 2242, 2264-65 (2002) and *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003), the latter regarding same sex affairs and the former on crimes committed by mentally retarded persons. For comments on the cases see Donald Childress III, ‘Using Comparative Constitutional Law to Resolve Domestic Federal Questions,’ *Duke Law Journal* 53:1 (2003): 193-221.

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fool would refuse quinine just because it did not grow in his back garden.’<sup>7</sup> One may venture into the study of other federal systems for the sheer joy of discovery or the sheer fascination for a certain federal system but that is a rare phenomenon. Often, there is little interest in comparisons if there is adequate local experience and literature. As the reader will find for himself, for sure there are several contentious, ambiguous issues and issues on which the Ethiopian Constitution remains silent. For example on the issue of whether constituent states’ boundaries in multicultural federal systems should be drawn in a manner to coincide with the nationalities, many alternative scenarios will be considered in chapter five. In the area of intergovernmental relations in general and enforcement of federal laws in particular, not only is there a conceptual and institutional gap in the Ethiopian federal design but there is also a rather haphazard experience that needs careful study. For these and other reasons the author has ventured to study at some length how other federal systems have dealt with the matter and come up with short and long-term alternatives. Thus we will be able to understand the federal system better and we will gain many insights to consider in case one is interested in a reform agenda.

Besides, we will be able to gather from some of the cases discussed in several chapters that comparative study can also serve as an aid in interpretation. The courts and tribunals empowered to interpret the respective constitutions may have adopted their own jurisprudence in the process of adjudicating federal cases. But it is also possible that in some cases such domestically developed court jurisprudence may happen to be insufficient to address a controversy. Comparative study may then help fill such gaps. It is interesting that the new laws proclaimed in Ethiopia to define the powers and

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7 Rudolf Jhering quoted in Zweigert and Kotz, *supra* note 2 p. 17; for an extensive discussion of the merits and demerits of comparative constitutional experience see Vicki Jackson, ‘Narratives of Federalism: Of Continuities and Comparative Constitutional Experience,’ *Duke Law Journal* 51:1 (2001): 223-286.

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responsibilities of the HoF and the CCI have granted extensive discretion to these organs to develop general principles of constitutional interpretation.

Furthermore, while recognizing very well the importance of local context, apart from constitutional forms, in the Ethiopian situation one cannot help but refer to federal systems elsewhere because the Constitution itself has incorporated many ideas from other constitutional systems. One may refer among other things to the comprehensive regime of human rights, the new laws that define the powers of the HoF and the CCI, the techniques of dividing power between the federal and state governments. Even the idea of drawing the constituent states to correspond with the geographic location of some of the nationalities, though it has its roots in the ESM of the 1960s, otherwise popularly known as the ‘question of nationalities,’ is not only Leftist in orientation but is also not without parallels elsewhere. Post independence India faced the challenge of whether to continue with British inherited artificial provincial boundaries or to redraw them in such a way as to correspond with the linguistic configuration of the ethnic groups. In the first two decades after independence, Indian leaders soon realized that unless reorganization along the latter path was initiated, the federal system was about to fall into crisis. Thus came the famous project of state reorganization. It is not then an exaggeration to state that the comparative element is ‘in built’ in the Ethiopian Constitution itself.

Last but not least although the study focuses on the Ethiopian federal system, there is no doubt that it will be of relevance to many other multicultural societies. It was fascinating to know in the course of the research that Nigerian colleagues are to some degree impressed by the new federal dispensation in Ethiopia.<sup>8</sup> Theirs is by design meant not to correspond with the settlement patterns of the major ethnic groups. In a

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<sup>8</sup> Rotimi Suberu, *Attractions and Contradictions of Ethnic Federalism: The Nigerian Experience*, A paper presented at a Conference on Ethnic Federalism: The Challenges for Ethiopia, Addis Ababa, April 14-16, 2004.

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way it subscribes to the American style of territorial federal system, a system, as cannot be emphasized enough, has little relevance as far as accommodation of diversity is concerned. As we shall argue further in chapters four and five that the territorial approach (which is the conventional division of power into geographically defined constituent units rather than linguistic, cultural, ethnic or other bases of identity) is a wrong solution to multicultural federal systems. That is why the idea of subscribing to the American style of federal system as suggested by distinguished Ethiopian scholars is far from convincing. In this regard the Nigerian federal crisis, apart from the dominant role of the military in conserving its very centralized shape, is partly attributable to its adherence to the American style of federal system. Thus with modesty, this study may also provide some lessons for other federal systems facing similar challenges in Africa or elsewhere.

Coming back to the methods, apart from the comparative approach and the analysis of formal laws and the interpretation of certain patterns observed in practice, this author has also interviewed several experts and practitioners of federalism where relevant. Besides, as has been indicated in the outline, federalism is not only about the formalistic study of the techniques in the division of power but also about how such an arrangement addresses particularly in multicultural systems the concern of the various groups. It is important to understand federalism not only in the books but also about the political practice of federalism. Often there is divergence between federalism in form and in practice but more so in Ethiopia where constitutionalism has not taken deep roots. It is thus relevant to comprehend some of the extra-constitutional factors that shape the federal process and to that extent the study is interdisciplinary in nature.

One final precaution is in order: first on the extent of the comparative study and second in terms of the scope of coverage. As can be implied from the title, other federal

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systems are relevant to the extent that they provide some insights into and scenarios on some crucial issues under investigation. The study is also limited in time. Many important developments are going on both at home and elsewhere that may have significant implications on the operation of the various federal systems. This study is, however, limited to those developments that occurred until the second half of 2005.

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**Chapter one**

**The Context of the Federal System in Ethiopia**

As the title suggests this is the chapter that sets the context for the federal system in Ethiopia. Part I begins with some precautionary and introductory notes and the aim is to consider Ethiopian history prior to Menlik as one phase of *de facto* federal experience and then the post Menlik period and particularly with the coming to power of Emperor Haile Selassie, as an era of centralization, a reversal of history and the birth of the present day crisis. All the same, the coming to power of the military and the 1974 Revolution did not bring the much desired change as far as political decentralization and the issue of accommodation of diversity were concerned. Major change in this regard occurred during the transitional period that was the prelude to the present federal set up.

Part II of chapter one addresses two central issues: the first part attempts to put the twentieth century state crisis in perspective. There are various approaches to looking at the crisis but none of them taken alone suffices to explain the complex situation. Thus, at the end of the first section of part two, it is concluded that in order to be able to forge a better future, it is important to understand the complexities of the problem as well as the fact that the main challenge in Ethiopia, as in other multicultural societies, is to forge a state that combines unity and diversity and this brings the relevance of the federal option to Ethiopia, thereby linking this chapter with all other chapters dealing with different aspects of federalism. The federal option remains vital, not only because it restores the historic *de facto* federal system, albeit in a different fashion this time, but also because it permits the existence of multiple identities under a single political union.



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The last section of this chapter apart from defining essential concepts like ethnic groups, ethnicity and nationalism (relevant in the Ethiopian context for some of these concepts have expressly been incorporated in the Constitution) hints at the limits of the nation-state in accommodating ethno-linguistic groups. Federalism in the context of multicultural societies transcends the theoretical fixation with the nation-state and its troubles in dealing with national minorities.

### Part One

#### 1.1 HISTORIC ETHIOPIA AS A DE FACTO FEDERATION

Ethiopian history dates back to the tenth century BC or at least official records take it to the Axumite civilization (first century AD to 1150).<sup>1</sup> There is no iota of doubt that Ethiopia is the birthplace of mankind. With the discovery of *Dinknesh* (wonderful), otherwise known by her *ferengi* name as ‘Lucy’ in 1974, in Hadar, the Afar land, of 3.5 million years old and so many other discoveries, the history of Ethiopia is as old as the human species itself. Yet, like many other issues in Ethiopia, its historiography is full of controversy. In terms of timing, some take it to millions, others to thousands and a few others to only hundreds of years, mainly to the emergence of the modern Empire state in the last quarter of the 19<sup>th</sup> century. In terms of the origin of its civilization, there is a contention between what Teshale calls ‘the Axumite paradigm’, which strongly contends for a civilization ‘from within’<sup>2</sup>, and the Orientalists who claim

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<sup>1</sup> Recent geological discoveries take the history of Ethiopia to a very remote time, legends to the 10<sup>th</sup> BC, but well documented records of Ethiopian civilization are available since the Axumite Kingdom after the birth of Christ. See Teshale Tibebu, *The Making of Modern Ethiopia 1896-1974* (Lawrenceville, NJ: The Red Sea Press Inc., 1995); Harold Marcus, *A History of Ethiopia* (Berkeley: University of California Press, 1994).

<sup>2</sup> In a nut shell, the content of the Axumite paradigm goes like this: The Ethiopian Queen Sheba, also known as Saba, Makada or Azeb, after hearing of King Solomon’s wisdom and glory in Jerusalem decided to visit him sometime in

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civilization came ‘from without.’ The Sabeans crossing from Yemen to Ethiopia ‘carrying the burden of civilization.’ Teshale Tibebu, a historian himself, subscribing to the Axumite paradigm, argues, ‘to state that Ethiopian history starts with the Sabeans and not with the indigenous people is tantamount to starting with the invaders. As the *Kibre Negast* (Glory of kings) narrates no Sabeans crossed to Ethiopia carrying the burden of civilization on their backs. It only talks of Queen Sheba’s adventure in Jerusalem.’<sup>3</sup>

In terms of its coverage, the dominant approach has been to portray Ethiopian history as ‘a story of succession of rulers and dynasties’<sup>4</sup> and as a result, because of the dominant position of the Amharas and the Tigrayans, it was equated with what the *ferengis* call ‘the Abyssinian culture.’ The bulk of the people were then left out. The range of other ethno-linguistic groups in Ethiopia has scarcely been visible and until recently little interest has been shown towards understanding their cultures and tradition.<sup>5</sup> It is an obvious fact that Ethiopia was portrayed in both official presentations and books as the land of the Abyssinians.

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the 10<sup>th</sup> century BC and while she was there, she conceived a child by him and on its birth, he was named Walda-Tibab (son of the wise man) also Menlik I. When he reached maturity, the son visited his father and came back with thousands of followers and his mother abdicated the throne in his favor and when he became king Menlik I, he became the founder of the Solomonic Dynasty. Since then Solomonic genealogy and Christian religion remained the core basis of legitimacy and unity of the Ethiopian state until 1974. Civilization then begins with Axum at its center, not with the Sabeans. It is exactly this story, which is incorporated in the *Kibre Negast*, which some call the ‘National Epic’ or the Ethiopian *Magna Carta*. The Axumite state lasted from first century AD to approximately 1150. It became a Christian state at about 335 AD making it the third political entity in history, after Armenia (301 AD) and the Roman Empire (312 AD). With its written script Geez, its number (*Kutur*), its own calendar and Christian religion everything that defined the Ethiopian state until 1974 was the result of Axumite invention and innovation. Teshale Tibebu, *supra* note 1, pp. XXI-XXVII; see also Haggai Erlich, *The Cross and the River: Ethiopia, Egypt and the Nile* (Boulder: Lynne Rienner Publishers, 2002): 15; Donald Levine, *Greater Ethiopia: The Evolution of a Multiethnic Society*, 2<sup>nd</sup> edn. (Chicago: The University of Chicago Press, 2000): 90-110; hereinafter referred as *Greater Ethiopia*.

<sup>3</sup> Teshale Tibebu, *supra* note 1, p. XVIII.

<sup>4</sup> Teshale argues that ‘it is time that the study of Ethiopian history be liberated from this approach’ and focuses on social history as well as the cultural history of the people. *Ibid.* p. XXIII.

<sup>5</sup> While the tradition has been to follow the ‘narration of dynasties approach,’ Teshale approaches the modern history of Ethiopia from a different perspective. Others also seem to break this tradition. See for instance, Mohammed Hassen, *The Oromo of Ethiopia: A History 1570-1860* (Cambridge: Cambridge University Press, 1990); D. Donham and W. James, *The Southern Marches of Imperial Ethiopia: Essays in History and Social Anthropology* (Cambridge: Cambridge University Press, 1986), and their recent work, *Remapping Ethiopia*, and Gebru Tareke, *Ethiopia: Power and Protest: Peasant Revolts in the Twentieth Century* (Cambridge: Cambridge University Press, 1991) who try to fill the gap by bringing the history of those not integrated into main stream ‘historic’ Ethiopia.

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As will be demonstrated in later sections of this chapter, the writing of history in the Ethiopian context has failed to transcend at least two constraints. On the one hand, Ethiopia had to define herself as the only country in Africa that defeated European colonizers, with the rest of the world being hostile to Africa. It had to prove to the rest of the world that it is a state that should join the international community and to do so, it had to train elites to write the history of this ‘nation-state.’ This is not without consequences. The history thus written in this global context had to focus on the state and its institutions, as it was an instrument of nation building. ‘It tended to extol the centralizing and unitary role of Ethiopian monarchs and concentrated on their innovative and modernizing role within the Ethiopian society, the church and state tradition in so far as it focused on the development and growth of an independent and literate Christian nation.’<sup>6</sup> The state itself was *not inclusive and the history too was not inclusive* and hence the controversy.

On the other hand, the Ethiopian Student Movement of the 1960s brought a new generation of historians as well as a new approach to writing history. While trying to fill the gap, this group of intellectuals have fallen into another trap and at times served as ideologues for national liberation movements. By undermining or at least giving less emphasis to the shared history, they have focused more on scoring the point that pre-Menlik Ethiopia constituted an amalgam of semi-autonomous kings and after Menlik’s coming to power Ethiopia became ‘the prison house of nationalities.’<sup>7</sup> The history they write, although it contributes to the other dimension of the peoples’ life, lacks at times

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<sup>6</sup> Alessandro Triulzi, ‘Battling with the Past: New Frameworks for Ethiopian Historiography,’ in Wendy James, Donald Donham, Eisei Kurimoto, Alessandro Triulzi eds., *Remapping Ethiopia: Socialism and After*, (Oxford: James Currey, 2002): 276-289. It was not a priority to work on the role of regional forces. For an interesting piece on how the assimilation paradigm affects the politics of language and history see Alemseged Abay, ‘Diversity and State Building in Ethiopia,’ *African Affairs* 103/413: 593-614 (2004).

<sup>7</sup> This was the expression Ernest Gellner used in his book, *Nations and Nationalism* (Oxford: Basil: Blackwell, 1983) at 85.

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objectivity or even evidence serving then only as an instrument of nationalist movements.<sup>8</sup>

As a result, one should not be surprised if the name Ethiopia itself has come to signify different things to different people. For some Ethiopia is the oldest Christian polity in Africa, a country that was ‘Christian when the rest of the world was prostrating in front of the pagan idols.’<sup>9</sup> A Christian island and after Adwa in 1896, the sole remaining pride of Africans and Negroes, symbol of ‘unflinching defiance’ in which any freedom lover will take immense pride. It is a country that has had its own constitution and codified laws since the thirteenth century.<sup>10</sup> By the ideologues of nationalist movements, on the other hand, it is dubbed as ‘ruthlessly colonial’. For some, Ethiopia is a multicultural and multi-religious state that should accommodate its diversity to make peace with itself, while for others it is one nation, one country and one territory with its Christian and Amhara identity.

Except for the twentieth century, a cursory reading of history<sup>11</sup> reveals that Ethiopia has for the most part been under a decentralized rather than a centralized system of governance. This observation essentially characterizes all periods that preceded the coming to power of Emperor Haile Selassie in 1930, leaving certain exceptions of brief unitary attempts by Emperors Tewodros (1847-1868) and Menlik II (1889-1913).

One observes a co-existence of a duality of authorities, mainly that of the Imperial throne, representing the center and a number of *provincial nobilities* effectively

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<sup>8</sup> Alessandro Triulzi calls the latter group of historians as ‘public historians,’ *supra* note 6: 277-279; at present the debate seems to continue in the form of Greater Ethiopia versus Ethno-nationalist writers.

<sup>9</sup> This is how Teshale (*supra* note 1) describes it in his book.

<sup>10</sup> I am referring here to the *Kibre Negast* and the *Fetha Negast* (the Law of Kings) that contained a collection of religious canons governing all aspects of life and believed to have been in effect since the time of Zera Yaacob (15<sup>th</sup> century).

<sup>11</sup> Aberra Jembere states that until 1854 Ethiopia consisted of loosely united territorial states. Aberra Jembere ‘Ethiopia: The Major Institutional Arrangements of Federation and Decentralization,’ in Lidija Basta, Jibri Ibrahim eds., *Federalism and Decentralization in Africa: The Multicultural Challenge* v. 24 (Fribourg: PIFF, 1999): 167-169.

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exercising decentralized power. Among other things, the nobilities from Gondar, Wello, Gojjam, Showa and Tigray shared power with the crown and at times claimed the throne itself. Indeed, the rivalry among these regional forces and the corresponding weakening of the imperial authority was one of the factors that contributed to the absence of a fixed capital or rather to the presence of shifting capital for a long period.<sup>12</sup> Several authors contend that regionalism or provincialism,<sup>13</sup> one essential element of diversity that defined the Ethiopian state, characterized the relationship between the center and the provinces.<sup>14</sup> Provincialism is slightly different from the notion of ethnic attachments. It refers to a special attachment or affection between a person or group indicating one's origin. It represented a sense of parochial identities and diversity of sentiments and interests. It had distinct boundaries and historical traditions of its own nurturing a passionate attachment to self-rule under the framework of imperial administration. The territory defined as a province also represented economic and political interests, which it defended collectively against trends of centralization, under the leadership of the local nobility.<sup>15</sup> It is comparable to the Swiss notion of Cantonalism, although the latter goes much further in protecting linguistic and religious rights.

<sup>12</sup> Bairu Tafla, 'Historical Background to the Conflicts in Ethiopia and the Prospects for Peace' in Peter Woodward and Murray Forsyth eds., *Conflict and Peace in the Horn of Africa: Federalism and its Alternatives* (Aldershot: Dartmouth, 1994): 3. The imperial throne had a political center that was forced to move from Axum in Tigray, to Lasta in Wello, to Showa, Gondar, back to Tigray and finally rested in Addis Ababa.

<sup>13</sup> Provincialism is, however, not based on a rigidly defined territory like the Swiss cantonalism. It often is flexibly adopted to mark at times a subunit, *wereda* or *awraja* and depending on the context, it could be used to include or exclude an identity. See Donald Levine, *Wax and Gold: Tradition and Innovation in Ethiopian Culture* (Chicago: the University of Chicago Press, 1965): 14, 49-54; hereinafter called *Wax and Gold*; see also John Markakis, *Ethiopia: Anatomy of Traditional Polity* (Oxford: Clarendon Press, 1974) at 45; hereinafter called *Anatomy of Traditional Polity*.

<sup>14</sup> In 1908 Menlik introduced the first ministerial form of government. A by-product of this was the division of the country in the same year into thirty-four administrative regions based on ethnic distribution and geographic position. Traditionally the major provincial units in northern Ethiopia were Tigray, Wolkait, Semien, Begemidir, Wag, Lasta, Gojjam, Amhara and Showa. The demarcation of the Southern Provinces following their conquest was more haphazard. During the Italian occupation Italy revised this and divided the country into Amhara, Harar, Oromo-Sidamo and Showa while Tigray and Eritrea were administered as one. In 1942, Haile Selassie again restructured the provinces into 12 but Amhara ceased to be a distinct province and its historic name disappeared from the map. Later the Hararghe province was split and Bale province was created from the South Western section bringing the number to 13. Finally, 'reunion' with Eritrea in 1962, brought the total number of provinces to fourteen. This lasted until 1987 when the country was again divided into 24 administrative regions and five autonomous units and in 1991 it was again restructured into the new federal set up. See Andargachew Tiruneh, *The Ethiopian Revolution 1974-1987* (Cambridge: Cambridge University Press, 1993); Markakis, *Anatomy of Traditional Polity*: 289-290

<sup>15</sup> Markakis, *Anatomy of Traditional Polity* at 45.

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Equally, autonomous kings existed on the South and Southwestern side of the country. Between the years of 1570-1860, Mohammed Hassen, for instance, contends with loose political as well as trade relations with the center, ‘the Oromo led an autonomous existence as masters of their destiny and makers of their own history.’<sup>16</sup> This reached its climax with the establishment of five kingdoms around the Gibe region, namely Limmu-Ennarya, Gomma, Guma, Gera and the Kingdom of Jimma. They were all absorbed into the Ethiopian state after the 1880s and only the last survived until 1932.<sup>17</sup> On June 6, 1882 at Embabo, Menlik defeated king Teklahaymanot of Gojjam and was able to end not only the Gibe Monarchy but also the Oromo of Wallaga and Illubabor. One also finds, for instance, the kingdom of Kaffa, Wolayta (Nigus Tona succumbed to Menlik in 1894), Sidama, Kambata and Janjaro mainly situated near the vicinity of the Omo River and the Rift Valley area. These kingdoms claim their origins back to the fourteenth and fifteenth centuries.<sup>18</sup>

On the Eastern side we find the Afar sultanate, the Somalis and the Emirate of Harar representing another important center of Islamic power and influence. For the major part of their history, the Afars lived under great autonomy of their own, with minimal intervention from the highland kingdoms in Afar affairs. The Awsa sultanate was a vassal of Menlik but after agreeing to pay tribute, the sultan won recognition of his authority over his subjects. The Afars were identified as a distinct group with their own mode of existence, predominantly nomadic pastoral and their own traditional hierarchy, culture and religion. Their relative autonomy came to an end with the coming to power of Haile Selassie in 1930.<sup>19</sup> Harar, the center of Islam, a religion which must have begun spreading in the Ethiopian region by the middle of the 8<sup>th</sup>

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<sup>16</sup> Mohammed Hassen, *supra* note 5: 1, 200

<sup>17</sup> *Ibid.*, at 200.

<sup>18</sup> Bahru Zewde, *A History of Modern Ethiopia 1855-1974* (Athens, Ohio: Ohio University Press, 1991) at 16.

<sup>19</sup> Ali Said, ‘Afar Ethnicity in Ethiopian Politics,’ in Mohamed Salih and John Markakis eds., *Ethnicity and the State in Eastern Africa* (Uppsala: Nordiska Afrikainstitutet, 1998): 110.

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century AD, (Other versions provide that Islam came to Ethiopia and started spreading during the rule of king An-Najashi when the first migrants came to him from Arabian Peninsula.) Ethiopia is the first country to recognize Islam at state level in the world. played a role as the springboard for Ahmed Gragn's attack against the center, when its leader Abdullahi was deposed, after the Battle of Chalanko on January 6, 1887 and in his place, Haile Selassie's father, *Ras* Mekonenn was appointed governor. The people inhabiting present day Benishangul-Gumuz and Gambela regions were loosely integrated into the Ethiopian state. They were incorporated in the 19<sup>th</sup> century and remained since then peripheral to the Ethiopian state, both geographically, sociologically, politically and economically speaking.<sup>20</sup> It is with the introduction of commercial farms in the 1940s that the lowland area's social foundation was penetrated. In short, the majority of the Kingdoms of the South, South West and Eastern sides existed as autonomous units only indirectly associated with the center usually marked by the payment of tributes.<sup>21</sup>

This cluster of kingdoms existed effectively for centuries until they were finally incorporated into the Ethiopian state in the second half of the 19<sup>th</sup> century. They predate the centralized Ethiopian state of the 20<sup>th</sup> century. However, it needs to be emphasized that despite their semi-autonomous existence there always existed a network of trade relationships as well as relationships based on religion. The imperial throne served as a symbol of unity and the political system combined a balance of forces between the monarchy and regional nobility, the former playing a centripetal role and the latter

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<sup>20</sup> Gebru Tareke, *supra* note 5 at 33; Dereje Feyissa, *Ethnic Federalism in Ethiopia: The Experience of Gambela Regional State*, a paper presented at the seminar on Ethnic Federalism: The Challenges for Ethiopia, Addis Ababa: 14-16 April 2004.

<sup>21</sup> Christopher Clapham, 'Constitutions and Governance in Ethiopian Political History,' in *Constitutionalism: Reflections and Recommendations, Symposium on the Making of the New Ethiopian Constitution* (Addis Ababa: Inter Africa Group, 1993) at 29, hereinafter called *Constitutions and Governance*.

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moderating the power of the center. No historical evidence has so far been adduced that disproves this very fact.<sup>22</sup>

Although it may be difficult to ascertain beyond doubt the exact autonomy and power of the kings, there are clear evidences indicating the fact that except during the tenth century when Yodit/Gudit attacked the Christian empire, during the campaign of Imam Ahmed (1527-1543)<sup>23</sup> and during the (Age of Princes) *Zemene Mesafint* 1769-1855,<sup>24</sup> three important periods in which the power at the center had to subject itself almost completely to regional forces, the balance often swayed, albeit slightly to the *Niguse Negast* (King of Kings). Yet, the regional notables held important powers. Defined in broad terms, the regional nobility submitted to the throne, contributed a fighting force in time of crisis or rebellion and collected and paid tributes to the monarchy: the collection of tribute and maintenance of national security being the function of the emperor. In return for this administrative and military function, the nobility were granted autonomy and the right to retain some amount from the tributes they collected for the center. They had their own army. This was indeed true until the coming to power of Haile Selassie when the army of regional forces had to be dissolved and replaced by national armed forces organized along modern lines. Among others, the regional nobilities not only had military and taxation powers but were also entitled to regulate trade and commerce, impose duties and demand men and material to maintain armies. They also controlled the extraction and distribution of valuable commodities, such as metals, salt and ivory. They were sometimes economically stronger than the emperor and often defied him. The general arrangement was, however, that such kings would submit at least symbolically by paying tribute to the king of kings at the center

<sup>22</sup> See Bahru Zewde, 1991, *supra* note 18 at 21.

<sup>23</sup> Nicknamed Ahmed Gagn, destroyed the Christian empire almost completely and was curbed with the help of missionaries from Portugal.

<sup>24</sup> During this era regional forces almost totally incapacitated the power of the king of kings in the eighteenth century. During the *Zemene Mesafint* (Age of Princes 1769-1855), for just a century, the Ethiopian monarch was dominated and almost reduced to a puppet by provincial forces. See Bahru *supra* note 18: 13-14.



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of political power.<sup>25</sup> Of course, the scope of the nobility's power varied with the strength of the emperor. The stronger the imperial power, the smaller the autonomy would be and vice versa, but it appears that regional power was far from being a mere instrument of central power although its economic and social foundation was entrenched in the imperial system. Rather, a mutual dependence between the two forces seems to have been the dominant feature of historic Ethiopia.

On the other extreme, it was Tewodros (1847-1868)<sup>26</sup> who by bringing to an end the regional lords, set the scene for centralization, but at the same time caused his downfall. Menlik picked up the current of centralization, although not completely, but none other than Haile Selassie and the *Derg* carried this mission to its extreme. The former stripped the nobility and the regions of their traditional autonomy and powers and the *Derg* intensified it. It is not surprising then that the major peasant revolts (Tigray, Gojjam, Bale) and the student uprising occurred during the former and all sorts of national and regional forces resisted the latter. We should note that unlike what is portrayed in some corners, these two regimes are the 'main incubators' of national and regional forces.<sup>27</sup>

Observing this fact Paul Henze recently wrote, 'Ethiopia, the oldest continually existing polity in Africa, has almost always been relatively decentralized at many stages in its long history, so decentralized, in fact, that only a vague tradition of statehood, combined with a sense of religious and cultural community held it together

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<sup>25</sup> Paul Henze, 'The Economic Dimensions of Federalism in the Horn of Africa' in Woodward and Forsyth, eds., *Conflict and Peace in the Horn of Africa: Federalism and its Alternatives* (Aldershot: Dartmouth, 1994) at 125.

<sup>26</sup> According to Teshale, Tewodros's attempt at centralized government was not only an attempt to end state anarchy but constituted the first round of defeat for the Oromos. The Yaju Oromo ruling house at Dabre Tabor had to be extinguished and he achieved that. The second and more blatant one was to be accomplished by Menlik at the second half of the 19<sup>th</sup> century. Teshale, *supra* note 1: 31; 37-38.

<sup>27</sup> Maimire Mennasemay, 'Federalism, Ethnicity and the Transition to Democracy,' *Horn of Africa*, v. XXI (2003) at 102.

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at all.<sup>28</sup> Clapham states, ‘historic Ethiopia approximated a federal system.’<sup>29</sup> The notion of autonomy and unity fully explain such a period. The history of Ethiopia is indeed full of strife between forces of centralization on the one hand, and local governors urging for decentralization and autonomy on the other. Perham wrote, ‘although the Ethiopian provincial *rases* were never able to establish for long their position as over-mighty subjects, the emperors on their side were unable to consolidate, century after century, the authority of the imperial government.’<sup>30</sup> A perennial tension existed between the king of kings and the provincial *rases* (heads) and the balance between the two over a period of time differed depending on the strength of arms. It is stated that ‘over the six hundred years or more of which we have reliable knowledge, neither side seems to have gained over the other until this [twentieth] century.’<sup>31</sup> By and large, the centralizing and decentralizing forces remained in balance.

The long-standing tradition of consciousness of unity and autonomy, that is to say duality in the exercise of power, is not only found on the records of history, it is also well symbolized in the notion of *Niguse Negast* (King of Kings). At least since the 13<sup>th</sup> century, Bahru wrote, ‘when a dynasty that claimed to represent the restoration of the Solomonic line came to rule the country, its rulers have styled themselves king of kings of Ethiopia’.<sup>32</sup> Nothing symbolizes the duality of authority better than the notion of *Niguse Negast*. It implied the existence of deep-rooted and strong kings in several of the provinces exercising, as briefly indicated above, important powers in their own territory. The clearest manifestation of the Empires *de facto* federation, if one may call this, can be discerned in the time of Emperor Yohannes IV (1872-1889). One author

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<sup>28</sup> Paul Henze, *supra* note 25 at 124.

<sup>29</sup> Clapham, *Constitutions and Governance*, *supra* note 21, at 29.

<sup>30</sup> Margery Perham, *The Government of Ethiopia* (London: Faber and Faber Limited, 1963) at 267.

<sup>31</sup> *Ibid.*, at 268.

<sup>32</sup> Bahru, *supra* note 18 at 1.

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notes, ‘his choice of the title *résa makwanenet* (head of the nobility) as he bid for the throne set the tune of his policy. He continued to regard himself as first among equals, king of kings, in the strict sense of the word, not an undisputable autocrat. Yohannes was ready to share power with his subordinates so long as his throne was not challenged. He adopted a more cautious policy of accommodation to regionalism,<sup>33</sup> though intolerant towards religious diversity.

In theory, it is often stated that the throne’s authority was absolute. But it was not so in practice. Primarily, until the twentieth century where provincial nobilities were effectively and systematically abolished, the Ethiopian state did not possess the structure and means required to impose the absolute claims the throne may have demanded. The vastness of the empire, geographical obstacles, absence of transport and communication facility, fiscal and manpower constraints, ethnic, linguistic and regional disparity, hindered direct central authority.<sup>34</sup> To the extent that the central power was hindered, it meant also that regional forces enjoyed themselves as autonomous kingdoms merely acknowledging the existence of a distant emperor. Indeed, the administration of the state was carried out by the nobility (the kings), a group that normally resisted the attempts for centralization. Even though the status, power, and privileges of the nobility depended on the appointment and grants dispensed by the emperor, quite naturally the nobility strove to secure continuity of status and privileges by rendering both office and status sometimes hereditary and free of royal control. Appointments were often given to leading families in the area, since provincial sentiments usually precluded the appointment of outsiders. The more powerful provincial kings were sometimes contenders for the throne itself.<sup>35</sup> As Levine stated it rightly: ‘The perennial tendency of certain regional families to become

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<sup>33</sup> *Ibid.*, at 43; Gebru, *supra* note 5 at 39.

<sup>34</sup> Gebru Tareke, *supra* note 5 at 70.

<sup>35</sup> Markakis, *Anatomy of Traditional Polity*, *supra* note 13 at 39.

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endowed with an aura of legitimacy in their own right’ often was a threat to the throne itself.<sup>36</sup> When a conducive environment was found, provincial forces never hesitated to crown themselves emperors. This demonstrates the fact that they were not only administrators of decentralized power by right, but they were also potential contenders to the throne.

Secondly, tradition and religion also imposed limits on the power of the Emperor.<sup>37</sup> Some authors argue that Ethiopia had experience with constitutional government that predated by many centuries the promulgation of the written constitution in the 20<sup>th</sup> century. If a constitution is defined, stated Clapham, ‘not as written document but as set of practices which guide the exercise of political power, then Ethiopia enjoyed constitutional government over a long period’.<sup>38</sup> One aspect of the constitutional practice limiting the power of the Emperor, emanated from the famous *Kibre Negast*, a document of great relevance in explaining the constitutional law of the Empire. This is probably one of the oldest constitutional documents in the entire world. Written in 1320 by a group of authors from Axum, interestingly after the downfall of the Zagwe Dynasty, (roughly from 1137 to 1270, that succeeded the Axumite state, and believed to have usurped power<sup>39</sup> without belonging to the Solomonic line) and during the Reign of Yikuno Amlak, an Amhara from Wello, who overthrew the Zagwe Dynasty and inaugurated a dynasty which called itself ‘Solomonic’ to emphasize its legitimacy as opposed to its predecessor.<sup>40</sup> Among other things, the *Kibre Negast* defined the core of the Ethiopian ethos and the source of legitimacy of the Emperor.<sup>41</sup> It provided the rules for succession to the highest office. Accordingly, no one except the descendant of

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<sup>36</sup> Levine, *Wax and Gold*, *supra* note 13: 154-155.

<sup>37</sup> Perham, *supra* note 30: 71-72.

<sup>38</sup> Clapham, *Constitutions and Governance*, *supra* note 21 at 29; Fasil Nahum, *Constitution for Nation of Nations: The Ethiopian Prospect* (Lawrenceville: New Jersey, Red Sea Press, 1997) at 17.

<sup>39</sup> Harold Marcus, *supra* note 1 at 12.

<sup>40</sup> Bahru, *supra* note 18: 8-9.

<sup>41</sup> Levine, *Wax and Gold*, *supra* note 13 at 110.

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King of Solomon shall ever reign to the Ethiopian throne.<sup>42</sup> It also provided about the complex organization of the imperial court and government and regulated the relation between the state and church. These rules combined together played a crucial limit to whoever failed to claim the legend. Even when one succeeded to the throne by might, its legitimacy was questioned immediately and would subsequently lead a downfall. The cases of Emperor Tewodros and Michael Sehul represent good examples. The former's inability to expressly affiliate with the Solomonic line as well as his radical position against the church frustrated his project of building a centralized state. The latter who was known for making and unmaking seats to the throne in Gondar although he was capable of throning himself, never claimed it probably because he failed to affiliate himself with the same line.<sup>43</sup>

Religion was another crucial factor. Indeed the connection between emperor and church was so strong that the imperial authority was committed to the church's faith. The emperor was required not only to be a believer of ancient Orthodox Christianity but also required to defend it. Religious conversion is one charge, which was not tolerable. Rulers who violated this injunction forfeited the allegiance of their subjects and their right to the throne. To mention a few, Emperors Ze Dingil (1603-04) and Susneyus (1607-32) were removed from the throne because of their conversion to Catholicism. In 1916 the charge of alleged apostasy, however obscure the fact may be, was instrumental in the overthrow of Lij Iyassu.<sup>44</sup> It is not surprising then that Christianity remained state religion until 1974.

For the most part, consciousness of unity and autonomy coexisted more or less in the balance the emperor slightly prevailed over regional forces. The plurality of kings,

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<sup>42</sup> Markakis, *Anatomy of Traditional Polity*, *supra* note 13 at 30; also Levine, *Wax and Gold*, *supra* note 13: 92-107.

<sup>43</sup> Fasil Nahum, *supra* note 38 at 17.

<sup>44</sup> Levine, *Wax and Gold*, *supra* note 13 at 21.

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with the *Niguse Negast* above them signifies some kind of federal or confederal government structure. The throne and the church represented the symbol of unity and regional forces exercised decentralized power. The *Niguse Negast de facto* dealt with national matters while the kings exercised powers over matters of local interest. There is no doubt that this presents in the words of Livingston, a typical ‘federal society.’<sup>45</sup> These are essential features of what we understand today as the federal principle. Suffice to emphasize here that before the emergence of the modern federal system in the United States in 1787, its features were never as clearly articulated as they are today. The more amorphous confederate form was predominant.<sup>46</sup>

The beginning of the twentieth century marked the first serious attempt to curb the autonomy of the regional forces. It was reported in 1906 that Emperor Menlik II (1889-1913) could at any time take away the authority of the highest *rases* without giving any reasons for his action. But this is far from the measures taken by Haile Selassie. According to Levine, Menlik did not decisively undercut the authority of the great provincial lords and towards the end of his reign the provincial *rases* became largely independent. It is true that the power of Jimma Aba Jifar II survived for instance until 1932.<sup>47</sup>

The coming to power of Emperor Haile Selassie in 1930 and the subsequent issuance of the 1931 Constitution, the first *written* constitution in the history of the country, marks a new epoch. It heralded the end of the role of the duality that existed for centuries. Provincialism and/or the autonomous kingdoms, the traditional check against the power of the king of kings, were completely absorbed into the centralized adminis-

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<sup>45</sup> William Livingston, ‘A Note on the Nature of Federalism,’ *Political Science Quarterly*, 67:1 (March, 1952): 81-95.

<sup>46</sup> For more on the distinctions between these concepts see chapter two.

<sup>47</sup> Levine, *Wax and Gold*, *supra* note 13: 177-185. This does not, however, fully describe the impact of his reign as far as several of the southern and southwestern kingdoms are concerned.

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tration.<sup>48</sup> Haile Selassie in conformity with his policy of centralization refused to confer the title of kings, thereby disappointing expectations at the time of his coronation. This is particularly clear from the nature of the two houses established under the 1931 Constitution. The emperor made sure that all potential contenders for power were members of these chambers that in effect had only an advisory role.

Apart from the introduction of the modern army after dissolving private armies of the regional notables, Haile Selassie's measure of direct individual taxation without the involvement of the intermediary notables, which in a way centralized the taxation system, hit hard the economic base of those regional notables. Their right to collect tax was taken over by the center.<sup>49</sup>

Nor did the 1974 Revolution, which gave a mortal blow to the old monarchy, bring any change in the move towards more centralization of power. As far as regional autonomy is concerned, except for the change of ideology from Solomonic genealogy to Socialism, the centralist character of the state remained intact and was even strengthened to a degree that far exceeded the imperial regime.<sup>50</sup>

The process of centralization, modernization, nation building or by whatever name it was conducted and with good intentions, was not without consequences. Firstly, the incorporation of the South, the Southwest and the Eastern sides from their previously autonomous position to complete absorption meant that the notion of the state, its institutions and culture were imposed on the incorporated kingdoms. Secondly, it

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<sup>48</sup> Perham, *supra* note 30 at 262.

<sup>49</sup> Gebru, *supra* note 5: 80-83. The transition was certainly not smooth. Most of the peasant rebellions were meant to stop this process of centralization.

<sup>50</sup> Many contend that the Revolution was not in the real sense a revolution in terms of the impact on political power and the change in the structure of the state. True, there were some sweeping measures taken like the nationalization of land that gave a relief to the tenants living in the south, but the core of the issue, that is political power and the marginalization of the large majority of the people, was almost kept as it was. See John Young, 'Ethnicity and Power in Ethiopia,' *Review of African Political Economy* 23: 70 (1996) at 534; see also Ivo Strecker, 'Glories and Agonies of the Ethiopian Past' review article at <http://ntama.uni-mainz.de/~aau/glories.html> as visited on 2/11/01.

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brought about all sorts of diversities in terms of religion, language, tradition and culture. Because the state failed to accommodate them, the religious, lingual, cultural as well as political and economic dominance gave birth to the ‘question of nationalities.’ Thirdly, the state became extremely centralized at the expense of regional rulers. The political marginalization of the bulk of the community led to civil wars whose cause fundamentally differed from earlier ones. This time resistance not only called for state reform but even at times challenged the state itself.<sup>51</sup> Several studies hinted that conflict in traditional Ethiopia was mainly an instrument for asserting some level of regional autonomy and not for upsetting the whole system, nor was it for separation.<sup>52</sup> ‘God can not be blamed, the King can not be accused’ was the main tenet. The opposition mainly looked for adjustment and restoration of violated rights like better administration, lower taxes, respect for local autonomy and reduction of corruption. By and large the legitimacy of the Monarch and its ideological roots were not attacked. In the 1960s, however, things started to change. The new forms of resistance changed significantly in terms of leadership, social composition, motivation and ideological orientations.<sup>53</sup>

## 1.2 THE PROCESS OF CENTRALIZATION (1930-1991)

### 1.2.1 The Era of Written Constitutions

If a constitution is intended to be a document enjoying a wide degree of popular acceptance which in turn helps to convey legitimacy on the public authority and guides the exercise of power along the lines which the constitution lays down, then none of the Ethiopian Constitutions to date come remotely close to meeting this specification.<sup>54</sup>

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<sup>51</sup> Clapham, *Constitutions and Governance*, *supra* note 21: 30-31.

<sup>52</sup> See Gebru, *supra* note 5 at 199, 203; Mesfin Wolde-Mariam, *The Horn of Africa: Conflict and Poverty*, (Addis Ababa: Commercial Printing Press, 1999): 140-141.

<sup>53</sup> Clapham, *Constitutions and Governance*, *supra* note 21 at 29.

<sup>54</sup> *Ibid.*, at 38.



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The above statement written by a close observer of the constitutional development in Ethiopia in 1993 remains as a main challenge in terms of the processes for making and amending constitutions.

### ***1.2.1.1 The 1931 Constitution***

The coming to power of emperor Haile Selassie in 1930 and the subsequent grant<sup>55</sup> of the 1931 Constitution marks a new epoch. On the one hand this epoch reinforced the traditional position of the emperor as ‘*Siyume Egziabiher, Niguse Negast Za-Ethiopia*’ which literally means: Elect of God, King of Kings of Ethiopia’ but on the other marked the end of the role of the nobility or at least the gradual reduction of their role in local leadership, the traditional check against the power of the king of kings, to insignificance. Yet, it is important to note that Haile Selassie was crowned with full support of the pre-war modern elite with a mission of ‘Japanizing Ethiopia.’<sup>56</sup>

This also marked the beginning of the culmination of the struggle for centralization, which began with the attempt at unification by emperors during the 19<sup>th</sup> century and reached its consolidation under the absolutist rule of Emperor Haile Selassie to be further reinforced by the military. The consequence was the alienation of the bulk of the regional actors leading to the center periphery polemics.

<sup>55</sup> One may wonder as to why the Emperor was motivated to grant this constitution. Certainly the legitimacy of his authority came from traditional sources (divine right to rule) and there was no popular demand for one at that time. A key motivation was undoubtedly the Emperor’s progressive inclination to join the international organization. Externally, there was the intention to convey an impression of modernity through the introduction of a legal framework for government, human rights, two-chamber legislature, and the abolition of slavery as good examples with little local significance. By 1923 when Ethiopia joined the League of Nations, European colonial forces attacked Ethiopian position as ‘uncivilized.’ Thus, it is related to the Emperor’s high regard for international prestige and his concern for improving his country’s image abroad. A second and more important reason was that the Constitution was designed to be a legal weapon in the process of centralizing governmental power and in limiting the authority of the nobility. It was intended to secure the formal submission of nobility to the emperor. Markakis, *Anatomy of Traditional Polity supra* note 13: 270-273; Christopher Clapham, *Constitutions and Governance, supra* note 21 at 31; Fasil Nahum, *supra* note 38 at 20.

<sup>56</sup> The 1931 Constitution was modeled on the Meiji Japan Constitution of 1889, which in turn was based on the 1871 German Constitution combining both modernity and tradition while avoiding revolution (Tekle Hawariat Wayeh, the drafter of the Constitution, was a Russian educated intellectual). Yet that ambition was to be frustrated because it failed to pursue and put to action what it set as a goal. See James Paul and Christopher Clapham, *Ethiopian Constitutional Development, v. 1* (Addis Ababa: Addis Ababa University Press, 1967).

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The first measure the Emperor took along the process of centralization was the grant of the Constitution. It was a fairly brief Constitution containing fifty-five articles. The first chapter with five articles dealt, as one might expect, with the emperor and the succession to the throne. The famous article three states ‘...the imperial dignity shall remain perpetually attached to the line of his majesty Haile Selassie I, descendant of king Sahle Selassie whose line descends without interruption from the dynasty of Menlik I, son of King Solomon of Jerusalem and of the Queen of Sheba.’ Article four stipulated about the succession to the throne and the subsequent provision explained ‘the person of the emperor as sacred, His dignity inviolable and His power indisputable’. His authority was unlimited and unquestionable and his function multi-faceted: the emperor was the head of the executive, the fountain of justice, the agent of change and the law-giver, albeit moderated by parliament that lacked the competence to enact law. To a careful observer such clauses represent a significant departure from the Ethiopian tradition of the right to rule which was open for any one (presumably from the regional nobility) who combines competence, might and Solomonic legend. With the coming to power of Haile Selassie and his constitution, it was planned to take a different course.

The bulk of the other provisions provided about the power and prerogatives of the emperor. The Constitution vested supreme power in the hands of the emperor and heralded the establishment of the institutions of the chamber of Deputies and the Senate. These two houses were important instruments for curbing the power of the nobility.<sup>57</sup> Close scrutiny over the provisions and the practice revealed that both houses were merely meant to play a strictly *advisory* role.<sup>58</sup> According to Article 31 members

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<sup>57</sup> See Articles 6-17.

<sup>58</sup> See Articles 36 and 46 for instance. Apparently Article 34 stipulates that a law comes into effect after both houses deliberate and with the confirmation of the emperor but, Article 9 specifically grants the emperor wide powers of law-making.

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of the Senate were appointed by the emperor from among the nobility and the local chiefs. As for the chamber of Deputies, they were chosen by the nobility and the local chiefs. The presence of the nobility while providing some semblance of legitimacy at the center, on the other hand became part of a toothless legislative body and in a way remained the instrument of the centralizing and modernizing process launched by the regime. ‘They simply found a place for honorable retirement, as they were kept in the capital under close surveillance.’<sup>59</sup>

Consequently, the Constitution’s major outcome was its ability to establish the legal framework within which governmental power was to be channeled and distributed. It was aimed against the personal, arbitrary and ill-defined powers traditionally held by the nobility. It reflected the traditional principle of absolute imperial power without any practical limitations. The Emperor was granted full executive power over both central and provincial government and the nobility and provincial governors were granted no independent authority.<sup>60</sup>

### 1.2.1.2 *The 1955 Revised Constitution*

The Revised Constitution<sup>61</sup> continued to reinforce the process of centralization. The sketchy provisions regarding the powers and prerogatives of the Emperor were exten-

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<sup>59</sup> Although it started a bit earlier and despite some exceptions as in Wallega, after his restoration in 1941, the level of autonomy of every semi-independent unit was greatly reduced. The periphery as a whole was incorporated into a uniform structure of provincial government through *Teklay Gizat* (provinces) and *Awraja* (zones). The overwhelming majority of regional and provincial governors were central officials especially from Showa. Any regional politics of dissent within the empire were limited, pacified through marriage with the imperial family, this was the case in Tigray and Wallega. Markakis, *Anatomy of Traditional polity*, *supra* note 13 at 273; Christopher Clapham, ‘Political Framework: Controlling Space in Ethiopia,’ in Wendy James, Donald Donham, Eisei Kurimoto, Alessandro Triulzi eds., *Remapping Ethiopia: Socialism and After* (Oxford: James Currey, 2002) at 13; hereinafter called *Controlling Space*.

<sup>60</sup> Paul and Clapham, *supra* note 56: 340-341. It is stated that they fought to secure and share power from their traditional holdings and they forced the Emperor to draft a law that was to be part of the constitution but that was never realized. See Aberra Jembere, *An Introduction to the Legal History of Ethiopia: 1434-1974*, 2<sup>nd</sup> edn. (Munster: Lit Verlag, 2000): 168-171.

<sup>61</sup> It was proclaimed on 4 November 1955 on the occasion of the twenty-fifth anniversary of the coronation of emperor Haile Selassie. Markakis, *Anatomy of Traditional Polity*, *supra* note 13 at 275; Clapham, *Constitutions and Governance*, *supra* note 21 at 34.

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sively elaborated in the new Constitution.<sup>62</sup> The Constitution spent one chapter settling the issue of succession on the rule of male primogeniture.<sup>63</sup> Detailed provisions vested in the Emperor wide powers over the military, foreign affairs, local administration and so forth.<sup>64</sup> Interestingly enough it also contained an elaborate regime of civil and political rights for the *subjects*.<sup>65</sup> In theory, the Constitution was the supreme law of the land governing even the Emperor. It contemplated even an independent ministerial government responsible to the monarch and parliament, an elected chamber and independent judiciary but these liberal provisions were overshadowed by executive prerogatives reserved to the Emperor who exercised them expansively.<sup>66</sup> Despite the apparent inclusion of the notion of separation of powers, little change was introduced regarding the position of the Emperor. He was both the head of state and of the government and he continued to oversee the judiciary through his *Chilot* (Crown Court).

A basic development in the revised Constitution compared to its predecessor was the introduction of the representative principle for the chamber of Deputies whose members were elected on the basis of universal adult suffrage.<sup>67</sup> But parliament was granted no control over the ministers indirectly or collectively, who remained responsible to the Emperor.<sup>68</sup> A measure of population representation with divine right of kings was resolved decisively in favor of the latter, with the Emperor retaining

<sup>62</sup> Compare, for instance, Articles 6 of 1931 with Articles 26 and 36 of 1955.

<sup>63</sup> The whole of chapter one (containing 25 detailed articles) is devoted to deal with this issue.

<sup>64</sup> See chapter two (Articles 26-36) and Article 66 that grant the Emperor the power to make and unmake the cabinet. To the credit of Haile Selassie he presided over Ethiopia's entry to the family of Nations in 1923 and the United Nations in 1945. He was instrumental as well in the Organization of Africa and the anti-colonial struggle in Africa. It was not by accident that its seat became Addis Ababa. He was also the one to undertake major legal reform by proclaiming some six modern codes that are effective to date. See Merera Gudina, *Ethiopia: Competing Ethnic Nationalism and the Quest for Democracy, 1960-2000* (Shaker Publishing: PhD thesis, 2003) at 69.

<sup>65</sup> See chapter three of the Constitution, Articles 37-65.

<sup>66</sup> James C.N. Paul, 'Ethnicity and the New Constitutional Order of Ethiopia and Eritrea' in Yash Ghai ed., *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-ethnic States* (Cambridge University Press, 2000) at 183; hereinafter called *Ethnicity and the New Constitutional Order*.

<sup>67</sup> See Articles 93, 94, 101; The Senate remained an appointed chamber reserved for the nobility and high officials.

<sup>68</sup> Markakis, *Anatomy of Traditional Polity*, *supra* note 13 at 278.

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direct control over the executive, with the power to appoint ministers and regulate the whole of the executive branch. While one of the two chambers of parliament was popularly elected, it was balanced by the senate, which was appointed by the Emperor.<sup>69</sup> There was a parliament but those who were eligible to be candidates were the nobility and wealthy landlords who were opposed even to modest land reform and by so doing they were the ones that made the Revolution inevitable.<sup>70</sup> A law approved by both houses could not override the position of the Emperor.<sup>71</sup>

Indeed critics state that, even more than its predecessor, the Revised Constitution was a legal charter for the consolidation of absolutism. The absolute powers of the emperor were spelt out in unmistakable terms. ‘By virtue of his imperial blood as well as by the anointing which he has received, the person of the emperor is sacred, his dignity is inviolable and his power indisputable.’<sup>72</sup> One author noted, ‘in essence the constitutional provisions amount to little more than a formal statement of the facts of political life in Ethiopia. It reinforced the ultimate power of authoritarian regime and the human rights regime were certainly luxury, which the government has not taken seriously, nor had anyone expected that it would. Most of the provisions were dead letters. It served to the regime’s penchant for what amounts to rather crude formalism.’<sup>73</sup>

In 1966 the recommendation to make the Prime Minister become the effective head of the executive with the power to appoint his cabinet, leaving the Emperor in a largely ceremonial role was partly implemented when the Prime Minister became formally res-

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<sup>69</sup> Clapham, *Constitutions and Governance*, *supra* note 21 at 35.

<sup>70</sup> Menghistu Fisseha-Tsion, ‘Highlights of the Constitution of the Peoples’ Democratic Republic of Ethiopia: A Critical Review of the Main Issues,’ *Review of Socialist Law*, 14: 2 (1988) at 129.

<sup>71</sup> See Article 88.

<sup>72</sup> See Article 4.

<sup>73</sup> Markakis, *Anatomy of Traditional Polity*, *supra* note 13 at 277.

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possible for selecting other ministers,<sup>74</sup> but later developments indicated that it was a far too premature gesture to be taken seriously. The same dilemma was to be repeated in 1974 when the Revolution was about to erupt.<sup>75</sup>

Beyond these constitutional provisions, there are other factors that explain the complexity of the process of centralization and its impact on the regional nobilities. We have already noted the fact that the power of the chamber of deputies was not that significant. The hereditary aristocracy was marginalized and if they had any voice it was through the Crown Council, which served as an advisory body to the emperor. Such leading figures of the nobility as Ras Kassa Hailu, Ras Seyoum Mengesha, Ras Mesfin Sileshi and Ras Emiru Haile Selassie as well as the *Abun* were members of the Council at various times.<sup>76</sup> Furthermore other factors contributed to the gradual decline of the nobility. Although historically they were in charge of military and administrative functions, their position declined due to the state's creation of modern civilian and military bureaucracy. The creation of a modern army was of particular significance as they lost all their power with it. Lastly, regional nobility were weakened with the result that the nobility drawn from Showa replaced the regional nobility. This led to what Andargachew calls 'the Showanization of the state,' that weakened not only the nobility but also the bond between the government and the people.<sup>77</sup>

Thus, towards the 1960s the regime was caught between series of contradictions: between the need for further modernization that needs efficient and decentralized administration on the one hand and the reliance a on personally appointed and centralizing regime, on the other; the growing contradiction between the traditional

<sup>74</sup> Bahru Zewde, *A History of Modern Ethiopia 1855-1974*, 2<sup>nd</sup> edn., (Athens, Ohio: Ohio University Press 2001) at 203.

<sup>75</sup> The 1974 draft Constitution was aimed at introducing a constitutional monarch of the same intent. What parliament lacked of course was any kind of political party structure, so it could not effectively become a mechanism for representing popular interests in the government of a highly centralized state.

<sup>76</sup> Bahru 2001, *supra* note 74 at 206.

<sup>77</sup> Andargachew Tiruneh, *supra* note 14, at 9.

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elite and the rising modern elite that felt isolated and was able to decipher the stagnation; and the narrowly defined identity versus the large heterogeneous population.<sup>78</sup>

### 1.2.2 The Ethio-Eritrean Federation (1952-1962)

The Ethio-Eritrean federation, as already pointed out, was a significant political factor that influenced the revision of the 1955 Constitution. The crisis related to the dissolution of the federation remained to be the central challenge to three consecutive Ethiopian governments, including the present one. Much has been written about it, but as it goes some way to explaining the operation of a federal system in the continent, we must devote some words to it as well.

The territory now called Eritrea was historically an integral part of Ethiopia since the Axumite Era in the first century AD. Eritrea did not exist as an entity of its own prior to 1890 when it was created by Italy.<sup>79</sup> The historical and cultural background of the Christian Eritreans is identical to those in Tigray. The language Tigrigna is the same as the one spoken in Tigray and belongs to the family of Semitic languages.<sup>80</sup> The Tigrayans, therefore, form a solid bridge connecting Eritrea with the rest of Ethiopia. The death of Emperor Yohannes in 1889 and the shift of center of power from Tigray to Showa created a favorable condition for Italian colonial expansion.

Between the years 1869-1889 Italy insisted on expanding southwards, despite suffering defeats brought upon them by Ras Alula at Dogali. As early as 1887, Menlik the King

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<sup>78</sup> Markakis, *Anatomy of Traditional Polity*, *supra* note 13: 374-373; Merera, *supra* note 64 at 72.

<sup>79</sup> Minase Haile, 'The Legality of Secession: The Case of Eritrea,' *Emory International Law Review* 8 (Fall 1994): 479-503

<sup>80</sup> Tekeste Negash, *Eritrea and Ethiopia: The Federal Experience* (Uppsala: Nordiska Afrikainstitutet, 1997) at 20; see also Kinfe Abraham, *Ethiopia from Empire to Federation* (London: EIIP, 2001). It is also provided that the various nationalities in Eritrea are also affiliated with their counterparts in Ethiopia.

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of Showa had expressed readiness to negotiate with the Italians about supplies of arms in exchange for cession of territory, if this would ensure his speedy accession to power.<sup>81</sup> Menlik seized the opportunity provided by the political vacuum created and sealed an Italo-Ethiopian pact, the treaty of Wuchale, in May 1889. As a result, part of the territory was ceded and in January 1890, Eritrea was born as an entity. In spite of the treaty of Wuchale, Italy continued expanding southwards and occupied some territories leading to the famous Battle of Adwa in 1896. Even after the battle of Adwa, the treaty of Addis Ababa (October 1896) which abrogated the treaty of Wuchale, recognized the independence of Ethiopia, but confirmed the Italian possession of Eritrea until 1941.

Menlik was in no position, according to some writers, to expel the Italians from Eritrea and he left Eritrea in Italy's possession.<sup>82</sup> Controversies exist as to why Menlik did not insist on expelling Italy from the whole of Eritrea as a victor of this famous war in history. One version of the controversy states that he was compelled to halt further Italian expansion into his territory owing to geopolitical and logistic reasons. If Menlik pursued pushing the Italians out as *Ras Alula* had wished, then Italy could send more reinforcement and the hard won victory could be lost.<sup>83</sup> Whereas the other version states that the territorial cession is seen from the angle of the then existing rivalry between Tigray and Showa. One should note the fact that Menlik was consolidating his power both in terms of weapons and territory when Emperor Yohannes was busy fighting foreign forces. Because of this, they believe Menlik gave the territory to Italy in a bid to weaken his northern rivals. For instance James Paul recently wrote: 'Menlik's 1896 post Adwa treaty with Italy guaranteed Ethiopia's independence within

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<sup>81</sup> Tekeste, *supra* note 80 at 31.

<sup>82</sup> The main cause of the Battle of Adwa is commonly explained as a controversy over Article XVII of the treaty of Wuchale whereby Italy claimed that Ethiopia had consented to be an Italian protectorate. Ethiopia claimed that the Amharic version of said Article of the treaty did not contain such a binding commitment and this finally led to war. Tekeste, *supra* note 80 at 14.

<sup>83</sup> This is the version of mainstream Ethiopian historians bent not to write about any black spots on Menlik's reign.



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settled borders in exchange for its recognition of Rome's sovereignty over the territory still occupied (even after Adwa) by reinforcing Italian armies based in Asmara. Thus was created in a legal sense a new typical artificial colonial territory, which Rome named Eritrea. Menlik was praised for his *realpolitik* but in appeasing Italy's colonial appetite he had sanctioned the partitioning of the Tigrayan peoples: those north of the Mereb River became subjects of an Italian colonial rule and those to the south remained independent Ethiopians but were governed by a new monarchy from distant Showa.<sup>84</sup>

As a result, from 1890 until its liberation in 1941, Eritrea was administered as a colony by the Italian colonial Ministry, under a governor nominated by the Italian king. After liberation Eritrea remained under British rule till 1952. After World War II Italy renounced all right and title to its colonies and the Treaty of Peace signed in Paris in 1947 provided for the final disposal of the former Italian colonies to be determined by agreement among the four allied powers, the USA, USSR, UK and France. Failing agreement, the matter would be submitted to the UN General Assembly for disposition. The four victorious allies established an investigating committee to come up with a proposal on the future of Eritrea. The United States based on its interest in the region and good relations with the Emperor was keen to see Eritrea joined to Ethiopia in unity. The USSR and some Afro-Arab countries were on the other hand opposed to this move. They took the position that only separate existence could guarantee the sovereignty and progress of Eritrea. At the same time, however, they were sympathetic to Ethiopia's need for access to the sea. Because of disagreements the matter was referred

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<sup>84</sup> James Paul, *Ethnicity and the New Constitutional Order*, *supra* note 66 at 176; see also the context of the drafting process of Wuchale Treaty in which some contend, before it took its final form, the treaty was negotiated between Rome and King Menlik of Showa much earlier than he became emperor. Sven Rubenson, *The Survival of Ethiopian Independence* (London: Heinemann, 1976): 380-400; among the prominent ones, Professor Tecola Hagos would insist that Menlik should be subject to 'high degree of treason.' See Tecola Hagos, 'A Sobering Lesson: The Menlik Factor and the New Defeatism' at <http://www.tecolahagos.com/menlikism.htm> as visited on October 10, 2004.

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to the United Nations.<sup>85</sup> In November 1949 the General Assembly set up the United Nations Commission for Eritrea, constituting members from Burma, Guatemala, Norway, Pakistan and South Africa whose task was to visit Eritrea and after taking into account the interests of the inhabitants and the interests of all the countries involved to report its findings to the UN. The findings were however divided. Burma and South Africa proposed federation with Ethiopia, Norway proposed union with Ethiopia while Pakistan and Guatemala proposed UN trusteeship for ten years and independence to follow thereafter.

In the period preceding the federation, the demand of political parties in Eritrea was diverse concerning the destiny of Eritrea. Many Eritreans demanded unity with Ethiopia, others requested for immediate independence and still others urged for a partition or at least a different status for the western side of the province. In short, the internal situation was divided.<sup>86</sup>

On the Ethiopian side, Haile Selassie demanded the full incorporation of Eritrea and nothing less. Ethiopia's claim was based on her need for access to the sea and by the claim of historical title and cultural affinity of the two populations. Furthermore, Ethiopian diplomats successfully invoked the OAU principle of non-territorial intervention in the internal affairs of the state and the need to respect the territorial integrity of African States whose territories were defined by colonial borders. Ethiopia argued that if Eritrea's plea received a hearing, it would upset the entire post-colonial African state system as legitimized by the Cairo Resolution of the OAU in 1964.<sup>87</sup>

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<sup>85</sup> Heinrich Scholler, 'The Ethiopian Federation of 1952: an Obsolete Model or a Guide for the Future,' in Peter Woodward and Murray F. eds., *Conflict and Peace in the Horn of Africa* (Aldershot: Dartmouth, 1994) at 12.

<sup>86</sup> At the time when the Commission of Inquiry was in Eritrea in November 1947, it spoke to the then sitting political party leaders and elders and in its report indicated that 1. The Union Party had 48 per cent support, the Muslim League that urged for independence or union with the Sudan 30.9 per cent, and the other parties had less than 10 per cent support. Tekeste, *supra*, note 80: 45; 53.

<sup>87</sup> Minase Haile, *supra* note 79: 479-503.

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The proposal by South Africa, Norway and Burma, constituting a majority, was finally approved by 46 to 10 with four abstentions. The Eritrean domestic situation, the international context and Ethiopia's case finally brought what is commonly described as the 'compromise formula,' which became UN General Assembly Resolution 390 A (v).

The UN General Assembly passed this resolution on December 2, 1950 and the Resolution stated that Eritrea should form 'an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian crown.' The first seven Articles of the Resolution passed by the UN General Assembly on December 2, 1950 formed the Federal Act. A draft constitution prepared by UN experts was submitted to an Eritrean Assembly and the latter adopted it on 10 July 1952. By proclamation Number 124 of 11 September 1952 the Eritrean Constitution with the Federal Act was put into force in *Negarit Gazette*. At this point in time, the federation of Eritrea with Ethiopia came into effect.<sup>88</sup> The Federal Act as well as the Eritrean Constitution provided for a 'federal arrangement' between the two governments. According to the Constitution 'Eritrea is an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown'.<sup>89</sup> The government of Eritrea was authorized, as a manifestation of its autonomy, to exercise legislative, executive and judicial powers.<sup>90</sup> The actual division of power under the federal act vested a number of basic functions in the federal government: notably defense, foreign affairs, currency and external trade while reserving residual powers to the Eritrean government. These included civil and criminal law, police, health, education, natural resources, agriculture, industry and internal communication.<sup>91</sup>

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<sup>88</sup> Tesfatsion Medhanie, 'Remarks on Eritrea and a Possible Framework for Peace,' in Peter Woodward and Murray F. eds., *Conflict and Peace in the Horn of Africa* (Aldershot: Dartmouth, 1994): 21-23; Scholler, *supra* note 85 at 13

<sup>89</sup> Article 3.

<sup>90</sup> Article 4.

<sup>91</sup> Article 5.

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Many controversies arose over the ambiguity of some of the concepts included in the documents as well as over the whole federal compromise. There seemed a consensus though that the term autonomous unit signified not a sovereign state but rather a politically organized unit linked federally with Ethiopia and that the phrase under the sovereignty of the Ethiopian crown implied that the federation, not the autonomous unit, enjoyed sovereignty.<sup>92</sup>

More controversial were the status of the federation and its subsequent dissolution in 1962. Closer observation of the 1955 Constitution and the Eritrean Constitution seems to suggest that Eritrea was only an autonomous region rather than a full-fledged unit in a federation, as we understand it today.<sup>93</sup> The Resolution characterized Eritrea as ‘an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown’. It did not accord Eritrea the status of a state in a federal union with Ethiopia.<sup>94</sup> In a federation resulting from two units, one would expect there to be three institutions. The two constituent units and one other overarching federal government for both of them. Furthermore, a supreme constitution which both units submit to, is a requirement. None of them existed in the UN sponsored federal compromise. The Resolution had provided for a Federal Council, an institution that was a faint approximation of a federal body. This body was to comprise Ethiopian and Eritrean representatives in equal numbers and *advise* the Emperor on matters of the federation. The Council was simply ignored and practically done away with before it could even start functioning. As a result, the federal powers belonged to the Ethiopian government. The Ethiopian Emperor was the sovereign, the Ethiopian courts were the federal courts and the Ethiopian Ministers were the ministers of the federal government.<sup>95</sup> Tekeste states, ‘For all intents and purposes the resulting relationship between Ethiopia and Eritrea

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<sup>92</sup> Scholer, *supra* 85 at 15.

<sup>93</sup> For more on the features of a federation see chapter two.

<sup>94</sup> Tesfatsion, *supra* note 88 at 19.

<sup>95</sup> Tesfatsion, *supra* note 88 at 20.

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was not in the least federal. Even according to the intentions of the union, Eritrea was not granted a federal status but only a status of autonomy.<sup>96</sup>

However, this constitutional ambiguity could not serve as a justification for not implementing even the regional autonomy. Even Eritrea's mere status of autonomous region was not tolerated by Haile Selassie's regime.<sup>97</sup> The reasons as stipulated by many writers seem to relate to the nature of the two incompatible Constitutions. Ethiopia by then had a feudo-monarchical system of government, ideologically sustained by some notion of the divine right of kings. It was imperial. The emperor ruled as an absolute monarch and as head of an empire every part of which he sought to subordinate to himself. The government had a notion of territorial integrity that was incongruent with federal or other structures of decentralization and hence the dissolution was no surprise. By contrast, the Eritrean Constitution was one modeled on those of Western democracy. It provided for three branches of government based on rule of law, it stipulated for fundamental freedoms and a multi-party system.<sup>98</sup>

Haile Selassie demonstrated a considerable diplomatic success when he orchestrated a federation between Ethiopia and Eritrea with the approval of the UN. However, the regime lacked the political wisdom and political will to maintain the regional autonomy. As early as 1955 the Emperor's representative in Eritrea already hinted at the fact that 'there are no internal or external affairs as far as Ethiopia is concerned...' and pointed out that 'the affairs of Eritrea concern Ethiopia as a whole and the Emperor.' In 1958 the Eritrean Assembly voted unanimously to abolish the Eritrean

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<sup>96</sup> Tekeste, *supra* note 80 at 160.

<sup>97</sup> Tekeste, *supra* note 80: 90, 98, 146. As early as by the end of 1953 Eritrean autonomy was severely compromised. The Eritrean Assembly was paralyzed for a number of reasons. It was led by an executive that had campaigned for complete union with Ethiopia. Tedla Bairu, the chief executive was also the leader of the Union Party; Eritrean autonomy under the Federal Act was perceived as a temporary hindrance to a complete union with the motherland. The move by the Union Party was consistently opposed by the Muslim League from the outset. All evidence seems to indicate that Tedla Bairu was equally determined to abolish the federation much earlier than the Ethiopian authorities.

<sup>98</sup> Tesfayon, *supra* note 88 at 20.

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flag and use only the Ethiopian flag. In 1959 the Ethiopian penal code replaced the existing legislation in Eritrea. In 1960 the Eritrean assembly voted unanimously to change the name Eritrean *government* to Eritrean *administration* and other adjustments connoting its lower position than a federation. On 14 November 1962 again the Assembly voted unanimously for the abolition of the federation.<sup>99</sup> Whether this important series of events was undertaken with full backing from the Ethiopian side or not is a troublesome question. But few seem to doubt the fact that these events were taking place with full knowledge and influence from both sides of the ‘federation.’ In as much as the Imperial regime had wanted to terminate the federation, the Eritrean Union party,<sup>100</sup> the then governing party in Eritrea, cooperated equally to the demolition of the autonomous status.<sup>101</sup>

The controversial debate among Ethiopian and Eritrean intellectuals as well as foreign writers begins with the status of the ‘federation’ that was in force from 1952-1962. The controversy gets reinforced with the impact of its dissolution in 1962. Many believe that by virtue of this compromise formula, the Resolution formalized the decolonization of Eritrea at this moment in time. Others believe that Eritrea was formally decolonized in 1993.<sup>102</sup>

The bulk of Ethiopian intellectuals believe that the Eritrean case is a case of secession rather than decolonization. The argument is that neither the terms of the Resolution nor international opinion following the dissolution allow the General Assembly to reserve

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<sup>99</sup> Paul and Clapham, *supra* note 56 at 384.

<sup>100</sup> Nationalist writers from Eritrea often state that the Union Party was much influenced and manipulated by Ethiopia but all other parties were equally financed either by the Arab world or Italy.

<sup>101</sup> Tekeste, *supra* note 80 at 90, 98, 146.

<sup>102</sup> For some Eritrean intellectuals like Bereket, the Eritrean demand for independence differed markedly from the claims of other groups in the region ‘because the Eritrean case is not a case of secession but a case of decolonization. Eritrea remained an Italian colony and was then transferred to another colonizer and was then decolonized in 1993.’ It is considered as an outright annexation and the theory of Ethiopia as ‘colonizer’ commences. Eritrea’s forced annexation by the Emperor violates UN Res. of 1950 and was thus contrary to established principle of international law. Bereket Habte Selassie, ‘Self-Determination in Principle and Practice: The Ethiopian-Eritrean Experience,’ *Columbia Human Rights Law Review* 29 (Fall 1997): 99-101.

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residual power to itself upon any violation.<sup>103</sup> The arrangement under the Resolution merely conceived of Eritrea as an autonomous decentralized unit, which is conceptually different from confederation and federation. Legally speaking, such an autonomous status can be modified by the central government and the Ethiopian Crown being sovereign, had every right to do what ever it wanted, though politically it was not advisable.<sup>104</sup> Consequently, Eritrea did not have a legal personality under international law until 1993. Regarding the charge that the re-incorporation of Eritrea in 1962 was illegal, it is important to note that it was the elected Eritrean Assembly that unanimously decided to terminate the federation in the first place. A minority of Eritreans also shares this view. Tekeste for instance wrote, ‘the war in Eritrea had neither [a] colonial character nor that of [a] war fought against [a] foreign dominator. It was an internal war for power sharing or control of state power.’<sup>105</sup>

Another point of equal importance is the fact that parallel to the series of measures indicated earlier on, the Muslim League was more or less consistently opposing the measures taken by the Eritrean assembly. It is no surprise therefore that the first armed opposition came from this group. It was to constitute the Eritrean Liberation Front (ELF). As a protest to the dissolution of the federation, a clandestine movement started around the same period first by the ELF and later by the (Eritrean People Liberation Front) EPLF and continued until 1991. Many consider the dissolution of the federation a cause of the protracted war that stayed for thirty years.

The armed struggle in Eritrea began in 1961 with the formation of the ELF by Eritrean exiles in the Middle East under the leadership of the veteran *shifita* Idris Awate. Syria

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<sup>103</sup> Minase, *supra* note 79 at 481.

<sup>104</sup> Both countries paid dearly because of the protracted war. The implications for any process of federal constitution drafting are clear. What ultimately matters is not the formal division of powers or the legal mechanism for its implementation but rather the commitment to implement what is proclaimed and then meets the basic political needs of those who live under it. Despite its complexities, with hindsight, it was the best compromise, which both sides should have adhered to.

<sup>105</sup> Tekeste, *supra* note 80 at 175.

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and Iraq regarded Eritrea as an integral part of the Arab world and indeed the ELF portrays even today Eritrea as a Muslim nation with a Christian minority. Egypt particularly allowed opponents of the Ethiopian regime to enjoy a safe haven. Its policy is based on dividing and weakening Ethiopia in the hope that the latter remains incapable of harnessing the huge water resources of Ethiopia that flow through the Nile to the Sudan and Egypt.<sup>106</sup> It must be noted here that Ethiopia supplies 86 per cent of the water that flows from *Abay* (the Nile). When ELF succumbed to its own internal squabbles and failed to absorb the then fast growing Christian opposition joining the struggle, the EPLF evolved as a powerful party to lead the struggle. The struggle both in its own right and in radicalizing the influence it exerted on the Ethiopian opposition in general played a significant role in the regime's collapse in 1974 and the military in 1991.<sup>107</sup> After 30 years of struggle, EPLF *de facto* controlled Eritrea in 1991 and a referendum held in 1993 resulted in Eritrean independence.<sup>108</sup>

Considering Haile Selassie's ambition of centralizing power, the failure of the Ethio-Eritrean short-lived autonomous experience was no surprise. What is more remarkable is that the regime was not willing to tolerate it even though there were clear indicators of the probable long-term consequences of the collapse. The failure of the decade of federal experience also fits the hypothesis that a federal system should be based on a covenant, should have internal support and should not result from outside. Most post-

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<sup>106</sup> Harold Marcus, *supra* note 1 at 175; Assafa Endeshaw, *Ethiopia: Perspectives for Change and Renewal* (Send Lee Press, 2002) at 106.

<sup>107</sup> Bahru 2001, *supra* note 74 at 219.

<sup>108</sup> For many optimists and those who had faith in the close military cooperation between EPRDF and EPLF, the 1993 referendum was supposed to end the 'civil war' or whatever name one may give it. However, the relationship between Ethiopia and Eritrea remains today (May 2005) as precarious as it was in 1991. The May 1998 conflict, apparently reported as a border dispute, brought about a new dimension of devastating war between the two countries. For a more objective assessment of the latest conflict see Jon Abbink, 'Badme and the Ethio-Eritrean Border: The Challenges of Demarcation in the Post-war Era,' in *Africa* (Roma) 58:2 (2003): 219-231. Many are surprised that the Ethiopian government as victor of the war failed to dictate its terms. While some have tolerated the Eritrean independence/secession in 1993 for the sake of peace, many expected that with the act of aggression in 1998 by Eritrea, Ethiopia would insist on fresh negotiations for a lasting peace including free access to the port of Asseb. But like Adwa in 1896, the outcome of the war does not seem to have brought any political or economic gains for Ethiopia.



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colonial federal experiments in Africa failed for similar reasons.<sup>109</sup> There is another bitter lesson for those who still claim to follow the Eritrean example of secession. Secession or the emergence of an independent state does not necessarily result in the establishment of a stable and democratic state. This is evident not only from the experience of post-independence Eritrea but also from many other of the post-independence African states. Secession or independence simply replicates the nation state without resolving the controversial and normative question of how to politically integrate, share power and resources among several contending forces.<sup>110</sup>

### 1.2.3 The Revolution and the Coming to Power of the Military

Towards the end of the imperial regime, the centralization and the tension between the traditional forces backing the regime and the modern elite was gaining momentum. Opposition to the regime took many forms.<sup>111</sup> Perhaps the 1960 attempted *coup d'etat* was a watershed. Infuriated with Ethiopia's backwardness compared to the newly emerging states in Africa, the designers wanted to restore Ethiopia to its proper place. They promised new factories and schools and also had a plan of introducing a constitutional monarch although the land issue was not raised. Despite its failure the coup succeeded to attract the attention of the university students who became the heirs of the rebels.<sup>112</sup> It was fundamental in the sense that for the first time many realized that the regime whose legitimacy came from the divine right to rule could be overthrown.

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<sup>109</sup> See chapters two and five for more details.

<sup>110</sup> See an interesting article by Allen Buchanan, 'Federalism, Secession and the Morality of Inclusion,' *Arizona Law Review* (Spring 1995): 53-63.

<sup>111</sup> Peasant rebellions broke out too in a number of provinces. The rebellion in Tigray in 1943 otherwise popularly known as *Kedamay Weyane* (the first rebellion), the Bale rebellion 1963-1970, Gojjam rebellion in 1968, Yajju in (1948 and 1970) Wello and Darasa (Gedeo 1960) are some of them. The rebellion differed in their ideological articulation, duration and in the involvement of external forces but by and large they indicate the heavy hand of the regime on the peasantry. Bahru 2001, *supra* note 74: 215-217

<sup>112</sup> Bahru 2001, *supra* note 74: 213-214.

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The aristocracy that had lost its military and administrative functions to the new elite was no longer the pillar of the monarchy. The young returnees from school abroad on the other hand thought they were working for a regime in which personal loyalty was of prime importance. It was clear to them to see how ignorant, corrupt and inefficient their superiors were.<sup>113</sup> In the course of the 1960s and 1970s the new elite armed with western ideology became the main antithesis of the *ancient* regime.<sup>114</sup> Alienated from the center and backed by Ethiopia's traditional opponents of the Middle East, Somalia, Eritrea, Oromos of Bale and the Ogaden were challenging the center. Finally, in the early 1970s, the regime lost two of its Western allies, the United States and Israel at a time when the Middle East was in ascendance because of the power and prestige it derived from its ability to control oil prices. With a view to end hostilities in Eritrea and Somalia and following Arab-Israeli war in 1973 Ethio-Israeli relations were severed. This was followed by cold diplomatic reactions from the United States apparently taken to accommodate the Arabs.<sup>115</sup>

Finally the urban uprising of 1974, the events of January to June of the same year showed a total collapse of the regime and the absence of any obvious successor to it.<sup>116</sup> It should be noted though that when the revolution was about to erupt, the nations teachers, taxi drivers, students, unemployed and the labor union had shown a stake in it thus making it very popular at inception. Towards the end of February the cabinet of Aklilu Habtewold was forced to resign and Endalkachew Mekonen<sup>117</sup> was instructed

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<sup>113</sup> Harold Marcus, *supra* note 1 at 167.

<sup>114</sup> The Ethiopian Revolution of 1974 caught almost everybody by surprise. Even the most radical of the students were unprepared. Bahru wrote, 'The Amharic saying *abyot feneda* (revolution erupted) clearly indicates the message. It clearly did explode in the face of both the regime and its opponents. Although there was a revolutionary elite with a formula for a better future there was also a huge gap between initiating the revolution and controlling it.' The little regard shown by the revolutionaries for the role of the army in their conflicts with the incumbent regime and their inability to bring that army under their influence contributed to the defeat of the February 1974 Revolution, Bahru 2001, *supra* note 74 at 218; Assafa Endeshaw, *supra* note 106 at 10.

<sup>115</sup> Andargachew, *supra* note 14: 32-33

<sup>116</sup> *Ibid.*: 34, 59.

<sup>117</sup> Further attempts at changing Ethiopian constitutional law were made after the stormy popular movement in February 1974 when the newly installed Endalkachew Mekonen government promised to promulgate yet another constitution that would make the cabinet responsible to parliament, unlike previous times when it was to the Emperor

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to form a new cabinet but despite the good profile of the team, it never succeeded to stop the course of the Revolution. ‘The plea for patience (*fata*) fell on deaf ears and indeed the radicals insisted *bulcha bikeyer wot ayatafitim* (changing the stove does not make the stew any better).’<sup>118</sup> Endalkachew was removed in July and replaced by Mikael Imiru, the latter to be replaced soon by the *Derg*.

Another crucial aspect of the Revolution, however, came from the military. It started with a modest request for economic and social reform like food and uniforms for their members but as many have described it became a ‘creeping coup’ implying the slow but systematic erosion of imperial power culminating in the deposition of the Emperor. Towards June of 1974 the *Derg* (which means committee in Amharic) which started as a movement within the capital was subsequently broadened with the inclusion of representatives of various units from all over the country and slowly it grew into a military parliament, constituting some 120 members under the chairmanship of General Aman Mikael Andom and Mengistu as the first vice chairman,<sup>119</sup> mainly constituting lower ranking officers. Taking the lessons of the 1960s, the *Derg* expressly declared loyalty to the emperor and did not show any ambition to seize power.

As far as the affairs of the government were concerned dual power prevailed for something like a month between that of the Endalkachew cabinet and the *Derg* but power continued to shift out of the hands of the former to the latter.<sup>120</sup> However, the *Derg* had already the armed forces, the media and police behind it and also secured the blessing

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alone that they  
had to be loyal. The aborted Enalkachew Cabinet sought to rescue the collapsing regime by replacing it with constitutional monarchy. By removing all the powers of the Emperor that were inherent in imperial rule in the two constitutions, for the first time in Ethiopian history, the people were described as the source of the authority of the government. See Articles 1 and 7 of the 1974 unpromulgated constitution. Also Assafa Endeshaw, *supra* note 106 at 65.

<sup>118</sup> Bahru 2001, *supra* note 74 at 231.

<sup>119</sup> Bahru 2001, *supra* note 74 at 233.

<sup>120</sup> *Ibid.*, at 235.

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of the Emperor. The cabinet was already divided between those working with the *Derg* and those who opposed it. The *Derg* continued to replace or isolate those who were not amenable to its whims. As a result Micheal Imiru replaced Endalkachew Mekonen as a Prime Minister on July 22. The *Derg* arrested the then Minister of defense Abiye Abebe and replaced him by Aman Adom. This time *Derg*'s control of the cabinet was almost complete.<sup>121</sup>

The *Derg* continued to weaken and abolish all institutions associated with the Emperor and finally confiscated businesses owned by the Emperor and the royal family. On 11 September, the ultimate attack against the Emperor was perpetrated as the famous film on the 1973 famine (that was kept secret) produced by Jonathan Dimpleby was made public. On September 12, 1974 the *Derg* suspended the Constitution, deposed the Emperor, and dissolved parliament, thus ending the regime. Although the *Derg* took over power from June 1974 with the set-up of a military committee, 12 September 1974 marks the official taking over of power.<sup>122</sup>

A convergence of domestic as well as international factors fueled by the urban uprising reflecting regional, ethnic as well as class contradictions as championed by the student movement, was accelerated by the military thus ending the regime with its Solomonic legend.<sup>123</sup> Not only did it end the Monarchy but this time the *Derg* filled the political vacuum by introducing socialism, a complete change of direction.

What is unfortunate about the Revolution was that despite its popular background, there was no organized civil force that could articulate 'a road map' for the masses. It was only the military that was organized and that filled the political vacuum.<sup>124</sup> The

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<sup>121</sup> Andargachew, *supra* note 14: 68-69.

<sup>122</sup> *Ibid.*, at 69.

<sup>123</sup> Merera, *supra* note 64 at 76.

<sup>124</sup> Bahru 2001, *supra* note 74 at 218; Assafa Endeshaw, *supra* note 106 at 10.

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two leftist political groups that were in existence allegedly, MEISON (All Ethiopian Socialist Movement) as of 1968 and EPRP (Ethiopian Peoples Revolutionary Party) as of 1972 had remained clandestine and their activities were limited to their student constituency. The military as the only organized force, therefore, exploited the existing power vacuum and easily took over leadership of the revolution.<sup>125</sup> Because of this, what came to power was the military, not the revolutionaries, defeating the cause of the revolution.<sup>126</sup> Through the mentors, mainly MEISON, the *Derg* was able to catch up with the leftist dialogue and declared the National Democratic Revolution (NDR) Program in 1976 and its ultimate objective was the setting up of the Peoples Democratic Republic of Ethiopia (PDRE) which came out in 1987. From 1974 up to 1987 the *Derg* ruled by decree.

After consolidating power the first measure the *Derg* took was to herald, the same date of its crowning, by decree all demonstrations and assemblies illegal. The proclamation that deposed the Emperor transformed the *Derg* into the Provisional Military Administrative Council (PMAC), which assumed full state power.<sup>127</sup> Simultaneously it suspended the Constitution, dissolved parliament, banned all strikes and demonstrations and declared *Ethiopia Tikdem* (Ethiopia First) with its socialist doctrine.<sup>128</sup>

As it started to catch up with the Marxist thoughts it nationalized financial institutions and private commercial and industrial enterprises in January 1975. This was followed

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<sup>125</sup> Merera, *supra* note 64: 22-23.

<sup>126</sup> *Ibid.*, at 78.

<sup>127</sup> The PMAC was established by Proclamation number 1 of 1974 Negarit Gazetta 34, 12 September 1974. It decreed it is hereby prohibited for the duration of the proclamation to conspire against the motto Ethiopia *Tikdem* (Ethiopia first) to engage in any strike, hold unauthorized demonstration or assembly or engage in any act that may disturb the public peace and security.

<sup>128</sup> Bahru 2001, *supra* note 74 at 236.

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by the nationalization of urban land and extra houses.<sup>129</sup> According to Bahru the nationalization measures transferred resources from private to government hands and thereby constituted the economic foundations of totalitarianism.<sup>130</sup>

The *Derg* also proclaimed the land reform in March 1975. Since 1965 University students had already popularized the slogan ‘land to the tiller’ calling for an end to the *Neftegna* and *Gebar* system in the South. The land reform, in as much as it eradicated centuries of social inequalities, appears to have had enduring positive impact. Indeed, by doing this the *Derg* was able to rob one of the causes of the revolution and at this point in time the *Derg* was at the height of its popularity.<sup>131</sup> The proclamation abolished all forms of private land ownership and prohibited the sale, lease or mortgage of rural land. In short, it put an end to landownership. Thus, a large section of the people of the south as such was emancipated from servitude, at least in the short run. The large section of the peasantry saw a stock in the emerging regime and was to constitute the bulk of the army. However, even this popular measure had its own drawbacks. Not only did the proclamation fall short of making the peasant the absolute master of the plot but it was also accompanied by a series of unpopular measures.<sup>132</sup> These measures ranged from state control of agricultural marketing that required the peasant to supply produce at fixed government prices to forced resettlement, collectivization and the relocation of peasant neighborhoods to new sites selected by government cadres (villagization).<sup>133</sup> At later stages dissatisfaction with these measures

<sup>129</sup> See Proc. 26, 31, 47 of 1975, Proc. 103 of 1976 on the nationalization of rural and urban land and extra houses, private schools, industries and commercial farms. According to Fasil, this was ‘nothing short of a declaration of war on the nobility and urban upper middle class’. Fasil, *supra* note 38 at 20.

<sup>130</sup> Bahru 2001, *supra* note 74 at 241.

<sup>131</sup> Assafa Endeshaw, *supra* note 106 at 13.

<sup>132</sup> After 1978 and the defeat of three threats (the Somalia war, MEISON, EPRP), the *Derg* reintroduced the structure of surplus expropriation that had been destroyed by land reform. The key institution there was the Agricultural Marketing Corporation (AMC), which laid down grain quotas to be delivered at highly disadvantageous prices by each region. Unsurprisingly this alienated the peasantry from the regime. Christopher Clapham, *Controlling Space in Ethiopia*, *supra* note 59: 15-17.

<sup>133</sup> More intrusive than the AMC, however, were the resettlement and villagization programs. See Articles 10.2 and 10.3 of the 1987 Constitution; also Clapham, *Controlling Space in Ethiopia*, *supra* note 59 at 19.

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was to be one of the factors for the rallying of the northern peasantry behind the EPRDF in its campaign to bring the *Derg* rule to an end.<sup>134</sup>

The *Derg* continued to consolidate power by crushing all sorts of opposition and on November 24, 1975 it announced the shocking news of the death of its chairman General Aman and the execution of some sixty top government officers of the imperial regime. This initiated the cult of political violence that attained its climax in the so-called Red Terror. It was first aimed at the urban guerilla resistance by EPRP members in which thousands of young intellectuals were killed but at later stages, MEISON too was a victim of this terror.<sup>135</sup> It was the official launching of state killing any one suspected of dissenting from the regime including the EPLF and TPLF.

### 1.2.3.1 *The 1987 Constitution*

Final stage to complete the institutionalization and monopolization of power was the promulgation of a new constitution and the proclamation of the Republic.<sup>136</sup> The process of establishing a vanguard and single party culminated with the set-up of the (Workers Party of Ethiopia) WPE in September 1984 with its chairman Mengistu. Interestingly, its formation was against the background of the worst famine in the country, a regime that got to power by publicizing another famine in 1973 was celebrating its new party when lives were lost for the same reason. The draft constitution was completed in 1986 and was formally submitted to public debate and

<sup>134</sup> Bahru 2001, *supra* note 74: 230-235.

<sup>135</sup> Existing clandestine parties failed to forge a common vision about the future and they also lacked a clear strategy to control the cause of the Revolution. When the *Derg* filled the vacuum, the EPRP confronted it by urban warfare and a series of failed *Coups d'etat* led to the loss of young generation of Ethiopians. EPRP insisted to overthrow the *Derg* without having to go through the routine works of organizing the masses. It insisted on the coming to power of transitory civilian rule and decided to eliminate the *Derg*. In reaction to this, the *Derg* declared the Red Terror against EPRP. The total amount of people killed in this state-sponsored terror is estimated at 250,000. See Gebru Tareke, The Red Terror in Ethiopia: An Historical Aberration? At [http://www.ethiopiafirst.com/news2004/Jan/Red\\_Terror\\_in\\_Ethiopia.html](http://www.ethiopiafirst.com/news2004/Jan/Red_Terror_in_Ethiopia.html) as visited on 5/3/2004.

<sup>136</sup> See Proclamation of the Constitution of the People's Democratic Republic of Ethiopia, proclamation No. 1/1987 *Negarit Gazeta* 47<sup>th</sup> Year No Addis Ababa, 12 September 1987.

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ratified by a referendum in February 1987. In an election in which a single party, WPE members, participated members of the National *Shengo* (parliament) were elected. While formally the *Shengo* constituted the highest legislative body, in practice, the *Shengo* was not to be sitting continuously but only once a year for a set period.<sup>137</sup> The role of the *Shengo* was undertaken by the State Council. It was the visible administrative organ of state power with the highest responsibility for undertaking the day-to-day state functions. It was also the permanent executive, legislative and administrative organ of the National *Shengo*.<sup>138</sup> Thereby the National *Shengo*'s role was reduced in a rubber-stamping body of the WPE.<sup>139</sup>

The Constitution<sup>140</sup> stated that Ethiopia is a unitary state constituting administrative and autonomous regions.<sup>141</sup> It stated that the nationalities are equal and ensured the equality of nationalities 'through ... combating chauvinism and narrow minded nationalism, [and by enhancing] the equality, respectability of the languages of nationalities as well as through equal participation in political, economic, social and cultural fields and through realization of regional autonomy'.<sup>142</sup>

An important political development of the 1980s *Derg* epoch was the recognition of the fact that despite all the forces the regime employed to destroy all opposition, the struggle to overthrow the regime persisted in some quarters of the country, mainly in Eritrea and Tigray. With a view to calm this resistance and to rob the rebels' cause, the PDRE Constitution expressly stated the possibility of organizing regional autonomies.

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<sup>137</sup> See Article 67.

<sup>138</sup> See Articles 81-83.

<sup>139</sup> For an elaborate commentary of the PDRE Constitution see Menghistu Fissehatsion, *supra* note 70.

<sup>140</sup> The form of the 1987 Constitution was determined no less than those of the 1931 and 1955 by the domestic ideology and external alliance of the incumbent regime. Since the Program of the National Democratic Revolution issued in April 1976 and the alliance with the Soviet Union in the subsequent year Ethiopia had been committed to Marxism Leninism on the Soviet model. The choice of this ideology was indeed shared at that time by most of the regime's opponents. Clapham, *Constitutions and Governments*, *supra* note 21: 33-35.

<sup>141</sup> See Article 59.

<sup>142</sup> See Article 2.



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This Constitution was also the first to recognize the presence in Ethiopia of different nationalities. It sought to combine the recognition of the cultural identity of ethnic or national groups and a measure of autonomy for them, with overall subordination to the center in the name of the ultimate supremacy of class solidarity over national identity. What is mysterious is why it came to this point late in time as the regime hinted its acknowledgement of the nationalities' right to self-determination as early as it took power.<sup>143</sup>

As the Ethiopian Student Movement had already popularized it, belatedly the *Derg* also tried to address the 'question of nationalities.' Given Ethiopia's existing situation, the problem of nationalities it was stated, could be resolved if each nationality was accorded full right to self-government. This means that each nationality would have regional autonomy to decide on matters concerning its affairs. As stated above the Constitution of FDRE was a unitary one but the unitary state comprised administrative and autonomous regions.<sup>144</sup> The National *Shengo* was empowered to determine by subsequent legislation the autonomous regions, their powers and boundaries. Accordingly, the *Shengo* proposed five autonomous regions and twenty-four administrative regions.<sup>145</sup> The five autonomous regions were Eritrea but without its Afar inhabited areas, Tigray, Assab for the Afars, Dire Dawa for the Issas, and Ogaden.<sup>146</sup> Subsequent proclamations defined more the powers and duties of the autonomous regions.<sup>147</sup> The fact that special status was granted to some administrative

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<sup>143</sup> Paragraph 5 of the Program of the NDR of Ethiopia which was the basic political guiding document until the promulgation of the new Constitution and the formation of WPE read: The right of self-determination of all nationalities will be recognized and fully respected. No nationality will dominate another since the history, culture, language and religion of each nationality will have equal recognition in accordance with the spirit of socialism. Basic Document of the Ethiopian Revolution published by the office for mass organization affairs: agitation, propaganda and education committee, Addis Ababa, May 1977, p. 153. Merera states that this was prepared by the MEISON that was by then an ally of the *Derg* and once the *Derg* and MEISON went into internal struggle and when the latter was effectively annihilated, the *Derg* no more propagated it until it did with the PDRE Constitution. *Supra* note 64: 82-83.

<sup>144</sup> Article 63(2).

<sup>145</sup> It issued proclamation 14 of 1987, a proclamation establishing autonomous and administrative regions.

<sup>146</sup> Article 2 of proc. 14/87. The other provinces were subdivided into 24 administrative regions. See Article 3.

<sup>147</sup> Proc. No. 14, 15, and 17 defined the powers and duties of the newly established autonomous regions. Proc. No. 15 particularly dealt with Eritrea and Proc. 16 dealt with the four other autonomous regions.

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regions reflects the long-standing recognition on the part of the government that there was a serious problem that deserved attention. The new regional structure announced sought to reorganize the entire basis of regional government according to nationalities as determined by the Nationalities Institute,<sup>148</sup> while dividing several of the larger nationalities, including notably the Oromos, Amhars and Somalis, over a number of regions. Its most noticeable legacy may well be in the formal recognition of nationalities and in the groundwork for the division of Ethiopia along ethno-linguistic lines, carried out by the Nationalities Institute.

Again formally speaking an attempt was made to decentralize power and the decision-making process after thirteen brutal years of centralized military administration. A fresh start was made to set up autonomous regions in the areas, which had been a focus of civil strife, ethnic violence and war.

Yet, it soon became clear that the PDRE project with its approach to the regional autonomy of some districts were all a means never taken seriously. Critics are unanimous in pointing out that it was a sham attempt. Opposition to the regime stated 'It remained the *Derg*'s Republic not a people's republic. Real power continued to be exercised by those who seized power on 12 September 1974, that is, the same military officers who have ruled the country under the PMAC continued to rule under the People's Democratic Republic, everything else being window-dressing. Those familiar face who were in power before the establishment of the Republic were indeed serving the new Republic and by the new Constitution they acquired a democratic

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<sup>148</sup> Institute for the study of Nationalities was established on 23 March 1983 by proclamation No. 236 of 1983. Its objectives were twofold: 1. 'to collect information and undertake studies on the different communities and nationalities of Ethiopia.' 2. 'To undertake studies leading to the drafting of a national constitution and the restructuring of the central and regional organ of government based on democratic and socialist principles.' Some 83 nationalities were recorded. The most original and perhaps the most controversial contribution of the Institute to the new republic was the reorganization of administrative regions of Ethiopia constituting 5 autonomous regions and 24 administrative regions. It is also contended that this study has served as a background for the post 1991 state restructuring. See Hailu Wolde Amanuel, *The Institute of Ethiopian Nationalities: Establishments and Accomplishments*, a paper presented at the 15<sup>th</sup> International Conference of Ethiopian Studies, July 25, 2003, Hamburg, Germany.

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legitimacy.<sup>149</sup> If anything, the process only resulted in transfer of power from the military and PMAC to the PDRE but in the end the same people who were responsible for all the turmoil emerged as leaders in a civilian dress. As expected, Mengistu became the President of the Republic and remained an accomplished dictator. The question of the return of the military to the barracks and the formation of democratic institutions remained unresolved.<sup>150</sup> Thus, it was an ‘attempt to wrap the military clique in civilian clothes bearing a new name Peoples Republic but remained the same old dictator.’<sup>151</sup>

With the coming to power of Mengistu Hailemariam as uncontested dictator after all the mass killings and unpopular measures including the persistent use of force to settle political differences with all sorts of oppositions, some have even doubted if any revolution occurred at all. It is a contradiction in terms. Regardless of their sweep to power, the soldiers did not bring about anything revolutionary to the existing power relations. True that the Emperor and the basis of his legitimacy (Solomonic line with divine right to rule) was overthrown but the centralized state with its narrowly defined Ethiopian identity remained unchanged. The ideological vacuum for legitimizing the state shifted to Marxism-Leninism as they perceived a relationship between oppressed nationalities and an oppressor nation, which they traced in the image of the state.<sup>152</sup> It also advocated secularism and declared the equality of religion and to this effect the *Derg* removed some symbols associated with the old regime including the loss of the Orthodox Church as a state religion. As already noted even the land reform failed to maintain its popularity. The nationality issue, the legacy of the old regime and as championed by the students remained unresolved and when the military tried to

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<sup>149</sup> Menghistu, *supra* note 70 at 231.

<sup>150</sup> Technically speaking it resulted in the transfer of power from the PMAC which ruled Ethiopia since the overthrow of Haile Selassie on 12 September 1974, to civilian institutions such as the National Shengo from which all powers and authorities in PDRE was in principle derived. Apparently, it also stated state power in principle derived from people whose sovereignty was exercised through the National *Shengo*. Mengistu, *supra* note 70 at 131.

<sup>151</sup> Bahru 2001, *supra* note 74 at 256; Assafa Endeshaw, *supra* note 106 at 59.

<sup>152</sup> Donald Levine, *Greater Ethiopia*, *supra* note 2, pp. xviii-xx.

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address it towards the end of its regime, it was not only half-hearted but was also too late. To this extent then one clearly sees the continuity, to an even aggravated degree of the political and social ills of the old regime.<sup>153</sup>

The continuity in the state structure with the old regime was clear. The centralization of power by far exceeded the old regime. Clapham speaks of encadrement, ‘incorporation into structures of control’, implying the complete control of the political space by the *Derg* in all aspects of life, for instance, through the peasant associations, youth associations, women associations, the *kebele* and all forms of associations one can imagine giving no space for individual autonomy.<sup>154</sup> The tradition of concentration of power in the emperor transferred wholesale to the new head of state, the President, backed by the only party allowed to operate, the WPE, itself controlling the dozen associations.<sup>155</sup> In this respect Clapham’s remark on the similarity of patterns between the 1955 and 1987 Constitution is worth quoting. ‘In a sense the two documents could scarcely be more different. The first was issued in the name of Haile Selassie I elect of God emperor of Ethiopia, conquering Lion of the Tribe of Judah, the second in the name of ‘we the working people of Ethiopia’, the role which in one is played by God and the emperor was in the other taken over by the alliance of the workers and peasants, the vanguard party. But in a sense the two can be seen as very similar documents. Both of them were intended to consolidate the power of an existing regime by giving it a formal basis, which on the one hand sought to convey an impression of legality and participation to the domestic population and on the other sought external support and recognition by adopting an acceptable external model.’<sup>156</sup> Now one can

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<sup>153</sup> See John Young, *Ethnicity and Power in Ethiopia*, *supra* note 50; also Boony Holcomb and Sisai Ibssa, *The Invention of Ethiopia, the Making of Dependent colonial State of Northeast Africa* (Trenton, New Jersey: Red Sea Press 1990): 350 ff.

<sup>154</sup> Clapham, *Controlling Space in Ethiopia*, *supra* note 59: 15-17.

<sup>155</sup> Assafa Endesahw, *supra* note 106: 68-69.

<sup>156</sup> Clapham, *Constitutions and Governance*, *supra* note 21 at 36.

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comprehend vividly the message of Clapham's statement in the quotation at the beginning of this section.

Under these circumstances, the *Derg's* commitment to regional autonomy was viewed with suspicion. The extent of the administrative and autonomous regions to exercise power decentralized to them was severed by the WPE's centralized decision-making structure and regional autonomy remained a dream that was never fulfilled. It was a grant from the centralized government that could easily be revoked but besides that it was too little too late. While it was originally argued that this move is right on the mark in line with the program of the NDR and deserves wide support, however, as expected, none of the liberation fronts participated in nor welcomed the move. It was never considered a genuine attempt to solve the problem of the nationalities in Ethiopia. Indeed, the *Derg* through its war policy gave further vigor to ethnic nationalism.<sup>157</sup> The nationalities question was pressed right after the revolution by the Oromo, Tigrayan and Eritrean radicals. Certainly, the belated measure did not attract the Eritrean groups for which an early federal accommodation would have been more appealing.<sup>158</sup>

As one writer noted it was modeled after the former USSR's approach to the question of nationalities. The nationalities would enjoy cultural rights and a limited amount of administrative autonomy within their own home areas subject to the overarching control of the communist party. In the Ethiopian situation the WPE played this role and in the end not even the minimal versions of self-autonomy were put into practice. All discontents had to be resolved along class lines under the vanguard WPE and the regime simply paid lip service to regional autonomy.<sup>159</sup>

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<sup>157</sup> Paul, *Ethnicity and the New Constitutional Order*, *supra* note 66 at 186.

<sup>158</sup> Menghistu, *supra* note 70 at 174.

<sup>159</sup> Clapham, *Controlling Space in Ethiopia*, *supra* note 59: 15-17, 25.

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The Constitution in dealing with regional autonomy did not offer any hope in terms of reconciliation for peace with the opposition. A political solution to the crisis was never whole-heartedly pursued. Political will on the part of the actors was manifestly absent. Indeed, the *Derg*'s single-minded reliance on coercion on the northern periphery was an essential ingredient in the sequence of events that followed. By totally alienating peasants in Tigray and Eritrea and by creating the conditions for a series of diasporas that began to interact with local politics the *Derg* set favorable conditions for the rise of the (Tigray People's Liberation Front) TPLF and EPLF.<sup>160</sup>

### Continuity or Reversal?

#### 1.3 THE TRANSITIONAL PERIOD (1991-1994)

Four years after the *Derg*'s Constitution came into force, the regime was almost destroyed by EPLF and TPLF forces and the balance of power completely shifted leading to a new political discourse. In February 1989 the *Derg* suffered a major debacle in Shire, Tigray which forced it to withdraw completely from Tigray and this indirectly forced the TPLF, an organization which had its genesis in a desire to liberate a province, to think of an agenda that encompassed the whole country. It was in this context that the Ethiopian People's Revolutionary Democratic Front (EPRDF-the ruling party at present) was born in 1989.<sup>161</sup> Economic stagnation and global changes

<sup>160</sup> Paul, *Ethnicity and the New Constitutional Order*, *supra* note 66 at 185.

<sup>161</sup> It was time for TPLF to rethink its agenda nationwide after controlling Tigray. It had to design a mechanism to mobilize other nationalities in its attempt to control political power at the center. EPRDF was the outcome and that gave the mandate to discuss issues concerning Ethiopia rather than Tigray alone. EPRDF constituted of, the TPLF, EPDM (Ethiopian People's Democratic Movement- group composed of mainly EPRP factions, was later changed to Amhara National Democratic Movement-ANDM in 1994), OPDO (Oromo People's Democratic Organization was formed from amongst Oromo prisoners of war held by the TPLF in Tigray or who used to belong to the EPDM) and EDORM (the Ethiopian Democratic Officers Revolutionary Movement, composed of the government military officers who had fallen

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also contributed to its immediate downfall. The *Derg*, whose support very much depended on the former USSR, was completely debilitated when the latter went into its own crisis.

With a view to bringing together the *Derg* and the opposition, mainly EPLF and TPLF, the London conference was scheduled in May 1991 that was mediated by Herman Cohen, United States assistant secretary of State for African Affairs. By then the *Derg*'s position was, however, completely weakened. The movements had controlled or encircled *Derg*'s last hold, Asmara and Addis Ababa, and its delegates lost vigor in pursuing the peace process. On May 21, 1991, Mengistu Haile Mariam, President of PDRE, left Addis Ababa by airplane allegedly to visit a military camp in the south west of the country. On its way, the plane was diverted to Nairobi, from where the president went into exile in Zimbabwe.<sup>162</sup>

Talks between the then government with EPRDF, EPLF and OLF were scheduled to start on 27 May 1991. No conference took place. Instead the government delegation left the talks and on the following day the EPRDF forces entered Addis Ababa to re-establish law and order. A joint statement of the three movements confirmed their agreement to hold a follow-up conference and to discuss the details of the transition period in general and the formation of a broad based provisional government.<sup>163</sup>

Consequently, a national conference for this purpose was convened in Addis Ababa from July 1-5, 1991. The Conference resulted in the signing of the Charter by the

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into TPLF hands, which did not last long), and the last to join EPRDF was the coalition member representing the South, Southern Ethiopian People's Democratic Front (SEPDF) in 1994. The establishment of the OPDO some say was a last resort taken by the TPLF, which after years of attempts to forge meaningful cooperation with the (Oromo Liberation Front) OLF failed. Sarah Vaughan, *The Addis Ababa Transitional Conference of July 1991: Its Origins, History and Significance* (Center of African Studies, Edinburgh University, 1994): 2-6; Bahru Zewde, 2001, *supra* note 74 at 257.

<sup>162</sup> Sarah, *supra* note 161 at 1.

<sup>163</sup> *Ibid.*, at 27.

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representatives of some 31 political parties,<sup>164</sup> the creation of an 87 seat Council of Representatives and the establishment of Transitional Government of Ethiopia (TGE).<sup>165</sup> The Conference also agreed on the modalities of the transition process to last two years. In the mean time, elections for local regional government were to be held, a new constitution was to be drafted, general elections for electing members of the constitutional assembly that ratifies the constitution were to be held and finally the election of the new national assembly was scheduled, thereby ending the Transition.<sup>166</sup> The most remarkable feature of the conference was that its members were designated almost entirely, save the representatives of professional organizations and the members from the university, on the basis of nationality, either from existing movements, or in some cases, notably in the South and Southwest, from organizations rapidly formed in order to take advantage of the new political atmosphere. In some cases the

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<sup>164</sup> After the flight of Mengistu most members of the Coalition of Ethiopian Democratic Forces (COEDF, mainly remains of EPRP, MEISON, EDU [Ethiopian Democratic Union] and Tigray Peoples Democratic Movement, was set up in April 1991) condemned the peace process in London. EDU left the COEDF and joined the July Conference. Ethiopian political organizations and groupings participated in the conference that was convened at Africa Hall from July 1-5 of 1991. Apart from EPRDF and the OLF, the main architects, participants from abroad included: the Ethiopian Democratic Coalition led by Nebiyu Samuel, EDU, and the Ethiopian National Democratic Organization (ENDO) led by the late Kifle Wodajo. Certainly, the conference coming soon after the decisive military victory of nationality-based coalition forces, liberation movements heavily dominated the scene. The EPLF opted for an observer status to stress the fact that Eritrea was not part of Ethiopia. As an outcome they adopted a Transitional Period Charter of Ethiopia and discussed a draft principle of co-operation between TGE and the Provisional Government of Eritrea. Commitment to peaceful competition was given the strong emphasis in order to participate in the July 1991 conference. As a result political organizations such as COEDF were excluded from participation because of 'their unwillingness to renounce violence as a means to achieve political ends.' Addis Alem Balema, *Economic Development and Democracy in Ethiopia*, (Rotterdam: Erasmus University, 2003) at 117; others contend that they were excluded because they were multinational, not in tune with the politics of the day. See for instance Merera, *supra* note 64, at 87. Whatever the reason may be, others contend, the conference has excluded the mainstream opposition, principally multi-ethnic in composition although to a large extent reduced to Amhara constituency. See for the latter view Edmond Keller, 'Regime Change and Ethno-Regionalism in Ethiopia: The Case of the Oromo' in Assafa J. ed., *Oromo Nationalism and the Ethiopian Discourse: The Search for Freedom and Democracy* (Lawrenceville, NJ: The Red Sea Press Inc. 1998) at 113.

<sup>165</sup> TPLF, OPDO, EPDM, three main members of EPRDF, each secured 10 seats and two seats were reserved to another member of EPRDF mainly constituting former officers and was later dissolved. In total EPRDF secured 32 seats. The OLF secured 12 seats. Other ethnically based parties by and large were granted seats ranging from 1 to 3. Radical leftist groups that mainly constituted the COEDF were left out, including the former regime, WPE.

<sup>166</sup> See Articles 10, 11 and 12 of the Transitional Period Charter of Ethiopia No. 1 *Negarit Gazeta* 50<sup>th</sup> year No. 1 Addis Ababa, 22 July 1991, hereinafter called the Charter. The conference presented with a draft paper outlining the principles of co-operation between the TGE and provisional government of Eritrea, which among others recognized the importance of the free port of Assab and deferred the declaration of the right of the Eritrean people to be determined by a referendum.



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representation was divided like in the Oromos between the OPDO, OLF and other similar movements organized on the basis of religion.<sup>167</sup>

As noted already, the national conference adopted an interim constitution, otherwise known as the Charter for the TGE. Composed primarily of leaders of nationality-based parties spawned by the civil war, the conference reflected a dramatic shift of political power from the center to new politicians from hitherto marginalized regions. The Charter established the framework for the provisional government and guaranteed nationalities to preserve their identity, administer their own affairs within their own defined territory, the right to participate in the central government based on fair and proper representation, and the right to self-determination.<sup>168</sup> It expressly empowered all legal and political responsibility for the governance of Ethiopia until it hands over power to a government popularly elected on the basis of a new constitution.<sup>169</sup> Furthermore, the Charter empowered the TGE to establish by law local and regional councils defined on the basis of *nationality*.<sup>170</sup> While this has clearly been conferred on the TGE some contest if it had this mandate at all.<sup>171</sup>

The establishment of national regional self-governments was provided for in another proclamation.<sup>172</sup> The Charter and the proclamation explicitly provided that the boundaries of the territorial regions be defined on the basis of nationality in order to

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<sup>167</sup> Clapham, *Controlling Space in Ethiopia*, *supra* note 59 at 26.

<sup>168</sup> See Article 2 of the Charter.

<sup>169</sup> Article 8 of the Charter

<sup>170</sup> Article 13 of the Charter.

<sup>171</sup> Some contended, 'No discussion was held on the proposal for fundamental and complex restructuring of the Ethiopian state on the basis of nationality.' Sarah, *supra* note 161 at 58. Others state that the 'conference went beyond the mandate of transitional government: the division of Ethiopia into 14 *kililis* or *reservations* is perhaps the most undemocratic act imaginable and particularly absurd coming from a transitional government.' Getachew Haile, 'A Dubious Commitment to Constitutionalism,' in *Constitutionalism: Reflections and Recommendations, Symposium on the Making of the New Ethiopian Constitution* (Addis Ababa: Inter Africa Group, 1993) at 26.

<sup>172</sup> Proclamation No. 7/1992, a proclamation to provide for the establishment of National/ Regional Self-Governments *Negarit Gazeta* 51<sup>st</sup> year No. 2 Addis Ababa, 14<sup>th</sup> January 1992.

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guarantee the nationalities the right to self-administration.<sup>173</sup> The proclamation distinguished between regional self-governments based on an agreement of two or more adjacent nationalities, and national self-governments, established by any nation, nationality or people.<sup>174</sup> Accordingly, the proclamation enumerated sixty-four identified nations, nationalities and peoples and set up fourteen regions.<sup>175</sup> The law provided for forty-eight of the identified nationalities to be able to start their own national/regional self-government at the *wereda* level or above. Moreover, it was provided that self-government of adjacent nations, nationalities and peoples may by agreement establish a larger regional self-government within any of the 14 regions specified.<sup>176</sup>

The remaining other nationalities and peoples with small populations were defined as minorities. Meaning a ‘nationality or people which can not establish its own *wereda* self-government because of the small number of its population.’<sup>177</sup> These nationalities and peoples with small populations and known as minority nationalities nevertheless were provided with appropriate representation in the district council.

The striking point is that nowhere do the charter and the proclamation employ the term federation in either their preamble or specific legal provisions, although both documents ensure each nationality with the right to self-determination including secession. The proclamation specifically enumerated both the powers of the central government and those of the self-governments.<sup>178</sup>

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<sup>173</sup> This suggested that nationality has replaced class as the official basis of politics in Ethiopia. Paul, *Ethnicity and the New Constitutional Order*, *supra* note 66 at 188.

<sup>174</sup> See Article 2 of Proc. 7/92 making such definitions.

<sup>175</sup> Article 3 of Proc. 7/92.

<sup>176</sup> Article 3 (2) b. of Proc. 7/92. Not long after the establishment of 14 regions by Proc. 7/1992 five regions decided to amalgamate and create a larger region named Southern Ethiopian Nations, Nationalities and Peoples Regional State (SNNPRS) Article 3(2b).

<sup>177</sup> Article 2(6).

<sup>178</sup> See Article 9, for instance, which stipulates that national/regional self governments shall have legislative, executive and judicial powers in respect of all matters within their geographical areas *except* such matters as defense, foreign affairs, economic policy, conferring of citizenship, declaration of state of emergency, deployment of army, printing of currency and major communication networks. See also Article 10.

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If one looks at the legal framework from the angle of a federal system, there is no doubt that the balance swayed in favor of the center. A somewhat ambiguous and less precise language was introduced in the proclamation implying that except for specifically enumerated powers of the central government, all other powers including residual powers belonged to the regional self-governments.<sup>179</sup> But the enumeration of the powers of the central government was not exhaustive and contained broad terms.

In the language of the Charter, the Transitional Government shall exercise all legal and political power for the governance of Ethiopia.<sup>180</sup> In no unequivocal manner, the proclamation also stated that national regional transitional self-governments are in every respect, entities subordinate to the central Transitional Government.<sup>181</sup> Moreover, the national /regional council (local parliament) that was the repository of overall political power regarding the internal affairs of the regions, was made accountable to the people which elected it and to the Council of Representatives of the TGE.<sup>182</sup> Besides, the ultimate power arbiter too was the Council of Representatives.<sup>183</sup> More importantly, in the exercise of the powers of the states, the relevant general policy and laws of the central government were to be respected. This was specifically mentioned in six of the ten provisions and was either indirectly referred to or assumed in the remaining ones.

Yet, despite the powers granted to the center the political dynamics as it was practiced and as designed by regional forces indicate that what was envisaged was no less short of a federation. The national/regional governments had law-making, executive and

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<sup>179</sup> Article 9 of Proc. 7/92

<sup>180</sup> Article 8 of the Charter.

<sup>181</sup> Article 3(3) of Proc. 7/92.

<sup>182</sup> National/regional self-government as well as National/Regional Councils are accountable to the central government. See Articles 12, 14, 9(3) of Proc. 7/92.

<sup>183</sup> See Articles 3(5); Sarah, *supra* note 161 at 48.

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judicial powers and have used them extensively until they were replaced by new elections with the adoption of the 1995 Constitution.<sup>184</sup>

The political implications that followed the introduction of the Charter and the proclamation issued to establish national/regional self-governments certainly represent departure from the past. As one writer noted two political developments were clearly observable: these are the choice of ethnicity as a basic principle of political organization of the state, and society and the reconstruction of the Ethiopian centrist and unitary state by introducing a federal system of government.<sup>185</sup> These two interlinked processes were again anchored on the basic formula of the right to self-determination for ethno-national groups. The political rationale for such a radical change in the fundamental thinking of state organization among other things has been the view that this formula was a decisive remedy for the resolution of Ethiopia's long-standing problem of the nationality question.<sup>186</sup>

In an attempt to address the nationality question, as already noted, the Charter proclaimed the right of all nationalities to self-determination, the preservation of national identities of each group and the right of each nationality to govern its own affairs. The political action set in motion for sure was clear in bringing to an end the notion of unitary state and was committed to devolve political power. This is in sharp contrast to the two earlier regimes.<sup>187</sup> Leenco Lata concurs with this view. 'It [the process of

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<sup>184</sup> Certainly this is a judgment in retrospect. It is not yet clear why it was not explicit in stating that the course of political action was federal. Fasil stated, 'It was not clear whether it is because it is transitional, the one to be laid down being left to the constitutional process or if it was leaving all options open.' *Supra* note 38 at 44. In any case it was an evolving federal process.

<sup>185</sup> Akililu Abraham, *Federalism, State Restructuring and Rights of Ethnic Minority Groups in Ethiopia* at <http://www.aaps.org.za/publications/AJJP/Akililu.html> as visited on 11/11/03.

<sup>186</sup> For more on the nationality question see *infra* Section 1.4.

<sup>187</sup> See Section 1.2 *supra*.

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transition] was more than a regime change. Recasting it [the Ethiopian state] on a totally new basis became the only alternative for its survival as an entity'.<sup>188</sup>

It was certainly an official acknowledgment of Ethiopia as a multi-ethnic and multi-religious state. The emphasis on nationality and the listing of the hitherto forgotten nationalities in a legal document could only be considered as a reflection of that commitment. By so doing Leenco stated the charter elevated to an equal partnership, the bulk of nationalities of the South and the Oromos.<sup>189</sup>

However, the promising beginning did not end as intended. Following the reorganization of the state structure and the national/regional governments, a regional election was scheduled for June 1992. The regional election to regional council was a cause of serious disagreement. While OLF and AAPO asked for postponement, as they were unprepared to compete in the regions, EPRDF<sup>190</sup> insisted to continue as scheduled. Following this and other disagreements OLF, one of the major actors during the making of the Charter, withdrew from the government and attempted to re-launch guerilla insurgency. Other oppositions also withdrew following its suit. Under these political dynamics one writer's observation that the 'conference of July 1991 may not have resulted in a one party government, its convention reflects to a large degree a one party dynamic'<sup>191</sup> seemed to reflect the political reality after the 1992 regional election. Critics state that EPRDF resulted in a process of replication of one existing organization, the TPLF, than a union of existing actors from the spectrum of Ethiopian

<sup>188</sup> Leenco Lata, 'The Making and Unmaking of Ethiopia's Transitional Charter,' in Asafa Jalata ed., *Oromo Nationalism and the Ethiopian Discourse: The Search for Freedom and Democracy* (Lawrenceville, NJ: The Red Sea Press Inc. 1998) at: 51.

<sup>189</sup> *Ibid.*: 57-58.

<sup>190</sup> While contacts between the OLF and TPLF were on and off during the *Derg*, at later stages, TPLF denounced the OLF as incapable of leading the Oromo struggle and withdrew the smaller number of TPLF cadres who had remained assisting the OLF. According to the TPLF, OLF was a foreign-based leadership, totally alienated from the day-to-day realities at home. The relationship went sour when the TPLF started to recruit Oromos from the Sudan and the Middle East. The bitter division between the two was finalized by the establishment in 1990 of OPDO. See Sarah *supra* note 161 at 18.

<sup>191</sup> *Ibid.*: 56-57.

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opposition forces. No doubt the TPLF was dominant and remains to be so at least until 2002 because of its considerable seniority, as it had been established in February 1975. The establishment and development of each of the other organizations had been at least facilitated by the TPLF.

However, at least until the opposition withdrew, unlike present tendencies one can state firmly in retrospect that the TGE was the most legitimate and democratic government that the country had had in its entire history. Although it was not elected, it was able to represent the major contenders of power and the then existing contending views. Certainly, it manifested a clear case of power sharing among major contenders.<sup>192</sup> EPRDF leaders and those who took part in the conference all acknowledged that they and their organizations held detailed discussions on the draft text of the charter during the period preceding the conference. Certainly, representatives from the University were not as active as the leaders of the liberation fronts yet they have aired their views in the conference as representatives.

One of the major tasks of the transitional Council of Representatives was to direct the process of constitution making and pave the way for a new national election based on the ratified constitution. A constituent assembly was elected in 1993, the TGE established a constitutional commission to prepare a draft instrument for submission to a specifically elected constitutional assembly vested with plenary power to promulgate an organic law. Again opposition parties withdrew. Instead of debating the content of the constitution, they denounced the legitimacy of the whole project. As a result, the

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<sup>192</sup> 'The Ethiopian government was more narrowly based and had less legitimacy in 1994 than in 1991. The major opposition movements had moved outside the legal political process' Marina Ottaway, 'The Ethiopian Transition: Democratization or a New Authoritarianism?' *North East African Studies* 2: 3 (1995) at 73; others state that 'In view of the new Constitutions content, it seems regrettable that the process for making it were flawed. It is an unusual document in terms of historic, empirical and theoretical premises and its articulation of the right of self-determination, its bill of rights, and in the construction of the federal system. It has been characterized as a *tour de force* to resolve potential conflict, as a treaty between the nations and the peoples of Ethiopia, who were portrayed as its authors. Except Articles 8, 39 and land policy, it is hardly possible that the opposition will come up with a better document.' Paul, *Ethnicity and the New Constitutional Order*, *supra* note 66 at 188.

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whole process was under the influence of EPRDF and only few individual candidates representing the opposition participated. The draft constitution was ratified by the Constitutional Assembly on December 8, 1994, which came into effect on August 21, 1995. Ethiopia officially adopted a federal form of government as of this date. National elections were held in May 1995 for regional and federal parliament and the FDRE new parliament was inaugurated on 21 August bringing the TGE and the Charter to an end.

Again under these circumstances one can hardly disagree with Marina Ottaway's apt observation of the last few years of the transition. 'It is a formal process devoid of content. The spirit of the democratic transition was missing completely as democratization became purely formal exercise, the major contenders of power from the opposition missing throughout'.<sup>193</sup> Hence the argument that the post 1991 political development did not reverse the historical pattern of domination.<sup>194</sup> However, it is also good to reflect on the nature of the Ethiopian opposition so far. It would be useless to put all the blame on the ruling party. Firstly, the opposition so far has formed a united front only in one respect: in its consistent but at times uncritical opposition to the ruling party. Until the May 2005 election none has come up with a comprehensive policy alternative that convinces the public and hence secures it to their side, the necessary vote to win seats in parliament. Such a serious attempt was made in 2003<sup>195</sup> but it evolved along a confusing pattern. In the summer of 2003 some fifteen opposition parties agreed to form the United Ethiopian Democratic Forces (UEDF) in the United

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<sup>193</sup> Ottaway, *supra* note 192 at 73, 81-83.

<sup>194</sup> That is for instance the gist of Merera's viewpoint in his thesis. *Supra* note 64 at 119.

<sup>195</sup> We are not yet sure but there appears to be internal differences among the members of CUD, for instance, between the moderate center right EDUP and the right wing *Keste Demena* (Rainbow Ethiopia) and AEUP on critical issues such as ethnic accommodation and federalism. As a result whether CUD will evolve as an extremist right wing party dismissive of the issue of diversity or whether it will reflect something less than that is something that time will tell. See <http://www.kestedemena.org/> as visited on 12-05-2005; for more on the critics see UEDF in eternal turmoil at [http://www.aiga1992.org/UEDF\\_%20IN\\_TURMOIL.htm](http://www.aiga1992.org/UEDF_%20IN_TURMOIL.htm) as visited on 26/06/04; Assefa Fiseha Federalism, Emerging Democracy, Election, Coalition Formation: some Thoughts at <http://www.aigaforum.com/Assefa-Fiseha-0505.htm> as visited on 12-05-2005.

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States. While this is the first real attempt to forge such a huge coalition of the opposition it seems that the UEDF has thereafter not progressed as much as expected. First and foremost, the process resulted in splits. Predictably, (as of September 2004), two members of the UEDF, AEUP and EDUP (both claim to be multinational but are predominantly influenced by the Amhara political elite except some nominal presence), withdrew from the coalition announcing the formation of another party Coalition for Unity and Democracy (CUD) towards the end of the year. UEDF then remained as an amalgam of an apparently multinational (EPRP and MEISON) as well as ethnic based parties. Following the May 2005 election and the issue of joining or not joining parliament UEDF again split into the ethnic based domestic forces that preferred to join parliament versus those Diaspora based ones who insisted in boycotting it. The CUD in its turn as well although initially appeared as vibrant opposition later went into crisis following the election and its outcome. Among other things, the issue of joining or not joining parliament, internal power struggle among the member parties of the CUD, lack of clarity on crucial issues such as accommodation of diversity and federalism contributed to the post election crisis within the CUD in particular and to the political tension in the country in general. Secondly, having gone through two most despotic regimes, it is simply naive to expect that Ethiopia will overnight turn into democracy. The politics of exclusion and the culture of authoritarianism that took deep roots from 1930-1991 are not going to vanish into thin air suddenly. It will linger for sometime on both sides of the political spectrum the ruling party as well as the opposition.

As the following section will demonstrate, however, one general pattern discernable throughout the emergence of the modern state and which still seems to prevail is the problem of fixation in the Ethiopian discourse with the politics of ‘zero sum game.’ It is for this reason that I earlier noted the TGE was more legitimate and inclusive than



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any other regime in the country's history. In a divided society like Ethiopia we cannot afford to have 'winners and losers.' The hard lesson one gets, for instance, from present-day Switzerland as well as from the rest of the world with divided societies,<sup>196</sup> is simply that unless the major contenders of power are in some manner absorbed into the political process and made to consume it, there is no end to the polarization. Apart from the linguistic, self-rule and cultural pluralism set since 1991, genuine power sharing remains the only alternative available to end the political deadlock.

### **Part Two**

#### **1.4 THE CHALLENGES OF BUILDING A MULTICULTURAL STATE**

##### **Putting the Conflict in Perspective**

Multi-ethnic societies can survive only if all respective groups within the polity feel themselves as winners.<sup>197</sup>

One of the most contested issues in the public discourse of Ethiopian politics remains the difficulty one gets in interpreting state failure in the twentieth century. While there is a general consensus about the fact that both the Imperial (1930-1974) and the military regimes (1974-1991) failed to address among other things central political and economic issues, there is less consensus on the causes of state failure and in interpreting the conflict. While some illustrate the cause of the conflict as resulting

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<sup>196</sup> See chapter three for more.

<sup>197</sup> Lidija Basta Fleiner, 'Minority and Legitimacy of a Federal State: An Outsider Perception of the Swiss Model,' in Lidija Basta Fleiner, Thomas Fleiner, eds., *Federalism and Multi-ethnic States: The Case of Switzerland* v. 16, 2<sup>nd</sup> edn. (Bale: Helbing & Lichtenhahn, PIFF, 2000) at 102.

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from ‘*Biherawi chikona*’ or ‘national oppression’<sup>198</sup> others contend that the conflict is merely political, not ethnic, as the bone of contention is state power. The author contends that there is no merit in reducing each factor in diagnosing the conflict, for each explains to a certain degree the character of the Ethiopian state in the 20<sup>th</sup> century and hence urges for a broader comprehension of the issues. In a nutshell, however, it could be stated that the state failure could be analyzed in terms of failing to build a multicultural state (touches all spheres of the state, political power, resources, identity and language issues) from all the diversities that the modern state has brought together during the second half of the 19<sup>th</sup> century and the relevance of federalism as an idea for forging unity out of diversity springs from this.

#### 1.4.1 The Instrumentalists

A majority of the authors seem to point that the over centralization of power and economic resources by the ‘dominant’ group, principally from Showa which despite genealogical mixtures defined itself and the state along this narrow perspective, and the subsequent marginalisation of others should be considered as the underlying factor in exacerbating the prolonged war in Ethiopia. The title of Markakis’s book about the politics in the Horn just speaks for itself.<sup>199</sup> A closer observation of these writers seems to suggest that the outbreak of ethnicity in public discourse is the result of this marginalization and hence can not be considered as a factor on its own to analyze the conflict: to be specific, ethnicity is the consequence, not the cause.

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<sup>198</sup> Strangely enough the ruling party, EPRDF and its most known critic Mesfin Woldemariam seem to agree on one point: in defining the post 1960s crisis as ‘ethnic’ by the latter and ‘national’ by the former. For the distinctions between ethnicity and nationalism see Section 1.5 below. For EPRDF’s version of the conflict see Section 1.4.2; Mesfin Woldemariam, *supra* note 52, at 149. But as will be explained in this section, the conflict is never exclusively ethnic.

<sup>199</sup> John Markakis, *Resource Conflict in the Horn of Africa* (London: SAGE Publications, 1998): 103-104; hereinafter referred to as *Resource Conflict in the Horn*; see also Christopher Clapham ‘Ethnicity and the National Question in Ethiopia’ in Peter Woodward and Murray Forsyth eds., *Conflict and Peace in the Horn of Africa: Federalism and its Alternatives* (Aldershot: Dartmouth, 1994): 30-31; hereinafter referred to as *Ethnicity and the National Question*.

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Markakis argues, ‘As the assertion of ethnic identity and aspirations do not always attain political expression, we need to inquire into the circumstances that encourage the politicization of ethnicity and lead to ethnic conflict.’<sup>200</sup> The gist of his thesis is that the conflict is political because the bone of contention is state power.<sup>201</sup>

Monopolization of political power meant that members of excluded ethnic groups lacked access to state power. This has serious implications. Where the state controls both the production and distribution of material and social resources, exclusion from state power is tantamount to material and social deprivation. Because it controls the production and distribution of material and social resources, the state has become the focus of conflict. Access to state power is essential for the welfare of its subjects, but such access has never been equally available at all. Since those who control the state have used its power to defend their own privileged position, the state has become both the object of the conflict and the principal means by which it is waged. Dissident groups seek to restructure the state in order to gain access to its power or, failing that, to gain autonomy or independence. The ultimate goal of most parties to the conflict, of course, is to enlarge their share of the resources commanded by the state. This is the real bone of contention and the root cause of the conflict in the Horn.<sup>202</sup>

Markakis casts doubt on the characterization of the conflict as ethnic. He writes ‘ethnicity certainly is a factor in the conflict, since in nearly all cases the opposing parties belong to groups with different ethnic identities. Whether such differences in themselves are sufficient cause for conflict is debatable and to define the conflict *a priori* as ethnic is questionable’.<sup>203</sup> Clapham’s position appears to be even stronger in

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<sup>200</sup> John Markakis, *Resource Conflict in the Horn of Africa*, *supra* note 199 at 104.

<sup>201</sup> *Ibid.*

<sup>202</sup> John Markakis, ‘Ethnic Conflict and the State in the Horn of Africa,’ in John Markakis and Katsuyoshi Fukui eds., *Ethnicity and Conflict in the Horn of Africa* (Athens: Ohio University press, 1994): 217-218; hereinafter referred to as *Ethnic Conflict and the State*.

<sup>203</sup> *Ibid.*

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this regard. He wrote that it is essential to point out that many of the current and recent conflicts have not in any meaningful sense been ethnic or have only included ethnicity as one element among others.<sup>204</sup>

Jon Abbink equally argues ‘in line with recent anthropological and political science insights into the discourse of ethnicity that has emerged is usually an ideological ploy for other interests advanced by elite groups and that ethnicity in itself does not have ontological status as an independent social fact.... ethnic identity is often being used to *construct* social differences that were not there before’.<sup>205</sup> By stating this Abbink joins the instrumentalists and the Modernists.

Clapham, Abbink and Markakis then agree that many of the recent conflicts cannot be categorized as ethnic at all and if the conflict manifested itself as ethnic, ethnicity is simply an instrument for gaining access to political power and resources. It is important to emphasize once again that according to these authorities the crisis is explained primarily in terms of political power: the centralization of power by what may be defined as a dominant elite and subsequently the state is defined as ‘*ethnocratic*’ one, that is, the monopolization of power by a few or one ethnic group and consequent exclusion of others.

Among such contributory factors are: the forced incorporation of the several ethno-linguistic groups and the coming to an end of the autonomous kings; the cultural, linguistic and religious implications of the narrowly defined Ethiopian identity, factors mainly related to the process of state formation in the 19<sup>th</sup> century; the relatively

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<sup>204</sup> Clapham, *Ethnicity and the National Question*, *supra* note 199: 30-31.

<sup>205</sup> Jon Abbink, ‘New Configurations of Ethiopian Ethnicity: The Challenge of the South,’ *Northeast African Studies* 5:1 (1998) at 60; also see Jon Abbink, ‘Ethnicity and Constitutionalism in Contemporary Ethiopia’ *Journal of African Law* 41:2 (1997) at 160, the latter referred to as *Ethnicity and Constitutionalism*.

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uneven economic development of the several provinces and the failure of the 1974 Revolution.

The process of centralization, some would prefer to call it “nation building”<sup>206</sup> was not without consequences. Firstly, the incorporation of the South, the Southwest and the Eastern sides from their previously autonomous position to complete absorption meant that the notion of the state, its values, institutions and culture were imposed on the incorporated kingdoms. Secondly, it brought about all sorts of diversities in terms of religion, language, tradition and culture. However, as the state failed to accommodate this diversity, the religious, lingual, cultural as well as political and economic dominance gave birth to the “question of nationalities.”<sup>207</sup> Thirdly, the state became extremely centralized at the expense of regional rulers. The political marginalization of the bulk of the community led to civil wars whose cause fundamentally differed from earlier ones. This time resistance not only called for state reform but even at times challenged the state itself.<sup>208</sup> Several

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<sup>206</sup> Bahru Zewde, *supra* note 18: 60-71; certainly there is no consensus as to whether Menlik’s march to the south was ‘reunification,’ ‘expansion’ (an expression used by Teshale p. 41, 31, 37 and Gebru) or otherwise. Authors like Teklestadi Mekuria (*Atse Yohannes ena Ye Ethiopia Andinet* 1982 E.C.: 296) consider his march to the south as an attempt to bring back territories that rightfully belonged to Historic Ethiopia but were cut off after the Oromo expansion. There is indeed evidences showing that some of these kingdoms cut off were paying tributes to the post Zagwe Christian kingdom or even to the Axumite kingdom, although doubtful that all were paying. Mohammed Hassen also does not seem to deny the fact that the semi-autonomous Oromo kingdoms before their ‘incorporation’ had trade and loose political relations with Christian Ethiopia. For an interesting view comparing at least two of the contending views (colonial or reunification) mentioned, see Ivo Strecker, ‘Glories and Agonies of the Ethiopian Past’ Review article at <http://ntama.uni-mainz.de/~aau/glories.html> as visited on 2/11/01.

<sup>207</sup> The meaning of this notion is far from clear. Young university students in the 1960s and 1970s, influenced by Marxism-Leninism and frustrated by the age old Monarchy argued in favor liberating “oppressed nationalities” from an oppressor group but as later events indicate it meant different things to different groups. For some it meant respect for diversity but to be implemented under class perspective. For the now ruling party, Ethiopia is nothing but the outcome of the free will of the nationalities rather than abstract individuals and the nationalities have not only right to self rule but also right to self-determination, secession included. For details, see John Young, *Peasant Revolution in Ethiopia: The Tigray People’s Liberation Front, 1975-1991* (Cambridge: Cambridge University Press, 1997).

<sup>208</sup> Christopher Clapham, “Constitutions and Governance in Ethiopian Political History,” in *Constitutionalism: Reflections and Recommendations, Symposium on the Making of the New Ethiopian Constitution* (Addis Ababa: Inter Africa Group, 1993): 30-31.

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studies hinted that conflict in traditional Ethiopia was mainly an instrument for asserting some level of regional autonomy and not for upsetting the whole system, nor was it for separation.<sup>209</sup> “God can not be blamed, the King can not be accused” was the main tenet. The opposition, whatever form it took, mainly looked for adjustment and restoration of violated rights like better administration, lower taxes, respect for local autonomy and reduction of corruption. By and large the legitimacy of the Monarch and its ideological roots were not attacked. In the 1960s, however, things started to change. The new forms of resistance that took shape in the form of “national liberation fronts” changed significantly in terms of leadership, social composition, motivation and ideological orientations.<sup>210</sup>

### **Explaining the Crisis<sup>211</sup>**

With the emergence of centralized administration, Ethiopia faced serious state crisis.

Attempts at explaining the cause of the state crisis have not only been less satisfactory but are also found to be diverse ranging from those who even today consider it was all a normal process of “nation building” and hence consider the liberation struggle as a form of tribalism to the instrumentalists<sup>212</sup> that focus on the concentration of political and economic resources at the center as a core source of tension and that emphasize the proliferation of ethnicity as an erroneous comprehension of political and economic deprivation and the ruling party-

<sup>209</sup> See Gebru, *supra* note 56 at 199, 203; Mesfin Wolde-Mariam, *The Horn of Africa: Conflict and Poverty*, (Addis Ababa: Commercial Printing Press, 1999): 140-141.

<sup>210</sup> Clapham, *Constitutions and Governance*, *supra* note 59 at 29.

<sup>211</sup> Much of the information and analysis for the introduction and this section draws from Assefa Fiseha, *supra* note 13 chapter one.

<sup>212</sup> Such thinkers are called instrumentalists because they view religious and ethnic groups as a means to achieve some political and economic goal and having no relevance thereafter. Included in this category are John Markakis, *Resource Conflict in the Horn of Africa* (London Sage Publications, 1998); Christopher Clapham, “Ethnicity and the National Question in Ethiopia,” in Peter Woodward and Murray Forsyth eds. *Conflict and Peace in the Horn of Africa: Federalism and its Alternatives* (Aldershot: Dartmouth, 1994) at 30-35; Jon Abbink, “New Configurations of Ethiopian Ethnicity: The Challenge of the South,” *Northeast African Studies* 50:1 (1998) at 60

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Ethiopian Peoples Revolutionary Democratic Front (EPRDF), a product of the 1960s Ethiopian Student Movement that focused on the “operation of nationalities,” that is, a ruling elite dominantly from one nationality controlling power, resources and narrowly defining the values and institutions of the state as a main cause. A few political elites even went further to state that it must be seen as a form of “internal colonialism.”<sup>213</sup> Needless to say all approaches seem to have their own serious limitations.

Certainly the advocates of the “nation building” process and the instrumentalists fail to grasp one of the central issues of the debate in diverse societies like Ethiopia. The Ethiopian state that emerged as a result of the centralizing trend was qualitatively different from historic Ethiopia not only in terms of its territorial size but also in terms of ethno-linguistic composition and religious diversity. The majority of the ethno-linguistic groups incorporated were told in no ambiguous terms to assimilate into this state. Rather than attempting to forge a state from the newly introduced diversity, the regimes imposed a narrowly defined state, whose cultural, social, political and religious foundation and its institutions failed to reflect the existing diversity on the ground. It is not surprising then that the legitimacy of the government, its institutions and the values upon which it is established remain one of the sources of tension and at times the cause of its terminal crisis. In other words, the challenging issue is how to constitute a legitimate government from all the ethno-linguistic groups that do not squarely fit the usual notion of national majorities versus national minorities.<sup>214</sup> The traditional “nation-state” project certainly assumes the existence of a dominant national group and in country’s like Ethiopia where there is no such clear dominant majority, it becomes a mask for the “majority’s” culture, language, religion to

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<sup>213</sup> See for example Assefa Jaleta, “Oromo Nationalism and Ethiopian Ethnocratic Politics”, *Horn of Africa* 20 (2002) p. 43

<sup>214</sup> For comparative details see Will Kymlicka, *Multicultural Citizenship* (Oxford: Clarendon Press, 1995).

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become the national culture, language or religion.<sup>215</sup> None other than Paul and Clapham have understood the importance and role of tradition in societies like Ethiopia.

To study tradition is not simply to study what happened long ago: it is to study an interlocking system of ideas and attitudes which have been held by a people over a long period, and which continues to affect their ideas and behavior in a large number of ways. Tradition is always with us; it may be changed, partly destroyed, or adapted by education or by social and economic development, but it can never be abolished...it is a force that binds a people together and gives them a national coherence and identity...<sup>216</sup>

Perhaps the absence of a numerical majority that dominates the political process at the center has a lot to explain for the persisting regime instability, the interethnic tension and rivalry among the groups for exclusive control of power. One need to note how other multicultural societies<sup>217</sup> like India and Switzerland faced this reality.<sup>218</sup>

Thus depending on the strength of the claims, identity and history of

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<sup>215</sup> *Ibid.* at 6, 110-111; As many have indicated the passions and emotions attached to identity if fueled by some political and economic deprivations are more than enough to cause conflicts.

<sup>216</sup> Paul and Clapham, *supra* note 56 at 282.

<sup>217</sup> The terms “multi-ethnic” or “multicultural” are used here to signify the fact that many states today contain a plurality of distinct ethno-linguistic and religious groups. Multiculturalism acknowledges, recognizes and at times promotes diversity against cultural unification and homogenization. See Topperwein, Nicole, *Nation-State and Normative Diversity*, 35 (Helbing & Lichtenhahn: PIFF, 2001).

<sup>218</sup> The situation in Ethiopia stands in sharp contrast with the experience of India and Switzerland, similarly multicultural states. See Wolf Linder, *Swiss Democracy: Possible Solutions to Conflict in Multicultural Societies* (New York: St. Martin’s Press, 1994); Harihar, Bhattacharyya *India as a Multicultural Federation: Asian Values, Democracy and Decentralization in Comparison with Swiss Federalism* (Bale: Helbing and Lichtenhahn, PIFF, 2001).



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minorities, however, decentralized or federal system of government appears to be the genuine solution if the state is to survive by accommodating diverse groups while maintaining unity and avoiding fragmentation.

There is additional crucial point that the “nation builders” and the instrumentalists fail to realize. Post Cold War developments as well as empirical evidence from multicultural societies hints that *identity does not necessarily vanish from the face of the political discourse even if political and economic situations are favorably accommodative, let alone when it is a state target of destruction*<sup>219</sup> *under the guise of “nation- building.”* Thus, while the nation builders have a point as they emphasize on the shared values and the difficulties of integration and the instrumentalists by focusing on the economic and political factors, two of the core causes of political instability, they often fail to consider the identity factor as a cause of tension in multicultural societies.

### **“Nation-building” in Plural Societies and the Issue of Identity and Values of the State**

Part of the reason why the “nation building” project in multiethnic/multicultural/multinational societies becomes problematic is that the process is based on a wrong transplantation of Western ideas that assume the existence of a dominant national group that commands clear democratic majority. In many parts of Africa including the Sudan and Ethiopia, the nation building project aimed at politically and culturally integrating the various groups into a narrowly defined state values: in the case of the former Arabic language and Islam and in the latter Amharic language and Christian religion. This raises conflicting perspectives on the identity of the state. In the Sudan for example, the dominant

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<sup>219</sup> This reminds us of the prominent article by Walker Connor, “Nation Building or Nation Destroying?” *World Politics* 24:3 (1972) pp. 319-355 where he argued that modernization, industrialization etc do not necessarily minimize ethnic loyalty and nation building may be nation destroying in diverse societies.

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elite mostly from the North desires the country to be Arab and Muslim while the Southern elite needs it to be African and De- Arabized or at least heterogeneous. Interestingly both dominant elite groups (from both countries) that defined such state values by equating themselves with the state and by marginalizing others do not constitute a majority. Thus it is not only based on a wrong transplantation of Western ideas but it is also *undemocratic nation building* project that was bound to fall, only waiting for the opportune moment to happen. The attempt to homogenize also contradicts the multicultural nature of these countries and negates the idea of mutual recognition.<sup>220</sup> This has implications in the establishment of public institutions, in the design of national symbols such as the flag, national anthem, currency and values of the state. As one of the prominent experts on federalism aptly wrote, in a diverse society, the most essential element for stability and order is the acceptance of the value of diversity and of the possibility of multiple loyalties expressed through the establishment of constituent units of government with genuine autonomy for self rule over those matters most important to their distinct diversity.<sup>221</sup> Thus for the nation building to be effective, the first measure that the countries (particularly the Sudan) need to do is to abandon the concept of basing such a process on one culture and religion and embrace multiculturalism as this will open a space for mutual recognition and multiple identity which is an important infrastructure for federalism.

### **The National Oppression Thesis and the Question of Nationalities**

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<sup>220</sup> The Interim Constitution of Sudan Article one declares Sudan as a multicultural state. It remains to be seen if such declaration is to be implemented in practice. Ethiopia has since the transition in 1991 officially embraced multiculturalism giving recognition to its “nations, nationalities and People” right to self-rule, shared rule at federal level and right to secede.

<sup>221</sup> See Ronald Watts, *supra* note 2 P.XIV.

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Distinct from the instrumentalist, colonial and Greater Ethiopia version of the story came the view that holds that Ethiopia should be viewed as a multicultural state and the nationalities need to be treated equally and have to be ‘liberated from’ the degrading situation they were put in, be it in the south or the north. But despite this general foundation and common understanding, the authors of this view could not agree on further details. As a result, it gave rise to various divisions and sub-divisions. The ‘national oppression’ thesis came into the Ethiopian political discourse with the ascendancy of the Ethiopian Student Movement (ESM) in the 1960s.

The events of the 1960s and 1970s were particularly crucial and still have repercussions on the present state structure and the ideology behind it. For instance, the major political parties including those in power as well as in exile claim their origin to this particular moment in history. Frustrated by stagnation of the economy and the imperial regime’s inability to bring any change, young, radical and leftist university students organized themselves both at home and abroad to overthrow the regime and the ESM was a tool.<sup>222</sup> The ESM was mainly a multinational force whose members were drawn from all the varied groups of Ethiopia. Their slogans ‘land to the tiller,’ ‘national equality,’ and ‘social justice’ were very popular in their challenge to the imperial regime. MEISON since 1968 and EPRP since 1972, which dominated the country’s politics in the early days of the Ethiopian Revolution, were direct offspring of the ESM. With the exception of EDU, almost all of the Ethiopian opposition forces derived their origins and inspiration from the student movement, and the central premises of that movement

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<sup>222</sup> Bahru Zewde 2001, *supra* note 74: 220-222. For a detailed account of the ESM see Randi Ronning Balsvik, *Haile Selassie’s Students: The Intellectual and Social Background to Revolution, 1952-1974* (Addis Ababa: Addis Ababa University Press, 2005); also Fentahun Tiruneh, *The Ethiopian Students: Their Struggle to Articulate the Ethiopian Revolution* (Chicago: Nyala Type, 1990).

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was that Ethiopia constituted a ‘prison of nationalities.’<sup>223</sup> Ethiopia was portrayed for the first time as a multicultural country and the movement clearly acknowledged that the nationalities should be treated equally.<sup>224</sup>

The gist of the view is that ESM believed there was ‘one oppressor nation’ whose political system, culture and language dominated the others and on the other, many ‘oppressed nationalities’ who were politically and economically marginalized, culturally and linguistically dominated. The (Showan) Amhara was identified as ‘oppressor nation’ and the rest the ‘oppressed nationalities.’<sup>225</sup> Walleign Mekonnen’s prominent article, a student leader killed in 1973 was a breakthrough in this regard. He wrote,

Is it not simply Amhara and to a certain extent Amhara-Tigre supremacy? Ask anybody what Ethiopian culture is? Ask anybody what the Ethiopian language is? Ask anybody what Ethiopian religion is? Ask anybody what the Ethiopian dress is? It is either Amhara or Amhara Tigray. To be a genuine Ethiopian one has to speak Amharic, to listen to Amharic music, to accept Orthodox Christianity.<sup>226</sup>

This was a fundamental challenge to the nation-building project and to the then discourse of multicultural Ethiopia. A challenge to the ‘one Ethiopia, one nation’ thesis. This paved the way to the nation, nationality right to self-determination.<sup>227</sup>

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<sup>223</sup> John Young, *Peasant Revolution in Ethiopia: The Tigray People’s Liberation Front 1975-1991* (Cambridge: Cambridge University Press, 1997); hereinafter referred as *Peasant Revolution in Ethiopia.*; Gellner, *supra* note 7 at 85.

<sup>224</sup> Gebru, *supra* note 5: 202.

<sup>225</sup> Merera, *supra* note 64 at 96.

<sup>226</sup> Quoted in R. Balsvik, *Haile Selassie Students.*; *supra* note 252 at 277.

<sup>227</sup> Merera, *supra* note 64 at 97.

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However, despite the fact that all were inspired by leftist orientations and even if they shared the manner in which the nationality question was to be resolved, particularly the EPRP and MEISON, they ended up in becoming one another's worst enemy. The dispute clearly remained a struggle for power between rivals.<sup>228</sup> Despite their adherence to the same political goals, the two oldest political organizations in Ethiopia became bitter enemies. They fought each other more than they fought the military regime. By 1973, following the Berlin conference, the split was getting clearer and the amorphous student movement evolved into two separate political parties: EPRP and MEISON. From then on the issue of nationalities remained unresolved and an Achilles heel to all political parties.

As a solution to the 'national oppression' described by the ESM there emerged contending views. Those who advocated for the regional autonomy formula as in the *Waz League*, those like MEISON and EPRP that in principle acknowledged the existence of 'national oppression' but whose dominant orientation was towards

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<sup>228</sup> EPRP that had managed to make significant inroads into mass organization was confident that it would be in a position to direct the course of the Provisionary Peoples Government (PPG). MEISON on the other hand which lagged behind in organizational affairs was prepared to let the *Derg* to power until it itself was sufficiently organized to take it back from the *Derg*. Thus by early 1975 MEISON had made a strategic shift from a position of opposition to the *Derg* to one of critical support. Thus the return of the civilian rule versus the support of the *Derg* became one critical area of difference between the two. The other areas of contention include: the transition from feudalism to socialism, and the question of nationalities. On the first they both agreed on the two-stage process, first national democratic revolution against semi-feudal society and then pave the way for socialism. On the second both recognized nationalities right to self-determination but with one important difference, MEISON never subscribed to secession. National self-determination was to be exercised within the limits of Ethiopia's sovereignty. EPRP resorted to city war to eliminate the *Derg*, its chairman as well as the ideological mentor, MEISON. In September 1976, the *Derg* on its part waged Red Terror on EPRP members and suspects. The license to kill was then openly directed thereafter not only against EPRP but against any opposition and suspects. By August 1977 MEISON itself became the target and most of its members were either captured or killed which marked the end of the organization as a viable organization. Critics of the ESM emphasize, 'fratricidal killings that marked the early years of the revolution took place among the idealist intellectuals and activists themselves. As such there were no irreconcilable ideological differences among the intellectual authors of the Red Terror as they were divided only by the choice of tactics of achieving their goals. They were all adherents of leftist ideology' it turned out to be a fight for competing ambitions rather than of political ideals. Gebru Tareke, *The Red Terror in Ethiopia: An Historical Aberation?* At [http://www.ethiopiafirst.com/news2004/jan/Red\\_Terror\\_in\\_Ethiopia.html](http://www.ethiopiafirst.com/news2004/jan/Red_Terror_in_Ethiopia.html) as visited on 5/3/2004; See Bahru 2001, *supra* note 74: 255, 247-248; Andargachew, *supra* note 14 at 155, 137-140; Merera, *supra* note 64 at 109.

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unity and they saw the struggle of the oppressed people as indivisible, a solution to be sought within class rather than along national lines and the third set constituted all the ethno-nationalist movements who preferred to define their struggle on the basis of ‘nationality’ than class.<sup>229</sup> The last group held that a new and democratic Ethiopia could only be constructed through the voluntary and consensual association of its parts.<sup>230</sup> It is important to mention that apart from sharing the view that the nationality question needs to be addressed, the exact meaning and scope of this vague clause was never clear. It is hardly possible that all groups meant the same thing. Even within the TPLF, the hard core of the ruling party, at the first phase of its evolution, it meant the self-determination of Tigray, within a democratic and multicultural context of Ethiopia and that implied self-autonomy, fair distribution of power and resources and equal recognition of culture, religion and language. Yet as included in the TPLF manifesto of 1976, secession was not ruled out. This position was abandoned for a long time and again came back with the establishment of MLLT (Marxist Leninist League Tigray) in 1986 and with it national self-determination up to and including secession, hence Article 39 of the federal Constitution.<sup>231</sup>

As was noted already, in the end, when the multinational parties fall into crisis partly due to internal problems and partly because the *Derg* annihilated them in turns, the national liberation movements emerged as the only viable forces to challenge the *Derg* and as a dominant political force particularly in the post 1991 *Derg* period.<sup>232</sup>

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<sup>229</sup> Merera, *supra* note 64 at 98.

<sup>230</sup> Gebru, *supra* note 5 at 202.

<sup>231</sup> See Aregawi Berhe, ‘The Origins of the Tigray People’s Liberation Front,’ *African Affairs* (2004), 103/413: 569-592.

<sup>232</sup> According to Merera, there are two paradoxes that need to be noted here. The first paradox is that the ESM and the multiethnic leftist movements had popularized the right of nationalities to self-determination to solve the national inequality. However, the national liberation movements effectively used it for mass political mobilization. The second is that the students and the civilian left

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EPRDF, the ruling party, as a champion of the nationalities right to self-determination in a bid to liberate the nationalities from ‘national oppression’ interprets the crisis as something resulting from national oppression. It considers the political, economic and cultural factors as something resulting from national oppression, a deliberate design of Showan Amhara elite. It considers both regimes that have defined the much broader notion of Ethiopian nationalism narrowly, structured the state accordingly and left the others at their mercy. The centralization of power and economic resources at the center is, therefore, viewed as a secondary rather than primary cause of the state crisis. Based on this premise, the ruling party defined its struggle not on the basis of class or multinational principles but as a nationalist one. It believed that emphasizing the nationality question was the right strategy to rally the oppressed people by rejecting the class-based approach of the ESM that EPRP and MEISON chose to follow. It is from this that the argument for national self-determination of nationalities and structuring the state based on a federal system that grants at least the major nationalities their own constituent states springs from.<sup>233</sup>

The National Oppression thesis is shared by several parties and leaders of nationalist movements and we now turn to some of them. One of the pioneer movements that long advocated the ‘national oppression’ thesis after the collapse of the ESM was the TPLF.

### The Tigrayan Cause

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brought about the 1974 popular revolution but the military usurped the leadership of the revolution and used it to destroy the civilian left dubbing them counter-revolutionary forces. When the *Derg* was defeated the only dominant groups remained the national liberation movements. It was double defeat for the multiethnic leftist movements. Merera, *supra* note 64 at 99.

<sup>233</sup> John Young, *Ethnicity and Power*, *supra* note 50: 531-534; see also John Young, *Peasant Revolution in Ethiopia*, *supra* note 253.

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Historical, economic and cultural factors contributed to the prominence of the ‘nationality question’ in Tigray. Tigray was always a provincial contestant to the throne and by and large was ruled by its own nobility. Although the Tigrayans shared a long common history, church and culture with the Amhara, after the death of Yohannes in 1889, Menlik seized the Solomonic title and turned the course of the empire to the South. His agreement with Italy to partition Tigray (since 1890 Eritrea, that constituted part of historic Ethiopia was alienated and ceded to the Italians) created a bitter legacy<sup>234</sup> and thereafter the region was marginalized in political and economic terms.

Although it was not organized on a nationalist basis against the imperial regime, the Rebellion in Tigray in 1943 shows how the Showan elite was meddling even at local level to further weaken its political rival. Slowly but surely Showa was making sure that its rival remains on its low ebb. With the banning of the army of notables and the centralization of the taxation system, Tigrayan notables’ economic and political power was eroded and they lost what Gebru calls ‘their corporate identity.’<sup>235</sup> After that they only survived as individuals and with the ‘grace’ they obtained from Showa. Though the rivalry between Yohannes’s heirs Gugsa and *Ras* Seyoum was a catalyst in weakening Tigray, each linked to the Showan dynasty through marriage and administering different parts of Tigray, their crisis also paved the way for manipulation and meddling. After Gugsa’s death his son Haile Selassie, who saw his rival Seyoum favored by the Emperor defected

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<sup>234</sup> Since then an artificial Eritrean identity was to be constructed along the colonial lines that finally led to one of the longest ‘civil wars’ in Africa. Colonial coincidence combined with Menlik’s willful act caused the historic split (now among Eritreans and Tigrayans who were by then one) of Tigrayan identity to date. Besides, the country’s major outlet to the sea was to be blocked. See Gebru, *supra* note 5 at 41. For more on the TPLF see John Young, *Peasant Revolution in Ethiopia*, *supra* note 253. Aregawi Berhe, *supra* note 261.

<sup>235</sup> Gebru, *supra* note 5 at 74.



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and joined the invading Italian army. After 1941, *Ras* Seyoum insisted on the restoration of Tigrayan autonomy that was never materialized. For one Tigray was now ruled by an appointee from Showa (Alemayehu Tenna) and for another local notables known for being rivals to Seyoum were appointed in Adwa and Enderta. Seyoum was then a loser in between. The tax system, the introduction of Amharic in all state institutions and the unpopular governor were more than enough to create popular resentment that finally led to the unsuccessful resistance in 1943 (portrayed as *kedemay Weyane* [the first rebellion] by the TPLF). Its failure sealed at least temporarily the struggle for centralization and autonomy in favor of the former.

It is a pity that in some academic circles this unfortunate circumstance is very much undermined. Teshale, otherwise a great historian, in his attempt to address the ‘nationality question’ makes a distinction between ‘national’ and ‘regional’ level. He contends that only in the south can one speak of ‘Amhara domination’ because of the triple merger of nationality, religion and language in the person of the *neftegna*. At the national level, however, no special economic as well as political benefit accrued to Amharas distinct from other nationalities and therefore national oppression is merely reduced to linguistic oppression.<sup>236</sup> There is even an argument that the government was not Amhara as such. However, the political, social and cultural foundation of the state remained to defend the nation-building project based on cultural integration. Besides, as already noted, the Amharas other than from Showa, although they were disappointed at the initial phase (the Gojjam rebellion of 1968) did not face the harsh realities that the Tigrayans went through. By associating themselves with the ruling elite from Showa they were able to secure jobs and derive some benefits. Economically, while in general little

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<sup>236</sup> Teshale, *supra* note 1: 174, 180.

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investment and economic progress was common throughout the country, the position in Tigray was even worse and the elite in Tigray relates this to Tigray's 'political emasculation' and deliberate Amhara action. There was no single industrial development in the entire province even by Ethiopian standards. Culturally- Tigray although inhabited by Tigrayans of the same Semitic group with the Amharas, Tigrayans have their own distinct language and they are self-conscious. Yet they were forced to abandon the Tigrigna language in order to attend school and to secure a job. The ban was considered a symbol of Amhara domination. Taken in light of the assimilation agenda of the ruling elite, the measure was perceived as a symbol of Amhara domination and the eventual extinction of the Tigrayan identity. Language then became relevant not only in its own right but also as a surrogate for other issues like cultural preservation, equal access to state power and redefinition of the identity of the state. The center of the debate, one should note, is between the Amhara elite, which equates Amhara identity to Ethiopian identity, and the Tigrayan elite, which claims equality of all nationalities and perceives Ethiopia as home of all the diverse groups. Political and economic marginalization and the historic divide and rule were to further fuel resentment. These were the reasons for the radicalization of the Tigrayan elite.<sup>237</sup>

Distinct from the ESM whose predominant view was to shape the struggle of the oppressed people along class lines, some of the University students from Tigray formed an association, which quickly evolved into a party, the TPLF on February 1975. Its purported aim was to defend the identity, dignity and interests of their nationality. Yet in its early stages, the Tigrayan student movement was not homogenous. Evidence seems to indicate that it harbored three different political

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<sup>237</sup> See Markakis, *Resource Conflict in the Horn of Africa*, *supra* note 199: 136-137; 1998; Young, *Peasant Revolution in Ethiopia*, *supra* note 273; Paul, *Ethnicity and the New Constitutional Order*, *supra* note 66: 178.

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tendencies. The first was an option to construct what they coined as ‘Greater Tigray’ that includes the Tigrigna speakers both in Tigray and Eritrea. Perhaps this was the agenda of the little known TLF. The second group was more in line with the ESM in suggesting that the liberation of Tigray should be seen in the context of liberation of Ethiopia, hence joined the EPRP. The third that was to be the basis of the TPLF focused on the liberation of Tigray both in terms of national and class, leaving the issue of post independence Tigray unsettled.<sup>238</sup>

In the face of gloomy and unfavorable domestic and global circumstances those young university students determined to bring to an end the misery. Before it appeared as the only vanguard force in Tigray, it had to face the TLF, EDU and EPRP in its infant stage. First it faced the TLF, an organization, whose story is little known but is believed to have designed the Tigrayan cause as a struggle against colonialism, following the EPLF. For the TPLF, as far as records show, the Tigrayan cause was not defined as a colonial one, although it defined its struggle as one of self-determination of oppressed nationalities, secession/independence was an option but not its maximum objective. As one has rightly noted the post liberation political status of Tigray, separation and independence or a nation within a multicultural Ethiopian polity was not pre-determined, it was to be determined in due course.<sup>239</sup>

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<sup>238</sup> Adhana Haile Adhana, ‘Tigray-The Birth of a Nation within the Ethiopian Polity,’ in Mohamed Salih and John Markakis ed., *Ethnicity and the State in Eastern Africa* (Uppsala: Nordiska Afrikainstitutet, 1998): 48.

<sup>239</sup> *Ibid.*: 42-49. TPLF’s struggle for self-determination could result in anything from autonomy, federation, confederation up to and including independence. Later, TPLF defined Ethiopia as a multi-ethnic state that belongs to all the groups living in it and set its sight on reforming it. The only exception in which the TPLF is said to have its agenda for secession was in 1976. See Medhane Tadesse, *Hiwahit Ye Ethiopia Liewalawinetna Beherawi Tikim 1967-1992* a paper presented at the 25<sup>th</sup> Anniversary of The TPLF Yekatit 12, 1992 E.C., Makalle unpublished.

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Since its struggle was defined as a national one, the presence of multinational forces was viewed as impediment to its objective and it had to face the challenges from EDU (and of the EDU's shadowy splinter group *teranafit* centralist)<sup>240</sup> and EPRP.<sup>241</sup> It was able to eliminate them certainly by force between 1976 and 1978. Since then Tigray remained the exclusive area of the TPLF's military and political operation, a situation, which still remains unchanged.<sup>242</sup>

As events unfolded, the Tigrayan cause seems to have been settled under a federal system in a multicultural Ethiopia. It is important to emphasize this point because in some corners, it is stated, the present federal structure is nothing but the resurgence of Tigrayan dynasty or the coming to power of the heirs of Yohannes.<sup>243</sup> Merera's major thesis in his PhD is to make a widely held view in the private press that everything is heaven in Tigray and the Tigrayans dominate the whole federal system. Indeed he argues that the present federal system is a guise for Tigrayan resurgence. However, his position suffers from two major setbacks. We earlier noted the problem of presenting mainstream national elites in the face of existing convergence of ideas. Certainly opinions are more complex than they appear in his presentation. As will be sufficiently described in this section, there is more convergence than divergence among the elites of the several nationality groups and the attempt to show so much divergence does not seem to be convincing. Another limitation is his articulation of the Tigrayan struggle as resurgence. Maybe this is a confusion resulting from a mix between his dissatisfaction with the TPLF/EPRDF led government and the much broader

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<sup>240</sup> Markakis, *Resource Conflict in the Horn of Africa*, *supra* note 199: 136-137.

<sup>241</sup> For more on the conflict between TPLF and EPRP see Addis Alem Balema, *supra* note 164 at 127.

<sup>242</sup> Some contend that this exclusivist trend affects dialogue among intra and interethnic parties. See Leenco Lata, *supra* note 188: 68, 72.

<sup>243</sup> The list of authorities subscribing to this view is numerous but the major ones include Merera and Teshale; it is important to note that the TPLF's initial agenda was to root out the local dynasty and it is not by accident that it faced EDU at its infant stage.

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Tigrayan cause.<sup>244</sup> One of the major contributions of the latter, among other things, is transformation of the Ethiopian ‘nation-state’ to a multicultural federal state. Given the above context, the national oppression seems to make some sense. The political and economic deprivation seems to be deliberate consequences of Showan attempts to hold its rival at bay.

It is interesting to note that the Tigrayan resistance, particularly after the 1974 Revolution seems to rather disprove the well-settled idea that the centers of conflict in many parts of the world including Ethiopia are the ones that are politically and economically deprived, in short the instrumental paradigm. The most effective and devastating resistance against the center came from Tigray, the birthplace of Ethiopian civilization and the mother of the authors of the *Kibra Negast* that provided the legitimizing basis for the Ethiopian state. It did not come from Afar or Gambela, although all raised their arms against the center. This is not an attempt to deny the political and economic drives behind it. It is simply to reiterate the point that not all political and economic deprivations lead to stiff resistance and there must be some additional reason to it.<sup>245</sup> The fact that they can recite a lot from their proud history coupled with what some call "political entrepreneurs", that is, political elites who are able to translate the politico-economic and identity grievances into a political action are some of the additional factors.

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<sup>244</sup> See Merera, *supra* note 164 at 119 and page 161-footnote number 1 where he explicitly subscribes to such a view.

<sup>245</sup> Tigrayans had much to recite from history for ethnic mobilization, apart from the harsh state policy mainly reflected in the form of political and economic marginalization and cultural suppression. But more than these factors, there existed national consciousness, that is, an elite group aware not only of its distinctness and the fact that Tigray has become a deliberate target of Showan muscle but also of providing leadership and translating these collective grievances into action. ‘Thus despite the richness of resources for ethnic mobilization, neither economic nor political grievances, by themselves, triggered a nationalist insurgency...the emotion that is invested in ethno-regional conflicts cannot be adequately explained in economic terms. Thus in Ethiopia factors other than economic or political ones were needed to set off nationalist insurgencies.’ Alemseged Abay, *supra* note 6 at 598. See also Section 1.5 *infra*.

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So many things have been said about the success of the TPLF. Its organizational discipline, its determination and endurance, its capacity to mobilize the people on its side, an organization from within, not from exile, as the people say, the inability of the 1974 Revolution to bring any noticeable change, while it was able to take the ‘the steam of the revolution’ in the south by enacting the proclamation that granted land to the tiller are some of them. These factors among other things were able to withstand the old political elite and feudal culture in Tigray, the military with its huge war machine and the trouble of *awarajawinet* (internal diversity within Tigray) were subdued effectively. By creating coalitions with other ‘partners,’ the TPLF was able to forge EPRDF in its bid to control the political space in Ethiopia after it controlled the whole of Tigray. EPRDF became the most dominant force after the change of government in 1991 and responsible for state restructuring along federalism that grants nationalities with self-rule.

Thus we see that the ruling party has for long advocated that it is the oppression of nationalities that is at the heart of the crisis and the political and economic marginalization is a consequence rather than a cause. Although in the early 1970s there has been an intense competition between ethno-nationalist parties and class based parties, the former dominated the scene. The present ruling party, EPRDF as a coalition of ethno nationalist parties and as a main architect of the transition (1991-1994) and the 1995 Constitution long advocated for nationalities right to self-determination up to and including secession as a decisive remedy for the resolution of Ethiopia’s long standing problem of the “nationality question.”<sup>246</sup> Yet, this in itself fails to underscore the point that in the end political and economic factors are crucial factors behind every conflict. Besides, this perspective fails to address adequately the problem of minorities within the different units and

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<sup>246</sup> See Articles 8, 39, 46, 47 of the 1995 Ethiopian Constitution. All articles referred to below are from this text, unless stated otherwise.

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cities that often are inhabited by ethnically intermixed individuals. Thus an approach that combines the accommodation of diversity with genuine sharing of power and resources among the diverse groups and the commitment to human rights will better explain the success or failure of the state in multicultural societies in general and in Ethiopia in particular.

### 1.4.2 The Other Relevant Perspectives

#### The Views from the South

A very close but newly emerging view to the national ‘oppression’ thesis is the Southern perspective.<sup>247</sup> In the competing nationalist perspective, a new regional force is emerging in Southern Ethiopia, an area that has long been marginalized. It is the homeland of more than fifty six ethnic groups with a combined population of more than 13 million. This is the region in which many of the authors at least agree on the point that until the 1974 Revolution and *Derg*’s proclamation of land to the tiller, thereby emancipating the bulk of the tenants and the landless from servitude, the Amhara from Showa, although not exclusively, with their *neftegna*, represented the worst form of class and national oppression for the bulk of the nationalities living in the south. Nationality, class and religion all combined in the person of the *neftegna*.<sup>248</sup> The general political vision and perspective of the elite from this area, unity in diversity within greater Ethiopia, has become a serious challenge to the Oromo elite who seeks secession, and to the mainstream ruling elite who might seek asymmetrical relations with the South.<sup>249</sup>

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<sup>247</sup> More is said about the current dynamics in the SNNPRS and the Benishangul Gumuz, and Gambela regions in chapter five.

<sup>248</sup> See for instance, Markakis, *Anatomy of Traditional Polity*, *supra* note 13; Teshale, *supra* note 1: 180; Gebru *supra* note 5 at 198.

<sup>249</sup> Merera, *supra* note 64: 107-108.

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There are certainly several views emerging but at least two are dominant. There is the EPRDF-member SEPDF which shares more or less the same political program with the opposition SEPDC except on the issue of land and secession. The latter, supports the federal option but short of secession and also wants to privatize land. SEPDF has recently undertaken a lot of reforms, particularly after the TPLF crisis in 2001 and in 2002 merged some dozen ethnic fronts to form one movement.<sup>250</sup> The attempt is to forge one party representing all nationalities. Despite troubling history, the region seems to be content with the federal option of unity in diversity. Over all assessment of the federal experiment in the South exhibits both fear and hope. The fear is that there is continuous rivalry among some of the political elite for controlling regional power at the expense of others and that seems to be fueling those that felt marginalized at regional level to raise issues of further redrawing of new zones, *Weredas* and even new states. Thus carrying with it the threat of opening "Pandora's Box"- where to end once one begins restructuring the region with more than 56 ethno-linguistic groups. A newly emerging multicultural federation may need to remain flexible in order to adjust territorial boundaries to meet new ethno-linguistic demands which is an expected thing in holding together federation but too much flexibility may lead to the Nigerian federation's logic of fragmentation.

The hope and rather promising point about the South given its size and incorporation into main stream Ethiopian politics is the potential role that it can play in stabilizing the federal game. The South being composed of relatively smaller nationalities that benefit more from interdependence and some form of self-rule than from a unitary system and independence, have a major potential role to play in bringing equilibrium to the two potential threats of the Ethiopian

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<sup>250</sup> See SEPDF merger attests SNNP's Desire for Peace, Unity, prosperity at <http://www.waltainfo.com/EnNews/2003/sep/27sep03/sep27e10.htm> as visited on 9/29/2003.



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federation: centralism (as reflected in the 20<sup>th</sup> century) and secession (as some political elites seem to be aspiring for it).

### **The Afar Region**

The Afar constitute a pastoral people who occupy a vast territory in the north-eastern part of Ethiopia but they also live in Eritrea and Djibouti, because of the sad legacy of the colonial scramble for Africa. The northern portion of the Danakils was included under Eritrea by Italians. The hinterland of the southern portion and the Awash River valley was incorporated by Ethiopia while the gulf of Tajura became the French colony of Djibouti. In Ethiopia they are found inhabiting in the north-eastern lowlands, now delineated as the Afar region, one of the constituent regions, in the federal system. Before the change of government in 1991, the Ethiopian Afars lived divided in the administrative provinces of Showa, Harareghe, Wello, Tigray and Eritrea.<sup>251</sup> Like the Somali, the Afars suffered from imperialist intrusion. As a region dominantly inhabited by Muslims the Afars also belong to the group of marginalized people by a state that defined itself along Christian religion.

It is stated that cordial relations existed between the center and the sultanate in Afar until the coming to power of Haile Selassie. Often, central governments' interest in the Afar was mainly economic as it was an outlet to the outside world as well as a source of salt. At later stages the region became one of the centers of discoveries about the human origin including *Dinknesh* (Lucy). Thus the strategic location of the Afar along the coast, the existence of trade routes with the center

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<sup>251</sup> Ali Said, 'Afar Ethnicity in Ethiopian Politics,' in Mohamed Salih and John Markakis eds., *supra* note 19 at 109.

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and its potential as an entry point for external aggressors, forced the central government from antagonizing the Afars. Thus the sultanates enjoyed some level of autonomy.

This was to be changed with the introduction of commercial farming in the 1960s. This was indeed a turning point in the sense that after its introduction, the Afars lost a large area of land. There were attempts to handle the matter with care as the emperor was also interested in incorporating Djibouti, but it did not prevent from flourishing various types of parties, particularly after the 1974 Revolution. The *Derg* fueled the situation because the nationalization of all rural land not only led to the expropriation of the holding of the Ali Mirah, an influential sultanate, who had a large private holding but also deprived the Afars of land that could be used for dry season grazing. Sultan Ali Mirah fled to Saudi Arabia and that marked the end of friendly relations between the center and the Afars.

Like the situation in the south as well as the Oromos, there are several parties operating in present-day Afar regional state that evolved from the crisis of the 1970s, with differing perspectives about the past as well as their visions about the future. One of the first parties to be set up in opposition to the *Derg*'s harsh measure was the ALF led by the Sultanate's son Hanfreh Ali Mirah. As the military was cornered by opposition from all corners, it tried to concede to some of the claims of the Afars for regional autonomy, which also had strategic advantages for the military in weakening the Eritrean cause. It was able to persuade some members of the ALF and caused its split in 1976 when a group of defectors left to form the Afar National Liberation Movement which found common ground with the regime in Addis Ababa and was granted a measure of control in the Danakil.<sup>252</sup>

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<sup>252</sup> Markakis, *Resource Conflict in the Horn of Africa*, *supra* note 199 at 175.

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The *Derg* mobilized the ANLM to its side and carved out an Assab autonomous region around the late 1980s. Yet this was not able to convince the opposition from the region and several parties remained suspicious of the new development.

Thus after 1991 the ALF whose main support came from the Awsa region, predominantly nomadic, dominated the transitional process as well as regional politics. However, internal family squabbles between the two brothers, the chairman of ALF and the then President Hanfreh Ali Mirah and Habib Ali Mirah, who was more hostile to the ruling party, led to confrontations with EPRDF. Close to the ALF is the ANLF that draws support from the Tigray speaking Afar in the Berahle area bordering the Tigray region and is said to be a faction that broke away from the ALF. It was influential in regional politics and stood second to APDO in the 1995-2000 elections for regional parliament. After March 1996 the regional presidency was transferred to APDO chairman Ismail Ali Siro. APDO evolved from TADO (Tigray Afar Democratic Organization), the Afars who border Tigray, and was restructured to represent the whole of Afar since 1992. Its main support came from the two zones that used to belong to Tigray and were predominantly cattle breeding. APDO was then able to break ALF's power monopoly at the region as well as at the center.

In short, except the ARDUF,<sup>253</sup> present circumstances in the Afar region seem to suggest that their claims can be satisfied with a genuine federal set-up that grants

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<sup>253</sup> Apart from those mentioned above there are two other parties in Afar. There is the ANDM that claims to represent the Afar intelligentsia affiliated with the old sultanate of northeast Afar in Girrifo, and considers itself as a progressive political group with few seats at the regional level. It was established in 1994. Finally there is the *Ugugumo* (Revolution), a militant group which confronted the Dreg in the past and is still challenging EPRDF. This group claims to represent all the Afar in the Horn, including those in Ethiopia and Eritrea, although it seems to be less interested in those who are in Djibouti. It is now called the ARDUF (Afar Revolutionary Democratic Unity Front) formally set up in 1993 from a coalition of three other parties. It aims to reunite at least the Afars in Ethiopia and Eritrea-Greater Afar land. Of late one wing of the ARDUF joined the ruling party (forming ANDM) and the remaining faction remained with the UEDF.

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the Afars an autonomy of their own: an aspect of the nationality question and in this sense it converges with the southern, the bulk of the Oromo parties, except the OLF and all others that settle their case within unity in diversity. However, the fact that it is linked with the regional politics of the Horn because of its geographic ties with Eritrea and Djibouti and through the latter with Somalia,<sup>254</sup> complicates the Afar issue.

### The Somali Situation

Ethiopian Somali (Region five as it was known during the transition) includes not only the people living in the Ogaden but also the area in the north bordering Djibouti as well as Southern Bale and part of Southern Sidamo. The Ethiopian Somalis as Muslims claim that they have been subjected to triple oppression: national, religious and class, except perhaps a brief period during the time of Iyassu (1913-1916). Going back in history, although there are some historical records that show that historic Ethiopia had access to the port of Zeila, an ancient port on the Somali coast, there is no reliable evidence that indicates beyond a shadow of doubt of the inclusion of Ogaden into historic Ethiopia before the

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<sup>254</sup> Across the border in Djibouti the Afar were involved in a power struggle with the Somali inhabitants of the enclave as the colony approached independence. The Somali were numerically inferior to the Afars at that time but were dominant in the town of Djibouti. They were integrated in the communal life of the colony, and had a higher level of education. However, they did not enjoy the favor of the French, due to their association with the Somali Republic and their sympathy to the vision of Greater Somalia. The French deported some Somalis, changed the colony's name and installed an administration under Ali Aref Bourhan 1960-1976, an Afar. In a referendum conducted in 1966, a majority chose to remain under French hegemony. In 1977 a majority of the Somali in Djibouti voted along with the Afar for independence and with the threat of Somali irredentism fading, the French now switched their favor to the Somali, particularly the Issa, the dominant clan in Djibouti. Ali Aref gave way to Hassen Gouled Aptidon, an Issa who became the first president of independent Djibouti. Office of the PM was reserved for the Afar and cabinet seats were evenly divided. Dissatisfaction with the Afar led at a later stage to a civil war which was also supported by Afar from Eritrea and Ethiopia but following its split in 1995 part of the faction joined the government in power while the remaining chose to continue to struggle. To date Djibouti remains to be under the influence of the Issa with President Omar Ghile, another Issa replacing Hassen Gouled Aptidon. Markakis, *Resource Conflict in the Horn of Africa*, supra note 199: 175-177.

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coming to power of Menlik.<sup>255</sup> Accordingly, some of the parties who claim to represent the interest of the region have articulated their arguments along the ‘colonial’ thesis, following the Eritrean elite.

What is striking about the Ethiopian Somali case is that its cause, however genuine it may have been, is complicated by political developments in the Horn and particularly by the intervention of neighboring Somalia state. Right after the Somalia Republic was established as an independent state in the Horn in 1960 it embarked on an irredentist policy of bringing all the Somalis living in the three neighboring countries: namely Ethiopia, Kenya and Djibouti, hence the five star flag. To this effect it created and nurtured the WSLF (Western Somali Liberation Front) to represent the Somalis of the Ogaden and SALF (Somali Abo Liberation Front) to represent the Somalis in Bale and parts of southern Sidamo and some portions of the Oromos (which the Somali Republic thought were Somalis but mistakenly considered themselves as Oromos) in the early 1960s and 1970 respectively.<sup>256</sup> Such an attempt was viewed by Ethiopia as a serious attack on its sovereignty and the confrontation led to moderate conflicts in Ogaden and Bale some time in the 1960s and to a full-scale war between the two countries in 1977. At all stages the United States and former USSR as well as Cuba were present on both sides supplying arms and even military support. Ethiopian military superiority effectively destroyed the Somali forces and the WSLF went into exile affiliating itself, as suspected, with the Siad Barr’s regime of Somalia. In 1980 the *Derg* was able to make a deal with the regime in Somalia about the Ogaden, which finally led to the death of the WSLF leading to the birth of another ONLF in 1984. The

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<sup>255</sup> Merera Gudina, *Competing Ethnic Nationalism and the Quest for Democracy* a paper presented at a seminar on Ethnic Federalism: The Challenges for Ethiopia, Addis Ababa, 14-16 April 2004.

<sup>256</sup> Markakis, *Resource Conflict in the Horn of Africa*, *supra* note 199: 126-130.

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ONLF seemed to have rejected the vision of Greater Somalia by focusing to forge a distinct Ogaden, separate from Ethiopia as well as Somalia.

Contrary to common expectations of the Somalis as a nation, the Somalis exhibit a variety of intra-ethnic diversity, mainly based on clan. Even when central government's interference in the region was very little during the early phase of the transition (1991-1994), they were divided into more than a dozen clan and lineage based groups, apart from the dominant Ogadenia clan. Some of them include the Issa and Gurgura, the Horiyal, Ishaq, Hawiye, Shekah and a few others who resisted such division but called on Somali unity/solidarity based on Islam.<sup>257</sup>

Since the break up of the Somalia Republic, the Ethiopian Somalis then seem to face a dilemma between genuine autonomy within federal Ethiopia, creation of independent Ogadenia or joining one of the newly emerging 'states.' Like the situation in Afar and Oromia there are several contending parties in the region. We have the Western Somali Democratic Party (WSDP) mainly supported by the people in Ogaden and active in the regional politics during the 1995-2000 period and articulating a middle ground between the ESDL and the ONLF's secession agenda. The latter seems to be divided between working with the government, playing a constructive opposition or insisting on the secession agenda. There is also the emerging Ethiopian Somali Democratic League set up in 1994 by merging some dozen Somali political and clan groups. This vision came from the late Dr. Abdul Mejid Hussein, a prominent Somali/Pan Ethiopian figure who believed the Somalis should stand together and solve their problems. In June 1998 ESDL merged with some remaining elements of the ONLF to form the Somali Peoples Democratic Party (SPDP). The SPDP and the ESDL seem to have made up their

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<sup>257</sup> John Markakis, 'Briefing: the Somali in the New Political Order of Ethiopia,' *Review of African Political Economy*, 29:59 (1994) 71-79.

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mind to work for a genuine autonomy within a federal Ethiopia and they are emerging as dominant political forces at regional as well as at federal level.<sup>258</sup>

After considering the national oppression at length, it is perhaps appropriate to conclude with the following note of precaution. To argue that the conflict has to be able to be seen in a broader fashion that takes into account the cultural and identity element, apart from political and economic factors in the Ethiopian context is *far from endorsing* the idea that the whole conflict should be solely interpreted along this line. This approach like the instrumental model will lead to another narrow perspective and indeed that is the problem with the national oppression thesis. While explaining another dimension of the conflict, it fails to transcend it. Hence, when Abbink argues, ‘Ethnicity and its socio-political use are embroiled in political, social and economic issues and has to be addressed through the latter,’<sup>259</sup> the proponents of national oppression have no satisfactory answer. One other writer has equally and rightly so pointed that the nationality question might be one cause but certainly is not the exclusive one. ‘Oppression, exploitation, poverty,

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<sup>258</sup> The first party to come to power during the transitional period in the Somali region, which at present is one of the units of the federation, was ONLF (Ogaden National Liberation Front) after winning most of the regional seats. However, shortly after it was established, the council dominated by ONLF demanded a referendum on independence. This move angered the central government, which eventually organized more than 13 tribal fronts and organizations to unite and challenge the policies of ONLF, forming the ESDL. In the next election, ESDL won but it was boycotted officially by ONLF (though there were individuals who ran in ONLF name) and formed the Regional government alone. Internal party squabbles led to a coup in the region, that caused the federal government to intervene but thereafter the ESDL was weakened due to the crisis. So the federal government commissioned a new unification initiative of ESDL and ONLF. ONLF broke into two factions between those that accepted this proposal and those who rejected any deal saying our question is a colonial one. ESDL and one faction of ONLF merged in 1990 E.C and formed a new party called Somali People’s Democratic Party while the other faction of ONLF was outlawed. It was the SPDP which won in the last election and set up the administration. It is the only effective political party in the region, there is another weak party called Western Somali Democratic Party (WSDP), which exists only by name. The new region was then ruled, firstly by ONLF, then ESDL and currently by the SPDP. Bashir Ali Mahdi, Interview September (2003), The Hague.

<sup>259</sup> Jon Abbink, *New Configurations of Ethiopian Ethnicity*, *supra* note 205 at 60.

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injustice are trans-ethnic and could be more adequately dealt with if they were given answers that are also trans-ethnic.<sup>260</sup>

## CONCLUSION

To conclude this part, the challenge for the Ethiopian state and indeed for many other multicultural states as well, has been, remains today and will remain to be its ability to craft a state that is united but that at the same time recognizes diversity. It is a question of building unity from diversity from a multicultural state. It is for this reason that federalism as an ideology and federation as a political institution incorporating both unity and diversity while at the same time imposing a limit on both makes it attractive for Ethiopia. If the assertions made so far are true then the evidence also seems to hint that national self-determination as a solution to the nationality question, while it might deal with the question of diversity, needs to be considered along with the political and economic factors that the instrumentalists have rightly emphasized. This for sure will have implications, for instance, in structuring the units of the federation.

Given Ethiopia's long existence as a *de facto* federal system, albeit under a monarchy, its diverse ethno-linguistic and religious groups and taking into account the fact that the Ethiopian state was in crisis for most of the 20<sup>th</sup> century mainly because of the concentration of power and resources at the center as well as because it failed to accommodate the diverse groups into the political process, then multicultural federalism remains the only defensible option to hold Ethiopia together. Federalism permits not only the existence of multiple identities under a single political union but also transcends the fixation with the nation-state and its limits in dealing with diversity. Federalism also breaks the politics of exclusion, as

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<sup>260</sup> Maimire Mennasemay, 'Federalism, Ethnicity, and the Transition to Democracy,' in *Horn of Africa* v. XXI (2003): 92, 100.



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power sharing is inherent to it thereby creating opportunities for absorbing the contenders for power into the political process. More is said on this on a separate course on federalism.

### **Overall Conclusions on the Ethiopian Constitutional Development**

If seen along Ogendo's analysis of post independence African countries constitutions, there are important remarks that remain relevant even for understanding Ethiopia's situation. One can state safely that both the 1931 and 1955 constitutions were imposed rather than outcomes resulting from due considerations of historical, economic, cultural and social realities of the Ethiopia. If Constitutions are meant to be laws in which the various aspirations and values of the public in general are expressed, that is, as covenants between the governor and the governed, a democratic expression of the will of the public, then, both constitutions fail to meet these requirements. It should be noted that constitutionalism as a culture, though a much broader notion, is very much linked with this aspect of constitution making. Both constitutions provided for supremacy of the Emperor than the law and not involve the participation of the Ethiopian people. Nor did the constitutions intend for limiting the powers of the Emperor as he remained supreme for more than four decades. The making of the 1987 constitution marked a new phase as there was an effort to engage the public at grass root level but because of the regime (a military junta) and what ever was promised in the constitution never realized in practice and thus remained merely on paper. The short span (only four years) and the civil war as well overshadowed its importance.

Another essential point related to the Ethiopian context is that there is a widely held view that considers constitutions merely as instruments for promoting the political will of the victorious ones/ruling elites of the time and not of the people

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per se and hence are viewed as instruments of submission, hence the saying “*Negus Aykese Semay Aytates*”. Many of the constitutions have not been results of negotiated outcomes or of a publicly held consensus. We should note that all past constitutions were done away with unconstitutionally and no section of society ever tried to restore them. Thus constitutionalism is yet to take roots in Ethiopia.

### **Review Questions**

1. Do you agree with the idea that Ethiopia had for long a decentralized state structure (at least before the 20<sup>th</sup> C)? why or why not?
2. If you agree, how do you characterize the decentralizing feature? How did the historically decentralized system come to an end?
3. What is the role of the 1931 and 1955 (you can find these documents in Paul and Clapham volumes on Ethiopian Constitutional Development) and other documents in setting the new trend? Closely look at the institutions and their respective powers and what that means in setting the trend.
4. Look at the Ethio-Eritrean ‘federal’ experience 1952-1962 and analyze it from the perspective of modern notion of federalism.
  - A. formally speaking what were the short comings
  - B. What were the political obstacles for its implementation and what events led to its collapse
  - C. What lessons can one draw from it? (the federal pact, impact of secession and relate it the post independence African struggle against colonialism and what the new nation-state model offered as a solution and what that means to others who want to follow similar pathway: secession/independence as a solution to all forms of injustice: does it really resolve the normative questions- the very key questions that trigger secession).

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**Chapter Two****Some Common Features Among Federations**

After discussing some of the factors contributing to the continued interest in federalism, this chapter in the following three sections elaborates some of the general features that one observes among polities called federations. It also discusses some concepts for the purpose of conceptual clarity. Because every federation operates within a specific local context, overemphasizing on those common characteristics does not explain why federations evolve in different ways. Therefore, the last section considers some of the extra-constitutional factors explaining this pathway. The main contribution of this chapter is in analyzing the proper balance that should exist between self-rule and shared rule in the federal systems in general and in Ethiopia in particular.

**2.1 INTRODUCTION**

Despite the horrific experience of interethnic tension and conflict following the end of the Cold War in the former USSR and Yugoslav federations, in the contemporary world, federalism as a political idea remains still popular for reconciling unity and diversity under a single political system. Some twenty-five countries of the world covering 40 per cent (two billion) of the population live in countries that claim to be federations. The European Union with its currently expanding vision seems to be evolving into a hybrid of confederal as well as federal institutions.<sup>1</sup>

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1 Raoul Blindenbacher and Ronald Watts, 'Federalism in a Changing World - a Conceptual Framework for the Conference' in Raoul Blindenbacher and Arnold Koller eds., *Federalism in a Changing World: Learning from Each Other* (Montreal and Kingston: McGill-Queen's University Press 2003) at 9; Ronald Watts, *Comparing Federal Systems*, 2<sup>nd</sup> edn., (Montreal and Kingston: McGill-Queen's University Press, 1999): 1-10; hereinafter called *Comparing Federal Systems*; Daniel Elazar 'From Statism to Federalism: A Paradigm Shift' *Publius: The Journal of Federalism* 25:2 (Spring 1995) at 15, hereinafter called *From Statism to Federalism*. Since 1999, there is indeed an international conference on federalism in which leading practitioners and experts gather and share experiences every two years.

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There are a number of reasons for this increased interest in federalism. Federalism as a political concept and federations in the form of institutions seem to provide ‘the closest institutional solution’ combining shared rule for some commonly shared purposes and self-rule for other purposes of regional interest in the world today. The reason is simply that there are double pressures calling on the one hand for larger political organizations due to rapid developments in transportation, social communication, technology and other shared values and due to growing awareness of worldwide interdependence. On the other hand there is pressure for smaller self-governing political units<sup>2</sup> established not only to guarantee expression to various forms of diversity but also in some cases resulting from ethno-linguistic dissatisfaction with the present organization and operation of the global world. Indeed, the late Daniel Elazar spoke of the world as in the midst of a paradigm shift<sup>3</sup> from a world of states (nation-states) to a world of diminished states. There is a global interdependence among highly unequal states and increased interstate linkages of a constitutionalized federal character. This development began after WWII but it was not until the collapse of the former Soviet Union that the extensive and decisive character of this paradigm shift became discernable to most people.

One could add to this the impact of globalization. On the one hand there is this trend towards an integration of economic and political forces which in a way affects the position of not only traditional nation-states but also existing federations. A good

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2 Ivo Duchacek, ‘Antagonistic Co-operation: Territorial and Ethnic Communities,’ *Publius: The Journal of Federalism* (Fall 1977): 4-25; Hereinafter called *Antagonistic Cooperation*; Watts, *Comparing Federal Systems*, *supra* note 1 at 4; Elazar, *From Statism to Federalism*, *supra* note 1 at 5.

3 Explaining this paradigm shift Daniel Elazar wrote, ‘it is not that the states are disappearing; it is that the state system is acquiring a new dimension. There are now networks of agreements that are not only militarily and economically binding for *de facto* reasons but are also becoming constitutionally binding *de jure*. This overlay increasingly restricts what was called state sovereignty and forces states into various combinations of self-rule and shared rule rather than limited into federations as we understand it today.’ States are now recognizing their interdependence and that rather than single centers there exist multi-centered decision-making units. Elazar, *From Statism to Federalism*, *supra* note 1 at 7.

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example is the impact of regional and global developments in the design of foreign affairs, for instance, in Germany and Switzerland.<sup>4</sup>

Although it is at times difficult to pursue it with a lot of force, federalism is also getting popular because it is employed as a means of solving ethnic conflicts. Earlier on, modernization and economic development were believed to absorb all sorts of diversity. But the ‘melting pot’ hypothesis and modernization at times simply reinforced rather than diminished forces of diversity. In situations where there is tension between those who want to maintain existing *status quo* and other forces that would like to restructure the state and even secede, federalism presents as a possible solution accommodating both interests. It has the potential to allow national minorities some measure of self-government within the contours of existing states.<sup>5</sup>

To this one may add the fact that the oldest federations in the West as well as some emerging stable federations like India have been able to survive and adapt to the changing realities in the world. The relative peace and stability together with economic prosperity contributed to attract the attention of those involved in state restructuring elsewhere in the world.<sup>6</sup>

## 2.2 FEDERALISM AND FEDERATIONS

Like many other concepts there is admittedly some difficulty in defining federalism. Within the context of the older federations, it might mean the joining together of some semi-autonomous units for some common goals. Within the context of the EU it might refer to the coming together of the bulk of European states and the emergence of new

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4 See chapter six.

5 John McGarry, ‘Federal Political Systems and the Accommodation of National Minorities,’ in Ann L. Griffiths ed., *Handbook of Federal Countries 2002* (Montreal and Kingston: McGill-Queen’s University Press, 2002) at 424.

6 Ronald Watts, *Comparing Federal Systems*, *supra* note 1 at 5.

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institutions combining confederal as well as federal features. Within the context of former communist federations, federalism may mean the existence of some features associated with the division of powers in constitutional form rather than in operational reality.<sup>7</sup> In the African context, federalism is associated with the colonial experience of divide and rule.<sup>8</sup> It might, therefore, mean different things to different people depending on historical and cultural context. Part of the explanation also comes from the fact that federalism has been the subject of study of different disciplines and different scholars have been studying different aspects of the same concept.<sup>9</sup>

Although earlier studies on federalism failed to make a distinction between federalism and federations,<sup>10</sup> it is now very common to observe such a distinction. Preston King in his pioneer study conducted in 1982,<sup>11</sup> and following him, Ronald Watts and some others<sup>12</sup> for instance distinguish federations from federalism. According to this distinc-

7 John Kincaid, 'Values and Value Trade offs in Federalism,' *Publius: The Journal of Federalism* 25:2 (Spring 1995): 30-31; Duchacek, *Antagonistic Cooperation*, *supra* note 2 at 14.

8 William Riker, *Federalism: Origin, Operation, Significance* (Boston: Little, Brown and Company, 1964) at 25.

9 For instance K.C. Wheare emphasized more on the importance of the existence of commonly shared institutions among federations and his study has been criticized as too legalistic, see K.C. Wheare, *Federal Government*, 4<sup>th</sup> edn. (London: Oxford University Press, 1963); Livingston on the other hand argued that the essential features of federalism are to be looked for, not in the shadings of legal and constitutional terminology but in the forces - economic, social, political and cultural - that have made the outward forms of federalism necessary. In short, federalism is a function of societies that is a territorially grouped diversity. William Livingston, 'A Note on the Nature of Federalism,' *Political Science Quarterly*, 67:1, (March, 1952): 84-87; still Blindenbacher and Watts acknowledging Livingston's contribution point out that it is also one-sided. They rightly contend that not only are institutions reflections of societies but once created they also influence the society that created them. One cannot deny the fact that the 1789 US federation, the 1848 Swiss federation and the 1995 Ethiopian federalism certainly were turning points in changing the political dynamic of the respective countries. In the two older federations by transforming confederations to modern federalisms and in the latter by restructuring the state based on federalism as well as on language. Blindenbacher and Watts, *supra* note 1: 12-13.

10 For instance William Riker employs in his book (note 8 above) 'centralized federalism' to mean federations and 'peripherized federalism' to refer to confederations, p. 5. William Riker also employs federalism to mean confederations, federations and the federal idea. 'The notion of federalism has existed from ancient times. Ancient and medieval federalisms succumbed rather quickly ... modern federalism has been notably successful' in this short quotation one sees the use of federalism to mean three things: the idea, confederate states and federations. William Riker, 'The Origin of Federal Government' in William Riker, *The Development of American Federalism* (Boston: Kluwer Academic publishers, 1987): 9-10. Hereinafter called *The Development of American Federalism*. In the famous *The Federalist Papers* the word federal was synonymous with confederations. See George Carey, *The Federalist, Design for a Constitutional Republic* (Urbana and Chicago: University of Illinois Press) p. 97; K.C. Wheare uses federalism to denote the actual system of governments (federations). *Supra* note 9: 9-10.

11 Preston King, *Federalism and Federation* (London: Croom Helm, 1982).

12 Watts, *Comparing Federal Systems*, *supra* note 1; Michael Burgess 'Federalism and Federation' in Michael Burgess, *Federalism and Federation in Western Europe* (London: Croom Helm, 1986); Alain-G. Gagnon, 'The Political Uses of Federalism' in M. Burgess and A. Gagnon, eds., *Comparative Federalism and Federation* (London: Harvester, 1993); Douglas Verney, 'Federalism, Federative Systems and Federations: The United States, Canada and India,' *Publius The Journal of Federalism* 25:2 (1995): 81-87.

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tion, federalism refers to an ideology:<sup>13</sup> a normative principle, while federations refer to institutions. Federation is descriptive concept referring to the actual system of governments.<sup>14</sup> Federalism as a political philosophy is essentially an organizing principle.<sup>15</sup> Deeply rooted in the Latin term *foedus*, federalism refers to the ‘coming together of humans as equals to establish political bodies in such a way that all reaffirm their fundamental equality and retain their basic rights.’<sup>16</sup> Perhaps this is a bit exaggerated in the sense of emphasizing too much on the equality of the partners to the federal bargain, but it is true that federalism is a compact referring to the unity among political entities, while at the same time retaining the autonomy of the entities.

Federalism as an organizing principle advocates a ‘multi-tiered government combining elements of shared-rule through common institutions for some purposes and regional self-rule’ for constituent units for some other purposes, thereby accommodating unity and diversity within a larger political union.<sup>17</sup> The essence of federalism as a normative principle is the perpetuation of both union and autonomy, in the latter for accommodating, preserving and promoting distinct identities within a large political union.<sup>18</sup>

Federations on the other hand refer to tangible institutional facts. They constitute the institutional and structural techniques for achieving one of the goals of federalism.<sup>19</sup>

Federations are used to describe actual systems of governments. Watts has introduced a

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13 ‘Is to mean the recommendation and sometimes the active promotion of support for federation. It is ideological in the sense that it can take the form of an overtly prescriptive guide to action.’ Federalism seeks federation but to achieve diverse ends and values. In the real world, the commitment to federations represents more a response to specific interests and problems than does a general ideological desire to achieve some abstract notion of democracy or freedom. Federalism has been examined as a political ideology in the sense that it reflects values and benefits, which recommend specific forms of federation. The particular type of federation prescribed is determined by the interests that the framers and the actors want to achieve. Thus, federalism is not as such a universal value. See for more Michael Burgess, ‘Federalism as Political Ideology: Interests, Benefits and Beneficiaries in Federalism and Federation,’ in M. Burgess and A. Gagnon eds., *Comparative Federalism and Federation* (London: Harvester, 1993): 102-113.

14 King, *supra* note 11 at 74.

15 *Ibid.*

16 Daniel Elazar, *Exploring Federalism* (Tuscaloosa, AL: University of Alabama Press, 1987): 2-7.

17 Blindenbacher and Watts, *supra* note 1 at 9.

18 Watts, *Comparing Federal Systems*, *supra* note 1: 6 and 17.

19 King, *supra* note 11 at 76; Burgess, *supra* note 12: 15-17. As will be discussed later, federalism can have centralizing or decentralizing trends and several values.

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third classification: federal political systems refer, according to him, to a whole spectrum of more specific non-unitary forms of governments ranging from decentralized system of governments, federations to confederations and beyond.<sup>20</sup> This term is also descriptive, which refers to a broad category of political systems, which somehow incorporate albeit faintly, the federal principle. In short, federal political systems suggest that there is more than one way to apply federal principles. Within such genus of political systems, federations represent one type of species.

The distinction referred to between federalism as ideology and federations as political institutions, should not, however, imply that the two are unrelated. Federalism as a normative principle no doubt influences the institution established in political reality. Indeed, it is not wrong to assume that federal institutions, to a certain degree enshrine an ideology, although such institutions may not necessarily and wholly reflect the norm on which they are based.<sup>21</sup> King has rightly remarked, ‘the normative orientation affects the institutions’.<sup>22</sup> He also remarks that there may be federalism without federations, but there can be no federations without some matching variety of federalism. Some form of federalism is always implicit in any given federation. This is to imply that federalism could still be manifested, for instance, in decentralized government forms, or confederal arrangements. This point hints to the fact that it remains as an important organizing principle of polities. But it is also important to note

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20 Watts, *Comparing Federal Systems*, *supra* note 1 at 6. This broad concept called federal political systems refers to all sorts of multi-tier governments. Federations constitute one among them. Others include, federacies and associated states. In the former a smaller political entity is linked to a larger one, usually a former colonial power, but the smaller unit retains considerable autonomy, perhaps more than is constitutionally granted to constituent states in a federation, in return for a minimal role in the government of the larger one. It is based on a bilateral arrangement and is given to a part of a state hence creating asymmetrical self-government. The latter refers to a more or less the same kind of relationship except that in this case the arrangement can be dissolved by either of the units acting alone. See *ibid*: 7-9; R. Watts ‘Forward: States, Provinces, Länder and Cantons: International Variety Among Sub-national Constitutions,’ *Rutgers Law Journal* 31 (Summer 2000): 941-958; John McGarry, *supra* note 5: 423-424.

21 King, *supra* note 11: 74-75.

22 *Ibid.*, p. 74.



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that the federalism behind it is often faintly reflected perhaps nothing more than the promotion of that degree of support for local units within a centralized polity.<sup>23</sup>

Bearing this distinction in mind, the focus of the following section is principally limited to discussing some of the shared characteristics that one can find among federations. In the process of discussing those shared features, concepts like confederalism and decentralized systems are also incidentally considered for the purpose of conceptual clarity.

### 2.3 SOME COMMON FEATURES AMONG FEDERATIONS

There is admittedly difficulty in defining what we earlier noted vaguely as federations. Like many concepts and institutions, federations are in a process of change and the ways they manifest themselves in different polities far from the same.<sup>24</sup> Making things worse, governments called federations have existed and continue to exist in such an overwhelming variety of forms that any attempt to include every one of them runs the risk of encompassing virtually any kind of government. Nonetheless, many continue to speak and write about federations believing that they share certain common characteristics. The purpose of the following section is part of the exercise in search of common features among some federations.

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23 *Ibid.*, p. 76, Perhaps this explains why federations manifest themselves differently in different societies. It might also explain, albeit weakly, why federations change and develop over time in a certain way. Federations move; they change and in this process they may depart from the normative orientation. See also Michael Burgess 'Federalism and Federation' in Michael Burgess and Alain-G Gagnon eds., *Federalism and Federation: a Reappraisal Comparative Federalism and Federation: Competing Trends and Future Directions* (Hemel Hempstead: Harvester Wheatsheaf, 1993): 12.

24 This will be clear from the discussions in chapters six and seven.

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**2.3.1 Division of Power**

No one contends the fact that federations are distinguished from other polities primarily by the fact that political power (commonly related to legislative, executive, judicial and financial functions) is constitutionally divided between the federal government and the states, and that both orders of government are autonomous with respect to the powers granted to them. This is indirectly based on the dual principle implicit in every federation of the desire to be united and to be autonomous. A common feature among federations has been the existence of, powerful motives to be united for certain purposes, on the one hand and deep-rooted motives for autonomous states for other purposes, on the other. This underlying notion of federations has implications on the design of federations through distribution of powers.<sup>25</sup> The federal government is often empowered with those powers that are shared in common and the states with those powers considered relevant for the expression of regional identity, hence the famous expression that defines federations as shared rule through common institutions and self-rule for constituent units. Through the former, one of the cardinal values, unity is promoted and through the second, the other cardinal value, diversity is equally promoted.<sup>26</sup> It is important to emphasize that in federations, the units are not only entitled to regional self-rule or administration by right but they also share in the process of common policy-making at the center.<sup>27</sup> The principle of power sharing inherent in federalism implies shared competencies and shared institutions through which the constituent units are accorded the right to be included in policy-making at federal level. Institutions are set up to protect the existence and authority of both orders of governments.<sup>28</sup> As will be illustrated in the next chapter and in chapter five, the

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25 Watts, *Comparing Federal Systems*, *supra* note 1 at 17.

26 *Ibid.*, p. 17, 35.

27 Elazar, *supra* note 16: 6-7. See chapters three and six as to how the constituent states in Germany and Switzerland influence even foreign affairs.

28 Watts, *Comparing Federal Systems*, *supra* note 1 at 17.

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notion of power sharing is not well-entrenched in the federal system in Ethiopia. In general, however, it appears that the constitutionally guaranteed division of power between the federal government and the states, in which both exercise their power autonomously within their own spheres, is a settled principle identifying federations from other forms of government.

### ***2.3.1.1 The Notion of Co-ordinate Relationship***

However, there is an endless debate as to whether in federations, in which power is divided between one center and perhaps two or more states, the relationship between the center and the states is *co-ordinate*, *balanced*, only *autonomous*, or even at times *subordinate*. The traditional thinking as presented by K.C. Wheare in his pioneer work states as follows: in federations ‘the constitutional division of power between the center and the states creates a relationship that is co-ordinate [co-equal] rather than a subordinate one.’<sup>29</sup> Although many have criticized his work as too legalistic, in actual fact he developed the idea of co-ordinate federal-state relationship from the unity-diversity combination deeply engrained in the federal principle. The following paragraph clearly illustrates this point.

It is important that the units in a federation should have produced for themselves stable governments with some history and tradition of working in the regions and with some roots in the people. Yet, this factor needs to be nicely balanced in the sum of forces at work in the union. People must have an established government to which they can be attached, but that attachment must not be too strong. Therein lies always a possible source of weakness in federal government that state loyalty may prevail over general

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<sup>29</sup> K.C. Wheare, *supra* note 9: 1-2; Ronald Watts also subscribes to this approach. He states: ‘federations represent a particular species in which neither the federal nor the constituent states of government are constitutionally subordinate to the other’. Watts, *Comparing Federal Systems*, *supra* note 1 at 7.

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loyalty. More likely is this to be true where state boundaries coincide with racial, linguistic or national boundaries. It is obviously an advantage that the units in a federation should be homogenous, as it creates a feeling of common attachment to the new states: nothing strengthens a regional government so much. But the danger is that the region may insure a loyalty greater than that of the union and that in time of conflict the union may fall apart. *That the two loyalties must be there is the pre-requisite of federal government, but that one should not overpower the other is also a pre-requisite.*<sup>30</sup>

In short his thesis is that there should exist a balance between the forces of unity and the forces for diversity. That the two forces should be co-equal (co-ordinate) and one should not prevail over the other.

Ronald Watts's study of post war commonwealth federations equally reinforces the importance of not only the dual loyalty to unity and diversity but also the point that there should exist a balance between the two.

Two features stand out as common to them all. First, the geographical distribution of diversity within each of these societies with the result that demands for political autonomy were made on a regional basis and second, there existed at one and the same time powerful desires to be united for certain purposes. There existed the duality of demands for union and regional autonomy and the relative *balance* or *equilibrium* in each between the conflicting forces for unity and diversity.<sup>31</sup>

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30 *Ibid.*: 50-51 (emphasis by the author). Livingston states: 'the difference must not be too great, else the community may break up into independent groups. Federalism cannot make coherent a society in which the diversities are so great that there can be no basis for integration.' Livingston, *supra* note 9 at 89.

31 Ronald Watts, *New Federations: Experiments in the Common Wealth* (Oxford: Clarendon Press, 1966): 92-93. Hereinafter called New Federations.

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The origin of this co-ordinate theory seems to go back to Hamilton's essay on *The Federalist Papers* No. 34.<sup>32</sup> Responding to the question on the position of states in the US Constitution, Hamilton wrote 'all apprehensions on the score of usurpation ought to be discarded. The general powers of the new government are limited and in all unenumerated cases the states would be left in the enjoyment of their *inviolable sovereignty* and independent jurisdictions. As for those areas where sovereign power is divided, the states would continue to enjoy *coordinate authority* with the national government.'<sup>33</sup>

As can be observed, behind the more formal approach of constitutional division of power between the federal government and the states is the federal idea of unity-diversity combination, a combination so complex that it can manifest itself in many ways. It is true that a federation is born when the political units in a state possess some element of diversity or identity which create in them the desire to maintain an autonomous existence, while at the same time there are certain factors of vital importance that all these units share in common and for which matter they desire a united existence. This presupposes two essential conditions for federations. First, the units involved must have many interests in common because of which they are convinced that there is good reason to unite and secondly, the units also possess by virtue of historical,

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32 The *Federalist Papers* consist of 85 essays written in 1787 and 1788 by James Madison, Alexander Hamilton and John Jay. Their purpose was to convince the limited electorate of New York to vote for the new constitution. *The Federalist* No. 34 in Roy Fairfield ed., *The Federalist Papers* 2<sup>nd</sup> edn. (Garden City: Anchor Books, 1966) 88; see also Rufus Davis, *The Federal Principle: A Journey Through time in Quest of a Meaning* (Berkeley: University of California Press, 1978) at 85.

33 Davis, *supra* note 32 at 85. Yet one needs to note that these papers were written to pacify the fears of those who opposed the move towards centralization. Otherwise Davis, who has made a comprehensive review of the authors of *The Federalist Papers*, wrote, 'from the outset and almost to the very end of the Philadelphia convention, the attempt to explain the relationship of the national government to the states, even by those most ready to compromise on almost everything but the idea of national government was translated in the language and analogy of hierarchy, primary/subsidiary, supremacy/inferiority, independent/dependent, general/limited power. Rarely if at all were the states spoken of as coordinates or co-equal institutions.' Besides, *The Federalist Papers* is, a work of 85 papers manifesting partisan as well as the personal positions of the victors of the convention, the chief ones being Hamilton and Madison. See for instance, *The Federalist Papers* No. 14, where Madison states, 'it is to be remembered that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects which concern all the members of the republic but which are not to be attained by the separate provision of any of the subordinate governments'. Davis, *supra* note 32: 85, 26, 46.

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political, social, cultural, linguistic, economic or other factors of diversity, the desire to look for an expression of their diversity. As far as those elements considered vital for the continuity of diversity are concerned they are not ready to forgo their right to be different. They retain their autonomy in respect of matters in which they differ from one another.<sup>34</sup> But this does not say much about the relationship between the two.

Reinforcing the co-ordinate principle Dikshit states:

Faced with the circumstances of commonly shared interests among the states for which they are ready to assign to the federal government, and diversity in terms of cultural, historical, linguistic or economic, which they want to retain, the units enter into a compromise to create a half-way house between complete unity and complete separation and a federation results. The basic problem of federations has traditionally been for the federations to keep the centrifugal and centripetal forces in *equilibrium* so that neither the planet states shall fly off into space nor the sun of the central government draw them into its consuming fire.<sup>35</sup>

More recently G. Smith has reiterated the idea of federalism as a doctrine of balance aiming at finding equilibrium between forces of centralization and decentralization. The federal idea in short is generally conceived as a *compromise*, between unity and diversity, autonomy and sovereignty, the national and the regional.<sup>36</sup>

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34 R. Dikshit, *The Political Geography of Federalism: An Inquiry into Origins and Stability* (Delhi: Macmillan, 1975) at 219.

35 *Ibid.*, 4, 219.

36 G. Smith, 'Mapping the Federal Condition: Ideology, Political Practice and Social Justice' in Graham Smith ed., *Federalism: the Multi-ethnic Challenge* (London: Longman, 1995): 5-6. W. Riker, one of the distinguished writers on federalism, limits the origins of federations to only two reasons. According to his famous 'law of federations' 'the necessary conditions in the federal bargain are that politicians, both those who offer and those who accept the bargain seek, to meet an external military or diplomatic threat or to expand militarily or diplomatically. It is important to understand the force of this law of federal origins. If framers overlook these necessary conditions their federations are likely to fail.' Riker, *Development of American Federalism*, *supra* note 10 at 3. However, Riker himself later conceded that this may not necessarily explain all federations. In the case of Nigeria, it was formed, although there was neither a military threat nor expansionist ambition and his thesis seems questionable but at the same time he doubts if Nigeria is a federation at all. However, protection or expansion may be attained without necessarily joining as formal federations, see

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The constitutional division of power between the federal government and the states is part of the design to erect a common central government for purposes that are best served in common, but at the same time also demand institutions that maintain local decision-making and guarantee autonomy in respect of matters that are served best by such autonomous units.<sup>37</sup> The duality resulting from unity and diversity is the one driving factor for polities that consider federations as institutions forging the two together. If this is translated into a constitutional formula, the shared interests among the states are assigned to the federal government during the federal bargain and the elements of diversity, which could be manifested in many ways in each federation and for which the states want to retain autonomy, are left for the states in the same process. Federations in theory are then expected to reflect this unity-diversity combination among others in the constitutional division of powers and because the two have to be balanced or that one should not have power over the other, the case for the co-ordinate relationship between the federal government, representing the forces of unity, and the states, representing the forces for autonomy emanates.

Preston King on the other hand contends that federations, although based on the ideology of unity from diversity, are rather fashioned to signify some kind of imbalance, more specifically, to establish federal supremacy, than a co-ordinate or balanced relationship between the center and the states.<sup>38</sup> His point is simply that the

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for instance Davis *supra* note 32: 132-133. Against Riker's thesis, Dikshit wrote, 'we do not think that the military condition is a necessary condition in all cases of federations. Today with the rise of modern federations and its further course of integration necessitated by the rise of large scale industrial economy and globalization, military security can no longer be sufficient reason to explain federations. The purposes that bind federations are not narrowly limited to political or military situations.' Dikshit, *supra* note 34 at 35. More importantly, such an interpretation overlooks the central role of federations in accommodating diversity based on ethno-linguistic demands for autonomy. In the case of India for example, it is hardly acceptable to explain the federation's survival in light of military or expansionist theory. As Davis remarked, 'cultural diversity alone made unitary government in India unthinkable.' Davis *supra* note 32 at 137.

<sup>37</sup> Dikshit, *supra* note 34 at 219.

<sup>38</sup> King, *supra* note 11: 59-60; 113-120; despite this generalization, however, John Kincaid argues that there are bound to exist differences in emphasis on either unity or diversity depending on several factors. It all depends on the values the federal system wants to achieve. In some cases the values to be achieved may lean towards diversity, which opposition may label separatism or may lean towards unity which opponents may label centralism. Kincaid, *supra* note 7 at 32. For the overall trend of federal centralization see chapters six and seven.

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co-ordinate theory is theoretically less convincing and is contradicted by federal practice.

The idea of federations as reflecting some form of balance between unity and diversity or the national and the regional, takes us back to the wider notion of federalism as an ideology briefly considered earlier. King points out that federalism as ideology reflects at least three different orientations: centralist, decentralist and an appeal to balance.<sup>39</sup> Centralist ideology in the abstract may lead to a complete integration (absolutism) among the states but is in practice limited to a more feasible form of integration that is partial and which does not attempt to be absolute. This principally reflects the process of center-seeking federations such as the United States and Switzerland. Federalism as an ideology served in the two polities to move towards a more centralized system compared to their previously loose confederal arrangements. Recently, the centralizing ideology has taken another form: ‘universalism’ referring to the normative thought about the desire for ultimate unity of mankind based on the assumption that it is only through global democratization and by working towards embarking on world citizenship that chaotic dangers of political fragmentation and uneven economic development will be overcome. Such universalist thinking appears to be behind the creation of larger political units.<sup>40</sup>

The decentralizing ideology again originally associated with the 1949 West-German federation theoretically refers to the opposite of complete integration: complete anarchy. But as complete integration is a rare phenomenon so is complete decentralization. In practice it aims at creating a less powerful center. Owing to external pressure or due to pressures from within, polities may decide to establish a federation from a previously single central power. Recently as there are calls for

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39 King, *supra* note 11: 20-21.

40 Smith, *supra* note 36 at 5.



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universalism, there are equally calls in which its advocates have concerned themselves with a particular polity demanding greater devolution of power towards self-governing units.<sup>41</sup>

The third observation is the view that considers federalism as a doctrine of balance or of co-ordination. We have already noted the remarks by Wheare, Watts and Dikshit emphasizing the point that in federations neither the forces of unity nor of diversity should predominate. Recently Smith wrote ‘more commonly federalism has been conceived as a doctrine of balance, it is bound up with the goal of finding an equilibrium between forces of centralization and decentralization reflecting the societal desire for union ... the federal idea in short is generally conceived as a compromise between unity and diversity, autonomy and sovereignty, the national and the regional.’<sup>42</sup>

### ***2.3.1.2 Limitations to the Co-ordinate Theory***

It may be theoretically easy to state that federalism as an ideology of balance guides the working of federations. Political power may be best to a nation if kept checked between the two opposing forces of centralization and decentralization. But as a matter of federal constitutional law and federal practice federations are clearly established with the federal government having some predominance over the states.

Dikshit, who expounded and extensively reviewed the concept of co-ordinate relationship between the federal government and the states, has in the end admitted, albeit hesitantly, that although the balance is a necessary prerequisite, it should be so that the forces for unity slightly dominate over those for autonomy. The states merge into a federation only when the centripetal forces in some sense prevail over the centrifugal

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41 *Ibid.*

42 *Ibid.*

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ones. If the communities involved are not prepared to submit themselves to an independent government, they have not achieved the federal requisite of having common interest, for which they entrust upon the central government.<sup>43</sup> William Riker too states, ‘the desire for either protection or participation [two reasons he considers vital for uniting within a federal system] outweighs any desire they may have for independence.’<sup>44</sup> Of course this does not imply that the operation of the forces of unity and diversity perfectly concur with the formal and constitutional structure. The appeal of federations and federalism in the modern world owes much to its capacity for evolution. Depending on the combination of the factors for unity and diversity, the nature of the resultant federation may differ in operation but as far as the constitutional design is concerned, as one writer puts it, in federations the states create a superior general government to co-ordinate their actions, but retain some freedom from control by that superior.<sup>45</sup> One also needs to note that federalism does not determine the extent of the scope of state autonomy. The system remains still federal even if all decisions except one are made at the federal government level.<sup>46</sup>

Ivo Duchacek reiterates the same idea. He states that although federal constitutions recognize the division of authority between the federal government and the states, ‘their respective powers are none the less not and have not been meant to be equal: the central government is clearly favored.’<sup>47</sup> Where federations are considered as evolving from a co-ordinate relationship between the federal government and the states, it is implied that neither intrudes upon the other, that neither is subject to the other, and that

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43 Dikshit, *supra* note 34 at 220.

44 Riker, *supra*, note 10 at 13.

45 *Ibid.*, p. 3; for more on how the notion of dual sovereignty slowly evolved into a more centralized and powerful center as the regime of cooperative federalism or as some would prefer to call it ‘coercive federalism’ somehow replaced it, although not completely, see chapter seven.

46 Riker, *supra* note 10 at 9.

47 Ivo Duchacek, *Comparative Federalism: The Territorial Dimensions of Politics* (London: Holt, Rinehart and Winston, 1970) at 233; Nicolas Schmitt writing on Swiss federalism also wrote ‘in terms of structure the federal state is one in which a plurality of minor constitutional organs are subordinate to but participate with a major constitutional organization.’ Nicholas Schmitt, *Federalism: The Swiss Experience* (Pretoria: HSRC Publishers, 1996) at 10.

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each has final say in its own domain. It implies that there is an equality of rank between the federal government and the states, which presumably means that they can never really be subject to the federal government. Where any conflict exists, it must be left open for any party to interpret. If both authorities are treated supreme and final within their respective spheres, it would imply only a mere treaty arrangement.<sup>48</sup> In the established federations, however, neither government is granted absolute sovereignty. Both orders of government submit to the federal constitution, and within that framework the constitution reserves the last word, when the authority of both orders come into conflict, to the federal government. It is not by coincidence that many federal constitutions provide for the supremacy clause, which, among other things, states that in case of conflict between federal and state law, the former prevails.<sup>49</sup>

Federations are viewed from a wider perspective as single political units with a coherent decision-making procedure. Theoretically speaking a perfect equilibrium or equality between the forces supporting unity, including federal unity and those opposing it, strictly implies the failure rather than the success of any projected union.<sup>50</sup> This is to state that where unity is politically desired, it results from imbalance. Where the forces of national integration are equally balanced against those supporting the continued independence of the units, the result can only be a failure of the union. If federalism is advocated as a balance implying equality between them in which neither may prevail, it is simply an anarchy representing the actors within the system enjoying perfectly equal power so that none, not even a majority, can prevail.<sup>51</sup> As a result King concludes that the formal promotion of federalism as a political philosophy of balance is normally incoherent.<sup>52</sup> It is a single political union, not a conglomerate of

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48 King, *supra* note 11 at 117.

49 See US Constitution Art. VI; Swiss Constitution Art. 49; German Basic Law Art. 31.

50 King, *supra* note 11 at 61.

51 *Ibid.*, at 23.

52 *Ibid.*, at 44.

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independent states. The federal government is perceived as a coherent decision-making procedure which incorporates the states in various ways, and thereby it establishes the federal center to be supreme, without construing this to mean the central government as eroding the autonomy of the states or excluding the participation of the states. In short, a perfect balance can only lead to a deadlock.

As stated earlier, the common explanation has been that in a federation, the component units enjoy a co-ordinate power with that of the federal center. If one construes this widely the notion of co-ordinate power means that federations involve dual sovereignty. Although it may be sometimes tempting to state that the states in a federation are sovereign, such a declaration is incorrect. Sovereignty as a matter of political discourse lies in those who are considered to be sources of authority and if we are talking about modern polities, this means in the people. It is true that this is somehow modified in federations. Not only are they founded on the citizen as a source of independent authority for the federal government as well as the states, federations also incorporate the principle of territorial representation. In this sense, the states have some role in establishing the federation, but this is far from saying that they are sovereign. In terms of constitutional federalism too, we talk of a supreme constitution to which both the federal government and the states should submit and in this respect both are strictly speaking not sovereign. They are only autonomous in as far as they have the power to act freely within the spheres assigned to them by the constitution. Of course, as far as international relations are concerned it is only the federal government that is treated as sovereign.

In addition to the theoretical difficulty, one may add the formal constitutional approach and practice of federations in support of the assertion that federations are not strictly speaking based on the doctrine of balance. The debate between the advocates of the

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nationalist theory also known as national democratic theory and the advocates of states' right, also known as the compact theory in the US during the 19<sup>th</sup> century and between the seceding catholic and protestant cantons in 1847 in Switzerland are illustrative in this regard. In the former, the tension between the advocates for a more centralized and strong center on the one hand and those advocating state sovereignty, in case the states felt that the center had violated the terms of the compact, led to a bloody Civil War from 1861-1865. The division over the origin of the federal system was critical. The National Democrats argued that the federal system was a creature of the American people while the advocates of the compact theory held the federal system was a product of a compact between the different states and the states are the fundamental units of the federal system. In short, the federal government did not create the states, rather the states created the federal government.<sup>53</sup> The outcome of the war proved a complete victory for the federal forces. Not only was the union saved from disintegration but also the ultimate supremacy of the federal government was established.<sup>54</sup>

In Switzerland too, the issue of federal versus cantonal supremacy was at the heart of the conflict in 1847. In response to the wave of change and liberalism the country faced, seven conservative Catholic cantons formed the league of seven for mutual protection after withdrawing their representatives from the Diet. They established a

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53 Sanford Schram, 'United States of America' in Ann Griffiths ed., *Handbook of Federal Countries 2002* (Montreal and Kingston: McGill-Queen's University Press, 2002) at 345; *The Federalist Papers* No. 39 tries to reconcile the tension between the two theories. In so far as the constitution is to be founded on the assent and ratification of the people of America given by their deputies elected for this special purpose and this assent and ratification is to be given by the people not as individuals but as composing the distinct and independent states to which they respectively belong, the act establishing the constitution will not be a national but a federal one. In relation to the source from which the ordinary powers of government are to be derived, the lower house will derive its power from the people of America based on population size, in this sense it is national, not federal. The senate is federal, not national. The president's election process appears to be of mixed character. The amendment process is neither wholly federal, nor wholly national. Neither the consent of all states nor a simple majority is required to amend it. By federal we mean that the operation of the government is supposed to consist in the political bodies composing the confederacy, when we say national, it lies in the citizens in their individual capacities.

54 B.M. Sharma and L.P. Choudhry, *Federal Polity* (London: Asia Publishing House, 1967): 185-186; Wheare, *supra* note 9: 2-3.

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union known as the ‘*Sonderbund*’ and withdrew from the confederation. A serious threat to the confederation was posed that led to a similar civil war between the center and the catholic cantons. The central government won the war and established similarly its supremacy over the seceding cantons.<sup>55</sup> It is in this context that the 1848 federal constitution was adopted.

In both cases their federations have only been adopted and maintained where the desire for union is significantly greater than the desire for independence. Where the two desires are approximately balanced, as one notable author wrote, federal political institutions are aborted.<sup>56</sup> There is no slightest doubt about the federal government’s supremacy in India. Indeed, the debate has been simply whether India is federal at all as it has so many centralizing features. It was established under a very strenuous tension following the partition of Pakistan and the bloody conflict between the Muslims and Hindus. It is only if one understands this context that one may appreciate to a certain extent the centralizing features. The founding fathers of the Indian Constitution were forced to declare India a ‘union’ and not even a federation.<sup>57</sup>

It is not by sheer coincidence, therefore, that many federal constitutions declare the supremacy of federal law over state law.<sup>58</sup> It is also worth noting that such declarations are not limited to concurrent powers. They are often very general declarations reserving the final say to the federal government and one may find separate declarations regarding concurrent powers. Almost all federations clearly provide the supremacy of the federal government over the states. It may be difficult to attach the significance of these declarations to every single federal decision but at least they

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55 Sharma and Choudhry, *supra* note 54 at 187.

56 Davis, *supra* note 32 at 141.

57 G. Parthasarathy, ‘Federalism and Constitutional Processes in India’ in Ian Copland and John Rickard eds., *Federalism: Comparative Perspectives from India and Australia* (New Delhi: Manohart 1999) at 285.

58 See, for instance, United States Constitution Art. VI; German Constitution Art. 31 and Swiss Constitution Art. 49.

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reflect the fundamental point that at the time of the federal bargain the forces of unity prevailed over those of autonomy and this is of great symbolic importance.

This is not to imply that the states in federations are in a precarious position in their relations with the federal government. As far as those powers assigned to them by the federal constitution are concerned, however limited those powers may be, they remain autonomous. It is the core of the federal principle that the political as well as the territorial autonomy of the states has to be respected.

In sum, federations strive to forge unity and build a nation while at the same time preserving the autonomy of the states: reflecting the various elements of diversity emanating from culture, tradition, religion, language or otherwise. To give expression to this striving towards unity from diversity, those interests which are of common interest to all the federal parties are entrusted to the federal government while matters that are vital to the preservation of a separate identity are left to the authority of the states.<sup>59</sup> The federal government takes responsibilities that have a nationwide implication and are applicable to all states and citizens while the states are empowered to legislate on matters applicable only to the state's territory. The division of power in a federation is based on a particular kind of constitutional framework. Political power is constitutionally divided between the federal government and the states and both operate autonomously within the spheres allotted to them,<sup>60</sup> yet under a general saving clause of federal supremacy. The exclusive hallmark of every constitutional system that purports to be federal is the presence of an explicit division of power in the constitution. Of course, the functions of the two governments are never completely

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59 D.J. Kriek, 'The Theory and Practice of Federalism' in D.J. Kriek, *Federalism the Solution?* (Pretoria: HSRC Publishers, 1992) at 16.

60 Elazar, *supra* note 16 at 34.

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delineated from one another, as it is not easy to state what matters are within the sphere of the federal government and within the states respectively.<sup>61</sup>

### ***2.3.1.3 Confederations, Federations and Decentralized Forms of Government***

Essentially, it is the constitutionally guaranteed autonomy of both the federal and state governments and their ability to act directly upon the citizens that distinguishes federations from other looser forms of alliances like confederations. The latter permit joint actions regarding some matters but the allied governments retain full authority. It is good to note that in confederations, the states retain almost the whole of their sovereignty, not only in their own independent jurisdiction but also even in those powers assigned to the center. There is no single and independent executive as such except the group of state delegates and the decision-making procedure too is designed to preserve the sovereignty of the state governments, requiring either unanimity or a qualified majority.

For instance, the United States confederation or the Articles of Confederation as it is called (1776-1789), incorporated the idea of division of powers. Indeed, Congress was authorized with a list of powers, but the exercise of such powers at the center was dependent upon the states. It was composed of delegates appointed by each state. The delegates were not only appointed by the states but also recallable before the year of office expired. Furthermore, the states maintained the right to fully instruct their delegates. Besides, concurrence of the states was necessary not only for the passing of major decisions but also for the subsequent execution.<sup>62</sup>

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61 See Davis, *supra* note 32 at 142; Wheare, *supra* note 9: 15-16.

62 Wheare, *supra* note 9: 3-4. After Independence on July 4, 1776 the thirteen American States established on November 15, 1777 the Articles of Confederation that were later replaced by the 1789 federal Constitution. See Sharma and Choudhry, *supra* note 54: 63-64.



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Consistent with other forms of earlier alliances, the power of Congress was completely dependent on the state-appointed delegates. The states made Congress complete servant of their will. Not only was independent central government absent, but except the few less important powers that could be decided by majority, the majority of the issues needed the approval of a qualified majority (9/13) and the overall structure reveals that ‘Congress could make treaties but could not persuade the states to honor them; it could authorize foreign trade but could neither regulate nor tax it, it could call for money but not collect it, borrow money but not repay it, print money but not support it.’<sup>63</sup> The real trouble arose out of the states’ desire to retain their supremacy. An extraordinary majority was required for decisions on foreign affairs, the military, and borrowing which means that five states could veto. In short, the real decision on important matters was pushed back from Congress to the states.<sup>64</sup>

In short, the principle of organization upon which the confederation was based was that of subordination of the center to the states. As a result, the central government had no direct authority to act upon the people.<sup>65</sup> Emphasizing the retention of almost complete sovereignty by the states Hughes defined confederations as ‘the sharing of any institutions of government between two or more unitary states.’<sup>66</sup>

It was the inadequacy of this arrangement that led to the federal Constitution of 1787. Indeed, the modern idea of federations was invented at the famous convention in Philadelphia (May-September 1787).<sup>67</sup> The convention made a substantial leap forward

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63 Davis, *supra* note 32 at 75.

64 William Riker, ‘The Invention of Centralized Federalism’ in Riker, *Development of American Federalism*, *supra* note 10 at 18.

65 Wheare, *supra* note 9: 3-4.

66 C. Hughes ‘Cantonalism: Federation and Confederacy in the Golden Epoch of Switzerland,’ in M. Burgess and C. Gagnon eds., *Comparative Federalism and Federation* (London: Harvester 1993) at 155.

67 Riker, *supra* note 10 at 18. According to Riker ‘as practical men, federalism, the result of the convention was an unanticipated consequence of practical judgment of the founders. The compromise between the forces for unity and for states’ rights was motivated more by practical expedition to save the union from dissolution than the intention to improve the confederation. It is hardly possible to attribute the conventions success as something resulting from the intent to create

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from the loose forms of alliance to the system of government widely known today as federation.

The pivotal actors in bringing about the Philadelphia convention were the Virginians, who had already started to amend the Articles of Confederation. They submitted their plan, which became the basis not only for the discussion but its revised plan ultimately became the United States Constitution. The plan provided for a government of three branches, somewhat independent of each other and each endowed with national authority; a two-house legislature subject to a conditional veto by an executive, and an independent judiciary.<sup>68</sup> Indeed, according to Riker, there was nothing federal about the Virginia plan, the goal of the Virginians was to establish a centralized unitary government.<sup>69</sup>

However, as the convention proceeded, the Virginia plan was revised on crucial points owing to the insistence of the confederal forces threat of withdrawal. Among others the plan was reversed, on first, the representation of the states: the Virginia plan proposed proportional representation based on population, while others insisted on the equal representation of states, an idea reminiscent of the Articles. The issue of whether states were to be represented equally or according to population was settled by a grand compromise. Proportional in the lower house and equal in the upper and at this point the idea of preserving the states was somehow injected into the new system.<sup>70</sup> The second point was the manner of election of the upper house. Here, too, the principles of the Articles were retained as indispensable. Thirdly, there was an urge for overall

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federalism. They were intending to centralize power at the expense of federalism, not to preserve federalism at the expense of centralization. The invention resulted in the process of trying to transcend the limits of the alliance, and after series of compromises.' Riker, *supra* note 10: 40-41.

68 For a detailed account of the history of the 1787 model and its predecessor see Davis, *supra* note 32: 74-100.

69 Riker, *supra* note 64 at 22. On the other hand, the New Jersey Plan provided for something close to the Articles of Confederation, only with minor improvements.

70 *Ibid.*, p. 30.

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central government veto over the states which was moderately settled with the inclusion of the supremacy clause.<sup>71</sup>

What came out of the convention was a fully national plan, but it was federal because in some way, it provided for the survival of the states. The states remained politically significant.<sup>72</sup> The tension between the two plans, the Virginia plan which called for a radical cure to the Articles calling for national government and the New Jersey plan which insisted on some adjustment to the Articles, led to a practical compromise. The final document read on the last day of the Convention (September 17, 1787) was in every sense a bundle of compromises, a mosaic of second choices on almost everything except the establishment of the national government.<sup>73</sup> The federation was a compromise between those who advocated for retention of state rights and those who advocated for a more centralized government, with the latter slightly prevailing over the former.

As to the contributions of this convention Davis states:

What is minimally understood of the 1787 model is this: that the burden of state is divided between two popularly elected governments: the national and the states, the national government is equipped with a bicameral legislature based on the two distinct principles, that of population representation and territorial representation; it incorporated the principle of duality under a single constitutional system of two distinct governments: national and state, each acting on its own right directly on the citizen; that subject to the provisions of the constitution each government is free to act independently or in concert with the other; that judicial disputes between the national

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71 *Ibid.*, p. 36.

72 Riker, *supra* note 64 at 40.

73 Davis, *supra* note 32 at 114.

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government and the states will be settled by the courts; that the national supremacy will prevail where two valid actions national and regional are in conflict; that the pact is contained in a written constitution; and lastly the constitution is a fundamental law, changeable only by a special procedure.<sup>74</sup>

The shift from confederation to federation was however never clear at the outset. Indeed, even after the end of the convention, some continued to consider the new arrangement a continuity of the Articles of confederation, an agreement between sovereign states, and others as the birth of a new polity, entirely different from its predecessor. The tension between the two thoughts continued until it was settled by war in 1865.<sup>75</sup> The move towards a new form of government distinct from the confederation was advocated strongly by the great authors of the Federalist camp, Alexander Hamilton, John Jay, and James Madison otherwise known by their pseudonym *Publius*. The three authors undertook a massive campaign of convincing the people that the new constitution was based on a different principle from its predecessor. The chief burden of *The Federalist* was to convince the people of the need for centralized federalism as they called for a closer union, or greater centralization than the one, which existed before.<sup>76</sup>

A similar central government dependency on the states existed under the Constitution of the German Empire of 1871-1918, or the Bismarck confederation, as it was widely known.<sup>77</sup> This confederation was a compromise between those effecting French centralism and traditional German disunity, with twenty-five German states (princes). Prussia with about two-thirds of the territory and three-fifths of the population

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74 *Ibid.*, p. 93, 122.

75 Wheare, *supra* note 9 at 3.

76 King, *supra* note 11 at 24.

77 Wheare, *supra* note 9 at 7.

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dominated the Bismarck *Reich*.<sup>78</sup> The constitution was silent on who should administer federal law. For reasons of political expediency and economy, Bismarck delegated administrative tasks to the states.<sup>79</sup> In principle legislative power was vested in both houses. The lower house consisted of 397 members elected by universal suffrage, Prussia alone sending 235 representatives to it. Its power extended to all legislative measures and had a five-year term but it could be dissolved earlier by the emperor with the consent of the upper house. The latter consisted of fifty-eight members of which Prussia alone claimed seventeen. Fourteen negative votes could veto a measure and hence Prussia alone could block any unwanted move. The members were more or less delegates appointed by the states and they voted according to the instruction of their governments, hence all the delegates of a state had to cast their votes similarly on the same question.<sup>80</sup> The Council was thus dependent upon the state governments in general and on Prussia in particular, for Prussia not only commanded seventeen votes out of fifty-eight, but the King of Prussia was the German Emperor and had the authority to appoint the imperial chancellor. The prime minister of Prussia was the imperial chancellor and the president of the Council of the confederation.<sup>81</sup>

As stated earlier, the member states had no equality of status whether in the Council of the Empire or in their internal administration, Prussia overshadowing all. There was a strong legislative centralization in the empire with an executive decentralization. The central government could legislate on all matters, but all laws were executed by officers of the states, there being no system of federal officers. The empire did not exercise direct authority over the whole population.<sup>82</sup> World War I destroyed that regime, which was replaced by the federal Weimar Republic. The 1918 Weimar

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78 Arthur Gunlicks, 'State (Land) Constitutions in Germany,' *Rutgers Law Journal* 31 (Summer 2000) at 972.

79 *Ibid.*, at 972; the system is called executive/administrative federalism and is still the dominant feature of the German federation. See chapter seven for more.

80 This practice is still operative in the *Bundesrat*. See chapter three (on Second chambers) for more.

81 Sharma and Choudhry, *supra* note 54: 46-47.

82 *Ibid.*: 47.

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constitution marked the transition to a parliamentary form of government. In 1933 the Länder parliaments were formally abolished by the Nazi government and Germany became a centralized unitary state.<sup>83</sup> Needless to say, Hitler abolished federalism along with all other German liberties, all of which were restored to Western Germany in 1949, following the end of World War II.<sup>84</sup>

Irrespective of some of the peculiar natures of the United States and German confederations, in both cases the central government lacked the capacity to act directly upon the people. Only the states can act directly upon the citizen. Confederations are organized on the principle of subordination of the common government to the states. Indeed, as Wheare stated, the indirect authority of the center over the citizen through the state governments is merely an illustration of this principle of subordination.<sup>85</sup> As always, confederations occur when several pre-existing polities join together to form a common government for certain limited purposes such as foreign relations and defense, but the common government is dependent upon the states. Modern federations

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83 Some contend that except for the years from 1933-1945 the political landscape of Germany always had a federal [confederal] structure. Martin Rogoff 'The European Union, Germany, and the Länder: New Patterns of Political Relations in Europe,' *Columbia Journal of European Law* 5 (Fall 1999) at: 417.

84 Elazar, *supra* note 16 at 132. Following WWI and the Revolution of 1918, 421 delegates to an assembly elected by universal suffrage, met at Weimar to frame a constitution. In the actual task of framing the constitution there were two parties with opposing views as to the position of the states. One wanted to wipe off the states and establish complete centralization and the other wanted to retain the separate character of the states with the only stipulation of curbing the power of Prussia. A compromise was reached between the two views and a federal constitution was drawn up and adopted by the Assembly on July 31, by 262 votes against 75 and came into force on August 11, 1919. Sharma and Choudhry, *supra* note 54: 48-49. With the coming to power of Hitler as a chancellor of Germany in 1933, the old battle on the division of power revived owing to the conception of the Empire as a federation or a unitary state with decentralized power to the states came close to complete centralization of power at the center. Officially, the states' sovereignty came to an end in 1933 and they were converted to mere subordinates. After the defeat of Germany in WWII, the Allied powers divided it into occupation zones under the US, UK, France USSR and later formed the Republic of Germany with a parliamentary system of government. *Ibid.*: 51-54. The decision to establish a federal system in West Germany was not entirely an indigenous determination seeking to provide a genuine democratic foundation; the Allies had decided quite early that there should be no concentration of power in the country. See Dikshit, *supra* note 34 at 150. With unification on October 3, 1990, came the debate on the mechanism of unification and the status of the Basic Law (it was viewed as temporary text in 1949): between those who advocated unification under Article 146 that stipulated for unification of Germany via a new constitution approved by a referendum and those that forwarded the unification scheme to be conducted under Article 23 (which in essence meant the Länder in East Germany apply collectively to join the Federal Republic). The latter option was pursued and as a result the Basic Law continued to serve for the whole of post-unification German polity. Watts, *Comparing Federal Systems*, *supra* note 1 at 26; see also Arthur Gunlicks, *supra* note 78 at 971. For a more detailed account of the process of unification and the new challenges in the German federation see Charlie Jeffery ed., *Recasting German Federalism: The Legacies of Unification* (London: Pinter, 1999).

85 Wheare, *supra* note 9 at 15.

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as we understand them today guarantee the independence and viability of the federal government such that its officials are enabled to decide on matters reserved to them, without the pressure from the states. The federal government governs directly the citizens who chose them. It is this relative independence of the federal government from the states that differentiates federations from confederations. In the latter, national officials were in one way or another forced to refer decisions on some national questions to state governments.<sup>86</sup>

The whole point reinforces the idea that federations are capable of effective action and capable of creating a citizen loyalty. In confederations states by constitutional right take part in central decisions, direct the voting of their delegates to the center, control its policy, confirm federal decisions. These states usually retain the primary loyalty of the citizen.<sup>87</sup>

### **Decentralized System of Government**

As opposed to confederations, in decentralized governments the units, often called local governments, are subordinate to the center. However wide powers they may exercise, the local governments are merely creations of the center by a statute and as a result they may be wiped out by the center at any time.<sup>88</sup> The arrangement presupposes the existence of central authority, which may for one reason or another delegate a portion of its authority to the local governments but such delegation is subject to unilateral withdrawal, amendment or revocation by the center.<sup>89</sup> Thus, the delegation of power is at the mercy and unilateral discretion of the center and not as a matter of

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86 William Riker and Ronald Schaps, 'Disharmony in Federal Government' in Riker ed., *Development of American Federalism*, *supra* note 10 at 75.

87 W. Riker, 'The Senate and American Federalism' in Riker ed., *The Development of American Federalism*, *supra* note 10: 136-137.

88 Ronald Watts, *supra* note 20: 943-945.

89 Ivo Duchacek, *supra* note 47: 112-113; see also Blindenbacher and Watts, *supra* note 1 at 10.

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right of the local government.<sup>90</sup> Of course, in some cases absorbing the local government may be politically not sound even if it is legally possible. But this does not change the theory that they are subject to unilateral revocation by the center. The center's decision to end the local units merely requires the passage of legislation. In some instances, the autonomy of local governments may be incorporated in a constitution, yet such clauses granting authority could be changed by the central legislature alone.<sup>91</sup> Besides, in decentralized systems, the emphasis is on self-rule rather than on shared rule. In a federation on the other hand, the division of power is constitutionally guaranteed and the states are not creations of the federal government. Both the federal government and the states derive their authority from the federal constitution and as a result neither level can change the terms of the compact as enshrined in the constitution.<sup>92</sup>

### 2.3.2 Written and Supreme Federal Constitution

#### Federalism as a Covenant?

A second essential point that one observes as a shared feature in federations relates to the fact that the division of power between the federal government and the states is based on a written and supreme federal constitution to which both orders of governments must submit. Federations originate from particular bargains struck at a particular time designed to serve for generations. Written constitutions are, therefore, necessary records of the terms of the bargain. Indeed, to write and adopt a constitution is to agree to the bargain itself.<sup>93</sup> The terms of the agreement, which establish the federal government and the states and which distribute powers between them, must be

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90 Elazar, *supra* note 16 at 35.

91 John McGarry, *supra* note 5 at 418.

92 Elazar, *supra* note 16 at 35.

93 Riker, *supra* note 10 at 17.



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enshrined in a supreme federal constitution, which is binding. This is a logical necessity deriving from the nature of the federation itself. If the federal government and the states are to remain autonomous within their respective spheres of jurisdiction, the authority of one should not depend on the other but must derive from something supreme to both of them. The federal constitution regulates their relations and so far as it regulates their relations with each other, it must remain supreme at least in all that concerns the division of authority between the two.<sup>94</sup> In short, the federal arrangement presupposes the existence of a supreme federal constitution from which the federal government and the states derive their authority.

Many federal constitutions express the essential supremacy of the constitution. The United States Constitution declares ‘this constitution, and the laws of the US which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the US shall be the supreme law of the land’.<sup>95</sup> The German Basic Law stipulates albeit more generally, the same principle. ‘Legislation is subject to the constitutional order; the executive and judiciary are bound by law and justice.’<sup>96</sup> Equally, the Ethiopian Constitution too declares, ‘The Constitution is the supreme law of the land...’<sup>97</sup>

From this emanates the argument that federations are based on a ‘compact,’ covenant or to use the Latin word *foedus*. Federations are considered to have resulted from the federal idea of compact, implying an agreement that is freely and mutually consented to. For instance, Elazar maintains that ‘federations evolve from a compact which is a deliberate coming together of humans as equals to establish bodies politic in such a way that all reaffirm their fundamental equality and retain their basic rights. Politics

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94 Wheare, *supra* note 9: 55-57.

95 US Constitution Article VI Section 2.

96 German Basic Law Art. 20 sub 3.

97 Ethiopian Constitution Art. 9 sub 1.

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whose origins are covenants reflect the exercise of constitutional choice. Each polity remains as a matrix compounded of equal partners who come together freely and retain their respective autonomy even as they are bound in a common whole.’<sup>98</sup> The autonomy of the states and the unity through the shared powers emanates from the covenant. One also noted: ‘The nature of consent to a covenant is critical for the legitimacy and perpetuation of the federal arrangement. Where there is no will to federate, federal arrangement may not be possible.’<sup>99</sup> Alain Gagnon also stated that one must ascertain if the initial impulse to adopt a federal system comes from internal or external forces or both. This point is important because it verifies whether a federal system in a given country has been imposed or desired. A ‘federal will’ seems to be an absolute prerequisite, for anything contrary is tantamount to planting a time bomb under the heart of the system.<sup>100</sup>

### Limits to the Notion of Federalism as a Covenant

In a way it may be correct to state that federations are based on contractual relations. The component states of a federation may have entered the union by their own free decision. The federation resulting there from may provide mechanisms for the states to negotiate continuously with the federal center over various matters.

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98 Elazar, *supra* note 16: 2-7.

99 John Kincaid, *Values and Value Trade Offs*, *supra* note 7 at 32.

100 Alain Gagnon, ‘Federalism in Multi-Community Countries: A Theoretical and Comparative Framework of Analysis’ in Lloyd Brown-John ed., *Centralizing and Decentralizing Trends in Federal States* (Lanham: University Press of America, 1988) at 25. In support of this assertion Nancy Bermeo claims, ‘in each of the post communist cases, failed federalism was the legacy of imposed rule and of a past shaped by a dictatorial party. The countries that broke away from the Soviet Union had their federal status imposed on them at the end of WWII by the Soviets.’ She proposes that an imposed federal system would be unlikely to last. The roots of the word federal lie in the Latin term *foedus* meaning covenant or compact. Covenants have to be voluntary and based on a sense of partnership. Every federal system that split apart or turned towards unitary form was imposed by an outside (usually) colonial power. Nancy Bermeo ‘The Import of Institutions,’ *Journal of Democracy* 13:2 (April 2002): 106-108. They are often called ‘forced together’ federations which indicates strong evidence of the fact that federal arrangements must be based on a domestic covenant if they are to survive.

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But the assertion that federations are based on contracts needs to be adopted with a serious qualification. First, federations unlike confederations are not exclusively based on the presumed existence of sovereign states. Equally important is the individual citizen who is subject to two orders of government. Federal governments and the institutions that result there from are organized partly on the principle of majority based on population size and partly on representation of territories, which may grant the territories equal or unequal representation. Stating that federations are based purely on covenants gives too much emphasis to the role of the states during the federal bargain and ignores the role of the citizen as a source of legitimate authority. King has rightly pointed out that at the heart of the social contract in federations is the fact that both the individual and territory represent certain interests requiring recognition and protection from the constitution.<sup>101</sup> Federalism assumes that the basic interest bearing units within the federations are territorial, the interests of these units being usually represented in the second chambers. It also assumes that individuals are also the ultimate right and interest bearing units within the federation in so far as the direct operation of the federal center is concerned.<sup>102</sup> It is the duty of the federation to protect the individuals and the groups who bear specific rights and interests.

Secondly, even referring to the states, which constitute the federation, they do not in all cases freely agree to enter or remain in the union.<sup>103</sup> The 1848 Swiss federation was established following the military defeat of the catholic cantons (*Sonderbund*) that attempted to secede from the confederation in 1847. In the case of India, indeed, the union is not considered at all as something resulting from sovereign states. It was not altogether willingly that the 565 princely states of India were brought to the Union in 1948.<sup>104</sup> In the United States, the delegates of the 1787 Philadelphia convention met in

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101 King, *supra* note 11 at 58.

102 *Ibid.*, at 59.

103 *Ibid.*, pp. 88-89.

104 *Ibid.*

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the context of the Articles of confederation which could be amended only by all thirteen states (Article XIII), and whose opening paragraph named all the states in order from north to south. Yet the new text that emerged stated that it was to become a constitution for those who ratified it when nine states did so. Besides, even if we agree that the compact maintains the continuity of the right of states to participate, then the union was under serious threat during the Civil War (1861-1865) and survived when the southern states were defeated by the northern states.<sup>105</sup>

The 1949 West-German federation resulted from the imposition of the Allied forces following the defeat of the Second World War. WWII ended with the unconditional surrender of Germany. The USA, UK, Soviet Union and France took over all powers and responsibilities in the country. They agreed to divide German territory into four occupational zones and to dissolve Prussia. The Cold War deepened the gap between the Soviet and the three western zones and made an agreement among all four powers on the future of Germany impossible.<sup>106</sup> Hence, Germany was divided into two by the winners of the war. The part that was to become West Germany had its component territories structured. Eight of the eleven states were artificially devised by the Allies.<sup>107</sup> The ‘Basic Law’ was not approved by a popular vote and the parliamentary council that endorsed the constitution was certainly not elected. The Basic Law was only conceived as provisional text largely because it divided Germany into two and partly because its basic features were imposed.<sup>108</sup> For the same reason it was called not a constitution but Basic Law, indicating its temporary nature. The Allied forces who fought twice in a short span of time wanted to create a weaker center than the one they had fought with. The chief device in achieving this objective was centrifugal

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105 *Ibid.*

106 Rudolf Hrbek ‘Germany’ in Ann Griffiths ed., *Handbook of Federal Countries 2002* (Montreal and Kingston: McGill-Queen’s University, 2002): 149.

107 King, *supra* note 11 at 97.

108 *Ibid.*, at 98.

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federation. Because of this context King concludes, ‘we are entitled to regard the constitution as an imposed arrangement.’<sup>109</sup> As we indicated earlier the Länder were dominantly artificial creations of the Allies and the parliamentary council, the body that formulated the new constitution was not a directly elected constituent assembly but rather was composed of representatives of Länder parliaments (assembly of 65 representatives of the *Land* parliaments which were at that time the only effective organs in West Germany) in the three western zones.<sup>110</sup> Accordingly, the argument that federations result from freely concluded covenants remains far from a universal principle.

Thirdly, even if it results from contracts, it still has a *unilateral* character. If we focus on the center-seeking federations (as in Switzerland and the US), the central government, crucial for the federation is absent during the federal bargain.<sup>111</sup> The limitation of the contractual basis of federations is even stronger in centrifugal federations. In Nigeria for instance it is argued that dualistic federalism of the theoretical postulate did not exist in the first place. The Nigerian federation was neither a contract between the states nor was it a voluntary union of a number of originally independent states. Historically, the federated states did not have a separate existence as political systems prior to the federation.<sup>112</sup> The same could be said of Ethiopia. Although the 1995 federation was adopted by an elected Constitutional Assembly, it is clear that the states as they exist today were never the major actors in the federal bargain. They are indeed the creations of the Constitution. In centrifugal federations, it could be said that the states are absent during the federal bargain. As a result, a

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109 *Ibid.*

110 Hrbek, *supra* note 106 at 149.

111 King, *supra* note 11 at 101.

112 Egite Oyovbaire, *Federalism in Nigeria: A Study in the Development of the Nigerian State* (London: Macmillan publishers, 1985): 17.

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federation resulting from such a negotiation in which one of the parties is absent turns out to be less contractual.

The principle that federations are based on a ‘compact’ should therefore be taken in a qualified sense. It is certainly true that some level of participation should exist when the federation is about to be set up. But beyond that is it difficult to prescribe any level of participation. Perhaps it is only safe to state that in order to guarantee continuously the autonomy of both governments and to prevent any possible encroachment of power by one level over another, the ‘agreement’ must be enshrined in a constitution that is both supreme and written. The relationship between the federal government and the states must be established in such a document, which only in that sense may be considered as compact.

### **2.3.3 Rigid Constitution**

The third important feature of federations emanates from the principle requiring the supremacy of the constitution. Federal constitutions must be rigid and require the participation of both the federal government and the states for their amendment. If the federal constitution contains the basic principles governing the relationship between the federal government and the states and if the authority of both governments derives from the constitution, then it follows that in order to ensure its supremacy, it should not be subject to unilateral alteration by either order of government alone. Indeed, the idea of federations as compact demands that if introducing formal changes to the federal constitution is deemed necessary then both the federal government and the states [through their government or their people] must participate in the amendment process. According to Carl Friedrich, the participation of the states in the amendment of the

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constitution is a key feature of a federation.<sup>113</sup> Furthermore, if the supremacy of the constitution is to be maintained it should not be easily alterable. That the amendment procedure should be rigid is also a requirement.<sup>114</sup> Constitutions change and adapt and an agreed method for achieving constitutional adjustments as the need arises is often the key to the continued success of the federation.

Apart from this general principle, however, federal constitutions differ significantly both as regards the specific procedures they prescribe and the degree of states participation for any amendment. On the one hand we have federations that require the consent of every state for any amendment and on the other we have federations where the ordinary vote of the federal parliament may sometimes suffice for amending the constitution. The Indian constitution falls into the latter category. However, those provisions vital for the distribution of power between the federal government and the states can be amended only by special majority of parliament and ratification by at least fifty per cent of the states.<sup>115</sup> In many other constitutions they are amended according to procedures that differ from the procedures for amending ordinary laws. In the US according to Article V amendments can be proposed by a two-thirds majority of each house in Congress or the legislative institutions of two-thirds of the states may request Congress to call a constitutional convention to consider and propose amendments. Ratification can also take one of two ways. It may require approval by three-quarters of the legislative institutions of the states or by three-quarters of the convention. In short, all amendments even if they do not affect the federal distribution of power, require ratification by three-fourths of the states or the convention. The only

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113 Carl Friedrich, *Trends of Federalism in Theory and Practice* (New York: Praeger, 1968): 6-7.

114 D.J. Kriek, 'The Rigidity of the Constitution' in Kriek, *supra* note 59: 57-58. The term rigidity means here that the procedures for amending the constitution differ from the procedures for amending an ordinary law. Often the former require a more rigorous procedure.

115 Indian Constitution Article 368.

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exception to this is that no amendment may be made to alter the equal representation of the states in the senate.<sup>116</sup>

In Switzerland, a proposal to amend the constitution may be initiated by the federal legislature or in some circumstances by one house of the federal legislature or even by 50,000 citizens. Whichever way an amendment may be initiated none can be effective until it is approved by a referendum: both a majority of the electorate and a majority of the cantons<sup>117</sup> must give their consent to complete or partial amendment before either is finalized.<sup>118</sup> In other words the voters themselves have the right to propose and also to ratify amendments.

In Germany, Article 79 prescribes that the Basic Law can be amended only by laws that expressly alter or supplement its text. Any such law requires the consent of a two-thirds majority of votes in both the *Bundestag* and the *Bundesrat* of the German parliament.<sup>119</sup> The following, however, cannot be amended: laws affecting the division of the federation into *Länder*, laws affecting the principle of the participation of *Länder* in legislation and laws affecting human rights as stipulated in Articles 1-20 of the Basic Law.<sup>120</sup>

The Ethiopian Constitution is perhaps more rigid compared to the other federations. In principle, the Constitution does not incorporate unamendable provisions. It requires the participation of both the federal and state governments in all amendment cases. Some of the provisions, mainly those prescribing the procedure for amendment itself, and those governing fundamental rights and freedoms can only be amended if approved by

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116 US Constitution Article V.

117 Swiss Constitution Article 142 sub 3 states the result of popular vote in a canton determines the vote of the canton.

118 See Articles 138-142 of the Swiss Constitution; see also Kriek, 'The Rigidity of the Constitution' in Kriek ed., *supra* note 59 at 64.

119 German Basic Law Article 79 sub 2.

120 *Ibid.* Article 79 sub 3; see also Kriek, *supra* note 114 at 66.



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the majority vote in all the states and by a two-thirds majority vote in each of the federal houses.<sup>121</sup> While the majority of the provisions, including those governing the relationship between the federal and state governments, can be amended only if approved by a two-thirds majority vote in a joint session of both federal houses<sup>122</sup> and a two-thirds majority vote of states.<sup>123</sup>

A final remark concerning amendment is that if ultimate control over constitutional changes is in the hands of all the states, such a system based on unanimity seems to have not moved from an association of states to a federation, if for any amendment the consent of every single component unit is required. On the other hand, if only a vote of federal parliament is required, such a system makes the amendment process indistinguishable from a unitary system. Some constitutions distinguish between amendments that affect the federal distribution of power and those that do not.

### 2.3.4 Umpiring the Federation

Equally important in a federation is the presence of a body that umpires disputes concerning the constitutionality of laws in general and the division of powers in particular. From the principle of constitutionally guaranteed division of power and the supremacy of the constitution follows that the last word in settling disputes about the meaning of the division of powers must not rest either with the federal government alone or with the states.<sup>124</sup>

It has already been noted that the constitutionally entrenched division of power is the hallmark of federations. However, the division of powers between the federal govern-

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121 Ethiopian Constitution Article 105 (1) a and 105 (1) b, and c.

122 Ethiopian Constitution Article 105(2) a.

123 *Ibid.*, Article 105 (2) b.

124 Wheare, *supra* note 9: 60-61.

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ment and the states cannot be delineated in such a way as to avoid all conflicts. As R. Davis notes the ‘division of power is artificial, imperfect and a generalized skeletal thing. Political life cannot be perfectly or permanently compartmentalized. The words can rarely be more than approximate crude and temporary guides to the ongoing or permissible political activity in any federal system.’<sup>125</sup> Certainly disputes about the terms of the division of power are bound to occur. Besides, adaptation and the need to adjust and accommodate the division to cope with the new, the unforeseen and the unintended remains crucial and interpretation is one of such methods. In the United States this is achieved through the Supreme Court. In Switzerland the last word does not seem to rest with the federal tribunal. It may decide cantonal laws to be invalid but it must accept the laws of the federal legislature as valid. The constitutionality of federal laws is reviewed through a referendum. A law passed by the federal legislature must be submitted to the people for approval when contested for its constitutionality. Only the people have the last word as to whether such a law shall become effective.<sup>126</sup>

In Germany, the Constitutional Court takes care of the duty of enforcing the supremacy of the Basic Law. Unlike the US Supreme Court, the Court does not involve itself with the ordinary settlement of disputes. It only handles issues that involve interpretation of the Basic Law.<sup>127</sup> In Ethiopia, the HoF is responsible for adjudicating constitutional cases in general and federal issues in particular.<sup>128</sup>

In sum, an impartial body, independent of the federation and the states, that decides on the meaning of the contested provisions concerning the division of power is essential for a federation.

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125 Davis, *supra* note 32 at 143.

126 Wheare, *supra* note 9: 18-19.

127 Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2<sup>nd</sup> edn. (Durham: Duke University Press, 1993) at 3.

128 See chapter eight for more.

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**2.3.5 Origin of Federations and Territorial Autonomy of the States**

As already indicated, the constitutional guarantee of the existence and autonomy of the states distinguishes a federation from decentralized unitary states. In the latter, the center has the right to create, extend or altogether eliminate local governments. The autonomy of the local government is in principle destructible by a decision of the central authority.<sup>129</sup> In federations, on the other hand, the states are autonomous and their autonomy is constitutionally protected. What this means, is that the federal government does not have free hand or the unilateral power to reorganize the states as doing so would affect the constitutionally guaranteed autonomy of the states. This is not to imply that the states are permanently immune from reorganization or that they are inherently indestructible. Indeed, the need for adjustment to future territorial changes should be regulated by the constitution, as there is always a possibility of accession of new territories, regrouping or division of existing units, internal boundary changes or even secession.<sup>130</sup> The point rather is that in federations the constitution stipulates any territorial adjustment to be approved by the consent of the states.

The fact that federalism is considered the territorial distribution of power presupposes that the states have a stable territory. Besides, if the autonomy of the states is to be effective, any territorial change needs the consent of the states. It appears that in centrifugal federations there is a tendency to think that the states prior to the establishment of the federation or during the formative stages did not reflect major diversities that define the states and as a result are more susceptible to demands for territorial adjustments as compared to the older ones.<sup>131</sup>

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129 Duchacek, *supra* note 47 at 234.

130 *Ibid.*, at 238

131 See chapters four and five for more.

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The way federations evolve as polities to some degree affects the autonomy and the territorial integrity of the states. Federations could be established in one of two ways. The older federations like the United States (1789) and Switzerland (1848) are often described as center-seeking or ‘coming together’ federations. The regions which desired to unite, had all had a previous existence, although it is to be noted that none of them had a long history as a truly sovereign, independent state.<sup>132</sup> They evolved slowly into their present form from formerly semi-independent states. In both cases, awareness of being a separate territorial community preceded the federation.<sup>133</sup>

The growth of the United States from the original League of thirteen colonies into a federal union of fifty states is, for instance, an example of by and large such a process. But it is good to note that the US Constitution unlike many other federations does not list the founding states. Their delegates were far from certain that the states would accept their draft. The names of the twelve original states (the thirteenth, Rhode island, was not present) appear only at the end of the last Article when the names of the delegates are listed, indicating the states they had represented in Philadelphia.<sup>134</sup> Initially some of the other territories were perhaps artificial: indeed it is, for instance, contended that ‘Virginia became part of the United States without ever having experienced virginity’<sup>135</sup> but subsequently they too acquired territorial identity, based on their separate existence and tradition over a considerable span of time. In general,

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132 Wheare, *supra* note 9 at 40.

133 Duchacek, *supra* note 47 at 236; there is a contention if the thirteen colonial states were ever independent. Prior to 1774, they were imperially co-ordinated into one Atlantic unit by the government in London. The states were then governed by the continental congress of 1774, which began to usurp the London authority. An area governed by several local governments inside an empire came to be governed by usurping committees, implying the prior independence of the states. However, this view is contested because others state that Congress had, by a declaration, directly seized authority from London before any of them were independent. See Riker, *supra* note 10 at 20.

134 See US Constitution Article VII.

135 C. Hughes, *supra* note 66 at 157; in any case the thirteen states may have been autonomous but the other thirty-seven never functioned as independent nations since they were created by the federal government.

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however, the territory of the states remained stable and any alteration requires the consent of the states.<sup>136</sup>

Switzerland, too, is a classical example of the step-by-step evolution into the present twenty full and six half cantons. The cantons with a long tradition of membership in a confederacy were to some degree sovereign.<sup>137</sup> The story begins with three original cantons in 13<sup>th</sup> century until the 1848 federation where it had evolved to twenty-five cantons. Jura being the latest addition to the list of cantons.

As a matter of principle member states within a federation have their own territory guaranteed by the federal constitution. For the classical thinking is that federations are taken as territorial entities. The confederation is bound by the constitution to respect the autonomy as well as the territory of the cantons. The Swiss Constitution is perhaps more explicit than any other federal constitution in this regard. It stipulates that, the confederation shall respect the autonomy of the cantons<sup>138</sup> and the confederation shall protect the existence and the territory of the cantons,<sup>139</sup> more specifically it provides that, modification of the territory of the cantons is subject to the assent of the people concerned, of the cantons concerned and the federal parliament in the form of a federal decree.<sup>140</sup>

The confederation shall accordingly prevent the cantons from violating the territory of other cantons, as well as from declaring territorial vindications with regard to the

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136 US Constitution Article IV section 3 stipulates that new states may be admitted by Congress into this union; but no new state shall be formed or created with the jurisdiction of any other state; nor any state be formed by the junction of two or more states or parts of states without the consent of the legislature of the states concerned as well as of Congress.

137 Christopher Hughes states that cantonal sovereignty is a fiction. They scrambled from one pre-state subordinate status straight into federal subjection. The peculiarity of Switzerland is, however, that most cantons have a much more plausible and more nearly continuous history of acting as states compared to other federations as they existed prior to the federation. Hughes, *supra* note 66 at 157.

138 Swiss Constitution Art. 47.

139 *Ibid.*, Article 53 sub 1.

140 *Ibid.*, Article 53 sub 3.

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territory of other cantons. This power of federal authorities is of crucial importance for the stability of the Swiss federation, where linguistic, cultural and confessional borderlines do not correspond with those of the cantons.<sup>141</sup> They argue that on the basis of cantonal sovereignty, no territorial change could be effectuated without the consent of the canton concerned. This has not been explicitly laid down in the Swiss constitution and principally speaking one could even argue the possibility of territorial changes by a simple Constitutional revision; however, such a solution is incompatible with the constitutional spirit of the confederation.<sup>142</sup>

What is common in both federations despite their respective peculiar history is the fact that some of the states predate or pre-existed the federation. The states entered into a federal bargain, negotiated and at a certain point decided to establish a federal government, while retaining for themselves some degree of state autonomy.<sup>143</sup> They represent ‘n+1’ type federations in which federal government was non-existent (if it existed only in a different type) and at the time of the bargain evolves as a new but important entity into the political process.<sup>144</sup> What is important in this respect is that the process of evolution of the federal system has some relationship with the autonomy of the constituent states. In this type of federations as already noted the constituent states predate the federation (the center). As a result they often are reluctant to grant wide powers to the center. For this reason the constituent states, at least during the initial phase of the federation, remain powerful. It is not by coincidence that it took a century

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141 Thomas Fleiner and Lidija Basta, ‘Federalism, Federal States and Decentralization’ in Lidija Basta, Thomas Fleiner eds., *Federalism and Multiethnic States: The Case of Switzerland* (Fribourg: Institute of Federalism, 1996) at 34.

142 *Ibid.*, p. 35. But even in Switzerland, at a certain point in history the issue of cantonal reorganization was a central point, although for the most part it remained stable. Subdivisions, reflecting the interest of sub communities, proved necessary during the 15<sup>th</sup> and 16<sup>th</sup> century. Three of the cantons were divided into half cantons. Unterwalden, one of the three constituting cantons, was divided in the 15<sup>th</sup> century into Obwalden and Nidwalden, the main reason was the difficulty of communication between the two major valleys constituting the territory. In 1597 Appenzell was divided into half cantons on the religious issue: outer Rhodes-protestant and inner Rhodes-catholic. In 1833 the Canton of Basel split into its urban and rural components as a result of rural resentment against urban dominance. Of course we also have Jura as latest addition. See Duchacek, *supra* note 47 at 237.

143 Kriek, *supra* note 59 at 19.

144 Dikshit, *supra* note 34 at 1.

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or so in the United States and Switzerland to transfer power from the states to the center either by amendment or judicial interpretation.<sup>145</sup>

On the other hand we have federations resulting from either a previously unitary state or a retiring colonial state. For want of a better term, these states are called centrifugal or ‘holding together’ federations. Some of them may have had federal or otherwise decentralized experience, for instance the Indian provinces had some experience of decentralized administration prior to independence but most of the provinces were reorganized on ethno-linguistic basis following independence. Germany, too, had confederal as well as federal experience during the 19<sup>th</sup> century as well as the beginning of the 20<sup>th</sup> century. But in all centrifugal federations, the federations evolved from a decision undertaken at the center to constitutionally diffuse power to newly established units or states.<sup>146</sup> The case of 1949 West German federation, the Indian federation of 1950, the Nigerian federation of 1960 and the 1995 Ethiopian federation belong to this category.

What is common in this group of federations is the fact that the states are by and large new creations of the federal bargain or even a unilateral decision of the center at later stages, rather than entities having a prior existence. In short, the center creates the states. The constituent states do not exist at the time of the bargain or if they do exist they are in a very premature state. For this reason they are in a weaker position compared to their counterparts in ‘coming together’ federations.

The difference in the process of evolution is not without implications for the ensuing federation. It affects not only the territorial autonomy of the states but also the operation of the federation. In center-seeking federations the autonomy of the states is

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145 See chapter six for more.

146 Kriek, *supra* note 59 at 19.

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constitutionally guaranteed requiring the approval by the states as compared to the new federations. As regards centrifugal federations, however, this is not equally true. One may consider the 1949 West German federation. After the events following the Second World War, Germany was put under the winners' military control. It was divided into four occupation zones: one each under the former USSR, USA, United Kingdom and France. In 1948 the rift between the three Western Allies on the one hand and the USSR on the other led to the withdrawal of the latter from the Allied control council. Reinforced by other reasons, the three Allied forces decided to reunify their zones of control in order to create a united German state.<sup>147</sup>

The German Länder consequently are partly the result of an imposed decision of the Allied forces. Unlike the 19<sup>th</sup> century German Empire, the position of the Länder were weakened both during the pre-war as well as post war periods. The pre-war centralization of power weakened the states and they were later subjected to a detailed adjustment by the Allied forces. Of the eleven Länder that constituted 1949 Germany, only three (Bavaria, Bremen, and Hamburg) retained their essentially traditional boundaries. The other eight were (artificial) creations from parts of the traditional states and lacked strong regional identities.<sup>148</sup> The Länder of former East Germany too are the result of the same process. Thus, while failing to provide the states with any marked regional identities, the new territorial subdivision deprived the states even of the historical inertia that the old states had possessed.<sup>149</sup> Accordingly, provision was made in Article 29 of the Basic Law for the territorial reform of the Länder.

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147 Dikshit, *supra* note 34 at 144.

148 In 1946 and 1947 five Länder were similarly created in East Germany but were absorbed into a highly centralized communist party state and were accordingly less autonomous. Two of these Länder, Thuringia and Saxony, were traditional states. These five Länder were reconstituted with some minor boundary adjustment in 1990 and together with the newly unified Berlin joined the Federal Republic in the fall of 1990, total constituting 16 Länder. Gunlicks, *supra* note 78 at 973.

149 Dikshit, *supra* note 34 at 153.



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This does not mean, however, that the component parts of the federation are constitutionally guaranteed. The reorganization of the Länder through consolidation, annexation, or redrawing of boundaries is constitutional, although such adjustments need to be approved by popular referendum pursuant to Article 29 of the Basic Law.<sup>150</sup> This provision provides the possibility for a comprehensive constitutional regulation for effecting territorial changes. The Federal Republic of Germany has been authorized to pass a federal law on new Länder frontiers, with full respect to historical and cultural background, as well as economic interest and social order.<sup>151</sup> Although the plebiscite has been constitutionally laid down as a procedural phase within the reorganization process, the final decision lies with the federal legislature. Article 29 stipulates that at least the population directly concerned with the on-going territorial modification shall have the possibility to express their opinion. But the result of such plebiscite may be overruled by a subsequent plebiscite at federal level.<sup>152</sup> Theoretically speaking then the territory of the states can be altered by federal government.

Two issues have currently heightened demands for territorial reorganization of the Länder. After unification economic and fiscal equalization, demographic and territorial differences among the sixteen Länder and voting procedures in the *Bundesrat* on the one hand and asserting interests vis-à-vis the federal and European community on the other have caused a revival of proposals for Länder boundary reforms.<sup>153</sup> The weaknesses of the new Länder of former East Germany and the challenges posed by the growing incursions of the European community into areas that were traditionally within the domain of either the Länder or the federal government have resulted in such

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150 Gunlicks, *supra* note 78 at 973.

151 Basta and Fleiner, *supra* note 141 at 35.

152 *Ibid.*

153 Gunlicks, *supra* note 78 at 974.

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demands.<sup>154</sup> The federal system is thus exposed to a double challenge: the enormous imbalance which exists between the western and eastern parts of united Germany and the their inability to cope with the enormous tasks of economic recovery and administrative transformation in the former GDR, which has affected the fairly balanced structure of former West German, and secondly the growing interference of the European community in areas of Länder responsibility.<sup>155</sup>

Proponents of reform call for the reduction of the number of Länder and thereby reducing the duplication of the various administrative services and political institutions. They also contend that reducing the number of the Länder increases administrative efficiency and it would therefore be rational to have something between seven to ten Länder. Opponents on the other hand argue that such proposals are technocratic in the sense that even federal countries like Switzerland have very small cantons and that even the artificially created Länder have by now created some kind of citizen loyalty and last but not least they pose the costs of major reform when there are other pressing demands.<sup>156</sup>

So far, calls for reform have not been seriously considered by the government. Despite the inclusion of Article 29 in the Basic Law for such a possibility no reform has yet been carried out. The only example include the 1952 when the south-western Länder of Baden, Wurttemberg-Baden and Wuttenberg-Hohenzollen merged to form Baden-Wurttemberg via Article 118 of the Basic Law and Berlin of course, as the East and West Berlin were unified to form one Land.

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154 Arthur Benz, 'Redrawing the Map? The Question of Territorial, Reform in the Federal Republic in Charlie Jeffery and Ronald Sturm' eds., *Federalism, Unification and European Integration* (London: Frank Cass & Co. Ltd., 1993) at 38.

155 *Ibid.* at 45.

156 Gunlicks, *supra* note 78 at 974.

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In sharp contrast, Ethiopia leaves the matter of reorganizing states almost entirely to the states, rather than to the federal government. The federal Constitution, like many other constitutions declares that, ‘the federal democratic republic shall comprise of states.’<sup>157</sup> However, the Constitution provides that ethno-linguistic groups within the states enumerated by the constitution have the right to establish their own states.<sup>158</sup> The Constitution stipulates procedures and assumes the demand for the establishment of new states to come from one of the groups within the multi-ethnic units of the federation and accordingly prescribes that such a demand has to be approved first by a two-thirds vote of the members of the Council of the ethno-linguistic group at local government level. This again assumes that every ethnic group has either a state of its own or if that is not the case has a local government of its own, to whom the petition is submitted. Once the two-thirds majority vote is secured, the demand is sent to the state council. The state council is required to organize a referendum within a year and if the concerned ethno-linguistic group approves by a majority vote in the referendum, then they can have their own state.<sup>159</sup> In short, state formation requires the approval of the local government and the consent of the concerned people as expressed by a referendum. The role of the state legislature is far from clear except in relation to organizing the referendum. One needs to note here the fact that it is not the state per se that seems to have the last word but the ethno-linguistic group within the state(s) that brought the demand. Besides, interestingly enough, the constitution leaves no room for any role to be played by the federal government. Nor does it provide any procedure for the possibility of merger between two or more states.

The case of India represents another extreme case in which the territorial autonomy of the states is completely within the hands of the central government. The territories that

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157 Ethiopian Constitution Article 46.

158 *Ibid.*, Article 47 sub 2.

159 *Ibid.*, Article 47 sub 3.

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were inherited were modified following independence in response to ethno-linguistic demands expressed in the slogan ‘one language one state.’<sup>160</sup>

The fact that federalism is considered to be the territorial distribution of power presupposes that the states have a stable territory. Furthermore, if the autonomy of states is to be effective, any territorial change needs the consent of the states. In this regard, there appears to be a disparity among the old and the new federations. On the one hand we have constitutions that require the consent of the states and on the other we have a federation where the federal parliament can make and unmake unilaterally the territory of the states. In between we have the German and Ethiopian federations, the former representing a more centralized process, the latter a more decentralized one. Overall, however, the territory of the states in centrifugal federations seems to be less settled.

Perhaps the more flexible nature of the constitution of the centrifugal federations is explained by the fact that the states at the time of the establishment of the federations do not reflect any pre-existing identity and hence subsequent adjustment is anticipated. But the more flexible it is, as in the case of India, the less federal it will be as it affects in the end the states’ autonomy: the core principle on which federations are based.

Earlier on it was pointed out that their origins have implications for the ensuing federations. The second implication in this regard is its impact on the federal bargain and the subsequent competence of the states and to some degree it also determines the direction of federal state relationship in policy decisions, once the federation is set.

It has already been indicated that the units in centrifugal federations are outcomes of either the federal constitution or subsequent law issued by the federal government. The

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160 See chapter four the Indian section.

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states did not as such exist in the form they have following the federal arrangement. This will definitely have implications on bargaining power. It is a federal arrangement made in their absence. For instance they may have no constitution of their own or if they have one, it could be part of the federal constitution in which they may have had little or no say.<sup>161</sup> As a result there is a tendency to have strong central government on the one hand and less powerful states on the other and a constant urge for more decentralization of power from the center.

On the other hand, where the federations evolve from center-seeking states, the fact that at least some of the states pre-existed the central government, may imply the existence of a strong identity aware of its historic autonomy which they want to jealously guard in the anticipated federation. Some of them may already have their own constitution that pre-dates the federal constitution. As a result they will be major contenders for powers, compared to the non-existing units in centrifugal federations, in the federal bargain. They try to settle what belongs to the non-existing center and leave the rest to the extent possible for themselves.<sup>162</sup> It is not surprising, therefore, to observe that in such federations at least during the first phases of its existence, there is a strong urge for more centralization of power. Indeed, this explains well the 19<sup>th</sup> century American and Swiss federations, not to mention the fact that it was this tension that caused the eruption of the 1861-5 and 1847 Civil Wars in both federations.

### **Motives for Establishing a Federation**

Authors have been debating for long as to why countries establish federal political systems. From all the debates what appears to be of general consensus is that the motives/reasons for establishing a federation differ from one federation to the other and often there are a combination of factors than one. For example the oldest

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161 Watts, *supra* note 20 at 947; this is the case in Nigeria and India for example but not in Germany and Ethiopia.

162 *Ibid.*, pp. 943-946

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federations like the United States and Switzerland had initially defense as their prime concerns. They were looking for ways of having greater weight against external force. But that was only until the external threat was removed. The US remained federal mainly to limit the threat of majority tyranny at the center. Federalism is a means for bringing down power to the people, a purpose more or less similar to the horizontal separation of powers. It was also a means for creating greater economic market an objective which the European Union later aggressively pursued. In Switzerland, federalism became an instrument for managing diversity. In Ethiopia, federalism is being used as a means to end the age old concentration of power and as a means for accommodating identity issues of the various ethno-linguistic groups. Thus there are often more than one reason or combination of reasons for establishing a federation.

#### 2.4 EXTRA CONSTITUTIONAL FACTORS

As can be observed from the features discussed above, the focus is on a set of institutions anchored in a constitution and the division of power between the federal government and the states. K.C. Wheare was the first to emphasize the importance of these institutions. But his study was criticized by many as emphasizing too much on rigid institutions.<sup>163</sup> It is true that despite these common features some federations fail while others succeed. As a result it raises the question as to why this is so. Several factors have been mentioned in this regard.

Livingston argued that federalism goes beyond legal institutions. ‘The essential nature of federalism is to be sought for not in the shadings of legal and constitutional terminology, but in the forces economic, social, political, and cultural that have made the outward forms of federalism necessary ... the essence of federalism lies not in the

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163 Livingston, *supra* note 9: 84-87; Nicolas Schmitt, *supra* note 47 at 7.

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constitutional or institutional structure but in the society itself. Federal government is a device by which the federal qualities of the society are articulated and protected.<sup>164</sup> According to him the federal institutions are reflections of the federal qualities of society. Livingston's contribution was significant as he pointed out the fact that the study of federalism goes beyond legal institutions. But others have pointed out that his approach has its own shortcomings. Raoul Blindenbacher and R. Watts suggested that to consider federal institutions as mere expressions of federal societies is one sided.<sup>165</sup> Federal institutions once created in turn shape and influence society. There is a complex relationship, which is not unilateral, between society, its institutions and its constitution. One cannot deny the fact that the years 1789, 1848 and 1995, for instance, mark the turning points in the United States, Switzerland and Ethiopia respectively. The two older federations emerged from an earlier weak center and certainly the new institutions had an impact in transforming society. The post-1991 federal system in Ethiopia, too, has radically changed the political process since then. Thus, the specific society under which the federal system operates and the institutions matter.

Nicolas Schmitt stipulates for a federation to be a successful political structure it must be honest to its proclaimed nature. That is to say, it should be a federation in form as well as in operational reality.<sup>166</sup> Others have emphasized the importance of democratic pluralism and the existence of decentralized party system. 'Federalism cannot exist without democratic pluralism which permits groups really to be autonomous. It is sometimes argued that an authoritarian one party system which by definition concentrates all political power in the hands of one group at one central point, is incompatible

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164 Livingston, *supra* note 9 at 84. By federal society he meant a territorially grouped diversity. One other writer on the same line is Rufus Davis. He wrote 'when at some moment federal systems resemble or differ from each other in some respect or the other, the reason though sometimes traceable to similarities or differences in their constitutional structure, flow more often than not from the things they share in common as *societies or the things that distinguish them as societies*'. Davis, *supra* note 32: 212-215.

165 Raoul Blindenbacher and Ronald Watts, *supra* note 1: 12-13.

166 Nicolas Schmitt, *supra* note 47 at 7.

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with the federal concept of divided power.’<sup>167</sup> Indeed, this factor seems to explain the differences between the Nigerian and Indian federations. Although both federations remain multicultural, as will be elaborated in chapters four and six, India’s centralizing feature is moderated by the political party system, particularly since 1967 in the states and since 1989 at union level. The Nigerian federal system, however, operated for a long time under strong military influence. Still others emphasized the fact that not only should the beginning of the federal process be voluntary but also that the process thereafter should have an inbuilt spirit of sense of partnership between the different actors in a federation.<sup>168</sup>

Perhaps an equally important factor that explains the differences in emphasis among the federations, despite the common structural forms are the values for which each federal system is set up. As later chapters will illustrate some federations are designed with a view to accommodate ethno-linguistic diversity and to forge unity out of diversity.<sup>169</sup> In this regard federalism is considered as a means of conflict management. In multicultural federations, the political expression of diversity is a key factor in this regard. For sure, not all federations give equal political expression to diversity but the greater the diversity in a federation, the greater seems to be the need to find institutions that politically absorb that diversity. While the emphasis on other federations may be to bring together formerly independent states or to provide accessible government or to politically subdivide a geographically sizable country.<sup>170</sup> Certainly all federations may have economic as well as political calculations in joining a federation.<sup>171</sup> Integrated

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167 Ivo Duchacek, *Antagonistic Cooperation*, *supra* note 2 at 14.

168 Nancy Bermeo, *supra* note 100 at 106.

169 Multicultural federations like India, Ethiopia, Nigeria and Switzerland aim at politically integrating their diversity under a single political union. See chapter four for more. For more on the values of federalism see Nicholas Haysom, ‘Constitution Making and Nation Building’ in Raoul Blindebbaicher and Arnold Koller eds., *Federalism in a Changing World: Learning From Each Other* (Montreal and Kingston: McGill-Queen’s University Press 2003): 216-238; John Kincaid, *supra* note 7: 32-43; Erwin Chemerinsky, ‘The Values of Federalism’ *Fla. L. Rev* 47:4 (1995): 499-525; Alain Gagnon, *supra* note 12: 23-40.

170 Nation-state federations like Germany and the United States are examples.

171 See Alain Gagnon, *supra* note 12 at 25.



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economic policies, improved means of communication, elimination of unproductive competition and expansion of markets are linked to the economic advantages anticipated by each constituent region. The choice of a federal system may also have political motives, like the desire for independence from foreign powers or the need for protection against foreign powers or perhaps to have a bigger say in the international arena and in the global world. In the United States for instance it was introduced to avoid power tyranny at the center and the Allied forces used the same rationale to decentralize power in Germany.

As already mentioned, the process in which each federal system evolved and the way each federal system adapts over the years also remain as relevant indicators explaining the divergent pathways of the federal systems. Any or a combination of these values could serve as a background for establishing a federation and depending on the emphasis on one or the other, federal systems may evolve differently over a period of time.<sup>172</sup>

## 2.5 CONCLUSION

The commonly shared features among federations as a specific form of political system could be summarized then as follows.

Firstly, there must exist two or more orders of government each acting within its constitutionally defined sphere directly on its citizen.

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172 Cheryl Saunders 'Constitutional Arrangements of Federal Systems' *Publius: The Journal of Federalism* 25:2 (Spring 1995) at 62.

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Secondly, a formal constitutional division of legislative, executive, judicial and financial matters<sup>173</sup> between the two orders of government ensuring some area of genuine autonomy for each order is vital. Considering the theoretical difficulties with the co-ordinate theory and observing federal practice, federalism emerges if the desires for the common good or unity predominate, albeit slightly, over the forces of diversity. The supremacy of federal law over state law, a logical corollary of this notion, missing in the Ethiopian constitution, has therefore more than symbolic significance. It is an important governing rule in a federation.

Thirdly, a supreme and written constitution not unilaterally amendable by one order of government but rather requiring the participation of the federal and the constituent states ensures not only the division of power but also the continued interest of the actors in the federal process.

Fourthly, an umpire to rule on the interpretation of cases involving the division of power specifically and on the rule of constitutionality in general, guarantees the rule of law to the contending actors.

Fifthly, processes and institutions to facilitate intergovernmental collaboration in those areas where governmental responsibilities are shared or overlap is also important.<sup>174</sup> These general features, however, are moderated by the extra-constitutional factors that explain the divergent pathways of the federations.

Last but not least, almost all federations have provisions for representation of regional interests in the federal policy-making process and this is often done through the second

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173 As far as division of financial powers between the center and states is concerned, a colleague of mine, Solomon Nigusie, is working his PhD thesis and for the sake of avoiding overlaps this study does not focus, except a brief note in chapter 3, on such topics.

174 See for more chapter seven.

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chambers based on the principle of territorial representation as distinct from the lower house commonly composed on the basis of population size. The next chapter takes up this point.

### Review Questions

1. How is a confederation different from a federation and a federation from a decentralized unitary state?
2. Despite the similarity in formal structures and institutions among federations we observe that some have failed, others remain in transition and some working ones? Why do you think this happens?
3. Do you agree with the idea that in federations the forces of unity must slightly prevail over the forces of diversity? Why or why not?

## Chapter Three

### Federations and Second Chambers

This chapter is in essence a continuation of the general discussion on federalism and federations covered by the preceding chapter. It is argued that a second chamber<sup>1</sup> based on a different composition and representing the interests of states, more specifically less populous states, is an institution that reflects the normative diversity inherent in federalism. It is also suggested that second chambers reflecting the entrenched representation of the states distinguishes federations from other types of polities. This chapter, comparative in its approach, commences by considering the underlying rationale for having second chambers and then proceeds to their manner of composition, election and more importantly, the powers entrusted upon them by their respective constitutions. The main point that the author develops is the idea that the Ethiopian Constitution, by establishing a non-legislative upper house, runs the risk of concentration of power at the center, to the exclusion of the states, and consequently leaves the states alone. The Constitution fails to ensure the constituent units' proper place in the institutions of power sharing as well as in the process of policy-making at federal level and by doing so it betrays the federal idea significantly.

#### 3.1 RATIONALE

Although bicameral houses can be found in unitary systems, owing to the federal idea, second chambers are more common, if not inherent in federations.

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<sup>1</sup> There is a danger in using the expression second chamber. In some countries it may refer to the popularly elected lower house. In this chapter, the second chamber (upper house) does not refer to the popularly elected lower house or what is commonly described as the House of Representatives. It is meant to refer to the other house whose members (as in the United States and Switzerland Senate) are directly elected or to those indirectly chosen as in the Ethiopian House of Federation, the German *Bundesrat* or the Indian Senate.

## THE ETHIOPIAN EXPERIENCE

Bicameral legislatures, in which there are two chambers involved in the federal law-making process, are common in federations. The lower house is often uniformly organized on the principle of proportional representation and there is a less strong federal element in it. But the upper chamber is often expected to reflect some federal idea and its legislative role is defended for at least two reasons.

The first emanates from the qualified application of the concept of sovereignty in federations. Stated otherwise, federalism as enshrining both unity and diversity qualifies to a certain extent, the ‘one man, one vote’ principle of democracy, particularly, in relation to the organization of the second chamber. While there may be many circumstances in federations in which majority rule is qualified, the point here is that federal arrangements by providing second chambers based on a different organizing principle from the lower house, limit majority rule. Watts has rightly pointed that ‘the distribution of seats in federal second chambers in terms of units may appear to counter the democratic majoritarian principle’ in favor of an equally important value in federations, the promotion of diversity.<sup>2</sup> It is true that with modern federations, the people as a composite body are ultimately sovereign. However, what is distinctive about federations is not the fact that the people are viewed as sovereign, but that the expression of sovereignty is tied to the existence and entrenchment of the units in federations. Preston King states, ‘In federations, the people are taken as a single entity, in one sense, but as plurality of entities in another. The people are represented as *whole* and *as parts*.’<sup>3</sup> Thus the federal parliament in a federation is expected to reflect the unity of the country in the lower house (elected by a popular vote) on the one hand and the diversity of

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<sup>2</sup> Ronald Watts, *The Institutions of a Federal State: Federalism and Democracy as Fundamental Counterweighing Principles* v. 6 (Friburg: Publication of the Institute of Federalism, 1996): 21.

<sup>3</sup> Preston King, ‘Federation and Representation’ in M. Burgess and A. Gagnon eds., *Comparative Federalism and Federation* (London: Harvester, 1993): 95-96, hereinafter referred to as *Federation and Representation*.

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the country in an upper house representing the states or some other regional interest, on the other.<sup>4</sup> Accordingly, federations are designed carefully with institutions that reflect the people as a whole on the one hand and the people as parts, often identified as states, on the other. The second chamber should be useful and strong or else it will be useless and for it to be meaningful, it should represent the federal principle as distinct from the democratic principle. The people then are taken as both united and as diverse. The dual existence of unity and diversity is inherent in the federal principle.<sup>5</sup>

From this developed the idea that federations are important institutions for the protection of powers designated to states. ‘Second chambers in federations provide a protective mechanism against federal derogation and the overstepping of delegated authority, and the impairment of the interests of one or more of the units. The protective mechanism is necessary because smaller and more sparsely populated units feel potentially threatened by more densely populated states.’<sup>6</sup> In this sense, federations are said to be ‘polyarchic’ in which not only individual citizens have an equal entitlement to vote but states also enjoy some form of right to influence the federal decision-making process, as compared to situations in ordinary democracy, where one can imagine the constitutive right bearers are individual citizens alone.<sup>7</sup>

Representation by territories and representation by size of population as distinct principles, operate in federations. It is for this reason that second chambers are defended. As Watts stated, bicameral legislature enables different principles of

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4 Rejean Pelletier, ‘Federalism and Upper Houses: Searching for a Solution’ in Lloyd Brown-John ed., *Centralizing and Decentralizing Trends in Federal States* (Lanham: University Press of America, 1988) P. 63.

5 King, *Federation and Representation*, *supra* note 3: 95-96.

6 P.A.H. Labuschagne, ‘The Role of the Second Chamber or Upper House in a Federation,’ in D.J. Kriek ed., *Federalism: the Solution? Principles and Proposals* (Pretoria: HSRC Publishers, 1992): 71.

7 Preston King, *Federalism and Federation* (London: Croom Helm 1982): 91; hereinafter referred as *Federalism and Federation*.

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composition and election in the two chambers and accordingly the federal legislature may represent both the unity and the regional diversity of the federation.<sup>8</sup> It is for this reason that King considers federations to be distinguished from other forms of states by the fact that the units in federations are represented on an entrenched basis within the federal legislature and that such representation can only be altered by extraordinary constitutional measures.<sup>9</sup> However, as will be noted later, not all second chambers reflect the federal principle adequately. Indeed, there is a wide variety among them.

The second explanation for the legislative role of second chambers emanates from the idea that in federations political power is constitutionally divided between the federal government and the states. Such division of power in itself is premised on the idea that federations are principally organized on the concept of ‘self-rule’ for some purposes and ‘shared-rule’ for other purposes.<sup>10</sup> Self-rule in a federal context means that an entity can decide certain matters autonomously over competencies within an overarching federal system. It promises the accommodation of a distinct identity. It requires institutions for enforcing it and it is for this reason that constituent units are often granted with legislative, executive and judicial powers. Shared rule, on the other hand, refers to shared competencies as well as shared institutions through which federal units are accorded special

8 Ronald Watts, *New Federations: Experiments in the Commonwealth* (Oxford: Clarendon Press, 1966) at 255, hereinafter referred to as *New Federations*.

9 King, *Federation and Representation*, *supra* note 3 at 94. The Ethiopian Federation may look strange if all Constitutions are judged by King’s standards. The representation in the second chamber is not on face value based on territorial basis. According to Article 61(1) of the Constitution, representation is based on nation, nationality and peoples. In short this refers to the various ethnic groups. However, if one considers other provisions of the Constitution like Articles 46 and 47, the states are principally defined on an ethno-linguistic basis and hence the net effect of nation, nationality representation may be considered as state representation, as the states are designed on such a nation, nationality basis, except that this cannot be carried to its end as not all nations and nationalities have their own states. Thus, there exists a dilemma between representing nationalities or states.

10 For a more detailed account of this notion see Thomas Stauffer and Nicole Topperwein, ‘Balancing Self-rule and Shared-rule,’ in Lidija Basta Fleiner and Thomas Fleiner eds., *Federalism and Multi-ethnic States: The Case of Switzerland*, 2<sup>nd</sup> edn. v. 16 (Bale: Helbing & Lichtenhahn, PIFF 2000): 4-74; Ronald Watts, *Comparing Federal Systems* 2<sup>nd</sup> edn. (Kingston: Queen’s University Press, 1999) p. 6, hereinafter referred to as *Comparing Federal Systems*.

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participation and input in the decision-making process at the level of the encompassing entity. It guarantees the inclusion of distinct groups in the political process in areas where common decision is deemed necessary. In this sense, it is a means of enhancing or forging common identity. For the concept to come to fruition the existence of a shared institution is a prerequisite. The role of the second chamber is crucial in this regard but it is also possible to envisage that the notion is also taken into account in the executive as well as the federal judiciary. Federal institutions as such should be viewed as means of forging solidarity within the federal system.

The division of powers in a federation is the outcome of series of negotiations among the several actors. According to this bargaining, certain powers and functions are given to the federal government and certain other powers and functions are left to the states. The negotiations are formally conducted and are enshrined in the federal constitution. The idea of shared rule is nothing but a reflection of the concept that the constituent states are made part and parcel of the powers assigned to the federal government in general and of the federal law-making process in particular. A more important value can be deduced from this objective of federalism. When states transfer certain powers and functions, this implies that they are part of the 'shared' rule. They are represented and accordingly participate in those powers. In this sense, one can say the negotiation or the federal bargain is not a zero-sum game to the states.<sup>11</sup> Hicks further reinforces this idea as follows: 'if we agree that a federal system has the dual role of creating *a nation* and preserving the *identity* of the units, it is clearly essential

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11 Labuschagne, *supra* note 6 at 70.



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that constitutions and institutions must be appropriately devised for both purposes. One of the required institutions in a federation is the House of States'.<sup>12</sup>

In sum, in addition to the traditional function of guaranteeing security to the interest of states/minorities 'there is more to be read: the guarantee of states participation in the law-making functions entrusted to the federal government is an important function of federations'<sup>13</sup> and this is often done by setting up second chambers. The entrenchment of the states in the federal government gives legitimacy to the reciprocal relationship between the federal government and the citizens of the various states. On the one hand, the states and the citizens have some control over the federal government, on the other hand the federal government exercises some level of direct authority over the citizens.<sup>14</sup>

Although the role of each second chamber in federations significantly varies depending upon which of the above rationales is predominant, all the federations considered in this study illustrate the case for second chambers with legislative functions. The Ethiopian Upper House is the only exception in this regard. The United States Constitution clearly makes the Senate an integral part of the legislature. It states, 'All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.'<sup>15</sup> The Swiss Constitution is even more explicit in guaranteeing the Cantons' participation not only in the law-making but also in other federal affairs. 'The cantons shall participate in the decision-making process on the federal level, in particular in federal legislation.'<sup>16</sup> The guarantee of the Cantons'

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12 Ursula Hicks, *Federalism: Failure and Success: A Comparative study* (London: The Macmillan Press, 1978) at 175 (emphasis original).

13 Labuschagne, *supra* note 6 at 70.

14 King, *Federalism and Federation*, *supra* note 7 at 89.

15 The US Constitution, Article 1, Section 1.

16 Swiss Constitution Article 45 (1).

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role in law-making is even more specifically stated as follows: ‘Subject to the rights of the people and the Cantons, the Federal Parliament is the highest authority of the Confederation.’<sup>17</sup> And in another sub section it is stated: ‘it [federal parliament] has two chambers, the House of Representatives and the Senate; which have equal powers.’<sup>18</sup> The German Basic Law likewise guarantees the states participation in the law-making and administration of federal law. It states, ‘The Länder participate through the *Bundesrat* in the legislation and administration of the federation...’<sup>19</sup> The Indian Constitution equally states that parliament as a composite law-making body consists of the Council of States and the House of People. It declares, ‘there shall be a parliament for the union which shall consist of the President and the two Houses, to be known respectively as the Council of States and the House of the People.’<sup>20</sup> What is common to all is the fact that the upper chamber is considered an important component of the federal law-making process.

The 1995 Ethiopian Constitution stands in sharp contrast in this regard. It fulfils the minimum requirement of having a second chamber but with a totally different function. Although the Constitution guarantees the various nationalities ‘*equitable representation*’ in the federal government,<sup>21</sup> close observation of Articles 39(3) and 62 reveals that the right to equitable representation in federal government only ensures the various nationalities in the federal executive, in the mostly non-legislative House of the second chamber and perhaps in other federal agents, but not in the federal legislature. Even though Article 53 states that ‘there shall be two federal houses, namely the House of Peoples Representatives [HoPR] and the

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17 *Ibid.*, Article 148(1).

18 *Ibid.*, Article 148 (2).

19 German Basic Law Article 50.

20 Indian Constitution Article 79.

21 Article 39(3) states as follows: ‘Every Nation, Nationality, and Peoples in Ethiopia has the right to full measure of self-government which includes the right to establish institutions of government in the territory that inhabits and to equitable representation in state and *Federal Government*’ (emphasis added).

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House of Federation [HoF]' in the sense of having two chambers, the legislative power of the latter is very much contested. The only provisions where one may by stretch of imagination trace legislative functions are Articles 99, 62(7) and 105. Under the former, the HoF has concurrent power with the HoPR in the determination of residual powers over taxation. In essence this provision refers to reserve powers regarding unspecified future tax bases. Article 62(7) refers to the 'division of revenues derived from joint Federal and State tax sources and the subsidies that the Federal Government may provide to the states.' In both cases, it appears that there is a role to be played by the HoF, but it is far from clear whether this role is legislative or otherwise. In the latter at least the practice so far indicates that the function of the HoF is to set the criteria that the HoPR may use in allocating shared taxes as well as subsidies concerning fiscal transfers to the states.<sup>22</sup> The HoF outlines the criteria to be taken into account and the HoPR considers the factors in approving the annual budget. As regards the powers of the HoF regarding Article 99, it is far from clear whether 'determining jointly' is meant to include decisions incorporated by laws to be approved by both Houses or whether it falls short of that. It could be stated that both Houses will decide in a joint meeting and that decision will be the basis for the HoPR in making laws, in which case it still remains a non-legislative function.

A less frequent but important power of the HoF is the role it plays in the amendment of the Constitution. Except in these cases, which one can hardly consider to be legislative functions, at least not within the list of law-making functions entrusted to HoPR under Article 55(2), the HoPR remains the sole and

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22 For instance the budget of the 1994 Ethiopian fiscal year [2001-2002] was independently approved by the HoPR but the criteria for allocating the budget to the different member states was separately decided by the HoF. See [http://ethiopianreporter.com/amh\\_newspaper/htm/R357/r357new1.htm](http://ethiopianreporter.com/amh_newspaper/htm/R357/r357new1.htm) as visited on 11-7-02.

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highest law-making authority of the federal government.<sup>23</sup> Article 55(1) is more specific in making clear the point that the HoPR exercises exclusively the legislative functions assigned to the federal government. It declares: ‘The House of Peoples’ Representatives shall have the power of legislation in all matters assigned by this Constitution to Federal jurisdiction.’

As stated earlier, the right to be represented in federal government stipulated by Article 39(3) could not be pushed further to include the federal legislature. For it is clear that there is no intention to that effect. It is inescapable to conclude, therefore, that unlike the other federations, the Ethiopian Constitution fails to entrench the states or to use the terms of the Constitution, the nations, nationalities and the peoples to be part of the federal law-making process. The consent of the HoF is not a precondition for the effectiveness of federal legislation.<sup>24</sup> Neither of the explanations indicated earlier, for having the second chamber is incorporated in the Ethiopian Constitution.

This is not without implications. In this regard Barbara Thomas-Woolly and Keller have rightly pointed out that the non-inclusion of the states may pose the question of legitimacy of the federal government. ‘The division of authority between the center and the states may not be enough to preserve the union. This is likely to be true if the central government, which reserves for itself jurisdiction over certain matters, is in the hands of a group which differs from those who control the regional governments. This may cause great antagonism in view of which the right of those in power in the capital to decide everything for the whole country could be questioned.’<sup>25</sup> This strain could be mitigated somehow if the

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23 Ethiopian Constitution Article 50(3) reads, ‘The House of Peoples’ Representatives is the highest authority of the Federal Government.’

24 Paul Brietzke, ‘Ethiopia’s ‘Leap in the Dark,’ Federalism and Self-Determination in the New Constitution’ *Journal of African Law*, 39:1 (1995) at 28.

25 Barbara Thomas-Woolly and Edmond J. Keller, ‘Majority Rule and Minority Rights: American Federalism and African Experience’ *The Journal of Modern African Studies* 32:3 (1994) at 414.

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central government includes representatives of the states. This inclusion would lead greater legitimacy to its decisions. Jon Abbink has also rightly stated that ‘the actual division of powers between the member states and the federal government as defined in the constitution is not federal enough ... the states have no role in debating policies and in proposing legislation formulated at or with the impact on the nation as a whole.’<sup>26</sup>

As the studies on the other federations will reveal, Ethiopian Constitution ‘betrays’ the federal idea significantly. It may be argued here that the role that the second chamber plays can be achieved otherwise. For instance, by taking into account regional interests in the composition of the federal cabinet, executive level co-operations between the federal government and the states (see chapter seven for more on this) or by introduction of proportionality in elections. But none of these elements are constitutionally guaranteed. There is a trend to reflect regional interests in the cabinet formation,<sup>27</sup> but it is far from formal. Besides, there is ample historical record of minorities’ marginalization from political power and it needs more constitutional guarantee if it is intended to replace the role of the second chamber.

The territorial units have neither the minimum participatory role nor the even greater functions assigned to upper chambers. The gist of the argument is therefore that the Ethiopian Constitution needs to be reconsidered seriously to empower the HoF to be part of the federal law-making process. There are three reasons for this assertion. Primarily, cursory reading of Ethiopian history proves that one of the perennial tensions has been the strife for power between centripetal

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<sup>26</sup> Jon Abbink, ‘Ethnicity and Constitutionalism in Contemporary Ethiopia’ *Journal of African law*, 41:2 (1997) at 168.

<sup>27</sup> As a matter of practice the composition of federal cabinet as well as other high level positions take into account ethnic as well as religious diversity. See for instance the ethnic and religious diversity of the federal cabinet for the second term at <http://www.waltainfo.com/Archive.html> as visited on April 11, 2003; see also Article 39(3).

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and centrifugal forces,<sup>28</sup> the latter constantly urging for local empowerment and for a certain role at the center, at times claiming the throne itself. The present arrangement addresses the problem of local empowerment, but fails to incorporate the states in the law making-process at the center. There is good reason to argue that power is still centralized in as far as the federal government does not allow the states to participate in those powers reserved to it.

Secondly, because the states are organized on a purely linguistic basis, there is an immense disparity among them in terms of population and geographic size, resources, administrative capacity and other elements of diversity. The power to legislate on federal matters is left to the exclusive authority of the HoPR organized on a proportionality basis. As a result, the existing glaring political asymmetry among states is constitutionally further reinforced at the center. There is no mechanism for the smaller states to check the decisions of the HoPR. It is completely in the hands of the largely populated states.

A prominent Ethiopian writer has rightly made the following observation:

The Ethiopian Constitution reflects this danger [the danger of the center being hijacked by a few more populous ethnic groups which may affect the aim of nation building] when it provides that the number of the House of Peoples' Representatives shall not exceed 550 ... Discounting the minority seats, the number of members of HoPR will not exceed 530. ... In the HoPR, the two populous ethnic groups [the Oromos and the Amharas] could have about 304 members, a clear majority of the total membership of the HoPR. In accordance with the Constitution, unless otherwise provided, all decisions of the House shall

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28 See for more on this chapter one, also M. Perham, *The Government of Ethiopia* (London: Faber & Faber limited, 1963) at 267; Assefä Fiseha, 'Federalism The Multiethnic and Multicultural Challenge: the Case of Ethiopia' in *Federalism, Decentralization and Good Governance in Multicultural Societies* (PIFF, Travaux de recherche, cahier No. 29, 2003): 63-105.

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be by a majority vote of members present and voting and the quorum requirement is the presence of more than half of the members of HoPR. Therefore, the combined vote of the Oromos and the Amharas would more than suffice for most of the business of the House.<sup>29</sup>

The very constitution, which aims to protect the nations, nationalities and peoples, betrays them by leaving their destiny in the hands of the more populous nationalities.

Thirdly, both the federal principle, in the sense of requiring the incorporation of the states in the federal law-making process and federal practice, at least the second chambers included in this study, support the case for a second chamber that has a role in law-making.

Despite the common rationale for having second chambers, however, there are significant variations in the manner of composition, election/appointment and more importantly in their role.

### 3.2 COMPOSITION

In terms of the basis of composition of second chambers, one observes a range of variations starting from those federations which organise on the basis of equality of territory to those federations balancing the principle of territoriality and citizen equality in the middle and those federations which are closer to the proportionality principle, on the other extreme.

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<sup>29</sup> Minase Haile, 'The New Ethiopian Constitution: Its Impact upon Unity, Human Rights and Development,' *Suffolk Transnational Law Review*, 20:1 (1996) at 4; see also *The 1994 Population and Housing Census of Ethiopia: Analytical Report V. II* (Addis Ababa: Central Statistical Authority, 1999); Articles 54, 59 and 58 of the Ethiopian Constitution.

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In the United States, the Senate embodying the principle of equal representation of the states, notwithstanding disparities in their population, was the price that the larger states had to pay for the participation of the smaller states in the federation. When there is a wide variety among the states in population, area, wealth or other elements of diversity, a straightforward application of the democratic principle of representation according to population would result in a federal power permanently controlled by the few more populous states.<sup>30</sup> The less populous states often fight to safeguard their interests from being swamped by the legislature composed by a popularly elected lower house. Accordingly, second chambers based on equal state representation<sup>31</sup> are instituted to take care of the concerns of the less populous states. It is only against this background that one understands the provisions of the US Constitution providing, ‘the Senate of the United States shall be composed of *two Senators from each state...*’<sup>32</sup> this is further reinforced under Article 5 which stipulates that ‘... no state, *without its consent*, shall be deprived of its equal suffrage in the Senate.’ Accordingly, each of the 50 states enjoys formal equal representation in the upper house, although there is a glaring disparity, for instance, between the tiny state of Rhode Island and the most densely populated state California. The Senate with such equality among the states is designed to check the potential of majority tyranny coming from the lower house.<sup>33</sup>

The same principle is adopted under the Swiss Constitution, except for introducing the notion of full and half Cantons. It states, ‘The Senate shall consist

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30 Watts, *New Federations*, *supra* note 8 at 257.

31 Campbell Sharman, ‘Second Chambers’ in Herman Bakvis and William M. Chandler eds., *Federalism and the Role of the State* (Toronto: University of Toronto Press, 1987) at 83.

32 United States Constitution Article 1 section 3(1).

33 K.C. Wheare, *Federal Government*, 4<sup>th</sup> edn. (London: Oxford University press, 1963) at 94.



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of 46 delegates of the Cantons.<sup>34</sup> Six half Cantons elect one and the remaining twenty each shall elect two senators.

The German federation represents a different principle that tries to balance the interests of the most populous states on the one hand and those of the less populous ones on the other. The Basic Law stipulates: ‘The *Bundesrat* consists of members of state governments which can appoint and recall them ...’<sup>35</sup> and in another section it provides, ‘each *Land* has at least three votes; Länder with a population between two to six million inhabitants have four, Länder with more than six million inhabitants five, and Länder with more than seven million inhabitants six votes.’<sup>36</sup> As can be seen from the provision of the Basic Law, the *Bundesrat*’s seats are allocated on a weighted basis giving some advantage to the less populated Länder but falling short of the principle of equal representation of states. In principle all the votes of each *Land* must be cast uniformly and cannot be split.

India’s Second Chamber, the Council of States, is similarly designed. The less populous states are favored but not to the point of guaranteeing equality among them. The Constitution states ‘the allocation of seats in the Council of States to be filled by representatives of the states and of the union territories shall be in accordance with ... the fourth schedule.’<sup>37</sup> The schedule provides a list of states and the corresponding seats allocated to each state. In the House with 245 members, excluding the twelve appointed by the President, the smallest state is allocated one seat, while the highly populated one with thirty-four. The basis of such allocation is less clear but one can reasonably guess that it is population size.

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34 Swiss Constitution Article 150.

35 German Basic Law Article 51(1).

36 *Ibid.*, Article 51(2).

37 Indian Constitution Article 80(2).

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Besides, the Constitution provides for twelve other members to be appointed by the President who are well qualified in science, art, literature or social services.<sup>38</sup>

The German and Indian approaches are in a way an attempt to counterbalance the immense inequality of the right of the citizen to vote among the several states. It is fashioned to render the votes of citizens across the states more equal. King has critically analyzed the tension between the two distinct principles of representation, the equality of states and the equal entitlement of the citizen to vote.

In federations where the legislative representation of regions is equal, any strict equality of votes among the regions creates a necessary inequality of representation between the citizens of the different regions. And in federations where the representation of the regions is unequal, the degree of entrenchment of regional power is thus far diminished. To diminish the entrenchment of regional power is equally to increase the degree of inequality between regions. The conventional reason for diminishing the degree of unequal legislative representation between regions is, of course, to render the votes of the citizens across regions more equal. But in the end there is simply a conflict between making regions more equal, or making all citizens more equal. In any event, inequality of regional representation in the upper houses of federal legislature is only a compromise. It represents an acknowledgment of the dilemma and does not eliminate the underlying conflict between the two distinct principles of representation in play.<sup>39</sup>

In sum, he concludes, ‘The principle of equality of citizens is eroded where the equality of regional representation is entrenched. The principle of equality of

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38 *Ibid.*, Article 80(3).

39 King, *Federation and Representation*, *supra* note 3: 98-99.

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regions is eroded where precedence is accorded to citizen equality. In a democracy, it is distinctive that citizens enjoy a right to vote on an equal basis. In a federation, viewed as a particular type of democracy, it is distinctive that representation of regions is in some manner entrenched. Federations incorporate necessarily and unavoidably some degree of inequality between the citizens of the different regions.<sup>40</sup> And the Indian Constitution and German Basic Law attempt to minimize the gap in the inequality between the citizens of the different states.

As can be gathered from the above paragraphs there is nothing that can universally be stated. What can only be stated with safety is that none of the federations have adopted a full measure of equality among the citizens. As Arend Lijphart suggests, strong bicameralism requires a second chamber that is dissimilar in congruence in terms of its composition compared to the first chamber. The incongruence is reflected by the conscious choice of providing overrepresentation to certain minorities or the smaller states of the federation.<sup>41</sup>

This leads to the assertion that the more severe the inequality in representation among the states in the upper house, the lesser the distinction in terms of composition will be in the other house and the more this defeats the rationale for having the second house in federations. This is exactly the dilemma one faces under the Ethiopian Constitution unless one justifies it by saying that after all it has functions other than law-making. Even then, however, one fails to see why the HoF should go far in endorsing almost the same principle of composition as the lower house. Article 61(2) of the 1995 Constitution stipulates ‘each Nation, Nationality and People shall be represented in the House of Federation by at least

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40 *Ibid.*, at 101.

41 Arend Lijphart, ‘Bicameralism: Canadian Senate Reform in Comparative Perspective’ in Bakvis and Chandler, *supra* note 31 at 105.

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one member. Each Nation or Nationality shall be represented by one additional representative for each one million of its population.’ Accordingly, the organizational principle of the HoF is the same with the HoPR except that there is a significant difference in the number of constituencies, 100,000 for the former and one million for the latter. The provision does not even apply any rational upper limits like the German one. According to this arithmetic, the population or ethnic group with the largest number will have as many seats as its size may allow in the HoF, as in the Lower House, and this puts into question the rationale for setting up a second chamber in a federation. Since the coming into force of the federal Constitution there have been two terms and the figures are indicative of this fact. During the first term (1995-2001) out of the 108 members of the HoF, Amhara had 18 (two seats for other minorities), Oromia 17, Tigray (three ethnic groups) 6, SNNPRS (with more than 45 ethnic groups) 51, Gambela (five ethnic groups) 4, Harari 1, Somalia 4, Benshangul/Gumuz (five ethnic groups) 4, and Afar 2 representatives.<sup>42</sup> And in the second term (2001-2005) the seats of the HoF are distributed as follows: Amhara 15, Harari 1, Somalia 4, SNNPRS 51, Oromia 18, Benshangul-Gumuz 3, Gambela 3, Afar 2, Tigray 3.<sup>43</sup> The figures indicate that more populated nationalities have more seats and that there is as such no upper limit to the number of seats.

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42 Apparently the figures are far from certain. Indeed there is an inconsistency between the Amharic and English source of the website of the Parliament. See <http://www.ethiobar.net/English/hofed/hofmemb.html> which shows the following figures, Afar 2, Amhara 17, Tigray 6, Oromia 16, Somali 4, Benshangul-Gumuz 4, SNNPRS 54, Gambela 4 and Harari 1 (total 108). While the English source <http://zobel.geez.org/sys=FirstTime.utf8&file=http://ethiobar.net/Amharic/hofed> as visited on 29-1-03, indicates as follows: Amhara 18, Oromia 17, Tigray 6, Afar 2, Benshangul-Gumuz 5, SNNPRS 51, Gambela 4, Harari 1 and Somali 4.

43 Unpublished document collected from the Secretary of the HoF, November 2002 indicating a total membership of 100. According to a population census carried out in 1994, the Ethiopian population amounts to almost 54 million and if the annual rate of 2.73 per cent population growth is added for the last decade, the present estimate is close to seventy million. See *Central Statistical Authority: the 1994 Population and Housing Census of Ethiopia V. II Analytical Report* (Addis Ababa, 1999).

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In sum, the composition of the upper chambers varies significantly, from the nearly majoritarian House of Federation in Ethiopia to that of minority protection in the US and Switzerland, with the German and Indian Houses balancing the tension between territorial and citizen equality, in between.

### 3.3 SELECTION OF MEMBERS

Similar variations exist among the federations in the manner in which the members of the upper house are brought to office. In the United States, originally members of the Senate were indirectly elected by the state legislatures.<sup>44</sup> Wheare argued that this was a remnant of the federal legislature dependency upon the government of the states.<sup>45</sup> An amendment<sup>46</sup> of the Constitution introduced in 1913, finally declared that Senators are directly elected by the people there of. The Swiss Constitution follows the same principle of direct election of members of the Senate. Article 150 states ‘... six half Cantons elect one and the remaining twenty each shall elect two senators.’ In both federations the citizens of the states directly elect the members of the second chamber. And the states are aggregates of electors who vote directly to choose members of the second chambers. Although a balanced representation in the Council of States is not expressly provided for by any legal provision, as a matter of practice, the deputies are often chosen in such a way that they represent the cantons two main components: the two languages, the two religions or the two main parties.<sup>47</sup>

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44 Art. I Section 3 reads, ‘ The Senate of the United States shall be composed of two senators from each state, chosen by the legislatures thereof ... ’

45 Wheare, *supra* note 33 at 3.

46 Amendment XVII states, ‘The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years.’

47 Nicholas Schmitt, *Federalism: The Swiss Experience* (Pretoria: HSRC Publishers, 1996) at 35.

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In Germany, by virtue of Article 51 of the Basic Law the members of the *Bundesrat* are delegates of their *Land* cabinets, holding office in the federal second chamber *ex officio* as members of their *Land* executive and voting in the House in a block on the instruction of their *Land* governments. Each *Land* Government sends members of its cabinet to represent the interests of the *Land* in the *Bundesrat*. As these officials are simultaneously delegates for the *Bundesrat* and officials of the *Land* government, they can be instructed and recalled by the *Land* government.<sup>48</sup>

In India, members of the federal second chamber are for the most part indirectly elected by the state legislature. Federal appointments are also provided as a means for ensuring representation of some particular interests and for this reason it provides for twelve such appointments out of an overall total of 250 members. Article 80 sub 4 states that the elected members of the legislative Assembly of the State shall elect the representative of each state in the council of states.

In the Ethiopian situation Article 61(3) envisages two possibilities. Members of the House of Federation may be elected indirectly by the state legislatures or the state legislature may decide the members to be elected directly by the people. So far experience indicates that all members are indirectly elected by the states.<sup>49</sup>

A more fluid issue is the interest that members of the upper house represent. When one speaks of representation, it is far from clear as to what it is to be represented. The difference in the manner of election of such members seems to have had an impact to the variation of interests to be represented at federal level. In the US and Switzerland, at least initially, representation is based on the

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<sup>48</sup> Watts, *Comparing Federal Systems*, *supra* note 10 at 95.

<sup>49</sup> Ethiopian Constitution Art. 61(3) stipulates, 'Members of the House of the Federation shall be elected by the State Councils. The State Councils may themselves elect representatives to the House of Federation, or they may hold elections to have the representatives elected by the people directly.'

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territorial principle and theoretically speaking the two representatives are expected to stand for the interests of the states.<sup>50</sup> In the US this was obvious before the 1913 amendment. Since then, however, it is doubtful whether the Senators represent the interest of the citizen, the state or some regional interest such as the mid west, east or the south, as the citizen directly elects them. Some cast doubts on the claim that Senators represent the States in the federal government.<sup>51</sup> In Switzerland too, it is possible to question how genuinely the cantons' interests are reflected in the Council of States. In principle deputies vote without instruction<sup>52</sup> and they can express cantonal interests. But neither the governments of the cantons nor parliament has any political influence on the decisions of the Council of States. There is a trend that the Council of States no longer represents member states but in another form the people of Switzerland as a whole. Its deputies vote according to political ideals or personal ideas rather than in the interests of the cantons.<sup>53</sup>

In Germany, as the *Bundesrat* is composed of the delegates of the executives of *Land* governments who vote as a block on the instruction of each *Land* cabinet, it appears that they represent the *Land* government, and more specifically the regionally governing party.<sup>54</sup>

Article 61(1) of the Ethiopian Constitution provides that the HoF is composed of representatives of nations, nationalities and peoples. Membership in the HoF appears to be not based on the principle of territoriality but on what the

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50 Sharman, *supra* note 31: 83-86.

51 For instance, Duchacek argued it is debatable whether today a Senator [US] still represents his own state interests or rather multi-state interests, functions or his party. Ivo Duchacek, *Comparative Federalism: The Territorial Dimensions of Politics* (Lanham: University Press of America, 1970) at 245. And for a more comprehensive critic on the role of the Senate see Lynn Baker and Samuel Dinkin, 'The Senate: An Institution Whose Time Has Gone?', *Journal of Law and Politics* 13 (1997): 21-68.

52 Schmitt, *supra* note 47: 33-36; see also Swiss Constitution Articles 148, 150, 156.

53 *Ibid.*

54 Sharman, *supra* note 31 at 84.

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Constitution defines namely nations, nationalities, and peoples. But the net effect as such may not be significantly different, because the Constitution defines the states in terms of ethno-linguistic identities. If a certain ethnic group does not have a state of its own, owing to its number or due to any other administrative factor, then it will have a local administration at a lower level. As can be observed from the Preamble and Article 8 it does not begin by the familiar formula of ‘We the people of Ethiopia.’ It rather stipulates ‘We, the Nations, Nationalities and Peoples of Ethiopia.’ In the words of Fasil, the constitution defines Ethiopia expressly as a nation of nations.<sup>55</sup>

Article 8, one of the fundamental principles of the Constitution, seems to reinforce this assertion. It unusually declares that all sovereign power resides in the nations, nationalities and peoples of Ethiopia. Actually the Constitution is considered as nothing more than an expression of their sovereignty. It is, therefore, claimed that what is represented are the nationalities, the authors of the Constitution.<sup>56</sup> But as already noted earlier and as will be demonstrated as regards the regime of fiscal transfers discussed below, this is merely rhetoric.

In the light of the above discussion, it can be stated that the federal role of the second chamber may range from being the forum for expressing the preference of state governments (Germany) to being an institution directly reflecting a pattern of electoral preference weighted in favor of the residents of the smaller units of the federation (Switzerland and the US) and pretension of house of nationalities in Ethiopia.<sup>57</sup>

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55 Fasil Nahum, *Constitution for Nation of Nations: The Ethiopian Prospect* (NJ, Lawrenceville: The Red Sea Press, 1997) at 51.

56 *Ibid.*, at 52.

57 Sharman, *supra* note 31 at 84.



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**3.4 POWERS**

The difference between second chambers is even more obviously seen when one looks at their constitutionally assigned roles in the law-making process in general and other powers in particular. It is not clear whether or not the second chamber is to function as co-equal legislature as in the lower house, in the sense of guaranteeing both participation and protection of state interests or is required to remain a subsidiary house, for instance only making sure that the interests of states are taken into account in the process. A three-fold classification can be made in this respect.

There are those that are fully symmetrical second houses as in the US and Switzerland where the two chambers are co-equal in power and are directly elected. We have already seen that in the United States all legislative powers are vested in both houses. Furthermore, the Senate is vested with additional important functions. Upon institution of charges by the lower house, the Senate has the sole power to try impeachment.<sup>58</sup> It has equal powers in all bills including money bills, except that it is introduced in the House of Representatives. In addition, the advice and consent of the Senate (two-thirds vote) is a requirement for the approval of treaties concluded by the President. The President's power to conclude international treaties is limited<sup>59</sup> to a great extent by the role of the Senate. The Senate has a similar role in the appointment of ambassadors, or other ministers, consuls, and judges of the Supreme Court.<sup>60</sup>

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58 US Constitution Article I Section 3(6) states, 'The Senate shall have the sole power to try all impeachments ... and no person shall be convicted without the concurrence of two thirds of the members present.'

59 US Constitution Article II Section 2(2) 'He [the president] shall have power with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators concur; and shall nominate, with the advice and consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, judges of the Supreme Court ...'

60 *Ibid.*, See also Labuschagne, *supra* note 6: 77-78.

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The Swiss Council of States is equally empowered in all legislative affairs. It has exactly the same power as the lower house and both houses play the same role in the selection of the Federal Council. In Switzerland, like the US, small cantons have through the second chamber an opportunity to check the influence of the more populated cantons, regardless of population size.<sup>61</sup> The Swiss Council of State, as it is called, enjoys equal status with regard to initiating and passing legislation; neither House dominates in the process of legislation. Like the United States both chambers are composed differently. And as can be seen from the Constitution, both houses have the same competence and they deliberate separately.<sup>62</sup>

In both the United States and Switzerland, the power of the Senate is further reinforced by the separation of powers between the legislature and the executive. Their equality is seen in matters of legislation, no law can be enacted unless both houses agree on the same text. Legislative acts and almost all other decisions of the legislature may only be enforced if they have the approval of both chambers.

The German *Bundesrat* belongs to the second group. It represents one of the more effective houses in a parliamentary system. Composed of representatives of the executives of the *Länder*, usually ministers of the *Land* cabinet, it has perfectly combined the participatory role as well as the protection function. Its particular membership as well as the fact that it has absolute veto over all federal legislation involving administration by the *Länder* has contributed to the success of this house.<sup>63</sup> It is allowed to initiate legislation, it has the right to examine and

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61 Thomas Fleiner, 'Switzerland: Constitution of the Federal State and the Cantons,' in Lidija Basta and Thomas Fleiner eds., *Federalism and Multiethnic States: the Case of Switzerland* (Fribourg: Institute of Federalism 1996) v. 16 at 81.

62 Swiss Constitution Articles 148, 149, 150, 156; see also Schmitt, *supra* note 47 at 32.

63 Watts, *Comparing Federal Systems*, *supra* note 10 at 96.

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comment on all bills proposed by the federal government before they are submitted to the *Bundestag* [lower house].

The type of bill proposed determines the power exercised by the *Bundesrat*. The Basic Law makes a distinction between those bills which require the consent of the *Bundesrat* to become a law and those where its objection could be overridden by an equivalent majority of the lower house. In the latter category of laws, the *Bundesrat* has the right to participate but only with a suspensive veto. If the *Bundesrat* objects to the proposed bill, the *Bundestag* can overrule it with the same majority which the former house applied to approve or reject. In other words, a simple majority in the Lower house can reject what has been approved by a simple majority in *Bundesrat*. The latter is given with an upper hand. However, in the case of bills that require the consent of the upper house, the *Bundesrat* has absolute veto.<sup>64</sup> In general, a bill requires the consent of the upper chamber if it has financial implications or affects the duties of the Länder or lays down administrative procedures for them in their function of implementing federal legislation. The *Bundesrat*, however, took an expansionist view of what constituted an administrative procedure and regarded the presence in a lengthy bill of a single clause requiring its consent as being sufficient to give it an absolute veto over the bill as a whole.<sup>65</sup> In practice this covers more than sixty per cent of all federal legislation. The reason for such an increased role of the *Bundesrat* in influencing federal legislation requiring its consent is that a series of constitutional amendments over the years transferred powers that traditionally belonged to the states. Giving the *Bundesrat* an absolute veto is part of the

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<sup>64</sup> See Articles 77, 83 and 84 of the German Basic Law.

<sup>65</sup> Philip Blair, 'Federalism, Legalism and Political Reality: The Record of the Federal Constitutional Court.' in Charlie Jeffery and Peter Savigear eds., *German Federalism Today* (New York: saint Martin's Press, 1991): 70-71.

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attempt to compensate the incursion on state autonomy.<sup>66</sup> In this category of laws, the final say is reserved for the upper house, not even a unanimous vote of the lower house could pass the law, so long as it is not approved by the former. It is important to note that the German federation is unique in the sense that the Länder play a very crucial role in the administration of federal law, compared to other federations like the United States where it employs a large number of federal agents for executing federal laws.<sup>67</sup> German federalism is often uniquely described as ‘executive federalism,’ signifying the fact that federal government is predominantly responsible for legislating most of the laws while the states are responsible for implementing such laws.<sup>68</sup> Consequently, in constitutional terms and practice, the *Bundesrat* is both the legislative organ of the Länder at federal level and at the same time, the federal organ of administration in the ‘whole state.’ This dual role has its origin in the twofold effect of Articles 50 and 84 of the Basic Law. Article 50 clearly stipulates that the Länder shall participate through the upper house in the legislation and administration of the federation. Article 84 states all federal statutes which regulate the institutional and/or procedural aspects of the role of the Länder in the execution of those statutes, require the consent of the *Bundesrat*. Thus, the role of the upper chamber is a double one in a double field. It is both that of co-legislature with the lower house and of representative of the Länder in their function as administrators of federal legislation.<sup>69</sup>

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66 Tony Burkett, ‘The Ambivalent Role of the Bundesrat in the West German Federation,’ in Michael Burgess ed., *Federalism and Federation in Western Europe* (Croom Helm: Harvester 1986) at 210; see also David Currie, *The Constitution of the Federal Republic of Germany* (Chicago: the University of Chicago Press, 1994): 61-65.

67 Burkett, *supra* note 66 at 211.

68 Uwe Leonardy, ‘The Working Relationship Between Bund and Lander in the Federal Republic of Germany’ in Charlie Jeffery and Peter Savigear eds., *German Federalism Today* (New York: saint Martin’s Press, 1991) pp. 40-59; Daniel Halberstam and Roderick Hills, Jr. ‘State Autonomy in Germany and the United States,’ *574 Annals* 173 (2001) 173-178.

69 Leonardy, *supra* note 68 at 46; Article 50 was amended in 1994 thus enhancing the role of the *Bundesrat* not only in the traditional role of legislation and administration of federal laws but also in matters of European union (see chapter six for more on this and also Article 23 of the Basic Law). Schneider argues that the *Bundesrat*, not the Länder was the winner in the 1994 Constitutional reform. Its veto powers further expanded to include legal regulation of state liability, of the railway system, local public transport, the postal services and telecommunications (Arts. 72/2, 80/2, 87e/5, 87f/1, 106a, 143a/3, 143b/2 of the Basic Law); Hans-Peter Schneider, ‘German

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According to Sharman the upper house representing the government of the *Land* makes it radically different from other second chambers in parliamentary systems.<sup>70</sup> It is constituted under the assumption that there is a possibility of conflict between the national executive based on the majority in the lower house and a differing state based majority in the upper house. By dividing *their roles* on the law-making process it introduced the possibility of accommodation between the two levels of government within the national legislature. This also proves the case that second chambers in parliamentary systems do not necessarily become weaker compared to their counterparts in Presidential systems.<sup>71</sup> It is an innovation in the organization of the second chambers. It articulates *Land* rights over federal law and to this effect it uses its veto and powers to amend. The *Bundesrat* exists not only as a check and to exercise a veto on federal government but also as its partner with a suspensive veto in the federal law-making process.<sup>72</sup>

The second chamber of India with subsidiary power and playing a precipitate function in the law-making process represents a third group. It represents a second chamber with a general power to revise legislation potentially able to amend bills but only with a suspensive veto. Although there appears to be a difference of opinion about the Indian Council of State, the constitutional provisions confirm

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Unification and the Federal System: The Challenges of Reform,' in Charlie Jeffery ed., *Recasting German Federalism: The Legacies of Unification* (London: Pinter, 1999) at 78.

70 Sharman, *supra* note 31 at 87.

71 According to some authorities, the variation in the manner of election of second chambers is not without implications. To a certain degree it affects the democratic legitimacy of second chambers and certainly its power. Lijphart, *supra* note 41 at 103. Watts, *Comparing Federal Systems*, *supra* note 10 at 96. Moreover, certain laws are required to be initiated only in the lower house. In India for example, the powers of the second chamber in relation to money bills are limited, a money bill can be delayed by the second chamber for only two weeks. *Ibid.* In case of conflicts between the two houses over a bill, provisions are clearly made to limit the power of the second chamber to only a suspensive veto. It is usually the lower house that has the last word in legislative matters. 'The refusal by the upper house to go alone may be overridden after a prescribed period of time.' Duchacek, *supra* note 51 at 249. In addition, where there are matters that need joint sittings, the lesser number of the members of the second chamber place it to a subsidiary position.. Labuschagne, *supra* note 6 at 74.

72 At the time of writing of this thesis (summer of 2004 in Heidelberg, Germany), colleagues at the Max Planck Institute mentioned to the author that a Commission is considering proposals to revise the powers of the *Bundesrat* as well as to transfer some responsibilities from the *Bund* to the *Länder*. At the time of writing the *Bund* was dominated by Social Democrats and the *Länder* governments by Christian Democrats. Thus, there was political deadlock in the two federal houses which some consider as resulting from wide powers of the *Bundesrat*.

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the idea that the upper house has a reversionary function. According to Sharma, the House enjoys an even greater authority, going beyond the co-equal legislative role, compared to the lower house.<sup>73</sup> It is true that the Constitution stipulates, 'bills shall not be deemed to have passed by the houses of parliament unless it has been agreed to by both houses, either without amendment or with such amendments only as are agreed to by both houses.'<sup>74</sup> The House also has important powers in amending the Constitution under Article 368. It is also the sole house that can pass binding decisions calling parliament to enact law-covering matters included in the state list.<sup>75</sup> However, the powers of the same House are also severely limited by the qualifications introduced under Articles 108 and 109. In the latter, money bills are not only introduced in the lower house but the last say is also reserved to it. The refusal of the upper house has no serious implications for the lower house may or may not endorse them, at its discretion. The upper house has only a suspensive veto; its concurrence is not required to pass all new laws. Under Article 108, in matters involving joint meetings, for instance disagreements on a bill, the fact that such a meeting requires only a simple majority and that the members of the upper house are almost half compared to the lower house, clearly indicates the dependency of the upper house on the other.<sup>76</sup>

With a completely different role, the Ethiopian HoF appears to stand as a fourth category. As already stated, the HoF does not have a legislative function. Some of the important powers conferred to the House under Article 62 include constitutional interpretation and organizing the Council of Constitutional Inquiry.

73 B.M. Sharma, *The Republic of India: Constitution and Government* (Bombay: Asia Publishing House, 1966) at 276. Watts on the other hand argues that it is a typical parliamentary upper house with only subsidiary function, *Comparing Federal Systems*, *supra* note 10 at 96.

74 Indian Constitution Art. 107(2). The provision, however, commences by a serious qualification subjecting this power to other Articles 108 and 109 regarding joint sittings and money bills.

75 Indian Constitution Art. 249 (1).

76 Watts, *Comparing Federal Systems*, *supra* note 10 at 96.

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According to the Constitution, it is believed that, constitutional interpretation is considered as a political rather than a judicial function. Explanations can be inferred from Articles 8 and 61. Article 8 stipulates, ‘All sovereign power resides in the nations, nationalities and peoples of Ethiopia.’ And Article 61(1) provides the fact that the House is composed of such diverse nationalities. By inference it can be concluded that, if sovereignty is placed on the nationalities and because the nationalities are sources of sovereignty, the house, which reflects their sovereignty, must interpret the constitution. This author has elsewhere argued that the House as a political body may be legitimate in adjudicating issues of constitutional interpretation involving the several federal institutions or in umpiring federal disputes between both orders of government, but it is doubtful if the House is to be an effective one for instance in the cases involving enforcement of fundamental rights and freedoms as well as other issues of less political significance.<sup>77</sup> Besides, the fact that members of the House are at the same time active members within the regional government, only visiting the Capital when there are calls for a meeting, often twice within a year, raises doubt about its institutional competence as a regular federal body. It is perhaps in the area of fiscal federalism that the HoF could be considered important.

### 3.5 THE ROLE OF THE HOF IN INTERGOVERNMENTAL RELATIONS

Fiscal federalism is by and large a concept derived from economics governing the allocation of revenue and expenditure responsibilities between federal and state governments and it also attempts to deal with the system of intergovernmental transfers between the federal government and the states as well as among the

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<sup>77</sup> Assefa Fiseha, ‘Constitutional Interpretation: The Respective Role of Courts and the House of Federation’ in *Proceedings of the Symposium on the Role of the Courts in the Enforcement of the Constitution* (Addis Ababa: Berhanina Selam, 2001): 6-26.

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states. However, although the theory might provide scientific basis for sorting out federal, state and local roles, in practice it is hindered by other values of federalism<sup>78</sup> such as accommodation of diversity, conflict management, solidarity and so on. The values of fiscal federalism often come into conflict with other values of federalism.<sup>79</sup>

The Ethiopian Constitution provides a separate regime of allocation of powers of taxation distinct from the technique for allocation of other powers.<sup>80</sup> As far as the powers of taxation are concerned, the Constitution stipulates separate powers of taxation for the federal government,<sup>81</sup> another separate list for the states,<sup>82</sup>

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78 The values of federalism as well as the specific objective of fiscal transfers might differ from one federal system to another. For example in Germany and Switzerland, fiscal transfers aim at creating more equitable life standards among the citizens as well as among the states. This brings us to the brief consideration of the regime of co-operative vs. competitive federalism. There are costs and benefits associated with each. Advocates of competitive federalism argue that just as economic competition produces superior benefits compared to monopolies or oligarchies, so competition between governments serving the same citizens is likely to provide citizens with a better service. They equate co-operative federalism with collusion directed at serving the interests of governments rather than of citizens. See Basic Law Arts. 72, 104 and 106. See Charlie Jeffery, 'German Federalism from Co-operation to Competition' in Maiken Umbach ed., *German Federalism, Past, Present, Future* (Houndmills: Palgrave, 2002): 170-178; also Wolf Linder, *Swiss Democracy: Possible Solutions to Conflict in Multicultural Societies*, 2<sup>nd</sup> edn. (New York: St. Martin's Press 1998): 63-64; John Kincaid, 'American Experience in the Theory and Practice of Fiscal Federalism,' in Douglas Verney and Balveeg Arora eds., *Multiple Identities in a Single State: Indian Federalism in Comparative Perspective* (Delhi: Konark Publishers pvt. Ltd. 1995): 324-340; also Hans Mackenstein and Charlie Jeffery, 'Financial Equalization in the 1990s: On the Road Back to Karlsruhe?' in Charlie Jeffery ed., *Recasting German Federalism: The Legacies of Unification* (London: Pinter, 1999): 155-176.

79 For more on the values of federalism see chapters four and five.

80 While Articles 51 and 52 stipulate that the federal government has enumerated powers and grant residual power to the states, this technique is not to be applied in the regime of fiscal federalism because the Constitution expressly provided a different principle under Arts. 94-99.

81 Article 96 stipulates the following as federal powers of taxation: customs duties, taxes and other charges on imports and exports, income tax on employees of the federal government and international organizations, income, profit, sales and excise taxes on enterprises owned by the federal government, income and winnings of national lotteries and other games of chance, taxes on the income of air, rail and sea transport services, taxes on the income of houses and properties owned by the federal government and rents collected from the same, fees and charges relating to licenses issued and services rendered by organs of the federal government, taxes on monopolies and federal stamp duties.

82 Among other things Article 97 states that states shall levy and collect income taxes on employees of the state and of private enterprises, fees for land usufructuary rights, taxes on the incomes of private farmers and farmers incorporated in co-operative associations, profit and sales taxes on individual traders carrying out a business within their territory, taxes on income from transport services on waters within their territory, taxes on income derived from private houses and other properties within the state, profit, sales, excise and personal taxes; income taxes on income of enterprises owned by the states, fees and charges relating to licenses issued and services rendered by state organs, and royalties for use of forest resources.



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concurrent power of taxation for both governments<sup>83</sup> and finally leaves undesignated powers of taxation to be decided by a two-thirds majority vote in a joint session of both federal houses.<sup>84</sup> In other words, residual power of taxation remains with the federal government. It seems, therefore, that as far as the law is concerned the Constitution emphasizes the federal principle. Indeed, it expressly declares ‘The federal government and the states shall respectively bear all financial expenditures necessary to carry out all responsibilities and functions assigned to them by law.’<sup>85</sup>

It should also be born in mind that the Ethiopian Federal system adheres to ‘dualism,’<sup>86</sup> somewhat strictly. Each level of government has its own legislative, executive, financial and judicial powers.

While this is generally the legal framework, in reality there appears to be some deviation from constitutional principles. Indeed, the trend in many federal systems, including Ethiopia can be described by what John Kincaid rightly calls ‘revenue concentration and expenditure decentralization.’<sup>87</sup> In almost all federal systems, because the federal government is assigned the task of redistribution as well as securing some level of economic stability, the most lucrative revenue sources have for the most part been kept under federal jurisdiction. On the

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83 Article 98 provides: ‘Federal government and the states shall jointly levy and collect profit, sales, excise and personal income taxes on enterprises they jointly establish, taxes on profits of companies and on dividends due to shareholders, taxes on incomes derived from large scale mining and all petroleum and gas operations, and royalties on such operations.’ However, this Article has ‘unofficially’ been amended in 1997. At least two reasons were provided for its amendment. It was stressed that most of the activities taxed under this Article relate to activities with interstate commerce and hence have spillover effects. It was also pointed out that it is practically difficult to legislate as the federal and state law-makers could not sit together to make laws. As a result, it was recommended that both legislation and collection of these taxes be assigned to the federal government but the allocation of the revenue would remain within the responsibility of the HoF as per Art. 62(7). However, the second reason seems less convincing because there are many ways of regulating concurrent powers of taxation. Both levels of law-makers need not necessarily sit together to regulate concurrent powers. As federal experience elsewhere indicates, it is still possible that the federal government can legislate solely or simply lay down framework legislation leaving some specific details to be filled in by the states. See for more on this chapter six.

84 Article 99.

85 Article 94.

86 For more on this see chapter seven.

87 John Kincaid, *supra* note 78 at 328.

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expenditure side, however, education, health and other social services, relatively high cost activities are often left within the domain of the states. Differences in the state's economic development and natural resource endowment also contribute to a wide financial capacity among the states. Besides, state governments often are responsible for the administration of federal laws in which case the expenditure responsibility of the states increases. As a result, comparative studies indicate that in most of the federal systems the states are not able to cover the whole of their expenditure responsibilities and some form of fiscal transfer from the federal government is inevitable.<sup>88</sup>

For these and other reasons the regime of fiscal arrangement is often lopsided to the federal government and federations have resorted to various kinds of measures to settle the vertical imbalance. However, different kinds of fiscal transfers from the center to the states (at times it also included horizontal equalization between the states) are not often without problems. The states dependency on the federal government affects the constitutional autonomy of the states. Financial resources affect and limit the capacity of the government to perform its assigned legislative and executive responsibilities. Whatever responsibilities are assigned to the states unless they are matched by resources that will enable them to exercise it, the autonomy becomes less effective. However, one has to note the wide variety of the nature of the fiscal transfers. In some federations, the fiscal transfers are followed by stringent conditions in which case their impact on the autonomy of the states will be severe<sup>89</sup> while in others the states might receive the fiscal transfers and dispose the funds according to their own priorities, in which case its impact on state autonomy could be less.

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<sup>88</sup> See Ronald Watts, *Comparing Federal Systems*, *supra* note 10: 43-53.

<sup>89</sup> John Kincaid argues that the United States system of grants in aid that flourished after WWII often contained strict conditions. The number of federal grant programs increased from 132 in 1960 to 593 in 1993 and Congress makes sure that state and local officials spend federal funds for specific purposes. *Supra* note 78 at 328.

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Taking the 2001/2002 Ethiopian fiscal year and the states' revenue generating capacity one would see that Oromia was able to generate 24.5 per cent, Amhara 11.2 per cent, Tigray 4.5 per cent, Afar 0.8 per cent, Somali 1.3 per cent, Benishangul Gumuz 0.9 per cent, SNNPRS 9.8 per cent, Gambela 0.55 per cent, and Harari 0.6 per cent. Added together, the revenue generating capacity of the states constituted only 36.1 per cent and hence the bulk of the expenditure responsibility of the states is taken care of by the federal government through the fiscal transfers. A survey over the years also indicates that the federal government collects more than 80 per cent of all revenue while the regional governments generate the balance which covers only 28.5 per cent of their total expenditure from their own revenue source.<sup>90</sup> As a result, many have argued that the autonomy of the states is heavily eroded because of their financial dependency on the federal government.<sup>91</sup> While there may be several other reasons for concluding that the federal system is more centralized in practice than it appears in text,<sup>92</sup> this evidence alone does not seem to warrant such an assertion because unlike many federations the fiscal transfers in Ethiopia for the most part have been unconditional.<sup>93</sup>

90 The survey also seems to indicate that Gambela, Benishangul-Gumuz, Afar and Harar are basically dependent for almost all of their expenditure responsibility from the fiscal transfer made from the center. They were able to cover less than ten per cent of their expenditure from their own revenue. Almost all of these regions are considered 'less developed' and lack by comparative standards the capacity to raise taxes. Infrastructure is poor and they also lack skilled manpower. For more on the regime of fiscal transfers in Ethiopia see Solomon Nigusie, 'The System of Revenue Transfer in the Implementation of Fiscal Federalism in Ethiopia', a paper presented at the 15<sup>th</sup> International Conference of Ethiopian Studies in July 2003, Hamburg, Germany; comparative study hints the following data on central government tax share and expenditure as part of total tax receipts and public expenditure. Switzerland tax share: 41 per cent, expenditure 30; Germany 51:39; United States 57:54. Source Wolf Linder 2<sup>nd</sup> edn. *Supra* note 78 at 43.

91 See for example Edmond Keller, 'Ethnic Federalism, Fiscal Reform, Development and Democracy in Ethiopia,' *African Journal of Political Science* 7:1 (2002): 21-47; Derese Degefa, 'Fiscal Decentralization in Africa: A Review of Ethiopia's Experience', a paper submitted on an ad-hoc expert meeting 7-9 October 2003 on Fiscal Policy and Growth in Africa: Fiscal Federalism, Decentralization and the Incidence of Taxation available at [http://www.uneca.org/eca\\_resources/Meetings\\_Events/SPD/fiscal/Papers/degefa.htm](http://www.uneca.org/eca_resources/Meetings_Events/SPD/fiscal/Papers/degefa.htm) as visited on 16 July 2004.

92 See chapter six and seven for other reasons for centralization.

93 Ronald Watts argues that substantial portions of federal transfers in parliamentary federations are unconditional and this is perhaps attributable to the fact that the legislature is able to control the cabinet as the latter is part of the legislature. This contrasts with the United States where Congress attaches specific conditions to

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It is in the field of fiscal transfers that the HoF is playing a crucial role. According to the federal Constitution, 'It [HoF] shall determine the division of revenues derived from joint federal and state tax sources and the subsidies that the federal government may provide to the states.'<sup>94</sup> It is important to note that the role of the HoF is double: it is the HoF that determines the criteria for the allocation of concurrent tax (Article 98) as well as on the subsidies that the states receive from the federal government.<sup>95</sup> While this role of the House is crucial in light of the states' dependency on fiscal transfers, the fact that its composition is more or less similar with the lower house creates a problem in the decision-making process. In an earlier study, the author pointed out that despite the difference in the size of electoral districts, the net outcome of both houses, despite the widely held view that the HoF is the house for nationalities, is majoritarian in much the same way as the lower house.<sup>96</sup> Now the relatively populated states are pushing the House to increase the weight of population size (and it has increased over the years from 30 per cent to 65 per cent) in the allocation of shared revenues and grants. The less populated states are consistently becoming the losers and it seems it is hardly possible to reverse this trend. As a result, while the HoF might have been envisaged as the most legitimate political body to decide on fiscal transfers, it is

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80 per cent of the fiscal transfers hence leading to tight expenditure accountability. Ronald Watts, *Executive Federalism: A Comparative Analysis* (Ontario: Queen's University, Institute of Intergovernmental Relations, 1989): 13-14.

94 Article 62(7).

95 The formula for the allocation of fiscal transfers has varied from time to time. At earlier stages, population size (33.3 per cent), level of development, and revenue generating capacity were the basis. Between 1997-1999, the variables remained the same but the weight attached to them increased to 60, 25 and 15 per cent respectively. In 2000/2001 one additional variable is added and the corresponding weight also adjusted. Population weight carried 55 per cent, level of poverty 10 per cent, expenditure demand 20 per cent, revenue raising capacity and execution efficiency 15 per cent. While the other criteria remain less controversial, the weight attached to population size was increased to 65 per cent in the year 2002/2003 fiscal year. Three highly populated states, Oromia, Amhara and SNNPRS, were instrumental in this shift. In the 2004/2005 fiscal year the same regions insisted on a further increase of the weight attached to population and the other states were outvoted. In the meantime the issue was far from settled; it was suspended for a while and in the end decided according to the criteria of the previous year. Interview, Samuel Alemayehu, Secretariat of the HoF, January 24, 2005.

96 See Assefa Fiseha, *Adjudication of Constitutional Issues in Ethiopia: Challenges and Prospects* (LL.M Thesis University of Amsterdam, June 2001 unpublished).

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becoming less relevant to the less populated states. It is for this reason that one might be tempted to conclude, as far as the less populated nationalities are concerned that the federal principle is not taken seriously.<sup>97</sup> In this crucial issue, for instance, the much-politicized issue of the right of nationalities has not been translated into political realities. The much-emphasized notion of ‘sovereignty of nationalities’ is nowhere to be found.

This could also have implications for the role that fiscal transfers could play in creating some degree of level playing field both vertically and horizontally. As already noted, some federations like Switzerland and Germany have clear policies of adhering to maintaining equality of standards across the federation while in the United States, it is more competitive. The Ethiopian federal system has yet to define for itself clearly along which lines it is going to evolve. At early stages, the fiscal transfers aimed at enhancing ‘war torn’ areas and also seemed to adhere to federal solidarity rather than competition among the states. Recent developments, however, seem to suggest that the idea of federal solidarity is becoming less and less relevant. This might then lead to tension with the idea that the federal system was established with a view to ameliorating ethnic tensions among the different nationalities. Interestingly it is important to note that it is the HoF that is entrusted with the responsibility to ‘promote the equality of the peoples of Ethiopia ... and consolidate their unity ...’<sup>98</sup>

Other powers of the HoF include: deciding issues related to self-determination of nations, nationalities and peoples, promoting the equality of the peoples; deciding

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<sup>97</sup> Many think wrongly that the HoF is the defender of the right of nationalities.

<sup>98</sup> Article 62(4). Article 89 (2) states that ‘Government has the duty to ensure that all Ethiopians get equal opportunity to improve their economic conditions and to promote equitable distribution of wealth among them’ and sub 4 of Article 89 also states ‘Government shall provide special assistance to Nations, Nationalities, and Peoples least advantaged in economic and social development.’

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disputes or misunderstandings that may arise among states; exercising concurrent powers together with the HoPR and this includes: the residue power on tax, election of the federal president, and constitutional amendment under Articles 104 and 105; determining the division of revenues derived from joint federal and state tax sources and the subsidies that the federal government may provide to the states; determining civil matters which require the enactment of laws by the HoPR; ordering the federal government to intervene if any state threatens the constitutional order in violation of the constitution.<sup>99</sup> The main function of the House appears to be an institution for conflict resolution and adjudication of constitutional issues rather than a law-making organ. As indicated in the first section of this chapter, federal law-making power is exclusively entrusted to the House of Peoples' Representatives in Ethiopia. This conclusion is not only clear from the specific powers of the HoF as outlined in the Constitution but is also well recorded in the minutes of the Constitutional Assembly.<sup>100</sup>

## CONCLUSION

What can be stated as a general conclusion from the survey of the institutions in the light of the normative requirement that federalism incorporates unity and diversity is that it is the second chamber, though not exclusively, which is expected to reflect normative diversity as we tried to indicate. The two most powerful second chambers, of the United States and Switzerland, seem to reflect another dimension of the interests of the electorate rather than the interests of the states. Who knows, maybe in the near future their legitimacy could be questioned seriously as the end result may be a mere duplication of houses, unless of course

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99 Ethiopian Constitution Article 62.

100 See *Ye Ethiopia Hige Mengist kale Gubae v. 4 and 5* (Addis Ababa: Hidar 14-20, 1987) Amharic. Minutes of the Constitutional Assembly November 25-December 1, (1994 Unpublished).

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there is revival of states' rights in the center. The Indian second chamber is certainly less powerful compared to the lower house. There is more to learn from the German *Bundesrat* if the federal idea of maintaining diversity at the center is to be something other than mere rhetoric. First, second chambers ought to be empowered to exercise some veto powers regarding key issues that affect the interest of the states. It does not matter whether the states represent diversity as in Switzerland or other interests as in Germany as the interests might differ from one federation to another. In Ethiopia, it appears that the states have no mechanism for checking the laws enacted at federal level, for not violating state autonomy as proclaimed by the federal Constitution. There is an important element missing in the Ethiopian situation. Thus, it is demonstrated that the federal system in Ethiopia lacks sufficient institutional avenues for guaranteeing shared functions to the units as policy-making is not shared between the two levels of governments. Beyond that states should also be able to defend other regional interests, which they might deem vital, against the center. Hence, not only should the HoF be a legislative house, it should also have some veto powers over matters deemed important by the states. The revisionary function of all second chambers is also vital as it brings a second thought to the bills adopted by the lower house.

#### Review Questions

1. Is the HoF a house of states or nationalities? Why or why not?
2. Do you think that the Nations, Nationalities and Peoples in Ethiopia have adequate avenues for influencing policy making at federal level? Why or why not?

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3. How would you assess the institutional competence of the HoF as a second chamber in terms of discharging its constitutional functions?



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**Chapter Four**  
**Forging Unity out of Diversity in Multicultural**  
**Federations: The Ethiopian Experience**

This chapter is devoted to the context of multicultural federations like Nigeria, India and Switzerland. These are federations that unlike nation-state federations which aim at national integration or assimilation, whose main concern is the accommodation of ethno-linguistic, religious and regional diversities either because they have national minorities or because they are inhabited by different national minorities, none of them constituting a majority. It begins with a brief introduction that sets the context of multicultural federations and then the remaining sections are devoted to the Ethiopian case.

**4.1 INTRODUCTION**

After the collapse of the Cold War and at a time when globalization is penetrating traditional nation-state territories, differences arising from ethnic and religious backgrounds within states, have become a serious cause of violence.<sup>1</sup> What is worse, such conflicts are becoming much more common than interstate violence and are often difficult to stop. Compared to traditional interstate wars, contemporary conflicts have not only changed dimension but have also become common among peoples.<sup>2</sup> Although many states considered to be sovereign today

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1 While there are something like 190 or so sovereign states, the number of ethno-linguistic groups far exceed the number of existing states. There is lack of coincidence between ethnic groups and the internal boundary of existing states. This brings into tension the idea of global interdependence and ethnic protest. 'Ethnic protest is in some sense modern as it represents a form of protest against the impersonal and monster state. A reassertion of ethnic identity in the contemporary search for identity and security presents a useful group therapy of sorts but it is also obsolete since neither seems to offer an appropriate framework and perspective for handling global problems.' Ivo Duchacek 'Antagonistic Cooperation: Territorial and Ethnic Communities' *Publius: The Journal of Federalism* (Fall, 1977) at 10 here in after called Antagonistic Cooperation.

2 Since 1945 ethnic violence has played a major role in about half of all wars, caused an estimated 12 million refugees and by conservative estimates resulted in at least 11 million deaths and because contemporary

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are multicultural, the issue of integrating different ethnic and cultural groups as well as the questions of accommodating religious and other minorities within the boundaries of existing states have remained one of the main challenges in the contemporary world.<sup>3</sup>

It is in this context that some still consider the federal idea attractive, not only to accommodate diversity but also as a means to contain such conflicts. This chapter, therefore, discusses specific multicultural<sup>4</sup> federations as to how they have been able to cope with the issue of forging unity from diversity. Federations, as indicated in the preceding two chapters, do have some common features and institutions. However, the similarities in basic structure exist with a wide difference in operation arising from the different political cultures and the various combinations of state diversity. As Davis stated, those common features work in a context that differs in history, political culture, circumstance, personality and ‘will’ and there is an immense and dynamic variety of these vital elements.<sup>5</sup>

Furthermore, as hinted in chapter two, there are differences in emphasis on the values of federalism. In the context of multi-ethnic federations the main emphasis, among other things, is on federalism’s ability to reconcile the forces of unity and diversity.<sup>6</sup>

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wars are between people rather than states, civilian casualties have increased tremendously. It is estimated that some three quarters of today’s war casualties are civilians. Nancy Bermeo, ‘A New Look at Federalism: The Import of Institutions’ *Journal of Democracy* 13:2 (April 2002) at 96.

3 Wolf Linder, *Swiss Democracy: Possible Solutions to Conflict in Multicultural Societies* (New York: St. Martin’s Press, 1994) at XVI.

4 The terms ‘multi-ethnic’ or ‘multicultural’ are used here to signify the fact that many states today contain a plurality of distinct ethno-linguistic and religious groups. It persists despite the traditional notion of nation-state that aims at national integration and assimilation. Multiculturalism acknowledges, recognizes and at times promotes diversity against cultural unification and homogenization. See for more David Miller, *On Nationality* (Oxford: Clarendon Press, 1995) at 120.

5 Rufus Davis, *The Federal Principle: A Journey through Time in Quest of a Meaning* (Berkeley: University of California Press, 1978) p. 122

6 K.C. Wheare, *Federal Government*, 4<sup>th</sup> ed. (London: Oxford University Press, 1963): 244-245; Watts too considers federalism an explicit recognition of multiple identities and loyalties and with institutions for shared-

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Federations in principle are considered as territorial and this has a specific meaning in multicultural federations. Ethno-regional communities are considered most appropriately represented through their spatial compartmentalization (states, cantons, provinces), predicated on the belief that ethno-regional communities should receive due territorial recognition.<sup>7</sup> One should note that this is not to imply that multicultural federations are not territorial. Indeed, the territoriality principle is at the core of any federation. The point is simply that in case of multicultural federations, the territories are designed on the basis of major diversities that define a certain society. Such federations presuppose the existence of a territorially grouped diversity.<sup>8</sup> Depending on the federal system the social diversities that produce federalism may be of many kinds. Differences of economic interest, religion, nationality, language, variation in size, differences in historical background, previous existence as independent or semi-autonomous status, dissimilarity of social and political institutions, all these or a combination of some may produce a situation in which the particular interest demands for local recognition. Certainly the difference must not be too much as in such cases no federation can be designed to integrate them.<sup>9</sup> The idea of geographically distributed diversity as an essential attribute of federations was originally coined by Livingston. ‘The social configuration of society, the type of interests which compose it, their diversity, their geographic distribution ... these elements constitute the infrastructure of a federal political system. These elements define

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rule as well as constituent units for self-rule. R. Watts, *Comparing Federal Systems*, 2<sup>nd</sup> ed. (Montreal and Kingston: McGill-Queen’s University Press, 1999): 6-11. Hereinafter called *Comparing Federal Systems*.

7 Several authors have emphasized the importance of this point. Federalism is reduced to nothing if it is held to embrace diversities that are not territorially grouped, for there are then no territorial units that can serve as constituent units of the federal system. William Livingston, ‘A Note on the Nature of Federalism,’ *Political Science Quarterly*, 67:1 (March 1952): 85-86; by definition a federal system is based on the recognition of the identity, interests, rights and powers of various territorially delineated communities that are primarily determined by their common awareness of territorial ethnic identity. Ivo Duchacek, *Antagonistic Cooperation*, *supra* note 1 at 13.

8 Graham Smith, ‘Mapping the Federal Condition: Ideology, Political Practice and Social Justice’ in Graham Smith eds. *Federalism: The Multi-ethnic Challenge* (London: Longman, 1995): 5-6.

9 Livingston, *supra* note 7 at 89.

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and guide the system. To the degree that social diversities are distributed on a territorial basis, they constitute the federal qualities.<sup>10</sup> Traditionally, federations have always been taken as territorial.<sup>11</sup> The fact that the territorial autonomy of the states in federations should be constitutionally guaranteed simply follows from that. The federal systems considered here are all based on the fundamental territorial diversity of power, so that territory becomes the basis for political action. The relatively permanent boundaries of the states serve as a strong bulwark for the diffusion of power. They offer continued opportunity for diverse interests to find expression.<sup>12</sup> It can also be used to protect minorities by allowing them greater autonomy within their political jurisdiction.

What is rather crucial in the attempt by multicultural federations in trying to reconcile unity and diversity is the political expression of diversity. Not all federations give equal political expression to all forms of diversity. It appears, however, that the greater the diversity in a federation, the greater the need to find institutions as a means of articulating such diversity within the domestic political system.<sup>13</sup> Some have pointed out that social fragmentation and diversity in themselves are not threat to integration, but they become a fertile ground for the same if the political system is not able to let the articulation of diversity manifest itself and if the political institutions are designed to reflect the interests of only some fraction of society.<sup>14</sup> In other words, there must be a reflection of diversity in the appropriate political institutions and that is the way to translate diversity into the political process. It is actually on this point that one observes significant

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10 *Ibid.*, at 85.

11 Thomas Fleiner and Lidija Basta, 'Federalism, Federal States and Decentralization' in Lidija Basta and Thomas Fleiner eds., *Federalism and Multiethnic States: The Case of Switzerland* (Fribourg: PIFF, 1996) at 34.

12 Daniel Elazar, *Exploring Federalism* (Tuscaloosa, AL: University of Alabama Press, 1987): 11-12.

13 *Ibid.*, at 66.

14 Akhtar Majeed, 'Conflict Management in Federal Plural Societies: Some Lessons From India,' in *First National Conference on Federalism, Conflict and Peace Building* (Addis Ababa, United Printers Plc., 2003): 132-141.

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difference among federations and this seems to explain (although it is not the only explanation) why some federations do better in minimizing tension among groups than others.

It is necessary to point out that the geographical distribution of diversity within a federation need not always rigidly follow the boundary lines of the component units of the state. As federalism embraces a series of diversities: historical, linguistic, cultural, religious, economic, social et cetera and all or any combination of these may be a ground for a group's demand for self-expression, it can hardly be expected that the state boundary lines will mark off areas which coincide with all the different interests and opinions which may be held on all questions.<sup>15</sup>

The essential point to remember is that the units in question should possess a total complex of diversities strong enough to distinguish them from their fellow members in the group and thereby make them desire and demand recognition of their individual identities. Beyond that, regionalism of the kind in which diversities spill over state boundaries is considered a valid manifestation of the federal arrangement. As will be seen for instance from the case of Switzerland, where each of the two major diversities in the nation's life is territorially arranged, one cutting across the other, diversity becomes a unifying factor in the federation.<sup>16</sup>

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15 R. Dikshit, *The Political Geography of Federalism: An Inquiry into its Origins and Stability* (Delhi: Macmillan, 1975) at 11.

16 *Ibid.*, at 12; Watts, *Comparing Federal Systems*, *supra* note 6 at 22, Linder, *supra* note 3 at 25.

## **4.2 Federalism and the Accommodation of Diversity: The Ethiopian Experience**

After discussing some general notions on federalism, federations and the context of multicultural federations in the preceding chapters, it is now time to consider the Ethiopian federal experience more closely. This chapter treats two principal and interrelated issues: one is how the federal system has been (un)able to accommodate the diverse ethno-linguistic groups since its establishment and the second is the contentious issue of how best to restructure the constituent states with a view to establishing a more viable federal system. Apart from these issues, this chapter also considers the context (global as well as local) under which the federal system was introduced, its peculiar features and their implications, the arguments for and against the federal system in general and more specific issues in particular, and lastly, its limitations. The study would be incomplete without considering the contemporary and outstanding federal issues in Ethiopia that are treated in the last section. In the meantime one is able to see the gap between constitutional principles and operational reality.

### **Federalism, Diversity and Conflict Management in Ethiopia**

#### **1. Introduction**

Situated in the Horn of Africa bordered by Kenya in the South, Somalia in the South East, Djibouti in the East, the Sudan in the West and Eritrea in the North, Ethiopia is a multicultural- hosting more than eighty of what the 1995 constitution calls "nations, nationalities and peoples", multi-religious- some fifty percent of its 79.2 million population, making it the second most populous country in Africa next to Nigeria, being Orthodox Christian, forty percent Muslim and the rest belonging to other minor religions. During the scramble for Africa by European

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powers at the end of the 19<sup>th</sup> century, Ethiopia successfully defeated Italian colonial forces at Adwa in 1896.<sup>261</sup> This combined with the heroic and successful resistance of Ethiopian patriots when Italy returned for revenge (1935-1941) was inspirational for the anti-colonial struggle in many parts of Africa. Indeed this unique patriotism and the two oldest religions: Christian Orthodox and Islam still serve as unifying features cutting across the different ethno-linguistic groups. The long years of independence means that it is a country with its own written script *Geez*, its number (*Kutur*) and own calendar.<sup>262</sup> Ethiopia is a founding member of the United Nations, as it was of the defunct League of Nations, Organization of African Unity and home to and a leading member of the African Union.

Except for the 20<sup>th</sup> century and leaving out some exceptions,<sup>263</sup> Ethiopia existed for the most part of its long and independent history,<sup>264</sup> principally under a monarchy with the Orthodox Christian faith serving as pillars of unity and various kinds of regional forces representing diversity and exercising important powers such as taxation on some economic activities, maintenance of local security and regulation of trade. The plurality of kings, with the *Niguse Negast* (king of kings) above them signified some kind of federal or confederal government structure. Thus the seeds of what Livingston calls “federal Society”<sup>265</sup> (regionally grouped diversity) has been there for long. These are essential features of what we

<sup>261</sup> Colonialism has not been, however, without its impact even on Ethiopia. Italian occupation from 1890-1942 of the northern province, the present-day Eritrea, is the sad legacy, although not exclusively, of colonialism.

<sup>262</sup> See John Markakis, *Ethiopia: Anatomy of Traditional Polity* (Oxford: Clarendon Press, 1974) Pp 43-71.

<sup>263</sup> The exceptions include Yodit/Gudit's attack to the Christian empire in the 10<sup>th</sup> century; the campaign of Imam Ahmed (1527-1543) and the Age of Princes (*Zemene Mesafint* 1769-1855). The power at the center had to subject itself almost completely to regional forces.

<sup>264</sup> The Ethiopian state, in its loose sense begins with Axum. The Axumite state lasted from first century AD to approximately 1150. It became a Christian state at about 335 AD making it the third political entity in history, after Armenia (301 AD) and the Roman Empire (312 AD). See Teshale Tibebu, *The Making of Modern Ethiopia 1896-1974* (Lawrenceville, New Jersey: The Red Sea Press Inc. 1995): XXI-XXVII; also Haggai Erlich, *The Cross and the River: Ethiopia, Egypt and the Nile* (Boulder: Lynne Rienner Publishers, 2002): 15; Donald Levine, *Greater Ethiopia: The Evolution of a Multiethnic Society*, 2<sup>nd</sup> edn. (Chicago: The University of Chicago Press, 2000) PP. 90-110; hereinafter referred as *Greater Ethiopia*.

<sup>265</sup> William Livingston, “A Note on the Nature of Federalism,” *Political Science Quarterly*, 67:1 (March, 1952): 81-95.

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understand today as the federal principle. Suffice to emphasize here that before the emergence of the modern federal system in the United States in 1787, its features were never as clearly articulated as they are today. The more amorphous confederate form was predominant.<sup>266</sup>

The beginning of the twentieth century marked the first serious attempt to curb the autonomy of the regional forces but the process of centralization of power took its highest stage during the reign of Emperor Haile Selassie (1930-1974).<sup>267</sup>

The coming to power of Emperor Haile Selassie in 1930 and the subsequent issuance of the 1931 Constitution, the first *written* constitution in the history of the country, marks a new epoch. It heralded the end of the role of the duality that existed for centuries as regional forces were replaced by centrally appointed agents of the Emperor, dissolved private armies of the regional forces and introduced centralized taxation system that hit hard economic base of those regional notables.<sup>268</sup>

Nor did the 1974 popular Revolution that brought the military (popularly known as the *Derg*- 1974-1991), which gave a mortal blow to the old monarchy, bring any change in the move towards more centralization of power. As far as regional autonomy and accommodation of the diverse groups into the political process is concerned, except for the change of ideology from Solomonic genealogy to Socialism, the centralist character of the state remained intact and was even strengthened to a degree that far exceeded the imperial regime.<sup>269</sup>

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<sup>266</sup> K. C. Wheare, Federal Government, 4<sup>th</sup> ed. (London: Oxford University Press, 1963) PP. 1-30.

<sup>267</sup> Donald Levine, Wax and Gold: Tradition and Innovation in Ethiopian Culture (Chicago: The University of Chicago Press, 1965) Pp. 177-185.

<sup>268</sup> M. Perham, The Government of Ethiopia (London: Faber & Faber Limited, 1963) at 262; Gebru Tareke, Ethiopia: Power and Protest: Peasant Revolts in the Twentieth Century (Cambridge: Cambridge University Press, 1991) pp. 80-83. The transition was certainly not smooth. Most of the peasant rebellions were meant to stop this process of centralization

<sup>269</sup> Despite some sweeping measures like the nationalization of land that gave a relief to the tenants living in the south, the core of the issue, that is political power and the marginalization of the large majority of the people, was almost kept as it was. See John Young, "Ethnicity and Power in Ethiopia," Review of African Political Economy



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The process of centralization, some would prefer to call it “nation building” was not without consequences. Firstly, the incorporation of the South, the Southwest and the Eastern sides from their previously autonomous position to complete absorption meant that the notion of the state, its values, institutions and culture were imposed on the incorporated kingdoms. Secondly, it brought about all sorts of diversities in terms of religion, language, tradition and culture. However, as the state failed to accommodate this diversity, the religious, lingual, cultural as well as political and economic dominance gave birth to the “question of nationalities.”<sup>270</sup> Thirdly, the state became extremely centralized at the expense of regional rulers. The political marginalization of the bulk of the community led to civil wars whose cause fundamentally differed from earlier ones. This time resistance not only called for state reform but even at times challenged the state itself.<sup>271</sup> Several studies hinted that conflict in traditional Ethiopia was mainly an instrument for asserting some level of regional autonomy and not for upsetting the whole system, nor was it for separation.<sup>272</sup> “God can not be blamed, the King can not be accused” was the main tenet. The opposition, whatever form it took, mainly looked for adjustment and restoration of violated rights like better administration, lower taxes, respect for local autonomy and reduction of corruption. By and large the legitimacy of the Monarch and its ideological roots

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23: 70 (1996): 533-534; see also Ivo Strecker, “Glories and Agonies of the Ethiopian Past” review article at <http://ntama.uni-mainz.de/~aau/glories.html> as visited on 2/11/01.

<sup>270</sup> The meaning of this notion is far from clear. Young university students in the 1960s and 1970s, influenced by Marxism-Leninism and frustrated by the age old Monarchy argued in favor liberating “oppressed nationalities” from an oppressor group but as later events indicate it meant different things to different groups. For some it meant respect for diversity but to be implemented under class perspective. For the now ruling party, Ethiopia is nothing but the outcome of the free will of the nationalities rather than abstract individuals and the nationalities have not only right to self rule but also right to self-determination, secession included. For details, see John Young, Peasant Revolution in Ethiopia: The Tigray People’s Liberation Front, 1975-1991 (Cambridge: Cambridge University Press, 1997).

<sup>271</sup> Christopher Clapham, “Constitutions and Governance in Ethiopian Political History,” in Constitutionalism: Reflections and Recommendations, Symposium on the Making of the New Ethiopian Constitution (Addis Ababa: Inter Africa Group, 1993): 30-31.

<sup>272</sup> See Gebru, *supra* note 8 at 199, 203; Mesfin Wolde-Mariam, The Horn of Africa: Conflict and Poverty, (Addis Ababa: Commercial Printing Press, 1999): 140-141.

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were not attacked. In the 1960s, however, things started to change. The new forms of resistance that took shape in the form of “national liberation fronts” changed significantly in terms of leadership, social composition, motivation and ideological orientations.<sup>273</sup>

### **Explaining the Crisis<sup>274</sup>**

With the emergence of centralized administration, Ethiopia faced serious state crisis.

Attempts at explaining the cause of the state crisis have not only been less satisfactory but are also found to be diverse ranging from those who even today consider it was all a normal process of “nation building” and hence consider the liberation struggle as a form of tribalism to the instrumentalists<sup>275</sup> that focus on the concentration of political and economic resources at the center as a core source of tension and that emphasize the proliferation of ethnicity as an erroneous comprehension of political and economic deprivation and the ruling party-Ethiopian Peoples Revolutionary Democratic Front (EPRDF), a product of the 1960s Ethiopian Student Movement focused on the “operation of nationalities,” that is, a ruling elite dominantly from one nationality controlling power, resources and narrowly defining the values and institutions of the state as a main cause. A few political elites even went further to state that it must be seen as a form of “internal colonialism.”<sup>276</sup> Needless to say all approaches seem to have their own limitations.

<sup>273</sup> Clapham, *Constitutions and Governance*, *supra* note 10 at 29.

<sup>274</sup> Much of the information and analysis for the introduction and this section draws from Assefa Fiseha, *Federalism and accommodation of Diversity in Ethiopia: A Comparative Study* (Nijmegen: Wolf Legal Publishers, 2006) chapter one.

<sup>275</sup> Such thinkers are called instrumentalists because they view religious and ethnic groups as a means to achieve some political and economic goal and having no relevance thereafter. Included in this category are John Markakis, *Resource Conflict in the Horn of Africa* (London Sage Publications, 1998); Christopher Clapham, “Ethnicity and the National Question in Ethiopia,” in Peter Woodward and Murray Forsyth eds. *Conflict and Peace in the Horn of Africa: Federalism and its Alternatives* (Aldershot: Dartmouth, 1994) at 30-35; Jon Abbink, “New Configurations of Ethiopian Ethnicity: The Challenge of the South,” *Northeast African Studies* 50:1 (1998) at 60

<sup>276</sup> See for example Assefa Jaleta, “Oromo Nationalism and Ethiopian Ethnocratic Politics”, *Horn of Africa* 20 (2002) p. 43

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Certainly the “nation building” process despite its own contributions in terms of creating Ethiopian nationhood was an attempt to assimilate the different groups into the ruling class’s identity and hence it is no surprise that after 1991 the national liberation fronts’ called for redefinition of the Ethiopian statehood. The instrumentalists while focusing on objective factors and some implied assumptions (ethnicity is an erroneous comprehension of political and economic deprivation and the idea that ethnic identity is fluid and perhaps an elite creation) do not address the issue that at the heart of the debate is the identity of the state and the values behind its institutions. The Ethiopian state that emerged as a result of the centralizing trend was qualitatively different from historic Ethiopia not only in terms of its territorial size but also in terms of ethno-linguistic composition and religious diversity. The majority of the ethno-linguistic groups incorporated were told in no ambiguous terms to assimilate into this state. Rather than attempting to forge a state from the newly introduced diversity, the regime imposed a narrowly defined imperial state, whose cultural, social, political and religious foundation and its institutions failed to reflect the existing diversity on the ground. One need to note how other multicultural societies<sup>277</sup> like India and Switzerland faced this reality.<sup>278</sup> The identity of the state and its institutions thus take center stage in the debate between those who defined it and those who were considered as its

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<sup>277</sup> The terms “multi-ethnic” or “multicultural” are used here to signify the fact that many states today contain a plurality of distinct ethno-linguistic and religious groups. Multiculturalism acknowledges, recognizes and at times promotes diversity against cultural unification and homogenization. See Topperwein, Nicole, Nation-State and Normative Diversity, 35 (Helbing & Lichtenhahn: PIFF, 2001).

<sup>278</sup> The situation in Ethiopia stands in sharp contrast with the experience of India and Switzerland, similarly multicultural states. See Wolf Linder, Swiss Democracy: Possible Solutions to Conflict in Multicultural Societies (New York: St. Martin’s Press, 1994); Harihar, Bhattacharyya India as a Multicultural Federation: Asian Values, Democracy and Decentralization in Comparison with Swiss Federalism (Bale: Helbing and Lichtenhahn, PIFF, 2001).

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subjects.<sup>279</sup>

It is not surprising then that the legitimacy of the government, its institutions and the values upon which it is established remain one of the sources of tension and at times the cause of its terminal crisis. In other words, the challenging issue once again is how to constitute a legitimate government from all the ethno-linguistic groups that do not squarely fit the usual notion of national majorities versus national minorities.<sup>280</sup> The nation state as is commonly understood has its own assumptions, which is not suitable for multicultural societies. The so-called “civil-nation state,”<sup>281</sup> the only alternative that liberal democracy pretends to prescribe is itself founded on some exclusionist element. It certainly assumes the existence of a dominant national group and in the end it is the majority culture, language, religion that becomes the national culture, language or religion. For multicultural states this is the wrong solution. Depending on the strength of the claims, identity and history of minorities, however, decentralized or federal system of government appears to be the genuine solution if the state is to survive by accommodating diverse groups while maintaining unity and avoiding fragmentation.<sup>282</sup>

Furthermore, post Cold War developments as well as empirical evidence from multicultural societies hints that *identity does not necessarily vanish from the face of the political discourse even if political and economic situations are favorably accommodative, let alone when it is a state target of destruction under the guise*

<sup>279</sup> As many have indicated the passions and emotions attached to identity if fueled by some political and economic deprivations are more than enough to cause conflicts.

<sup>280</sup> Attempts at explaining as to how nation states may cope with minorities often focus on the usual notion of national majorities versus national minorities but some multicultural societies like Ethiopia do not even have national majorities to begin with and makes the analysis less helpful. See for instance Will Kymlicka, Multicultural Citizenship (Oxford: Clarendon Press, 1995).

<sup>281</sup> For an elaborate discussion on the distinction between the ethnic versus civic nation state and its limits in dealing with the issue of multicultural societies see Michel Seymour, Jocelyne Couture, Kai Nielsen, “Introduction: Questioning the Ethnic/Civic Dichotomy,” in Michel Seymour, Jocelyne Couture, Kai Nielsen eds., Rethinking Nationalism (Calgary: University of Calgary Press, 1998): 2-3.

<sup>282</sup> While there are something like 190 or so sovereign states, the number of ethno-linguistic groups far exceed the number of existing states. There is mismatch between ethnic groups and the internal boundary of existing states and this is more acute in Africa where boundaries were hastily and artificially drawn during the scramble for the continent. See for instance Dimitrios Karmis and Wayne Norman, “The Revival of Federalism in Normative Political Theory,” in Dimitrios Karmis and Wayne Norman eds. Theories of Federalism: A Reader (New York: Palgrave Macmillan, 2005) p. 13.

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of “nation- building.”<sup>283</sup> Thus, while the instrumentalists have a point by hammering on the economic and political factors, they often fail to consider the identity factor as a cause of tension in multicultural societies.

On the other hand, the ruling party has for long advocated that it is the oppression of nationalities that is at the heart of the crisis and the political and economic marginalization is a consequence rather than a cause. Thus it championed, for long for the nationalities right to self-determination up to and including secession as a decisive remedy for the resolution of Ethiopia’s long standing problem of the “nationality question” and with that in view, as a main architect of the transition and the 1995 Constitution, stipulated a distinct clause that placed sovereignty on the “nationalities, nations and people” and consequently reorganized the constituent states in a manner that ensures self-rule to at least the major nationalities and even permits them to secede after going through some procedures.<sup>284</sup> Yet, this in itself fails to underscore the point that in the end political and economic factors are crucial factors behind every conflict. Thus an approach that combines the accommodation of diversity with genuine sharing of power and resources among the diverse groups will better explain the success or failure of the state in multicultural societies in general and in Ethiopia in particular.

The federal system that started *de facto* since 1991 and *de jure* following the adoption of the 1995 constitution attempts to end the cycle of political crisis by decentralizing power and resources to nine constituent states and two autonomous cities and by ensuring self rule to the ethno-linguistic groups at various levels.<sup>285</sup>

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<sup>283</sup> Are not India and Switzerland living examples? What could explain the present predicament in Ethiopia as well? If Haile Selassie’s and *Derg*’s policy of forced assimilation were effective, by now we would have seen individual citizen with no group affiliation. On the Contrary however the group affiliation in Ethiopia rather got reinforced in reaction to the repression from the state.

<sup>284</sup> See Articles 8, 39, 46, 47 of the 1995 Ethiopian Constitution. All articles referred to below are from this text, unless stated otherwise.

<sup>285</sup> Certainly there are some critical limitations on the new federal system and there is no attempt to discuss them here. For some of the views see Assefa Fiseha, *supra note 14* chapter 5; Maimire Mennasemay, “Federalism,

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The essence of this chapter is that given the fact that Ethiopia is inhabited by many nationalities and as can be seen from its recent political history the main source of instability is related to the concentration of power and resources by some sections of the ruling elite that at the same time designed a “nation building project” that aimed at forcefully assimilating others into a narrowly defined value of the state that is incompatible with plural societies, ideally federalism appears to be the best conflict management device. However, the federal system seems to be facing series of challenges that include the lack of appropriate institutions and democratic tradition- a political will to work within a diverse atmosphere, unfavorable political culture within the political elite and the protection of minorities within the regions.

### 4.3. Federal Features

In terms of origin, while some contend that it is a ‘coming together’<sup>286</sup> federation, the Ethiopian federation as it appears on text reflects both aspects of ‘coming together’ and ‘holding together.’ Some of the features of the coming together include: first, the Preamble, distinct from many other federal constitutions, commences with the phrase ‘We the Nations, Nationalities and Peoples of Ethiopia ... are strongly committed in full and free exercise of our right to self-determination ... ‘ Furthermore it is stated, ‘All sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia.’<sup>287</sup> Elsewhere it is indicated that ethno-linguistic criteria are the sole basis for organizing the units that

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Ethnicity and the Transition to Democracy,” *Horn of Africa*, Special Issue on Federation in the Horn v. XXI (2003) pp. 88-115; Alemante G. Selassie, “Ethnic federalism: Its Promise and Pitfalls,” 28 *Yale Journal of International Law* 51 (2003) pp. 51-107.

<sup>286</sup> The terminology was coined by Alfred Stepan, ‘Federalism and Democracy: Beyond the US Model,’ *Journal of Democracy* 10:4 (1999): 19-33. Andreas Eshete, “Ethnic Federalism: New Frontiers in Ethiopian Politics” *First National Conference on Federalism, Conflict and Peace Building* (Addis Ababa: United Printers, 2003) Pp. 160-161.

<sup>287</sup> Article 8. Indeed it is stated that the constitution is an expression of their sovereignty (Art. 8(2)).

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constitute the federation.<sup>288</sup> If the federal government abuses their right to self-administration, they are entitled to reassert their powers of sovereignty by changing or abolishing the government. This collective right of nations, nationalities and peoples is clearly spelt out as the right to self-determination.<sup>289</sup> This right is not even subject to derogation during national emergency.<sup>290</sup> Thus the foundation of the Ethiopian state as well as its continuance now requires the consent of each nation, nationality and people.<sup>291</sup> This gives one the impression that the federal state is a union formed through the free consent of each of the nations, nationalities and peoples.

However, there are also ‘holding together’ aspects and the mere emphasis, as if it is a federation built from the nationalities, will be an exaggeration. Although some parts of the country experienced a *de facto* autonomy in the pre-1991 period, many of the constituent states that now form the federation had no such experience previously. The Preamble, taken together with other provisions of the text, may be considered as evidence to prove the considerable importance that the accommodation of diversity has in contemporary Ethiopian politics. Nevertheless, the federation is incomparable to the states and cantons, for instance, of the United States and Switzerland. Surely, the present state organization, is not something that reflects the previous organization of the provinces. In fact it is meant to introduce a significant and deliberate departure from the former provincial experience as the provinces were not convenient to ensure self-rule to the nationalities. In short, it is a federation established from a formerly unitary state. And the states have had no prior existence as states and if any one existed, it

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<sup>288</sup> See Articles 46 and 47.

<sup>289</sup> See Art. 39.

<sup>290</sup> Article 93.

<sup>291</sup> Andreas contends that this aspect of the federation is not altogether a fiction. The northern part of the country during the late period of the *Derg* was practically *de facto* independent, particularly Tigray under TPLF had the experience of complete autonomy. He also states that the unitary state was completely dissolved in 1991 leaving only nationality-based parties free to reconstruct the state. Andreas, *supra* note 26 at 161.

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is only as a province in a highly centralized imperial state, a military dictatorship, or during brief transitional period (1991-1994).<sup>292</sup> Besides the overriding power of the federal government in practice, the limited role of the constituent states in influencing the federal law-making process, explains its 'holding together' aspect.

Since 21 August 1995 Ethiopia is constitutionally a multicultural federation. The federation constitutes nine autonomous states (commonly referred as regional states) and two cities: the federal capital Addis Ababa and Dire Dawa. Ethiopia introduced the federal system against the background of a widely held skeptical view about federalism both at home<sup>293</sup> and in Africa at large. Despite the continent's pluralistic nature and federalism's promise to accommodate diversity, the overriding aim almost everywhere in Africa, except in Nigeria, the new developments in South Africa and the Sudan has been the pursuit of political unity and territorial integrity giving no political expression to diversity.<sup>294</sup> Seen against this context the post-1991 Ethiopian experiment, stands as an exception. With a view to addressing the age old cause of the state crisis, the federal system intends to decentralize power and resources and resolve the "nationalities question" by accommodating the country's various ethno-linguistic groups. Among other things, the Constitution states that the federal government and the states shall have legislative, executive and judicial powers.<sup>295</sup> Although it is a fact that none of the constituent states existed as autonomous entity, owing to the aggregate nature of the federation, the federal government appears to be one with

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<sup>292</sup> Following the downfall of the military regime in May 1991, Ethiopia had a transitional government from 1991 up to 1994. The number of constituent states during this transition was fourteen. Some five regional states in the South merged in 1994 forming the Southern Nations, Nationalities and Peoples Regional State (SNNPRS). As a result, one can say some of the territorial boundaries of the regional states were drawn as in the SNNPRS following the decision to form a federal state.

<sup>293</sup> See *infra* the section on the contending views.

<sup>294</sup> Even though there is widely held view that federalism provides mid way options for those who want to maintain the territorial integrity of existing states and for those who claim regional autonomy and that federalism enables to forge unity out of diversity, until recently, Nigeria was the only country in the continent that claimed to be federal.

<sup>295</sup> See Art 50 (2).



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enumerated and limited powers<sup>296</sup> and the states hold residual powers.<sup>297</sup> The Constitution also comprises a brief account of some state powers in addition to the reserve power. It might appear that, by virtue of the reserve clause, any power not mentioned in Article 51 belongs to the states. But the Constitution gives other powers to the federal government, powers which are not mentioned in Article 51 but which are distributed through out the text. These include the power to enact labor, commercial and penal codes, to approve federal appointments submitted by the executive and to establish federal institutions. So the reserve powers of the states only apply after discounting all the powers of the federal government, which are enumerated through out the text of the Constitution, and not just in Article 51. It is also worth noting that the Constitution provides neither 'a necessary and proper clause' as in the United States Constitution, nor a comprehensive list of shared powers as in the German Basic Law. Even those powers that appear to be exclusive federal powers seem to have some limitations in terms of the extent of their scope.

The Constitution empowers the federal government to *'formulate and implement the country's policies, strategies and plans in respect of overall economic, social and development matters...; ...establish and implement national standards and basic policy criteria for public health, education, science and technology...'*<sup>298</sup> One may state that this is perhaps more than the 'necessary and proper' clause for it grants the federal government with wide powers on economic, social, health and education aspects. It seems to put primary responsibility on the federal government to determine major policy directions and standards. This expressly

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<sup>296</sup> Article 51 enumerates the classic powers of the federal government that we commonly find in many federal constitutions.

<sup>297</sup> Article 52. In principle Art. 52(1) is like the Tenth Amendment or Art. 30 of the Basic Law. It states, 'All powers not given expressly to the federal government alone or concurrently to the federal government and the states are reserved to the states.' Yet Art. 52(2) enumerates some powers of the states besides to the reserve power mentioned above.

<sup>298</sup> Article 51 sub 2 and sub 3 (Italics mine).

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covers all economic and social issues that were federalized during the 1930's in the United States. There is no doubt that these powers cover the bulk of concurrent power on a vast field of social and economic affairs as stated in other federations. However it is also possible to argue with equal force that if one follows the terms closely, the powers of the federal government even in these vital areas do not seem exhaustive. The same Constitution also empowers the states, among other things 'to formulate and execute economic, social and development policies, strategies and plans for the state.'<sup>299</sup> There is obviously a lot of overlap between the powers of the federal government and the states concerning economic, social and development plans as well as health and education. But the extent of power of the respective governments is not clearly stipulated. To what extent could the federal government outline the national standards and policy criteria or the breadth and depth of the nationwide policies? It is consequently also not clear what is left for the states. But it seems clear from the provisions that the federal government cannot exhaustively legislate on all these matters. The wording of Article 52(2) seems to suggest that the states are endowed *not merely with administrative power* but with the power to formulate and execute economic, social and development policies. No doubt that this power is the basis for shared/framework power covering the bulk of social and economic sphere.

There is more to the power of the constituent states. Although there is no exact congruence between the territory of the states and the ethno-linguistic groups, every attempt has been made to make sure that the major nationalities have their own 'mother states.' The Constitution also emphasized that it is built on the consent of the nations and nationalities and hence places sovereignty with them. The nationalities are also entitled to a full measure of self-government that

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<sup>299</sup> Art. 52(2) c.

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includes the right to establish institutions of government in the territories that they inhabit and to equitable representation in state and federal government.<sup>300</sup>

In addition to the reserve powers other provisions of the Constitution too confer power on the states. According to Article 50 sub 5 states are empowered to draft, adopt and amend state constitutions. The states are entitled to frame and ratify their own constitution subject to some restrictions stipulated under the federal constitution.<sup>301</sup> The state constitutions cannot contradict the federal constitution.<sup>302</sup> The separation of state and religion is also guaranteed under the federal constitution<sup>303</sup> and therefore it does not seem possible for some states to establish religious states. This is further reinforced by the fact that the constitution states ‘all federal and state legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this (third) chapter.’<sup>304</sup> As a result states cannot deviate from the guarantees enshrined under the federal constitution.

The federal system operates within a parliamentary form of government.<sup>305</sup> At federal level there are two Federal Houses: The House of Peoples Representatives (HoPR) and the House of Federation (HoF).<sup>306</sup> The former is composed of members elected by the people for a term of five years in a direct and fair election and contains 547 members, 20 of which are allocated to minorities. The members of the House are believed to be representatives of the Ethiopian people as a whole and not of a specific group.<sup>307</sup> Although on appearance one may get the impression that the two-chamber parliament is responsible for policy-making at

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<sup>300</sup> See Art. 39 sub 1, 2, and 3.

<sup>301</sup> This is unlike the federations in India and Nigeria where state constitution are embodied within the federal constitution.

<sup>302</sup> See Art. 9.

<sup>303</sup> See Art. 11.

<sup>304</sup> See Art. 13.

<sup>305</sup> Art. 45.

<sup>306</sup> Art. 53.

<sup>307</sup> Art. 54.

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federal level, it is only the HoPR which has the sole power of legislation in all matters assigned to the federal government. The same House is the highest authority in the federal government.<sup>308</sup>

The HoF is a representative organ whose members are representatives of each nation and nationality and its main task is constitutional interpretation and determination of revenue derived from joint federal and state tax and subsidies that federal government grants to the states.<sup>309</sup> It was meant to be a counter majoritarian institution to balance against the HoPR but it could hardly serve that role primarily because it is barely involved in law-making and secondly because in its composition it by and large replicates the HoPR.<sup>310</sup>

In line with other parliamentary federal systems, there is a fusion of legislative and executive powers in a popularly elected lower house. Authority is divided between the federal government and the states but within each level power is concentrated in the parliamentary fusion of legislature and the executive. Although a discussion of the details of the competence of each level of government is beyond the scope of this short essay one could broadly state that except in the area of foreign affairs and policy making at federal level the regional governments in Ethiopia, at least, formally speaking do have wide powers.<sup>311</sup>

The federal executive consists of the ceremonial president and a powerful Prime Minister along with his cabinet. The federal President, who is the head of state, is nominated by the HoPR from among its members but approved in a joint session of the two Houses by a two-thirds-majority vote for a term of six years.

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<sup>308</sup> Art. 50(3).

<sup>309</sup> Arts. 61 and 62.

<sup>310</sup> For more on this point see Assefa Fiseha, "Federations and Second Chambers," *Indian Journal of Politics*, 39:3 (2005): 87-128.

<sup>311</sup> For detail treatment of the division of legislative and executive power between the federal and state governments see Assefa Fiseha, "Theory versus Practice in the Implementation of Ethiopia's Ethnic Federalism," in David Turton ed., *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective* (Oxford: James Currey, 2006): 131-164.

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The powers of the President are nominal and symbolic. The President opens a joint session of both Houses every September, signs a draft law before its promulgation and receives credentials of foreign ambassadors.<sup>312</sup>

The most powerful federal executive figure remains to be the prime minister along with the Council of Ministers. The political party or coalition of political parties that has the greatest number of seats in the HoPR is entitled to form the executive and lead it. The prime minister is elected from among members of HoPR and in this sense is not necessarily the party leader. The Prime Minister is the chief executive, the chairman of the Council of Ministers and commander in chief of the national armed forces. The Prime Minister submits candidacies for minister, commissioner as well as highest judicial posts to the HoPR for approval. The PM also follows up and ensures the implementation of laws, policies, directives and other decisions adopted by the HoPR, leads the Council of Ministers and exercises overall supervision over the implementation of foreign policy and policies, regulations, directives and decisions adopted by the Council of Ministers.<sup>313</sup>

There is another point that the constitution shares with other multicultural federations like India and Switzerland: in its attempt to forge unity in diversity, it has adopted a pluralistic approach towards language.

### **Language Policy**

The issue of adopting one or more official languages is one of the thorny points in multicultural federations. Regional and ethno-linguistic groups usually press for the official recognition of their language, both at regional and federal levels. One reason is that language is seen as highly related to the cultural self-identity, and

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<sup>312</sup> Arts. 70 and 71.

<sup>313</sup> Arts. 72, 73 and 74.

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survival of groups.<sup>314</sup> Another is that it is intertwined with the power position of ethnic groups. To a certain degree it affects access to national jobs and therefore the participation of members of ethno-linguistic minorities at the center.<sup>315</sup>

The adoption of more than one official language may be a substantial burden, but it is a necessary price, which must be paid where otherwise only an imposed single language is likely to disrupt the state.<sup>316</sup> The counterargument is that a single national language serves both as lingua franca and as a means for promoting national unity. Multicultural federations have often adopted either of the two approaches at federal level to settle the issue of official language.<sup>317</sup>

Pre-1991 Ethiopia's regimes insisted on having one official and national language for all affairs of public life. Indeed the issue of language is one of the areas where one clearly observes the lack of any sign of commitment to pave the way for pluralism. Both the emperor and the military regimes in line with the century of assimilation policy insisted on imposing Amharic on the majority of the ethnic groups leaving no room even at local levels. Formally Amharic was the official language,<sup>318</sup> but for all intents and purposes, it was also the national language. Apparently, the 1987 Constitution imposed an obligation on the state to ensure the equality of languages of nationalities,<sup>319</sup> but like all other provisions it was not taken seriously. The implications of the provisions in a unitary state with an assimilationist mission are clear. All cultural, educational and identity matters

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<sup>314</sup> Ronald Watts, New Federations: Experiments in the Common Wealth (Oxford: Clarendon Press, 1966) at 233 here after called New federations; Carl Friedrich, Trends of Federalism in Theory and Practice (London: Pall Mall Press, 1968) at 32.

<sup>315</sup> Ibid at 233.

<sup>316</sup> Ibid.

<sup>317</sup> See Indian Constitution Arts. 343, 345 and the eighth Schedule; also the Swiss Constitution that provided for three official languages.

<sup>318</sup> See Article 125 of the Revised Constitution; Article 116 of the 1987 Peoples Democratic Republic of Ethiopia Constitution.

<sup>319</sup> Art. 2 sub 5 of the 1987 Constitution.

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were required to be expressed in Amharic. All other languages being relegated to a secondary status.

The 1995 Federal Constitution attempts to balance the interest of maintaining national unity on the one hand and the ethno-linguistic groups demand for cultural preservation and distinctiveness on the other. It declares Amharic as the working language of the Federal Government but does not spell the official language for communication between the federal government and the states although as a matter of practice, Amharic remains to be so.<sup>320</sup>

At first sight, the present constitution may not seem to be significant departure from the 1987 Constitution, which also gave all Ethiopian languages equal state recognition. The present Constitution entitles member states to determine by law their respective working languages.<sup>321</sup> This opens the way for the states to adopt their own official languages. Looking at the practical records of the regional states, three different approaches seem discernible. First, some states have adopted their own majority language as the working language of their respective regional administrations. Amhara, Tigray, Oromia, Afar, and Somali fall into this category. Other states which do not have a majority ethnic group (Benishangul-Gumuz, SNNPRS and Gambela) have chosen Amharic as their respective working languages. The third trend is the one adopted by the state of the Harari Regional State, where Harari and Oromiffa have been chosen as official languages.<sup>322</sup> What is particularly interesting in this development is its significance in portraying how sub-regional political actors may opt to deal with the language issue under the general constitutional framework.<sup>323</sup>

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<sup>320</sup> Article 5 sub 2.

<sup>321</sup> Article 5 sub 3.

<sup>322</sup> See Art. 5 of the Harari state constitution.

<sup>323</sup> Mohamed Habib, 'Federalism and its Implications for the Language Question in Ethiopia,' in First National

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The position taken by the federal constitution is considered by some as too much, while for others is too little. Some contend that given the ethno-linguistic lines the federation claims to follow, it was not unexpected to have some of the dominant languages serve as equal working languages.<sup>324</sup> Others argue that even this midway position is unacceptable and contend that this has created the biblical Tower of Babel in Ethiopia. They even go further and state that Amharic should have been considered as the national language of Ethiopia.<sup>325</sup> While the former observation seems to be correct in light of other multicultural federations like Switzerland with seven million people and well-developed economy, in the Ethiopian context, it should be seen against the background of seventy nine million people, more than eighty languages and poor economy. The latter view simply closes its eyes to the fact that accommodation of diversity is an equally important value in federations.

However, these general features of the Ethiopian Constitution have to be understood along with several other distinct features.

#### 4.4 Distinct Features of the Federal System

##### 4.4.1 The Explicit Recognition of Nations/Nationalities as Building Bricks of the Federation and Its Implications

One feature one notices throughout the Constitution is the utmost importance given to the ethno-linguistic groups within the Ethiopian polity. Unlike many constitutions, the Preamble of the Ethiopian Constitution does not commence with

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Conference on Federalism, Conflict and Peace Building (Addis Ababa: United printers, 2003): 243-251.

<sup>324</sup> Tsegaye Regassa, Ethnic Federalism and the Right to Self-Determination as a Constitutional Legal Solution to Problems of Multi-Ethnic Societies: The Case of Ethiopia (LLM thesis, Faculty of Law, University of Amsterdam, June 2001) at 63. Among the opposition political parties operating at home, some of the Oromo parties such as the Oromo Federalist Democratic Movement aim at promoting Oromiffa as a second official language at federal level.

<sup>325</sup> Minase Haile, "The New Ethiopian Constitution: Its Impact upon Unity, Human Rights and Development," Suffolk Transnational Law Review 20:1 (1996), at 11.



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the traditional constitutional formula of “we the people,” but with “We the Nations, Nationalities, and Peoples of Ethiopia” and somewhat vaguely the Constitution grants ethno-linguistic groups a kind of ‘confederate’ position, in the federation. Dealing with the fundamental principle of the constitution, chapter two, the text declares, “All sovereign power resides in the Nations, Nationalities, and Peoples of Ethiopia.”<sup>326</sup> The same Constitution grants the nations, nationalities and peoples the right to self-determination. It insists that there must be some congruence between the nation, nationality and territory they inhabit.

A consequence of this is the fact that the Constitution organizes the constituent states on “the basis of settlement patterns, language, identity and consent of the people concerned.”<sup>327</sup> While this provision does not in so many words state that they are organized along ethnic lines, most analysts and practice so far make it clear that the key factor in delineating the states seems to have focused mainly on the criteria of language.<sup>328</sup> Accordingly, the Constitution enumerates nine member states of the federation.<sup>329</sup> The Constitution employs the term “state” but in common usage they are called regional governments (*kilil*), a name carried over from the transitional period (1991-1994). They are the states of: Tigray, Afar, Amhara, Oromia, Somalia, Benshangul/Gumuz, the SNNPRS, the Gambela Peoples and the Harari people. The notion of granting to the nations/nationalities their own “mother” states as enshrined in the Constitution entitles every nation/nationality (to those who have not yet been granted a state) the right to establish their own state<sup>330</sup> at any time. This is an expression of the idea that the

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<sup>326</sup> Article 8.

<sup>327</sup> Art. 46 (2).

<sup>328</sup> Paul Brietzke, “Ethiopia’s Leap in the Dark: Federalism and Self-Determination in the New Constitution,” *Journal of African Law* 30: 1 (1995): 19-20; Fasil Nahum, *Constitution for Nation of Nations: The Ethiopian Prospect* (Lawrenceville, NJ: The Red Sea Press 1997: 51-52.

<sup>329</sup> Art. 47 (1).

<sup>330</sup> Article 47(2). The Constitution under Art. 47(3) provided strict procedures to be followed in such process. The required procedures among others include: the approval by two-thirds majority of the members of the council of

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right to self-determination and the right to self-rule can best be realized through the creation of states whose borders coincide with the nations/nationalities. The federal system, therefore, takes the territorial principle seriously.<sup>331</sup> Theoretically, therefore, every nation/nationality can have its own state and hence we can imagine no less than eighty states. It is important to point out that seven out of the nine constituent states (the only exceptions being the SNNPRS and Gambela) are named after the major nationalities that “dominate”<sup>332</sup> the respective states. Addis Ababa<sup>333</sup> and Dire Dawa<sup>334</sup> are specially administered autonomous city-states directly accountable to the federal government and do not fall within the territory of any of the constituent states. Their position is, therefore, less autonomous compared to the constituent states.

Many multicultural federal systems like India and Switzerland provide one way or another recognition and accommodation to groups. But the most striking feature of the Ethiopian federal system, from many others, is the “explicitness, at constitutional level, of its affirmation of the national self-determination and the logical consistency with which it attempts to institutionalize that principle.”<sup>335</sup> Not only are nations and nationalities granted the right to form their own states but they are also guaranteed the right to walk away from the federal pact after

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the nations, nationality and people concerned, presumably at local government level and the approval by a majority vote of the nation/nationality or people in a referendum organized by the State Council. Interestingly enough, the constitution is silent about the role of the federal government in the whole process except one vaguely stipulated provision. According to Article 62(6): “The House of Federation shall strive to find solutions to disputes or misunderstandings that may arise between the states.” The role of the state beyond organizing a referendum is also far from clear.

<sup>331</sup> This seems to be the logic behind Articles 46 and 47.

<sup>332</sup> This is a rather fluid expression and is elaborated more in the Section dealing with the treatment of minorities.

<sup>333</sup> Addis Ababa is the capital city of the federal government and has the right to self-government but it is responsible to the federal government (Art. 49). It used to be one of the fourteen regional governments during the transition period (1991-1994) but not under the new Constitution.

<sup>334</sup> Dire Dawa is also administered directly by the federal government. There have been issues of disagreement over the town between the Oromia and Somali regional states and since 1995, it is under the supervision of the federal government. It has special geo-political significance particularly after the war between Ethiopia and Eritrea broke out in 1998. The only railway that connects Ethiopia with Djibouti passes through Dire Dawa.

<sup>335</sup> Will Kymlicka, “Emerging Western Models of Multination Federalism: Are They Relevant for Africa?,” in David Turton ed. *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective* (Oxford: James Currey, 2006): pp. 54-55.

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going through some strict procedures. Interestingly, it is the state and the Constitution itself that encourages any group to think itself as a nation/nationality and promote it as a candidate for statehood. The granting of “mother” states to some of the major nationalities is a logical consequence of this. In principle there is no constitutional asymmetry among the states, although there is some level of political asymmetry.<sup>336</sup> The institutions of the regional states (legislative, executive, taxing powers, civil service) indicate enormous resemblances and most of the capital cities, including the federal capital- Addis Ababa are so far the political, economic and cultural capitals, the balance being heavily in favor of Addis Ababa.

#### 4.4.2 Viable Federal Units?

There is another peculiar feature related to the explicit recognition of the nationalities as building bricks of the Federation. In many other multicultural federations, the federal outcome arose in response to a particular sort of problem, namely the problem of competing nationalisms within a single state. It evolved out of piecemeal democratic negotiation and in response to particular nationally mobilized groups.<sup>337</sup> To borrow Richard Simeon's phrase there is bound to exist "diversity of diversities"<sup>338</sup> both within the global context and within each respective federation. The strength of the claims of these diverse groups is, therefore, expected to be different requiring flexibility in the design of the constitutional solution. In the case of Ethiopia, the state structure represented by

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<sup>336</sup> Article 47 sub 4; federal practice suggests that the system of intergovernmental relations via the Ministry of Federal Affairs, fiscal competence of the states and court structure (in some states dual and in others delegated) some level of political asymmetry is inherent in the federal system. See Assefa, *supra* note 14 chapter seven for details.

<sup>337</sup> Kymlicka, *supra* note 75 at 14. By this he meant the nation-state with a dominant national ethos trying to impose its values on national minorities and the latter trying to resist such imposition and federalism being instituted to guarantee self-rule to such national minorities.

<sup>338</sup> Richard Simeon, "Managing Conflicts of Diversity" in Unity in Diversity: Learning from Each Other Conference Reader of the 4<sup>th</sup> International Conference on Federalism Nov. 2007, New Delhi p. 104.

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the central government was forcefully dismantled in the hands of national liberation fronts (in 1991) that fought against the system representing the ethno-linguistic groups in different parts of the country. The decision to create the federation came from the victorious national liberation movements under a circumstance where the military and security apparatus of the unitary state was practically abolished. The Ethiopian approach is therefore, revolutionary in its straightforward grant of self-determination and self-rule to all nations and nationalities. Certainly, there were dozens of ethno-nationalist movements claiming some form of regional autonomy and even at times secession.<sup>339</sup> However, it is also true that not all groups within the Ethiopian state were mobilized and if mobilized, they were not necessarily mobilized on a nationalist basis. The point is that federal autonomy has been accorded to groups that had not in fact been politically mobilized.

This is not without implications. Because the groups have not mobilized for it and because some of them failed to articulate regional interests as political entities, not as anthropological units, some of the constituent units have not yet been able to evolve into viable entities as expected, even after a decade of federal experience. Certainly, there are many contributory factors to their crisis.<sup>340</sup> It must be noted that the federal system was introduced after the fall of the most

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<sup>339</sup> Many of the nationalist parties that claim to represent the Oromos, Somalis, Afars and principally EPRDF are clear examples.

<sup>340</sup> The point made by Maimire, "the constitution establishes regions on the basis of sociological diversity and out of which no political community can be driven," (*supra* note 25 at 93), seems to be partly true, but is indiscriminate. Nations/nationalities in the sense they are understood in the west are much more than ethnic groups with a possible candidacy for statehood and so many of them claim that right in Ethiopia. So not all of them could be dubbed as ethnic groups. Some of the constituent states under discussion include: Afar, Somali and Gambela. The two-tier nature of the federal system (those with relatively better experience in self-rule versus marginalized ones) has been made clear in a number of studies. See for instance John Young, "Along Ethiopia's Western Frontier: Gambella and Benishangul in Transition," *The Journal of Modern African Studies* 37:2 (1999): 321-346; Jon Abbink as well remarked that in the constituent states under discussion, there have been dismal failures. See his article "Ethnicity and Constitutionalism," *Journal of African Law* 41:2 (1997) at 173; also Dereje Feyissa, "The Experience of Gambella Regional State," in David Turton ed. *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective* (Oxford: James Currey, 2006): pp. 208-230.

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centralized regime that neglected the bulk of the ethno-linguistic groups. Thus, from inception most of the constituent states lacked skilled manpower and resources to man the newly established local institutions. There were only a few hundred experts, for example, in Afar, Somali, Gambela and Benishangul-Gumuz regional states in 1995/1996 and the situation remained the same until the Ethiopian Civil Service College took the responsibility of training civil servants for these regions with a view to breaking the historic marginalization from political power and resources. Historic marginalization also meant that there was little or no infrastructure in the less integrated regions, making self-rule difficult. Less integration in historic Ethiopia also implies that the inhabitants of low land regional states, in relative terms, being mostly pastoralists lacked the tradition of indigenous settled administration and a disciplined ruling party capable of articulating regional interest. Thus there is lack of not only disciplined and institutionalized local parties but the local politics operates under a socially fragmented and sectarian political elite.<sup>341</sup> As some of these low land regions are also located on the borders with neighboring states, local politics is very much interlinked with regional politics (the Somali region being the classic case) and thus subject to manipulation and maneuver by internal and external forces. These and other factors facilitated governmental and party interference from the center. The low level of political development in these regions means that the ruling party plays a greater role in local administration than in other constituent states.

Thus close observation of the performance of some of the states suggests that they have not yet been able to articulate distinct regional interests, a viable political unit that can compete with the federal government in intergovernmental relations. In short, some do not seem to have acquired the status of

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<sup>341</sup> See for example Abdi Ismail Samatar "Ethiopian Federalism: Autonomy versus Control in the Somali Region" *Third World Quarterly* 25: 6 (2004): 1131-1154.

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nation/nationality, which the Constitution seems to generously grant them.<sup>342</sup> In such circumstances, it may be wise to rethink the federal system again and set up an asymmetric federal system. In a way this is not an earth-shattering discovery. The federal system in practice is asymmetric in many respects. For instance, as far as intergovernmental relations is concerned, the constitutional principle “Member states ...[of the Federation]... shall have equal rights and powers”<sup>343</sup> is compromised to a considerable extent in relation to some of the member states. The fiscal competence of the states, the court structure, their representation in the second chamber, the political implications of Articles 46 and 47 (constituent states for some and not for all) are clear evidence of an already existing political asymmetry. Comparative studies also point to the fact that it is possible to increase from the norm the federal authority and correspondingly reduce the competence of some of the states in particular circumstances.<sup>344</sup> This could be done on a transitory phase and until such time that the constituent states demonstrate some level of institutional competence to rule their own affairs.

#### 4.4.3 Shared Rule

There is another consequence of the emphasis on the territorial principle (Articles 46 and 47). In as much as a federal system is about self-rule it is also about shared rule. The balance between the two has always been subject to debate but their importance is beyond doubt. The grant of “mother states” may be important in terms of concrete recognition of diversity,<sup>345</sup> but the recognition and promotion of

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<sup>342</sup> See, for instance, an interesting article about the crisis in Gambela by Dereje Feyissa, *supra* 80 61.

<sup>343</sup> Art. 47(4).

<sup>344</sup> For more on the concept of asymmetry see Ronald Watts, Comparing Federal Systems, 2<sup>nd</sup> edn. (Ontario: Queen’s University, Institute of Intergovernmental Relations, 1999) Pp. 63-68; Balveer Arora, “Adapting Federalism to India: Multilevel and Asymmetrical Innovations,” in Balveer Arora and Douglas Verney eds., Multiple Identities in a Single State: Indian Federalism in Comparative Perspective (Delhi: Konark Publishers Pvt. Ltd., 1995): 71-104.

<sup>345</sup> Another area where diversity has been given political expression is the language policy.

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diversity as can be observed from the Swiss federal experience does not stop there. What is important is the *political expression of diversity*. Several studies have indicated that diversity as such is not in itself a threat to integration<sup>346</sup> but it becomes a fertile ground for federal instability if the political system is not able to give it political expression. The federal arrangement by territorializing the state concretizes self-rule and as some critics indicate, “fragments” the state. With a view to ensuring the right to self rule to the nationalities, the Constitution either grants “mother states” to the nationalities or does ensure them at least a local government at zone or *wereda* level. Thus it takes the right to self rule seriously. Yet there is an important aspect that is missing. It fundamentally fails to integrate what it “fragments.” The emphasis on self-rule should be complemented by proportional representation in elections,<sup>347</sup> in the civil service, in the executive and the judiciary. One might state that there is Article 39 (3), which provides for the equitable representation of the states at federal and state level as well as the composition of the ruling party (that is a coalition of parties from different nationalities) that looks like typical of Lijphart’s model of consociational ethnic accommodation, namely the principle of power sharing among ethnic leaders at federal level. Yet this has its own limitations.

First and foremost, the practice so far indicates Article 39(3) is limited to executive power sharing and does not include legislative power sharing at federal level. Secondly, the decade of federal experience points out that coalition within the ruling party is conditional upon subscribing to the ruling party’s membership and its ideology. So many political parties that more or less share the ideology of

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<sup>346</sup> Akhtar Majeed, “Conflict Management in Federal Plural Societies: Some Lessons from India,” in First National Conference on Federalism, Conflict and Peace Building, (Addis Ababa: United Printers Plc., 2003)Pp. 132-141.

<sup>347</sup> For a more detailed account of how a country’s electoral system contributes to the stability or instability of a country see Maimire, *supra* note 25: 107-110.

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the ruling party are forced to operate autonomously because they are not encouraged to form a coalition as the ruling party insists on subscribing such parties to its conditions. To a large degree, this goes a long way to explaining some of the troubles in the SNNPRS and Oromia.

In the area of fiscal transfers too, the role of the smaller nationalities is becoming less significant and the HoF that is supposed to be their guardian is evolving along the interests of the more populous states and nationalities. The fact that its composition is more or less similar to the lower house is creating a problem in the decision-making process. The most populated states are pushing the House to increase the weight of population size in the allocation of shared revenues and grants. The less populated states are consistently becoming the losers and it seems it is hardly possible to reverse this trend.<sup>348</sup> As a result, while the HoF might have been envisaged as the most legitimate body to decide on fiscal transfers, it is becoming less relevant to the less populated states. It is for this reason that one might be tempted to conclude, as far as the less populated nationalities are concerned, the federal principle is not taken seriously. In this regard, the much-politicized right of nationalities has not been translated into political realities. These are crucial factors of integration that focus on shared rule and that counter balance the emphasis on self-rule. Thus while ensuring self-rule to the nationalities is a step in the right direction, this measure needs to be complemented by institutional arrangements that give effect to power sharing schemes to the various actors at federal, regional and local levels.

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<sup>348</sup> The HoF has as of 2007 endorsed a new formula.



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**4.4.4 Congruence between the Nationalities and the Territories?**

However, the presentation of the federal system as granting “mother states” to nationalities could be misleading. Despite the attempt to grant a mother state to some of the dominant nationalities, the process has not resulted in homogeneous states. In this sense, to adopt the words of Duchacek, Ethiopia like other multicultural federations is “partial ethno-territorial federalism”<sup>349</sup> or in the words of Hoekema is “indirect consociationalism.”<sup>350</sup> In the ideal (non-existent) case of perfect “integral ethno-territorial federalism” there will be a perfect coincidence of all intra-federal and national boundaries. However, in the case of partial ethno-national federalism it is a federation in which only major nationalities have and administer their own autonomous units. That certainly is the case in India with many hundred ethno-national groups but with only twenty-eight states and the same holds true for Nigeria. The Ethiopian federation as well submits to this reality despite the promise to elevate every group to a nation/nationality. While the states of Amhara, Oromia, Tigray, Afar and Somalia have clear dominant nationality groups, the other states are clearly multicultural. Benshangul/Gumuz has Berta, Mao-Komo, Shinasha, Gumuz and Benshangul nationalities. Gambela has Nuer, Anuwak and Mezenger, and Harari has an enormous number of Oromos, Amharas and Guraghes. The SNNPRS constitute of more than fifty-six “nationalities.”<sup>351</sup> The federally administered cities of Addis Ababa, Dire Dawa and many other cities found within the states like Hawassa/Awassa, Nazreth/Adama, Shashemene, to mention a few are particularly heterogeneous as

<sup>349</sup> Ivo Duchacek, “Antagonistic Cooperation, Territorial and Ethnic Communities,” *Publius: Journal of Federalism*: 7 (1977): 17-18.

<sup>350</sup> Andre Hoekema, “Aspects of Legal Pluralism in the Federal Set up of the Ethiopian State,” *Ethiopian Journal of Development Research* 24:2 (October 2002): 2-3.

<sup>351</sup> The term nationalities has to be applied carefully here. It seems that in the case of the SNNPRS, Gambela and Benishangul-Gumuz states in practice they are not treated as nations/nationalities. The most multicultural states are treated with some level of skepticism from the center. If one has to interpret the federal practice the meaning appears like this: for the moment you are not nations/nationalities but should you one day become so then you have the constitutional right to form your own states.

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they are inhabited by economic migrants. Even the states with dominant nationalities like Tigray, Amhara and Oromia have not escaped their own multi-ethnicity.

However, the SNNPRS is peculiar in some respects.<sup>352</sup> One can make two conflicting hypotheses. On the one hand, it is possible to state that the territorial approach is less feasible taking into account the many ethno-linguistic groups. Certainly, there has been a move along that line in recent years. It has become the region in which the EPRDF has experimented party reform for the first time. The SEPDF, ruling party in the region and also a member of the EPRDF, was originally a coalition of some twenty ethnic fronts operating in the South. It has now been transformed into one party (movement), SEPDM in 2002.<sup>353</sup> Along with it, following the post 2001 state constitutional reform more emphasis was put on *Weredas*<sup>354</sup> as regards the allocation of budget. It is reported that this is done with a view to weaken the link between claims for more and more of local government as fueled by the budget allocation formula. By creating more and more sub units, the ethnic groups rightly or wrongly thought that they would share more and more of the national budget. It is no surprise then that the Prime Minister in his July 2000 report to parliament declared “they ought to have used their budget as *Maresha*” (ploughshares), implying to finance specific plans bringing returns “but they used it instead as *Genfo*” (porridge). According to sources, the move was triggered by two reasons, one because of the sudden

<sup>352</sup> For more on the SNNPRS, see Jon Abbink, “New Configurations of Ethiopian Ethnicity: The Challenge of the South,” *Northeast African Studies* 5:1 (New series) (1998): 59-81; Sarah Vaughan, *Response to Ethnic Federalism in Ethiopia's Southern Region*, in David Turton ed. *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective* (Oxford: James Currey, 2006): pp. 181-207.

<sup>353</sup> What the transformation from a front to a movement implies is far from clear. However, some hint that SEPDF, which was a front of some twenty ethnic groups, was dependant on the fronts in decision-making. Important decisions were made by the twenty parties at zone level and then implemented by the SEPDF. This led to a weak regional state and strong zones. After the reform major decisions are made by the movement and not by the twenty parties. The role of the fronts accordingly is diminished. Interview, Speaker of the second chamber in the SNNPRS Ato Tekle Didu, Awasa, March 3, 2005.

<sup>354</sup> Weredas are the second lowest level local governments.

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expansion of parochial ethnic sentiments often manipulated by local elites and secondly this was aggravated by the budget allocation formula. If there are new sub-state units they will be entitled to run their own budget and so everyone wanted to have one. This led to further restructuring in the region from nine to thirteen zones and eight special *weredas*.<sup>355</sup>

Compared to the relative peace in regions like Tigray and Amhara, dominated by one nationality and relatively able to articulate regional interest in their relations with the federal government, some have suggested an asymmetric federal system, that is, a greater role of the federal government in the SNNPRS, Afar, Gambela and Benishangul-Gumuz states.<sup>356</sup>

However, this argument is not without limitations and this brings the second hypothesis. The most frequent and deadly conflicts ever since the introduction of the federal system in 1995 have been in the same states: SNNPRS, Gambela and Benishangul-Gumuz.<sup>357</sup> It is true that there are many factors that brought about the conflicts but certainly one is the failure to design adequate mechanisms for dealing with the complex multi-ethnic groups living in each of the respective states. These are the states in which the grant of “mother states” has not fully been materialized because of an alleged lack of a dominant nationality or because of constituting too many small ethnic groups. Relative peace has been restored in some of them, for instance, in SNNPRS after the Wolayta, Silte and Kaffa-Sheka

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<sup>355</sup> Interview with Assefa Kessito, Lecturer and who is actively involved with political developments in the SNNPS, November 2002; see also *Zemen Magazine* Hidar 1995, *Ye Debub Ye Politica Tikusat* : 8-11; *Human Rights Watch World Report* (2003): Africa: Ethiopia <http://www.hrw.org/wr2k3.africa5.html> as visited on June 15, 2003.

<sup>356</sup> However unsubstantiated with empirical evidence it may be, there also appears to be a political consensus for a federal option for treatment of the regions on a case-by-case basis. This was, for instance, one of the kernels of a recent seminar on Ethiopian federalism held in Addis Ababa. The papers of the seminar has recently been published in book form. See David Turton ed. *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective* (Oxford: James Currey, 2006).

<sup>357</sup> For a detailed account of the conflicts see Assefa, *Supra*, 14, chapter five.

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were granted local governments. If this argument is convincing then it makes a strong case for further restructuring of the regional governments, along with the general view that nationalities should be granted their own “mother states” even within multiethnic regional states. The fact that there has been frequent conflicts in the SNNPRS (in other regions with similar compositions like Gambela and Benishangul-Gumuz as well) compared to other states (in which EPRDF insisted that the boundaries of the constituent states should match the boundaries of the nationalities and thereby creating a more homogenous states and hence creating relative peace) seems to suggest that the multi-ethnic states should also be structured along similar lines. The south is relatively more stable and peaceful after the series of regional state restructurings than, for instance, four years ago. But this brings with it the issue of where to begin and end the reorganization of the sub-units within the region. There are still claims for more zones and *Weredas* in several parts of the SNNPRS and the creation of a new state (the Sidama claim being potentially one) as a member of the federation as well can not be ruled out.

Both are tentative arguments and not much can be said in this very dynamic region. As can be observed from the federal experiment in the SNNPRS, the region exhibits both fear and hope. The fear is that there is continuous rivalry among some of the political elite for controlling regional power at the expense of others and that seems to be fueling those that felt marginalized at regional level to raise issues of further redrawing of new zones, *Weredas* and even new states. Thus carrying with it the threat of opening "Pandora's Box"- where to end once one begins restructuring the region with more than 56 ethno-linguistic groups. A newly emerging multicultural federation may need to remain flexible in order to adjust territorial boundaries to meet new ethno-linguistic demands which is an expected thing in holding together federation but too much flexibility may lead to

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the Nigerian federation's logic of fragmentation.

The hope and rather promising point about the SNNPRS given its size and incorporation into main stream Ethiopian politics is the potential role that it can play in stabilizing the federal game. The SNNPRS being composed of relatively smaller nationalities that benefit more from interdependence and some form of self-rule than from a unitary system and independence, have a major potential role to play in bringing equilibrium to the two potential threats of the Ethiopian federation: centralism (as reflected in the 20<sup>th</sup> century) and secession (as some political elites seem to be aspiring for it).

#### **4.4.5 Unicameral Legislature/Adjudication of Disputes**

The 1995 Ethiopian Constitution provides for a two house federal parliament: the House of Peoples' Representatives (HoPR) and the House of Federation (HoF). But this is in some sense misleading because the second/upper chamber (HoF) is not part of the law making process at federal level. In other words, federal law does not need the consent of the HoF, to be a law. It is the lower house (HoPR) that has exclusive power as far as law making at federal level is concerned.<sup>358</sup>

#### TABLE 3

In terms of composition Article 61(2) of the Constitution stipulates 'each Nation, Nationality and People shall be represented in the House of Federation by at least one member. Each Nation or Nationality shall be represented by one additional representative for each one million of its population.' The provision does not even apply any rational upper limits like the German one. According to this arithmetic, the population or ethnic group with the largest number will have as many seats as its size may allow in the HoF. As for the selection/election process Article 61(3)

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<sup>358</sup> See Arts. 51, 55 and 54(3).

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envisages two possibilities. Members of the HoF may be elected indirectly by the state legislatures or the state legislature may decide the members to be elected directly by the people. So far experience indicates that all members are indirectly elected by the states.<sup>359</sup>

Federal practice elsewhere suggests that a genuine federation not only should it guarantee autonomy to the states but also should incorporate the states in the central decision-making process.<sup>360</sup> Never the less the Ethiopian federal system departs from this trend and grants the HoF among other things with the power to interpret the Constitution, resolution of disputes among the regions, decide on intergovernmental subsidies and joint taxes.<sup>361</sup>

Behind the policy choice of the framers vesting the power to interpret the constitution and to review the constitutionality of laws to the HoF, not the judiciary, has something to do with reputation of the judiciary and ideological matters. Firstly, the framers of the Constitution thought that interpretation of the constitution is not purely a legal/technical matter that should be left to the judiciary. The framers of the constitution felt that, the constitution is the "political contract among the nationalities" and only a house that is composed of representatives from the nationalities should be vested with the task of determining the scope and meaning of the text of the constitution. Thus it is firmly tied with the idea that the Constitution provides an overriding place for the right of nationalities.

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<sup>359</sup> Ethiopian Constitution Art. 61(3) stipulates, 'Members of the House of the Federation shall be elected by the State Councils. The State Councils may themselves elect representatives to the House of Federation, or they may hold elections to have the representatives elected by the people directly.'

<sup>360</sup> Daniel Elazar, *Exploring Federalism*, (Tuscalusa: University of Alabama Press, 1987) 12.

<sup>361</sup> For more on the role of second chambers in federations and the role of the HoF in adjudication of disputes see Assefa Fiseha, "Federalism and the Adjudication of Constitutional Issues: The Ethiopian Experience," *Netherlands International Law Review* v. LII:1 (2005): 1-31.

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Secondly, in historic Ethiopia, adjudication of cases formed part and parcel of public administration. One finds a merger of functions within the executive, administration of justice and executive function proper. Indeed adjudication of cases was considered to be the principal function of the executive. For example in Menlik's era of appointment of the historic ministers in 1908, the Minister of Justice was also the Chief Justice.<sup>362</sup> The attempt to separate the judiciary from the executive was not that easy either. Long and tiring process of negotiation in 1942 led to partial victory as far as the judiciary is concerned: only the highest benches, that is, the High Court and the Supreme Imperial Court were able to be relatively free from the influence of provincial administrators. In all other respects, the court structure reflected until 1992 the traditional practice of combining judicial and executive functions in the person of the local chiefs and provincial governors. At the apex of the court structure one found until 1974, the emperor, dispensing justice in the *Zufan Chilot* (Crown Court).<sup>363</sup>

This blend of judicial and executive function in the latter is not without implications. The crisis of the Ethiopian state for the most part of the 20<sup>th</sup> century had its effect on the judiciary as well. As a result of this historical context, thus when EPRDF came to power and started the new federal system, the prestige and reputation of the judiciary was at its ebb, associated with all forms of nepotism, corruption and worst of all, an arm of the most despotic regime on earth, well known for executing life with out any semblance of due process of law. Thus the historical context and the ideological factor contributed to the shift of reviewing constitutional issues from the regular judiciary to the HoF.

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<sup>362</sup> Aberra Jembere, *An Introduction to the Legal History of Ethiopia 1434-1974* (Hamburg: LIT Verlag Munster, 2000) pp. 219, 227, 240.

<sup>363</sup> Under the unitary systems, the judiciary was contained within the executive branch. The federal Supreme Court was separated from the Ministry of Justice in 1992. It suffers from a severe shortage of qualified legal and judicial personnel to operate its many layers of courts.

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An over all assessment over the performance of the HoF in the adjudication of constitutional issues reveals that it has played important role particularly over those cases that are of high political significance- cases of the nature where the US Supreme Court would refuse to decide citing the “political question doctrine.”<sup>364</sup> This is linked with the HoF’s quasi political nature. However this is not without possible implications as to its impartiality as Ethiopia is venturing into multiparty politics. So far, as federal system operated under one dominant party system and its impartiality has not been brought to test. With the emerging multiparty politics, it remains to be seen how far the HoF will serve as an impartial adjudicator on important intergovernmental conflicts.

### **Federalism and Secession**

A related issue is secession. This is one of the highly contested provisions of the Constitution. Article 39 of the Constitution expressly incorporates the right of nationalities to secede after complying with some procedures. This right cannot even be suspended during a state of emergency.<sup>365</sup> The right is granted to the various nationalities, but one can construe this provision as equally providing the right to constituent states as well, as they are mainly defined by language criteria (the congruence argument).<sup>366</sup> In brief, the procedures for secession are as follows: First the demand for secession has to be made to the legislative Council of the nation, nationality or people concerned and has to be approved by a two-thirds majority of the same body; Secondly, the federal government has to organize a referendum which must take place within three years from the time it received the concerned council’s decision for secession; Thirdly, the demand for

<sup>364</sup> For a comprehensive review of the HoF’s role see Assefa Fiseha, “Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation” *Mizan Law Review* 1: 1 (2007) Pp. 1-32.

<sup>365</sup> Art. 93.

<sup>366</sup> However, this position needs qualification. There must be some wisdom in granting the right to secede to nations/nationalities and not expressly to the constituent states. It appears that the constitution implicitly acknowledges its own limitations. Not all nationalities have their own states and granting the right to the constituent states would have meant only for a few nationalities.



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secession must be supported by a majority vote in the referendum; Finally the federal government will have transferred its powers to the council of the nation, nationality or people who have voted to secede; and when the division of assets is effected in a manner prescribed by law. Part of the argument for secession is based on the construction of the principle included in the Preamble and the clause that declares the nationalities as sovereign.<sup>367</sup> The nation/nationalities are the founders of the constitution in general and the federation in particular and hence have the right to go away from it when they feel aggrieved by the fact that the terms of the compact are abridged by the federal government. In a way this takes us to the compact theory and the limitations hinted above.

The inclusion of such right, it may be contended, is justified by extra federal factors.<sup>368</sup> The arguments for the inclusion of secession are not based on any prior history of the states as sovereign entities but on the notion of nationalities' right to self-determination, which in turn is the outcome of the leftist oriented Ethiopian Student Movement of the 1960s, the ideology of the 'nationality question' and as implemented by EPRDF. Its exact scope is not often clear for it has been used by different political parties to mean different things. For many it means nationalities right to self-rule within a multicultural and democratic Ethiopia in which there is equal recognition of culture, religion and language but for the ruling party it also includes secession.

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<sup>367</sup> Article 8.

<sup>368</sup> Apart from the ruling party, some parties from Oromia and Somali put secession as a condition to participate in the political process, indicating that there were pragmatic reasons for its inclusion. They think that Art. 39 is their only guarantee against oppressive central government. See the newsletter issued by the Constitutional Commission issue No. 3, May 1994 E.C.; *Ye Ethiopia Hige Mengist Gubae Kale Gubae* (Minutes of the Constitutional Assembly) v. 3 *Hidar* 8-13/1987 E.C. (Addis Ababa, 1994), discussions on Article 39. For general reference see Cass Sunstein, 'Constitutionalism and secession,' *U. Chi. L. Rev* 58, 633 (1991): 634, 643-644. For more on secession; also see Allen Buchanan, 'Symposium Issues in the Philosophy of Law: Participant: Federalism, Secession, and the Morality of Inclusion,' *Arizona Law Review* 37 (1995): 53-62; Will Kymlicka, 'Federalism and Secession: At Home and Abroad,' *Canadian Journal of Law and Jurisprudence* 13:2 (2000): 207-224.

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Some contend that the procedures for its exercise are strict and even doubt the political will to exercise it. Andreas Eshete writes that EPRDF, though a champion of self-determination, is opposed to its exercise.<sup>369</sup> Equally Barbara Thomas-Woolly and Edmond Keller state: ‘When EPRDF overthrew the military regime in 1991; ethnic groups that had been historically oppressed in Ethiopia were promised the right to self-determination but it soon became clear that what the EPRDF envisioned was regional autonomy for ethnically based sub-states within the context of an Ethiopian federal union.’<sup>370</sup> It is difficult to prove the veracity of these allegations but they hint that there is a lot of skepticism about its application. Nevertheless it is expressly singled out as a constitutional right.

However, there is a bitter lesson that one can learn from Eritrea's secession in 1993. Secession or the emergence of an independent state does not necessarily result in the establishment of a stable and democratic state. This is evident not only from the experience of post-independence Eritrea but also from many other of the post-independence African states. Secession or independence simply replicates the nation state without resolving the controversial and normative question of how to politically integrate, share power and resources among several contending forces.<sup>371</sup> It is for this reason that a genuine federal system is often preferred as it gives space for both unity and diversity, short of fragmentation.

#### 4.5. Some of the Contending Views on the Federal System

The round table discussion has shown that federalism in Ethiopia has already

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<sup>369</sup> Andreas *supra* note 26 at 168.

<sup>370</sup> Barbara Thomas-Woolly and Edmond Keller, ‘Majority Rule and Minority Rights: American Federalism and African Experience,’ *The Journal of Modern African Studies*, 32:3 (1994) at 417.

<sup>371</sup> See an interesting article by Allen Buchannan, ‘Federalism, Secession and the Morality of Inclusion,’ *Arizona Law Review* (Spring 1995): 53-63.

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become a point of national consensus. This is to say that, at this stage, virtually all sheds of opinion are agreed that the federal option is the only viable and reasonable alternative for Ethiopia. It has been argued further that the existing consensus has developed as a result of the dramatic change in the attitude of people towards the practical results of the system, particularly the relative peace and good performance in the socio-economic sector. At the initial stage, there had been anxiety in some quarters as to the possible consequences of the reforms introduced by way of addressing the historical grievances of the different ethnic groups. Now, it seems clear that events of the last one and half decade have shown that the country would not fall apart because of the freedom of the different ethnic groups to portray their sub-national identities, cultures and values within federal Ethiopia. Never the less, the federal system with its overriding features focusing on the right of nationalities and particular emphasis on self-rule has generated an intense scholastic interest. Broadly speaking, one can make three apparently contradictory perspectives.

The first groups of scholars consider the “ethnic” federation as a sign of the first mark of disintegration.<sup>372</sup> Some analysts have warned that the dual loyalty requisite in federalism is not kept in balance. As a result, they contend that the whole arrangement is a treaty of alliance among near sovereign ethnic groups and concluded that since the adoption of ethnic based states, Ethiopia’s federation is virtually extinct.<sup>373</sup> It is stated that “regionally based ethnicity may reinforce the demands of some ethnic groups for more and more states and finally for secession.”<sup>374</sup> Brietzke too wrote that the ethnic federation gives ethnic groups too

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<sup>372</sup> Bekele for instance argues that unless something is done, the federal system will crumble once the ruling party is voted out of office. Bekele Haile-Selassie, Ethiopia: A Precarious Ethno-Federal Constitutional Order (Doctoral dissertation) University of Wisconsin Law School 2002 (Unpublished), p. 7.

<sup>373</sup> Minase, *supra* note 65.

<sup>374</sup> John Cohen, “Ethnic Federalism in Ethiopia” *Northeast African Studies* 2:2 (New series) (1995) at 168.

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much power, placing the integrity of the federation at risk.<sup>375</sup> Overall, they underline the emphasis on the politics of difference and the subsequent threat of fragmentation.<sup>376</sup>

Yet the argument that “ethnic” federalism tends to sharpen and institutionalize previous differences and carries with it the danger of fragmentation, although with some validity,<sup>377</sup> needs qualification.<sup>378</sup> It is a global problem that any multicultural federal system be it Ethiopia, India or any other country, carries with it two existential problems, however successful it may be. There is always the problem of integration in any country with minorities and more so in multicultural federations. There are bound to exist “two solitudes”<sup>379</sup> or “three nationalities with their backs to each other”<sup>380</sup> or the “hard and open ethnic identities.”<sup>381</sup> Multicultural federations also attempt to contain the threat of secession but by the mere fact that they are multicultural they cannot avoid it altogether. After all, multicultural federations are potentially (in the worst case scenario) many nation-states in the making. It is not, therefore, endemic to Ethiopia nor is the ruling party to be blamed for institutionalizing it. Thus whether the federal system will consolidate unity in diversity or fragment the different groups depends on several

<sup>375</sup> Paul Brietzke, *supra* note 68 at 37.

<sup>376</sup> Some have dubbed it as suicidal, Charles Ehrlich, “Ethnicity and Constitutional Reform: The Case of Ethiopia,” *ILSA J. Int’l. and Comp. L.* 6 (1999) at 62; others have called it “a recipe for disaster,” Brietzke, *supra* note 68 at 35; Minase states by placing sovereignty on the nations/nationalities rather than on the people that the “constitution can be said to have juridically extinguished Ethiopia as a sovereign entity and created nine sovereign states in its place on the same territory,” *supra* note 65: 21-22.

<sup>377</sup> Border disputes between two or more regional states particularly between Oromia and SNNPRS; between Oromia and Somali Region; border and resource conflicts between Afar and Somali regional states; demands for new zones and Werdas in the SNNPRS have caused deaths to thousands of lives and destruction to property.

<sup>378</sup> Kymlicka points out that these are existential problems in every multicultural federalism including the west. *Supra* note 75.

<sup>379</sup> This is a reference made to Canada.

<sup>380</sup> This is a reference made to Switzerland.

<sup>381</sup> Maimire employs this notion in order to analyze the interethnic relations before and after the introduction of the federal system in Ethiopia. “Open ethnic identity” he claims recognizes the “other” as different but not alien and does not subject to double exclusion-identity and location, while “hard identity” makes identity and location inseparable leading from the “different” to double exclusion. This makes sense in the light of the present state crisis in Gambela, Oromia and Benishangul-Gumuz regional states where a significant number of people from different backgrounds are treated like “guest workers” for not being the “son of the soil.” Dereje calls them “inconvenient minorities.” Maimire, *supra* note 25 at 98; Dereje, *supra* note 80.

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other factors.<sup>382</sup>

A related point frequently mentioned in the debate is the idea that ethnicity or sociological diversity should be left to the private sphere. For instance an author noted, “Disagreements about one’s ethnic origin, an outcome of ethnic diversity is a private matter that should not have an effect on the way the common goods are defined and pursued.”<sup>383</sup> However, this approach of separation of state and ethnicity is not only based on a wrong analogy but is also based on the wrong transplantation of American ideas into a multicultural federal system. Will Kymlicka rightly points out that the notion of the separation of state and ethnicity, a concept drawn from the principle of separation of church and state that was used as a tool for resolution of religious conflicts in the 16<sup>th</sup> century is an incorrect analogy. Many thought that religious tolerance based on the separation of church and state provides a model for dealing with ethno-cultural differences as well. According to this view, ethnic identity, like religion, is something that people should be free to express in their private life, but should not be the concern of the state.<sup>384</sup> In short, there should be a “benign neglect” of ethnic and national differences. But this does not work in multicultural societies like Ethiopia.<sup>385</sup> As we already noted, it is the majority culture, language, religion that becomes the national culture, language or religion which is wrong solution for multicultural federations and in the case of Ethiopia we do not even have a majority. The values of the state institutions themselves are at the center of the debate and hence it is difficult to assume for the state to remain neutral.

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<sup>382</sup> Some of them include the commitment to the federal principle, tolerance and the accommodation of difference, strengthening the institutions of democracy, economic development, the presence of a dominant/ majority nationality as well as the prevalence of rule of law and constitutionalism. For the complex network of relationships between a society, its constitutions and political institutions, See B. O’Leary, ‘An Iron Law of Nationalism and Federation? A (neo-Diceyan) Theory of the Necessity of a Federal *Staatsvolk*, and of Consociational Rescue,’ *Nations and Nationalism* 7:3 (2001): 273-96.

<sup>383</sup> Maimire, *supra* note 25 at 94; Professor Mesfin has also devoted a small book to make this case. Mesfin Wold-Mariam, *The Horn of Africa Conflict and Poverty*, (Addis Ababa: Commercial Printing press, 1999).

<sup>384</sup> Will Kymlicka, *supra*, note 17 at 6.

<sup>385</sup> *Ibid.*;: 110-111.

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The second group of observers rightly point the most obvious limitation of the federal system, that is, the paradox between generously granted constitutional powers and a centralized federal system in practice resulting from centralized policy making process and a dominant ruling party system that is responsible for generating most of the policy documents. As a result, some observers contend that the autonomy of the states is limited in practice and the party structure overshadows the institutions and in this regard, they contend, it is not federal enough as promised. Some even contend further arguing that this is a continuity of the traditional form of “political control” by center.<sup>386</sup>

Ever since the establishment of the federation, Ethiopia is ruled by a coalition composed of several regionally based ethnic parties constituting the ruling party. At first sight it appears to be a party structure that enhances a federal division of power because the federal government appears to be run by an organization with a regional, rather than central basis of power. But practically, the EPRDF is controlling all the regional state governments in the Ethiopian federation either directly through the member parties or indirectly through affiliated parties that apparently look autonomous but have strong links with EPRDF. On the positive side, given Ethiopia's diverse society, coherent and disciplined party at federal and state levels appears to be an asset, compared for example with what is happening in Nigeria, but at times this exceeds its limit and affects state autonomy.<sup>387</sup>

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<sup>386</sup> For the details of the contradiction between what the constitution promises and actual realities see Assefa Fiseha; supra note 14 chapter 6; other groups even state that the traditional political control by the center is still manifested through the doctrine of democratic centralism. One of the authors who articulated about the centralization of the federal system along this line is Merera. See the essence of Merera's thesis entitled *Ethiopia: Competing Ethnic Nationalisms and the Quest for Democracy 1960-2002* (Shaker Publishing: 2003) at 119; Charles Ehrlich, “Ethnicity and Constitutional Reform: The Case of Ethiopia,” *ILSA J. Int'l. and Comp. L.* 6 (1999) at 57.

<sup>387</sup> Lovise Aalen, *Ethnic Federalism in a Dominant Party State: The Ethiopian Experience 1991-2000* (Bergen: Chr, Michelsea 2002) at 83.

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On the positive side, given Ethiopia's diverse society coherent and disciplined party at federal and state levels appears to be an asset, compared for example with what is happening in Nigeria and what transpired in Kenya's Kibaki government after Moi.<sup>388</sup> Yet in Ethiopia, it seems it is exceeding its limits. The largely centralized party structure appears to contradict the division of power that is expected to exist in a federation.<sup>389</sup> As a parliamentary federal system, the party discipline combined with 'democratic centralism'<sup>390</sup> seems to have great impact on how decisions are taken within the party. A central committee leads the ruling coalition. The central committee, often through the chairman, generates specific plans of action which are the basis for the EPRDF's five-year plans that are implemented nationwide. The five-year plans to be implemented are adopted at federal level and become the basis for state government plans and policies.<sup>391</sup> The point is that the party structure in Ethiopia undermines the federal division of power and subordinates the regional governments to the federal government. In the area of intergovernmental relations, an area not well regulated in the constitution, for example, the evolving practice indicates that it is a top-bottom approach in which the states have not yet commenced establishing forums for airing their common agenda in their relations with the center. A more serious concern however is in the impact that the party system may have on the evolution of the relevant institutions in a multiparty context. It is this factor along with its

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<sup>388</sup> Though not federal, some studies on Kenya's post Moi era hint that Kibaki's government was based on a loose coalition lacking strong hand at the center of government and opening up ways for ineffectiveness, corruption and confusion. See Joel Barkan, "Kenya After Moi," *Foreign Affairs* January/February 2004.

<sup>389</sup> By now there is ample evidence pointing out that a centralized party system and federalism are more an oxymoron. It is certainly this anomalous combination that led many federal writers to conclude that many of the former socialist federal systems were federal in form and not in operation. See for example Alfred Stepan, 'Federalism and Democracy: Beyond the US Model,' *Journal of Democracy* 10:4 (October 1999): 22-23; Daniel Elazar, *Exploring Federalism* (Tuscaloosa, AL: University of Alabama Press, 1987); Ivo Duchacek, 'Antagonistic Cooperation: Territorial and Ethnic Communities,' *Publius: The Journal of Federalism* (Fall, 1977): 3-29.

<sup>390</sup> This is a very vague concept but implies that decisions are often reached at party level, often at the top executive level (small number of party leaders allege to have monopoly of theoretical knowledge, as ideologues, as sources) and flow directly (top-bottom, not the other way round) to the grass root party members; See Medhane Tadesse and John Young, "TPLF: Reform or Decline?," *Review of African Political Economy* 30: 97 (2003) at 394.

<sup>391</sup> Aalen, *supra* note 127 at 82.

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impact on the process of policy-making that explains the centralizing trend in the federal system. It is also this factor that appears to explain the fact that intergovernmental conflicts are rare, perhaps absent, from most of the contemporary conflicts that challenge the federal system.

The third groups of observers argue that given Ethiopia's multicultural and multi religious context, the present federal system is the only panacea to the country's age old political crisis as it provides a decisive remedy for Ethiopia's long-standing problem of the "nationality question". The supporters of the new federal systems have hailed the process as an aspect of democratization of state and society and as a "stroke of genius" that will reduce tension and conflict in the country and at its very best a model for governing multi-ethnic states in Africa.<sup>392</sup>

#### **On Restructuring the Constituent States**

Final point of contest among academicians and practitioner's of federalism relate to the issue of how best to restructure the constituent states. As indicated in the introductory section, the ruling party as an architect of the federal Constitution and the champion of the "Nationality question" the right of nationalities became not only the basic principle of political organization but also constituted the foundation for restructuring the unitary and centrist state in the process of setting up the federal system. While the authors of the Constitution argue that one way to resolve ethnic tension is to redraw the states boundaries along language criteria and that territories should meet the interests of people, not vice versa, others stipulate the return to the pre-1991 epoch of provincialism as a basis of dividing political power or at least suggest the American style of territorial ("ethnic-free")

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<sup>392</sup> See Kinfe Abraham, Ethiopia from Empire to Federation (London: EIIPP, 2001): 453-493; Fasil, *supra* note 68, at 107.



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federalism.<sup>393</sup> Thus, the choices seem to be limited between ethnic versus American territorial federal system but as will be indicated in brief there are some midway options.

So far, three divergent perspectives seem to be emerging. First, some argue for the 'restoration of Ethiopia's historic provinces and organizing them on a federal basis.'<sup>394</sup> Very close along this line, the position of the opposition parties has so far not been concise and articulate but almost all parties that claim to be multi-ethnic, most of which are now dominated by the Amhara elite strongly argue in favor of a non-linguistic and territorially based federal structure.<sup>395</sup>

While such a proposal may contribute in bringing, for instance, administrative convenience for the Amharas, Somalis and Oromos, it does not seem feasible in light of the emphasis on the congruence argument between nationalities and the territory they inhabit, particularly for those that have been mobilized along ethno-nationalism lines. In these three regional governments, while maintaining the language criteria, one can still consider the notion of provincialism in a federal context. Provincialism is one element of diversity that defines Ethiopian society. As a result, although the several ethnic groups organized in a state speak the same

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<sup>393</sup> For a brief summary of the position of the different parties on federalism see Merera Gudina, "Contradictory Interpretation of Ethiopian History: The Need for a New Consensus," in David Turton ed. *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective* (Oxford: James Currey, 2006): pp. 119-130. Of late, right wing and multinational opposition parties have merged and formed the Coalition for Unity and Democracy, CUD for short, and in its election manifesto seems to be critical, if not opposing any federal arrangement. See also CUD goes for Constitutional Reform as Election Platform at <http://www.ethiopianreporter.com/displayenglish.php?id=2104> as visited on April 12, 2005; also .Daniel Kindie, "Problems and Prospects for a Horn of Africa Confederation/Federation," *Horn of Africa Journal* v. XXI (2003): 1-19.

<sup>394</sup> Bahru Zewde argues that the new regional governments, although they demonstrate linguistic unity, are bereft of historical basis and administrative rationality. See Bahru Zewde, What did we Dream? What did we Achieve? And where are we Heading? At <http://eeaecon.org/miscellaneous/vision2020/bahruv2020.htm> as visited on 18/05/2004.

<sup>395</sup> See Merera, *supra* note 126 at 155; of late CUD has emerged as the dominant coalition with an election manifesto that sets the following standards for establishing the constituent states: wishes of the people, historical and cultural ties, language, administrative efficiency and convenience, settlement patterns, and geography. At <http://www.kestedemena.org/documents/cudmanifesto.pdf> p. 89 as visited on 18-05-2005. They seem rather crude criteria and do not tell much as to which predominates over which.

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language, they have historically existed within different provinces. Besides, there is also intra-ethnic diversity among the Amharas, Oromos and Somalis (certainly there is a strong clan based regionalism and rivalry among the Ethiopian Somali's, for instance, among the Issa, Issac and Ogaden).<sup>396</sup> Besides federalism's aim is to forge unity out of diversity, short of secession, that is, setting some limits on both forces. Breaking the three constituent states into further units that take into account predominantly language but also administrative convenience, intra-ethnic diversity, the symmetric factor and the wishes of the people will certainly minimize the threat to the center for it remains consistent with the values of federalism: forging unity from diversity from smaller units interdependent among each other and it is also the genuine concern of every government to foster federal unity rather than fragmentation. No doubt this also creates a mechanism for promoting values that cut across the new units.

But overall, implementing an American style of federal system uniformly and throughout, is incompatible with the context of multicultural federal systems. That the states should reflect the essential attributes of the existing diversity in a society is the crucial element that one deduces from, the experience of Switzerland and India. Post Independence India demonstrates the fact that territories should reflect major diversities that define the people inhabiting the state. The Swiss approach of dealing with ethno-linguistic demands without necessarily granting 'mother states' or, stated otherwise, historically evolved cantons speaking the same language but divided into different cantons, is instructive. Out of the twenty-six Swiss cantons twenty-two of them are unilingual (seventeen cantons German speaking, four cantons French speaking and one Italian speaking). Three of the remaining are bilingual and only one

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<sup>396</sup> Interview with one of the experts of the Somali region, January 13, 2006.

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trilingual canton.<sup>397</sup> Yet there exists a wide range of factors cutting across cantonal boundaries. There is no single large German speaking Canton, nor is there single French speaking canton. By the same logic we can think of organizing some of the larger states in Ethiopia along the same pattern. Among other things we can think of three or more Amhara states and equally four or more Oromia and Somali states. This settles the issue of political asymmetry as well as the limits of establishing the language based constituent states. As some authors note: 'Ethnicity may guide efforts at drawing or redrawing regional boundaries, yet using it as a sole basis for legitimacy could have disastrous consequences.'<sup>398</sup>

Secondly, EPRDF insists, at least so far, on maintaining the status quo. The ethnic based political parties other than EPRDF, such as SEPDC and ONC, as well favor a more balanced federation based on genuine linguistic or ethnic criteria, which also take into consideration the rights of all Ethiopians as citizens. At normative level, there is as such no significant difference between these two options within the second scenario except that the opposition-based ethnic parties seem to emphasize and take the problem of local tyranny seriously. Much has been said about the strengths and weaknesses of this approach. It certainly remains crucially relevant but gives too much emphasis to the nationality question and ignores all other variables vital for federal stability.

Thirdly, somewhere in-between there is an emerging middle position in the internal debate inclined to consider the granting of 'mother states' only to those nationalities that have been mobilized and fought for it while applying a different

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<sup>397</sup> Thomas Fleiner, 'Recent Developments of Swiss Federalism,' *Publius: The Journal of Federalism* 32:2 (Spring 2002): 97- 124.

<sup>398</sup> Edmond Keller and Thomas-Woolly, 'Majority Rule and Minority Rights: American Federalism and African Experience,' *Journal of African Studies* 32:3 (1994) at 418.

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criterion for the other regional states.<sup>399</sup> As we noted already, some of the drawbacks of the present constitutional approach is the fact that some of the constituent units have not yet been able to evolve as viable regional governments. Some do not seem to have acquired the status of nation/nationality which the constitution ascribes to them. They have not been able to articulate regional interest worth constituting a federal unit. The lack of experience, skilled manpower and resources and historic marginalization may have aggravated the problem but the fact that there is more trouble in some of the constituent states who have not been historically mobilized, calls for some sort of asymmetric federal system at least in the short run. As can be seen from, the fiscal competence of the states, the court structure, their representation in the second chamber and the political implications of Articles 46 and 47 (constituent states for some and not for all) are clear evidences of an existing political asymmetry. Pragmatism may thus urge for a greater role of the federal government in some rather than in other constituent states for at least a transitory period.

Overall, while some observers contend that the federal system has not in any way reduced the nature and intensity of various conflicts, a closer observation seems to reveal the point that given the political atmosphere in which the country was in 1991, that is, a virtually collapsed centralized regime in which one could hardly predict what will follow shortly, the different groups have over the last decade and half shown a stake in the federal arrangement. Despite some critical limitations, the federal system, seen in light of the fragile situation that the country was in, in the face of ardent national liberation movements like the OLF and some factions from the Ethiopian Somali, the commitment to national self-determination and establishment of the regional governments was probably the

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<sup>399</sup> The case for asymmetric federalism has impliedly been suggested in a seminar on Ethiopian federalism. Ethnic Federalism: The Challenges for Ethiopia, Ras Makonnen Hall, AAU, 14-16 April 2004.

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only measure that could ensure the survival of the Ethiopian state. Its contribution to relative peace is therefore remarkable.<sup>400</sup> By creating regional governments whose boundaries coincide with at least some of the major nationalities, the federal system is an attempt to serve as a conflict regulating device as it creates more homogenous states. Since the introduction of the federal system, there has been a significant shift of discourse from assimilation to an open accommodation of the nationalities and redefinition of the values of the Ethiopian state, creating a political space to historically marginalized groups. The post 1991 state restructuring based on federalism is one of the most visible political steps ever taken by the Ethiopian state to integrate historic minorities. Some of them have been promoted from obscure districts to a regional state. As one author rightly pointed out, the state has “delivered at the periphery.”<sup>401</sup> The federal system as well has diffused the various conflicts to the local level making them less a threat to the center. Besides, the argument that conflicts are recurring and that the federation may wither away with the ruling party is something that draws its evidences from the former failed federations of the USSR and Yugoslavia. Yet, there are ample evidences indicating that such federations were "window dressing federations" and not federations in reality.

However, despite the positive contributions of the new federal system discussed above, it also has its own shortcomings. Indeed the Ethiopian federal system, as will be illustrated below faces the classic issues that arise in other multicultural settings one of which is the threat of local tyranny at constituent unit's level.

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<sup>400</sup> Medhane and Young, *supra* at 130 at 401.

<sup>401</sup> Dereje, *supra* note 80: 7-8.

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**4.6 Federalism and the Treatment of Minorities in the Regions**

From the decade of federal experience, one major challenge the Ethiopian federal system is facing relates to the issue of local tyranny at constituent unit level. Traditionally, federal systems regulate relations between the federal government and the states. Despite recent developments in some federations on the status of local governments,<sup>402</sup> the tradition has been that local governments are at the discretion of regional states. In multicultural federations, this raises the thorny issue of the position of minorities within each respective state.

The notion of majority and minority in the Ethiopian federal context is indeed confusing. Although what constitutes a minority has been contested, according to the widely recognized author Capotorti, it implies that they are less in number compared to the rest of the population of the country and as a result of the democratic game of numbers they are in a non-dominant position. The minority are nationals of the state of residence and possess ethnic, linguistic or religious characteristics (*identity stuff*) that distinguish them from the rest of the population and are interested to preserve their identity instead of integrating into the dominant group.<sup>403</sup> Yet in the Ethiopian case we observe some aberrations to this general notion. One possible approach to understand it is to figure out its meaning at federal and state levels. If majority is understood to be a numerical majority dominating a certain political process, then at federal level none of the nationalities taken alone constitute a majority. In principle the Constitution appears to transform every nationality into a majority by granting a “mother state” or local government but that applies only to some of the dominant ethnic groups.

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<sup>402</sup> See Basic Law of Germany Art. 28; Swiss Constitution Art. 50.

<sup>403</sup> F. Capotorti, Study on the Rights of Persons Belonging to Ethnic, Racial and Linguistic Minorities, UNO 1977, UN-Doc. E/CN.4/Sub.2/384, Rev. 1, para. 58

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The Oromos constitute the largest ethnic group but they are by far less than fifty per cent. Perhaps the absence of such a numerical majority that dominates the political process at the center has a lot to explain for the persisting regime instability, the interethnic tension and rivalry among the groups for exclusive control of power.

At constituent unit's level, two contradictory notions of majority and minority are emerging. In the states of Oromia, Amhara, Tigray, Afar and Somali, five out of the nine regional states, each of them dominate the political process in their respective states. Other ethnic groups in each of these regions are, therefore, minorities. However, these contextually defined majorities will become minorities in other regional states. Another dimension emerging in the city state of Harar, Gambela and Benishangul-Gumuz states is that the numerical majority remains to be a political minority in terms of its influence in the regional political process. In the state of Harar, the Hararies, constituting only seven per cent of the total population in the region play a key role as regards the rest of the ethnic groups living in the region. In Gambela despite some controversy over figures, the Nuer stand to be numerically greater than their rivals, the Anuaks, but the latter, at least until 2003, dominated the region's political process since 1991. The same holds true in the Benishangul-Gumuz state. While the Berta remain numerically larger than the Gumuz, the latter dominate the political process in the region. In these three cases, therefore, the notion of majority and minority seems to have been reversed from the ordinary understanding of the concepts.<sup>404</sup>

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<sup>404</sup> Another notion of minority for instance in relation to the composition of HoPR and HoF: out of 547 representatives in HoPR 20 seats are allocated for special representation of minority groups. There a single seat in HoPR represents an electoral constituency of roughly 100,000 population and implicitly minority refers to those groups whose population is less than 100,000. In the case of the HoF there is one representative for every one million population but even those who constitute less than one million do have one representative. Hence an ethnic group that constitutes of less than one million people could also be considered a minority.

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In this context, the danger is that the respective regional states and the dominant ethnic groups consider themselves “owners” of the “mother state.” Other citizens of different ethnic background or those who do not like to associate themselves with any ethnic group have practically no place, which certainly contradicts the constitutional provisions that stipulate the right to work and live in a place of one’s choice. In these respect frequent conflicts between the Oromos and minority Amharas (some three million Amharas are believed to exist in Oromia region) living in Oromia region have led to loss of life and destruction of property at different times. Bedeno, Arba Gugu and Gara Muletta are clear instances.<sup>405</sup> Recently (in 2002) a large number of Amharas were evicted from the southwest to the Amhara region and the case remains as yet unsettled.<sup>406</sup>

Despite some alarming reports and signs of abuse, the threat against local minorities has not yet been given the necessary attention from federal and regional government authorities. The incidents have been tolerated so far but could turn to explosive situations at any moment aggravating the fragile transition. There are still ample indications of this kind of tension and threat on minorities in several parts of the country. On several occasions (between 2005 and 2006) the author has observed high sense of insecurity felt by minorities in Oromia (Jimma area), SNNPRS so much so that the minorities have started to remit the income they generate from their business to places of their ethnic origin. Further confusion to this delicate position of minorities is the constitutional clauses of some of the regions issued after the decision of the HoF that further relegates their status to second rate citizenship. For example the Revised Benishangul Gumuz Regional Constitution and that of Gambela Article 34

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<sup>405</sup> Kjetil Tronvoll, *Ethiopia a New Start?* (Minority Rights Group, 2000): 22.

<sup>406</sup> See Tesfaye Tafese, *The Predicament of Amhara Migrant-settlers in East Wollega Zone*, Ethiopia (unpublished paper presented at the Ethiopian Studies conference held in Norway 2006



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distinct from what is provided in other state constitutions only ensure the right of minorities to work and live and do not provide for the right to elect and to be elected.<sup>407</sup> The practice combined with such constitutional anomaly simply indicates how worse the position of the minorities is in some regions.

The crisis in Gambela in 2003, and the tension in Benishangul-Gumuz, and partly in Harar and Oromia, with respect to the individual citizen's right to live and work in a place of one's choice is not because of constitutional form but because of failure to enforce constitutionally stipulated principles. The Constitution is clear in stating that every Ethiopian has the right to engage freely in any economic activity and to pursue a livelihood of his/her choice anywhere within the national territory.<sup>408</sup> The Constitution does impose an obligation on all branches of government at both levels with the duty to respect and enforce the fundamental rights and freedoms enshrined in it. Yet these provisions seem to have been overshadowed in practice by the emphasis on self-rule and collective rights. Nor are the necessary institutions for enforcing human rights well entrenched.<sup>409</sup>

Thus in the five regional states with dominant nationalities, the dominant nationalities constitute a majority in their respective states and any one other than them is a minority. In the three remaining constituent states, the situation is slightly different from that in the other regional states. What is distinct in these regional states is the fact that the tyranny arises from a minority against the majority.

### **The Way Forward**

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<sup>407</sup> State constitutions of Amhara and Tigray for example ensure minorities right not only to work and live but also to elect and to be elected. See the respective constitutions Art 33.

<sup>408</sup> Article 41.

<sup>409</sup> Laws establishing Human Rights Commission and Ombudsman were enacted a long time ago but it took more than four years to set up the institutions. The judiciary has not yet been able to deal with human rights issues satisfactorily.

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From the brief discussion of the issues concerning local minorities two conclusions seem to be inescapable. Firstly, there is obvious tension between a constitutional form implying multicultural federalism in which the forging of unity in diversity is the goal, and as some critics indicate an "ethnic" federal system in operation. Ethnicity is a state of mind emanating from a feeling of separate identity, which in turn is based on shared cultural markers (culture, language, religion etc.), but more importantly on the myth of common descent. It is important to point out that the myth of common descent is an essential characteristic of an ethnic group but not of national groups that share a common language, religion, custom, history and tradition but not necessarily a common descent. The subjective belief in myth of common descent is in short the essence of an ethnic group or ethnicity.<sup>410</sup> This is not without some implications when it is mobilized to attain certain goals. The myth of common descent serves as a basis for excluding people who share the culture but not the common descent or in the opposite case to include people who share the common descent but not the culture.<sup>411</sup> If we uphold the ethnic notion briefly considered here, it appears that a large number of Ethiopians are by and large excluded from some aspects of the regional political process. The case is a living example of the ambiguities and tensions inherent in the federal system, not clear is which way the federal system is evolving.

Secondly, as long as federalism is viewed as a means of sharing power and resources among contenders and a means for accommodation of diversity and peaceful coexistence of diverse groups in multicultural federations, the cases hint that a lot remains to be done in this respect. We observe not only the lack of

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<sup>410</sup> Chaim Gans, The Limits of Nationalism (Cambridge: Cambridge University Press, 2003) at 10; James Kellas, The Politics of Nationalism and Ethnicity (London: Macmillan, 1991) at 51.

<sup>411</sup> Chaim, *supra* note 149 at 28.

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consensus on power and resource sharing among the indigenous groups but also the exclusion of significant number of minorities at times accounting forty seven percent of the region's population from the political process.

One possible solution is the setting up of two chambers at *state level*, one composed on the basis of the democratic principle (population size or one man, one vote) and another house for the protection of local minorities. Both houses should have law-making powers and the second chamber could even be granted veto power on some crucial issues of prime importance to minorities.<sup>412</sup> Secondly, the federal executive, the federal and state judiciary and the institutions of Human Rights Commission and Ombudsman have to be well-organized throughout the country if the bulk of human rights provisions enshrined in the constitution are to be enforced in meaningful manner. This is perhaps the only way to guarantee interstate mobility of labor and capital. Besides, as in Benishangul-Gumuz and certainly other multiethnic regional states, genuine power and resource sharing among the contenders for power seems the only viable solution to bring stability to the regions. The approach so far has not been satisfactory to the major contenders for power in each of the respective regions. The federal government simply shifted its alliance from one group to the other without trying to provide a solution acceptable to all groups. Federalism's role in regulating conflicts in multicultural societies depends on whether the actors in the political process intend to use federalism in achieving those goals.

## 5. Challenges to the Democratization Process

As already noted in the introductory section, the rather exemplary and generous

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<sup>412</sup> Indeed the Revised Constitution of the Region Arts. 74-82 stipulate about the Nationality Council but this Council simply strengthens the position of the indigenous nationalities rather than the disenfranchised/marginalized groups.

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federal system is operating in relatively less favorable socio-economic and political conditions on the ground owing to the contradictory perspectives resulting from Ethiopia's recent political history. As can be observed from the politics of the early 1970's and following the May 2005 election Ethiopia's transition to democracy is facing a serious threat. This challenge in the transition to multiparty democracy comes partly from an incomplete process of transition and partly from an authoritarian, uncompromising and rigid political culture within the political elite.<sup>413</sup>

After the adoption of the Constitution in 1995, Ethiopia has undergone three elections (1995, 2000, and 2005) and is waiting for the fourth parliamentary election in 2010. In the first two elections, the ruling party dominated the political scene with not more than 12 seats in federal parliament for the opposition, as the latter were for one reason or another missing through out. For a long time, the fragmented opposition preferred to withdraw from the process claiming that the transition has not been open and inclusive enough. They thought that by withdrawing from the process the legitimacy of the transition and the position of the ruling party will be affected under the hope that this will result in pressure from the international community and donors in "leveling the play field". The opposition as well was very much fragmented and lacked for long clear and comprehensive policy alternative to rally its supporters against the ruling party. It mainly focused on criticizing weaknesses of the government. Added to this is the authoritarian and exclusionist political culture within the political elite on both sides of the spectrum that reigned for long in the country with its hangovers on the present.<sup>414</sup> The ruling party on its part argued that the transition to democracy

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<sup>413</sup> For more on the authoritarian political culture and its historical sources see Jon Abbink, "Discomfiture of Democracy? The 2005 Election Crisis in Ethiopia and its Aftermath," *African Affairs*, 105/419 (2006).

<sup>414</sup> See Assefa supra note 14 at.53; Marina Ottaway, "The Ethiopian Transition: Democratization or New Authoritarianism?" *Northeast African Studies* 2:3 (1995) pp.73; 81-83

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has been affected owing to the absence of what it calls “loyal and peaceful opposition,” an opposition that is committed to work respecting “the rules of the game” and within the constitutional framework. Implicit in the debate as well relate to what form of federal/decentralization scheme best suits Ethiopia’s reality and as to whether Ethiopia is to be considered as a “single cultural unit” or the home of a plural society opening up chance for multiple identity and loyalty. Thus the incomplete process of transition (1991-1994) and the divergent perspectives had bearings on the transition to democracy making it more challenging and protracted.

The cumulative effect of such un happy transition brought its ugly turn in the May 2005 third national election. The process commenced with historically unprecedented positive pre-election debate in which a certain section of society that felt was not part of the process made a significant comeback by joining the process. Withdrawal was thus replaced by engagement. For the first time in its entire history significant numbers of opposition party members participated in the election and later joined both the federal and regional parliament. Yet this positive political development was followed by post-election crisis. The CUD (coalition for unity and democracy- a coalition of four parties from the opposition) alleging that the ruling party has rigged the election, parliamentary procedures being hostile to the opposition<sup>415</sup> and doubting the impartiality of the Electoral Commission decided not only to boycott the parliament in October 2005<sup>416</sup> but also decided, according to the claims of the ruling party, to remove it by calling its supporters for all kinds of "colored revolution" along that of Ukraine and

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<sup>415</sup> The working procedures of the federal parliament required one-third vote in the 547 seats parliament in order to set an agenda and this was considered too cumbersome for the opposition to make any meaningful contribution. This was later amended following intense negotiation between the ruling part and the opposition.

<sup>416</sup> Majority of the members of the CUD boycotted the new legislature's first sitting but 93 of them later joined the HoPR. Members of the United Ethiopian Democratic Forces (UEDF), the second largest opposition and other smaller opposition members, however, joined Parliament from the outset.

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Georgia.<sup>417</sup> Adding fuel to the problem the ruling party following the election outcome amended via the outgoing parliament several laws transferring authority from the City government, then controlled by the CUD, to the federal level with significant impacts at least as far as revenue sources of the City is concerned. This reinforced the tension and led to violent demonstrations in June and November 2005 that resulted in loss of life and destruction of property and imprisonment of the principal leaders of the CUD who were released in the summer of 2007 after series of negotiations initiated by prominent Ethiopian Elders.<sup>418</sup> Also aggravating this development is the intra-party politics. The CUD although initially appeared as vibrant opposition, later went into crisis following the election and its outcome.<sup>419</sup> The CUD was a hastily assembled coalition of the four, just a few months before the election, with disparate views and agendas,<sup>420</sup> generation gaps and more importantly, power rivalry within the several factions of the coalition. The cumulative effect is that it resulted in deteriorating human rights situation and a political atmosphere more or less reminiscent of the upheavals we had in 1974 and 1991.<sup>421</sup> Thus, despite an openly contested multiparty third parliamentary election, Ethiopia's political process did not result in happy outcome to all parties.

Regrettably the CUD has failed to take over both the seats it won in the federal

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<sup>417</sup> It is worth noting that all international election observers although indicated election irregularities in several election poles they never declared the irregularity was grave enough to *have changed the outcome of the election*. They instead urged all parties to accept the outcome gracefully. See for instance the Final Statement on the Carter Center Observation of the Ethiopia 2005 National Elections, September 2005.

<sup>418</sup> Most elected leaders of the CUD were in prison between 2005 and 2007. Their cases have been brought before the federal court and in a rather controversial procedure most of them were found guilty but were released in the summer of 2007 following the intense negotiation initiated by the famous Elders (*shimagles*).

<sup>419</sup> The National Election Board stated that the ruling party and its allies secured 347 in a parliament with a total seat of 547 and declared it as a winner. The CUD secured 109 while the UEDF 52 seats. 11 seats went to an Oromo opposition while 1 for an independent candidate. See NEBE announces official results at <http://electionsethiopia.org/Whats%20new40.htm> as accessed on June 15, 2006.

<sup>420</sup> Some of the coalition members claim to be social democrats, others liberals democrats and some others nationalists.

<sup>421</sup> 1974 was the time where the aging Emperor was deposed by popular upheaval but as there was no organized political party to fill the vacuum, the military stepped in and started to crush all demonstrations resulting in what is infamously known as "Red Terror" that claimed 250, 000 urban elites. In 1991, the military regime was in turn overthrown by the Ethiopian Peoples Revolutionary Democratic Front-EPRDF- the present ruling party. With the collapse of the military it was hardly possible to predict the future.

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parliament<sup>422</sup> and in the Addis Ababa City Council.<sup>423</sup> As a result the federal parliament has (as of early May 2006) handed over administration of the federal capital to a one year caretaker administration and by elections were held in April 2008 where the ruling party in a less contested election regained all lost seats.

Thus one great obstacle in the operation of the federal system and that is often reflected on both sides of the political spectrum (that is the ruling party and the opposition) partly the result of deep rooted authoritarian tendency but partly the result of what one may call the “Ethiopian factor” is the *militant political culture* (events of the Red Terror, trends of centralization in the decade old federal experiment, and the latest violent clashes in June and November 2005 clearly manifest this tendency) within the political elite that stands in sharp contrast to the *federal political culture*. While in the latter, parties and major actors are expected to work together towards the achievement of their common goals respecting their differences (that is what federalism is all about), this has not been the case for long in Ethiopia. Each of the major actors in the political process consider the other as “enemy” and do not trust one another and hence could not evolve as political partners with some common goals. Nor is there any trend to respect areas of differences. It is simply a sad situation of “you think my way or you will be eliminated.”

## Conclusion

Seen from comparative perspective, the post election crisis and the divergence of

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<sup>422</sup> The National Election Board stated that the ruling party and its allies secured 347 in a parliament with a total seat of 547 and declared it as a winner. The CUD secured 109 while the UEDF 52 seats. 11 seats went to an Oromo opposition while 1 for an independent candidate. See NEBE announces official results at <http://electionsethiopia.org/Whats%20new40.htm> as accessed on June 15, 2006.

<sup>423</sup> In Addis Ababa the Opposition (CUD) won 137 (99.3%) in the 138 seats parliament. By some twist of history the April 2008 by elections resulted in 137(99.3%) seats to the ruling party, only one seat going to the opposition.

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opinions between the various forces is not without some parallels in history. Indeed it has some resemblance with what happened in the US and Switzerland in the 19<sup>th</sup> century, with some major qualification. While in the US (1861-65) and Switzerland (1847) the tension resulted because confederate forces were not willing to give way to the emerging weaker federal government, in Ethiopia, on the other hand, pro-center forces seem to be attempting to reverse the emerging federal process. In the two older federal systems, the federal forces somehow dominated the scene and the notion of “sovereignty of the states” gave way to a stronger federal system but it remains to be seen in Ethiopia (depending on balance of forces) how this will evolve in the coming years.

The large role which must be attributed to the political party running the federation since its inception, naturally leads to the question of the prospects of the federation. Because of the confederate legal structure, which until the present has been under the firm control of the ruling party (in a way an anomaly with the federal principle of division of power and multiple centers of decision-making), a change in the party system may result in a significant change in the federal outcome. It is true that if an opposition controls (parts of) the political space there are many possible scenarios.

There are those who argue that once the ruling party loses control of the federal system, the federal system will wither away with it. Indeed, in many federations that relied more on a centralized party system than on the ‘federal compact and federal institutions,’ the withering away of the party has led to the withering away of the federation. However, the Indian federal experience offers another more positive scenario. Here the weakening of the once dominant Congress party was expected by many to lead to a reform of the federal system in favor of an increase



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in state power. Yet, there has been no significant change to the system despite the fact that several different parties ruled India by turn. This seems to counterbalance the ‘withering away’ hypothesis somehow.

In Ethiopia, since the May 2005 election, the accommodation of diversity is no longer limited to the accommodation of nationalities but should also encompass the emerging political diversity.

This diversity, apart from the ruling coalition, roughly consists of a coalition of forces which are pro-center but perhaps with some decentralizing features on the one hand, and federalist forces with some policy alternatives distinct from that of the ruling party, on the other. While the possibility of such pro-center forces dominating both federal and state governments cannot be ruled out in the near future, the emergence of pro-center coalition parties seem to be rather reinforcing claims of ardent ethno-nationalist and pro-federal forces in response. In line with this, the centralizing tendency that was prevalent within the ruling party is now strongly challenged by its own coalition partners who have controlled the constituent units and who seem to be afraid of the return to the pre-1991 epoch of ‘national oppression.’

Summing up, it is submitted that Ethiopia’s choice for multicultural federalism is a step in the right direction, but its success hinges on many factors. Firstly, the existence of a *political will* to operate in a politically diverse atmosphere is vital given the lack of a dominant majority, on the one hand and the ethno-linguistic and emerging political diversity, on the other. In other words the culture of respect and open accommodation of political and identity differences is an important infrastructure of federalism. Secondly, the establishment and

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strengthening of the several institutions mentioned in the study particularly, the respect for the autonomy of the regions, second chambers at federal and regional state level as well as the mediating and dispute handling institutions is vital for ensuring the rule of law and for enhancing shared rule. Thirdly, the protection of minorities in the constituent units in a manner that strikes proper balance between the nationalities right to self-rule and the free movement of labor and capital is a matter of necessity, if one is to give effect to the notion of 'building one political and economic community'. Last but not least, the negotiated settlement at a constitutional level among the political forces on at least some of the contentious issues is a matter that will significantly contribute towards federal stability.

#### CONCLUSION

The striking feature of the federal system begins from the ambiguity in the process of establishing the federal system. This ambiguity in a way runs throughout the Constitution and also seems to be a cause for confusion in the process of enforcing the federal system. The requisite balance between the forces of unity and diversity, the combination of national self-determination and federalism, the dilemma in creating constituent states that coincide with nationalities, and the relation between individual and collective rights are cases in point. The contemporary crises in Gambela, Benishangul-Gumuz, Oromia and partly Harar seem to be attributable to these dilemmas. At a theoretical level, what can be gathered from the comparative study is the fact that a stable and working federation needs to strike a balance slightly in favor of centripetal forces. Federations, whatever their origins, come into existence through collective participation of the citizen as well as the constituent states. In that sense, the

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compact view and the sovereignty of the states or nations/nationalities is more of a fiction than a reality. Federal practice as well points along this line.

Further among Ethiopia's peculiar features is the explicit acknowledgement of national self-determination and its firm position to institutionalize the principle. It is the constitution that defines the right of every group to constitute nations, nationalities and people, that grants mother states to some of them and rather than recognizing only historically mobilized nationalities, it prefers a straightforward grant of self-determination to all nationalities. In many other multicultural federations, the system accommodated national minorities in response to a particular type of problem and therefore evolved on a piecemeal basis.

One of the drawbacks of this constitutional approach is the fact that some of the constituent units have not yet been able to evolve as viable regional governments. Some do not seem to have acquired the status of nation/nationality, which the Constitution ascribes to them. They have not been able to articulate regional interests worth constituting a federal unit. The lack of experience, skilled manpower and resources and historic marginalization may have aggravated the problem but the fact that there is more trouble in some of the constituent states who have not been historically mobilized, calls for some sort of asymmetric federal system at least in the short run. In relation to such constituent states the powers of the federal government need to be extensive compared to the other regions.

The possibilities for reconsideration at a constitutional level seems to be remote but as we noted already, there are some relevant options for restructuring some of the constituent states. That the states should reflect the essential attributes of the

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existing diversity in a society is a crucial element that one derives from the experiences of Switzerland and India. As the Swiss federation demonstrates the cantons protect language, religion and regionalism (cantonalism): essential diversities that define the Swiss people. Post independence India also demonstrates the fact that territories should reflect major diversities that define the people inhabiting the state. Unless that is taken into consideration, the federation can go into crisis. The bold recognition of diversity and its pluralist dimensions in Ethiopia is, therefore, commendable. Yet this has to take into account other essential factors as well. If the cause of the state crisis for the most part of the 20<sup>th</sup> century is interpreted as a complex one, not in the way the instrumentalists, the prompters of the national oppression or the contenders of a Greater Ethiopia taken alone, stipulate, then organizing the regional governments in a way that addresses the nationality question as well as the political and economic factors should be a logical one.

The federal system as it stands emphasizes self-rule rather more than shared rule. The granting of ‘mother states’ may be important in terms of concrete recognition to diversity but the recognition and promotion of diversity as can be observed from the Swiss federal experience does not stop there. What is important is the *political expression of diversity*. Several studies have indicated that diversity as such is not in itself a threat to integration but it becomes a fertile ground for federal instability if the political system is not able to give it political expression. The federal arrangement by territorializing the state concretizes self-rule and as some critics indicate, ‘fragments’ the state but there is one important aspect that is missing. It fundamentally fails to integrate what it ‘fragments.’ The emphasis on self-rule should be complemented by proportional representation in elections, in the civil service, in the executive and in the judiciary and mechanisms should be

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designed to for the constituent states to influence policy-making at federal level. One might state that there is Article 39 (3), which provides for the equitable representation of the states at federal and state level as well as the composition of the ruling party (that is a coalition of parties from different nationalities) that looks typical of consociational ethnic accommodation, namely the principle of power sharing among ethnic leaders at federal level. Yet this has some critical limitations. Firstly, among coalition members of the ruling party some lack the requisite autonomy to run the respective regional governments. Apart from this, even though there are some parties (not members of the ruling party) that seem to share the ideology of the ruling party, coalition with the ruling party has not yet materialized because the ruling party insists they should first join as members and should subscribe to its ideology. So far, coalition is next to impossible unless the conditions are met. To a large degree, this goes a long way towards explaining some of the troubles in the SNNPRS and Oromia. Secondly, it has already been pointed out that the nations/nationalities role in the central decision-making process, a crucial element of sharing power at the center, is almost insignificant. Thirdly, it is also demonstrated in chapter three that in the area of fiscal transfers as well, the role of the smaller nationalities is becoming less significant and the HoF, which is supposed to be their guardian, is evolving in line with the interests of the more populous states and nationalities. These are crucial factors of integration that focus on shared rule and that make up the emphasis on self-rule. After all, it is because the two previous regimes failed to share power with the diverse groups that the state went into crisis. That aspect needs to be emphasized. Besides, federalism is not only about self-rule but also about shared rule.

Despite its shortcomings the federal system has been able to introduce a new political arena and institutional design to integrate marginalized groups. Some

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have been promoted from obscure districts to the level of regional government. This has helped some groups to regain ethnic pride and identity as well as creating opportunities for the use of local language. Its contribution to relative peace is also significant. By positively responding to the nationality question, it has been able to contain, at least so far, the most devastating civil war in the continent. Presently, existing conflicts as such are to some degree localized and do not constitute major threats to the survival of the state. Given the fact that the country was on the verge of collapse, it is huge, poor and ethnically diverse, the attempt to hold together is just a step in the right direction.

However, some of the contemporary issues need serious attention. Local tyranny is a risk that hovers over the federal system. One possible solution is the setting up of two chambers at *state level*, one composed on the basis of the democratic principle (population size or one man, one vote) and another house for the protection of local minorities. Both houses should have law-making powers and the second chamber could even be granted veto power on some crucial issues of prime importance to minorities. Secondly, the federal executive, the federal and state judiciary and the institutions of Human Rights Commission and Ombudsman have to be well-organized throughout the country if the bulk of human rights provisions enshrined in the constitution are to be enforced in meaningful manner. This is perhaps the only way to guarantee interstate mobility of labor and capital. Besides, as in Gambela, Harari and Benishangul-Gumuz regional states, genuine power and resource sharing among the contenders for power seems the only viable solution to bring stability to the region. As already indicated, the approach so far has not been satisfactory to the major contenders for power in each of the respective regions. The federal government simply shifted its alliance from one group to the other without trying to provide a solution acceptable to all groups.

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**Review Questions**

1. How are multicultural federations different from nation state federations?
2. Summarize the main issues over which there are divergence of opinions exist regarding the Ethiopian federal system and critically evaluate each of them
3. How do you think it is possible to minimize the issue of rights of minorities in the regional states?
4. What factors contribute the unpopularity of the federal idea in Africa in the 1950s and 1960's?

## **Chapter Five**

### **Division of Legislative Powers**

Conventionally the study of federalism focuses on the division of powers (legislative, executive and judicial, a task the remaining three chapters will do) between the federal and state governments. But federalism as illustrated in the preceding four chapters goes much further than the study of technicalities and forms. Thus the following chapters, while analyzing the form and scope of the division of the various public powers, do further explain the reasons for the relative lack of federal-state or intergovernmental conflicts that one would have expected to take center stage given the existing diversity and wide constitutional powers of the constituent units. It will be argued, among other things, that the potential for autonomous states in Ethiopia hinges on some form of party incongruence between the federal government and the states and on the commitment to constitutionally proclaimed precepts.

This chapter focuses on the division of legislative functions in the different federal systems with some emphasis on Ethiopia. It covers the various techniques of dividing legislative power between the federal government and the states in the different federations and towards the end explains the paradox between constitutional form implying constituent states with wide powers versus the reality indicating otherwise as in the Ethiopian context. There is an ongoing debate concerning the authority of the constituent states in Ethiopia. The bulk of the writers seem to subscribe to the view that the constituent states have meager authority. Hence the trend of centralization, according to this view, is inherent in the constitution itself. To the contrary this writer contends that if the provisions of the constitution are taken seriously, at least as far as self-rule is concerned, then



on paper their powers are more comparable to a confederation than a federation. The writer contends that the constituent units in the Ethiopian federation at least *formally* speaking do have important powers, and at times their powers even far exceed the powers of the constituent states in other federations. Yet, this constitutional grant of power is constrained by a centralized party structure and centralized policy-making. The current trend of centralization is not, therefore, inherent in the constitution. It is true though that compared to the states in other federations, the constituent states in Ethiopia do not share much of the federal power, for instance, in the way the constituent states in the European federations influence decision-making at federal level, through the second chamber or in the manner these states influence foreign affairs.

#### 5.1 THE FORM AND SCOPE OF DISTRIBUTION OF LEGISLATIVE POWERS

We have already noted elsewhere<sup>1</sup> that the division of authority between the federal government and the states is one of the hall marks of federations. Central to this question is of course, which authorities are divided between the two levels of governments.<sup>2</sup> For instance in the United States, broadly speaking,<sup>3</sup> the federal system is designed to enable both the federal government and the states to enact law, to execute and adjudicate it. Legislative, executive, judicial and financial powers are allocated based on the idea that there should some correspondence with the scope of legislative, executive, judicial and financial powers. It is considered essential for governments to possess the executive and judicial authority and the financial resources to implement the function within their

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1 See chapter two for more.

2 Cheryl Saunders, 'Constitutional Arrangements of Federal Systems,' *Publius: The Journal of Federalism* 25:2 (Spring 1995) at 61.

3 Otherwise the regime of co-operative federalism has blurred dual polity somehow. See for more chapter seven.

legislative competence.<sup>4</sup> In other federations, however, this may not necessarily be so. While there may be a legislative division, the way the executive and judicial functions are organized differs from the United States approach. Again broadly speaking, these federations resorted to centralized law-making, mainly entrusted to the federal government with a more decentralized executive structure reserved to the states and an integrated judicial system. This is based on the assumption that it is impossible to avoid overlaps and there is a heavy reliance on a large measure of interdependence between the federal government and the states.<sup>5</sup>

By *forms* of distribution of legislative power we are referring to the ways in which these powers are constitutionally allocated between the federal government and the states. While the *scope* of legislative powers refers to the areas and amount of jurisdiction assigned to each order of government. In other words, with the latter we refer to the substance of power allocated while with the former we refer to the technique of allocation of power.<sup>6</sup>

Despite specific variations among the federations, there are some common features one observes in the forms of distribution of legislative powers between the federal government and the states.<sup>7</sup> The constitutional allocation of legislative power is defined on the basis of three categories, namely exclusive powers (of the

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4 Saunders, *supra* note 2: 68; see also Ronald Watts, *New Federations: Experiments in the Common Wealth* (Oxford: Clarendon Press, 1966): 169; hereinafter called *New Federations*.

5 See chapters seven and eight for more.

6 See Ronald Watts, *Comparing Federal Systems*, 2<sup>nd</sup> edn. (Montreal & Kingston: McGill-Queen's University Press, 1999): 37-39; hereinafter referred to as *Comparing Federal Systems*.

7 One should note that there are some peculiar features that define every federation and the similarities could mask other deeper variations. David Currie, *The Constitution of the Federal Republic of Germany* (Chicago: The University of Chicago Press, 1994) at 33. See chapter two, the last Section. Ronald Watts 'Forward: States, Provinces, Länder, and Cantons: International Variety Among Sub-National Constitutions,' *Rutgers Law Journal* 31 (Summer 2000): 941-957. Rufus Davis, *The Federal Principle: A Journey Through Time in Quest of a Meaning* (Berkeley: University of California Press 1978): 122-123; see also Ronald Watts, *Comparing Federal Systems supra* note 6: at 36; Flora Goudappel, *Powers and Control Mechanisms in European Federal Systems* (Gouda Quint: Sanders Institute, 1997): 45.

federal government and/or of the states), concurrent powers and reserve powers.<sup>8</sup> In the US, Swiss, German and Ethiopian federations the federal government is granted enumerated powers. In some of these federations the federal constitution defines the federal power in a limited fashion while in others the constitution defines it broadly. In all these federations the residual power belongs to the states.<sup>9</sup> The Indian Constitution introduces a slightly different technique. The Constitution provides for a long list of exclusive federal powers, a list of exclusive state powers and a third list of concurrent powers leaving the residue with the center.<sup>10</sup>

## 5.2 EXCLUSIVE POWERS

In general the powers to be distributed in federal systems fall into one of two main categories: exclusive powers and non-exclusive powers. Traditionally, the use of exclusive powers refers to the powers for which the federal constitution has created a monopoly, which either is in the hands of the federation or of the states. In theory the exercise of such an exclusive power as described in the federal constitution is left entirely to the entity to which it has been attributed.<sup>11</sup> Looking

8 D.P. Wessels, 'The Division of Powers in a Federation' in D.J. Kriek ed., *Federalism The Solution?* (Pretoria: HSRC, 1992) at 43.

9 See US Constitution Art. I section 8, the Tenth Amendment; German Basic Law Arts. 30, 70; Swiss Constitution Art. 3 and Ethiopian Constitution Arts. 51 and 52.

10 Indian Constitution schedule VII; Art. 246. The Indian Constitution defines the functions and powers of both levels of government as well as those functions and powers that they will exercise jointly. List I, also called the Union list, includes subjects over which the union shall have exclusive power of legislation and contains 97 items. List II or the state list, comprises items over which the state legislature shall have exclusive power of legislation and list III grants concurrent powers to the union and the states over list of items, and by virtue of Art. 248 all residual powers belong to the Union. See Durga Das Basu, *Introduction to the Constitution of India*, 4<sup>th</sup> edn. (Calcutta 12: Sarkar and Sons Ltd., 1966) at 253. The nature of the distribution of powers is such that the framers of the constitution attempted to specify the items in detail in order to avoid conflicts and clash of jurisdiction, leaving little scope for the judiciary to intervene. But the desire is difficult to fulfill because disputes are unavoidable and the judiciary has been called upon to adjudicate several disputes between the union and the states. M.R. Kazimi, 'Supreme Court and the Center-State Legislative Relations,' Abdulrahim Vijapur ed., *Dimensions of Federal Nation Building* (New Delhi: Jamia Hamdard, 1998) at 140.

11 Goudappel, *supra* note 7 at 40. However, the meaning of exclusive powers is not the same in all federations. For instance, the context in Germany and India is different. In Germany, pursuant to Art. 71 of the Basic Law, exclusive federal power is defined as follows, 'on matters within the exclusive legislative power of the

at federal level, there are certain functions of government, which in a federation are and ought to be exclusively within the power of the federal government. Such functions by their very nature cover the entire territory of the federation and apply equally to all member states and citizens.<sup>12</sup> According to K.C. Wheare the existence of exclusive power is crucial to a federation. 'There must be some matter, even if only one matter, which comes under the exclusive control of the federation and likewise under the states' because shared power can in the end be absorbed, at least potentially, into the exclusive list to the extent that the federal government chooses to regulate it.<sup>13</sup>

There are some general similarities in the allocation of exclusive powers between the federal government and the states in all federations. The United States Constitution enumerates under Article I section 8 the powers of the federal

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federation, the states shall have power to legislate only if and to the extent that they are expressly authorized to do so by a federal law.' As a result even on exclusive federal matters the state can legislate. German law does not assign exclusive power to Länder but it does recognize exclusive legislative power of the federal government. Goudappel, *supra* note 7 at 54. In India too the regime of exclusive state power is used very flexibly. The center can step in in a number of ways to legislate even on exclusive state affairs.

<sup>12</sup> B.M. Sharma and L.P. Choudhry, *Federal Polity* (London: Asia Publishing House, 1967): 394.

<sup>13</sup> K.C. Wheare, *Federal Government* 4<sup>th</sup> edn. (Oxford: Oxford University Press, 1963) at 79; despite some differences, generally speaking, defense, the functioning of the economy and the monetary system, major taxing powers, foreign trade and foreign affairs have been the domains of the federal government.

government.<sup>14</sup> Other sections of the Constitution too grant Congress powers in addition to those mentioned under Article I section 8.<sup>15</sup>

But Congress's power to make laws for the whole territory of the United States emanates principally from Article I section 8 and this very provision in theory endows Congress, not with all legislative power, but only with the legislative powers enumerated therein. According to American federal tradition and the interpretation given by the Supreme Court, the federal government cannot claim powers not allocated to it by the constitution.<sup>16</sup> According to Laurence Tribe 'an act of Congress is invalid unless it is affirmatively authorized under the Constitution while State actions in contrast are valid as a matter of federal constitutional law unless prohibited explicitly or implicitly by the constitution.'<sup>17</sup> This is what is known as the doctrine of enumerated powers. The legislative powers of the federal government are defined and such laws are given supremacy under Article VI.<sup>18</sup> Congress thus has limited legislative power and limited in the sense that its power extends only over those enumerated by the constitution. The

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14 Among other things: 'The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States... to borrow money on the credit of the United States; to regulate commerce with foreign nations, and among the several states...; to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States; to coin money, regulate the value thereof... fix the standard of weights and measures; to provide for the punishment of counterfeiting the securities and current coin of the United States; to establish post offices and post roads; to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries; to constitute tribunals inferior to the Supreme Court; to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; to declare war...; to raise and support armies...; to provide and maintain a navy...; to provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions; to provide for organizing, arming, and disciplining the militia and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officer, and the authority of training the militia according to the discipline prescribed by Congress;...and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this constitution in the government of the United States, or in any department or office there of.' Art. I sect. 8 of the United States Constitution.

15 See for instance Art. III, Art. X sect. 1; Art. IV sect. 3 and Amendments XIV, XVI.

16 Wessels, *supra* note 8 at 44.

17 Laurence Tribe, *American Constitutional Law* 3<sup>rd</sup> edn. v. I (New York: New York Foundation Press, 2000) at 796.

18 Sanford Schram, 'United States of America,' in Ann Griffiths ed., *Handbook of Federal Countries* 2002 (Montreal & Kingston: McGill-Queen's University press, Forum of Federations 2002): 372-391.

Tenth Amendment that reads ‘the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people’ makes the doctrine of enumerated federal powers an explicit part of the Constitution.<sup>19</sup>

While this is the basic scheme of the United States division of powers, there is more to it that emanates from a rather vague clause stated as the ‘necessary and proper clause’, last paragraph of Article I section 8. This has been the basis of the doctrine of implied powers which empowers Congress to make all laws which shall be ‘necessary and proper’<sup>20</sup> to execute both the specific legislative powers granted to Congress by Article I section 8 itself and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. According to Tribe this remains extremely important as ‘an explicit incorporation within the language of the Constitution of the doctrine of implied powers: the exercise by Congress of power ancillary to an enumerated source of national authority is constitutionally valid, so long as the ancillary power neither conflicts with external limitations such as those of the bill of rights and federalism, nor renders Congress’ power limitless.’<sup>21</sup> While the German, Swiss and Indian constitutions enlarge federal power by the inclusion of comprehensive articles on exclusive federal and concurrent powers, this vague clause along with the power for common defense and general welfare, the

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19 Tribe, *supra* note 17 at 796.

20 At this point it is important to note the context in which the United States federation commenced in 1789 and how it operated subsequently. See Arthur Gunlicks, ‘Principles of American Federalism’ in Paul Kirchhof and Donald Kommers eds., *Germany and its Basic Law* v. 14 (Baden-Baden: Series Drager Foundation, 1993): 96-97. John Attanasio ‘Conference Forward: Stages of Federalism,’ *Saint Louis University Law Journal* 42: 2 (1998) at 486.

21 Tribe, *supra* note 17 at 799. Underlying the extension of the functions of the federal government are implied powers derived not only from the necessary and proper clause but also from three other categories of constitutionally enumerated powers namely *war power clause*, the *commerce clause* and the *tax and spending clause*. For instance through the war power clause the federal government enters ‘the sphere of scientific knowledge, research and the manufacturing field.’ Wessels, *supra* note 8 at 45.

commerce clause and the meaning given to them by the Supreme Court were instrumental in expanding federal government's power in the US over the years.

The meaning of the 'necessary and proper' clause was an issue when Congress enacted a law establishing, Bank of the United States in the famous case *McCulloch v. Maryland*.<sup>22</sup> The Court unanimously upheld the power of Congress to charter a second bank of the United States. The chief justice, Marshall, constructed the necessary and proper clause and the gist of implied power of Congress as follows: 'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution are constitutional.' In interpreting what is necessary and proper in this famous case, Marshall stated it as meant 'useful and convenient' rather than 'absolutely indispensable.' And declared that Congress possesses the power, not expressly named, to establish a bank. Thus the power of the federal government to establish a national monetary and banking system is an implied power arising from the constitutionally enumerated power to levy taxes and to regulate trade. Ever since this was an important 'channel for the federal government's infiltrations of the states' power through the necessary and proper clause,'<sup>23</sup> also called elastic clause.

Broadly stated the German Basic Law like the United States Constitution stipulates that state authority is the rule and federal power the exception. 'Except when otherwise provided or permitted by this Basic Law, the exercise of state powers and the discharge of state functions is a matter for the states'.<sup>24</sup> More

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22 *McCulloch v. Maryland* 17 US (4 Wheat.) 316 (1819).

23 Ivo Duchacek, *Comparative Federalism: The Territorial Dimensions of Politics*, 2<sup>nd</sup> edn. (Lanham: University Press of America, 1987) at 272; Tribe, *supra* note 17 at 801. Applied to the commerce clause we find the same dilemma as to whether Congress may regulate anything that is related to interstate commerce or that Congress may enact any regulation that assists it in carrying out its commerce regulating power.

24 Basic Law Article 30.

specifically the same principle is endorsed on legislative matters. ‘The states shall have the right to legislate insofar as this Basic Law does not confer legislative power on the federation.’<sup>25</sup> But the granting of authority to the federal government differs significantly from that in the United States. Federal powers in Germany include not only those subjects which have always been federal under the United States Constitution and most of the economic and social matters that were federalized in the United States during the New Deal, but also fields like contract, tort, criminal law which in the US belong to the states.<sup>26</sup> The expressly federal and the comprehensive list of concurrent powers that are potentially subject to federal absorption, introduce a departure from the United States style of division of legislative powers.<sup>27</sup>

The legislative areas in which the federal government exercises exclusive powers are enumerated in Article 73.<sup>28</sup> The lists of exclusive federal powers are very much like the list of Congressional powers under Article I section 8 of the United States Constitution but with no necessary and proper clause. Instead there are subsequent provisions providing for a long list of shared powers between the federal and state governments, absent in the United States. Because the definition

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25 Basic Law Article 70 (1).

26 If one looks at the Basic Law Arts. 74 and 75 (concurrent and framework powers) it is not difficult to decipher the departure from the US federal system. Also see David Currie, *supra* note 7 at 34.

27 Three factors make the German federation unique. The exhaustive list of federal and concurrent powers, the *Bundesrat*'s role and the legislative-executive division between the federal government and the states. German federalism assigns legislative power mainly to the federal government whereas the states are in most cases responsible for implementing not only state law but also the bulk of federal law. In short, the law-making function is mainly the role of the *Bund* (federal government) while the executive function is that of the *Länder*/states. Hence some prefer to call the German federation executive or functional federalism. Arthur Benz, ‘From Unitary to Asymmetric Federalism: Taking Stock after 50 Years,’ *Publius: The Journal of Federalism* 29:4 (1999) at 56. Michael Burgess and Franz Gress, ‘The Quest for a Federal Future: German Unity and European Union’ in Michael Burgess and Alain-G Gagnon eds., *Comparative Federalism and Federation: Competing Traditions and Future Directions* (New York: Harvester, 1993) at 173. But the states play a crucial role in shaping as well as influencing the process of law-making at federal level through the *Bundesrat*. Currie, *supra* note 7 at 35.

28 It states that the federation shall have exclusive power to legislate with respect to ‘foreign affairs and defense, including the protection of the civilian population; citizenship, freedom of movement, passports, immigration, emigration, and extradition; currency, money and coinage, weight and measures and the determination of standards of time; the unity of the customs and trading area foreign trade; air transport; federal rail ways; postal and telecommunications services; industrial property rights, copy rights and publishing; statistics; regulation of federal employees.’



of exclusive federal power under Article 71 is very flexible under the Basic Law, the closest American analogy to the exclusive federal powers mentioned under the Basic Law 'are not coinage or treaty making powers which are absolutely forbidden to the states but tariffs and interstate commerce, over which state power is restricted in the absence of Congressional consent.'<sup>29</sup> The decisions of the Constitutional Court are of interest because they represent sensitivity towards reserved state autonomy that has been missing from the US Supreme Court for many decades.<sup>30</sup>

In Switzerland, broadly speaking, the general principle which the Constitution adopts in dividing legislative power between the federal government and the states, is similar to the United States and Germany.<sup>31</sup> As one of the older federations<sup>32</sup> the previous sovereignty of the states was the point of departure for the Swiss federation and the cantons are declared sovereign so long as the federation does not limit their sovereignty. This means that the fields in which the federal government is competent to legislate must be defined in the Constitution and that the federation is able to intervene and legislate in a particular domain only if empowered to do so by the Constitution. Consequently, spheres of activity not mentioned in the constitution are considered to fall within the competence of the cantons.<sup>33</sup> But what is distinct about the Swiss federal constitution is that there is nothing similar to the clause of Article I section 8 of the United States or that of

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29 Currie, *supra* note 7 at 36.

30 One of the celebrated decisions is the *Television* case of 1961 (12 BverfGE 1961).

31 Article 3 states 'The cantons are sovereign insofar as their sovereignty is not limited by the Federal Constitution; they shall exercise all rights which are not transferred to the Confederation.' Articles 42 and 43 also stipulate that the main task of the confederation is regarding tasks that require uniform regulation while the cantons define their tasks within the framework of their powers.

32 It is often referred to as 'Swiss Confederation' although every one knows that it is a federation.

33 For more on the Swiss federation see Nicolas Schmitt, *Federalism: The Swiss Experience* (Pretoria: HSRC publishers, 1996): 41-42; Otto Kaufmann, 'Swiss Federalism' in Robert Goldwin, Art Kaufman and William Schambra eds., *Forging Unity out of Diversity: The Approach of Eight Nations* (Washington D.C.: American Institute for Public Policy Research, 1989) at 208; Wolf Linder, *Swiss Democracy: Possible Solutions to Conflict in Multicultural Societies* (New York: St. Martin's Press, 1994) at 41.

Articles 73 and 74 of the Basic Law. The legislative power of the federal government and the states is found dispersed over various articles throughout the Constitution and it is not easy to single out which powers are exclusively federal and which are not.<sup>34</sup> Distinct from the Swiss tradition of cantonal sovereignty, the new Constitution has even empowered the federal government to assume tasks that require uniform regulation.<sup>35</sup> It remains to be seen if this clause is going to function as the equivalent of the implied or commerce clause in the trend of centralization.

The Ethiopian Constitution in general follows the United States and Swiss forms of distribution of powers.<sup>36</sup> According to Article 50(2) ‘the federal government and the states shall have legislative, executive and judicial powers.’ We have earlier noted the point that the Ethiopian federal system appears to reflect some aspects of coming together as well as holding together.<sup>37</sup> Although it is a fact that none of the constituent states existed as autonomous entity, owing to the aggregate nature of the federation, the federal government appears to be one with enumerated and limited powers<sup>38</sup> and the states hold residual powers.<sup>39</sup> The

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34 By and large the following are mentioned as exclusive federal powers: national defense [the use of the army, and the regulation of legislation on the organization, instructions and its equipments is federal but cantons can also have their own troops, see Arts. 58 and 60], custom and excise, railways, posts, telephone and telegraphic services, declaration of war, national currency, regulation of banking and the monetary system, mass media, aviation, nuclear energy, civil and criminal law as well as the procedural laws, foreign affairs and gathering of statistics, weight and measures, foreign trade. See Arts. 58, 60, 77, 82, 83, 87, 90, 92, 93, 98, 99, 101, 122, 123, 125.

35 See Art. 42 Section 2. The new Constitution came into force in 1999 and has been amended several times thereafter.

36 For an elaborate discussion on the context of the federal system in Ethiopia see chapters one and five.

37 See chapter five section 5.2.

38 Article 51. Among the chief powers expressly granted to the federal government are: to protect and defend the constitution; *formulate and implement the country's policies, strategies and plans in respect of over all economic, social and development matters (italics mine)*; establish and implement national standards and basic policy criteria for public health, education, science and technology as well as for the protection and preservation of cultural and historical legacies; formulate and execute the country's financial, monetary and foreign investment policies and strategies; enact laws for the utilization and conservation of land and other natural resources, historical sites and objects; establish and administer national defense and public security forces as well as a federal police force; administer the national Bank, print and borrow money, mint coins, regulate foreign exchange and money circulation; it shall determine by law the conditions and terms under which states can borrow money from internal sources; formulate and implement foreign policy; negotiate and ratify international agreements; regulation of air, water and sea transport and major roads linking two or more states, as well as for postal and

Constitution also comprises a brief account of some state powers in addition to the reserve power.

It is worth noting that the powers granted to the federal government are not limited to the list under Article 51. It might appear that by virtue of the reserve clause, any power not mentioned under Article 51 belongs to the states. But other provisions of the Constitution also indicate additional powers entrusted to the federal government. As can be gathered from the minutes of the Constitutional Assembly, there appears to be a problem of poor draftsmanship. In general it appears that Article 51 was intended to cover a whole list of powers conferred on the federal government and then other provisions were to specify the respective powers of each federal body, for instance that of the HoPR and the executive, as if there existed a separation of powers among the federal bodies.<sup>40</sup> Yet what appeared as a final product did not reflect this intention. Article 51 therefore failed to incorporate all powers of the federal government. So the reserve power of the states only applies after discounting all power of the federal government distributed throughout the Constitution. Some of the exclusive federal powers not mentioned under Article 51 but indicated elsewhere, include the power to enact a labor code, commercial code, penal code, approval of federal appointments

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telecommunications services; levy taxes and collect duties on revenue sources reserved to the federal government; determine and administer the utilization of the waters or rivers and lakes linking two or more states or crossing the boundaries of the national territorial jurisdiction; regulate inter-state and foreign commerce; administer and expand all federally funded institutions that provide services to two or more states; deploy at the request of a state administration federal defense forces to arrest a deteriorating security situation within the requesting state when its authorities are unable to control it; enact all necessary laws in order to give effect to political rights provided for in the constitution; declare and lift national state of emergency and state of emergencies limited to certain parts of the country; determine matters relating to nationality; determine and administer all matters relating to immigration, the granting of passports, entry into and exit from the country, refugees and asylum; patent inventions and protect copyrights; establish uniform standards of measurement and calendar; enact laws regulating the possession and bearing of arms.

39 Article 52. In principle Art. 52(1) is like the Tenth Amendment or Art. 30 of the Basic Law. It states, 'All powers not given expressly to the federal government alone or concurrently to the federal government and the states are reserved to the states.' Yet Art. 52(2) enumerates some powers of the states besides to the reserve power mentioned above.

40 That is what Art. 55 for the HoPR and Art. 72 on the executive, for example, attempt to deal with. See *Ye Ethiopia Hige-Mengist Gubae Kale Gubae v. 4 Hidar 14-20, 1987 E.C.* discussions on Article 55.

submitted by the executive, and the establishment of federal institutions.<sup>41</sup> Consequently, Article 51 is not the only provision to be referred to as a source of power of the federal government.<sup>42</sup>

It also worth noting that the Ethiopian Constitution provides neither for the ‘necessary and proper’ clause nor for any express comprehensive list of shared powers like the German Basic Law. As a result, it seems difficult to extend the federal powers in light of the fact that the Constitution commits itself more towards self-determination and ‘sovereignty of Nations, Nationalities and Peoples.’ However, it is possible to argue that given the terminology employed in stipulating some of the provisions, there is a lot of gray area, which in the long run might lead to a controversy. The Constitution empowers the federal government to *‘formulate and implement the country’s policies, strategies and plans in respect of overall economic, social and development matters...; ...establish and implement national standards and basic policy criteria for public health, education, science and technology...’*<sup>43</sup> One may state that this is perhaps more than the ‘necessary and proper’ clause for it grants the federal government with wide powers on economic, social, health and education aspects. It seems to put primary responsibility on the federal government to determine major policy directions and standards and certainly this is the practice, at least so far, although it is not clear whether this is because of state governments lack of expertise or whether this is considered to be federal power. This expressly covers all economic and social issues that were federalized during the 1930’s in the United States. There is no doubt that these powers cover the bulk of concurrent power on a vast

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41 See for instance Arts. 55(3), 55(4), 55(5), 55(13).

42 Indeed the word exclusive does not appear in the English text of Articles 51 and 55 that enumerate federal powers but the Amharic text of Art. 52(1) states of *‘beteley’* implying the same. See Legese Dera, *The 1994 FDRE Constitution on Legislative Power Distribution: Comparative Study* (Addis Ababa University, Faculty of Law, LL.B thesis, 1996) (unpublished) at 62.

43 Article 51 sub 2 and sub 3 (Italics mine).

field of social and economic affairs as stated in other federations. However it is also possible to argue with equal force that if one follows the terms closely, the powers of the federal government even in these vital areas do not seem exhaustive. The same Constitution also empowers the states, among other things ‘to formulate and execute economic, social and development policies, strategies and plans for the state.’<sup>44</sup> The big question is to draw the borderline between the two but certainly there is no doubt that the *legal framework of most of the policy-making areas remain concurrent*. However, as the HoF does not have law-making power there is no institutional mechanism reflecting the potential concurrent legal framework.<sup>45</sup>

Of interest in the Ethiopian federal system is the fact that some state governments have chosen to follow the Latin alphabet<sup>46</sup> in education as well as in printed media while other states have continued to use the *Geez* alphabets. It also appears that the former states prefer to follow the Gregorian calendar than the Ethiopian calendar. The question then is how far can the states differ in this crucial area in light of the fact that the federal government has the power to ‘establish uniform standards of measurement and calendar.’<sup>47</sup>

The Indian Constitution contains a very elaborate scheme of center-state distribution of powers and functions. It seeks to create three functional areas: an exclusive area for the Union, List I of the Indian Constitution of schedule VII provides for 97 comprehensive list of exclusive federal matters<sup>48</sup> and Article

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44 Art. 52(2) c.

45 See chapters three and seven for more. It is the contention of this author that the federal system has not designed adequate mechanisms for the states to participate in policy-making at federal level.

46 For example, Oromia, Somali and Afar states.

47 Art. 51(20) and Art. 55(2) f.

48 Among other things the list includes foreign affairs, defense, military and air force, atomic energy, citizenship and naturalization, banking, currency and coinage, piracies and crimes committed on the high seas, railway shipping, navigation, post and telegraph, foreign exchange reserve, banking and interstate trade,

246(1) confers on parliament an exclusive power to make laws with respect to the matters in the Union list. The states are not entitled to make any law in this area.

The Indian constitution also provides for an exclusive state list. Article 246(3) confers an exclusive power on the states to make laws with respect to the matters enumerated in the state list (List II and the seventh schedule) comprising of 66 items and in principle the Union is debarred from legislating with respect to them.<sup>49</sup>

The third list constitutes a common or concurrent area in which both the Union and the states may operate simultaneously subject to the over all supremacy of the Union. A unique feature of the Indian constitution scheme of division of powers is the existence of a large concurrent field for the Union and the states. Article 246(2) confers a concurrent power of legislation on both the center and the states with respect to the matters enumerated in the concurrent list (List III).<sup>50</sup>

While the forgoing may be the brief account of the distribution of powers, the Indian Constitution, unlike other federations, provided for a powerful center from the outset.<sup>51</sup> From the enumeration and classification of the entries in the various lists, it would appear that the federal government has been vested with vast

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communication over railways, national highways, airways, cultural and educational functions, union services, judicial powers regarding the supreme court and high courts.

49 Art. 246(3) and the state's list (List II). Some of the powers of the states include the maintenance of public order, police, local government, public health and sanitation, forests, fishery, education, state taxes and duties, wild life, intrastate commerce and administration of justice, maintenance of law and order within a state, not including naval, military and air force; public peace and safety, relief for the disabled, land and agriculture, fisheries, intrastate trade and commerce.

50 Art. 246(2) plus the list; also see the Section on concurrent power *infra*. M.P. Jain, *Indian Constitutional Law*, 4<sup>th</sup> edn. (Nagpur: Wadhwa and co., 1998) at 244; see also Wessels, *supra* note 8 for a similar view: 46-48.

51 See Section 6.5 *infra*, also note 249 and the accompanying text. Other federations have over the years adapted along the line of centralization.

powers<sup>52</sup> contained in the union and the concurrent lists coupled with supremacy of federal law and holding residual powers.

Central government's power has been extended by several devices adopted in the formulation of the entries. Firstly, some of the entries in the Union list are phrased in such a way that their scope can be increased by the Union government itself.<sup>53</sup> Secondly, some of the entries in the state list are subject to entries in the Union list, or the concurrent list or a law made by parliament.<sup>54</sup> Thus, the dimension of several entries in the union list or the concurrent list is expansive.<sup>55</sup>

Thirdly, parliament has the power to make laws with respect to any matter included in the state list for a temporary period, if the second chamber declares by a resolution of two-thirds of its members present and voting that it is necessary in the national interest that parliament shall have power to legislate over such matters.<sup>56</sup> Fourthly, as per Article 250 parliament is empowered to make laws on any matter included in the state list for the whole or any part of India while an emergency has been proclaimed.<sup>57</sup> And the central government has the power to determine when an emergency exists.<sup>58</sup> Under a proclamation of emergency the Union parliament can legislate on any matter in the state list so long as the emergency proclamation is in force.<sup>59</sup> Fifthly, if the legislatures of two or more states resolve that it shall be lawful for parliament to make laws with respect to any matter included in the state list relating to those states it can enact laws as

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52 Art. 251; See also Jain, *supra* note 50 at 282.

53 For instance, see entries 52, 53, 54, 56, 62, 63, 64, 67 of List I.

54 Entries 11, 13, 17, 22, 23, 24, 32, 54 list II; 11, 13, 26, 27, 57 list of List III.

55 Jain, *supra* note 50 at 263.

56 Art. 249 (1).

57 Art. 250.

58 Art. 352.

59 For more comments see Sharma and Choudhry, *supra* note 12 at 402.

regards those states.<sup>60</sup> The states can by delegating their powers to parliament extend union power by consent.<sup>61</sup> In all these cases, if there is inconsistency between the laws of the Union and the states, the latter shall to the extent of the inconsistency be inoperative but only so long as the Union law is operative.<sup>62</sup>

Finally, presidential rule allows the Union government to intervene in state jurisdiction.<sup>63</sup> If the President on receipt of reports from the governor of a state or otherwise is satisfied that a situation has arisen in which the government of a state cannot be carried on in accordance with a provision of the constitution, the President may by a proclamation declare the state to be under the authority of parliament.<sup>64</sup> The union may then directly take over government of that state. Besides when there is a failure of constitutional machinery in the states, the president may declare that the powers of the legislatures of the states shall be exercisable by or under the authority of parliament. Parliament may then make laws on any matter within the scope of the state.<sup>65</sup>

The implication of the preceding discussion is clear. Some of these apparently exceptional powers vested in the Union make it an overarching center, more powerful than any other federal government in other federations. Thus, in India the centralizing feature is not something that evolved over the years as in other federations resulting from constitutional adaptation, amendment or interpretation but it was the result of deliberate *constitutional design* from the outset. The

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60 Art. 250.

61 Art. 252.

62 Arts. 249, 250.

63 Art. 356.

64 Art. 356 b.

65 For more comments see Sharma and Choudhry, *supra* note 12 at 419. Presidential rule (PR) under Art. 356 has raised a lot of controversy as to its impact on the Indian federal arrangement. In the landmark case of *Bommai v. Union of India*, AIR (1994) S.C., p. 1918, the Indian Supreme Court declared that PR is subject to judicial review. See also Kazimi, *supra* note 10: 38-41; Ved Marwah, 'Use and Abuse of Emergency Powers: The Indian Experience,' in Balveer Arora and Douglas Verney eds., *Multiple Identities in a Single State: Indian Federalism in Comparative Perspective* (Delhi: Konark Publishers Ltd., 1994): 136-160.



supremacy of the constitution has in practice been moved into omnipotent central institutions of authority that are not merely in theory capable of amending the constitution, making and unmaking the states, but actually have done so many times.<sup>66</sup> At state level since 1967 and at federal level since 1989, came the end of single party dominance. Since then Indian federalism is backed by coalition governments that moderate the centralizing feature. Within the centralizing feature, the Supreme Court, as guardian of the constitution also plays a modest role in keeping the federal arrangement alive.<sup>67</sup>

Despite the whole range of variations among the federations a common pattern of sorts emerges. The general principle on which allocation of responsibilities has usually been based, is the vague concept ‘that matters of national importance should be reserved to the federal government while matters of regional importance should devolve to the states.’<sup>68</sup> But the principle does not tell us much about the specifics of what powers should go to the federal government and which ones to the states. Besides, it has not been possible to avoid the provision of a wide range of shared powers. What is of national or of local importance cannot be decided on any *a priori basis* and federal constitutions show variations in this regard.<sup>69</sup>

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66 Wessels, *supra* note 8 at 47.

67 Despite the very centralized feature of the Indian constitution, the Supreme Court sometimes plays a key role in entrenching the federal system as well as in giving effect to the limited autonomy of the states. In *Keshvanand v. state of Kerala* (1973), the Supreme Court declared that the federal system in India is one of the basic features of the constitution, which cannot be altered even by amendment. In *Automobile Transport v. state of Rajasthan* (1962), the Court gave effect to the context of the federation namely that the units of the union have certain powers however limited they might be. Some other principles that the Indian Supreme Court has developed in the process of interpreting an overlap of entries between the state list and the union list include: harmonious construction rule that states that if there is any conflict between the two entries it is the duty of the Court to reconcile the entries and bring about harmony between them. See for more Kazimi, *supra* note 10: 141-143. Arts. 249, 250 and 252.

68 *Ye Ethiopia Hige-Mengist Gubae Kale Gubae v. 4 Hidar 14- 20, 1987 E.C.* (Minutes of the Constitutional Assembly, November 1994) discussions on Article 51; Asok Chanda, *Federalism in India: A study of Union-State Relations* (London: George Allen & Unwin Ltd., 1965) at 72; Jain *supra* note 50, at 242.

69 For instance, trade and commerce are exclusively federal in the United States, India, Ethiopia and Switzerland but concurrent in Germany requiring federal legislation but administered by the states; external trade is exclusively federal in all federations; interstate trade is federal in the United States, Switzerland, Ethiopia and India but concurrent in Germany. Intra-state trade belongs to the states in the United States and Ethiopia, is concurrent in Germany and India. Currency is exclusively federal in all federations while banking is concurrent in

Broadly speaking, the exclusive federal powers include defense, foreign affairs, immigration, major taxation powers, currency and foreign exchange, foreign and interstate trade, maritime shipping, inter-regional communication and matters physically transcending state boundaries and key aspects of economic activity for which uniform regulation is deemed important, including currency and postage.<sup>70</sup> Transportation and communication are services which embrace the whole country and not only bring considerable revenue into the central treasury but also enable the federal government to make its authority felt by all citizens. These are the postal, telegraph and telephone services which are wisely assigned to the federal government. To entrust these to the states would mean unnecessary multiplication of authority, creation of inconsistent directives and increased chances of friction.<sup>71</sup>

There are still some variations even in those powers that are often considered exclusive federal powers. Defense and foreign affairs are usually considered beyond the reach of the states but there is indeed some element of sharing even in these fields.

The field of defense is considered mostly an exclusively federal power. It is the essence of federalism to accommodate diversity but warlike circumstances require centralized power to be discharged effectively. Besides, the history of older federations indicates that one of the reasons to join the federation was to have a

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the United States and Germany and exclusively federal in Switzerland, Ethiopia and India. Insurance is parallel in the United States and Switzerland, concurrent in Germany and federal in India and Ethiopia. Regulation of road and bridges is parallel in the United States and Switzerland, concurrent in Germany; railways are parallel in the US and Germany, federal in Switzerland, India and Ethiopia; air transport and postal services are federal in all federations; telecommunication is federal in Ethiopia, India and Switzerland but parallel in the United States. Broad casting is federal in the US, Ethiopia, Switzerland and India while concurrent in Germany. See respective constitutions Arts. I section 8 of the US; 73-75 of the Basic Law of Germany; 51, 52, and 55 of Ethiopian Constitution; 42-104 of Swiss Constitution for example. Also Ronald Watts, *Comparing Federal Systems*, *supra* note 6: 126-130.

<sup>70</sup> Saunders, *supra* note 2 at 70; Watts, *New Federations*, *supra* note 4 at 180.

<sup>71</sup> B.M. Sharma, *The Republic Of India: Constitution and Government* (Bombay: Asia publishing House, 1966) at 396.

common defense. Furthermore, the centralization of defense is supposed to back foreign relations.<sup>72</sup> For these reasons the control of armed forces, control of land, naval and air forces, were not only believed to reinforce political influence in international politics but also to minimize the risk of secession as in the case of 19<sup>th</sup> century Switzerland and United States. Yet while maintaining the basic principle that defense remains federal, the states have in many cases been involved one way or another with at least the police power (responsibility for maintaining law and order within their borders). In the United States, different aspects of it are assigned to the federal government and the states.<sup>73</sup> It gives the component states the power to raise militia implying voluntary or part-time troops as opposed to a permanent corps under the command of the governor. It is exclusively federal in India and Germany. In Switzerland it appears to be federal yet leaves wide powers enhancing the role of the cantons.<sup>74</sup> The cantons are responsible for a number of activities that have an impact on war power. The same could be said for Ethiopia under Article 52, which empowers the states to establish and administer a state police force and to maintain public order and peace within the state. It is worth considering if the sharing of defense powers is desirable in a federation. Are not the lessons of the Civil War in the United States and Switzerland instructive? It is possible that the states may use such force to defy federal power although the general basis of sharing is to enable the states to maintain internal order or defy attacks from other states. Yet it needs to be carefully balanced in order not to threaten the federation, and more so in Ethiopia which is full of rebel and liberation forces.

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72 Wheare, *supra* note 13 at 197.

73 The Second Amendment of the US Constitution provides 'A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.'

74 See Swiss Constitution Arts. 58 sub 3; 60 sub 1; 73 sub 1; 57-60; 65a.

In the field of foreign affairs, it has now become common to see variations among federations. Traditionally it is the need for centralization of foreign powers in the hands of the federal government that among other things was the driving force among older federations in their bid to transform themselves from a confederation to a federal polity.<sup>75</sup> In fact, one of the reasons for establishing a federation was the need for a unified foreign policy. As a result, in many cases foreign relations are the exclusive domains of the federal government. In the older federations like the United States there often is a constitutional provision not only conferring foreign relations to the federal government but also prohibiting the units from exercising foreign relations and if they have to, only with the consent of the federal government. This implied that even in the exceptional case of the units having such power depends on the consent of the federal government, which still reaffirms that foreign policy, is an exclusive domain of the federal government. This position is often described as ‘external unity and internal diversity’ that is to stand together against the world outside in a potentially threatening international environment, while safeguarding diversity within the federation.<sup>76</sup> This is the basis of the concentration of foreign policy at the center in traditional federations.

In some federations, however, the states have obtained formal representation in international fora, particularly when the matter concerns the interest of the states.<sup>77</sup>

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75 Schmitt, *supra* note 33 at 85; in a confederation the states may retain some or all of the foreign affairs powers.

76 Bernhard Ehrenzeller, Rudolf Hrbek, Giorgio Malinverni and Daniel Thurer, ‘Federalism and Foreign Relations’ in Raoul Blindenbacher and Arnold Koller eds., *Federalism in a Changing World-Learning from Each Other* (Montreal and Kingston: McGill-Queen’s University Press, 2003): 53-73.

77 John Kincaid, ‘Foreign Relations of Sub-national Units’ in Raoul Blindenbacher and Arnold Koller eds., *Federalism in a Changing World-Learning from Each Other* (Montreal and Kingston: McGill-Queen’s University Press, 2003): 74-96.

Crucial in the treatment of foreign affairs is the issue of defining the role of the units in shaping foreign policy as well as the impact of foreign policy on the rather formal division of powers between the federal government and the states. We know that the control of foreign relations includes among other things treaties concluded between the federal government and foreign states.<sup>78</sup> In this global world treaties cover a whole variety of subjects including social and economic fields, protection of human rights, education, drugs control, international criminal matters, labor conditions and if the federal government has exclusive power over conclusion and execution of treaties, then it can use this power to legislate laws on subjects including those that are within the competence of the states, thereby invading the exclusive competence of the states.<sup>79</sup>

There is a dilemma here. On the one hand if foreign affairs is exclusively federal as has been the case in the older federations, then the fear is that the exclusive power of the states may become ‘concurrent over time or nil at worst’ because the federal government may through treaty-making power enter the sphere of the states and affect the constitutional division of power.<sup>80</sup> This brings to the front the question whether the mere fact of concluding a treaty on a given subject confers on the federal government legislative power over that subject in so far as is necessary to implement the treaty and if allowed does not this amount to an intervention in the power of the units over the same subject matter? On the other hand, if the states have too much influence on foreign policy then the federal government may not be effective on the international scene to protect national interests. The question put broadly then is whether control of foreign relations

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78 Wheare, *supra* note 13 at 179.

79 Duchacek, *supra* note 23: 259-260.

80 Wheare, *supra* note 13 at 180; Duchacek, *supra* note 23 at 260; see also Rahmatullah Khan, ‘Implementation of International and Supra-National Law by Sub-National Units’ in Raoul Blindenbacher and Arnold Koller eds., *Federalism in a Changing World-Learning from Each Other* (Montreal and Kingston: McGill-Queen’s University Press, 2003): 115-129.

should be given in its entirety to the federal government or be divided between the federal government and states and what mechanisms are available to control the former in the exercise of foreign affairs to reflect divergent interests of the states in the federation? Control of treaties involves at least two processes. There is the making of the treaty between the federation and another state normally within the domain of international law and there is the execution of the treaty in the domestic sphere. It is crucial to identify as to whether the federal constitution confer both powers, the making and implementation on the same organ, or if it is a shared power.

Broadly speaking federal constitutions provide two approaches in dealing with foreign affairs. The United States,<sup>81</sup> India<sup>82</sup> and Ethiopia<sup>83</sup> adhere to the dominant thinking that foreign affairs are exclusively federal while Germany<sup>84</sup> and Switzerland<sup>85</sup> have introduced some departure from this approach in which mechanisms are designed for the constituent states to have some say when a treaty has impact on matters within state jurisdiction.

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81 See US Constitution Art. I Section 10; Art. II Section 2 and the famous decision of the Supreme Court *Missouri v. Holland* 252 US 416 (1920) in which the Court established the principle that certain subjects might be exclusively within the competence of the states from the perspective of domestic law but not with respect to the implementation of international obligations.

82 See Art. 253 that vests plenary power of treaty-making and implementation exclusively on the union government; Basu, *supra* 10 at 225; Sharma and Choudry, *supra* note 12 at 294; Kahan, *supra* note 80 at 126.

83 Arts. 51(8); 55(12); 74(6); 50(8); 48(1) hinting that at horizontal level there is a distinction between the conclusion of a treaty (competence of the executive) and its ratification (that of HoPR). But as far as vertical division of power between the federal government and the states is concerned, foreign affairs remain the exclusive domain of the federal government. Yet the states have limited autonomy in signing among themselves (Art. 48) as well as with neighboring countries. See for instance, Amhara State Constitution Art. 49 3.3.3, SNNPRS Con Art. 51 sub 3 and Con of Tigray Art. 49 sub 3; Gedariff, Amhara State Delegations Sign Accord at <http://www.waltainfo.com?EnNews/2003/may/03may03/may03e3.htm> as visited on 5/12/2003.

84 See Arts. 32 and 23 and the celebrated decision of the Constitutional Court on the Concordat case [6 BverfGE 309 1957] where the Court established the principle that the federal government cannot encroach on the competence of the states using foreign affairs power.

85 See Arts. 54, 55 and 56.

### 5.3 SHARED LEGISLATIVE POWERS

Although the constitutional division of power between the federal government and the states is the central point in federations, we find, however, that the dividing line between the two powers is never clear. There are deliberate and some unintentional overlaps in the division of power.<sup>86</sup> Shared powers represent the meeting point of the two levels of governments, otherwise considered exercising exclusive shares of federal and state powers. Even in the United States where there is no explicit list of shared powers, the Supreme Court has been able to create a wide regime of shared powers.<sup>87</sup> It is possible that this is because the framers intended these to be overlapping or concurrent powers, including *inter alia* the powers to tax, to regulate commerce and to initiate social policies.

Because the allocation of powers to the federal government and the states could not be done neatly, federations provide another set of powers commonly described as shared powers. These powers refer to that category of powers in which both the federation and the states exercise at some point at least part of the power. Experience has shown that there are certain matters which cannot be allocated exclusively either to the federal government or the states. It may be desirable that the states should legislate on some matters but it is also necessary that the federal government should also legislate to enable it in some cases to secure uniformity across the nation.<sup>88</sup> Another reason for having shared powers is the fact that the federal government may need to guide and encourage state efforts and more importantly some measures taken by the states may have spill-over

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86 Duchacek, *supra* note 23 at 58. He states that there are at least five principal overlaps that blur the line between federal and provincial powers. Federal monopoly over foreign affairs and defense, emergency clauses, implied powers, concurrent powers and the lack of verbal precision.

87 Schram, *supra* note 18 at 347.

88 Asok Chanda, *supra* note 68: 68-69.

effects and for this reason the federal government may need to intervene.<sup>89</sup> Shared powers as well avoid the necessity of enumerating complicated minute subdivisions of individual functions to be assigned exclusively to one area of government or the other, thus serving as a flexible channel for adjustment to new circumstances.<sup>90</sup> They are introduced in recognition of the inevitability of overlaps of jurisdiction between the federal government and the states.<sup>91</sup>

Because the regime of shared powers is unavoidable, federal constitutions often provide mechanisms of handling conflict situations between the federal government and states. Because shared powers assume an overlap of legislative functions,<sup>92</sup> in case of conflict it is often stated federal law whether passed before or afterwards should to the extent of the inconsistency prevail.

Traditionally, it has been argued that the existence of a separate list of powers other than exclusive and residual ones is liable to raise considerable problems. For instance, Wheare argues that shared powers add another series of disputes about jurisdiction to the already formidable list of possible conflicts, which are inevitable in even the simplest federal systems.<sup>93</sup> Where the system is organized with an exclusive list leaving the rest to the others, there is then one list of subjects and disputes and interpretation can be confined to the meaning of words in that list. If a shared list is added, there are not only disputes about the meaning of the words in the new list but about the extent to which these words overlap or conflict with the words in the exclusive list and about the extent to which laws passed by the unit exercising shared powers conflict with each other. If to an

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89 *Ibid.*, pp. 68-69.

90 Watts, *Comparing Federations*, *supra* note 6 at 38.

91 *Ibid.*

92 Wheare, *supra* note 13 at 79, Watts, *New Federations*, *supra* note 4 at 175; US Constitution Art. VI; Swiss Constitution Art. 49; German Basic Law Art. 31; for more on the Ethiopian issue see chapter five.

93 Wheare, *supra* note 13 at 79; the simplest form he claims is one organized with only one list of exclusive powers leaving the residue to the states and obviously he was referring to the United States.



exclusive list and a shared power list another exclusive list is added as in India then the problems of interpretation becomes even more complex. Three lists must be compared.<sup>94</sup> It, may, therefore, raise considerable problem of interpretation and create disputes. There is also the need for a more precise division of power to reduce uncertainty in the legal regime. Furthermore, it may leave the states in doubt about the extent of their legislative authority since in addition to being normally excluded from the federal list they may at any time be excluded from shared power as well.<sup>95</sup>

However, Wheare's view of federalism is based on the co-ordinate theory implying dual polity, in which each government acts directly towards the citizen and assumes a clearly layered division of power that is far from real.<sup>96</sup> Thus, Duchacek states that the existence of shared powers is simply another reflection of the fundamental impossibility and also the undesirability of dividing political powers neatly and permanently.<sup>97</sup> Besides, as the next chapter will illustrate, executive federalism particularly in Germany and Switzerland indicates that the classic approach of duality has been taken over by developments, mainly the regime of co-operative federalism, although this has not replaced the dual framework completely.

In terms of the field of coverage it can be stated broadly that for the most part the social and economic spheres fall into this category. Economic affairs (that include regulation of trade and commerce, industries and labor and economic planning) raise issues because both levels of government have a lot of vested interest in these spheres of activities. It is for instance rarely possible to demarcate the line

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94 *Ibid.*, at 81-82.

95 *Ibid.* at 79.

96 *Ibid.* at 14.

97 Duchacek, *supra* note 23 at 272.

between trade and commerce which is interstate and that which is intra-state.<sup>98</sup> On the one hand there are bound to be conflicts of economic interests between states specializing in different products and the fear that measures taken by the federal government integrating the national economy might undermine the cultural distinctiveness of the diverse societies. Besides, in the economic sphere states are often concerned to ensure the economic welfare of their citizens and to develop policies related to their own particular economic interests.<sup>99</sup> These reasons call for state control of these spheres. On the other hand there is the need for guarantee free trade and economic development and in developing countries there is the urge for rapid economic growth through active federal participation. These provide the reasons for federal government's involvement in these fields.<sup>100</sup>

Social services cover education, health protection and welfare of citizens, insurance, and assistance for old age, unemployment, accident, and workers' compensation. There are a number of arguments in favor of state governments' involvement. Regional governments often have the primary constitutional responsibility. The personal nature of the services, the need to adapt them to local circumstances and their close relation to other aspects of local government urge for state power. However, extensive federal financial assistance has often been necessary because of program costs and because of the pressure for federal wide standards of service to the citizen.<sup>101</sup> Besides, greater scale of research and specialization is possible at federal level.

As a result these two fields (economic policy and social affairs) show extensive activity at both levels of government. Experience so far indicates that one can

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98 See below commerce clause.

99 Watts, *Comparing Federal Systems*, *supra* note 6 at 40.

100 Watts, *New Federations*, *supra* note 4 at 182.

101 Watts, *Comparing Federal Systems*, *supra* note 6 at 40.

distinguish at least two types of shared powers: concurrent powers and framework powers.<sup>102</sup>

### 5.3.1 Framework Powers

When framework legislation has been prescribed for the exercise of a power, a special type of shared power exists that in principle grants the federal government the competence to issue general legislation in a specific policy field. This federal legislation is subject to strict conditions because it has to leave substantial room for the states to issue their own legislation within the limits set by the federation.<sup>103</sup>

The federal government may use framework legislation to regulate federation-wide standards while leaving the states room to legislate the details and to deliver the services in a manner adaptable to local situations. The states under this category of powers are allowed to fill in the gaps with more detailed laws. Unlike the concurrent powers in which the federal government has the potential competence to absorb, federal framework legislation indicates an interesting compromise that requires significant decentralization of policy-making authority without sacrificing uniformity where it is needed.<sup>104</sup> Especially in the social services the federal government may legislate to secure a basic national uniformity and to guide regional legislation while leaving the states with the initiative for details and for adaptation to local circumstances.<sup>105</sup>

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102 Goudappel, *supra* note 7 at 41.

103 *Ibid.*, at 41.

104 Watts, *Comparing Federal Systems*, *supra* note 6 at 38.

105 Philip Blair, *Federalism and Judicial Review in West Germany* (Oxford: Clarendon Press, 1981) at 85; Watts, *New Federations*, *supra* note 4 at 174; also Art. 75 of the German Basic Law. The article enumerates areas falling within this category: general principles on higher education, hunting, nature conservation, land distribution, regional planning, general legal relations of the press, film industry, land reform, water resource

There is less guidance as to how far framework legislation enacted by the federal government could possibly go into details. In Germany where framework legislation is very common, the Constitutional Court held that a federal framework law cannot stand on its own but must be designed to be filled in by state legislation. It must leave the states an area, which is of substance.<sup>106</sup> This way it tried to protect the states' legislative power. Because the federal government has extensively used this power of legislation in a manner that affected the autonomy of the states, the Basic Law provision dealing with framework legislation (Article 75) was one that was amended as part of the Constitutional reform in 1994. The new provision set at least two minimum conditions to be fulfilled before a federal framework law could be enacted.<sup>107</sup> It appears therefore that as far as the law is concerned, for the federal government, the framework powers are more restrictive than concurrent ones as it is obliged to leave room for the states to issue their own legislation.<sup>108</sup> Framework powers not only preserve the right of the states to legislate but also positively presuppose future state legislation. Federal government may not in principle exhaust the subject.<sup>109</sup>

The Swiss constitution also provides for framework laws. Some provisions grant the right of supervision and general provisions and in such cases the cantons have some freedom to issue their own legislation additional to the federal law, which they can adapt to the specific requirements of the situation in their territory.<sup>110</sup> In

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management, registration of residence, identity cards, legal status of state and public servants. This article was amended on 14 November 1994.

106 4 BverfGE, 115 (1954).

107 Art. 75 cross refers to Art. 72 to extend the conditions attached to concurrent powers to framework laws and these are: the necessity to establish equal living conditions or the maintenance of legal or economic unity. Apart from this Art. 75 also stipulates under sub 2 that only in exceptional cases could framework law be detailed or directly applicable.

108 Goudappel, *supra* note 7: 56-57.

109 Blair, *supra* note 105 at 87; see also Currie, *supra* note 7 at 51.

110 Goudappel, *supra* note 7: 49-50.

some fields the confederation has limited power of laying down principles, for instance police regulation concerning forestry, hunting and fishing, town and country planning. In these cases cantons have their own legislative power but they are limited to the determination of detail.<sup>111</sup>

Although it has traditionally been argued that the Ethiopian Constitution has no shared powers except in the area of taxation, it is clear that it provides some provisions dealing with framework powers. By virtue of Article 55(6) the HoPR is empowered to enact *civil laws*, which the HoF deems ‘necessary to establish and sustain one economic community’.<sup>112</sup> In principle by virtue of Article 52, civil law<sup>113</sup> is a matter reserved to the states. However, as a matter of exception the federal government may enact civil laws when the HoF states that it is necessary to enact such laws to establish and sustain one economic community. This is a clear departure from the general clause under Article 52 sub 1. The last clause states that whatever is not expressly given to the federal government alone or concurrently with states remains with the states. But here the approach is that whatever is not expressly given from the civil law to the federal government is not necessarily with the states. It points out that federal government may legislate even in areas of civil law. It appears that like its German counterpart, if the federal government through the HoF decides that uniformity in some fields of civil law should be achieved in light of the potential and actual variation among states in terms of culture, religion and tradition, which may have a bearing on the

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111 See Arts. 76 and 79 for instance; also Schmitt, *supra* note 33.

112 This notion is not defined in the constitution but interestingly a policy document issued by the federal government underscores the point that there can be one economic community if there is a network of infrastructure that connects people together and when there is a uniform economic, fiscal and monetary policy as well as free movement of labor and capital throughout the country. If this is so then the power of the federal government is very wide in scope. But note that it seems to be limited to civil law. See *Be Ethiopia Ye Democrasiyawi Ser’at Ginbata Gudayoch* (Ministry of Information, Addis Ababa, Ginbot 1994 E.C.): 201-217.

113 The constitution does not define what the content of civil law is but traditionally it is understood to include all matters covered by the existing civil code, which in principle is within the jurisdiction of the states unless the constitution itself federalizes it as in the case of land.

rights of children, women or even inheritance, then the HoPR may be compelled to enact such laws. According to the Basic Law in Germany the conditions for enacting concurrent and framework powers are ‘to establish equal living conditions throughout the federal territory or the maintenance of legal or economic unity.’<sup>114</sup> There is no doubt that a comparison of the two hints at the Basic Law provision granting wider powers to the federal government. The responsibility of establishing equal living conditions or the maintenance of legal unity taken in light of the fact that under Article 74 of the Basic Law most part of civil law, criminal law and the procedures is concurrent, leaves wide powers to the federal government.

On the other hand, in Ethiopia civil law is the residual power of the states and in the context of the ethno-linguistic and religious diversity within which the federation operates, the reasons for some level of uniformity remains compelling. However, this attempt has to be considered in light of the sensitivity to accommodate the diverse nationalities in Ethiopia. Yet this clause is potentially a key provision for guaranteeing uniformity in some fields of civil law. The above view has been expressly expounded by the Justice and Legal System Research Institute in its bid to convince the HoF to direct HoPR to enact a nationwide Notaries Act which among others aimed at regulating agency, authentication, registration of contracts concerning immovables, some movables, sale of share certificates, registration of contracts of marriage, lease contracts, registration of Memoranda of Association and authentication of documents made by Embassies abroad.<sup>115</sup> The institute argued that these are vital instruments that may affect

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114 Basic Law of Germany Arts. 72 and 75.

115 See the letter written by the director of the institute to the HoF asking the House to press for such federal law, written on *Tirr* 10, 1993 (January 18, 2001, unpublished).

freedom of trade and commerce if states are allowed to issue different laws. Consequently the federal government issued the law.<sup>116</sup>

Another area of great significance falling under the framework legislation appears to be Article 51(2) and sub (3) versus 52(2) c. The former states, ‘It [the federal government] shall establish and implement national standards and basic policy criteria for public health, education, science and technology as well as for the protection and preservation of cultural and historical legacies.’<sup>117</sup> And in another section stipulating the power of the states, it is stated that the states have power ‘to formulate and execute economic, social and development policies, strategies and plans of the state.’<sup>118</sup> There is obviously a lot of overlap between the powers of the federal government and the states concerning economic, social and development plans as well as health and education. But the extent of power of the respective governments is not clearly stipulated. To what extent could the federal government outline the national standards and policy criteria or the breadth and depth of the nationwide policies? It is consequently also not clear what is left for the states. But it seems clear from the provisions that the federal government cannot exhaustively legislate on all these matters. The wording of Article 52(2) seems to suggest that the states are endowed *not merely with administrative power* but with the power to formulate and execute economic, social and development policies. No doubt that this power is the basis for shared/framework power covering the bulk of social and economic sphere.

The situation on education is illustrative here. In theory higher education is a federal matter while elementary and high school education fall within the

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116 The law referred to is Proclamation 334/2003 Authentication and Registration of Document, *Federal Negarit Gazette*, 9<sup>th</sup> Year No. 54 Addis Ababa, 8 May 2003.

117 Art. 51(3).

118 Art. 52(2) c.

jurisdiction of the states. As a result all universities are established by the federal government.<sup>119</sup> However, one has to look into policy documents issued by the federal government.<sup>120</sup> In one of these documents the federal government has issued a very detailed policy directive covering the whole range of education from elementary to university level.<sup>121</sup> How is one then to reconcile the formal dichotomy of powers that appears in the different proclamations on the one hand and the federal policies on the other? One should note that these policy documents originate from the party leadership, they are then discussed and approved by party meetings and issued as official documents through the federal Minister of Information. In theory the policies are issued with a view to creating uniformity and building consensus and the states are allowed to adapt these policies taking into account their own specific circumstances.<sup>122</sup> It remains to be seen whether practice leaves the states enough room for adaptation.

The provision that empowers the states to legislate on state civil servants is also far from being exclusively a state matter.<sup>123</sup> At first sight, it appears there are two entirely separate laws: a federal law governing the federal employees and state law regulating state civil servants.<sup>124</sup> Yet the federal constitution does not leave it there. In the implementation of state laws concerning the state civil service, the state is required to approximate national/federal standards. Besides, if one looks at

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119 See for instance, Council of Ministers Regulation No. 61/99 establishing Makelle University 6<sup>th</sup> Year No. 13 and pursuant to Art. 3(3) making it accountable to the Ministry of Education; Council of Ministers Regulation No. 62/99 establishing Debub University 6<sup>th</sup> Year No. 14 which is also accountable to the Ministry of Education; Council of Ministers Regulation No. 3/96 establishing the ECSC by virtue of Article 2 sub 2 is accountable to the PM. Strengthening this thinking is what is elaborated by Proc. 217/2000 6<sup>th</sup> Year No. 47 strengthening the Management and Administration of Schools Amendment. According to this proclamation Art. 3, state legislatures are empowered to issue regulation with respect to the administration and management, the educational curricula, the employment and administration of teachers in public schools.

120 *Ye Ethiopia Federalawi Demokrasiawi Republic Mengist Yemasfesem Akim Ginbata Strategy ena Programoch* (Addis Ababa: Ministry of Information Yekatit 1994 E.C.): 193-257.

121 *Ibid.*, pp. 29-84.

122 Interview with Dr. Gebreab Barnabas January 3, 2003, Minister of State, Ministry of Federal Affairs.

123 Art. 52(2) f.

124 See Proclamation No. 262 of 2002, Federal Civil Servants Proclamation, *Federal Negarit Gazeta*, 8<sup>th</sup> Year No. 8 (January 2002) that exclusively regulates civil servants at federal level and states have accordingly regulated their respective civil servants.



the policies issued by the federal government, the policy blurs the formal distinction and duality of authority stipulated in the constitution. In the document there are standards that the federal government clearly spelt out as applicable to civil servants nationwide.<sup>125</sup>

Another area of relevance in the field of framework legislation refers to land law. Articles 52(2) d, 55(2) a, and 51(5) stipulate in theory parallel powers between the federal government and the states. Both entities are given different aspects of the same subject matter.<sup>126</sup> Federal government, by virtue of Article 51(5) is empowered to enact laws for the utilization and conservation of land while the states are empowered to administer land and other natural resources in accordance with federal laws (52(2)). In theory, it appears legislation is a federal matter while the administration of land and natural resources belongs to the states. However, constitutional practice differs from theory. In the case *Biyadglegn Meles & et al v. the Amhara Regional State*<sup>127</sup> the applicants requested the CCI to declare that the state land law and regulations issued subsequently to implement the laws, contravened the federal constitution on the ground that it is the power of the federal government, not the state government, to enact comprehensive land legislation and as a result requested the CCI to declare the state law unconstitutional. However, the HoPR has enacted proclamation 89/1997<sup>128</sup> that

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125 *Ye Ethiopia Federalawi Democrasiaawi Republic Mengist Yemasfesem Akim Ginbata Strategy Ena Programoch* (Addis Ababa: Ministry of Information, Yekatit 94 E.C.): 193-257.

126 This may also look like parallel power. Parallel powers (one type category of shared powers) refer to one set of shared powers in which the exercise of one and the same power has been attributed to the federal government and the states. One portion of power is given to the federal government while another part of the same matter is kept with states as in for instance the United States shared federal and state control over the national guard. As long as both stick to their own part of the power and the two do not intertwine, both exercise their part parallel to the part of the other without the existence of a subordinate relationship. In Switzerland there are fields in which the confederation has parallel competence with the cantons although there are only few of them, for instance taxation, civil and criminal procedure (under the old version of the constitution) and both the confederation and the cantons can legislate simultaneously. See Duchacek, *supra* note 87 at 270; Goudappel, *supra* note 7 at 41, 49 footnote 43; Schmitt, *supra* note 33 at 42.

127 *Biyadglegn Meles & et al v. the Amhara Regional State* petition *Miazia* 30 1989 E.C. (unpublished).

128 Proclamation No. 89/1997, 'Federal Rural Land Administration Proclamation,' *Federal Negarit Gazeta*, 3<sup>rd</sup> Year No. 54, Addis Ababa 7 July 1997; As a result it seems to have fallen into the category of framework

stipulates that the regional government may proclaim laws on rural land and lays the general framework for them.<sup>129</sup> Furthermore, the federal law retroactively endorses state laws that were enacted before its promulgation as the law in question was enacted prior to the federal proclamation. The CCI ruled that the law is constitutional on two grounds: it is part of the residual power of the states and also because it has been retroactively endorsed by the federal proclamation.

One may raise interesting issues here. Can the federal parliament confer this kind of power on itself? Why should the federal parliament retroactively endorse the state law if it falls within the power of the states? More interestingly, if the HoPR finds out that the states lack such power, could such law be saved by retroactive endorsement because such an arrangement can easily be manipulated to disturb the formal division without going through the amendment process?<sup>130</sup> A similar issue in India has been addressed as follows: ‘When the states lack legislative competence with respect to a subject matter, parliament will have such competence. At times when a state law is declared invalid because of legislative incompetence, parliament comes to the rescue of the state law by way of validating the same. Here the principle is that parliament cannot merely pass an act saying that such a state act is hereby declared valid. This amounts to delegation of legislative power to the state legislature on a topic which the constitution has kept outside state jurisdiction and this parliament is not

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legislation. This is perhaps one instance indicating that in some fields the constitution has expressly empowered the state executive to administer federal laws like the cases in Switzerland and Germany, although it is not common practice.

129 Arts. 5 and 6 of Proc. 89/97 state some general conditions that the state law should comply with. It specifically requires the state law to comply with federal environmental policy, to respect women’s rights, regulates the payment of compensation, and guarantee rights of the holder.

130 Interestingly enough the Ethiopian Constitution Art. 51(9) states: ‘The Federal Government may, when necessary, delegate to the states powers and functions granted to it by Article 51 of this constitution.’ For more on this see chapter seven note 132 and the accompanying text.

competent to do. It is for the constitution and not parliament to confer competence on state legislature.<sup>131</sup>

It seems that when the HoPR decided to retroactively endorse the state law, it had doubts on its constitutionality. Yet in line with the definition of concurrent power it is possible to positively construe that the state law is valid even if enacted prior to the federal law. After all it is usually the case that federal law comes at a later stage when there is a need for securing uniformity among potential diverse state practices. Federal law then steps in to cure the undesired divergence in state law.

### 5.3.2 Concurrent Powers

As one category of shared powers, concurrent powers refer to powers attributed to both entities. However, one of the entities, often the states, are allowed to exercise this power until the federal government steps in to legislate on such powers. The states continue to regulate in some fields until the former occupies the field and the part of the concurrent power which has not yet been occupied by the federal government, may still remain with the states.<sup>132</sup> Concurrent powers provide an element of flexibility in the distribution of power enabling the federal government to postpone the exercise of potential authority in a particular field until it becomes a matter of federal importance. They enable both governments to exercise their respective powers depending on whether the matter remains of regional or of national importance.<sup>133</sup>

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131 Jain, *supra* note 50 at 280; of course, federal parliament can easily enact it.

132 Goudappel, *supra* note 7 at 41; Watts, *Comparing Federal Systems*, *supra* note 6 at 38.

133 Watts, *New Federations*, *supra* note 4 at 174.

## The Commerce Clause

We have earlier on noted in relation to the United States federation that the enumerated powers of the constitution did not as such prevent Congress from asserting wide powers covering many fields of economic and social issues through the ‘necessary and proper’ clause. Another clause of great importance that was instrumental in expanding Congress’s power is the commerce clause. While in other federations the regime of concurrent powers has somehow mitigated the raising of similar controversies, the situation is left open under the Ethiopian Constitution. The Constitution stipulates: ‘It [federal government] shall regulate interstate and foreign commerce.’<sup>134</sup> And we know the borderline between interstate and intra-state commerce is one of the thorny issues in federations. No doubt the powers given to the federal government in broad terms to ‘formulate and implement the country’s policies, strategies and plans in respect of overall economic, social and development matters ... establish and implement national standards and basic policy criteria for public health, education, science and technology ...’<sup>135</sup> might slightly save or perhaps divert the channel of controversy but even then not too much because there arises again the problem of delimiting the extent of the federal power in outlining the policy issues mentioned or the standards to be set and the power of the states to fill in what is left from the federal power. In view of this it is perhaps worth exploring the experience of the United States Supreme Court in interpreting the commerce clause, although it is far from settled as to whether the commerce clause is concurrent or exclusive federal power.

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134 Art. 51(12).

135 Art. 51 sub 2 and sub 3.

Article I Section 8 gives Congress the authority to regulate commerce among the several states. This is one of the most debated and contested clauses of the US Constitution. What activities are to be included in this clause? What exactly is the scope of this power? Should it be interpreted to include activities that are not interstate commerce themselves but have effect on interstate commerce? A variety of thoughts have been suggested although there is still less consensus on the matter. The commerce clause is both the chief source of Congressional regulatory power justifying virtually all of its economic regulations and more controversially a limitation<sup>136</sup> on state legislative power.<sup>137</sup> With the wide interpretation given to the commerce power by the Court this power became the source of the federal government's extensive power to regulate the economic life of the country, to deal with national economic problems, to prevent or restrict disfavored local activities and to restrict the states from interfering with the flow of trade and traffic over state boundaries.<sup>138</sup>

The early interpretation of Congress power over commerce was hinted at in *Gibbons v. Ogden*.<sup>139</sup> A New York grant of a steamboat monopoly affecting navigation between New York and New Jersey conflicted with a federal statute licensing such interstate commerce. It was, therefore, held void under the

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136 The commerce power raises many controversies regarding the division of power between the federal government and the states. One such controversy relates as to whether the granting of constitutional power to the federal government means that the federal government holds that power exclusively, or, whether instead the states also have concurrent power with the federal government. See Anton Scalia, 'Plenary Speech' in Raoul Blidenbacher and Arnold Koller eds., *Federalism in a Changing World: Learning from Each Other* (McGill-Queen's University Press 2003): 539-548. The other holds that the commerce clause grants exclusive federal power and as a result the states are debarred from exercising this power. Chief Justice John Marshall opined the latter view in *Gibbons v. Ogden*. The doctrine that prohibits the states from regulating some aspects of the commerce power is sometimes called the 'negative commerce' clause or the 'dormant commerce' clause presumably because it emanates from judicial invention of the constitutional silence on the matter.

137 Limitations on the states power in the field of commerce often emanates from what is commonly described as the dormant clause. As to its contours it takes us back to the scope and extent of the commerce power. The more widely it is interpreted, the less room it leaves for the states. For an extensive commentary on the nature of the dormant clause see Tribe, *supra* note 17 at 807; 1029-1030.

138 Jain, *supra* note 50 at 290; see also Thomas Merrill, 'A new Age of Federalism' (1998) 1 *Green Bag* 2d 153: 153-162.

139 *Gibbons v. Ogden* 22 US 9 Wheat (1824).

supremacy clause. Marshall noted: ‘Congressional power to regulate commercial intercourse extended to all commercial activity having any interstate component or impact, however indirect. Acting under the commerce clause, Congress could legislate with respect to all commerce, which concerns more states than one. This power would be plenary, absolute within its sphere, subject only to the Constitution’s affirmative prohibition on the exercise of federal authority.’ He also stated that the commerce power did not reach intra-state commerce. National power extends to those internal concerns, which affect the states generally, and restraints upon exercise by Congress of its plenary commerce power lie in the political process, not the judicial process.<sup>140</sup> In a nutshell, the Court granted broad powers to Congress under the commerce clause.<sup>141</sup>

With the depression after 1929 and with the advent of the New Deal<sup>142</sup> in 1933, Congress became particularly active in economic and social legislation. But the Court decided major laws involving New Deal legislation unconstitutional on the ground that they violated the Tenth Amendment.<sup>143</sup> The Court’s decision that negated federal attempts to deal with economic emergency was greeted by a storm of critics and in 1937 President Roosevelt even suggested reform against the Court. In reaction to this the Court started to uphold several important laws and in the *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, the case most frequently cited as indicating the ‘change in time to save nine,’ the power of

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140 See Mark Killenbeck, ‘Madison, M’Culloch, and Matters of Judicial Cognizance: Some Thoughts on the Nature and Scope of Judicial Review,’ *Arkansas Law Review* 55:4 (2003) at 901; Tribe, *supra* note 17 at 808.

141 Between 1887 and 1937 the Supreme Court undertook to judge the limits of affirmative Congressional power. It contrasted sharply with the approach of Chief Justice Marshall in *Gibbons v. Ogden*. In place of this broad definition of commerce power that Congress could regulate, the Court substituted a formal and rigid principle trying to define commerce on the basis of what constituted an economic activity or not. See Tribe, *supra* note 17: 808-810.

142 In reaction to the Great Depression of the 1930s, the administration initiated a legislative program for the improvement of social welfare expanding the federal government’s role. A new perception of co-operative federalism was thus created while emphasizing the dual polity.

143 The case most frequently cited as indicating the ‘change in time to save nine’ is the *National Labor Relations Board v. Jones and Laughlin Steel Corp.* 301 US 1 (1937) in which the power of Congress to regulate the economy under the commerce clause was given wider meaning. See also Gunlicks, *supra* note 20, 99.

Congress to regulate the economy under the commerce clause was given wider scope.

Between the years 1937 and 1995 the Court almost deferred the interpretation of the commerce power to congressional findings and Congress enacted civil rights legislation, criminal statutes, food and drug laws. Up to 1995, the Court either applied the substantial effect<sup>144</sup> and aggregation or cumulative effects principle<sup>145</sup> or deferred to congressional findings.<sup>146</sup> The Court significantly withdrew from mediating federalism disputes between national and state governments and permitted the political branches to resolve their own disputes. *United States v. Lopez*<sup>147</sup> marks the beginning of perhaps either a shift in the position of the Court or a reaction to the over centralization of power with the federal government. At issue in *Lopez* was the constitutionality of the Gun-Free School Zone Act of 1990. This portion of the 1990 crime bill banned the possession of firearms within a 1000 feet of school grounds. The Act made it a criminal offence for any individual possessing a firearm around a school zone. A five majority of the Court held that Congress has exceeded its authority to regulate commerce among the several states. The Supreme Court struck off a statute, as beyond Congress commerce power on the ground that the activity regulated was neither a part of, nor had any demonstrably substantial effect upon interstate commerce. The Court characterized the act as criminal statute that has nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms.

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144 See *United States v. Darby*, 312, US 100 (1941) in which the Court held that an activity that took place wholly intra-state could be subjected to Congressional regulation because of the activities impact in other states. The Court stated intra-state transaction might be so intermingled with interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled.

145 See *Wickard v. Filburn* 317 US 111, 129, (1942) in which the Court stated Congress could control household production of goods because the cumulative effect of household production of goods might affect the supply and demand on the interstate commodity market.

146 Attanasio calls this phase 'political federalism' implying that national, state and local governments work out how they will divide or share powers and responsibility among each other. Attanasio, *supra* note 20 at 487.

147 *United States v. Lopez*: 514 US 549 (1995).

The majority opinion held that the Court's invalidation of the Gun-Free School Zone Act flowed from its conclusion that the relevant test was whether the regulated activity, any instance of firearms possession near a school, substantially affects rather than merely affects interstate commerce. To the majority it seemed obvious that if this activity satisfied the test then every activity would satisfy it. *Lopez* focused not on the activity's effect as such but more on whether or not that activity could itself be described as part of an economic enterprise.<sup>148</sup> Thus, the Court decided to intervene after 1937 as it felt Congress has overreached the limits of its authority.<sup>149</sup> In 2000, *United States v. Morrison*,<sup>150</sup> the Court invoking *Lopez* again reaffirmed that Congress's authority to regulate commerce is not without limits. Gender motivated crimes of violence are not in any sense of the phrase economic activity. The Court declared void the 1994 Violence Against Women Act on the ground that it exceeded congressional activity to regulate interstate commerce. The Court rejected Congress's claim that non-economic violent criminal conduct falls within its competence merely because it has an aggregate effect on interstate commerce.<sup>151</sup> As to the effects of the cases, Jesse Choper concludes that it is certainly a shift in the position of the Court although Congress still has other channels (spending and taxing clauses) and hence the

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148 Tribe, *supra* note 17: 818-819; The *Lopez* Court characterized the substantial effects test itself as limited to regulation of economic or commercial activity emphasizing that even *Wickard* involved economic activity in a way that possession of a gun in a school zone does not. According to the majority economic or commercial activities are eligible for the substantial and cumulative effects test. It sent a message to Congress that it could not pass legislation without at least attempting to locate its exercise of power on the map of Article I. Although the Court acknowledged that Congress has near plenary power over interstate commerce, it stressed that the federal government is not permitted to invade state autonomy by virtue of this power.

149 Susan Mezey, 'The United States Supreme Courts Federalism Jurisprudence: *Alden v. Maine* and the Enhancement of State Sovereignty,' *Publius: Journal of Federalism* 30:1/2 (Winter 2000) at 22.

150 *United States v. Morrison* 529 US 598, 608 (2000).

151 For more comments on the case see Mark Killenbeck, *supra* note 140 at 901; Attanasio characterizes this phase (1990s) as the neo-judicial stage. In this phase courts are not limiting themselves to constraining the power of the states but instead are again playing a role in restraining the power of the national government as against the states. It began with the *National League of cities v. Usery* 426 US 833 (1976), but was reversed by *Garcia v. SanAntonio Metropolitan Transit Authority*, 469 US 528 (1985). It then revived with *New York v. United States* 505 US 144 (1992) that invalidated Congressional law that required states to dispose of radioactive waste within their borders by a certain date or take title to that waste and be liable for all the waste that was located within their borders. Attanasio, *supra* note 20: 486-487.



impact of the cases seems to be limited unless the Court also acts in respect of these powers.<sup>152</sup>

One theme that may define these developments is limited judicial interpretation to preserve some essential state sovereignty. The Courts involvement in this era may be driven by a belief that the political process has failed to guarantee adequately an appropriate level of autonomy to the states.<sup>153</sup> The present position of the Court on commerce power could be put in a nutshell as follows. Five members of the current Court (Chief Justice Rehnquist, Justices O'Connor, Kennedy, Scalia and Thomas, also called 'federalism five') have aligned themselves with what can be characterized as the judicial supremacy approach, arguing that they have a constitutionally mandated responsibility to ensure that federal commerce power should not violate the dignity of the 'sovereign' states. Quite repeatedly they have emphasized the importance of states in the federal political process. While the minority four (Justices Stevens, Souter, Ginsburg and Breyer) believe that it is proper, indeed necessary for them to defer to Congress when that body in its considered judgment (laws reflecting compromise ideas of different pressure groups) believes an activity whatever its nature has a substantial effect on the national economy. According to the latter group, the basic limit on federal commerce power is the inherently built-in system through state participation in federal governmental action. In short, the limits should be sought in the political process rather than in the judiciary. This is also called the political safeguards model.<sup>154</sup>

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152 Jesse Choper, 'Taming Congress's Power Under the Commerce Clause: What Does the Near Future Portend?', *Arkansas Law Review* 55:4 (2002-2003) at 735, 793.

153 Attanasio, *supra* note 20 at 487.

154 See Mark Killenbeck, *supra* note 140 at 902.

Coming back to the discussion on concurrent powers, in Germany, the list of concurrent federal powers of the Basic Law is extensive.<sup>155</sup> The bulk of legislative powers in the Basic Law belong to the concurrent category.<sup>156</sup> The fields of framework and concurrent powers have also been extended by numerous amendments to the Basic Law. Not only was the field widened by the ‘clause of need’<sup>157</sup> condition attached to the exercise of framework power but the Constitutional Court also insisted that the evaluation of fulfillment of such conditions is a political question, not subject to adjudication by the Court. As a result it virtually abandoned control over these preconditions for the exercise of the wide range of federal concurrent powers.<sup>158</sup>

The new Amendment that came into force in November 1994 changed the clause of need for the federation into a ‘clause of necessity,’ implying a stricter requirement and hence a slight shift in favor of the states.<sup>159</sup> In order to force the Constitutional Court to abandon its political question doctrine, the Court was granted the express power to adjudicate disputes concerning the fulfillment of the

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155 Art. 74 among other things includes: civil law, criminal law and corrections, court organization and procedure, the legal profession, notaries, and the provision of legal advice, registration of births, deaths, and marriages, the law of association and assembly, the law relating to residence and establishment of aliens, the law relating to weapons and explosives, matters relating to refugees, public welfare, the law relating to economic affairs-mining, industry, energy, crafts, trades, commerce, banking, stock exchanges, and private insurance, labor law, the regulation of education and the promotion of research, regulation of land and natural resources...it covers almost all economic and social powers that the United States Supreme Court found implicit after 1937 except that the codes are within the reserve powers in the United States.

156 Philip Blair and Peter Cullen, ‘Federalism, Legalism, and Political Reality: The Record of the Federal Constitutional Court,’ in Charlie Jeffery ed., *Recasting German Federalism: The Legacies of Unification* (London: Pinter, 1999): 119-154.

157 Before the Amendment of the Basic Law the second paragraph of Art. 72 of the Basic Law provided that in the concurrent field the *need for* regulation by federal law must exist on one of the three specific grounds, namely that a matter cannot be effectively regulated by the legislation of an individual state, that regulation by state law might prejudice the interests of other states or of the people as a whole or that federal legislation is necessary for the maintenance of legal or economic unity, especially the maintenance of *uniformity* of living conditions. In interpreting this provision, the Constitutional Court stated that the concepts involved are indeterminate and need *political judgment*. This gave a free hand to the *Bund* on concurrent powers.

158 2 BverfGE, 213, 224 (1953). Almost all writers agree that the Court left the interpretation of the conditions to the free will of the federal legislator. See Blair and Cullen, *supra* note 156; Currie, *supra* note 7 at 43.

159 In the new clause of Art. 72 (2) an attempt is made to narrow the discretion of the federal government in exercising concurrent powers.. See for more details Art. 74.

clause of necessity as well.<sup>160</sup> Besides, the list of possible appellants has been widened as the Land parliaments, who lost much of their competencies and who also have little control over the executive dominated cooperative federalism, are now granted direct competence to challenge federal intrusion before the Court.

In Switzerland too there are fields in which the confederation has concurrent powers shared with the cantons. When the substance of a power does not inevitably lead to impossibility for the cantons to exercise it, the cantons are free to exercise that power as long as the confederation does not make use of its concurrent power. It is also possible that the confederation may not have provided federal law covering the entire policy field. In those cases, the cantons can issue their own legislation on the remainder of the policy field.<sup>161</sup> But the cantons have no individual authority if the confederation in regulating the fields has exhausted the matter.

The Indian Constitution is known for its long list of concurrent powers. Article 246(2) confers a concurrent power of legislation on both the Union and the states with respect to the matters indicated as list III, seventh schedule. It is indeed the large field of concurrent powers within the scheme of division of powers which distinguishes the Indian federal system from other federal systems and the practice regarding concurrent powers is one of the factors that indicate that the Union's power is more extensive than any other federation.<sup>162</sup> The third list constitutes a common or concurrent area in which both the Union and the states may operate simultaneously subject to the overall supremacy of the former. In

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160 Basic Law Art. 93/1/2a reads 'The Federal Constitutional Court shall rule in the event of disagreements whether a law meets the requirements of paragraph (2) of Art. 72, on application of the *Bundesrat* or of the government or legislature of the *Land*.'

161 Traditionally these fields included: civil law, copy right law, bankruptcy law, criminal law, labor law, utilization of water, power, trade and industry, hunting and protection of birds but many of these fields are now transferred to the federal government by virtue of the new Constitution.

162 Sharma and Choudhry, *supra* note 12 at 394.

India, the general idea underlying the concurrent list is that there may be subjects on which parliament may not feel it is necessary or expedient to initiate legislation in the first instance because these matters may not be of national importance. States may, therefore, take necessary action with respect to any matter in the list. But if at any time any of these matters comes to be of national importance or if there is a need to guarantee uniformity the federal government may step in and legislate on any of the concurrent fields. Many of the Indian codes are enacted as a result of the exercise of this power.<sup>163</sup> Where the federal law is not exhaustive states can also make supplementary law and the concurrent law thus makes the scheme of distribution of powers somewhat flexible.<sup>164</sup>

In Ethiopia, the general thinking about shared powers has been that Article 52(1) which among other things states ‘all powers not given expressly to the federal government alone or *concurrently* to the federal government and the states...’ is without much significance because the constitution nowhere indicates such concurrent powers. For instance one author notes that there are no concurrent powers in Ethiopia except on tax matters.<sup>165</sup>

However, it is still possible to argue that even in other, non-tax fields there are concurrent powers. The Constitution has in one way or another incorporated concurrent powers, albeit not explicitly. It is only that the framers have not expressly made it as suggested by Article 52(1). As a result, the scope of

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<sup>163</sup> Jain, *supra* note 50 at 244; see also Wessels, *supra* note 8; 46-48 for a similar view.

<sup>164</sup> This covers the bulk of social and economic aspects, criminal law and procedure, civil procedure, marriage, divorce, contracts, partnership, trust, torts, welfare of labor, insurance, economic and social planning, criminal law and procedure, family law, contract law, bankruptcy and trust law, social security, trade union, news papers, electricity, prevention of cruelty to animals and vagrancy, court affairs except the Supreme Court and the high court, public welfare, education at higher level, economic power and planning.

<sup>165</sup> Lovise Aalen, *Ethnic Federalism in a Dominant Party State: The Ethiopian Experience 1991-2000* (Bergen: Chr. Michelsea Institut 2002) at 56; see Article 98 on the concurrent power of taxation. It is true that only in the field of taxation, under Art. 98 distinct from Arts. 51 and 52, the constitution expressly incorporates concurrent powers. For a brief note on taxation powers see chapter three.

functions of the federal government are wide enough although it appears to be a limited and enumerated one. As already noted federal practice indicates that a clear demarcation of powers between the federal government and states is impossible, even if desired. One can find some examples of such powers. First, it is stated, 'it [HoPR] shall enact a penal code.'<sup>166</sup> The states may, however, enact penal laws too on matters that are not specifically covered by the federal penal legislation. It appears that this is more of a concurrent than parallel or framework one. Because the states may enact only if the federal penal law does not exhaust the list of offences. Potentially the federal parliament may by virtue of Article 55(5) exhaust the field leaving no room for the states. But states do often include specific offences not covered by the federal penal code in every piece of legislation and as result it is not a power merely written on paper.

### **Conflict Between Federal and State Law**

It is important to analyze the effect of enacting legislation by the federal government in the field of a concurrent power. In general preceding legislation passed by the states becomes null and void if it deals with the same, subject matter. But because the legislation issued by the federal government often is not exhaustive in all aspects, there is need to leave a little room for the states to enact their own supplementary legislation or save what is enacted already. This point actually distinguishes concurrent from exclusive powers. In Germany, according to the spirit of the amended provision the federal government has the power to enact legislation on the concurrent field only to the extent the necessity clause permits. Not all powers can then be automatically transferred from the states to the federation as it happens in the case of exclusive powers. Even when the

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166 Art. 55(5).

federal government exercises such a power in accordance with the conditions, the states can revoke it where the necessity ceases to exist.<sup>167</sup> Compared to the previous clause and the position previously held by the Court this is a significant improvement on the power of the states. But as a matter of principle the general effect of the provision ‘ the states have power to legislate in so far as the federation does not exercise its rights to do so’ is clear.<sup>168</sup> As is normal in a federal system, it leads to federal pre-eminence. Federal and state law cannot stand on equal terms in the field of concurrent laws. As soon as the federal government decides to legislate, the states are debarred from further legislative regulation and their existing legislation becomes permanently inoperative to the extent that the federal government has occupied the field. The scope for the Court to exert decisive influence is also very modest. State regulation is not excluded but only when the federal law is not exhaustive.<sup>169</sup> Of greater analytical interest is the Constitutional Court’s conclusion that the federation could not pre-empt state regulation without regulating the matter itself.<sup>170</sup>

In the United States, in case of conflict between concurrent state and federal power, the governing rule is ‘pre-emption.’ Article VI, clause 2, otherwise known as the supremacy clause states: ‘This Constitution and the Laws of the United States which shall be made in pursuance thereof...shall be the supreme law of the land...anything in the Constitution or laws of any state to the contrary notwithstanding.’ Yet the determination of when federal law should pre-empt state law is not clear and the Supreme Court has developed some guiding principles like ‘express pre-emption’ referring to cases in which Congress’s

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167 See Art. 72 paragraph 3.

168 Art. 72 paragraph 1.

169 Blair, *supra* note 105 at 72; Philip Blair, ‘Federalism, Legalism and Political Reality: The Record of the Federal Constitutional Court’ in Charlie Jeffery and Peter Savigear eds., *German Federalism Today* (New York: St. Martin’s Press, 1991) at 69.

170 34 BverfGE 9, 1972; see also Currie, *supra* note 7 at 49.

intention to pre-empt state law is express; ‘conflict pre-emption’ referring to Congress’s implicit intent to preempt state law when it is impossible to give simultaneous effect to both federal and state law and ‘field pre-emption’ referring to cases where an act of Congress impliedly occupies the whole field leaving no room for the states to fill in.<sup>171</sup>

As in other federations the Indian Constitution regulates the potential for conflict between Union and state law. In case of overlap of a matter between the three lists, predominance has been given to the Union legislature.<sup>172</sup> There are two ways of interpreting Article 254(1) of the Indian Constitution. The Supreme Court and a few scholars state that its application is restricted to cases of controversies between union and state law in respect of fields covered by the concurrent list only.<sup>173</sup> In such cases it is clear that the federal law will prevail. However, others insist that its application covers any potential conflict not only fields covered by the concurrent list but any of the fields in other lists. Jain for instance states that ‘it does not appear to be sound to confine Article 254(1) only to the situation where the center-state laws fall in the concurrent list rather than when they fall in different lists and yet are inconsistent to some extent. It can be conceived that under Article 253 parliaments can legislate even on a state matter to effectuate a treaty and this law may conflict with state law. There is no doubt that in this case federal law would prevail and this result can be achieved only by invoking the wider meaning of Article 254(1).’<sup>174</sup> It appears that this view is more appropriate than the former. Federal constitutions in other countries do not limit the application of the supremacy clause to cases of shared powers although we know for certain that the application of it does not give a free hand to the federal

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171 Scalia, *supra* note 136: 543-544.

172 Arts. 251, 254(1); the latter regulates the inconsistencies between federal and state laws.

173 Basu, *supra* note 10 at 253.

174 Jain, *supra* note 50 at 275.

government.<sup>175</sup> But it is important to note that not the whole of the state law is declared void but only the part that is repugnant with the federal law. If the offending provision is severable from the rest of the Act, only that provision will fail and not the entire statute.<sup>176</sup> Furthermore, the state law repugnant to the federal law is not ‘dead,’ it is eclipsed and if the federal laws were to be repealed at any time, it would again become operative.

The Ethiopian Constitution is silent as far as the thorny issue of regulating the relationship between federal and state law in general and in relation to shared powers in particular is concerned. The question of the governing principle in case of conflict between state and federal law in the Ethiopian federation has been dealt with extensively in chapter five. There are certainly two views. If one adopts the federal supremacy clause by default, then most of the principles stated in this section discussing shared powers in other federations, will hold true in Ethiopia as well. But if one adheres to the ‘supremacy of nations, nationalities and peoples’ literally because of the principles stated on the preamble, the pretentious aggregate nature of the federation, Articles 8 and 39, then it may be difficult to state that federal law will pre-empt state law. Perhaps the best compromise is to decide the issues on a case-by-case basis rather than subscribing to either principle on the abstract level. However, in an interesting case *Biyadlegn Meles & et al v. the Amhara National State* the CCI ruled any law issued by the states regarding the administration of land shall be of no effect if it contradicts the federal rural land administration proclamation.<sup>177</sup> Apart from this the federal law itself declared: ‘A land administration law heretofore enacted by any Regional

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175 It is to be interpreted in line with the federal requisite of respect for state autonomy.

176 *R. M. D. C. v. Union of India* S.C. (1957).

177 See *Biyadlegn Meles & et al v. the Amhara National state Miazaia* 30 1989 E.C. (May 1998 unpublished). The federal law challenged was Proclamation No. 89/1997, Federal Rural Land Administration Proclamation, *Federal Negarit Gazeta*, 3<sup>rd</sup> Year No. 54, Addis Ababa, 7 July 1997.



Council shall be applicable insofar as it is not inconsistent with this proclamation.<sup>178</sup>

Two possible interpretations may arise from this case. It may be viewed as a blanket declaration both by the law and the CCI of the supremacy of federal law over inconsistent state laws or its scope of application may be limited to matters shared between the two levels. The case certainly refers to federal framework legislation but its long-term effect remains to be seen.

#### **5.4 RESIDUAL POWERS**

Residual powers represent those powers not listed or partly listed by the constitution and assigned to either unit of government. Federal constitutions must provide rules on how to deal with changes in the distribution of powers between the federal government and the states and must govern whom to entrust with new responsibilities that have come about because of changes in new circumstances. This is crucial because such an approach settles tensions between those who urge for greater centralization and those who may urge for greater state powers.<sup>179</sup> The United States, Switzerland, Germany, and Ethiopia have preferred to leave residual powers with the states<sup>180</sup> while in India such powers belong to the center.

The importance of residual powers is very much related to the scope of exclusive powers conferred upon the other unit of government. The point is that the greater the list of enumerated powers, the less significant the residual powers will be. In the United States, for instance, the placing of residual powers with the states

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178 Art. 8 of Proc. 89/97 cited above.

179 Linder, *supra* note 33 at 42.

180 The Tenth Amendment of the US Constitution; Art. 3 of Swiss Constitution; Arts. 30 and 70 of the Basic Law and Art. 52 of Ethiopian Constitution.

during the early phase of the federation was a sign of state sovereignty. It was a consequence of the limited list of powers assigned to the federal government.<sup>181</sup> Whatever was not conferred to the federal government was withheld for the states. The residual power of the states in the United States is often called the ‘police power’ referring to the residual prerogatives of sovereignty ‘which the states had not surrendered to the federal government.’<sup>182</sup>

The main basis for the assertion that residual power belongs to the states in the United States is the enumerated power of Congress under Article I Section 8 as well as the Tenth Amendment. It is stated that: ‘The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people.’ While there is no doubt from the context in which the federation evolved and also from the doctrine of enumerated powers of the federal government that this is so, there is a debate as to the exact contours of the Tenth Amendment. Some think that the United States still is a ‘dual polity’ and as result the Tenth Amendment is an independent source of state power rather than a mere restatement or reaffirmation of Congress’s enumerated powers. According to this view Congress cannot exceed its limited powers and encroach upon the ‘sovereignty’ of states. While others contend that the clause is simple reaffirmation of the limited powers of Congress and as a result neither federalism nor the doctrine of states’ rights provides limits on Congress’ power to enact. The Supreme Court is equally divided along the same line and it seems it has adopted inconsistent decisions.

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181 Watts, *New Federations*, *supra* note 4 at 172.

182 Tribe, *supra* note 17 at 1046; Federalism in the United States was the result of a political compromise between unitary and confederal forces and in its early stage was understood as dual polity, implying sovereign states, not states with limited autonomy.

In the period before 1937, the Supreme Court sometimes invoked the Tenth Amendment but in most cases the Court treated the Amendment not as expressing an independent constraint on federal power but simply as stating the corollary to the proposition that federal power is indeed limited.<sup>183</sup> The idea was that any power not delegated to the federal government was *ipso facto* reserved to the states and their people. ‘The Tenth Amendment said as such to be sure but the same could supposedly have been true in any event given the tacit postulate that the United States Constitution created a national government of limited, enumerated powers only.’<sup>184</sup>

After 1937 the states’ rights doctrine declined from the Court’s jurisprudence. In the famous case of *United States v. Darby*<sup>185</sup> the Court ruled that the Tenth Amendment ‘states but a truism that all is retained which has not been surrendered.’ The ruling seemed to undermine entirely any constitutional role of the Tenth Amendment as a barrier to the exercise of federal power. According to some authorities this marked the death of dual federalism. No longer could the states look to the Constitution and the federal courts for protection against the increasingly active federal government.<sup>186</sup> This was further reinforced by the Court’s broad reading of the commerce power.<sup>187</sup> For three and half decades after *Darby*, invocation of states’ rights was more rhetoric than a reality. The conventional wisdom was that federalism in general and the rights of the states in particular provided no judicially enforceable limits on Congressional power.

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183 For early signs of the Court interpreting the Tenth Amendment as a source of independent limit on congressional power and of the idea of dual federalism that is both the federal government and the states having separate and distinct sovereignties acting separately from each other see *Collector v. Day* 78 US 11 Wall 113 (1870), *Ashton v. Cameron County Water Improvement District* 298, US 513 (1936).

184 Tribe, *supra* note 17 at 860.

185 *United States v. Darby* 313 US 100 124 (1941); see also Tribe, *supra* note 17 at 862.

186 Gunlicks, *supra* note 20 at 100; the Court offered Congress *carte blanche* to regulate the economic and social life of the nation. See also Tribe, *supra* note 17 at 863.

187 See *supra* on concurrent powers.

In the *National League of Cities v. Usury*<sup>188</sup> the Supreme Court held the Tenth Amendment constitutes an independent limit on the granting of power in Article I. In the period where Congress was omnipresent, the Court reminded Congress of the old view that the constitution and the federal system are premised on the existence of the states as meaningfully independent entities. While Congress is generally the appropriate body to determine the relative allocation of powers between the national and state governments, the Court stated that recognition in the states of a constitutional right to survive as more than an empty form necessarily implies certain substantive and/or structural limits on the powers of Congress. If these limits are to have any real meaning, Congress' power must be limited. The case also reflects the view that political safeguards of federalism cannot always be counted on to protect state autonomy.<sup>189</sup> However, in *Garcia v. San Antonio Metropolitan Transit Authority*<sup>190</sup> relying on the political safeguards of federalism the Court reversed the *National League of Cities v. Usury*.

In all these decades, the Amendment was only a truism granting the states only whatever power was not possessed by the federal government. The expansion of federal power had impact on what was reserved to the states, indeed little remained for the states in the form of residue.

In *New York v. United States*<sup>191</sup> the Supreme Court declared unconstitutional an act of Congress on the basis of protecting states against federal commandeering of state legislatures. It stated Congress could not order state law-making processes by forcing states to regulate whatever the substantive field might be. In *Printz v.*

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188 *National League of cities v. Usury* 426 US 833 (1976).

189 For a more comprehensive view on the case see Tribe, *supra* note 17 at 865.

190 *Garcia v. San Antonio Metropolitan Transit Authority* 469 US 528 (1985).

191 *New York v. United States* 505 US 144 (1992).

*United States*<sup>192</sup> the Court declared the 1993 Brady Hand Gun Violence Prevention Act (Brady act) unconstitutional as, in the opinion of the Court, the statute forced state executive officials to conduct background checks on prospective handgun buyers. The invalidated provisions required state officers to administer a national regulatory program by running certain checks on people who wanted to purchase firearms. It stated that the *New York* anti-commandeering principle applies not only to congressional attempts to commandeer state legislative processes but also to congressional efforts to regulate state executive officials. The gap left unanswered in the *New York* case as to the federal governments competence to order state executive officers to enforce federal law was put to rest in *Printz v. United States*, where the Court announced that the federal government may neither issue directives requiring the states to address particular problems nor command the states officers or those of their political subdivisions to administer or enforce a federal regulatory program.<sup>193</sup> *Printz* provides an interesting counterpoint to Germany's system, which essentially relies on the states to administer federal programs.

The debate over the proper allocation of federal authority in the cases reflected a longstanding division between the nine justices of the Supreme Court, advocates of a differential judicial review, now a minority, in recent cases, who maintain that the states are adequately represented through the normal political process via their representatives in Congress and absent highly unusual circumstances, it is unnecessary for the Court to intervene to protect their interests, and the opposing view that holds that in the name of dual sovereignty the Court must always be

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192 *Printz v. United States* 521 US 98, 117 S.C. 2365 (1997); while *New York v. United States* guaranteed the states based on the Tenth Amendment their legislative functions. *Printz* extended the 'anti-commandeering' principle beyond legislative functions to include administrative functions performed by state officers. Daniel Halberstam and Roderick Hills, Jr., *State Autonomy in Germany and the United States*, 574 *Annals* 173 (2001): 173-183; see also chapter seven.

193 Tribe, *supra* note 17 at 880.

alert to put a stop to any attempt by federal government to encroach up on the state's policy making authority.<sup>194</sup>

On an academic level the view that the Tenth Amendment is merely a reminder to Congress that its authority is limited seems to be dominant. For instance, Tribe concludes about the Tenth Amendment as follows:

By its term it reserves to the states only the authority not delegated to the federal government that is authority beyond the enumerated powers. Straightforward reading of the Tenth Amendment then, would suggest that any authority express or implied contained within the enumerated powers would necessarily not be reserved to the states, respectively or to the people. Thus although the Tenth amendment plays a role in the constitutional framework, it does not seem faithful to the text of the amendment itself to treat it as imposing an independent limit on Congress' enumerated powers; it simply reserves to the states and people the residual powers that the enumerated powers do not cover. It simply fills the constitutional silence with respect to national governments authority and in this sense it is not meaningless.<sup>195</sup>

And by this view no law within Congress power is to be invalidated for interfering with state's rights.<sup>196</sup> Despite the Supreme Court's expansive approach for the most part of the 20<sup>th</sup> century, the recent cases illustrate somehow the point that the states' sovereignty doctrine is not dead yet. It is not absolutely clear whether it is simply a pause in the ever-expanding Congress' power or a call for a

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194 For an interesting article on the position of the Supreme Court see Susan Mezey, *supra* note 149 at 25.

195 Tribe, *supra* note 17 at 903; see also Erwin Chemerinsky *Florida Law Review* 47:4 (1995) at 523 for the same view; Jesse Choper, *Judicial Review and the National Political Process* (Chicago: The University of Chicago Press 1986): 175, 206.

196 See also Attanasio, *supra* note 20 at 486.

complete revival of dual polity but they remain significant decisions. Besides, compared to states in other federations, the states remain very powerful because they still fashion important legal regimes, for instance police power, criminal law, tort, family law, contract law, corporate law, trust and estate law, property law, education and health law that normally are either centralized or fall within the concurrent scheme in other federations.<sup>197</sup>

By contrast, in India where the Constitution provides for three exhaustive and comprehensive lists of exclusive federal, state and concurrent powers, it appears that the residual power reserved to the federal government has less significance.<sup>198</sup> In the Indian context it refers to the power to legislate with respect to any matter not enumerated in any of the three lists. There have not been many reported decisions where power has been attributed to the Union solely on the basis of residuary powers. The three lists are drawn exhaustively and presumably all subject matters identifiable at the time of constitution making and regarding which a government could conceivably be called upon to make laws in modern times have been assigned to one of the lists. Residual power is then just meant to represent the unforeseen matters and not in the way it is understood elsewhere.<sup>199</sup>

The German Basic Law, like the United States stipulates a presumption in favor of the states in general as well as specifically with respect to legislative and executive functions.<sup>200</sup> However, the presumption in favor of the states clause

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197 Apart from this US Constitution Art. IV Section 3 provided no states can be divided or merged without the consent of the state legislature; Art. IV Section 4 guarantees every state protection against invasion and domestic violence; the second Amendment guarantees the right of each state to maintain militia; see also Attanasio, *supra* note 20 at 486; Gunlicks, *supra* note 20 at 91.

198 Indian Constitution Art. 248.

199 Jain, *supra* note 50 at 279; Watts, *New Federations*, *supra* note 4 at 174; Watts, *Comparing Federations*, *supra* note 6 at 38.

200 Basic Law Art. 30 states: 'Except as otherwise provided or permitted by this Basic Law, the exercise of state powers and the discharge of state functions is a matter for the Länder.' Art. 83 goes to state, 'The Länder shall

compared to its counterpart in the United States constitution, the Tenth Amendment, is slightly different. Apparently there is similarity between Article 30 of the Basic Law and the Tenth Amendment of the United States. But the latter did not prevent either a broad construction or extensive recognition of implied powers. The formulation of federal powers in the two Constitutions, too, is different. The United States Constitution gives Congress the power to do certain things, a formulation inviting the call for the necessary and proper clause.<sup>201</sup> But the Basic Law, apart from its more detailed and exhaustive allocation of powers, has no necessary and proper clause and is not set in a tradition of judge-made law.<sup>202</sup> In Germany, in theory the federation like the United States has competence to legislate only on those matters that are specified in the Basic Law. However, the point is that after looking at the enumeration of exclusive federal powers and comprehensive concurrent powers one may doubt if the reserve power has any meaning.<sup>203</sup> As a result there is no great deal of legislative activity left to the states.<sup>204</sup> As far as self-rule is concerned, the states actions are limited to the areas of culture, education, electronic media, museums, hospitals, police and local government and more importantly the power of adapting federal laws when there are leeways.<sup>205</sup> The only compensation to the continual diminishing of states' legislative power that the Germans contend with is through the *Bundesrat* and through the execution of federal law.

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execute federal laws in their own right in so far as this Basic Law does not otherwise provide or permit'. See also Art. 70.

201 Philip Blair, *supra* note 105 at 114.

202 For an elaborate essay on German Federalism and the decisions of the Constitutional Court see Philip Blair *supra* note 169: 63-82.

203 The broad powers of exclusive federal, concurrent and framework powers stipulated in Arts. 70-75 of the Basic Law reduce the competence of the states to insignificance.

204 Uwe Leonardy, 'The Working Relationship between Bund and Länder in the Federal Republic of Germany' in Jeffery and Savigear eds., *supra* note 169 at 42.

205 The whole federal arrangement has something to explain to this final outcome. Law-making is almost exclusively within the domain of the federal parliament yet the states shape such processes through the *Bundesrat* and through enforcement of federal laws. David Currie, *supra* note 7 at 74; Donald Kommers; *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham: Duke University Press, 1989) at 89.



Owing to the limited role of the state legislative bodies, the Constitutional Court, unlike the US Supreme Court, is sympathetic to safeguard the states limited autonomy. To construe the federal powers widely would mean to reduce the states to merely administrative authorities. In one of the famous decisions, the *Television case*<sup>206</sup> the Constitutional Court ruled that the fundamental premise of the Basic Law was one of State autonomy.<sup>207</sup> The reservation to the Länder of all powers not granted to the federation precludes any presumption of federal authority in case of doubt. One needs to compare this with the *United States v. Darby* where the Court ruled the Tenth Amendment is a mere reminder of the limited powers of Congress and cannot stop Congress from enacting even on state matters. In Germany federal power cannot be construed so broadly until there is nothing left to reserve. The catalogues of federal powers are interpreted strictly.<sup>208</sup> As a result, the federal government often resorts to the machinery of constitutional amendment and the Basic Law has undergone a great many explicit textual amendments most of which served to extend federal power.<sup>209</sup>

The issue of whom to entrust with the reserve powers is decided in favor of the cantons in the Swiss federation. The Swiss solution exhibits a preference for cantonal autonomy and in theory prevents uncontrolled growth of federal power. It is stated that cantons are sovereign as long as their sovereignty is not limited by the federal constitution.<sup>210</sup> They have exclusive right to execute legislative,

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206 *Television case* 12 BverfGE 205 (1961).

207 The doctrine of implied powers is also less relevant in Germany as the manner of distribution of power is already lopsided in favor of the federal government. The only exception where the Court took position expanding federal power related to major fields of economic matters (Basic Law Art. 74 sec 11), which one see a similarity with the US Court's position in interstate commerce. See Philip Blair and Peter Cullen, *supra* note 156 at 124.

208 Currie, *supra* note 7 at 38; see also for a similar conclusion Blair, *supra* note 169 at 70; also Peter Lerche, 'Principles of German Federalism' in Paul Kirchhof and Donald Kommers eds., *Germany and its Basic Law* v. 14 (Baden-Baden, Series Drager Foundation, 1993) at 76.

209 The Basic Law too does not include an implied powers provision comparable to the necessary and proper clause found in the United States constitution.

210 See Swiss Constitution Art. 3; also see for comments Linder, *supra* note 33 at 42; Goudappel, *supra* note 7 at 46

executive and judicial powers within their territory in all domains that are subject to state power. The confederation is obliged to respect this exclusive ‘sovereignty’ of the cantons.<sup>211</sup> According to Wolf Linder the residual power of the cantons has been effective in controlling excessive centralization of power. ‘First it prevents new powers from being assumed without changing the constitution’ as can happen in the United States by judicial interpretation. Thus, all subsequent additions of new powers to the federation were made formally through constitutional amendment and secondly the procedure to confer any new power to the federation needs not only a majority in both chambers of parliament but also a majority of cantons and of the people at a popular vote.<sup>212</sup> Yet, there is no doubt that after centuries of federal experiment the new constitution established a more powerful federal government than the one that existed under the older text.

One should also note that Swiss federalism, like its German counterpart, is characterized by executive federalism. A consequence of which is that the fields in which the cantons are free to legislate are quite few and have been diminishing compared to earlier times. Concerning civil law, for instance, the confederation adopted in 1907 the code of civil law and, in 1911, contract law. In the same manner criminal law was unified in 1937 and cantons no longer have power to prosecute criminal acts. Even civil and criminal procedures, which remained cantonal laws, have recently been transferred to federal power by the new constitution.<sup>213</sup> In a nutshell the following fall within the cantons jurisdiction. Cantons have their own constitutions and they define their own political system.

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211 This sovereignty, however, is not absolute. The federal constitution places for instance limitations as it guarantees human rights (Arts. 7-36) to all citizens and provides judicial review by the Swiss federal Supreme Court of cantonal laws and authorities and more importantly, cantonal limitations emanate from the legislative and executive competence of the federation. Thomas Stauffer, Nicole Topperwien, Urs Thalmann-Torres, ‘Switzerland’ in Ann. Griffiths ed., *Handbook of Federal Countries 2002* Montreal & Kingston McGill-Queen’s University Press 2002) at 317.

212 Linder, *supra* note 33 at 42; Arts. 138-142.

213 See Arts. 122 and 123; Schmitt, *supra* note 33 at 43.

Cantons also decide the status of local government; almost all levels of education are regulated at cantonal level but the federal government has also some say. The cantons define the curriculum, employ and elect teachers but regulation of examination is federal. Besides, Article 27 imposes on all cantons a common beginning of the school year, there are also cantonal and federal universities. The cantons are responsible for public order within their territory in peacetime as there is no federal police force; and cantons have retained legislative autonomy in areas where the confederation has enacted only framework legislation, for instance in country planning, forestry, hunting, fishing and naturalization. The same could be said as far as organization of the judiciary and fiscal law is concerned. There are no lower federal courts and federal employees except in railways, federal postal service, telegraph and telephone services. Cantons also have exclusive power in the affairs of church and state, public health, and fire regulation. What is most striking about the Swiss cantons is their right to conclude treaties among themselves.<sup>214</sup>

One could state that as far as self-rule is concerned, the cantons authority has over the years diminished like the states in Germany. It is in the field of shared powers that the cantons continue to shape the federal system. The cantons have several mechanisms for influencing decision-making at federal level through the second chamber,<sup>215</sup> in elections to the federal assembly, the cantons form the constituency and political parties are strongest at cantonal level and more importantly, statutes and constitutional amendments are always subject to a popular referendum.<sup>216</sup>

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214 See Art. 48. But the provision sets limits. Such agreements cannot be contrary to federal law, the interests of the Confederation or rights of other cantons.

215 See Arts. 45 and 55.

216 Arts. 140-142.

The Ethiopian Constitution too expressly confers residual powers on the states. It states: ‘All powers not given expressly to the federal government alone or concurrently to the federal government and the states are reserved to the states.’<sup>217</sup> As noted earlier one has to look into those powers given expressly or impliedly to the federal government in several sections of the Constitution and any other power not mentioned, by default belongs to the states.

The CCI ruled on the issue of the extent of residual powers of the states. A petition was submitted from the Prime Minister’s office to the HoF seeking its advice as to whether the HoPR has the competence to enact a federal family code applicable nationwide.<sup>218</sup> If it has a competence, to what extent would this affect autonomy of the states to make laws on the same subject? The CCI investigated briefly Articles 52(1), 55(6) and 62(8) and ruled that enacting a family code is a state power on two counts. First, the enactment of a family code is intertwined with the culture, tradition, and religion of society. It is an aspect of diversity that needs regional protection. Second, reserve power belongs to the states and such power is not expressly granted to the federal government. This normally belongs to the states. But it briefly noted the importance of Article 55(6) although it stressed that it is not relevant to the issue at hand as the federal Constitution outlines the minimum standards under chapter three, the supremacy clause of Article 9 sub 2, 62 sub 1 and 84 sub 2 as enough safeguards in case the states enact family laws that contradict those minimum guarantees.

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217 Art. 52 sub 1.

218 Ruling of the Council of the Constitutional Inquiry (CCI) *Miazia* 26 1992 E.C. (May 2000, unpublished). The CCI is an advisory body of the HoF on matters that concern constitutional interpretation. See Art. 84.

The Constitution enumerates a list of seven jurisdictions given to the states in addition to the reserve clause.<sup>219</sup> One may doubt the relevance of the enumeration of state powers as the states are granted reserve powers. According to Ulrich Preuss it is ‘not only redundant but even dangerous to enumerate powers of the states because this will in time of conflict and crisis raise the question of what about those issues which are not mentioned in Article 52 sub 2?’<sup>220</sup> The enumeration of state powers is important when the federal government retains the residual powers or when what is conferred on the states constitutes an exceptional grant of power on the states that would normally constitute a federal power, for instance participation of states in foreign affairs.<sup>221</sup> A closer look at Article 52 sub 2, however, indicates that the lists of powers mentioned are routine functions of the states rather than exceptional ones. The title of Article 52 sub 2 is also indicative of the fact that the list is an illustration giving only a portion of some of the authorities of the states.

There is more to the power of the constituent states. Although there is no exact congruence between the territory of the states and the ethno-linguistic groups, every attempt has been made to make sure that the major nationalities have their

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219 Art. 52(2) stipulates ‘consistent with sub-Article 1 of this Article, states shall have the following powers and functions: a) to establish a state administration that best advances self-government, a democratic order based on the rule of law, to protect and defend the Federal Constitution; b) to enact and execute the state constitution and other laws; c) to formulate and execute economic, social, and development policies, strategies and plans of the state; d) to administer land and other natural resources in accordance with federal laws; e) to levy and collect taxes and duties on revenue sources reserved to the states and to draw up and administer the state budget; f) to enact and enforce laws on the state civil service and their conditions of work; in the implementation of this responsibility it shall ensure that educational, training and experience requirements for any job, title or position approximate national standards; g) to establish and administer a state police force, and to maintain public order and peace within the state. Interestingly the list ends with a semicolon rather than with a full stop and it might give the impression that some powers are missing but the Amharic version of it ends with a full stop (*arat netib*) and might not raise controversies in light of the fact that the reserve power belongs to the states. The respective state constitutions have reproduced these powers almost *verbatim*. See for instance Art. 47 of the Constitution of Oromia and Art. 47 of SNNPRS. The wording of the latter, however, is slightly different. It states: ‘All powers and functions which are not given expressly to the federal government in accordance with the Constitution of the Federal Republic of Ethiopia shall be vested in the regional state.’

220 Ulrich Preuss, *Comments on the Draft Constitution of Ethiopia by International Legal Experts* (Addis Ababa: The Inter Africa Group, November 1994, unpublished note).

221 Goudappel, *supra* note 7 at 40.

own ‘mother states.’ The Constitution also emphasized that it is built on the consent of the nations and nationalities and hence places sovereignty with them. The nationalities are also entitled to a full measure of self-government that includes the right to establish institutions of government in the territories that they inhabit and to equitable representation in state and federal government.<sup>222</sup> The nationalities are also entitled to secede after going through some procedures and this right cannot even be suspended during a state of emergency.<sup>223</sup> Some contend that the procedures<sup>224</sup> for its exercise are strict and even doubt the political will to exercise it. Andreas Eshete writes that EPRDF, though a champion of self-determination, is opposed to its exercise.<sup>225</sup> Equally Barbara Thomas-Woolly and Edmond Keller state: ‘When EPRDF overthrew the military regime in 1991; ethnic groups that had been historically oppressed in Ethiopia were promised the right to self-determination but it soon became clear that what the EPRDF envisioned was regional autonomy for ethnically based sub-states within the context of an Ethiopian federal union.’<sup>226</sup> It is difficult to prove the veracity of these allegations but they hint that there is a lot of skepticism about its application. Nevertheless it is expressly singled out as a constitutional right. It is a generous grant of power to the regional states; indeed, in the absence of a federal supremacy clause it appears to have granted undivided power of sovereignty. ‘The principal provisions of the new constitution taken together demonstrate a willingness to diminish powers and resources at the disposal of central govern-

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222 See Art. 39 sub 1, 2, and 3.

223 Art. 93.

224 In brief, the procedures are states under Art. 39 (4) of the Ethiopian Constitution as follows: when a demand for secession has been approved by a two-thirds majority of the members of the legislative Council of the nation, nationality or people concerned; when the federal government has organized a referendum which must take place within three years from the time it received the concerned council’s decision for secession; when the demand for secession is supported by a majority vote in the referendum; when the federal government will have transferred its powers to the council of the nation, nationality or people who have voted to secede; and when the division of assets is effected in a manner prescribed by law.

225 Andreas Eshete, ‘Ethnic Federalism: New Frontiers in Ethiopian Politics,’ in *First National Conference on Federalism, Conflict and Peace Building* (Addis Ababa: United Printers, 2003): 168.

226 Barbara Thomas-Woolly and Edmond Keller, ‘Majority Rule and Minority Rights: American Federalism and African Experience,’ *The Journal of Modern African Studies*, 32:3 (1994) at 417.

ment and inclusive national identity in order to enhance the authority of the constituent states.<sup>227</sup>

In addition to the reserve powers other provisions of the Constitution too confer power on the states. According to Article 50 sub 5 states are empowered to draft, adopt and amend state constitutions. The states are entitled to frame and ratify their own constitution subject to some restrictions stipulated under the federal constitution. The state constitutions cannot contradict the federal constitution.<sup>228</sup> The separation of state and religion is also guaranteed under the federal constitution<sup>229</sup> and therefore it does not seem possible for some states to establish religious states. This is further reinforced by the fact that the constitution states ‘all federal and state legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this (third) chapter.’<sup>230</sup> As a result states cannot deviate from the guarantees enshrined under the federal constitution.

This is unlike other federations like India and Nigeria where the major features of the state constitutions are embodied within the federal constitution.<sup>231</sup> Here in Ethiopia, in the interest of compatibility, the federal constitution includes those fundamental requirements for member states but the states are normally left free to articulate their own constitutions.<sup>232</sup> The same is the practice in the United

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227 Andreas Eshete, *supra* note 225 at 160.

228 See Art. 9.

229 See Art. 11.

230 See Art. 13.

231 See for more chapter four. Indeed, in neither country do the states have their own constitutions.

232 But it is not difficult to see the similarity among the state constitutions. In some cases it is even possible to find a similar article, not even the number of the article changed.

States, Switzerland and Germany.<sup>233</sup> Yet there are again similarities in the structure of the state governments.<sup>234</sup>

The federal constitution hints at the various levels of government that should exist at state level. It states that ‘state governments shall be established at state and other administrative levels that they find necessary. Adequate power shall be granted to the lowest units of government to enable the people to participate directly in the administration of such units.’<sup>235</sup> As can be gathered from the minutes of the Constitutional Assembly, there was a heated debate as to whether the federal constitution should prescribe all the hierarchies of the levels that should exist at state level. In the end a compromise was reached. On the one hand they agreed that in light of the existing diversity in size and population among the states and in order to give effect to the autonomy of the states, the setting of such details should be left to the states. On the other hand they thought it is necessary to state the fact that however diverse the position of local governments may be, they should be granted ‘adequate powers.’ It was clearly stated that the local governments should not merely be agents of the state governments but should have some level of autonomy.<sup>236</sup>

As a result, except for the general power under Article 50(4) and with respect to judicial structure, the determination of the scope of powers and autonomy of local

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233 For more information on the state of state constitutions in other federations see Daniel Elazar, ‘State Constitutional Design in the United States and other federal systems,’ *Publius: The Journal of Federalism* 12 (winter 1982): 1-10; Daniel Elazar, ‘The Principles and Traditions underlying State Constitutions,’ *Publius: The Journal of Federalism* 12 (Winter 1982): 11-25; Ronald Watts, ‘States, Provinces, Länder and Cantons: International Variety Among Sub-National Constitutions,’ *Rutgers Law Journal* 31 (2000): 941-950; Arthur Gunlicks, ‘State Constitutions in Germany,’ *Rutgers Law Journal* 31 (2000): 971-986.

234 The state constitutions by and large provide for a unicameral parliament although the SNNPRS provide for a bicameral house. See Arts. 58, 59 of SNNPRS Con.; Art. 51 of SNNPRS Con., and Art. 49 of Oromia; Arts. 48, 49 and 56 of Amhara, for instance. But there are some variations in the German states.

235 Art. 50(4).

236 See *Ye Ethiopia Hige Mengist Gubae Kale Gubae v. 4 Hidar* 14-20, 1987 E.C. (Minutes of the Constitutional Assembly November 1994: Addis Ababa, unpublished) discussions on Art. 50.



governments has been left to the states and several state constitutions have elaborately designed sub-state entities in their constitution. This happened particularly following the major project of state constitutional reform in 2001/2002. Prior to the reform, the decision-making process at state level was centralized.<sup>237</sup>

This has to be seen in light of the new developments in Germany, India and Nigeria where the federal constitutions have been amended to define the powers and responsibilities of local governments.<sup>238</sup> The regulation of local governments in one way or another is gaining momentum not only in the sense of enhancing participation at local level but because of the increased trend of tensions between majorities and minorities particularly in multi-ethnic states. This issue is important because it has something to do with safeguarding those citizens who find themselves a minority within a sub-national territorial unit. The existence of intra-unit minorities within sub-national units of government is unavoidable and it needs a system regarding how to deal with it.<sup>239</sup> The Indian constitution has recently been amended to include local governments.<sup>240</sup>

Apart from the powers mentioned above, by virtue of Article 5(3) the units of the federation are allowed by law to determine their respective working languages and accordingly Tigray, Oromia, Afar and the Somali states have adopted their local languages as official ones at state level. SNNPRS, Benishangul-Gumuz and Gambela states have adopted Amharic, the federal working language, as a

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237 For more on the process of the reform see James Polhemus, 'Ethiopia's Emerging Regional Councils: New Players in Conflict Management,' in *First National Conference on Federalism, Conflict and Peace Building* (Addis Ababa: United Printers, 2003): 188-199.

238 For more on the Indian and Nigerian position of local governments see chapter four. Basic Law of Germany Art. 28 as well as Swiss Constitution Art. 50 outlines some basic principles concerning the organization and structure of local governments.

239 For more on the issue of majority and minority see chapter five.

240 See the 73 and 74 Amendments of India's Constitution; see also chapter four.

working language at state level. It appears that it is easier and wiser to adopt the federal working language to avoid interethnic tension in the choice of languages when there are several ethnic groups living together in a state and when none seems to be clearly dominant. The SNNPRS constitution, for instance, declares that Amharic shall be the working language of the regional state but under another section<sup>241</sup> it empowers the *zones* and *special weredas* to determine their respective working languages in their own local council.<sup>242</sup>

## 5.5 EXPLAINING THE PARADOX

Apart from the general similarities and specific differences in the form and scope of division of powers among the federations in this chapter and from the extensive discussion regarding the supremacy clause in chapter five, it appears that as far as self-rule and the list of powers as provided in the text are concerned the powers of the constituent states in Ethiopia are not as meager as some would make us believe. The dominant view so far is that ‘the powers of the member states are relatively meager and this has been reinforced by the regional governments fiscal dependency on federal level.’ They also emphasize albeit not explicitly, that the ‘centralized’ nature of the federal system is inherent in the Constitution itself because *policy-making* is very much centralized.<sup>243</sup> But the comparative study seems to suggest that the constituent states rather have an overwhelming amount of power at least so far as self-rule is concerned. For instance the states in India are in a much weaker position. They do not have their own constitutions and their legislative powers in the state list can easily be superseded by the Union. We have

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241 Sub 3 of Art. 5 of the constitution of SNNPRS.

242 Art. 5 of the Constitution of SNNPRS.

243 Two authors who seem to share this view include Lovise Aalen, *supra* note 165: 59-61; Andreas Eshete, *supra* note 225: 166-167.

already noted how omnipresent the powers of the Union government are. Unlike the states in Switzerland and Germany as well as India the states in Ethiopia can enact their own procedural and civil codes. Constitutional practice is not yet clear but the federal constitution in Ethiopia has also no ‘necessary and proper’ clause as in the United States or a comprehensive list of shared powers as in Germany. One may add the clauses on self-determination and the sovereignty of nationalities. Besides, the constitution is clear to authorize the states ‘to formulate and execute social and development policies, strategies and plans of the state’ within the overall federal framework. As a result, formally speaking the states are given wide powers. However, this needs qualification as for instance in the field of foreign policy and the sharing of federal power, there is actually very little to compare because the Ethiopian federal structure is designed completely with an emphasis on self-rule but not much on shared rule.

Even the argument emanating from states’ fiscal dependency needs qualification. As we have noted in chapter three it is true that much of the revenue raising capacity as well as the most lucrative taxes belong to the federal government. Indeed, this aspect is something that one can discern across federal systems for we have stated that the fiscal regime in many federations is characterized by ‘revenue concentration and expenditure decentralization.’ Yet in the Ethiopian context much of the fiscal transfers from the federal government to the states have not so far been attached to any specific conditions in the way it is done in other federations. Therefore the trouble with the authors seems to arise from their failure to distinguish between constitutionally proclaimed principles with operational reality.

The paradox between generously granted constitutional powers versus a centralized federal system has to be explained by considering two categories of reasons. The first category includes the process of policy-making, the party system in general and the existing system of intergovernmental relations in particular, of which an extensive discussion is presented in chapter seven. The second group constitutes the 2001 party crisis, the Ethio-Eritrea War and the federal intervention law. These are factors, which if taken alone, might seem isolated events but if taken together seem to give the broader perspective about the general trend reinforcing the point that the explanation for the current trend of centralization has to be sought at the political rather than a constitutional level.<sup>244</sup>

It is important to keep this in mind in order to understand an ongoing debate regarding the fate of the federal system. Proponents of the view that the centralizing feature of the federal system emanates from the constitution contend that even if the ruling party's dominance is not there or even if a new party comes to power, it is not clear if it will bring much change because the state power is limited to executive and cultural power and an opposition winning in the regions may not bring much change.<sup>245</sup> This author on the other hand argues that because of the confederate legal structure, which at present is under firm control of the ruling party (in a way an anomaly with the federal principle of division of power and multiple centers of decision-making) a change in the party system will probably result in a significant change in the federal outcome. It is true that if an

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244 It is interesting to note that there is as such no dispute about this trend. Yet as regards the explanation why this trend is forthcoming there seem to be two contending views. Some contend that the indicated factors do not constitute trends of centralization but the federal government is trying to fill in institutional gaps. They, for instance, place the law on federal intervention as an inherent part of Art. 93 of the federal constitution that declares about federal emergency. On the other hand others contend that the federal government is by conduct reversing the unity-diversity combination for good. For the latter group the law on federal intervention, for instance, goes much further than what was intended by the constitution on state of emergency governing situations of intervention by the federal government, a context referring to a much wider notion than state of emergency. This author holds the second view.

245 Andreas Eshete, *supra* note 225: 167-168.

opposition controls the political space there are many possible scenarios. It is difficult to foresee, for instance, the force that will hold the states together, particularly in case centrifugal forces dominate the political scene. There are those who argue that once the ruling party loses control of the federal system, the federal system will wither away with it.<sup>246</sup> Indeed in many federations that relied more on a centralized party system than on the ‘federal bargain and federal institutions’ the withering away of the party has led to the withering away of the federation.<sup>247</sup> One other possible scenario can be drawn from the Indian federal experience. The weakening of the Congress party – once the vanguard and dominant political force for at least the first two decades and half - did not result in significant changes in the federal system. Many were expecting that when state based coalition parties control the center, there will be several amendments to the Constitution in favor of the states. Yet not much changed despite the fact that several parties ruled India by turns.<sup>248</sup>

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246 See for instance Bekele Haile-Selassie, *Ethiopia: A Precarious Ethno-Federal Constitutional Order*, (University of Wisconsin Law School, Doctorial thesis, 2002 unpublished) at 7.

247 The precaution here is that there is rather less evidence indicating the causal link between the failure of the federations with the federal system. The evidence rather points to the fact that they failed because they were federation in form and *not in reality*. See Thomas Merrill, *supra* note 138 at 154; also see Daniel Elazar, *Exploring Federalism* (Tuscaloosa, AC: University of Alabama Press 1987); Nancy Bermeo, ‘A New Look at Federalism: The Import of Institutions,’ *Journal of Democracy* 13:2 (April 2002): 96-108; Ivo Duchacek, ‘Antagonistic Co-operation: Territorial and Ethnic Communities,’ *Publius: The Journal of Federalism* 7 (Fall 1977): 5-15; John McGarry, ‘Federal Political Systems and the Accommodation of National Minorities’ in Ann Griffiths ed., *Handbook of Federal Countries 2002* (Montreal and Kingston: McGill-Queen’s University Press, 2002) at 429.

248 After independence, Indian federalism, in addition to its unitary feature has further been centralized by the Congress Party. This party had a significant role because of its role in liberating India from British rule and many small state level parties had almost no role. For this reason, India has been, like Ethiopia is at present, under one party dominant federalism. Between 1950-1967, the center-state federalism issue remained dormant because the Congress Party dominated across all Indian States as well as a majority in federal parliament. Things started to change after 1967 when state based parties gained dominance in almost half of the states. The new parties urged for respect of state autonomy as well as renegotiations over many governmental affairs. In 1989 such a regionally based coalition of parties was able to control the center. Both before and after the 2004 elections, it seems that it has become a fact of life in Indian politics that for any party to control the center it should get the support of regionally based parties. Even the old and mighty Congress Party could not secure the maximum majority it wanted in the 2004 election and had to form a coalition. For long, federal power has been controlled by coalitions of state based parties and yet has not brought about significant reforms of the federal system. This seems to counterbalance the ‘withering away’ hypothesis somehow. An opposition controlling either the states or the center may at an early stage call for renegotiations of power but once it controls the key powers it may continue enjoying what it used to abhor as an opposition. See Robert Bejesky, ‘Hegemonic and Centralized Political Party Systems: Undermining Egalitarian Principles of Federalism? A Cross-National Comparison of India, Mexico, and the United States,’ *Temple International and Comparative Law Journal*, 14:2 (Fall 2000): 374-375.

We now turn to the consideration of the factors contributing to the trend of centralization. Although one can discern a pattern of centralization or transfer of responsibilities from the states to the federal government either by way of judicial interpretation (as in the United States), constitutional amendment (as in Switzerland and Germany), deliberate constitutional design (as in India) or a combination of all in all the federations over the years,<sup>249</sup> the Ethiopian federation is also evolving along the same pattern despite its commitment to and emphasis on the sovereignty of nations, nationalities and their entitlement to self-determination. It is not clear whether this move is a conscious design to bring into balance the forces of unity and diversity or whether it is continuity of over centralizing power despite the constitutional form.

During the first phase of the Ethiopian federation, 1995-1998, the defining philosophy was that there could only be stable peace if the nations and nationalities are empowered as stipulated under the federal constitution. It was emphasized now and then that the federal system is the 'political contract' of the nationalities that brought the federation into being as a result of their free will. Diversity was promoted without limits. EPRDF's original design was Ethiopia as a multination state and the home of diverse ethnic groups, languages and religions. That is certainly the message one reads from the constitutional form and the forces of unity were de-emphasized. As a result one may call this period the honeymoon period for the states.

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249 For the trends of centralization in the US see William Alexander, 'The Measurement of American Federalism' in William Riker ed., *The Development of American Federalism* (Boston: Kluwer Academic Publishers, 1987): 99-112, 100. Duchacek, *supra* note 23 at 263. Thomas Merrill, *supra* note 138: 155-160. See for more Hartmut Klatt, 'Centralizing Trends in the Federal Republic: The Record of the Kohl Chancellorship' in Charlie Jeffery and Peter Savigear eds., *German Federalism Today* (New York: St. Martin's Press, 1991): 120-137; also Uwe Leonardy, 'The Institutional Structures of German Federalism,' in Charlie Jeffery ed., *Recasting German Federalism: The Legacies of Unification* (Pinter: London, 1999): 3-22. For the Swiss Federation see Schmitt, *supra* note 33: 47-48; Otto Kaufman, *supra* note 33 at 219; Wolf Linder, *supra* note 33 at 40; Thomas Fleiner, 'Recent Developments of Swiss Federalism,' *Publius: The Journal of Federalism* 32:2 (Spring 2002): 97-124; the centralized nature of the Indian federal system has already been made clear.

The second phase (1998-2001) shows a sudden assertion of the notion of Ethiopian nationalism<sup>250</sup> when the war with Eritrea broke out in May 1998. Ethiopian nationalism and patriotism was at its peak and this was to overshadow the emphasis on diversity. The need for running an efficient military apparatus and the War of aggression also contributed to re-channeling resources and manpower to the center and hence to a more centralized federalism. After the crisis in TPLF in March 2001,<sup>251</sup> the dominant coalition partner of EPRDF, which had significant spill-over effects on the other coalition members and the federal as well as state governments, principally in the SNNPRS and Oromia, not only affected the autonomy of the states but also seems to have contributed to a shift in the balance of power from the traditionally collective leadership of EPRDF (regionally based) to the federal government.<sup>252</sup> Following the crisis, the tone of discussion seems to have shifted towards the dangers of ‘narrow nationalism,’ and the ‘manipulation of ethnic identity for parochial purposes.’ Perhaps as a mark of this mutation towards a more centralized federal system, limiting somehow the forces of diversity, the federal government has established or at least provided the legal framework for establishing a federal police force, partly replaced the delegated court structure by a dual court structure and even decided to transform

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250 This is the most debatable concept in the Ethiopian public discourse. Adherents of one nation, one country, and one language view this concept out right as an abstract oneness despite ethnic or religious differences. Sometimes it is pursued in a manner that forces minority languages and religions to assimilate rather than to co-exist alongside with the ‘dominant’ culture. On the other hand others view Ethiopianism as sum total of the diverse ethnic and religious groups. Ethiopian nationalism in the second context accommodates and at times promotes the multi-ethnicity that exists in fact. While the former notion often carries with it the danger of assimilation, the second view equally carries with it the risk of over-emphasizing ethnic differences.

251 In March 2001, the party chairman of TPLF and current Prime Minister was challenged by an opposing fraction. At a critical party decision 12 members voted against and 16 in favor, two being absent, one the late Kinfe G. Medhin and Mulugeta Chaltu who resigned from his position in 2003. Apparently the cause of the split as alleged by the dissenters is that the PM had been too complicit with Eritrean matters during the war with Eritrea from May 1998- Dec. 2000 (Indian Ocean News Letter, March 24, 2001). The dissenters were expelled from their party as well as government position. This had a domino effect on other member parties of EPRDF in the SNNPRS, Tigray and Oromia. Senior party members who shared the view of TPLF dissenters were equally expelled from party and government positions (Indian Ocean News Letter, June 30, 2001), (Africa Confidential Oct. 26, 2001).

252 For instance Medhane and Young argue that the crisis resulted in a ‘shift of power from the regions to the federal government in Addis Ababa, from the instruments of the party to the state and from among the group the TPLF Central committee to Meles Zenawi.’ Medhane Tadesse and John Young, ‘TPLF: Reform or Decline?’, *Review of African Political Economy* 30: 97 (2003) at 389.

the ethnic based southern coalition to a single movement with a view to weaken the decision-making power of each member front.<sup>253</sup>

### **Federal Intervention in the Regions**

Very recently a law has even been enacted that permits the federal government to intervene in the states. The law is framed as ‘The system for the intervention of the federal government in the regions...’<sup>254</sup> Conceptually, one may raise an issue over the distinction in the terminology between *emergency* (a term employed in the federal constitution Art. 93) and *intervention*, a term used in the new proclamation. In light of the Constitution’s emphasis on the ‘sovereignty of nationalities,’ why does the new proclamation choose intervention, a term which has implications much wider than emergency? As far as we understand it, emergency situation refers more to an extraordinary than to normal circumstances that necessitate the use of special powers in order to arrest a *crisis* situation.<sup>255</sup> Intervention on the other hand may connote to federal governments interference

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253 The motives and the basis of the new organizational basis are not clear but recently the ruling party is reported to have officially stated that it is reorganizing its structure. For instance, the SEPDF, a member of the EPRDF and a coalition of twenty or so Ethnic Fronts, has been changed into a movement (SEPDm) after merging all the fronts. For the impact of such a

transformation see chapter five note 132. However, similar reform is expected to face a strong opposition mainly from hard-core nationalists from within TPLF and Oromo Peoples Democratic Organization (OPDO). Interview confidential November 2003.

254 Certainly there were reported cases of (*de facto*) intervention by the federal government in the states as in the Somali and SNNPRS. In the former, the elected president of the regional government was removed by a coup and this caused an intervention. A comprehensive conference on peace and development was held to restore the state government but the elected president chose to remain out of office and was replaced. In the SNNPRS the local security and police force and state government were practically dissolved/suspended and replaced by a federal police force until the local party reorganized itself and elected a new president for the state but none of the procedures that will be discussed shortly, were followed. It was done simply through party channels. These *de facto* cases of intervention seem to be regulated now by a new legislation. The relevant law is the System for the *Intervention* of the Federal Government in the Regions, Proclamation No. 359/2003, *Federal Negarit Gazeta* 9<sup>th</sup> Year No. 80 Addis Ababa, 10 July, 2003. In 2004 the state of Gambela was in a state of emergency following the crisis.

255 In India, for instance, emergency could be declared on either of four grounds stipulated in the Constitution: when the security of the entire country or any part of it could be threatened by war or external aggression or by armed rebellion; when there is a breakdown of constitutional machinery in a state and the government of the state cannot be carried on in accordance with the provisions of the constitution; when the financial stability or creditworthiness of the country or one of the states could be threatened and lastly when there is threat of external aggression or internal disturbance which is not grave enough for action under Arts. 352 or 356 but nevertheless serious enough to call for other action by the Union government (Art. 355).



with the states even in normal circumstances or situations not contemplated by the constitution. In general, one cannot imagine federal constitutions without some sort of intervention or emergency clause of one kind or another.<sup>256</sup> In many federations, the determination of the existence and gravity of an external or internal threat to the federal way of life is in the hands of federal executive<sup>257</sup> and certainly this is so in Ethiopia (Article 93). The central question in a federal context is the frequency of federal intervention, the grounds for intervention and the effects of such intervention.

The federal Constitution envisages three possibilities of federal action presumably on the autonomy of states. Firstly, it states<sup>258</sup> that ‘it [federal government] shall deploy at the request of a state administration, federal defense forces to arrest a deteriorating security situation within the requesting state when its authorities are unable to control it.’<sup>259</sup> According to this clause, it is not clear whether the federal government here refers to the HoPR, HoF or Council of Ministers because all three of these organs have some power to initiate federal action. However, the proclamation (Article 5) makes it clear that it is the Prime Minister who deploys the federal police force or the defense force to the region. What is characteristic of this intervention is that it is initiated by a request from the state administration when the state law enforcement machinery is not able to handle the situation, not from the federal government. In light of the fact that maintaining public peace and order is the primary role of the states<sup>260</sup> through their own police force, the conditions attached for federal action are important. The effect of the federal

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256 See for instance Art. 91 of the Basic Law and Swiss Constitution Art. 52 though they are brief.

257 Duchacek, *supra* note 23 at 264; see also German Basic Law Art. 91.

258 Art. 3 of Proc. No. 359/2003 states ‘Security situation shall be deemed to have been deteriorated where there is an activity that disturbs the peace and safety of the public and the law enforcement agency and the judiciary of the region are unable to arrest the security problems in accordance with law.’

259 Art. 51(14); for some insights on federal intervention see Hashim Tewfik, ‘Conflict Management Structures and Federal Intervention Under the Ethiopian Constitution,’ in *First National Conference on Federalism, Conflict and Peace Building* (Addis Ababa: United Printers, 2003): 226-242.

260 Art. 52(2) g.

action does not seem to be clear from the provisions of the constitution or from the law but there is no express clause stipulating the dissolution/suspension of the state legislature or the state executive. It is also important to note that this ground of federal action could overlap with the other bases of federal action. Seen in comparison with the grounds for the declaration of emergency under Article 93 (the presence of threat from an external aggressor, breakdown of law and order which endangers the constitutional order, natural disaster or an epidemic), our earlier note on the distinction between intervention and emergency seems valid. This clause makes it clear that the federal government can deploy its forces in the states even if the situation is far from a state of emergency.

Secondly, the HoPR shall on its own initiative request a joint session of the HoF and of the HoPR to take appropriate measures when state authorities are unable to arrest violations of human rights within their jurisdiction. It shall on the basis of the joint decision of the House give directives to the state authorities concerned.<sup>261</sup> This ground of intervention is distinct from the former in the sense that the HoPR may take this initiative even when there is no state request. Indeed it gives one the impression that the state administration itself could be a suspect, among other things. Again the proclamation nowhere mentions the possibilities of suspension or dissolution of state bodies as a consequence of the federal action. This ground of federal action as well is not in the list of grounds for declaring state of emergency, reinforcing further the assertion that the federal law is meant to regulate situations of intervention much wider than state of emergency. Yet there is still a link. Although it appears that this is distinct from the clause on the state of emergency, the failure to enforce federal directives issued by joint de-

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<sup>261</sup> Art. 55(16); according to Proc. 359/2003 Art. 7 '[V]iolation of human rights shall be deemed to have been committed where an act is committed in a region in violation of the provisions of human rights stipulated in the constitution....and the law enforcement agency and the judiciary are unable to arrest such violations of human rights.'

cisions of both Houses to stop the violations as well as to bring the suspects to justice<sup>262</sup> may in the end result in a ground for intervention because of endangering the constitutional order.

Thirdly, the HoF shall order under Article 62(9) federal intervention if any state, in violation of this federal constitution endangers the constitutional order. The HoF as a supreme organ responsible for not only interpreting the constitution but also defending it<sup>263</sup> is given power under Article 62(9). Certainly this seems to have some overlap with the declaration of the state of emergency. Under the federal constitution ‘ a breakdown of law and order which endangers the constitutional order and which cannot be controlled by the regular law enforcement agencies and personnel...’<sup>264</sup> is a ground for declaration of a state of emergency. It is true that not all violations of the constitution by a state might endanger the constitutional order or such endangering of the constitutional order may not necessarily constitute enough ground for declaration of a state of emergency as it may be handled by regular enforcement agencies. This is implied in the proclamation. Even if the elements that cause the federal action under the proclamation are generally called constituting matters that endanger the constitutional order apparently making it similar to the condition of a state of emergency, subsequent provisions clearly make a distinction between the role of the Federal Council of Ministers, a body in charge of federal state of emergency and the HoF, a body that orders the federal government to intervene under the

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262 See Proc. 359/2003 Art. 11 cum Art. 12 which states that violation of the directives given pursuant to Art. 11 of the proclamation constitutes an element that endangers the constitutional order.

263 See Art. 9 cum 61, 62.

264 Art. 93(1); Art. 12 of Proc. 359/2003 states ‘An activity or act carried out by the participation or consent of a regional government in violation of the Constitution or the constitutional order and in particular: 1. Armed uprising 2. Resolving conflicts between another region or nation, nationality or people of another region by resorting to non-peaceful means 3. Disturbance of peace and security of the federal government; or 4. Violations of directives issued...’ by the HoPR after a joint session with HoF to a state government to stop violation of human rights as per the second ground of intervention.

proclamation.<sup>265</sup> However, extreme cases can fit the conditions laid down under Article 93.

Certainly there could be an overlap between the role of the federal Council of Ministers and the HoF.<sup>266</sup> The respective role of each federal organ in a crisis situation is not clearly articulated. The consequences of intervention based on the third ground are severe and might even extend to suspending the state Council and the highest executive organ of the region and replace it by Provisional Administration.<sup>267</sup>

In light of the extensive use of presidential rule and emergency laws in the Indian federal system and its frequent use for circumstances not contemplated during the constitutional design, it is perhaps good to consider the decision of the Indian Supreme Court. Presidential rule (misnomer for the president's action done with the advice of the Council of Ministers) grants wide powers to the federal government to intervene in the states. If the president on receipt of reports from a governor of states or otherwise is satisfied that a situation has arisen in which the government of a state cannot be carried on in accordance with a provision of the constitution, the president may by a proclamation declare the state to be under the authority of parliament.<sup>268</sup> The union may then directly take over government of a state. Besides when there is a failure of constitutional machinery in the states, the president may declare that the powers of the legislature of the state shall be

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<sup>265</sup> See, for instance, Arts. 13 and 14 of Proc. 359/2003 that give one the impression that HoF is responsible when the matter does not constitute a state of emergency but it will be the Council of Ministers that takes the action if it constitutes a federal state of emergency.

<sup>266</sup> There seems to be an interesting similarity with the Indian federal system in this regard. The Indians make a distinction between a national state of emergency (Art. 352) which may result in complete suspension or dissolution of state executive and legislature or in other words the federal government and parliament take over state matters versus presidential rule under Art. 356 which seems restricted to failure of constitutional machinery in a particular state.

<sup>267</sup> See Art. 14(2) b; also Art. 15.

<sup>268</sup> Art. 356 b.

exercisable by or under the authority of parliament. Parliament may then make laws on any matter within the scope of the state. Because presidential rule has been used several times to remove a state government run by an opposition, which according to many Indian authors has nothing to do with the purpose of presidential rule, in the landmark case of *Bommai v. Union of India* the Supreme Court declared that even PR is subject to judicial scrutiny.<sup>269</sup>

Federal intervention may then become one avenue through which the federal authority is encouraged or authorized to cross the federal-state division to limit or suspend temporarily state autonomy in the name of safeguarding the constitutional order of the federation. Indian experience, for instance, indicates that the Union might use federal power to oust state based opposition parties and there is also the problem of the objective determination of the seriousness or imminence of an external or internal danger to peace and security.<sup>270</sup> In emergency situations, the federal government suspends a state government and assumes to itself all legislative and executive powers of state government and may even suspend part of the constitution that deals with division of powers. In short, in India, the president has the power to transform the federal system into a unitary system during crisis situations. Yet this has to be seen against the background of the constitutional design when it came to force six decades ago. The Ethiopian federal system does not seem to warrant such wide application of federal intervention. It has been argued all along that the federal system focuses more on self-rule and on the notion of sovereignty of nationalities. However, the new law lays down a wide legal framework for federal action that seems to go against the tone of the federal system itself.

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269 Presidential rule under Art. 356 has raised a lot of controversy as to its impact on the Indian federal arrangement. See Kazimi, *supra* note 10: 38-41; Ved Marwah, *supra* note 65: 136-160.

270 Indian Constitution Arts. 352, 353, 356.

## 5.6 CONCLUSION

Certainly there are many variations and similarities among the federations both in terms of form and scope of legislative power. There is apparently a paradox in the Ethiopian constitution between constitutional form and reality. The text grants wide powers to the states. There is no necessary and proper clause or comprehensive regime of shared powers although one might be able to remotely trace some equivalents under the federal constitution. The states furthermore do retain reserve power. One should also note, debatable though it may be, the pretentious commitment to sovereignty of nations, nationalities and people. Yet, if one compares the position of the states with the Länder in Germany or the Cantons in Switzerland in terms of power sharing at federal level including the power they have to influence foreign policy, one certainly finds out that under the Ethiopian constitution more emphasis has been given to the self-rule (again formally speaking) rather than to the shared-rule aspect of federalism. This is partly explained by the ruling party's long held view of national self-determination (Articles 8 and 39), which in the end failed to complement the nations' and nationalities' right to self-rule with some form of power sharing at federal level. In the area of fiscal transfer and federal law-making, for example, the federal principle is undermined. Besides, the autonomy of the states seems to be checked by a centralized party structure, centralized policy-making and current trends also seem to suggest a movement towards centralization rather than otherwise. Under these prevailing circumstances, it is important to point out that either the form has to be brought closer to the reality or the reality has to conform to the form.

### Review Questions

1. Combining your readings of chapter two and five how do you think the process of evolution of the federal system affects the autonomy (constitutional and territorial) of the states?
2. How is a framework power different from concurrent one? Is it possible to make such a distinction in the Ethiopian federal system?
3. Do you agree with the assertion that there are some centralizing trends in practice? Why or why not?

DIVISION OF EXECUTIVE POWER AND INTERGOVERNMENTAL RELATIONS

**Chapter Six**

**Division of Executive Power and Intergovernmental Relations**

As can be understood from the title of this chapter, the purpose of the study is twofold: to consider how different federal systems enforce federal laws throughout their territory and to analyze the scheme of intergovernmental relations. An investigation into the Ethiopian Constitution reveals that there are legal as well as institutional lacunae governing the division of executive power and institutional mechanisms facilitating intergovernmental co-operation between the federal government and the states. The final objective of the study is, therefore, to analyze the experience of other federal systems in order to shed some light on the rather important but gray area of the system of intergovernmental relations within the Ethiopian federal system. In view of this, the chapter is divided into three major sections. Section one explains the systems of enforcing federal laws in the constituent states as developed in the different federal systems. In this section the focus is on the constitutional situation regarding intergovernmental relations. This section appears to suggest the fact that there are mutually exclusive approaches in the different federal systems, but this is not true. As the dynamics of intergovernmental relations in the second section elaborates, the regime of co-operative federalism, even if it means slightly different things in the federal systems, bridges the gap in between. The last section focuses on the system of intergovernmental relations in Ethiopia and attempts to draw some lessons from the other federations.

Before considering the execution of federal laws in the constituent states, it is perhaps proper to clear up a popular misconception in Ethiopia as to the territorial application of federal laws. Many wrongly think that federal laws are limited to



DIVISION OF EXECUTIVE POWER AND INTERGOVERNMENTAL RELATIONS

Addis Ababa and Dire Dawa.<sup>1</sup> The fact, however, is that all laws made by federal parliament within the scope of its powers designated by the Constitution apply in all the states and the two autonomous districts. The federal government has the duty to see that such laws are executed throughout in one way or the other. Indeed, this is one of the cardinal principles that distinguish a federation from a confederation.<sup>2</sup> In the latter, the central government does not have direct authority over the citizen. It can only reach the citizen through the states. In a federation, the federal government has direct authority over citizens and therefore can legislate as well as execute laws that have direct bearing on citizens. Of course, as will be illustrated later, the manner in which the federal governments execute their laws throughout the territory may be different. Some federal systems rely on their dual, that is, federal and state structure, while others rely on what is described as ‘executive federalism’ in which the federal government heavily relies on state machinery for the implementation of federal laws.<sup>3</sup> In Ethiopia this conceptual ambiguity seems to play some role, perhaps in addition to other reasons, in explaining why there is no clear constitutional framework governing the division of executive power between the federal government and the states.

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1 It is not by accident that until very recently the federal government did not have many federal institutions in the states despite constitutional powers to establish such offices. One has to travel from Jijiga or Rama to Addis Ababa to get a passport. Federal police force is one such instance. It is only with the judicial system that one discerns a relatively clear system of relationships between the federal government and the states. See chapter eight for more.

2 Nowadays the distinction between a confederation and a federation is getting blurred. Traditionally, it used to be that in confederations, broadly speaking, the area of self-rule was more predominant than areas of shared rule. In international relations as well, all member states retained their autonomy. In federations on the other hand, the area of shared rule predominates the area of self-rule and in international relations, only the federal government represents the nation. Yet with the emergence of the European Union, some constituent states are now represented at EU level. For more on this see chapters two and six.

3 The federal government maintains federal institutions only in a few areas of exclusive federal matters.

## DIVISION OF EXECUTIVE POWER AND INTERGOVERNMENTAL RELATIONS

**6.1 DUAL VERSUS EXECUTIVE OR FUNCTIONAL FEDERALISM**

Let us start with some general remarks on the notions intergovernmental relations, executive federalism and co-operative federalism. As will be demonstrated later in this chapter, intergovernmental relations is a very broad notion referring principally to the relations (formal or informal) between the federal government and the constituent states concerning the co-ordination of policies on shared programs but at times goes much further than that. It may as well cover the horizontal relations between the constituent states or even the relations between the federal government and the local governments. Executive and co-operative federalism may at times mean the same thing as aspects of intergovernmental relations but there is also some slight difference. While the system of co-ordinating policies and shared programs between the federal government and the states involve in theory both the elected and appointed officials, in parliamentary federations, it is often dominated by the executive of both governments hence the name executive federalism. While the notion of co-operative federalism may be used in both presidential and parliamentary federations, the notion of executive federalism is rarely, if ever, used in presidential federations.

Broadly speaking, federal systems enforce their laws and policies by setting up dual structures, federal and state institutions or by entrusting the state machinery with the power to enforce both federal and state laws. In this section we will explore both mechanisms with a view to understanding as to how federal laws and policies are implemented in Ethiopia. To make the comparative study more relevant we will set the Ethiopian context first.

## DIVISION OF EXECUTIVE POWER AND INTERGOVERNMENTAL RELATIONS

In principle the Constitution seems to suggest that there are dual structures. That executive power is co-extensive with the legislative power. The Constitution states: ‘The federal government and the states shall have legislative, *executive* and judicial powers.’<sup>4</sup> This seems to point to the fact that the organization of the federal executive is co-extensive with the division of legislative power. It hints that there will be parallel federal and state executive organs in charge of enforcing federal and state laws respectively. The Federal Council of Ministers is also empowered to ensure the implementation of laws and decisions adopted by the HoPR.<sup>5</sup> With such a view Article 10 (1) b of Proclamation No. 4/1995<sup>6</sup> that defines the powers and duties of the federal executive organs stipulating the common powers and duties of federal ministries, reads: ‘Each Ministry shall: in its field of activity ensure the enforcement of laws, regulations and directives of the Federal Government’ and the proclamation provides fifteen Ministries.<sup>7</sup> The number has been increased to eighteen by another proclamation.<sup>8</sup> This also seems to back the duality in the organization of the executive hinted at by Article 50(2) of the Constitution.

However, constitutional practice indicates that there is a gap in enforcing federal laws. It is true that there are some federal executive organs organized throughout the country to enforce federal laws. Chief among them are Customs Authority,

4 Article 50(2) ‘A Proclamation to Pronounce the Coming into Effect of the Constitution of the Federal Democratic Republic of Ethiopia,’ Proclamation No. 1/1995, *Federal Negarit Gazette*, 1<sup>st</sup> Year No. 1, Addis Ababa, 21 August 1995, hereinafter referred to as Ethiopian Constitution.

5 Art. 77(1) of the Constitution.

6 ‘Definition of Powers and Duties of the Executive Organs of the Federal Republic of Ethiopia,’ Proclamation No. 4/1995, *Federal Negarit Gazette*, 1<sup>st</sup> Year No. 4, Addis Ababa 23<sup>rd</sup> August 1995.

7 According to Article 9 of the same proclamation the following 15 Ministries are established: the Ministry of Agriculture; Economic Development and Co-operation; Trade and Industry; Mines and Energy; Public Works and Urban Development; Water Resources; Transport and Communications; Labor and Social Affairs; Finance; Education; Health; Justice; Information and Culture; Foreign affairs and National Defense.

8 According to Article 4 of the ‘Reorganization of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation,’ Proclamation No. 256/2001, *Federal Negarit Gazette*, 8<sup>th</sup> Year No. 2, Addis Ababa 12<sup>th</sup> October 2001, three more new Ministries are established, namely, Office for the Coordination of Capacity Building; Ministry of Rural Development; Ministry of Federal Affairs and some other Ministries have been reorganized.

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Federal Inland Revenue, Telecommunications, Postal Services, Insurance and Banking and Federal Public Prosecution. These are federal agents normally enforcing exclusive federal powers. With respect to the latter for instance, the law states, ‘the office of the central attorney General shall have...duty to (1) ensure that laws, regulations, orders and directives of the central transitional government are correctly and uniformly applied in all places,’<sup>9</sup> which remains effective today. It is true though that the office depends on the state police as far as the investigation of the crime is concerned. The states have also organized a parallel state prosecution office for the prosecution of the bulk of other non-exclusive federal crimes.<sup>10</sup> The Federal Police was until very recently organized only in Addis Ababa but a recent proclamation authorizes the federal government for the setting up of such institutions in other regions.<sup>11</sup> Equally, the federal civil service proclamation deals exclusively with federal civil servants<sup>12</sup> and Article 89 expressly repeals all previous laws that were in force and applicable throughout the territory leaving the states to enact their own laws. In all these circumstances, which by and large are exclusive federal matters, one observes the federal government enforcing its policies and laws directly through its agents.

However, these are not the only federal institutions. Many of the federal Ministries mentioned above do not have branch offices outside Addis Ababa nor is there any express delegation of power to the state executive. It is important to

9 Article 5(1), ‘A proclamation to Provide for the Establishment of the Office of the Central Attorney General of the Transitional Government of Ethiopia,’ Proclamation No. 39/1993, *Negarit Gazeta*, 52<sup>nd</sup> Year No. 24, Addis Ababa, 11 January 1993.

10 Interview with the Regional Head of Justice Bureau, *Ato Getahun Kassa*, November 19/2002, Makelle.

11 See Article 5 sub 3 of Proclamation No. 313/2003, ‘Federal Police Commission Proclamation,’ *Federal Negarit Gazeta*, 9<sup>th</sup> Year No. 30 Addis Ababa, 4 January 2003; this proclamation replaced Proclamation No. 207/2000, ‘A Proclamation to Provide for the Organization and Administration of the Federal Police,’ *Federal Negarit Gazeta*, 6<sup>th</sup> Year No. 37, Addis Ababa, 27 June 2000. The new proclamation also allows for the *delegation*, when this is deemed necessary, of the powers given to the federal police commission to regional police commission. Art. 7 sub 15.

12 ‘Federal Civil Servants Proclamation,’ Proclamation No. 262/2002, *Federal Negarit Gazeta*, 8<sup>th</sup> Year No. 8 Addis Ababa, 3<sup>rd</sup> January 2002.

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point out that even in Germany and Switzerland, states that rely heavily on state executive organs for the enforcement of federal legislation, the federal government in each of them has these minimum federal institutions to enforce exclusive federal powers. The duality implied under Article 50(2) should, therefore, imply something beyond these few institutions to cover the whole field of other federal powers enumerated under Articles 51 and 55 of the federal Constitution.

As noted while discussing the division of powers, despite the apparent lack of express concurrent powers, the bulk of social, education, economic and health affairs are shared between the federal government and the states. Certainly there are no institutionalized meetings, for instance, between respective heads of health, education and agriculture, of the federal government and the states. We have noted how police power is shared in the area of crime investigation even when both governments have legislated on their respective police forces. It is in these areas that the regime of co-operative federalism has been very influential in other federations. As far as the bulk of other fields are concerned the federal government has not yet organized institutions to enforce its laws.

Apart from the enforcement of federal laws through direct federal agents, there appears another pattern in the process of evolution: delegation. The federal income tax proclamation as well as the federal police commission proclamation, for instance, expressly permit the federal government to delegate some of its functions to the respective state bodies.<sup>13</sup> In these instances, it appears that what is delegated is the execution of laws. A related development is when the regional state machinery directly executes federal laws. Sometimes, the state governments

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<sup>13</sup> See federal Constitution Art. 50(9); as well as Proc. 313/2003 Art. 7(15) for example.

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take over the responsibility of enforcing federal laws despite the absence of direct authorization.<sup>14</sup> What this shows is the lack of a well-organized institutional set-up for the enforcement of federal laws as well as the fact that the system of intergovernmental relations in Ethiopia is in its infant stage. As will be demonstrated later, enforcement of the bulk of federal laws in the states is undertaken either by informal contacts between the respective offices or following party channels. It is true that in a federal system, federal laws and policies should take into account the autonomy of the states. However, so long as this limit is respected, it must be emphasized that the enforcement and co-ordination of such laws throughout the territory is an essential aspect of ‘building one political as well as economic community’ as proclaimed under the Preamble of the Constitution.

There are several reasons as to why a clear division of executive power of one type or another is crucial to the Ethiopian federation.

First, the Ethiopian Constitution follows the old style division of granting enumerated and limited powers to the federal government and the residue to the states, compared to the German, Swiss, and Indian constitutions. The Constitution does not provide for a comprehensive regime of concurrent powers. Under such circumstances there is a higher potential of intergovernmental conflict and worse, the courts do not have the power to adjudicate such conflicts. The HoF too is not institutionally well-organized.

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14 For example regional states are required to administer land and natural resources in accordance with federal laws. But in many other cases state constitutions stipulate a general clause stipulating, ‘without prejudice to the provision of the federal constitution, the state executive shall have the power and function to ensure the implementation of laws and decisions issued by the state council and *the federal government*.’ Examples include Art. 66, 58, 56, 55 of SNNPRS, Amhara, Tigray and Oromia state constitutions respectively. Thus, the regional Bureau of Tourism, Trade and Industry may directly enforce laws of the federal government even if there is neither express delegation nor any federal body at regional level.

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Secondly, so far there are no formal federal-state mechanisms of intergovernmental relations except what was *de facto* known as the office of Regional Affairs (*kilil guday zerf*) within the Prime Minister's office, later formally replaced by the Ministry of Federal Affairs.<sup>15</sup> Yet, the latter's competence is not only limited to 'give assistance to the Regions with particular emphasis on the less developed ones'<sup>16</sup> but its current focus is also mainly related to the supervision and co-ordination of the following executive organs: federal police commission, federal prisons administration, national urban planning institute and Addis Ababa and Dire Dawa city administrations.<sup>17</sup> The most important power, which this office could play as an institution of intergovernmental co-operation equally in all the states, is missing from Proclamation Article 11 that defines its powers and duties. It was supposed to institutionalize and replace the *de facto* heavy reliance on party structure but failed to do so. The federal government heavily relies on party lines rather than on formal institutions of intergovernmental cooperation. Intergovernmental relations are important in installing the culture of negotiation between the federal government and the states, checking the trend of centralization and thereby enhancing the bargaining power of the states. Institutionalizing intergovernmental relations could further facilitate resolving potential center-state conflicts. While the process is calm at the moment owing to the congruency of the party system at the center and the states, it is not impossible to imagine states run by a party whose political program is different from the center or *vice versa*. There and then conflicts could be serious and channels of negotiation should be set up to accommodate interests. The March 2001 TPLF split and its subsequent impact on other states regarding federal-state relations is clear evidence to this effect.<sup>18</sup>

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15 See Proclamation No. 256/2001, *supra* note 8; Article 4(6).

16 *Ibid.*, Article 11 (1), c.

17 *Ibid.*, Article 6.

18 For more on the nature of the crisis see note 144 *infra*.

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Thirdly, Ethiopia has no law-making second chamber. The HoF does play a modest role in the area of fiscal transfers, one field of intergovernmental relations between the federal government and the states, but this in itself is within the process of evolution.<sup>19</sup> The states as indicated elsewhere do not have control over the laws enacted by the federal government. The institutionalization of the regime of intergovernmental relations may then be one option for participating on matters shared between the federal government and the states.

With this setting we now proceed to explore how other federations have been able to execute federal laws in their respective territories. As far as the division of the executive powers in a federation is concerned, it could be generally stated that they have followed either of the following two approaches: dual federalism or executive federalism.

### 6.1.1 Dual Federalism

Dual federalism is represented by the United States federation, where the allocation of executive authority is in principle considered co-extensive with the distribution of legislative responsibilities.<sup>20</sup> This stems from the fact that, if the federal and state governments are to remain autonomous, then each must act directly towards the people in the process of enforcing its laws. As a result, it follows that not only legislative but also executive, financial and judicial powers should be divided between the federal government and the states so that each will act autonomously. A strict application of the principle results in a dual polity. In

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<sup>19</sup> See for more chapter three.

<sup>20</sup> Ronald Watts, *New Federations Experiments in the Commonwealth* (Oxford: Clarendon Press, 1966) at 177, hereinafter referred to as *New Federations*.



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theory, dual or layered cake federalism, as it is sometimes called, assumes little overlap or sharing of functions between the two governments.<sup>21</sup>

In the context of the United States federal system dual federalism constituted an amalgam of four distinct notions. We should of course note that this has much to do with the fact that the federal system evolved from semi-autonomous states. Firstly, it states that the federal government has one set of enumerated and limited functions and the states another set of unenumerated reserve powers. Secondly, within their respective spheres the two governments are *co-ordinate* and *sovereign*. Thirdly, there is less overlap of power between the two governments and hence less sharing. There is rather a competition between the two levels of government as each legislates, executes and adjudicates its laws.<sup>22</sup> At least in its formative stage, owing to the concept of states' rights, the dominant operative concept was that of competitive federalism which denoted a spirit of competition and rivalry between the federal government and the states. The states were conscious of their powers and rights and thus resented the growth of the federal power and its encroachment on the states domain.<sup>23</sup> Fourthly, changes in the

21 Watts, *New Federations*, *supra* note 20, at 225.

22 While the notion of dual federalism may be an appropriate description of the 19<sup>th</sup> century federal system of the United States, matters have changed a lot in the 20<sup>th</sup> century in favor of what some call co-operative or marble cake federalism, signifying a complex intermixing of powers and responsibilities between the federal government and the states with shared rather than layered powers. See the section on co-operative federalism *infra*. While American Federalism has been understood in terms of dual federalism, Laslovich argues that the actual practice of American federalism has significantly departed from this vision. In as much as the federal system contained some seeds of co-operative federal elements in the 19<sup>th</sup> century, in its present form it has been predominantly portrayed as co-operative but no one seems to deny the existence of some aspects of duality although the powers of the federal government have expanded so much. See Michael Laslovich, 'The American Tradition: Federalism in the United States,' in Michael Burgess and Alain-G. Gagnon eds., *Comparative Federalism and Federation, Competing Traditions and Future Directions* (New York: Harvester, 1993): 187-188; equally Rufus Davis states that although the early 19<sup>th</sup> century federalism is presented as 'dual worlds where two political streams flowed in parallel and splendid isolation from each other, the implications of interdependence were not wholly ignored.' 'By the mid 20<sup>th</sup> century the *two conditions* which characterized the political setting of the 19<sup>th</sup> century, the insulated remoteness of agricultural communities and the minimalization of government intervention in the affairs of the community completely changed.' More emphasis was placed on co-operation than on dual polity. Thus making the point that neither was 19<sup>th</sup> century American federalism solely dual nor is the present federal system exclusively co-operative. Rufus Davis, *The Federal Principle: A Journey Through time in Quest of Meaning* (Berkeley: University of California Press, 1978) at 147.

23 M.P. Jain, *Indian Constitutional Law*, 4<sup>th</sup> edn. (Nagpur: Wadhwa and Co., 1998) at 379.

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power distribution between the two can be accomplished only by constitutional amendment.<sup>24</sup>

Compared to the executive federalism scheme of the German and Swiss federations, in the United States it is difficult to imagine that Congress would ever trust the states to enforce federal laws.<sup>25</sup> The usual reason federal laws are enacted is that the states have proved unwilling to tackle the problem. The same political pressure that produced legislative reluctance is, therefore, likely to trigger delay in the execution of such laws. The doctrine stipulates that ‘all governments which are not extremely defective in their organization must possess within themselves the means of enforcing their own laws.’<sup>26</sup> In order to reduce federal bureaucracy and to permit diversity some federal statutes do provide for state participation in their enforcement but they generally provide for federal intervention in case the states do not do the job.

The duality of executive authority has the following advantages: firstly, this is believed to reinforce the autonomy of the legislative body; secondly, it assures to the government the authority to implement and enforce its own legislation, which might otherwise run into difficulty when it relies on the state machinery; thirdly, in parliamentary systems, it is only when the legislative and executive responsibilities coincide that the legislature can exercise control over the body, executing its laws.<sup>27</sup> While this seems to be the general structure of dual polity, it

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24 For more on dual versus co-operative federalism in the United States see Joseph Zimmerman, ‘National-State Relations: Co-operative Federalism in the Twentieth Century,’ *Publius: The Journal of Federalism* 31:2 (Spring 2001) at 18; also Arthur Gunlicks, ‘Principles of American Federalism’ in Paul Kirchof and D. Kommers eds., *Germany and its Basic Law* v.14 (Baden-Baden, series Drager Foundation, 1993) at 91; hereinafter referred to as *Principles of American Federalism*.

25 David Currie, *The Constitution of the Federal Republic of Germany* (Chicago: The University of Chicago Press, 1994) at 167; living examples in this regard are the challenges the federal system faced in the enforcement of civil liberties in the 19<sup>th</sup> century as well as in the 1940s. The defects of the Articles of the Confederation also represent such fears.

26 David Currie, *supra* note 25 at 67.

27 Watts, *New Federations*, *supra* note 20 at 178; Ronald Watts, *Comparing Federal Systems*, 2<sup>nd</sup> edn. (Montreal and Kingston: Queen’s University Press, 1999) at 37; hereinafter called *Comparing Federal Systems*.

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will be misleading to state that there existed no connections between the two levels of governments. Although it is true that dual polity has a strong normative force in the United States, as later sections will demonstrate, the regime of co-operative federalism has also a lot to explain, even in the US on the level of intergovernmental relationships for the most part of the twentieth century.

### **6.1.2 Executive Federalism**

The second possible arrangement of the executive in federations is the one widely practiced in Germany and Switzerland and to some degree in India. In these federations administrative responsibility has not coincided with legislative authority. Administration for many areas of federal legislative authority is constitutionally assigned to the governments of the units.<sup>28</sup>

In Germany, the Basic Law stipulates about the distribution of authority between the federation and the states. The principle included under Article 30 that all residual power accrues to the states is specifically repeated with regard to the execution of federal laws. The Basic Law provides: 'the states shall execute federal laws in their own right in so far as the Basic Law does not otherwise provide or permit.'<sup>29</sup> Consequently, outside of the exclusive federal areas in which the Basic Law provides for direct federal administration, nearly the country's entire administrative agency is undertaken by the states. While executing federal laws in their own right, the states regulate the establishment of the authorities and their administrative procedure but federal government can state

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<sup>28</sup> Watts, *Comparing Federal Systems*, *supra* note 27 at 37.

<sup>29</sup> Article 83 of the Basic Law of Germany; for more details about the German executive division of powers see Philip Blair, 'Federalism, Legalism, and Political Reality: The Record of the Federal Constitutional Court' in Charlie Jeffery and Peter Savigear eds., *German Federalism Today* (New York: St. Martin's Press 1991): 63-82; also Currie, *supra* note 25: 66-67.

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otherwise or issue general administrative rules, if the *Bundesrat* consents to that effect.<sup>30</sup> Besides, if the states execute such laws as a matter of their *own concern*, the measures available to the federation are strictly limited.<sup>31</sup> In particular the federation cannot create its own federal agencies to be sent to the states, although the federal government exercises an oversight to ensure that the states exercise federal laws in accordance with the law and the *Bundesrat* can decide as to whether a state has violated the federal law or not and an appeal can be lodged against such decisions before the Federal Constitutional Court.<sup>32</sup>

The Basic Law also provides for situations where the states enforce federal laws as agents of the federation and subject to binding federal instruction.<sup>33</sup> When the states do so as agents of the federation, the federal government can take measures to ensure that the states execute federal laws faithfully. State authorities may be subject to strict instructions from highest federal authorities. Federal administrative structures exist only in those limited areas where the Basic Law expressly provides for direct federal administration.<sup>34</sup> But the Basic Law has a general saving clause to set up autonomous federal authorities for matters on which the federation has legislative power.<sup>35</sup>

It is important to note, however, that federal administrative power is more the exception than the rule. And to the extent that there are direct federal agencies, there is dual federalism of some kind but its scope is very limited and is not the defining element of the German federation. On the contrary, it is the regime of

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30 Basic Law Article 84(1).

31 This has to be compared with the Indian federal system in which the federal government may issue presidential rule against the culprit state if it so wishes.

32 Basic Law Article 84 (3) and (4).

33 Basic Law Article 85.

34 These matters include foreign affairs, defense, currency, some federal taxes, social insurance programs covering more than one state, railroads and postal services, federal waterways, certain police functions, shipping, air transport, federal banks and the armed forces. See Articles 87-90.

35 Basic Law Article 87(3).

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executive federalism, that is, the fact that the federal government is responsible for the enactment of federal law while the states remain mainly responsible for the execution of such laws that features the German federation. As some would insist, the federal system is functional (legislative power mainly belongs to the federal government and execution to the states) but what is peculiar again is that the two levels of government as well as the two functions are tied up together through the *Bundesrat*, mainly composed of Länder governments and responsible not only for the making of laws together with the lower house but playing a crucial role as an institution of intergovernmental relations.

In general, Switzerland like Germany falls into the category that federal government is for the most part responsible for law-making while the states are for administering it. The phrase executive federalism in the Swiss context as well refers to the cantonal administration of federal law, constitutional or delegated.<sup>36</sup> The principle is the same as what is stated under the German federation, although it is not stated as comprehensive as is the case with the Basic Law. The Swiss Constitution states: ‘The cantons shall implement federal law in conformity with the constitution and the statute.’<sup>37</sup> Furthermore it provides ‘the confederation shall leave the cantons as large a space of action as possible, and shall take their particularities into account.’<sup>38</sup> The latter part grants the cantons greater freedom of action compared to the Indian experience even when they implement federal law. This is an express constitutionally mandated authority of the cantons. While elaborate clauses like the Basic Law provisions of Articles 83 to 90 are missing, in some cases the federal constitution specifically orders cantons to execute federal laws. For instance, the protection of the environment;<sup>39</sup> keeping and caring

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<sup>36</sup> Nicolas Schmitt, *Federalism: The Swiss Experience* (Pretoria: HSRC Publishers, 1996) at 4.

<sup>37</sup> Swiss Constitution Art. 46 (1).

<sup>38</sup> Swiss Constitution Art. 46 (2).

<sup>39</sup> Art. 74(3).

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for animals;<sup>40</sup> civil protection; protection of nature; protection of national highways, and yet the constitution does not fail to state, as in Articles 74(3) and 80(3), a saving clause stating that a federal statute may reserve, if necessary, the executive power to the federal government to directly execute through its own agents. An equivalent of this clause one finds in the Basic Law.

Beyond constitutionally mandated executive federalism, according to Schmitt, legal practice also indicates that the federal legislature can delegate the (executive, not legislative) power to execute federal laws even if the constitution does not specifically provide for it.<sup>41</sup> It has become a basic principle of Swiss federalism. Because the federal legislation often is not exhaustive and because the cantons are allowed to adapt the federal law to their own circumstances, executive federalism gives the cantons some degree of autonomy even in the fields that are regulated by federal legislation. The extent of the autonomy depends of course on the nature and depth of the federal legislation.

It is good to note that in some fields like customs and excise, railways, postal services, the confederation has both legislative and executive functions. Federal government takes decisions and sees their execution through its own federal officers and to that extent dual polity exists. But these fields are a few in scope and the bulk of other federal legislation is administered by the cantons.<sup>42</sup>

In a nutshell, while in the United States the distribution of administrative responsibility in most matters corresponds with the distribution of legislative authority, in these federations there is a constitutionally mandated and entrenched

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40 Art. 80(3).

41 Schmitt, *supra* note 36 at 45.

42 Art. 46 of the Swiss Constitution reads: 'The Cantons shall implement federal law in conformity with the Constitution and the statute.'

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provision for splitting legislative and administrative jurisdiction between the federal government and the states.<sup>43</sup>

The distribution of executive power in India also shows some similarity to the German and Swiss federations, although the arrangement has its own peculiar features.

The distribution of executive powers between the union and the states is somewhat distinct from that of the legislative powers. Opinions are slightly divided about the scheme of executive structure. Basu and Jain state that it follows the scheme of distribution of the legislative powers.<sup>44</sup> That is to say that the executive power of the state is co-extensive with its legislative power, which means that the executive power of a state shall cover only its own territory and with respect to those subjects over which it has legislative competence as included in List II.

Conversely, the union shall have exclusive executive power over matters with respect to which parliament has exclusive power to make laws, List I and the exercise of its powers conferred by any treaty or agreement. On the other hand, Sharma and Chanda argue that the administrative powers of the central government are not co-extensive with its legislative powers, the latter being very extensive.<sup>45</sup> As a result, the federal government executes its laws through the states.<sup>46</sup> Accordingly, they state, there is no exclusive union agency in the states

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43 Watts, *Comparing Federal Systems*, *supra* note 27 at 40; Watts, *New Federations*, *supra* note 20 at 178.

44 Durga Basu, *Introduction to the Constitution of India*, 4<sup>th</sup> edn. (Calcutta 12, S.C. Sarkar and Sons Ltd., 1966) at 255; Jain, *supra* note 23 at 364.

45 We have already noted in chapter six how extensive the legislative power of the union is compared to the federal government in other federations.

46 B.M. Sharma, *The Republic of India: Constitution and Government* (Bombay: Asia Publishing House, 1966) at 419; Asok Chanda, *Federalism in India: A Study of Union-State Relations* (London: George Allen & Unwin Ltd., 1965): 102-105.

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for the administration and execution of union laws.<sup>47</sup> The state legal apparatus is used for this purpose. One explanation provided is historical. Owing to its unitary background preceding the federation, the unified arrangement for the administration of justice was left almost intact. Considerations of continuity and economy also explain to some degree why India follows some degree of executive federalism.<sup>48</sup>

The provisions of the Indian Constitution appear to endorse the latter view.<sup>49</sup> The executive power of the center extends to the whole of India in respect of matters in List I and any power related to the implementation of treaties or international agreements, whether the subject appertains to the Union, state or concurrent list.<sup>50</sup> However, the Union is not obligated to administer by itself all matters in the exclusive domain. It usually entrusts administrative responsibility to the states.<sup>51</sup> The state's executive power extends to its territory in respect of matters in list II. In respect of matters in which both the union and the states have legislative powers,<sup>52</sup> that is the concurrent sphere and a few other cases from the state list, the executive power rests with the states except when either the constitution or a law of parliament expressly confers it on the Union. In this area, therefore, there are several alternatives available. If the Union makes no law, the executive power rests with the states. When the Union makes a law, it can adopt any of the following alternatives regarding executive power under that law. It can leave it with the states or may take over administrative power itself by making an express provision in the law to this effect or it may create a concurrent area by taking part

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47 Cases where the Union government directly enforces its laws include defense, foreign affairs, foreign exchange, posts and telegraph, all India radio and television, airways, railways, currency and customs.

48 Chanda, *supra* note 46: 102-105.

49 See Indian Constitution Arts. 73 and 162.

50 Indian Constitution Art. 73 1 b.

51 Art. 154 (2) b.

52 List III and list II cases falling under Arts. 249, 250, 252 253, 356.



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of the executive power itself and leaving the rest to the states.<sup>53</sup> Besides, the Indian Constitution permits delegation of power by the Union to the states or *vice versa* so long as there is consent on both sides.<sup>54</sup> The Union can also delegate its executive authority on the states by legislation even without the consent of the states.<sup>55</sup> In general, the Constitution lays down a flexible and permissive scheme of allocation of administrative responsibilities between the Union and the states.<sup>56</sup>

In India, unlike the German and Swiss federations, when the center executes its laws through the states, the constitution grants the Union certain powers of administrative control over the activity of the states. The fact that the executive power is not co-extensive with the legislative power of the Union is considered ground enough to impose on the states constitutional responsibility to enforce union laws. The right to issue directives flows logically from this position.<sup>57</sup> Accordingly, the executive power of the state may not impede or prejudice the exercise of executive power of the Union. The Union is also empowered to give directions to the states as may appear to be necessary.<sup>58</sup> The executive power of every state shall also be exercised as to ensure compliance with the law made by parliament.<sup>59</sup> This has been necessitated by the fact that the administrative power of the Union not being co-extensive with its legislative power, the states should observe *uniform direction* in administering central laws, where there is no central agency to administer those laws.<sup>60</sup>

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53 Jain, *supra* note 23 at 346.

54 Indian Constitution Art. 154(2); art 258.

55 Arts. 258 (1); 258 (a); 258 (2) a; see also Basu, *supra* note 44 at 256; Sharma, *supra* note 46 at 421.

56 It also provides some of the mechanisms of co-operative federalism for instance, the provisions enabling parliament to legislate in the state area on the request of two or more states, the scheme of financial relations between the center and the states, administrative relations between the center and the states, full faith and credit-mechanisms by which rights legally established in one state could be given nationwide application. See Indian Constitution Arts. 261, 262, 263 that give advice to the president on interstate disputes, organizations for settling river water interstate disputes; Jain, *supra* note 23 at 380.

57 Chanda, *supra* note 46 at 257.

58 Art. 257.

59 Art. 256.

60 Sharma, *supra* note 46 at 421.

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According to Chanda the implication of the constitutional requirements is far-reaching:

It implies the executive power of a state with regard to the administration of even a subject in the state list must be subordinated to the executive power of the Union in regard to a federal subject. The purpose is to ensure that the executive policies of the Union and the states are in harmony. No state has a right to place its own interpretation on a central law or have its own policy on how it should be enforced under the constitutional provisions. If a state fails to honor its obligation to enforce a central law, the center can under Article 256, issue a directive to the defaulting state. If this is not heeded by the state governments, the central government can invoke Article 356 as authorized by Article 365. By way of sanction if the president makes proclamation under Article 356 he will be entitled to assume for himself any of the functions of the state government as are specified in that Article.<sup>61</sup>

Although the Indian distribution of executive power shows some similarities with the German and Swiss executive structures, it has a large number of unitary features. The overriding power of the Union, which is part of the whole constitutional framework, also manifests itself in this field vividly. The autonomy of the Indian states is not comparable to the states in Germany and Switzerland. In the latter, not only can the states adapt federal law to their own context when they administer it but they are also not subject to the harsh consequences that the Indian states might face for failing to comply with federal instructions. In India, the President is allowed to take over the administrative responsibility of a state, if

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61 Chanda, *supra* note 46 at 108; see also Basu, *supra* note 44 at 267.

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he is convinced that a state has failed to administer federal law according to federal requirements.

Compared to the emphasis on dual polity of the United States, these federations have chosen to establish many points of contact both constitutional and informal between the federal government and the states. This arrangement is based on one or more of the following factors.

First, we should note that we are speaking of a federation of constitutionally established and divided powers but overall operating under a single political union. The welfare state of the 20<sup>th</sup> century, the widening scope of governmental activity and the consequent integration of the economy clearly indicate that it is extremely difficult to divide responsibility neatly between the federal government and states even if desired. The functions assigned to the different governments are inevitably interrelated. Even in the areas for example like defense, often considered as exclusively federal, and education, which often is either a state matter or concurrent, after all, who will deny that the quality of education will somehow affect defense engineering? The need for flexibility rather than rigid classification of authority, therefore, contributed to the close links between the two governments.

A second factor that contributes to the extensive regime of contacts between federal and state organs is the need to avoid unnecessary duplication of agencies. Where the federation is based on a more or less homogenous society (the German federal system is a clear case in point) or where there is scarcity of resources (in this regard India and other emerging federations are cases in point), some

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federations tend to share certain institutions such as courts and administrative services.<sup>62</sup>

A third factor, particularly in Germany and Switzerland where the state executive is basically empowered to implement federal legislation, grants the states further discretion to adapt the federal laws to local circumstances during implementation. Often the federal government lays down considerable uniform legislation while leaving the rest to be applied by regional governments in ways that take account of varying state circumstances.<sup>63</sup> In developing federations too, it may be an important factor for maintaining federal unity during the early stages of the federation.<sup>64</sup>

But there is also a limitation to this manner of enforcing federal laws. In practice the federal government directly administers through its own agencies only a few matters on its exclusive list. Quite a number of federal functions are administered through the states. The law enforcement mechanisms belong mainly to the states and therefore even if the law is federal, its implementation by and large depends on the capacity, co-operation and passion with which the states seek to enforce it. In India for instance, it is not uncommon to see that many federal laws are diluted and remain paper tigers because of weak and indifferent administration by the states.<sup>65</sup> As a result, federal programs can be frustrated as their application depends on the capacity and willingness of the state executive.

This concern seems to justify the dual polity of the United States. As one writer noted: 'In the United States it is difficult to imagine that Congress would ever

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62 Indian Administrative Services, for example, do serve both levels of governments.

63 Schmitt, *supra* note 36 at 44.

64 Watts, *New Federations*, *supra* note 20 at 225.

65 Jain, *supra* note 23 at 355.

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trust the states to enforce federal laws.’<sup>66</sup> There is an inherent concern that the federal government may remain defective as it lacks the means of enforcing its laws. It is to minimize this risk that the German and Swiss federations provide saving clauses that state that if necessary, the federal government may set up its own autonomous institutions to administer its laws.

While the existence of dual authority may be the defining element of the United States federalism and executive federalism a main feature of the Swiss, German and to some degree Indian federations, federal practice indicates that the difference between the two systems is not as sharp as is suggested in theory. The regime of co-operative federalism standing somewhere in between has bridged the gap between the two systems. Even in the United States the functions of different levels of government cannot be executed in isolation.<sup>67</sup> The several governments do not function in watertight compartments. They come in contact with each other at many points. Their areas of operation and functioning cross and intersect in several respects thus creating a variety of governmental relations between the federal government and the states and between the states *inter se*. Indeed, several authors have written that even 19<sup>th</sup> century American federalism had some features of power sharing.<sup>68</sup> Zimmerman has recently confirmed the view that the United States federation had some seeds of co-operative federalism from the outset.<sup>69</sup>

Certainly American federalism has shown some changes during the 20<sup>th</sup> century. After 1937, the federal practice did not reserve much exclusive jurisdiction to the

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66 Currie, *supra* note 25 at 167.

67 Jain, *supra* note 23 at 239.

68 Daniel Elazar, *American Federalism a View from the States* (New York) Thomas Crowell Co., 1966): 53-76.

69 Zimmerman, *supra* note 24: 17-18.

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state governments to legislate free from federal interference.<sup>70</sup> After the New Deal, federal-state relationships shifted radically from its traditional form in which the states became recipients of federal grants-in-aid thereby administering dozens of important federal programs (that contain general nationwide standards), including unemployment insurance, poverty assistance, environmental protection, workers health and safety, public housing, community development, maintenance and construction of interstate highways. With the grants, Congress was able to induce states as well as condition states' continued ability to regulate in a given area on that states' assistance in the implementation of federal regulatory policies. Thus, Congress can secure state co-operation first by making a credible threat to pre-empt state law by creating a federal agency to regulate a field in place of the state unless the state regulates according to federal standards. Secondly, Congress may also condition the state's receipt of federal funds on that state's regulating according to federal standards and will secure state assistance as long as state politicians value the federal funds, even if they dislike federal conditions. One can add the widening role of commerce power over the most part of the 20<sup>th</sup> century that brought about the regime of intra-state trade to the realm of interstate commerce. Duality then is more a myth than a reality.

### 6.3 THE SYSTEM OF INTERGOVERNMENTAL RELATIONS IN ETHIOPIA

As noted in the beginning of this chapter the Ethiopian Constitution offers little guidance on managing federal-state relations relative to roles and tasks. There is

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70 The notion of dualism was relatively weakened during the Marshal era, revived during the years that preceded the Civil War and severely weakened following the War. With the Depression, the New Deal and with the famous decision in *United States v. Darby* in 1941 in which the Supreme Court pronounced that the Tenth Amendment does not serve as a barrier to national government, dual federalism was almost declared irrelevant, if not dead. It is currently getting refreshed as in the *Lopez* and *Printz* decisions. Just in 2000 Chief Justice Rehnquist opined in *United States v. Morrison* 120 S. Ct. 1740, (2000), 1754, emphasizing that there is a need to distinguish between what is truly national and what is truly local. See Arthur Gunlicks, *Principles of American Federalism*, *supra* note 24: 91-101; also chapter six.

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no study of how the relationship between the federal government and the states will be managed on a sector-by-sector basis. It has taken a century or more for other federations to settle these relationships by legislation, litigation, political practice, and tradition. It is time to point out once again that this constitutional gap needs to be filled. As can be gathered from the brief introduction, there is neither a comprehensive dual structure nor executive federalism at work. The institution of co-operative federalism, too, is not well-known.

### 6.3.1 Delegation

One might suggest that the federal government can work through delegation.<sup>131</sup> Indeed, this is stated under the Constitution, which states: ‘the federal government may, when necessary, delegate to the states powers and functions granted to it by Article 51 of this constitution.’<sup>132</sup> There are important issues of interest here. First, which powers from the list of exclusive federal powers under Article 51 can be delegated to the states? One should also note that Articles 50 and 51 are general provisions not limited to legislative powers. They cover broad powers of the federal government, both legislative and executive. As a result, does the provision cover delegation of legislative and executive powers or only one of them? Would not an open clause authorizing delegation contradict the federal principle enshrined in the Constitution? And more seriously, would not this go against the rigid procedure of amendment prescribed in Articles 104 and 105? The

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131 The Indian Constitution relatively provides more elaborate provisions for intergovernmental delegation of administrative power. This may happen either under an agreement between the governments or by legislation. While the Union can use both methods to delegate administrative powers to the states, a state can use only the first method to delegate administrative power to the Union. See Arts. 258(1), 154. See also Jain, *supra* note 23 at 347; Chanda, *supra* note 46 at 108.

132 Article 50(9) and for the record of the debates see *Ye Ethiopia Hige Mengist Gubae Kale Gubae* (Minutes of the Constitutional Assembly) v. 4 *Hidar* 14-20, 1987 E.C. (November 1994) discussion on Art. 50; for comparison see Basic Law Art. 71.

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constitutional guaranteed division of power is likely to be endangered if both the federal government and the states have the right to change this distribution at will.

Apparently, the Ethiopian constitution seems to provide for downward delegation only. It is silent as to whether the states can delegate their powers to the federal government. There is no express clause permitting the states to delegate their powers to the federal government. An express clause included in the draft permitting the states to delegate some of their powers, was rejected on the basis of protecting the powers and functions of the states; such fear is, however, in theory unfounded.<sup>133</sup> It is inherent in delegation that whoever has delegated power can also take it away at any moment. There is an undisputable right to reclaim it. As a result, in the absence of express prohibition in the constitution, the states may delegate part of their powers to the federal government. There is ample experience elsewhere in Germany and India that both powers could be delegated from one level of government to the other.

Yet, delegated power is not without problems. It raises the central issue of whether it is possible to change by legislation the basic tenet of the federal compact. On the one hand, it is possible to suggest that (restricting the argument to execution of laws) delegation is an informal way of providing a solution to specific challenges and need not necessarily be viewed as a digression from the constitution. Apart from this, if we stick to the words of the constitution, that is, a federation established on the free will of the nationalities, then the issue of downward or upward delegation becomes less relevant. In the latter case, the states as creators and holders of residual power have nothing to fear by delegating some of their powers. However, as noted in chapter five at length, the aggregate

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133 See Minutes, note 132 *supra*.



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nature of the federation is more a fiction than a reality. Chapter six and this chapter as well have demonstrated how the federal system operates in reality. Hence the fear that upward delegation might affect the autonomy of the states is not without ground. Federal practice so far indicates that the federal government delegates the states some aspects of the executive rather than legislative powers, with the exception of a few framework laws. Indeed, delegation is done on a piecemeal basis and seems to be limited to administration of federal laws in areas in which the federal government has not established its own agencies. The only comprehensive provisions on delegation we have in the constitution relate to the courts.<sup>134</sup>

So in the absence of any dual or European style of federal law enforcement in the states or alternatively delegation as hinted by the constitution with all its shortcomings, formally speaking the federal government seems to be very *soft*. Indeed, this was obvious during the crisis in SNNPRS in the year 2002. When the state machinery collapsed because of a state party crisis, there was no federal institution to take over responsibility on matters of federal concern. Even though the federal government is authorized by the federal constitution to establish a federal police force,<sup>135</sup> it did not have one except in Addis Ababa and as a result lives were lost and property destroyed until the situation was brought to a halt.

However, the federal government has found at least three ways of influencing the state governments thereby facilitating the enforcement of federal laws and programs: namely through, formerly, the *Kilil Guday Zerf* (Office for Regional

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134 Until very recently there were Federal High Court and Federal First Instance Courts in Addis Ababa and Dire Dawa. In all other regional states, the function of the two courts was delegated to the state Supreme Court and state high court respectively. However, dual court structure has now been established in six regional governments and the delegation continues in the three remaining states. See chapter eight.

135 See Article 51(6).

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Affairs) and presently, the Ministry of Federal Affairs which may be considered as co-operation through executive institutions; party structure and the process of policy making. Whether these mechanisms are enough to substitute the formal division of executive power hinted at by the federal constitution between the federal government and the states is somewhat difficult to tell at this stage.

### **6.3.2 Co-operation through Executive Institutions**

The political relationship between the federal government and the states is regulated by both formal structures weakly defined in the constitution and various proclamations as well as practice outside the legal framework. One such mechanism is the Ministry of Federal Affairs. The activity of the Ministry of Federal Affairs in the states is one of the semi-formalized practices that has an impact on federal-state relations. It is part of the Prime Ministers office in the federal government. Perhaps it is proper to start with the track record of its predecessor, the *Kilil Guday Zerf*.

As to the impact of the now *defunct* office for Regional Affairs on intergovernmental relations, as John Young has rightly pointed out a ‘two tier system’ of federalism is emerging in Ethiopia. ‘Although the constitution does not make such a distinction, in practice one is forced to make a distinction between the regional states of Tigray, Amhara, Oromia and SNNPRS with their relatively greater level of political and economic development on the one hand and the other four states, Gambela, Benshangul-Gumuz, Afar and Somali, otherwise known as ‘emerging states,’ or ‘less developed states’ which stand out for their lack of

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development and historical political marginalization on the other.<sup>136</sup> While the former states, at least until recently jealously guarded their authority and also have better administrative capacity, the latter states are not yet capable of assuming the full responsibility of a state government. At least two factors explain the context of the emerging states. As peripheral states, the impact of historical legacy of isolation from the center is still felt. In relative terms, the shortage of trained personnel is acute in these regions. Infrastructures are almost absent. Secondly, a large section of the people inhabiting these states are pastoralists with no tradition of indigenous settled administration.<sup>137</sup>

Consequently, the federal government provides the emerging states with additional support and this placed them under the Prime Minister's scheme of formerly the Office for Regional Affairs and presently the Ministry of Federal Affairs, which oversees their political development.

The initial argument for such an approach was that the Office was organized to lend a hand to states in general. In the long run, it aimed to enhance the lowland state capacity to utilize their constitutional rights to administer their own affairs. Yet later developments, according to critics, indicated that this objective was an instrument to further their dependence on the center. While the federal government clearly states that without its assistance these states cannot move a step forward under the prevailing constraints, some view this trend as a mechanism of controlling the states by the center. The Office for Regional Affairs was viewed as a key instrument in controlling these states.

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136 John Young 'Along Ethiopia's Western Frontier: Gambella and Benishangul in Transition,' *The Journal of Modern African Studies* 37: 2 (1999) at 344.

137 *Ibid.*

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Ethiopian Peoples Revolutionary Democratic Front (EPRDF), the ruling party, had its own *Rases* in each of the states, particularly in Afar, Benshangul-Gumuz, Gambela and Somali and through them it intervened on several policy issues in state affairs. The Office for Regional Affairs used to send *advisors* to the emerging states and their status was less formalized and without any clear legal framework. The advisors from the Ministry of Federal Affairs virtually run the regional government and hindered self-administration.<sup>138</sup> The criticism is that they exceed their mandate as consultants and assistants and become more like managers that the regional government is accountable to. 'It is acknowledged that they participate in regional council meetings, reconcile differences between coalition parties in government and conduct the crucial *gim gema*<sup>139</sup> session. They are responsible for developing the political position of the regional government, review appointments and dismissals.'<sup>140</sup>

Secondly, EPRDF has also deployed *party officials* in the regions. These are officials known as advisors monitoring and assisting the state governments. For instance, key figures of former TPLF members were assigned to run Oromia, Somali and Afar, and Bitew Belay, most prominent of all and who was the head of the *Kilil Guday Zerf*, formed the SNNPRS and had a key role between 1997-2001. He also often traveled to other regional hot spots like Somali and Afar to reconcile contending political forces or replace inefficient or corrupt regional administrations through what were called 'peace and development

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138 Lovise Aalen, *Ethnic Federalism in a Dominant Party State: The Ethiopian Experience 1991-2000* (Bergen: Chr. Michelse, Institute of Development Studies and human Rights, 2002) at 86.

139 *Gim gema* literally refers to evaluation and has a long and unique history in the ruling party. Continuous sessions are held when serious public complaints or 'unwanted' officers become red tapes to government policy. Its proponents state that it is an evaluation of performance records, part of the routine in public administration whereas its critics hold that it is a means to purge critical thinkers or the opposition from office.

140 John Young, *supra* note 136 at 342.

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conferences.<sup>141</sup> The point is that the federal government's concern over these peripheral states, as the most marginalized ones is appreciable. The issue is simply that the assistance and supervision by advisors or party officials goes too far until the ordinary person observes that the key persons running the regions in fact are not the elected regional officers but the appointees of the federal government. In the end this practice seemed to have perpetuated the regions dependency on the center. Virtually every critical political decision had to be considered by these watchdogs.<sup>142</sup>

At least until March 2001 there was some difference between the states of Tigray, Amhara, Oromia and SNNPRS on the one hand and the emerging states on the other. In the former perhaps because the ruling coalition party in each of the states is believed to be the strong wing of the ruling party that runs the federal government, federal intervention was relatively less formal. In the second group of states there was close supervision earlier on by the Regional Affairs of the Prime Ministers office and presently by the Ministry of Federal Affairs.<sup>143</sup>

After the split within TPLF, an influential coalition of the ruling party, EPRDF decided to withdraw those *rases* as well as the *party figures* with a view to enhance state autonomy.<sup>144</sup> It was believed that their role had gone too far,<sup>145</sup> to

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141 Such conferences are held in a number of cases. More often they are held in the emerging states and in the end the conferences result in dismissals of officers of various hierarchies on allegations of poor performance, corruption etc. Young, *supra* note 136: 330, 336.

142 *Ibid.*, at 343.

143 Comparing the two groups, Aalen, like Young, states that all in all the four emerging states were the units in the Ethiopian federation, which experience the most severe central interference in regional affairs. They were governed by formally independent parties but were nevertheless practically run by officials from the regional affairs department and centrally assigned party cadres without formal positions. The low level of political development in the emerging states means that EPRDF plays a greater role in local administration in these regions than in other parts of the country. Aalen, *supra* note 138 at 88.

144 In March 2001, the party chairman of TPLF and current Prime Minister was challenged by an opposing faction. At a critical party decision 12 members voted against and 16 in favor, two being absent, one the late Kinfe G. Medhin and Mulugeta Chaltu who resigned from his position in 2003. Apparently the cause of the split as alleged by the dissenters is that the PM had been too complicit with Eritrean matters during the war with Eritrea from May 1998- December 2000 (Indian Ocean News Letter March 24, 2001). The dissenters were expelled from

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the extent of making such states puppet states rather than autonomous states. The record of the Office for Regional Affairs was not, therefore, that impressive.

It was in this context that the Ministry of Federal Affairs then *de jure* replaced the Regional Affairs Office of the Prime Minister. The powers and duties of this office are rather briefly outlined as follows:

- a. In co-operation with the regions, ensure that public peace and order is maintained;
- b. without prejudice to the provisions of Articles 48 and 62(6) of the federal constitution, facilitate the resolution of misunderstandings arising between regions;
- c. *give assistance* to the regions with particular *emphasis* on the *less developed ones*;
- d. supervise and co-ordinate the executive organs,<sup>146</sup> mainly, Federal Police Commission, Federal Prison Administration, National Urban Planning Institute, Addis Ababa and Dire Dawa city administrations.<sup>147</sup>

One may wonder about the differences between these two institutions apart from the fact that now the new institution's function is more legalized and has been set

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their party as well as government position. This had a domino effect on other member parties of EPRDF in the SNNPRS and Oromia. Senior party members from those who shared the view of TPLF dissenters were equally expelled from party and government positions (Indian Ocean News Letter, June 30, 2001) (Africa Confidential Oct. 26, 2001).

145 This fact is no more contested. Even a senior member of the ruling party *Ato Sebhat Nega*, in an interview held with *Woyin* admits that low ranking EPRDF cadres were practically ruling some of the regions, relegating the elected state officers. For full content of this interview see at <http://www.aiga1992.org/woyin-sebhat5.html> as visited on July 22/2004. Several meetings held in July 2001, in the aftermath of the party crisis, chaired by a senior TPLF central committee member (Ambassador Addis Alem Balema), also confirm the same view. In his words 'we have been making and unmaking the regional governments in the

states and how could we honestly expect that they will autonomously administer themselves' (source: author's personal experience).

146 Article 11, Proclamation No. 256/2001, 'Reorganization of the Executive Organs of the Federal Democratic Republic of Ethiopia,' *Federal Negarit Gazeta*, 8<sup>th</sup> Year No. 2, Addis Ababa, 12<sup>th</sup> October 2001.

147 *Ibid.*, Art. 5(6).

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up as one of the federal ministries. According to Dr. Gebreab, ‘the objective of providing additional support, that is, more federal impetus to the emerging states has remained the same. The new element added is a more or less coherent policy framework, a vision that hinges around capacity building of the emerging states. There was a similar mission earlier on but it focused on the traditional concept of training and infrastructure. Now capacity building is all-inclusive including change in attitude, in work ethos, guidelines, procedures and institutional capacity.’<sup>148</sup> He also points out that now it is intergovernmental relations rather than inter-party relations. Intergovernmental relations, according to Gebreab, assume the state party as partners and as coalitions. Implying that even if the parties that run the emerging states do not constitute members of EPRDF, his office is working with them, in the fields specified by law, and the federal government is not trying to replace them. According to Gebreab the office recognizes the state executive and the ruling party in these regions as a partner or a coalition government and influences them indirectly using the government venue rather than the party channel. He says, ‘I am not a political advisor but a representative of federal government’<sup>149</sup> implying his key role as instrument of intergovernmental co-operation at least in these states.

Looking at the list of powers of the new Ministry and the practice, it is the assistance, not to all the states but to the less developed states, which is still given emphasis. Its role as an instrument of intergovernmental relations between the federal government and *all the constituent states* is not explicitly stated. Its important role as an institution for supervising or co-ordinating enforcement of federal laws and programs is not clearly stated. This rather crucial role is missing

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148 Interview with Dr. Gebreab Barnabas, Minister of State, Ministry of Federal Affairs, Walta Information Center, December 25/2002.

149 *Ibid.*

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in its power. As can be gathered from the proclamation, it is not broadly organized to facilitate intergovernmental relations between the center and states and its supervisory and co-ordinating role is limited to few institutions. No institutional structure has been established as far as the federal executive in the states is concerned.<sup>150</sup> Until such further reform then, its role will be limited like its predecessor in relation to the emerging states and in relation to the institutions mentioned above.

In its conflict handling power (see section b above) there is certainly an overlap with what is stated under Articles 48 and 62(6) of the Constitution on the powers of the HoF. The general scope is that the HoF does the legal aspect of the conflict but the Ministry of Federal Affairs handles administrative, political and developmental affairs with the states. It facilitates political negotiations before, for instance, an issue is taken for referendum. In short, it undertakes a ‘non-binding consensus building or political negotiations.’<sup>151</sup> But there is nothing that prohibits the HoF from adopting the same process of dispute settlement in addition to its quasi-judicial function of constitutional interpretation and dispute settlement. After all one of the reasons for taking the power of interpreting the constitution from the regular judiciary to the political organ, HoF, was because it was felt, that the HoF is more legitimate than the courts. The HoF as a ‘representative of Nations and Nationalities’ was preferred to the courts, for its legitimacy as well as because constitutional interpretation was considered a political act. Indeed, one has to state explicitly that to the extent that the HoF exercises its powers to settle disputes between states and the crucial power of ‘determining the division of revenue derived from joint federal and state tax

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150 One reason suggested is the lack of human resources. In the interview process it was pointed out that Gambella had only one medical doctor and in the opinion of Dr. Gebreab, it will be impossible to think at this time to set up its structure in the regions. Interview with Dr. Gebreab Barnabas January 3/2003.

151 Interview with Dr. Gebreab Barnabas January 3/2003.



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sources and the subsidies that the federal government may provide to the states'<sup>152</sup> it remains an important organ of intergovernmental relations.<sup>153</sup>

However, a lot of skepticism surrounds the Ministry of Federal Affairs because of the bad record of its predecessor. It remains to be seen if this young institution is able to transcend the stigma associated with the *Kilil Guday Zerf* and serve as an institution of intergovernmental relations, rather than a party instrument. So far the effect of TPLF's split and the legalization of federal-state relations, albeit in a limited form, through the Ministry of Federal Affairs is not yet clear. Yet it is good to point out that federal-state relations in Ethiopia are closely linked to changes in party power.<sup>154</sup> As has been pointed out earlier, when TPLF split into two and the dissidents were expelled from the party as well as government positions they held, it had a *domino effect* on other member parties of EPRDF in the SNNPRS, Tigray and Oromia. Senior party members from OPDO, coalition party and member of EPRDF as well as the ruling party in the state of Oromia and in the SNNPRS who shared the view of TPLF dissenters were equally expelled from party and government positions. At this moment it was difficult to distinguish party structure from constitutional institutions. It appears that because 'EPRDF has effectively merged with the state, the crisis of the Front is in effect a crisis of the Ethiopian state.'<sup>155</sup> The internal split in the TPLF and the following crises in the other states show how fragile and soft the government institutions are and it is tempting to state that there cannot be but a party channel. Institutions for intergovernmental relations, separate from party channels are, therefore, not only

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152 Article 62(7); see also the power of the HoF to order federal intervention Art. 62(9).

153 For more on the role of the HoF in intergovernmental relations see chapter three.

154 Aalen, *supra* note 138 at 104.

155 Medhane Tadesse and John Young, 'TPLF: Reform or Decline?' *Review of African Political Economy* 30: 97 (2003) at 389; on the other hand some state that crisis of that magnitude could have led to military rule, civil war or anarchy but because the political elite demonstrated political maturity, it paved the way to a system that is conscious of managing different kinds of conflicts. See Tom Patz, 'Ethiopia,' in Ann Griffiths ed., *Handbook of Federal Systems 2005* (Montreal and Kingston: McGill Queen's University Press, 2005) at 144.

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important for day-to-day co-ordination of federal laws but are also conditions for maintaining federal stability. These institutions should be permitted to evolve as autonomous government bodies so that they will survive regardless of any party bickering.

### **6.3.3 Co-operation through Party Channels**

We now turn to the second mechanism. Despite the formal constitutional division of powers as outlined in other sections and the dual executive system, the lack of institutionalized federal executive powers throughout is not without reasons. Implementation of federal law is facilitated by *party channels*. This is perhaps the most pervasive scheme used by the federal government to influence state governments as well as to guarantee uniformity of policies. Perhaps the use of party channels is not unique to the Ethiopian federation. Riker and Schaps state<sup>156</sup> that ‘intergovernmental disputes are important features of federations although the excess may lead to a peril or the absence of which might be an indicator of full unification or the federal collapse... Federations constantly suffer from a lack of integration between policies of the federal government and the states. The institutional structure of most contemporary federations is, therefore, important to contain intergovernmental disputes and to integrate policies.’ One such mechanism they outline is through political parties, which could be a source of harmony or disharmony. A political party is expected to harmonize the policies of the federal government and constituent states.

If the officials of both sets of government are adherents of the same ideology or followers of the same leader or leaders, then they might be expected to pursue

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156 William Riker and Ronald Schaps, ‘Disharmony in Federal Government’ in William Riker, ed., *The Development of American Federalism* (Boston: Kluwer Academic Publishers, 1987): 73, 74, 75.

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harmonious policies. But in all federations which have a relatively free society with competing political parties, just the converse occurs. In the heat of party struggle, competing parties use the central government against the constituent governments and vice versa. The only circumstance in which it is perhaps impossible for intergovernmental conflict to appear as a product of party competition is when one highly disciplined party controls all governments, both federal and the state. This tendency is rare unless it is a federation under a dictator. The forces of diversity will not allow complete absorption to occur in a free society.<sup>157</sup> In federations, there are two extreme situations with so many other options in between. 'If one homogenous political party controlled all governments, both federal and the state, there would be no occasion for intergovernmental conflict. If on the other hand, all constituent governments were controlled by one homogenous political party and the federal government by another, the degree of federal conflict would be tense. Between these two extremes lie all existing federations.'<sup>158</sup>

The Ethiopian federal system seems to fit one of the extremes rather than the multiple options in between. The general view is that if the same party organization controls both federal and state level governments and has a centralized party structure, this might weaken the power of the regional governments in a way that undermines regional autonomy. On the other hand if a party system is genuinely decentralized or if the regional governments are run by parties that operate autonomous from the party in power at federal level, this might enhance the power of the regional governments and strengthen both their

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157 *Ibid.*, at 76.

158 *Ibid.*, at 77.

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capacity to run regional affairs and genuinely represent regional interests at federal level.<sup>159</sup>

Ethiopia is ruled at present by a coalition composed of several regionally based ethnic parties. At first sight it appears to be a party structure that enhances a federal division of power because the federal government appears to be run by an organization with a regional, rather than central basis of power. But practically, the EPRDF is controlling all the regional state governments in the Ethiopian federation; either directly through the member parties or indirectly through affiliated parties. On the positive side, given Ethiopia's diverse society, coherent and disciplined party at federal and state levels appears to be an asset, compared for example with what is happening in Nigeria, but at times this exceeds its limit and affects state autonomy. The four major parties of EPRDF, Oromo Peoples Democratic Organization, (OPDO), the Amhara National Democratic Movement (ANDM), the Southern Ethiopian People's Democratic Front (SEPDF) and Tigray Peoples Liberation Front (TPLF) operate in the four regions of Oromia, Amhara, SNNPRS and Tigray respectively. In addition to the member states that are under direct control by EPRDF member parties, EPRDF has close allies and affiliated parties in the other regional states of the federation. These parties are formally autonomous from the ruling party but cannot be considered as opposition parties because of their tight links with the EPRDF.<sup>160</sup> We need to note what we stated earlier in relation to these states about the role of the *Kilil Guday Zerf*. The EPRDF has been instrumental in creating the affiliated parties,<sup>161</sup> namely the Afar National Democratic Front in Afar region; the Somali Peoples Democratic Front in Somali; the Gambela People's Democratic Front (GPDF) in Gambela; the

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159 Aalen, *supra* note 138 at 81.

160 Aalen, *supra* note 138 at 83. Also note the statement by Ato Sebhat Nega in his interview with *Woyin* where he points out how the regional governments were subordinated to cadres from EPRDF, *supra* note 145.

161 Note the statement by a senior TPLF member in footnote 145.

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Benshangul Gumuz Peoples Democratic Unity Front, BGPDUF in Benishangul Gumuz and the Harari National League (HNL) in Harar.

This largely centralized party structure appears to contradict the division of power that is expected to exist in a federation.<sup>162</sup> The point is that the party structure in Ethiopia undermines the federal division of power and subordinates the regional governments to the federal government. It is this factor along with its impact on the process of policy-making that explains the centralizing trend in the federal system. It is also this factor that appears to explain the fact that intergovernmental conflicts are rare, perhaps absent, from most of the contemporary conflicts that challenge the federal system. As already demonstrated in chapter five, boundary disputes, the issue of local tyranny, and not federal-state issues dominate the federal system. It is only in 2004 that the regime of fiscal transfers was brought to the table in the HoF.<sup>163</sup> As a parliamentary federal system, the party discipline combined with ‘democratic centralism’<sup>164</sup> seems to have great impact on how decisions are taken within the party. A central committee leads the ruling coalition. The central committee, often through the chairman, generates specific plans of action which are the basis for the EPRDF’s five-year plans that are implemented nationwide. The five-year plans to be implemented are adopted at federal level and become the basis for state government plans and policies.<sup>165</sup>

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162 By now there is ample evidence pointing out that a centralized party system and federalism are more an oxymoron. It is certainly this anomalous combination that led many federal writers to conclude that many of the former socialist federal systems were federal in form and not in operation. See for example Alfred Stepan, ‘Federalism and Democracy: Beyond the US Model,’ *Journal of Democracy* 10:4 (October 1999): 22-23; Daniel Elazar, *Exploring Federalism* (Tuscaloosa, AL: University of Alabama Press, 1987); Ivo Duchacek, ‘Antagonistic Cooperation: Territorial and Ethnic Communities,’ *Publius: The Journal of Federalism* (Fall, 1977): 3-29.

163 See chapter three for more.

164 This is a very vague concept but implies that decisions are often reached at party level, often at the top executive level (small number of party leaders allege to have monopoly of theoretical knowledge, as ideologues, as sources) and flow directly (top-bottom, not the other way round) to the grass root party members. One is supposed to strictly execute the decision coming from this higher hierarchy. This in turn seems to be based on the idea that a party is supposed to lead, not to be led by the people. In Amharic they say ‘yehizib chira anketelim,’ which roughly goes like ‘we do not follow the tail of the people,’ interview confidential, January 3, 2002, Addis Ababa; see also Medhane and Young, *supra* note 155 at 394.

165 Aalen, *supra* note 138 at 82.

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What is apparent, therefore, is that except the difference, between the two groups of states distinguished above, which is a matter of degree, both groups of state government are under the direct control and influence of the ruling party. This in turn seems to fit the extreme scenario mentioned above. Consequently, the constitutional right of the states to formulate and implement plans and policies are severely diminished by the fact that the state governments are in one way or another forced to follow the centrally designed policies and plans, resulting from the party structure.<sup>166</sup> Just to mention one instance, even if there is no formal governmental relation between the Federal Ministry of Information and the respective State Bureaus of Information, the Federal Minister of Information is head of EPRDF's party propaganda and chairs meetings of state propaganda machinery (for the most part heads of regional bureau of information are members in such meetings) in his capacity of party member and thereby installs whatever directions necessary which the state propaganda organs have to implement.<sup>167</sup> Yet, there is no governmental structure connecting the respective federal and state offices.

In our comparative studies, we earlier on noted the various complex networks of relationships between the federal government and the states in Germany and Switzerland. In Ethiopia, except the party channel, there is hardly any institutionalized intergovernmental mechanism comparable to those in the European federations. There are no formal meetings on governmental level between federal ministers and state governments. Nor are there any such meetings

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166 Aalen, *supra* note 138 at 85. However, it is important to project the Ethiopian federal structure in the absence of strong and centralized parties like EPRDF. There are some who contend that such a party structure is not only necessary but also a precondition in a federal type state like Ethiopia. Dr. Gebreab, for instance, argues that only under such system can one easily facilitate federal-state relations. Speech made by Dr. Gebreab at the National Conference on Federalism and Conflict, Addis Ababa, May 5-7, 2003.

167 Interview with Suleman Dedefo November 26/2003, Addis Ababa.

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among representatives of legislative bodies of the two governments. Particularly the meetings of respective heads of federal and state governments having similar functions as well as federalism without the center, that among others includes meetings among equivalent officers of state governments (*i.e.* individual state ministers whose responsibilities cover the *same areas* of policy) could play a crucial role in harmonization of federal laws and as a forum for sharing experiences.

One significant development along this line is the issuance of Proclamation No. 334/2003 on authentication and registration of documents. The proclamation sets up the federal office of the Notary responsible for the registration and authentication of commercial documents and declares not only that the document so authenticated is conclusive but shall also be acceptable in all states. Conversely, a document authenticated and legalized by the state governments will also be conclusive and acceptable for the federal government.<sup>168</sup> This is an attempt, albeit partially, to introduce what in the United States is called the ‘full faith and credit clause.’<sup>169</sup> This is certainly an important development in securing legal certainty at both federal-state and interstate level.

#### **6.3.4 Co-operation through the Process of Policy-Making**

Another instrument of influencing the states and hence inter-governmental relations and in enforcing federal policies is through the power of policy-making.

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168 Proclamation No. 334/2003, Authentication and Registration of Document, *Federal Negarit Gazeta*, 9<sup>th</sup> Year No. 54, Addis Ababa, 8 May 2003; Arts. 27 and 30.

169 See US Constitution Art. IV section 1 that partly reads, ‘Full faith and credit shall be given in each state to the Public Acts, Records, and Judicial Proceedings of every other state...’

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The federal government has currently issued several policy documents.<sup>170</sup> These documents outline sometimes areas covering even elementary education that are according to the Constitution within the competence of the states. The documents might make some sense in the context of state governments that lack expertise who may design the necessary policy areas but the authors sometimes forget that in a federal system, there is limit on the competence of the respective governments. The documents mainly originated as party documents but were then published as federal documents and published by the Ministry of Information. Party members at federal and state level discuss them and decide to implement them in their capacity as government officers. In general the states accept the economic, social and development plans issued by the federal government. In theory they can adapt the policies to fit their own circumstances but the federal government does play a key role in influencing through national policies mainly due to the party congruence and decision-making structure and secondly, because the states lack the required expertise to bring alternative policies.<sup>171</sup>

#### 6.4 CONCLUSION

We can conclude from the above discussion that in Ethiopia, mechanisms for enforcing federal laws and policies are weak, if not completely non-existent, in many areas. The reliance on party instrumentality might be feasible in the light of the present resources and manpower constraints but it is very unreliable when there is a tension between government and party structure. In this respect Ethiopia

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170 See for instance *Ye Ethiopia Democrasiyawi Republic Mengist Ye Masfesem Akim Ginbata Strategy ena Programoch* (Ministry of Information, Addis Ababa Yekatit 94 E.C); also *Be Ethiopia Ye Dimocraci Sirat Ginbata Gudayoch* (Ministry of Information, Addis Ababa, Ginbot 94 E.C.)

171 Some authorities indicate that some of the states literally copy the federal policies. Interview with Suleman Dedefo November 26/2003. But Gebreab speaks of harmonization and customization of federal policy by the states as common. Interview January 3/2003.



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has enough lessons to learn from the 2001 crisis. Consequently, it seems better to look for either of the options discussed in other federations.

As has been pointed out in this chapter, broadly speaking there are two options: the dual structure hinted at in the constitution or the executive federalism practiced in Germany and Switzerland. This author recommends that in the short run, the European experience seems preferable, but in the long run, the dual system with its co-operative complement is better. The operation of the federal system in Ethiopia is at present hindered by, among other things, the lack of resources and trained manpower. As a result, executive federalism might be a good option in ameliorating the problem. It might minimize the unnecessary duplication of agencies and resources by sharing certain institutions such as administrative services<sup>172</sup> and courts. This arrangement also has some other advantages.

First, we should note that we are speaking of a federation of constitutionally established and divided power but over-all operating under a single political union. The welfare state of the 20<sup>th</sup> century, the widening scope of governmental activity and the consequent integration of the economy clearly indicate that it is extremely difficult to divide responsibility neatly between the federal government and states even if desired. The ever-expanding regime of constitutional or other practice-based shared powers is clear evidence to this effect. It is evidence of the fact that the functions assigned to the different governments are inevitably interrelated. The need for flexibility rather than a rigid classification of authority contributes to the close links between the two governments.

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172 For instance see also Indian Constitution Art. 312.

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Secondly, in Germany and Switzerland where the state executive is mainly responsible for the administration of federal laws, the system grants discretion to adapt the federal laws to local circumstances during implementation. Often the federal government lays down considerable uniform legislation while leaving the rest to be applied by regional governments in ways that take account of varying state circumstances.<sup>173</sup> In developing federations too, it may be an important factor for maintaining federal unity during the early stages of the federation.<sup>174</sup> But one could argue that in Ethiopia at present, the states are not even able to take care of their own affairs let alone to enforce federal matters. This is clearly the case in Afar, Somali and Gambela, at least so far. If the European alternative is chosen, therefore, it should take this problem into account. Besides, one has to work out the responsibility of both governments, *i.e.* the level of supervision by the federal government, finance and condition of intervention, if necessary. Another drawback of this approach is that as the states do not influence much of the federal decision-making process, they might not be so co-operative to implement it. It is difficult to trust the state agents under such circumstances. The efficiency of federal law and policy depends on the state administration and carries with it the risk that the laws and federal programs may merely remain paper tigers. As a result federal programs could be frustrated. The need for a dual executive authority stems from this and other reasons as well. In a less democratic country, the presence of federal structure, separate from the state machinery (dualism) also provides a second alternative for the citizen to look for amidst the linguistic and religious diversities prevalent in the states. The need for uniformity in some fields and affairs too is another good reason. Besides, dual executive structure, as noted earlier on, not only enhances the autonomy of the legislature but is also a mechanism for subjecting the executive to strict legislative control.

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173 See Schmitt, *supra* note 36 at 44.

174 Watts, *New Federations*, *supra* note 20 at 225.

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Review Questions

1. How is executive power divided in Ethiopia?
2. What does Intergovernmental Relations mean? How is it different from exclusively exercised powers?
3. What shape do you think IGR should take in Ethiopia?
4. What are the possible institutions for IGR?

## Chapter Seven

### Federalism and the Adjudication of Disputes

#### 7.1 Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation (HoF)

*Ethiopia adopted a federal system de facto since 1991 and de jure since 1995 with a view to decentralizing power and resources from the center and to accommodate the diverse ethno-linguistic groups that exist in the country. As constitutionally entrenched division of power between federal and state governments is at the bed rock federalism and as the division of powers often is far from clear, it is inherent in any federal system that there must be an organ for the adjudication of constitutional issues and for the settlement of disputes concerning the competence of the two levels of governments. While in most other federations this is a task undertaken by either the Supreme Court or the Constitutional Court, in the 1995 Ethiopian federal constitution, this task is entrusted to the non-legislative second chamber, other wise known as the House of Federation (HoF). This article attempts to review the impact of such constitutional arrangement on the judiciary based on the experience of the HoF ever since its establishment.*

*The general trend observed is that despite institutional and pragmatic challenges, the HoF has over the years evolved as a legitimate body for the settlement of disputes at least as far as issues of high political and constitutional significance are concerned. This is not, however, without implications on the role of the judiciary. While the constitution has left some grey areas for the judiciary, the new laws that define the role of the HoF and recent decisions of the HoF indicate that the judiciary has been significantly affected owing to the role of the HoF.*

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**7.1.1. FEDERALISM AND THE ADJUDICATION OF DISPUTES: INTRODUCTORY REMARKS AND CONTEXT**

Ethiopia is a multicultural, multi-religious and the second most populous country (by latest estimates 77,000,000) in Africa next to Nigeria. Except for the 20<sup>th</sup> century and leaving out some exceptions, Ethiopia existed for the most part of its long and independent history, principally under a monarchy with the Orthodox Christian faith serving as pillars of unity and various kinds of regional forces representing diversity and exercising important powers such as taxation on some economic activities, maintenance of local security and regulation of trade. Thus the seeds of what some authors call “federal Society”<sup>424</sup> (regionally grouped diversity) has been there for long.

Towards the end of the 19<sup>th</sup> century when Ethiopia took its present shape, and with the emergence of strong emperors, particularly Haile Selassie (1930-1974) and the Military (1974-1991) the centre virtually abolished the autonomy of all regional forces through the introduction of centralized taxation system, modern army and police force, by sending appointees from the centre to the localities and crucial of all by imposing the motto 'one country, one culture, one language, one people, one religion.' Thus the values of the state and its institutions became exclusive. Furthermore, while the process brought all sorts of diverse groups, the state structure failed to incorporate them into the political process and this led to the state crisis that reigned for the most part of the 20<sup>th</sup> century.

There is lack of consensus in explaining the source of the state crisis but two of

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<sup>424</sup> See William Livingston, "A Note on the Nature of Federalism," *Political Science Quarterly*, 67:1 (March 1956): Pp. 81-95. The introductory observations draw from Assefa Fiseha, *Federalism and Accommodation of Diversity in Ethiopia: A Comparative Study*, Nijmegen: Wolf Legal Publishers (2006) Chapter one Pp. 1-87.

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the most dominant perspectives include the "instrumentalists"<sup>425</sup> most of whom include western observers and some Ethiopian analysts who portray the centralization of political power and resources as the core of the problem and consider the proliferation of ethnicity as wrong manifestation of political and economic deprivation that will simply vanish from the political spectrum with the decentralization of power and resources and the advocates of the "national oppression thesis" who think that Ethiopia was simply the "prison house of nationalities" and hence call not only for the decentralization of power and resources but also for the accommodation of the different groups into the political process by ensuring self rule and adoption of pluralistic language policy. The latter claim that identity may change or adapt in reaction to a given situation but does not necessarily vanish from the political spectrum and hence the emphasis on accommodation.

Ethiopian Peoples' Revolutionary Democratic Front (EPRDF), the ruling party that overthrew the military regime (1974-1991) as an advocate of the second perspective and of the right of nationalities to self-determination secession included, dominated the political scene since 1991, decided to abolish the system of unitary government and introduced the federal system *de facto* since 1991 (the Transition ranged from 1991-1994) and *de jure* since August 1995 with the adoption of the federal Constitution. Since then, Ethiopia is officially a multicultural federation forging unity in diversity constituting nine autonomous states and two semi-autonomous cities that are accountable to the federal government. The constituent units have been reorganized with a view to ensuring

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<sup>425</sup> Such thinkers are called instrumentalists because they view religious and ethnic groups as a means to achieve some political and economic goal and having no relevance thereafter. Included in this category are John Markakis, *Resource Conflict in the Horn of Africa*, London Sage Publications, (1998); Christopher Clapham, "Ethnicity and the National Question in Ethiopia," in Peter Woodward and Murray Forsyth eds. *Conflict and Peace in the Horn of Africa: Federalism and its Alternatives*, Aldershot: Dartmouth, (1994) pp. 30-35; Jon Abbink, "New Configurations of Ethiopian Ethnicity: The Challenge of the South," *Northeast African Studies* 50:1 (1998) p. 60.

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self-rule to at least some of the major nationalities and in some units this has created "inconvenient" local minorities. The attempt is to forge multicultural federation whose ambition is to ensure self-rule to the different nationalities, divide power and resources among the different groups and adopt an accommodative language policy. Consequence of which is that unlike many constitutions, the Ethiopian Constitution commences by saying "We the nations, nationalities and peoples of Ethiopia and under Article 8 the nationalities are declared sovereign and under Article 39 they are granted with the right to self-determination that among others include the right to use one's language, to preserve once culture and history, the right to equitable representation at federal institutions and finally and if the need arises, to secede after complying with some procedures.

While some observers contend that the federal system has not in any way reduced the nature and intensity of various conflicts, a closer observation seems to reveal the point that given the political atmosphere in which the country was in 1991, that is, a virtually collapsed centralized regime in which one could hardly predict what will follow shortly, the different groups have over the last decade and half shown a clear stake in the federal arrangement. Since the introduction of the federal system, there has been a significant shift of discourse from assimilation to an open accommodation of the nationalities, creating a political space to historically marginalized groups. The federal system as well has diffused the various conflicts to the local level making them less a threat to the centre. Besides, the argument that conflicts are recurring and that the federation may wither away with the ruling party is something that draws its evidences from the former failed federations of the USSR and Yugoslavia. Yet, there are ample

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evidences indicating that such federations were "window dressing federations"<sup>426</sup> and not federations in reality. One could also make positive scenarios based on the experience from multicultural federations such as Switzerland and India. As such diversity is not a threat in itself, it becomes a fertile ground for conflict only if the system fails to provide a political solution to it in the form of resource and power sharing, the accommodation of the groups to the decision-making process and by ensuring self-rule.

### **7.1. 2. Constitutional Adjudication: The Role of the Tribunals**

Crucially important in a federation is the presence of a body that umpires disputes concerning the constitutionality of laws in general and the division of powers in particular. From the principle of constitutionally guaranteed division of power and the supremacy of the constitution follows that the last word in settling disputes about the meaning of the division of powers must not rest either with the federal government alone or with the states.<sup>427</sup>

The constitutionally entrenched division of power is the hallmark of federations. However, the division of powers between the federal government and the states cannot be delineated in such a way as to avoid all conflicts. As R. Davis notes the 'division of power is artificial, imperfect and a generalized skeletal thing. Political life cannot be perfectly or permanently compartmentalized. The words can rarely be more than approximate crude and temporary guides to the ongoing or permissible political activity in any federal system.'<sup>428</sup> Certainly disputes about the terms of the division of power are bound to occur. Besides, adaptation and the need to

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<sup>426</sup> See for example Daniel Elazar, *Exploring Federalism*, Tuscaloosa, AL: University of Alabama Press, (1987).

<sup>427</sup> K. C Wheare, *Federal Government* 4<sup>th</sup> edn., London: Oxford University Press, (1963) Pp. 60-61.

<sup>428</sup> Rufus Davis, *The Federal Principle: A Journey Through Time in Quest of Meaning*, Berkeley: University of California Press, (1978) p. 143.



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adjust and accommodate the division to cope with the new, the unforeseen and the unintended remains crucial and interpretation is one of such methods. In the Ethiopian Constitution, this rather crucial function is granted to the HoF.

Time and space do not permit a comprehensive study of constitutional review of legislation in various federal systems. Yet in light of the relevance of this enterprise in consolidating the federal system, an attempt is made here to link federalism and the role of the judiciary, albeit with the main emphasis on the Ethiopian experience. Let it be clear from the outset that federalism has served as one of the important justifications for the introduction of the system of constitutional review of legislation.<sup>429</sup> Through the tribunal that interprets and adjudicates constitutional issues federal systems have been able to promote legal integration.<sup>430</sup> There is no exclusive claim here that federal integration is the sole function of the tribunal or the judiciary as indeed political and economic factors do play a crucial role in promoting integration. Yet the highest tribunals of federal systems or the body that adjudicates constitutional issues do also play an important role. One will note that in the Preamble of the Ethiopian Constitution an express statement is made to the effect that the federal system aims at creating 'one political and economic community' and a promise of 'common destiny.' The latter, if taken seriously, has even stronger implications in the sense that if the nationalities indeed have a 'common destiny' then they have to live together, even if they dislike each other. If this ambitious plan of federal integration is to have meaning then one avenue for such integration is through the mechanism of constitutional adjudication.

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<sup>429</sup> Constitutionalism, the incorporation of human rights in many national constitutions and rule of law are the other justifications. The former upholds that governmental power is limited by constitutional norms. There are, therefore, procedures and institutions established to enforce such limitations reducing the dangers of unchecked power. See for example Vicki Jackson and Mark Tushnet, *Comparative Constitutional Law*, New York: Foundation Press (1999) Pp. 190-206.

<sup>430</sup> See Mauro Cappelletti, *The Judicial Process in Comparative Perspective*, Oxford: Clarendon Press, (1989): Pp. 169; 312-313; herein after called *The Judicial Process in Comparative Perspective*.

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As already mentioned, one of the fundamental features of a federal system is the division of powers between the federal government and the states. Besides, in federal systems, not only is the federal constitution supreme but the federal law should also be declared supreme over contrary state law. True that the supremacy of the federal law is not without limits. The federal legislature should enact its laws and policies within the limits set by the federal constitution. Once that condition is met however, federal law breaks contrary state law.<sup>431</sup> Two consequences follow from this: there must be an institution that enforces the supremacy clauses and there must also be an institution that takes care of the daunting task of demarcating the boundary of the powers of the federal government and the states. Federal constitutions do attempt to define the scope and powers of the two levels of government but there is bound to exist natural imprecision in the language of the constitution.<sup>432</sup> Suffice it to mention here the wide meanings given to 'interstate commerce,' 'implied powers' and the 'necessary and proper' clause by the United States Supreme Court. Through the mechanism of constitutional adjudication then federal integration is given a more concrete meaning.

### 7.1.3 Differences between the Institutions: Several Practices

For historical and philosophical reasons, constitutions have adopted different mechanisms for reviewing the constitutionality of laws and decisions of government bodies. The (dis)trust that the states have over the judiciary, the

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<sup>431</sup> As a result of this many federal constitutions stipulate not only about the supremacy of the federal constitution but also about the supremacy of federal over state law.

<sup>432</sup> 'Constitutional language is often imprecise or inconclusive, and the circumstances of its application often unanticipated or unforeseeable by its authors.' James Brudney, "Recalibrating Federal Judicial Independence," *Ohio State Law Journal* 64:1 (2003) at 175.

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differing commitments to natural law or legal positivism, the differing application of the notion of separation of powers, have influenced in one way or another, the nature and scope of the national institution established to review issues of constitutionality.<sup>433</sup> Pre-WWII Europe trusted its legislature and led to the horrors and that in turn led to a shift in paradigm, for instance, in Germany to the evolution of Constitutional Court.

Broadly speaking, one can see two patterns regarding the institutions empowered to adjudicate constitutional issues. Many federal systems have vested this important power either in their ordinary courts or separate constitutional courts. Accordingly, these courts not only have the power to interpret the constitution, but are also and even more importantly entitled to decide on the conformity of the laws with the constitution. What is common in all is the fact that there is commitment to a 'higher law,' that reflects the society's fundamental values and a law that contravenes this higher law should cease to exist by some kind of procedure.<sup>434</sup> The systems do not accept the 'omnipotence' of positive law, but rather subject positive law to a superior law, according to modern notions, the latter being constitutional law. Yet although constitutional review through the courts is in principle based on the principle of subjecting legislation to a higher law, it essentially has two distinct forms.

On the one hand, there is this diffused (decentralized) system also called the American- system that accords every branch of the judiciary the right to review the constitutionality of laws. In principle any court has the power to declare any law or decision of an executive body unconstitutional, if such a law or decision violates the constitution, final appeal being reserved to the federal Supreme Court.

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<sup>433</sup> M. Cappelletti, *The Judicial Process in Comparative Perspective*, *supra* note 7: Pp. 115-131.

<sup>434</sup> Mauro Cappelletti, *Judicial Review in the Contemporary World* (Indianapolis: Bobbs-Merrill, 1971) p. 15.

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This has been the case since the famous decision of Chief Justice John Marshall of the US in *Marbury v. Madison*<sup>435</sup> in 1803. Since then many other countries including India have adopted it. Some traces of it also exist in Switzerland where the courts have the power to disregard cantonal laws. In Switzerland, judicial control is not, however, allowed over federal laws.

What characterizes the decentralized system of judicial review in the US is the requirement of the presence of ‘real controversy and adverse parties’<sup>436</sup> for the Court to decide the constitutional question. Besides the US Supreme Court would insist that the matter must be justiciable and must not involve ‘political questions.’<sup>437</sup> The ordinary courts decide constitutional issues in the process of disposing their routine function and review of constitutionality is, therefore, something that comes to the courts incidental to the case.<sup>438</sup> The logic of the decentralized system in a nutshell, it is the duty of the judges to apply and interpret the law and in doing so if the judges find a contradiction and inconsistency between two laws of different hierarchies, it is the duty of the judges to apply the higher law.<sup>439</sup>

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<sup>435</sup> *Marbury v. Madison* 5 US 1 Cranch 137 (1803). For a detailed account of Judicial review and this famous case see R. Carr, *The Supreme Court and Judicial Review*, Greenwood Press Westport, (1970): Pp. 37-57.

<sup>436</sup> This is judicially invented doctrine from Art. III of the United States Constitution. Thus the Court declines to give advisory opinions and to adjudicate what the German Constitutional Court does by way of abstract review. It is established that federal judges will not render an opinion or decide a case unless there is an actual dispute between litigants before the Court. The Court settles the adverse interests and the decision must have effect on the parties. The case is then said to be justiciable. It is one of the mechanisms of self-restraint developed by the Court over the years to avoid head on clashes with the other branches of the government. John Ferejohn and Larry Kramer, "Independent Judges, Dependent Judiciary: Institutionalizing Judicial Self- Restraint," *N. Y. U. Law Review* 77:4 (2002): Pp. 1003-1008.

<sup>437</sup> See *infra*, note 48 and the accompanying text.

<sup>438</sup> For more comprehensive treatment of the differences see Allen Brewer-Carias, *Judicial Review in Comparative Law* Cambridge: Cambridge University Press, (1989) Pp. 131-135.

<sup>439</sup> This was the essence of Hamilton’s argument in the *Federalist Papers* No. 78, which John Marshall was to further develop in his famous *Marbury v. Madison* decision. Hamilton wrote, ‘The Interpretation of the Law is the proper and peculiar province of courts. A Constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain it’s meaning, as well as the meaning of any particular Act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.’

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On the other hand, the centralized system confers the power of reviewing the constitutionality of laws to constitutional courts.<sup>440</sup> Typical of which is the German Constitutional Court characterized by its distinctive constitutional jurisdiction. It constitutes two senates each with eight judges: one handling mainly basic human rights cases, otherwise known as constitutional complaints while the other senate decides disputes involving constitutional issues proper. Half of the judges are selected for a single non-renewable term of twelve years, by a special electoral committee of the *Bundestag* while the other half are selected by the *Bundesrat* and to that extent by the governments of the states. In both cases a majority of two-thirds is required which is impossible to arrive at unless there is a consensus among the major parties. Thus the federal government and the states have influence on the selection of the judges of the Court. The manner of appointment as well as some of its powers, according to some authorities, make the Constitutional Court has a hybrid role: political and legal.<sup>441</sup> Distinct from and independent of the ordinary courts, the Constitutional Court serves as a watchdog for the enforcement of the supremacy of the constitution. The Court as such does not involve itself in the ordinary settlement of disputes unless the case relates to a constitutional question. However, it does not restrict itself to constitutional issues emanating from specific cases. It can also decide differences of opinions or doubts on the compatibility of federal or state law with the Basic Law upon the request of a few public bodies.<sup>442</sup>

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<sup>440</sup> As to why many of the continental systems opted for a model of the constitutional court other than the regular judiciary see Mauro Cappelletti, *The Judicial Process in Comparative Perspective*, *supra* note 7 Pp. 49-52; 137; for a very recent account of the personal background of the Chief Justices of the Supreme Court of the United States, indicating very rich experience in other branches of the government before assuming judicial position, indeed one was even a President of the country see William Rehnquist, "Lecture: Remarks of the Chief Justice: My Life in the Law Series," *Duke Law Journal* 52:4 (2003) Pp. 787-805.

<sup>441</sup> Nevil Johnson, "The Federal Constitutional Court: Facing Up to the Strains of Law and Politics in the New Germany," in Klaus Goetz and Peter Cullen eds., *Constitutional Policy in United Germany* London: Frank Cass, (1995) P. 132.

<sup>442</sup> See Basic Law Art. 93. For more on the German Constitutional Court see Rainer Arnold, "The German Constitutional Court and its Jurisprudence in 1996," *The Tulane European and Civil Law Forum* v. 11 (Winter 1996) Pp. 85-110; Philip Blair and Peter Cullen, "Federalism, Legalism, and Political Reality: The Record of the Federal Constitutional Court" in Charlie Jeffery ed., *Recasting German Federalism: The Legacies of Unification*,

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Compared to the American Supreme Court, the German Constitutional Court has an extensive and wide-ranging jurisdiction regarding the Basic Law. Furthermore, the source and authority of the Constitutional Court are relatively settled for there are clear constitutional provisions empowering it, whereas it remains, at least on academic level, disputed as to where the Supreme Court's power comes from and how it should be exercised. The Constitutional Court was deliberately introduced with the principal role of reviewing the constitutionality of laws, a pivotal role for protecting against the return of the evils and horrors of dictatorship. As a result broadly speaking the challenges of 'judicial activism' are less serious in Germany than in the United States. The Constitutional Court is consciously designed to play an active role in its capacity as a guardian of the Basic Law. Its 'activism'<sup>443</sup> is thus often tolerated.<sup>444</sup>

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London: Pinter, (1999)Pp. 119- 154; Lars Mammen, "A Short Note on the German Federal Constitutional Court and Its Power to Review Legislation," *European Human Rights Law Review* 6:4 (2001) Pp. 433-438.

<sup>443</sup> In the United States there is an ongoing debate on the role of the Supreme Court regarding judicial review: according to Henry Abraham, it is 'the most awesome and potentially the most effective power in the hands of the judiciary in general and the Supreme Court in particular.' Every Court in the United States has the power to declare unconstitutional and hence unenforceable any law, any official action and any other action by public officials that the Court deems to be in violation of the Constitution. In the area of constitutional interpretation, this raises concerns because it invalidates a law considered to be an outcome of a number of compromises between political actors in Congress. Thus there are those who contend that in exercising this important power the Courts must exercise 'self-restraint.' The Courts should remain faithful and adhere to the written constitution, only refer to the *original intent* as put by the framers, guided by strict construction of the text and give priority to political branches to act or not to act. More importantly, the Courts should not put their own personal preferences and philosophies under the pretext of interpretation. They should rather adhere to judicial precedents. On the other hand, there are those who contend that the Court should have some active role. Constitutions are, they contend, *living documents* to be interpreted in line with present realities. Thus the proponents adhere to a more affirmative role or even aggressive role of the Court in regulating governmental laws and actions. They do not hesitate over the fact that the courts have some 'law-making' functions and hence at times prescribe policies. As a result, they come in a head-on clash with the charge that the judiciary usurps the function of other branches of governments. See Henry Abraham, *The Judiciary: The Supreme Court in the Governmental Process*, 10<sup>th</sup> edn., New York: New York University Press, (1996) pp. 69-70; 90-91.

<sup>444</sup> Apart from this rather oversimplified difference there exist other deeper variations among the institutions. The extent of the tribunal's jurisdiction has already been briefly mentioned. In many cases not only has the Constitutional Court a clear mandate but it also does not shy away from considering cases, which the Supreme Court may consider political. There are also deeper variations in the methods and doctrines of interpreting the constitutions. For more on these issues see Danielle Finck, "Judicial Review: The United States Supreme Court versus the German Constitutional Court," *Boston College of International and Comparative Law Review* 20 (1997)Pp. 123-157; James Brudney, *supra* note 9, Pp. 149-194; David Beatty, "The Forms and Limits of Constitutional Interpretation," *American Journal of Comparative Law* 49:1 (2001) Pp. 79-120.

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**7.1.4 The House of Federation: The Ethiopian Choice**

The practice of constitutional interpretation in Ethiopia follows a different pattern. According to the 1995 Ethiopian Constitution, the authority to interpret the Constitution is vested in the second chamber, the House of Federation. According to the Constitution Articles 62 and 83, the HoF is not only empowered to decide constitutional disputes but also to interpret the constitution.<sup>445</sup> Unlike second chambers in other federations, the HoF has no law-making functions.<sup>446</sup> The rationale for vesting the power of interpreting the constitution in the HoF, and not in the regular judiciary or a constitutional court as can be gathered from the minutes of the Constitutional Assembly emanate from two sources. One is related to the framers view of the ‘nature’ of the constitution in general and to the role of the nationalities in particular. The framers think that the new federal dispensation is the outcome of the ‘coming together’ of the nationalities. Indeed, it is clearly stipulated in the preamble and Article eight that the ‘nations, nationalities and peoples are sovereign.’ The Constitution is considered as the reflection of the ‘free will and consent’ of the nationalities. It is, in the words of the framers, ‘a political contract’ and therefore only the authors that are the nationalities should be the ones to be vested with the power of interpreting the constitution.<sup>447</sup> To this effect, the HoF that is composed of the representatives of the various nationalities

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<sup>445</sup> There has been some confusion in the terminologies between what constitutes constitutional disputes and constitutional interpretation, although they are of less practical significance because both powers belong to the HoF. Under Article 62(1), the HoF has the power to interpret the Constitution. Article 84 (1) as well states: ‘All constitutional disputes shall be decided by the HoF.’ Yet, for those who are familiar with the jurisdiction of the German Constitutional Court (it is no secret that the two new laws: Proclamations No. 250/2001 and 251/2001 that regulate the powers of the HoF and the CCI are influenced by the experience of the Constitutional Court), constitutional dispute has a very narrow meaning. It refers to cases in which a matter is referred to the CCI or the HoF arising from a real case and controversy, which some refer to incidental/concrete judicial review. However, as will be demonstrated later, constitutional interpretation could also arise in many other cases apart from real cases and controversies. Issues regarding separation of powers and federalism that are referred to the Constitutional Court or the HoF in the abstract are good examples.

<sup>446</sup> For details on the HoF see Assefa Fiseha, *supra* note 1 Pp. 137-158.

<sup>447</sup> See *Ye Ethiopia Hige Mengist Gubae Kale Gubae v. 4 Hidar 14-20, 1987 E.C.* (Minutes of the Constitutional Assembly, November 1994) discussions on Articles 59, 61 and 62.

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is expressly granted the power to review the constitutionality of laws and of course other essential powers as well.<sup>448</sup>

The second reason is related to the first. The framers were well aware of the fact that empowering the judiciary or a constitutional court may result in unnecessary ‘judicial adventurism’ or what some prefer to call ‘judicial activism’ in which the judges would in the process of interpreting vague clauses of the constitution put their own preferences and policy choices in the first place. Thus the framers argued, this might result in hijacking the very document that contains the ‘compact between the nationalities’ to fit the judges’ own personal philosophies. It is not difficult to understand the fears and concerns of the framers in light of the fact that the judiciary in Ethiopia has not yet won ‘the hearts and minds’ of the ordinary citizen. As will be noted below, the good days in which the judiciary gains prestige and respect as the third branch of the government, are yet to come. Yet one could argue in favour and against the policy choices made in the Ethiopian Constitution. Elsewhere it is argued that owing to the lack of theoretically sound basis for the institutions that interpret the constitution in many jurisdictions and taking into account the fact that in many countries including Ethiopia the prestige of the judiciary is low and that establishing deep rooted institutions for democracy to operate may take time, any constitution that claims

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<sup>448</sup> See Art. 62(1) that states ‘The House [House of Federation] has the power to interpret the Constitution.’ And Art. 61(1) states, ‘The House of Federation is composed of representatives of Nations, Nationalities and Peoples.’ Each nationality has at least one member but each nationality is represented by one additional representative for each one million of its population. I have earlier on argued as a result that the HoF is majoritarian in much the same way as the other house and the claim that it is guardian of the nationalities is rather fluid at best and pretentious at worst. At state level two patterns are evolving. In the regional states of Tigray, Amhara, and Oromia, the state constitutions established a ‘Constitutional Interpretation Commission’ composed of representatives from each district/*wereda* Council. In Tigray, the members of the HoF are also members of the Commission and in Amhara every nationality is also represented. In SNNPRS, however, the Constitution established a ‘Council of Nationalities,’ a house more or less identical with the federal HoF both in terms of power and composition. In all of the regional states mentioned, the Commission or the Council of Nationalities is assisted by the Council of Constitutional Inquiry (CCI) of each respective state. The CCI in the states as well is designed in much the same way as the CCI of the HoF. See Articles 70 and 71 of Amhara, 67-69 of Oromia, 67-70 of Tigray and 58, 59 and 78 of SNNPRS state constitutions.



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to incorporate both constitutionalism and democracy, two of the competing values, must attempt to reflect both values in the process of constitutional adjudication. The application of the two values to constitutional interpretation will result in establishing a tribunal composed of legal professionals and politicians, (similar to the Council of Constitutional Inquiry- CCI) a tribunal capable of rendering binding decisions on cases brought before it. A tribunal so composed will be in a theoretically sound and politically legitimate position. Such tribunal best suits the nature of the enterprise called constitutional interpretation.<sup>449</sup>

Behind the policy choice of the members of the Constitutional Assembly to vest the power to interpret the constitution and to review the constitutionality of laws in the HoF, not the judiciary, has something to do with the reputation of the judiciary and ideological matters. In historic Ethiopia adjudication of cases formed part and parcel of public administration. One finds a merger of functions within the executive, the administration of justice and the executive function proper. Indeed, adjudication of cases was considered to be the principal function of the executive. For example, in Menlik's era of appointment of the ministers in 1908, the Minister of Justice was also the Chief Justice.<sup>450</sup> The attempt to separate

<sup>449</sup> For a summary of the arguments see Assefa Fiseha, "A New Perspective on Constitutional Review," *Tilburg Foreign Law Review* 10:3 (2002) Pp. 237-255. The judiciary is often criticized for being anti-majoritarian, at odds with the democratic principle; judicial activism is also considered at odds with the principle of separation of powers for it takes away the role of the other branches of governments and many consider the judiciary lacks the competence to make law. But such opinions at times go too far in the sense that judicial functions have procedural and substantive limits. Judicial discretion is not as open as many think it to be. Besides modern constitutions stipulate many mechanisms of preventing tyranny and do not as such provide pure democracy. Thus we speak of horizontal and vertical separation of powers, federalism, supremacy of the constitution, checks and balances, human rights and so on. Apart from this the legitimacy of the court and legitimacy of the other political branches come from different sources. For the judiciary, it is its impartiality and its procedural fairness that it provides to the parties that serves its legitimate existence. For the other branches, it is democratic accountability to the electorate. More importantly, even in the area of constitutional review, the courts may have the last say, but it is only for a time. The Court may modify or even reverse its former decision. More importantly, the legislature may modify or even reverse the decision of the court, and constitutional amendment as well can reverse the decision of a court. The decision of the Court may thus be overruled by other branches of government. See Cappelletti, *The Judicial Process in Comparative Perspective*, *supra* note 7 P. 151; H. Abraham, *The Judiciary*, *supra* note 20, Pp. 72; 94-95.

<sup>450</sup> Aberra Jembere, *An Introduction to the Legal History of Ethiopia 1434-1974*, Hamburg: LIT Verlag Munster, (2000) Pp. 219, 227, 240.

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the judiciary from the executive was not that easy either. A long and tiring process of negotiation in 1942 led to a partial victory as far as the judiciary is concerned: only the highest benches, that is, the High Court and the Supreme Imperial Court were able to be relatively free from the influence of provincial administrators. In all other respects, the court structure reflected until 1992 the traditional practice of combining judicial and executive functions in the person of the local chiefs and provincial governors. At the apex of the court structure one found until 1974, the emperor, dispensing justice in the *Zufan Chilot* (Crown Court).<sup>451</sup>

This blend of judicial and executive functions in the latter is not without implications. As briefly noted in the introduction, the crisis of the state had its effect on the judiciary as well. Indeed, it is difficult to see the judiciary in isolation from the whole political system under which it operates. First and foremost the judiciary never had a separate existence of its own as an institution. It was subject to all kinds of pressures from the other branches. Thus, external pressure on the judiciary has deep roots and is not without some hangovers on the new federal judiciary. Administrators at state level, even today, think that it is natural to order the judge or at times even close benches at the lower level of administration.<sup>452</sup> Second, the judiciary never survived the regime it established. It was no surprise to see every new regime setting up its own version of the judiciary that suits its mission. It was never designed to be an institution as the third branch of the government in the real sense. This has left an impression on ordinary citizens to the effect that changes in government will entail another

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<sup>451</sup> Under the unitary systems, the judiciary was contained within the executive branch. The federal Supreme Court was separated from the Ministry of Justice in 1992. It suffers from a severe shortage of qualified legal and judicial personnel to operate its many layers of courts.

<sup>452</sup> The experience of the state courts for example in the Somali, Oromia and Afar regional states indicate the level of executive intervention particularly at *Wereda*/District levels. This was made clear in a workshop on judges held in Addis Ababa in mid February 2007.

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round of appointments and dismissals of judges. Thus in 1991 when EPRDF came to power and introduced the new federal system, the prestige and reputation of the judiciary was at its ebb, associated with all forms of nepotism, corruption and worst of all, an arm of the most despotic regime on earth, well-known for execution of life without any semblance of due process of law.<sup>453</sup>

The judicial system in Ethiopia is under serious pressure both from what Cappelletti calls 'the consumers of law and justice,'<sup>454</sup> that is the citizens and the government of the society under which it operates. There is a serious complaint that the judiciary is dragging its feet in rendering decisions both at state and federal level and as a result its role in enforcing contracts and creating an atmosphere of stability and predictability for business thereby promoting economic development, is questioned. The judiciary, on the other hand, complains about a whole list of factors affecting its performance: salary, lack of trained judges, resources and absence of economic security, political pressure and commitment of its own judges. Added to this is the ideological challenge of the ruling party. Until recently its commitment to the judiciary, despite the constitutional provisions was far from clear. The judiciary was a suspect. It was associated with pre-democratic regimes or is considered as hostile to reform. Often top executive officials spoke about the importance of *hizbawi dagna*, 'popular judge' maybe implying one who is ideologically affiliated to the ruling party or perhaps an elected one. Only recently has the importance of an

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<sup>453</sup> For a detailed account of the arguments behind the dismissal of judges in the Transition period both from the side of the victims and the government see Frode Elgesem, *The Derg Trials in Context: A Study of Some Aspects on the Ethiopian Judiciary*, Human Rights Report No. 1, Norwegian Institute of Human Rights, University of Oslo, (1998).

<sup>454</sup> Cappelletti, *The Judicial Process in Comparative Perspective*, *supra* note 7 P. 58.

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autonomous judiciary been realized. No doubt this outlook will have a bearing on the judiciary's limited role in the Ethiopian context.<sup>455</sup>

The framers of the Constitution, however, recognized the fact that interpretation involves legal technicalities. As a result, the HoF is assisted by the Council of Constitutional Inquiry (CCI), consisting of eleven members that among others comprise the Chief Justice and his deputy of the federal Supreme Court, who also serve respectively as chairman and vice chairman of the CCI, six other legal experts appointed by the President of the Republic with the recommendation of the lower house, as a matter of practice coming from different constituent states, and three persons designated by the HoF from among its members. The CCI has the power to investigate constitutional disputes.<sup>456</sup> The investigation may result in a *prima facie* case calling for interpreting the Constitution, in which case the CCI is required to 'submit its recommendations' to the HoF or remand the case and render a 'decision' if it finds there is no need for constitutional interpretation. In the latter case, the party dissatisfied with the decision of the CCI may appeal to the HoF.<sup>457</sup> Thus it is clear that the CCI is merely an advisory body to the HoF, lacking the competence to give a binding decision. The HoF as well has been at liberty to disregard the CCI's opinions in some cases.<sup>458</sup>

<sup>455</sup> Only in his 2003 parliamentary report in July 2004, the Prime Minister mentioned signs of improvement in civil matters. See PM's Performance Report of 2003/4 at [http://www.waltainfo.com/Amnews/1996/Ham/meles\\_report.htm](http://www.waltainfo.com/Amnews/1996/Ham/meles_report.htm) as visited on 09/07/04.

<sup>456</sup> Art. 82 of the Constitution; Art. 4 of Proclamation No. 250/2001, Council of Constitutional Inquiry Proclamation, *Federal Negarit Gazeta*, 7<sup>th</sup> Year, No. 40, Addis Ababa, 6 July 2001; Art. 84 of the Constitution.

<sup>457</sup> Art. 84 of the Constitution; Art. 6 of Proc. 250/2001, *supra* note 33.

<sup>458</sup> The practice so far indicates that the HoF has for the most part endorsed the decisions of the CCI but in the case of the Benishangul-Gumuz case (discussed in *infra*) it disregarded the opinion of the majority and the minority and came up with an entirely new decision. It also appears that the CCI's opinion in many cases is not well-articulated and often is very brief. This is perhaps because the members are quite busy with other functions and have little time to do research concerning the cases.

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### **7.1.5 The Jurisdiction and Procedures of the HoF**

Although the Constitution has been less clear on the scope of powers of the HoF and the procedures to be employed in the process of adjudicating constitutional issues, the ‘law consolidating the HoF and defining its powers and responsibilities’ has attempted to clarify some of the ambiguities.<sup>459</sup> For the sake of completeness let us first remark on this new ‘law.’

### **7.1.6 The Respective Role of the HoF and the Courts within the Constitutional Framework**

The first question that comes to mind when one thinks of a law enacted by the House of Peoples' Representatives (HoPR) that defines the ‘powers and responsibilities’ of the HoF itself established by the constitution to check the constitutionality of the laws of the HoPR, is whether the law itself is constitutional or not. Could the HoPR really define the powers and responsibilities of the HoF? More specifically, does the HoPR have competence to do so? Would not such a power, if it existed at all, lead to a conclusion that the HoPR may in the process limit, extend or even take away the competence of the HoF? Is not the HoF competent enough to define its responsibilities in light of the broad powers indicated in the Constitution? These are interesting questions and perhaps one day they will be dealt with by the HoF. In the early phase of the process of drafting such law, some experts, aired their concerns in a small gathering organized by the HoF and HoPR and stated that in light of the function

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<sup>459</sup> Proclamation No. 251/2001, Consolidation of the House of the Federation of the Federal Democratic Republic of Ethiopia and to Define its Powers and Responsibilities, *Federal Negarit Gazeta*, 7<sup>th</sup> Year No. 41, Addis Ababa, 6 July 2001; see also Proc No. 250/2001 *supra* note 27. Except for the general clauses that empower the HoF to ‘interpret the constitution and to decide constitutional disputes’ the constitution was silent on the exact contours of the vague clauses.

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of reviewing constitutionality of laws, the attempt to define the powers of the HoF through the HoPR is questionable. However, their opinion did not seem to have won the support of the actors.

More important, however, is the compatibility with the Constitution of the two new laws<sup>460</sup> dealing with the HoF and the CCI regarding the jurisdiction of the HoF and indirectly ‘stripping the jurisdiction’ of the regular judiciary, a judiciary already weakened because it lacks the competence to review the constitutionality of laws. In an earlier study and before the enactment of the laws, this author tried to define the respective roles of the Courts and the HoF.<sup>461</sup> In light of the generality of the clauses of the Constitution on the respective role of these bodies, the author’s main finding was to restrict the role of the HoF to reviewing the constitutionality of laws enacted by the legislature: federal and state; resolution of disputes among high federal organs mainly dealing with the horizontal separation of powers and umpiring federal disputes. The three important reasons for this view were as follows.

Firstly, the Constitution does not seem to wipe out the role of the judiciary completely. If one sticks to the terms employed by the text, the relevant Article states: ‘Where any federal or state *law* is contested as being unconstitutional...’ and the Amharic version which according to Article 106 has the final legal authority in case there is contradiction between the English and the Amharic versions is even more explicit in stating that the term ‘law’ refers to laws enacted by federal and state legislative bodies.<sup>462</sup> Thus it was logical to argue that other

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<sup>460</sup> The two laws referred to are Proc. 250/2001, *supra* note 33, and Proc. 251/2001, *supra* note 36.

<sup>461</sup> See Assefa Fiseha, "Constitutional Interpretation: The Respective Roles of the Courts and the House of Federation," in *Proceedings of the Symposium on the Role of Courts in the Enforcement of the Constitution*, Addis Ababa: Birhanina Selam, (2001) Pp. 6-26.

<sup>462</sup> Article 84(2) reads in full: ‘Where any Federal or State *law* is contested as being unconstitutional and such a dispute is submitted to it by any court or interested party, the Council shall consider the matter and submit it to the

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subordinate regulations issued by the executive and decisions of governmental bodies other than ‘laws’ were left to the courts. There is another second reason for concluding the same. In parliamentary systems, of which Ethiopia is one, the supremacy of parliament, subject of course to the supremacy of the Constitution, requires that all other branches of government are bound to assume that legislation enacted by parliament is constitutional and the courts are prohibited from nullifying such legislation. The presumption of constitutionality has expressly been incorporated in the new law.<sup>463</sup> Thus, administrative acts and decisions of public bodies could be questioned for their constitutionality as well as for their conformity with the enactment of parliament by the regular judiciary. Thirdly, the practice of the CCI as well hinted at this position, at least until the enactment of the laws. In the case of *Addis Ababa Taxi Drivers Union v. Addis Ababa City Administration*<sup>464</sup> and in the case of *Biyadiglign Meles et al v. Amhara National Regional State*,<sup>465</sup> the CCI ruled that remedies concerning the conformity of regulations with the enabling legislation, as well as violations of rights by the executive do not amount to reviewing constitutionality of laws and thus parties have to seek remedy from the courts.

However, the constitutional position as well as practice have been confused with the enactment of the new laws. According to the new laws ‘law’ (that is subject to the investigation for its constitutionality by the HoF) shall mean proclamations issued by the federal or state legislative organs, and regulations and directives issued by the federal and states government institutions and it shall also include

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House of Federation for a final decision.’ In this provision, the term law might look ambiguous so as to include even subordinate regulations of the executive. However, its Amharic version makes it relatively clear by specifying the point that ‘laws’ or *Higoch* refers to an act of the legislature (*Be Federalu Mengistim Hone Be Kilit Hig Awchi Akalat Ye Miwotu Higoch*) at federal and state level.

<sup>463</sup> Art. 9 of Proc. No. 251/2001 sub 1 states: ‘Unless otherwise proved to the contrary, the enacted law is presumed to be constitutional while the House starts to review its constitutionality.’

<sup>464</sup> Decision of the CCI on *Tirr 17/1992 E.C.* (25 January 2000, unpublished).

<sup>465</sup> Decision of the CCI on an application made on *Miazia 30 1989 E.C.* (8 May 1997, unpublished).

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international agreements that have been ratified by Ethiopia.<sup>466</sup> Thus by defining ‘the law’ too broadly to include all conceivable acts of the legislature and the executive, the drafters of the new laws that are supposed to define the role of the HoF and the CCI, have themselves apparently come up with an unconstitutional law. This is so because the federal constitution is at least clear on this point: it never intended to include regulations, directives and decisions of administrative bodies in the way the laws attempted to include. By so doing the drafters have wiped out or at least attempted to wipe out the jurisdiction of the courts: federal and state. It thus remains to be seen how this anomaly is to be settled by the HoF.<sup>467</sup>

But at least in the case of Coalition for Unity and Democracy (*CUD*) vs *PM Meles Zenawi*<sup>468</sup>, a recent case brought before the CCI requesting the latter to declare unconstitutional a directive issued by the PM following the May 2005 election crisis and its aftermath banning demonstrations in the capital for a month was entertained by the CCI and considered as constitutional although the CUD started its case and applied to the relevant Federal First Instance Court. This is a very

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<sup>466</sup> See Art. 2(2) and Art. 2(5) of proc. No. 251/2001 and 250/2001 respectively.

<sup>467</sup> When this fact was brought to the attention of participants in a seminar held in December 2002 at the Ghion Hotel by this author at which federal and state court judges as well as representatives of both federal Houses attended, it was like a surprise. Nobody really knew that so much power is being taken away from the courts and the Deputy Chief Justice did not hide his astonishment.

<sup>468</sup> *CUD vs PM Meles Zenawi*, Decision of the CCI rendered on 14 June 2005. This is a very interesting case because the Federal First Instance Court to whose bench the case first appeared wilfully relinquished its constitutional mandate in its decision held on June 3, 2005 by referring the case to the CCI. The Court in its brief remark on the application of the CUD rejecting the case for lack of mandate, adopted a very literal and positivist approach on the meaning of the ‘law’ and failed to analyze the link between the law and the Constitution. The case could have enlightened our understanding of constitutional practice better if the Court adopted a different interpretation. The HoF’s position would then have been clearly tested in the case. The CUD is a coalition of four opposition parties that participated in the May 2005 parliamentary election and that secured 107 seats but decided to boycott its seats because of allegations of election fraud and vote rigging. While the government argued that there were objective reasons for the one-month ban on demonstrations in the capital, the claim being the opposition is ready for street violence to overthrow the government on unconstitutional means and hence the directive, the opposition on its part claimed it was undertaking peaceful demonstration as provided in the Constitution and wanted to declare the directive as unconstitutional. While there are still controversies on the constitutionality of the directive and no one is able to give conclusive verdict, it is possible to argue that the PM would have been in a much defensible position if he resorted to emergency declaration through the Council of Ministers as provided under the Constitution Article 93.



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interesting case because the Federal First Instance Court to whose bench the case first appeared wilfully relinquished its constitutional mandate in its decision held on June 3, 2005 by referring the case to the CCI. This trend seems to conform to what is provided in the new laws for which we have questioned their constitutionality. This also implies that the courts are further stripped of their jurisdiction.

### **Horizontal Separation of Powers**

On the issues of horizontal separation of powers and umpiring the federal system, the main argument justifying the power of the HoF emanated from the nature of the HoF as well as from the experience that one draws from the Supreme Court of the United States and the German Constitutional Court. The latter is empowered to adjudicate disputes among the highest federal institutions: the federal president, the two federal chambers and the federal government in respect of their constitutional powers. Through the procedure of abstract review as well it reviews the compatibility of legislation with the constitution. In doing so and despite express constitutionally based power, it has been at times criticized 'for making political choices between competing legislative programs for which it is neither competent nor equipped.'<sup>469</sup>

The American Supreme Court does not have as extensive power as the German Constitutional Court to adjudicate abstract review or differences of opinion among federal branches. The Supreme Court adjudicates concrete disputes arising from cases and controversies between parties. The object of judicial review in the United States is the vindication of the rights of a party to a case.<sup>470</sup> Besides, the

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<sup>469</sup> Donald Kommers, "Comparative Constitutionalism: German Constitutionalism a Prolegomenon," *Emory Law Journal* 40:3 (1991) Pp. 837-874.

<sup>470</sup> Christopher Wolf, *The Rise of Modern Judicial Review*, New York: Basic Books Inc., (1986) p. 102.

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Supreme Court has developed self-restraining doctrines, albeit not always consistent, to minimize its active involvement in the competence of the legislative and executive branches. The Court has avoided cases brought before it by invoking the ‘political question doctrine.’<sup>471</sup> Broadly speaking such cases included matters concerning the ‘republican form of the government,’ ‘the conduct of foreign affairs,’ war power, impeachment, ‘presidential powers discretion,’ and recognition of foreign governments. For these kinds of issues, it is argued, the political branches rather than the Supreme Court are legitimized to address the resolution of disputes among the branches of the federal government. The exact contours of the political question doctrine is less precise though. It appears that the doctrine has some relevance when it concerns the exercise of powers within the confines of the (horizontal) separation of powers. It becomes relevant when the question is whether one of the institutions is alleged to have encroached upon the powers of the other branches. There and then the Court does not seem to hesitate to adjudicate the matter. But the doctrine becomes less relevant, for instance, if the issue is as to whether the executive made the correct use of its executive powers because discretion is often left to the same institution and the judiciary cannot replace the executive. While this has been the general trend, some, like Jesse Choper, went even further in stating that:

The federal judiciary should not decide constitutional questions concerning the respective powers of Congress and the President *vis-à-vis* one another; rather the ultimate constitutional issue of whether executive action (or inaction) violates the

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<sup>471</sup> This notion is far from clear but according to the opinion of the Court, the constitution has reserved certain kinds of questions for ultimate decision by the political branches and such questions are beyond judicial examination or considered as non-justiciable. It is in a way one other item of judicial self-restraint. The Court removes some cases from consideration because the matter is deemed inappropriate for resolution by judges. But the borderline between what constitutes a constitutional or political case is never easy to draw. See for example Tim Koopmans, *Courts and Political Institutions: A Comparative View*, Cambridge: Cambridge University Press (2003) P. 52, 98-104; The most often cited cases indicating the Court's inconsistent interpretation on this matter is *Baker v. Carr*, 369 US 186 (1962) and *Bush vs Gore*, 531 U.S. 98 (2000).

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prerogatives of Congress or whether legislative action (or inaction) transgresses the realm of the President should be held to be non-justiciable, their final resolution to be remitted to the interplay of national political process.<sup>472</sup>

At any rate, issues concerning the horizontal separation of powers often fall within the grey areas of law and politics and the settlement of such disputes truly involves political matter, which the regular judiciary may lack the competence to deal with. However, the HoF would be the most suitable candidate as it is more a political than a judicial body. It is in recognition of this fact that it is stated: ‘A case requiring constitutional interpretation which may not be handled by courts may be submitted to the CCI by, at least, one-third of the members of the federal or state councils or the federal or state executive bodies.’<sup>473</sup> No specific case has yet been reported under this procedure but it may be interpreted to cover two crucial aspects: horizontal separation of powers both at federal and state level as well as vertical division of powers between the federal and state governments. This appears to be so from the nature of the parties.

### **Respective Powers at Federal and State Level**

The same could be said about the task of defining the respective powers of the federal government and the states, an essential aspect of federal systems. In the United States the conventional wisdom until the 1990s has been that federalism in general and the right of states in particular provided no judicially enforceable limits on Congressional power.<sup>474</sup> The Court relied on the political safeguards of federalism. It was argued that a final solution on the federal government’s

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<sup>472</sup> Jesse Choper, *Judicial Review and the National Political Process*, Chicago: The University of Chicago Press, (1983) p. 263.

<sup>473</sup> Art. 23(4) of Proc. No. 250/2001. This clause specifies the parties who have standing before the HoF as far as issues involving constitutional interpretation are concerned. Needless to say the courts cannot handle cases involving constitutional interpretation.

<sup>474</sup> Notable exception is *National League of Cities v. Usury* 426 US 833 (1976).

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encroachment on state power disputes should be sought from the political process. The states are well-represented in Congress. On the other hand, the Supreme Court should invalidate state laws if they encroach upon federal power.<sup>475</sup>

However, the Supreme Court has since 1992 changed its position and established itself as a guardian of the federal system. In *New York v. United States*<sup>476</sup> and *Printz v. United States*,<sup>477</sup> the Court made a remarkable shift from its earlier position in controlling Congress from violating the constitutional power of the states. To this one may add its decisions on commerce clause, *US v. Lopez*<sup>478</sup> and *US v. Morrison*.<sup>479</sup> In all these cases, the Court argued, it is its duty to protect the authority of the states, albeit, in many cases by a majority.

In Germany, decisions of the FCC on two of its important powers, namely the settlement of disputes between major political institutions<sup>480</sup> and abstract review,<sup>481</sup> have at times been criticized for encouraging litigation by actors in the federal system, to frustrate political projects of their opponents at another level. Losers in the political process often resort to the Court to reverse a political decision. It is important to note that most of the federal powers in Germany belong to concurrent and framework powers. The federal government extensively used these powers and the FCC on its part insisted that whatever conditions stated

<sup>475</sup> Choper, *supra* note 49 at 175, 206; Edward Rubin and Malcolm Feeley, "Federalism-Some Notes on the National Neurosis," *UCLA Law Review* 41:4 (1994) Pp. 903-952; Erwin Chemerinsky, "The Values of Federalism," *Florida Law Review* 47:4 (1995) Pp. 499-540.

<sup>476</sup> *New York v. United States* 112, S. Ct. 2408 (1992).

<sup>477</sup> *Printz v. US* 521 US 98, 117 S. Ct. 2365, (1997).

<sup>478</sup> *US v. Lopez*, 115 S. Ct. 1624 (1995).

<sup>479</sup> *US v. Morrison* 529 US 598, 608, (2000).

<sup>480</sup> This refers to the FCC competence to decide disputes as to the rights and duties of the federation and the states. It is basically a question of defining the respective jurisdiction of the concerned organs.

<sup>481</sup> Refers to the determination of whether a norm of federal or state law is in conformity with the Basic Law or whether a state law conforms to federal law. It can be initiated by federal or state government, one-third of the members of the *Bundestag* without reference to any concrete case. This procedure is unique in the sense that it has no parallel, for instance, in the United States. In the United States safeguarding the constitution is only possible as long as there is a case. See Basic Law Article 93.

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in the Basic Law for the exercise of concurrent and framework powers is a matter for the discretion of the federal legislature. It subscribed to the political question doctrine and in the end the states lost much of their powers. In 1994 the Basic Law was amended, which has a bearing on the exercise of not only framework and concurrent powers but also on the jurisdiction of the FCC. An attempt is made to narrow down the discretion of the federal legislature in the exercise of concurrent and framework powers.<sup>482</sup> By doing so the Basic Law tries to extend the legislative autonomy of the states.

The failure by the FCC to exercise its power under the old provisions of the Basic Law to regulate the discretion of the federal legislature in the areas of framework and concurrent powers also prompted an amendment on the jurisdiction of the FCC. Accordingly, the Basic Law stipulates the FCC has jurisdiction ‘in the event of disagreements whether a law meets the requirements of paragraph (2) of Article 72 [this paragraph sets the conditions that should be complied with for the federal government in order to enact concurrent law], on application of the *Bundesrat* or of the government or legislature of the Land.’<sup>483</sup> Thus in Germany, unlike the United States, the jurisdiction of the FCC is express even in areas, which the United States Supreme Court would consider to be political. The new amendment is clear enough in this respect. It is an attempt to reverse the FCC’s earlier position at least in the areas of concurrent powers.

In the Ethiopian situation, it does not seem there is a need to consider the federal issues at two levels in the way the literature about the American system provides. Nor is there any ground to trust the political process to safeguard federalism.

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<sup>482</sup> See Articles 72 (2) and 75 (2) of the Basic Law.

<sup>483</sup> Basic Law Article 93 (1) 2a. It is remarkable that the *Land* legislature has the right to bring this action before the FCC. They are the ones who lost much of their power because of excessive exercise of federal concurrent power.

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Indeed the federal system in Ethiopia is unique, as the states have no role in the law-making process at federal level. When the Americans suggest that the political processes can provide a better alternative, it is because the federal government and the states are actively involved in the federal legislative process. The Senate is expected to check the lower house and safeguard the interests of the states. No such comparable guarantee exists in Ethiopia. The only guaranty for the nationalities appears to be the vigilant exercise of their powers as ultimate interpreters of the constitution. Yet, the same House, although considered by many as the House of nationalities, is a house dominated by the nationalities with the highest population count. Thus composed in a more or less similar fashion like the lower house. At any rate federalism in its broad sense, that is, defining the respective powers of the federal government and the states as well as checking the compatibility of federal and state laws with the constitution, is one area of jurisdiction for the HoF.<sup>484</sup> The issue of the political question doctrine becomes less relevant in this respect because from the outset the HoF is a political body. The debate on ‘judicial activism’ versus ‘judicial self-restraint’ is thus less relevant in the Ethiopian context. As the following cases illustrate, the HoF as a quasi-judicial/political body seems to be legitimate organ for cases that are of high political and constitutional significance.

The first controversial case concerns the *Silte* decision<sup>485</sup> a case in which a certain community that were perceived to be part of the *Guraghe* ethnic group wanted to secede from the latter and set up a local government in the Southern Nations, Nationalities and Peoples Regional State (SNNPRS-one of the nine constituent units of the federation- inhabited by more than 56 small ethnic groups). The process involved, as required by the federal Constitution Arts 39 and 47, the local

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<sup>484</sup> This is implied under Article 23(4) of Proc. 250/2001.

<sup>485</sup> See the opinion of the CCI written on 25 January 2000 (unpublished).

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population, the regional parliament (constituted of the diverse groups) and the HoF but the respective role of these actors was never clear. The matter was finally resolved in 2000 by a referendum organized by the HoF in which large majority of the *Silte's* chose to secede and form a local government within the constituent unit. Given the complexity of the case (who is the 'self' that determines the right to self-rule at local level?) and the number of institutions involved (the two ethnic groups at local level, the state parliament composed of the various ethnic groups and the HoF), the final decision of the HoF to submit the matter to a referendum, though the issue of who should participate in the referendum is far from settled, and the fact that the final verdict was gracefully accepted by all concerned indicates the wise approach adopted by the HoF.

A second and more controversial one is the Benishangul-Gumuz case that involved the tension in the region between the indigenous groups (Berta, Gumuz, Shinasha, Komo and Mao) and the highlanders (Amhara, Oromo and Tigray nationalities). Candidates from Amhara, Oromo and Tigray nationalities for the 2000 election for the regional council were prohibited on the basis that they were not able to speak any one of the five languages namely Berta, Gumuz, Shinasha, Komo and Mao. Particularly the Berta insisted that the candidates should not be allowed to run for office if none of them are versed in Berta language. It accordingly petitioned the Election Board and the latter decided to bar them from running as candidates stating that they were not able to speak the Berta language. The Amharas, Oromos and Tigrayans, most of them transferred to the region during the *Derg's* (military junta that ruled the country from 1974-1991) resettlement program (constituting some forty seven per cent of the population in the region), complained to the HoF against the decision of the Electoral Board on *Yekatit* 10, 1992 E.C. (February 2000). The applicants argued that the decision of

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the Board violated their constitutional right to be elected granted to every citizen without any discrimination and asked the House to quash it as it contravenes the supremacy clause of the federal constitution (Article 9).

The CCI gave its opinion on *Sene* 29, 1992 (6 July 2000) to the HoF admitting that the application raises constitutional interpretation questions. The expert opinion constitutes majority and a dissenting one. The issues formulated were: as to whether the law<sup>486</sup> which sets the conditions for candidature, one of which is knowledge of the vernacular of the state, is in violation of the constitution or not? And as to whether the decision of the Electoral Board based on such law is constitutional or not.<sup>487</sup>

The majority, after considering the relevant law and the Constitution<sup>488</sup> rather briefly opined that because the proclamation stated knowledge of the local language as a condition for candidacy, it violated the constitutional provision on the right to take part in conducting public offices as well as to be elected. It stated that the proclamation discriminates against those who are not versed in one of the local vernaculars and concluded the proclamation violated the Constitution. On the Board's decision it stated that it is based on this unconstitutional provision and

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<sup>486</sup> The law in question is the Proclamation to make the Electoral Law of Ethiopia conform with the Constitution of the Federal Democratic Republic of Ethiopia Proc. No. 111/1995, *Negarit Gazeta* TGE, 54<sup>th</sup> year, No. 9 Addis Ababa, 23 February 1995.

<sup>487</sup> See the opinion of the CCI (unpublished).

<sup>488</sup> Article 38(1) of the federal constitution states 'every Ethiopian national, without any discrimination based on colour, race, nation, nationality, sex, language, religion, political or other opinion or other status has the following rights:

a. to take part in the conduct of public affairs, directly and through freely chosen representatives,

b. on the attainment of 18 years of age to vote in accordance with law,

c. to vote and to be elected at periodic election to any office at any level of governments.

While Article 38 of proclamation 111/1995 stating the criteria on candidacy states 1. Any person registered as an elector shall be eligible for candidature where he ...

b. is versed in the vernacular of the national region of his intended candidature and the Amharic version states *Ye Miwedaderbetin Ye Biherawi Kilil Kuanka Ye Mi Yawik*.



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because the law is referred to the HoF the viability of the decision hinges on the constitutionality or unconstitutionality of the proclamation referred to the HoF.

The minority view is more elaborate and is mainly based on the constitutional argument that the issue has to be seen in light of the letter and spirit of the whole constitutional text rather than on a single provision and it needs balancing between two or more competing constitutional values. The minority acknowledged that there is an express clause on the right to elect and to be elected as well as the fact that the Constitution does not allow discrimination on the basis of language. However, it articulated that in this case there is no discrimination on the basis of language and considered the decision of the Board, not in violation of the Constitution.

It stated that the proclamation does not discriminate on the basis of language. In much the same way as in the Oromia, Amhara or Tigray regional states, that is constituent states in which the regional official language is the language of one of the dominant nationalities, anyone who is not versed in the regional government's official language cannot run for office as a candidate. By the same analogy, anyone who does not speak any of the local vernacular languages in Benishangul-Gumuz, whatever his or her nationality may be, cannot run for office and the minority insisted that this cannot be considered a violation of the Constitution on grounds of discrimination. The minority focused on the peculiarity of the Ethiopian federal system and its emphasis on the sovereignty of nationalities and the fact that language constitutes one essential attribute of identity.

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The HoF considered both opinions but rendered a different decision which was more in line with the opinion of the minority than with that of the majority.<sup>489</sup> It emphasized that no doubt if the candidate is to speak for the people he/she claims to represent in parliament or to introduce his/her aims and programs to the electorate, he/she is required to know the regional official language. By virtue of the proclamation, the candidate is required to know the official language of the *region* and to that extent the proclamation does not contradict the principles of the Constitution. On the other hand, the House found the Board's interpretation of the proclamation to mean a candidate should be versed in any of the indigenous languages, particularly the Berta language, one of the five languages spoken in the region that is not the official language of the regional state, unconstitutional and declared it null with prospective effect. Of interest in this regard is the fact that because of the multi-ethnic nature of the regional state and because Amharic is widely spoken by a large majority of the people in the region, the regional Council has adopted Amharic as the official language.

### Comments on the HoF Decisions

It is easier to start with the expert opinion of the CCI majority. They emphasized the constitutional provision of the right of the citizen to elect and to be elected and the principle of non-discrimination stipulated in the same text. According to the majority it does not matter whether the candidate who is elected in the regional council speaks or understands the local vernacular. The candidate has the right to be elected and cannot be prohibited because he/she does not speak the language.

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<sup>489</sup> See decision of the HoF of *Megabit 5*, 1995 E.C (12 March 2003) that in a nutshell upheld the law as constitutional but declared the decision of the Board as unconstitutional and hence of no effect with prospective effect. It articulated that Article 38 of the proclamation is not in violation of Article 38 of the Constitution. It also underscored that whoever wants to run as a candidate is required to know the working language of the *regional state*, and not one of the local vernaculars (unpublished).

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This misses the fundamental virtue of not only the Ethiopian Constitution, which is apparently based on the free will of nationalities, but also the values of federalism, unity in diversity. The nationalities are declared sovereign under the Ethiopian constitution and constituent states are established to empower at least some of the major nationalities to have their own ‘mother’ states, the right to administer themselves, to use their own language and even to secede. In multicultural federations in as much as we need to have a politically and economically integrated society, we also have to respect and promote diversity. The crucial issue is to draw the balance between the two.

The minority opinion, even though it emphasized the importance of investigating the whole text and the fact that the nationalities are considered as the building bricks of the federation, was not specific enough as in the decision of the HoF to emphasize the point that what is required under the proclamation is the candidate’s knowledge of the working language of the regional state, and not of any of the local vernaculars. But in doing so the minority have touched upon one of the thorny issues in the federal system to which neither the majority nor the HoF was able to provide an answer. Could one really argue with a lot of emphasis that a candidate cannot run for office as long as she/he cannot understand even one of the local languages? Would it be possible to give an affirmative answer to this question under the constitution or should these multi-ethnic regions be subject to a different treatment: they do not have their own regional governments and because many ethnic groups are living there they had to adopt Amaharic for communication and because of this highlanders are not required to know any of the local vernaculars. This raises the central issue of the dilemma in the federal

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system<sup>490</sup> on the one hand declaring the equality of states and nationalities whereas on the other hand only some nationalities have their own constituent states. Those who do not have their own constituent states cannot impose the language requirement on the candidate as is the case in other regional states, for example Amhara, Somali, Oromia and Tigray. This is a question that opens Pandora's box.

There are two options here. One may be tempted to state that if in the states of Amhara, Oromia, Afar, Tigray and Somali knowing a local language is a requirement to run for public office, there is no reason to deny multi-ethnic regions the same right. Because they do not have their own constituent state, they should not be subjected to different treatment. Otherwise a clear constitutional asymmetry is going to evolve between those nationalities that have their own 'mother states' and those that do not. Or should we simply reiterate that after all the Constitution has made that clear by recognizing only nine constituent states with its own implications?<sup>491</sup>

A related argument can be deduced from the federal Constitution. As several sections of the Constitution indicate, at least formally speaking, the Ethiopian Constitution is closer to a confederation than a federation.<sup>492</sup> It emphasizes the sovereignty of nationalities, it grants nationalities the right to self-determination,

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<sup>490</sup> This dilemma is clear under Article 46, which recognizes only nine members of the federation, while in fact there are more than eighty ethnic groups and secondly there is the dilemma we are noting in this section: ethnic versus multicultural federation.

<sup>491</sup> His Excellency Dr. Gebreab, former Minister of State at the Ministry of Federal Affairs, speaks of 'minority states,' in reference to these multi-ethnic states, particularly Harari, Gambela and Benishangul-Gumuz states, in which the numerical minority is permitted to dominate the local political process, consequence of the inherent feature of the federal system. Speech made at the First National Conference on Federalism, Conflict and Peace Building, Addis Ababa, May 5-7, 2003.

<sup>492</sup> See the Preamble, Articles 8, 39 that among others proclaim sovereign nationalities with right to self-determination including secession, coming together to establish a federation, granting the federal government only limited powers and maintaining the residue for themselves; yet this has been counterbalanced by a centralized federal practice.

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secession included; there is no federal supremacy clause unlike many other federal constitutions. It appears that the nationalities are considered as building bricks as if they preceded the federation. All this taken together seems to indicate that at the time of the federal bargain the forces of diversity prevailed over the forces of unity whereas in many working federations one finds a balance in which forces of unity slightly prevail over the forces of diversity. If this argument is pushed further then it may imply that the Constitution has taken a position as far as the tension between collective versus individual rights is concerned, in favor of the former. If so, the decision of the Electoral Board, however absurd it may be in creating 'small islands' everywhere, forcing every citizen to find out where his 'mother state' is, could be justified.

This is, however, contrary to the political and economic integration envisaged by the federal Constitution. In the Preamble it is stated 'We, the nations, nationalities and peoples of Ethiopia: strongly committed, to *building a political community* founded on the rule of law.... Convinced that to live *as one economic community* is necessary in order to create sustainable and mutually supportive conditions...have, therefore, adopted this Constitution through representatives we have duly elected for this purpose as an instrument that binds us in mutual commitment to fulfil the objectives and the principles set forth above.' Thus, it is a clear political and economic integration that the federation envisages. It is good to note the emphasis given to the free movement of labour and capital across the country as a means to enhance this project in a recent federal document.<sup>493</sup> Seen from this angle, the position of the minority is an extreme.

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<sup>493</sup> See *Be Ethiopia Ye Democrasiyawi Sirat Ginbata Gudayoch*, Ginbot 1994 E.C. (Addis Ababa, Ministry of Information) Pp. 32-35; 169, 180, 207, 214.

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Another argument against the minority could be deduced from the Constitution. The Constitution has for one reason or another made a choice (Article 46). By outlining only nine member states it seems to have defined what constitutes majority and minority nationalities. One can then conclude that the language test under Article 38 of the proclamation is only applicable to those states defined under Articles 46 and 47 and not to other states. Lastly, the position of the minority in the CCI's decision not only enhances majority-minority tension but goes even further and creates minority tyranny over majority in some of the constituent states. The CCI minority by adopting such a position closes its eyes to the rights of economic migrants. Yet, the decision of the HoF skilfully escapes this thorny issue by focusing on the technical interpretation of the provisions of the proclamation without substantively addressing the concerns of the indigenous ethnic groups.

Despite the above mentioned limitations, the decision on this case is perhaps one of the most celebrated decisions of the HoF that attempted to strike a balance between the concerns of the different groups.

The third case concerns the border dispute between Oromia and the Somali regional state.<sup>494</sup> A controversy that ensued following the restructuring of the regional states in line with the 1995 Constitution with a view to ensuring self rule to the nationalities. There arose a boundary dispute between the two regions covering long disputed boundary and that was finally resolved by a referendum

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<sup>494</sup> The two regional states share more than 1000 km border area. In the border areas inhabited by nomadic people, the tension between communities over grazing land and water predates the present federal set up. But with the introduction of the state restructuring after 1991, mobility was somehow restricted which intensified resource competition. For more on the conflict regarding Babile see Ahmed Shide, "Conflicts Along Oromia-Somali State Boundaries: The Case of Babile District," in *First National Conference on Federalism, Conflict and Peace Building* (Addis Ababa: United Printers, 2003) Pp. 96-112. As of September 2004, the long overdue issue of settling the border between Oromia and Somalia regional states seem to be finally subject to a referendum organized by the HoF on 463 *Kebeles* claimed by both regions. See *Reporter* (Amharic) *Meskerem* 30, 1997.

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organized by the HoF. Because of its sensitivity and magnitude, the HoF entered into extensive dialogue with the communities involved, the two regional governments and finally reached at an amicable settlement.

Indeed given the comparative experience -the Supreme Court of the US imposing self restraint on it self based on the 'political question' doctrine and the German FCC hesitating to enforce matters that it felt belongs to the political branches, the HoF's bold assertion in the three cases indicate the point that the HoF is an appropriate body for issues in the grey area between law and politics. Yet the HoF's jurisdiction needs to be confined to cases that have a high political and constitutional significance. These are matters with significant political flavour for which the judiciary may be ill suited to handle with care.

#### **Concrete Review and Individual Complaints**

Two other areas of jurisdiction for the HoF include the concrete review and individual complaints. There is an interesting similarity in this respect between the FCC and the HoF.<sup>495</sup> In case of concrete review, the regular judiciary, if it comes across a case the disposition of which requires the interpretation of the constitution or the checking of the compatibility of the law at issue with the constitution, must refer the constitutionality issue to the FCC or the HoF, because reviewing the constitutionality of laws is the jurisdiction of the Constitutional Court or the HoF. The court adjudicating the merits of the case does not have the jurisdiction to investigate the constitutionality issue. The reference to the FCC or the HoF could be made by the court on its own initiative or on the application of parties. There is thus a split of function between the regular court that decides on the merits of the case and the FCC or the HoF that decides the conformity of the

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<sup>495</sup> See Article 84 of Ethiopian Constitution; Art. 21 of Proc. 250/2001; Article 100 of the Basic Law.

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legislation with the constitution without going into the merits of the case. This is distinct from the American courts in which in principle any court decides the constitutionality of the law in the process of deciding the merit of the case. The monopoly power of the FCC or the HoF in many parliamentary federations is justified by the respect for the legislature. Not every court should be allowed to disregard the will of parliament.<sup>496</sup>

An interesting issue in this respect concerns the question when the court is bound to refer the matter to the HoF or the FCC. Is it enough for the court to refer the constitutionality issue so long as an objection to this effect is raised by one of the parties or should the court wait until there is some doubt on the law's constitutionality or should the court convince itself beyond doubt that the law is unconstitutional? This is crucial because if the court has to establish for itself that there is a *prima facie* case of unconstitutionality, before referring the matter, then the court is in a way reviewing, albeit not conclusively, the constitutionality of the law. It is only that it cannot repeal or declare the law unconstitutional. Apart from this, if mere objection by a party leads to a reference of the case to the FCC or the HoF then the jurisdiction of the court could practically be hampered for trivial reasons. It is in recognition of this fact that the law stipulates: 'The Court handling the case shall submit it to the CCI *only if it believes* that there is a need for constitutional interpretation in deciding the case.'<sup>497</sup>

The last procedure concerns what the Basic Law calls 'constitutional complaints.'<sup>498</sup> The same is stipulated under the new law in Ethiopia. 'Any person

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<sup>496</sup> William Karl Geck, "Judicial Review of Statutes: A Comparative Survey of Present Institutions and Practices," *Cornel Law Review* 51 (1965-66) p. 279.

<sup>497</sup> Art. 21(2) of Proc 250/2001. The Basic Law Article 100 stipulates the same principle. See also Martin Borowski, "The Beginnings of Germany's Federal Constitutional Court," *Ratio Juris* 16:2 (June 2003) p. 156.

<sup>498</sup> See Article 93 (1) 4a of the Basic Law.



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who alleges that his fundamental rights and freedoms have been violated by the final decision of any government institution or official may present his case to the CCI for constitutional interpretation.<sup>499</sup> This is significant in the sense that the constitution was silent on constitutional complaints. In Germany this procedure has both subjective and objective purposes. It was introduced to serve as a form of legal protection to the individual once certain procedures for its exercise are complied with. It is an extraordinary remedy available to the individual for protecting the individual's basic rights and in that sense it is there to render a legal remedy to an individual against any law, directive or final decision of any branch of the government, including the judiciary. On the other hand, it also has an objective function. The decision might clarify a general constitutional issue or might preserve the legal system in general. In the latter case even if the complaint is withdrawn the FCC may continue to render its decisions because it is of general interest to the legal system.<sup>500</sup>

The relevance of the complaint procedure is not yet familiar practice in Ethiopia. Nor is the distinction between objective and subjective purposes of the complaint well understood. In one case<sup>501</sup> (before the issuance of the new law), the CCI rendered a decision that gave the impression that this procedure has only a subjective purpose. The real parties in dispute were husband and wife involved in a divorce case. A *Sharia* Court already decided the case but the wife who was not happy with the outcome of the case took the matter to the Federal First Instance Court, to reverse the decision of the *Sharia* Court. The husband, on the other hand, applied to the Islamic Affairs Supreme Council requesting this body to intervene on behalf of the Muslim community in general in finding out whether

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<sup>499</sup> Article 23(1) of Proc. 250/ 2001.

<sup>500</sup> Borowski, *supra* note 74 at 174.

<sup>501</sup> The case was submitted to the CCI by the Islamic Affairs Supreme Council in *Tikimit* 1992 (October 1999) and decided by the CCI on *Tirr* 17, 1992 E.C. (25 January, 2000).

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the regular judiciary has the competence to review decisions of religious courts. The alleged unconstitutionality is related to the fact that the *Sharia* Court has already rendered a binding decision to the parties. The Supreme Council applied to the CCI on the matter. The issue before the CCI was a resolution of the question whether or not the ordinary courts (at whatever level) have a constitutional mandate to review the decisions of the *Sharia* Courts pursuant to Articles 34(5)<sup>502</sup> and 78(5) of the Ethiopian Constitution. The CCI sadly dismissed the case on the ground that the parties to the dispute, not the Supreme Council, have the standing to refer the matter to the CCI. Yet, the CCI's position is subject to criticism. Although the decision of the CCI or the HoF in the end would have an implication for the parties in dispute, the case mainly sought an abstract or general remedy from the CCI. The Supreme Council was as representative of the Muslim community seeking to define the scope of legal pluralism tolerated by the Constitution. It was an attempt as such to define the role of religious and traditional institutions within the general constitutional framework.

It is important to mention that the procedure of constitutional complaint both in Germany and Ethiopia is subject to rigorous scrutiny before the FCC or the HoF admits the application. In Germany because the number of constitutional complaints increased in the course of time, a committee of three judges usually undertakes preliminary examination before the complaint is admitted.<sup>503</sup> The applicant is also required to exhaust remedies in the lower courts before applying to the FCC. The new law in Ethiopia stipulates similar requirements. Not only is

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<sup>502</sup> Article 34(5) states: 'This Constitution shall not preclude the adjudication of disputes relating to personal and family laws in accordance with religious or customary laws, with the consent of the parties to the dispute.' And Article 78(5) partly provides: 'Pursuant to sub-Article 5 of Article 34 the HoPR and State Councils can establish or give official recognition to religious and customary courts.'

<sup>503</sup> Article 13 paragraph 8 (a) of the Law on FCC (1958).

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exhaustion of remedies in the relevant government institution required but the applicant is also required to have a final decision, that is an adjudication that has been exhausted and against which no appeal lies along the same path way. These requirements, rigorous as they might appear, try to sift out only the most relevant ones preventing the excessive flow of cases to the FCC or the HoF. It should not be forgotten that these bodies are established to adjudicate only constitutional issues, distinct from the practice with decentralized forms of review.

**Conclusion**

As illustrated in the cases, the HoF has played an important role in the adjudication of constitutional matters particularly those cases that are of high political significance. The fact that the HoF is composed of representatives of nationalities indirectly elected by the electorate at regional level seems to give the HoF an impression of a political organ than a judicial one. Nevertheless this is not without possible implications as to its impartiality as Ethiopia is venturing into a multiparty politics. So far, there has been one ruling party at federal and state level and the HoF's impartiality has not been brought to test. With the emerging multiparty politics, however, it remains to be seen how far the HoF will serve as an impartial adjudicator on important intergovernmental conflicts. A more challenging issue to the HoF however is the fact that it is composed of important figures coming from the regions. While this may positively contribute on the HoF's ability to serve as a forum for addressing regional concerns, it may at the same time serve as an obstacle because the HoF is in a way becoming a part time House. In reality and unless extra-ordinary circumstances dictate, records so far indicate that it meets only twice a year. Apparently, the Constitution (Article 83) imposes a duty on the HoF to decide cases *within thirty* days of receipt of opinion

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from the CCI, while it is *actually* holding its regular session once in six months. Under such circumstances and with the increase in the number of intergovernmental conflicts, the House certainly will be an inefficient institution. It is thus suggested that in the long run it should aim to have its own permanent members. In relation to the jurisdiction of courts, the new laws and the recent case seem to leave no room for the judiciary as far as adjudication of constitutional matters is concerned. It is, however, the contention of this author that the new laws need to be challenged for their constitutionality as it was not the intention of the framers of the Constitution to deny jurisdiction to the judiciary from all constitutional matters.

**7.2 ORGANIZATION OF THE JUDICIARY IN A FEDERAL SYSTEM**

There is a question as to whether the division of power inherent in federalism applies for judicial power to the extent of requiring each order of government to have its own court system.<sup>64</sup> On the one hand there is the view that state courts subject to review by the Supreme Court are sufficient to protect the interest of the federal government. Lower federal courts are perceived as unnecessary, expensive and likely an intrusion on the autonomy of the state governments. According to this view, State courts are believed to be competent for the work required so long as appeal is guaranteed to a higher federal tribunal. This seems to be the trend in Germany, Switzerland and India.

On the other hand, there is a view that federal courts like federal executive agents are desired to effectively implement the power of the federal government. If one

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64 See K.C. Wheare, *Federal Government*, 4<sup>th</sup> edition (Oxford: Oxford University Press, 1963) at 69; also Cheryl Saunders, 'Constitutional Arrangements of Federal Systems,' *Publius: The Journal of Federalism* 25:2 (Spring 1995) at 68.

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takes the federal principle of division of power strictly, not only are legislative and executive functions divided between the federal government and the states, but judicial authority too is divided. This would lead to a dual set of courts: federal courts applying and interpreting federal laws and another set of state courts applying and interpreting the laws of each state. That seems to be the case with the United States and Ethiopia. Where separate court systems exist it is assumed that judicial power should be divided between them in line with the rest of the federal arrangement. There is a fear that state courts might not fully enforce and implement federal policies. This view remains skeptical about the competence of state courts. There is some distrust in state courts in adjudicating federal laws. Besides there is the need for maintaining uniformity in the interpretation of federal laws. However, the existence of dual court structure among other things creates difficulties for litigants by the existence of two separate court hierarchies, each with limited jurisdiction.

The United States follows the dual court system of courts. The Constitution provides that the judicial power shall be vested in one Supreme Court<sup>65</sup> and in such inferior courts as the Congress may from time to time ordain and establish. As a result, two types of federal court are established: the constitutional courts, also called Article III courts and the legislative courts also called Article I courts.

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65 See US Constitution Art. III. Congress may also establish Art. I courts or legislative courts to carry out the legislative power the constitution has granted it. Examples of legislative courts include US Court of Appeals for the armed forces, US Court of Veteran Appeals, US Tax Court, US Bankruptcy Courts, US Court of Federal Claims which handles monetary suits brought against the US, and the US Court of international trade, which is authorized to hear and decide civil actions against the US, federal agencies or their employees, arising out of any law pertaining to international trade. There are also administrative courts within many of the federal agencies. Cases are taken to administrative law judges on the level of the federal district court and appeals could be taken to a board or commission by the federal agency that issued the regulation. Appeals from the rulings of the major agencies are brought then directly before the US Court of Appeals. Decisions of the district courts, Art. I courts, administrative agents and state supreme courts may be appealed before the thirteen US Courts of Appeals. Note that in the end there is judicial review by the regular judiciary at appellate level against the special courts. See Henry Abraham, *The Judiciary*, *supra* note 16: 8-11.

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The former are established by Congress under Article III of the US Constitution while the latter owe their existence to Article I of the same Constitution.<sup>66</sup>

Only federal courts are provided for in the constitution. There is the federal court system, an integrated system divided into numerous geographic units and various levels of hierarchy. In addition, each state has its own court system that operates within the state. Because of this duality, the state courts administer state law and federal courts administer federal law. There are three levels of federal courts: at the bottom are district courts also called trial courts, mainly with original jurisdiction. There are ninety-four such federal district courts with at least one in each state. Next we have the circuit courts of appeals also called US Circuit Courts, intermediate levels of federal courts. They are the workhouses of the federal court system because the bulk of cases are resolved there. Appeals to these courts are made if the losing party feels that the lower court has made an error of law, not an error of fact. The US courts of appeal are divided geographically into thirteen circuits each covering at least three states mainly concerned with appellate jurisdiction.<sup>67</sup> The judges, often three, will herald the decision to the litigants and the parties have several options. They may seek reconsideration of the decision by the same three judges panel; they may seek rehearing of the panel's decision by all of the judges of that circuit sitting together or they may seek review by the Supreme Court by filing a motion for a writ of *certiorari*.<sup>68</sup>

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<sup>66</sup> Legislative courts, compared to the constitutional courts, are quasi-judicial in the sense that they are close to the administration. They are creations of Congress under Art. I to apply federal law and to adjudicate federal claims. Appeal is always guaranteed from these courts to the constitutional courts. The legislative courts also render advisory opinions. They were created partly to have more flexible tribunals than the three federal constitutional courts and to assist in reducing the workload of the main federal courts. The technical nature of some of the cases too made these peculiar courts necessary. A more crucial difference between the two is, however, the safeguards accorded to the constitutional courts in terms of tenure, salary and independence by virtue of Article III of the constitution. No such safeguard exists for the legislative courts. See Henry Abraham, *The Judiciary*, *supra* note 16: 8-11.

<sup>67</sup> See Richard Posner, *The Federal Courts, Challenges and Reform* (Cambridge Massachusetts: Harvard University Press 1996): 4-13; R. Carr, *supra* note 8: 7-8.

<sup>68</sup> *Certiorari* is a Latin term meaning to make more certain or better informed. It signifies the willingness of the Court to review the case, but not necessarily to hear oral arguments. It is strictly discretionary to the Court and

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Thirdly, we have the Supreme Court. It is the apex of the federal court system consisting of nine justices who hear and decide cases. Its jurisdiction is largely discretionary through the process of *certiorari*: under the so-called rule of four, if four of the nine justices favor hearing a case then *certiorari* will be granted. In selecting which cases to consider, the justices look for those in which a substantial federal question is presented, that is, the Supreme Court can review cases on appeal from federal courts or state courts whose decisions are based on an issue of federal law, for instance, when a federal appeals court invalidates a state statute or when a state court strikes down a federal statute. Or two lower courts have reached conflicting conclusions over the same issue and therefore a higher authority's opinion is sought or the court may want to issue a new opinion.<sup>69</sup> Another reason is when a lower court has ruled on a matter that the Supreme Court has not yet settled in an earlier case.<sup>70</sup> Otherwise it is important to note that the Supreme Court is not the highest court of appeals over the state judiciary, which is quite independent from the federal judiciary.

At state level, each state has its own independent judicial system. The highest court in each state is the ultimate authority on what the law is with regard to state law from the state's point of view. Most states have a three-tiered level county court, appellate court (court of appeals) and a court of last resort usually called the Supreme Court.<sup>71</sup> The Court's decision constitutes the law of the state and is thus final and binding. Only if the remedies are exhausted and if a substantial federal

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granted only when a minimum of four justices agree that there is special and important reason that warrants the Court to order the court below to send the record for review. Henry Abraham, *The Judiciary*, *supra* note 16: 26-27. Toni Fine, *How the United States Court System Functions in Democracy* (Sept. 1999) 4:2 at 8.

69 Toni Fine, *supra* note 68: 8, 45.

70 Sullivan Lagon, 'The Role of the Independent Judiciary,' *Freedom Papers* No. 4 (United States Information Agency, 1999): 7-8.

71 Toni Fine, *supra* note 68 at 9.

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question is present can cases go to the Supreme Court. In which case, the two court systems may converge at the level of the federal Supreme Court.<sup>72</sup>

Germany introduces a judicial hierarchy different from the United States judicial system. All judicial power not given to federal courts is reserved to the states.<sup>73</sup> This means that in contrast to the situation in the United States, most matters involving federal law are litigated initially in state courts subject only to ultimate and limited federal appellate review.<sup>74</sup> In Germany all lower and intermediate courts of appeals are state courts, whereas all courts of final appeals are federal tribunals. The Basic Law<sup>75</sup> expressly contemplates federal courts only for military, civil service controversies and intellectual property.

The organization and operation of the judiciary is more or less shared between the federal government and the states. Federal law specifies the basic organization and jurisdiction of state courts but their administration and staffing, including the training of judges, is under the control of the states. At the lowest level one finds the regular courts that adjudicate ordinary civil and criminal cases, administrative courts, labor courts, social courts, finance courts and constitutional courts. There are also respective appellate courts at state level. The high federal courts cap these respective judicial hierarchies. In the interest of uniformity and protection of federal rights, the Basic Law provides for five federal supreme courts other than the Constitutional Court. The highest court of appeals in each of these areas is respectively, the federal Supreme Court, federal administrative court, federal labor court, federal social court and federal finance court. The federal

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72 Henry Abraham, *The Judicial Process*, *supra* note 16: 3-45.

73 German Basic Law Arts. 30 and 92.

74 David Currie, *The Constitution of the Federal Republic of Germany* (Chicago: The University of Chicago Press 1994) at 75; Donald Kommers, 'Autonomy versus Accountability: The German Judiciary in Peter Russell and David O'Brien eds., *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (Charlottesville and London: University Press of Virginia, 2001) at 141.

75 Art. 96 of the Basic Law.



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constitutional court is the highest court of review for constitutional cases. Germany's integrated appeals system in which cases begin in a state court and end in a federal appellate court causes few problems because almost all statutory law is federal law.<sup>76</sup> Contrary to the view in the United States that considers appeal as an insecure remedy for possible state hostility to federal legislation, Germans do not appear to view the absence of lower federal courts as a threat to the supremacy of federal law.<sup>77</sup>

In one significant respect the potential authority of federal courts is broader in Germany than in the United States. Nothing in the catalogue of the Basic Law suggest that they are limited to deciding matters of federal law and indeed it expressly permits the states to give them ultimate appellate jurisdiction over controversies arising under state law.<sup>78</sup> Federal appellate review in Germany promotes uniformity even in areas outside the legislative authority of the federation. Thus although the great preponderance of legislative authority in Germany is federal, the executive and judicial powers of the federation are significantly narrower. The federation may neither enforce nor expound every law it may constitutionally enact.<sup>79</sup>

The Swiss judiciary is also organized in a more similar fashion to Germany. The statutes of the federal government need not be applied by special federal agencies and federal courts. They have to be executed by cantonal agencies and enforced by cantonal courts. The law is an indivisible unity. Therefore one cannot have competing federal and state court systems. Thus cantons do execute and

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76 See chapter six for more.

77 Currie, *supra* note 74 at 75; Kommers, *supra* note 74 at 141.

78 See Art. 95, 99.

79 Currie, *supra* note 74 at 77.

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implement federal laws<sup>80</sup> with cantonal courts and cantonal agencies. In each canton<sup>81</sup> there are intricate civil, criminal, administrative and other specialized courts with extraordinary jurisdiction and with some intermediate level of appeals and finally one finds at the highest level of appeal, the Federal Supreme Court.<sup>82</sup> In short, justice is a matter for the cantons. The cantonal courts exercise jurisdiction to apply both the law of the cantons and the laws of the federal government. A question of application of either federal or state law by the courts does not present much difficulty. There is just one set of courts and practically one body of law.<sup>83</sup> There are few federal courts: just the federal court and its autonomous branch, the federal court for social insurance. The federal court is a multifaceted court. It is a court of appeals for civil law matters, a court of *cassation* for criminal cases, a penal court for some serious criminal cases and an administrative court too. It also serves as a constitutional court against cantonal law and cantonal decisions. The supreme federal tribunal does not, however, have judicial review over federal legislation. It is an appeal court against all cantonal law but not against federal law.<sup>84</sup> It stands as a highest court of appeal over the cantonal courts. This function is held to be its most important power because in the absence of all inferior federal courts, the uniformity of laws could not otherwise be assured. The federal tribunal is not only a court of appeal, it has original jurisdiction and some power of judicial review.<sup>85</sup>

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80 Thomas Fleiner, 'Switzerland: Constitution of the Federal State and the Cantons,' in Basta Fleiner and Thomas Fleiner ed., *Federalism and Multiethnic States, the Case of Switzerland* v. 16, 2<sup>nd</sup> edn. (Fribourg: PIFF, Helbing and Lichtenhahn, 2000): 106-107; see Arts. 145, 122, 123, 168, 188-191c.

81 Cantonal diversity is reflected in the organization of the courts. In some cantons the judges are elected by the people; in others they are nominated by parliament or special nominating bodies. Fleiner, *supra* note 80 at 113.

82 Nicola Schmitt, *Federalism: The Swiss Experience* (Pretoria: HSRC Publishers, 1996) at 135.

83 W.J. Wagner, *The Federal States and their Judiciary* ('s-Gravenhage, Montori, 1959) at 172.

84 One unique feature of Swiss federalism is the lack of judicial review at federal level. This means that the federal Supreme Court has no direct influence on the balance of power between the cantons and the confederation. This is because of the way democracy operates in Switzerland and because of the mistrust of the power of judges. The framers trusted democratic institutions than the courts. See Art. 188 of the Swiss Constitution.

85 Wheare, *supra* note 64 at 70; see Arts. 145, 122, 123 168 188-191c.

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The Indian constitution sets up a federal judiciary consisting only of the Supreme Court without any inferior courts in the federal judicial system. Unlike the United States, there is a single integrated system of courts for the union as well as the states that enforce and interpret both the Union and state laws and at the head of the entire system stands the Supreme Court of India. Below the Supreme Court stand the high courts of the different states and under the high courts there is a hierarchy of other courts which are referred to in the constitution as subordinate courts: courts subordinate to and under the control of the high courts.<sup>86</sup>

The state high courts and other inferior courts continue to constitute the state judiciary. The arrangement was meant to assure a uniform judicial standard and is thus a powerful force in the political integration of the various parts of the republic. The states in India are all subjected to the jurisdiction and powers of a single integrated judicial system.<sup>87</sup> In short, the same system of courts headed by the Supreme Court administers both the union and state laws as are applicable to the cases coming up for adjudication.<sup>88</sup>

The Indian constitution sets out in considerable detail the organization and jurisdiction of the two upper tiers of the hierarchy of courts: the federal supreme court and the state high courts.<sup>89</sup> The organization of subordinate courts is, however, left to the states although the integrated nature of the system of courts is assured by the authority given to the high courts to supervise all courts and

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86 Art. 233 sub 7. For more on the Indian system of courts see Maureen Callahan VanderMay, 'The Role of the Judiciary in India's Constitutional Democracy,' *Hastings Int'l & Comp. L. Rev.* 20 (1996-1997): 103-133; A.S. Anand, 'Indian Judiciary and Challenges of the 21 Century,' *The Indian Journal of Public Administration* XLV: 3 (July-Sept 1999): 287-302; Prem Kumar and Rai Bhatia, 'Independence of Judiciary and Appointment of Judges,' *The Indian Journal of Public Administration* XLV: 3 (July-Sept 1999): 364-398. Durga Basu, *Introduction to the Constitution of India*, 4<sup>th</sup> edn. (Calcutta 12, S.C. Sarkar and Sons Ltd, 1966) at 231; Owing to the shortage of experienced judges, Indian federalism formed a single integrated system with the authority over the judicial organization and jurisdiction divided between the union and the states. Ronald Watts, *New Federations: Experiments in the Common Wealth* (Oxford: Clarendon Press, 1996) at 227.

87 Charma and Choudhry, *Federal Polity* (London: Asia Publishing House, 1967) at 318.

88 M.P. Jain, *Indian Constitutional Law*, 4<sup>th</sup> edn. (Nagpur: Wadhwa and Co. 1998) at 120.

89 See Arts. 222, 230, 227, 233 union list entry 95, state list entry 65, concurrent entry 46.

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tribunals within their territorial jurisdiction.<sup>90</sup> The jurisdiction and power of the Indian Supreme Court are in their nature and extent very wide. It is at once a federal court, a court of appeals and a guardian of the constitution and the law declared by it in the exercise of any of its jurisdiction under the constitution is binding on all other courts within the territory of India.<sup>91</sup> While the jurisdiction, for instance, of the US Supreme Court is confined to cases arising out of the federal relationship or those relating to the constitutional validity of laws and treaties, the Indian Supreme Court is the highest court of appeal in the land relating to civil and criminal cases, apart from cases relating to the interpretation of the constitution.<sup>92</sup>

The Ethiopian Constitution gives some hint about the organization<sup>93</sup> of the judiciary.<sup>94</sup> The Constitution states that supreme federal judicial authority is vested in the federal Supreme Court and reserves for the HoPR to decide by a two-third-majority vote to establish inferior federal courts as it deems necessary, nationwide or in some parts of the country.<sup>95</sup> There is only one federal Supreme

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90 Arts. 227,233 sub 7.

91 See Art. 141.

92 Basu, *supra* note 86 at 235; see Art. 133 sub 5.

93 Looking back through history we see that not only was the judicial structure unitary but was also fused with the administrative function. The adjudication of cases was regarded as the principal function of the administrative officers. Government officials were discharging both administrative and judicial functions and appeals were taken to the next higher governor. In 1942 the administration of justice proclamation No. 2 of 1942 established a four-tier court system and in 1987 the court structure was changed into a three-tier system. Under the *Derg* regime, the Ethiopian Judicial system was unitary and the country was divided into fourteen provinces in which the High Courts would sit and only one Supreme Court in the capital, Addis Ababa. It remained a unitary one until 1991. The dual court structure was introduced during the transition and more recently after 1995. See Aberra Jembere, 'The Administration of Justice in Ethiopia: Effects of Structural, Jurisdictional and Procedural Changes' in Baye Yimam Richard Pankhurst *et al* eds., *Proceedings of the XIVth International Conference of Ethiopian Studies* v. 3 (Addis Ababa: Addis Ababa University 2000): 1314-1333.

94 Art. 50(2) states that the federal government and the states shall have legislative executive and judicial powers. Apparently this points to a dual judicial structure. But until recently it was principally based on a delegated judicial structure, where the state courts served not only as an institution for interpreting state laws but also assumed the function of the two other federal courts, except the role of the federal Supreme Court. With the new amendment proclamation Article 2, the Federal High Court has been established to enforce exclusive federal matters in some selected states mainly the SNNPRS, Gambela, Benishangul-Gumuz, Somali and Afar. See Proclamation No. 322/2003, Federal High Court Establishment Proclamation, A Proclamation to Provide for the Establishment of Federal High Court in some Regions, *Federal Negarit Gazeta*, 9<sup>th</sup> Year No. 42, Addis Ababa, 8 April 2003.

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Art. 78(2).

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Court with nation wide jurisdiction and until very recently, the federal High Court and First Instance Courts were limited to Addis Ababa and Dire Dawa. As far as the organization of the inferior federal courts in the states is concerned the constitution declares that the jurisdiction of the Federal High Court and of the First Instance Courts are delegated to state courts.<sup>96</sup> By virtue of this delegation the state Supreme Court exercises, in addition to its state jurisdiction, the jurisdiction of the federal High Court and the state high courts exercise, in addition to their state jurisdiction, the jurisdiction of the federal First Instance Court.<sup>97</sup> In order to guarantee the right of appeal of the parties to the case, decisions rendered by a state high court exercising the jurisdiction of the federal First Instance Court are appealed to the state supreme court.<sup>98</sup> While decisions rendered by a state supreme court on federal matters are appealed to the federal Supreme Court.<sup>99</sup> With the recent decision of parliament to establish inferior federal courts<sup>100</sup> a full-fledged dual court structure is on its way, at least in five regional states. As a result there are inferior federal courts in some states while the delegated power seems to continue in three other states namely, Oromia, Amhara and Tigray, adding to the point noted in chapter five that some level of asymmetry exists in reality among the constituent states.

As far as the state courts are concerned, from the provisions of the Constitution one finds that the judicial structure consists of the state first instance courts at the lowest level, also called *wereda* courts, above which we have the intermediate

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96 Art. 78(2). As recorded in the Minutes of the Constitutional Assembly, one of the reasons for limiting the setting up of federal courts to Addis Ababa and Dire Dawa and to delegate the function of the federal courts to state courts in all other regions, until recently was related to budget and human resource constraint. Otherwise the members have emphasized that the judiciary too should be organized on a dual basis and state courts should have the final say on state matters. At the early stage certainly the setting up of a dual court structure would have been expensive and difficult to staff with qualified judges. Certainly there would also be confusion over jurisdiction for litigants.

97 See Art. 80(2) and sub (4).

98 Art. 80 (5).

99 Art. 80(6).

100 Proc. 322/2003, *supra* note 94, Art. 2.

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zone/high court and at the highest level we have the state supreme court.<sup>101</sup> All the state constitutions too stipulate that the judiciary of the regional state shall be organized<sup>102</sup> in such a way as to comprise the regional supreme court, high courts and first instance courts. As a result the Ethiopian judicial system theoretically speaking is organized on a dual basis in which there are two parallel court systems, the federal courts and the state courts with their own independent structures and administrations. However, until the enactment of the new laws the operation of the federal and state courts was an integrated one. One probable reason for the original design of the dual but delegated court structure under Article 78(2) was the lack of trained legal experts when it was set up in 1995. However, after 10 years of experience it appears that the delegated function of state courts has brought some inadequacies in the enforcement of federal laws.<sup>103</sup>

### Shared Judicial Power

As described above, among the federations considered the United States alone adopted the dual structure of courts, one set of courts interpreting federal laws and another set of courts enforcing state law. Ethiopia too seems to follow the same pattern. But this parallel system does not necessarily imply that each set of courts exercises jurisdiction that is completely exclusive of the other.<sup>104</sup> Although there are certain matters, which the federal legislature may provide to be exercised exclusively by federal courts, there are many matters falling within the judicial power of the United States in which state courts have a concurrent jurisdiction

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101 See Arts. 80 and 81; Art. 50(7).

102 See, for instance, Art. 67-69 of Amhara, 72-77 of SNNPS, 62-67 of Tigray and 61-66 of Oromia State Constitutions.

103 Specially the federal government is inspired by the lack of impartiality in the SNNPRS and Gambela states courts following the state crises and ethnic conflict in 2002 and 2003 respectively. The state courts have been blamed for complicity in bringing local culprits before justice. Interview with his Excellency, Dr. Gebreab Barnabas, Minister of State, Ministry of Federal Affairs, January 2003.

104 Wheare, *supra* note 64 at 69.

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with that of the federal courts. In a nutshell, there may obviously be, like other powers, exclusively federal, exclusively state and shared judicial powers. Of course when there are concurrent judicial powers between the federal and state judiciary, mechanisms should be installed to resolve conflict of jurisdiction. There may be confusion for litigants as to where to file their case. In certain circumstances, a case brought before a state court may thereafter be taken to a federal court. Otherwise, even when there is a parallel system of courts as in the United States, Congress has not made the jurisdiction of each court exclusive. The two systems in the United States interlock. One aspect of that interlocking occurs when in a case before a state court any question arises that calls for the interpretation of the constitution of the US or of the validity of any act of Congress or treaty made there under. Such questions normally fall within the ambit of federal courts or in last resort in the Supreme Court either because the case may be transferred from the state to the federal court or because it can go on appeal to the Supreme Court from the highest court of the state.<sup>105</sup>

There are two views as far as the Ethiopian court structure of shared judicial power is concerned. On the one hand there are those who hold that the dual court structure is strictly taken both under the constitution and the proclamations issued<sup>106</sup> and as a result contend that civil or criminal cases fall either before an exclusively federal court or an exclusively state court; hence there is no case of shared/concurrent judicial power.<sup>107</sup> One indication of this is the fact that Proclamation 25/96 has not openly provided for the existence of shared judicial powers. The other view, which this author holds, holds that despite the law's

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105 *Ibid.*, at 70.

106 Proc. 25/96; Proc. 254/2001; Proc. 321/2003.

107 See for example Abebe Mulatu, 'The Court System and Questions of Jurisdiction under the FDRE Constitution and Proclamation 25/26' in *Proceedings of the Symposium on the Role of Courts in the Enforcement of the Constitution* (Addis Ababa: Birhanena Selam, 2001): 124-142.

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silence there still remains a concurrent judicial power. For instance, labor cases are mentioned nowhere in the proclamation as federal cases but we know for certain from Article 55(3) of the Constitution that it is a federal law matter. The commercial code too is a federal law by virtue of Article 55(4) of the Constitution and the same holds true for the penal code (Article 55(5)). We know also for certain that the state courts do adjudicate criminal cases in the regular discharge of judicial duties, *not in their delegated powers*.<sup>108</sup> The fact that the federal Supreme Court does also review state cases when it discovers errors of law also suggests the existence of shared judicial powers. As a result despite the apparent parallel existence of courts, like other powers, there are shared judicial powers.

Besides the federal and state constitutions incorporate a huge number of rights and freedoms. It is declared that ‘All federal and state legislature, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this chapter [chapter three].’<sup>109</sup> This clause, if taken seriously, has far-reaching consequences as far as the role of the judiciary in enforcing and protecting human rights is concerned. It must be emphasized also that it is a duty imposed on the judiciary at all levels, apart from the other branches. It is also clear that ‘respecting and enforcing’ fundamental rights and freedoms by the judiciary is meaningless, unless the judiciary in one way or another is involved in interpreting the scope and limitation of those rights and freedoms which it is bound to enforce. In this respect, contrary to popular thinking, the federal and state courts are not prohibited from interpreting the

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108 Several interviews held with federal as well as state court judges in January 2004 reveal that particularly on criminal cases the state courts enforce the penal code, otherwise a federal law, as if it is a state matter. No question of jurisdiction has so far been raised. None of the judges were even aware of the fact that the entire penal code falls within federal jurisdiction.

109 See federal Constitution Art. 13(1); also Art. 10.



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constitution.<sup>110</sup> One need only mention incidentally that the United States Supreme Court had to labor a lot to enforce the fundamental rights and freedoms throughout the federal system because it lacked such constitutional authority and its inclusion in Ethiopia was meant to avoid such mishaps. This adds to the view that that there is shared judicial power although the final say as far as constitutional interpretation of parliamentary legislation is concerned, is reserved to the HoF.

It is obvious, therefore, that there has been no uniformity among federations in organizing their judiciary. A dual judiciary would seem to be the logical corollary of the dual polity in federations but as indicated it is not strictly followed. Even in the United States there is some reliance on state courts to apply and interpret the laws of the federal government. The method of organizing courts in federations, therefore, indicates some variation. What is common to all is that either there is a safeguard clause granting the federal government the power to establish federal courts or the right of appeal to a federal tribunal from state courts is guaranteed where matters affecting the law of the federal government are at issue.

### 7.3 JURISDICTION

The US Constitution spells out the powers of the federal judiciary in some detail including the assignment of original jurisdiction to the Supreme Court in some matters as well as appellate jurisdiction in others.<sup>111</sup> Even if it is true that

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110 In a seminar held at the Ghion Hotel in Addis Ababa in December 2002, it was a surprise to many federal and state court judges when the author argued about the respective role of the courts under the existing constitutional order, namely to interpret the constitution, short of declaring the law null and void, the latter an ultimate power reserved to the HoF.

111 Art. III section 2; see also Carr, *supra* note 8: 8-11.

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Congress may within the limits of the Constitution provide remedial measures or together with the states attempt to amend the constitution, such measures are taken rarely and it is ‘simply a fact of life that in the United States *all social and political issues* sooner or later appear before the Supreme Court, thus making it the most powerful of all courts.’<sup>112</sup> The Supreme Court has two kinds of jurisdiction namely appellate and original and in the exercise of appellate jurisdiction the court is the highest tribunal in the republic although it exercises it as a matter of discretion. Its original jurisdiction is constitutionally specified as extending to cases involving two states, those between a state and the federal government and those involving foreign ambassadors, exercised rarely. The Constitution reserves to Congress the authority to alter appellate jurisdiction by law, but its original jurisdiction can only be altered by constitutional amendment.<sup>113</sup>

As is well-known, the primary task of the Supreme Court lies in the realm of appellate jurisdiction. Here, with its power to declare laws and acts of the executive unconstitutional, it serves as final arbiter in the interpretation of the constitution. It provides the authoritative and uniform interpretation of the law of the land. Appellate cases reach the Supreme Court from both the constitutional courts and the legislative courts as well as the highest state courts, within the context discussed above.<sup>114</sup>

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112 Henry Abraham, *The Judiciary*, *supra* note 16 at 23 (Italics mine).

113 Henry Abraham, ‘The Pillars and Politics of Judicial Independence in the United States’ in Peter Russell and David O’Brien eds., *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (Charlottesville and London: University Press of Virginia 2001) at 30; hereinafter referred to as *The Pillars and Politics of Judicial Independence*.

114 Henry Abraham, *The Judiciary*, *supra* note 16 at 24; see section 8.2 *supra*.

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To begin with the authority of the federal courts, this is limited to certain specific situations, all other possible types of jurisdiction being reserved to state courts.<sup>115</sup>

The specific types of jurisdiction granted to the federal courts under this principle may be grouped under two broad headings. First, certain kinds of cases may be heard by the federal courts because of the nature of the *subject matter* of the litigation. Thus, if the facts of the case are such as to involve federal constitution, a federal treaty or a federal statute, the case may be heard by a federal court. Likewise, any case arising within the field of admiralty or maritime law falls within the jurisdiction of federal courts. Second, the federal courts, because of the nature of the parties, may hear certain types of cases irrespective of the subject matter. For instance, cases affecting ambassadors and other foreign diplomatic and consular agents, controversies to which the federal government is a party, cases between two or more state governments and cases between a state government and citizens of another state or between citizens of different states.<sup>116</sup>

The federal courts also have *exclusive* jurisdiction over bankruptcy, patent and copyright law. They *share* concurrent jurisdiction with states over suits between citizens of different states, in which federal judges apply the appropriate state law and cases involving the constitution and federal laws, in which state judges must apply federal law. By and large all other possible types fall within the jurisdiction of the state courts.<sup>117</sup>

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115 The Tenth Amendment.

116 Art. III section 2.

117 Yet the respective jurisdictions of the federal and state courts cannot in practice be kept as neat as the above suggests. There is a large but vague field where the two jurisdictions overlap. The subject matter may involve both federal and state statutes and it may not be easy to determine whether it falls within the federal or state judicial competence. Besides, the jurisdiction of federal courts within the constitutionally defined area is not necessarily exclusive. With the exception of the original jurisdiction of the Supreme Court, Congress is free to determine how much of this jurisdiction any federal court shall possess. Congress may also provide for the exercise of jurisdiction within these federal areas by state courts. It should be noted that the United States Supreme Court reviews certain cases heard originally by the state courts. If the highest court in a state holds a federal statute or treaty invalid or upholds a state law against the charge that it violates the federal constitution or is repugnant to a federal law or treaty, an appeal to the Supreme Court may be made as of right by a party. R. Carr, *supra* note 8: 9-11.

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The Indian constitution has set up a federal judiciary consisting only of the Supreme Court without any inferior courts in the federal judicial system. The state high courts and other inferior courts continue to be the courts constituting the state judiciary.<sup>118</sup> The Supreme Court has three kinds of jurisdiction, original, appellate and advisory. Under Article 131 of the constitution, the Supreme Court has exclusive original jurisdiction<sup>119</sup> to any dispute:

- A. between the government of India and one or more states;
- B. between the government of India and any state or states on one side and one or more states on the other;
- C. between two or more states, if and in so far as the dispute involves any question whether of law or fact on which its existence or extent of a legal right depends, so long as such a treaty does not exclude the court's jurisdiction.

The Supreme Court in its original jurisdiction adjudicates purely federal disputes or intergovernmental disputes.<sup>120</sup> A dispute falling within A-C, as noted above, to be justiciable by the Court should involve a question whether of law or fact on which the existence or extent of a legal right depends, thus excluding political questions.<sup>121</sup> Controversies concerning the election of the president and vice president are also decided by the Supreme Court. The Supreme Court in its original jurisdiction is also the guardian of fundamental rights and freedoms and issues writs for the enforcement of the rights.<sup>122</sup> It is the supreme interpreter of the constitution and the guardian of the people's fundamental rights. As noted already, it is the ultimate court of appeal in all civil and criminal matters and the

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118 Sharma and Choudhry, *supra* note 87 at 322.

119 Art. 131.

120 Art. 131.

121 Jain, *supra* note 88 at 125.

122 Art. 32.

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final interpreter of the law of the land and thus helps in maintaining uniformity of law throughout the country.<sup>123</sup>

The jurisdiction of the Court, however, does not extend to disputes arising out of any treaty where such treaty or agreement excludes the jurisdiction of the court.<sup>124</sup> It must be a dispute in respect of a legal right but not a political one. Private parties or agencies could not bring a case under Article 131.<sup>125</sup>

The appellate jurisdiction of the Supreme Court is described as follows: An appeal shall lie to the Supreme Court from any judgment, decree or final order of a high court in the territory of India, whether in civil, criminal or other proceedings if the high court certifies that the case involves a substantial question of law as to the interpretation of the constitution. The appellant should confine himself to the constitutional law point involved. Such a restriction is necessary to limit the flow of cases coming to the Supreme Court.<sup>126</sup> Where the high court has refused to give such a certificate, the Supreme Court may, if it is satisfied that the case involves a substantial question of law as to the interpretation of this constitution, grant special leave to appeal from such judgment, decree or final order. The Supreme Court's jurisdiction in this regard is remarkable in interpreting the constitution. In addition to the constitutional matters stated above one can appeal from the decisions of the high court even in civil proceedings if it involves a substantial question of law, though of course only if the high court certifies it. The substantial question of law involves arguable cases often indicating a difference of opinion and whose significance is not limited to parties but requires intervention of the Supreme Court in guaranteeing some

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123 See also Basu, *supra* note 86 at 238; Arts. 132-134.

124 Jain, *supra* note 88 at 125.

125 *Ibid.*, at 127.

126 *Ibid.*, at 128; see also Art. 132 sub 1- 2.

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uniformity.<sup>127</sup> Thirdly, in criminal matters appeal is allowed from the decision of the high court in exceptional circumstances for instance when the high court reverses the decision of the lower court that acquits a suspect from life imprisonment or death.<sup>128</sup>

Fourthly, the Supreme Court also has important powers of review regarding decisions of tribunals other than the regular judiciary.<sup>129</sup> In the modern era of complex government there are numerous disputes handled by a host of varied adjudicatory bodies outside the regular judicial hierarchy. Indeed it is wrong to assume that the courts monopolize the entire business of adjudication. There is the plethora of bodies and officials that undertake adjudicatory functions under powers conferred to them by legislation often covering controversies between the administration and individuals. They are often called quasi-judicial, indicating that they are not courts pure and simple but do have some features of both courts as well as the administration. The Supreme Court hears appeals from decisions of such bodies; it is a forum to correct any misuse of power or procedural irregularity by such bodies. It is interesting to note that the Supreme Court exercises this power even if many of the statutes establishing such tribunals state that their decision is final.<sup>130</sup>

Lastly, the Supreme Court also exercises advisory jurisdiction.<sup>131</sup> The President may if it appears to him that a question of law or fact has arisen or is likely to arise which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court, refer it to the court for consideration.

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127 Jain, *supra* note 88 at 129; see also Art. 133 sub 1.

128 Art. 134.

129 Art. 136.

130 Jain, *supra* note 88 at 136.

131 Art. 143 (stipulates about the President's competence to seek opinion from the Court, while Art. 131 stipulates about the original jurisdiction of the Court).

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The president may even under this clause refer matters excluded from the normal jurisdiction of the court. This is contrasted with United States Supreme Court that consistently refuses to give advisory opinions, refusing to decide abstract, hypothetical or contingent questions.

Unlike the United States Supreme Court whose appellate jurisdiction is confined to cases arising from constitutional issues, federal laws or treaties, the Indian Supreme Court is the highest court of appeal concerning civil and criminal cases apart from cases relating to the interpretation of the constitution. Besides, the Supreme Court has an extraordinary power to entertain appeal without any limitation upon its discretion from the decision not only of any court but also of any tribunal within the territory of India.<sup>132</sup> This is in addition to its federal umpiring role. The decisions rendered by the Supreme Court are binding on all the authorities throughout the Republic of India. Because of the lack of inferior federal courts, the states in India are all subject to the jurisdiction and powers of a single integrated judicial system at the apex of which stands the Supreme Court.

The Ethiopian judicial system, compared to other federations, stands constrained in its jurisdiction. Even within the limited powers conferred by the Constitution, several internal as well as external factors seem to be at play to maintain the judiciary's low profile. Firstly, judicial powers are being taken away from the regular judiciary to special other tribunals whose constitutional status remains controversial. When there is legislative leeway for intervention, governments often decide to 'strip' courts of their jurisdiction<sup>133</sup> to adjudicate matters in which the government of the day has vital interests or they may transfer jurisdiction over

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132 Art. 136.

133 Peter Russell, 'Towards a General Theory of Judicial Independence,' in Peter Russell and David O'Brien eds., *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World*, (Charlottesville and London: University press of Virginia, 2001) at 14.

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such matters from the regular courts to tribunals whose decision-makers often lack the security of tenure or expertise enjoyed by the judiciary. For instance, in Ethiopia despite the constitutional clause under Article 78(4) stipulating that ‘special or *ad hoc* courts which take judicial powers away from the regular courts or institutions legally empowered to exercise judicial functions and which do not follow legally prescribed procedures shall not be established,’ there are controversial tribunals introduced from time to time by the federal legislature and they do seem to dismantle the courts jurisdiction. The clause of prohibition is understandable in light of the terrible experience under the military that used to set up many such special courts for summarily executing political suspects and the clause appears to be a significant departure in this regard. While this was the background, recent developments seem to cast some doubt on the workability of this principle. Slowly, important powers are being taken away from the regular judiciary to special tribunals within the various ministerial offices.<sup>134</sup> The point is often made in relation to delay of cases in the courts, that they are dragging their feet. It is also alleged that many suspects die in jail before they see the gates of the court. Some have been released right away when the court gives its verdict because they have been in jail for a period beyond the court’s sentence. More importantly, the delay is affecting business transactions. Businessmen and women cannot rely on the rule of law and decisions of courts because no one knows how

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134 See for instance Proc. 97/98 that entitles the banks to sell the property of defaulting debtors without going to the courts. Arts. 77 and 78 of Proc. No 286/2002 permit the Inland Revenue Authority to confiscate the property of defaulting tax payers without going to courts. Proclamation 286/2002 Income Tax Proclamation, *Federal Negarit Gazeta*, 8<sup>th</sup> Year No. 34, Addis Ababa 4 July 2002. Of the several semi-judicial tribunals, the Tax Appeal Commission, the Administrative Tribunal for Civil Servants, the labor courts, Re-enactment of Urban Lands Lease holding Proclamation (Articles 17 and 18) allow appeal to the regular judiciary only if there is a *basic error of law*. See Proclamation No. 42/1993, Labor Proclamation, *Negarit Gazeta* of the Transitional Government of Ethiopia, 52<sup>nd</sup> Year No. 27, Addis Ababa, 20 January 1993; The Federal Civil Servants Proclamation, Proclamation No. 262/2002; Proclamation No. 272/2002, Re-Enactment of Urban Lands Lease Holding Proclamation, *Federal Negarit Gazeta*, 8<sup>th</sup> Year No. 19, Addis Ababa, 14 May 2002. However, many of the government offices administered by board stipulate their decisions to be final.



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long a case is going to take. Consequently, Civil Service Reform in general and justice reform in particular is top of the agenda for the government.<sup>135</sup>

Yet, one may wonder if taking away the judiciary's constitutional power is going to help the institution in the long run. The point here is not that such semi-judicial bodies are unimportant. Comparative study indicates that such semi-judicial bodies exist and they do play an important role along with the regular judiciary. In the United States the bulk of them are known as Article I or legislative courts as opposed to Article III courts. In India too there are similar institutions. In Germany and Switzerland such tribunals exist but constitute part of the regular judiciary.<sup>136</sup> In India and the United States their decisions are subject to review by the regular judiciary.<sup>137</sup> There is an ever-increasing governmental activity and some cases may better be addressed by the tribunal with the administration. These may also have to do with the fact that the courts are overburdened to take up these new matters or such technical matters. Nevertheless, it is difficult to consider them courts in the proper sense of the term<sup>138</sup> and yet they decide questions affecting the rights of citizens and their decisions are binding upon them. Indeed, it is true that not all cases and controversies go to the regular judiciary and because of the technicality involved or the wish to reduce the caseload of the judiciary, their relevance might not be questionable.

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135 At present, the federal Government is undertaking a major civil service reform program, which in one way includes judicial reform. Unfortunately, the reform concerning the justice system is in the hands of many institutions. The Ethiopian Justice and Legal System Research Institute, the Ministry of Justice and the Ministry of Capacity Building as well as the federal Supreme Court are involved in the process in one-way or another. Consequently, problems of duplication and lack of co-ordination among the various offices and executive interference are bound to occur. There is confusion as well as overlapping of parallel and simultaneous justice sector reform programs and it is highly probable that the judiciary will be influenced and affected by justice reform programs administered and directed by an executive branch. Besides, centralized approach to justice reform in Ethiopia like all other issues, raises additional concerns. In a country that has adopted a dual court structure, the holistic approach to the reform needs to take into account regional disparity and local constraints. See *Yefitiñ Sirat Mashashaya program be Ethiopia* (Addis Ababa, Birhanina selam, 1994): 5, 11; also government draft reform program with 39.1 million birr at <http://www.ethiopianreporter.com/eng.newspaper/htm/no350/r350news.htm> 26/05/2003.

136 Donald Kommers, *supra* note 74 at 135.

137 Indian Constitution Art. 32 and 226, 227, 136.

138 Basu, *supra* note 86 at 246.

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Thus, comparative study suggests two alternatives. While the tribunals are unavoidable they should either be autonomous (indeed Russell extends the concept of judicial autonomy to any such tribunal<sup>139</sup> involved in adjudicating or rendering authoritative settlement of disputes about legal rights and duties, which is quite less practical as they are often structurally placed within the executive) or else the highest judicial organ as in the supreme court should exercise judicial power on specific grounds. The trouble in Ethiopia is that such tribunals are neither autonomous nor subject to review at a higher level.

Secondly, although the judiciary arguably has power to interpret the constitution, it has no power of reviewing the constitutionality of laws and this power has been expressly granted to the HoF.<sup>140</sup> Thirdly and more importantly, the judicial branch's power of reviewing decisions of several other tribunals is far from clear and the Court has not yet established it beyond doubt. The German, Indian, not to mention United States federal experiences clearly indicate that at least the highest federal court does have this review power. Most federal laws establishing these tribunals do not allow appeals even by way of last resort to the federal courts. Worst of all Proclamation No. 25/96 which is supposed to define federal and state judicial powers has left so many things unresolved and the federal courts can review by way of appeal matters granted to states as regards exclusive federal matters, but are not allowed to review the bulk of shared judicial powers. A state supreme court decision on a federal matter, not exclusive, could be final and binding without resort to the federal Supreme Court except by way of cassation.

Coming back to the issue of jurisdiction of courts in Ethiopia, the jurisdiction of courts and the powers they have to adjudicate cases is constitutionally guaranteed

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139 Peter Russell, *supra* note 133 at 8.

140 For more on the adjudication of the constitutionality of laws in Ethiopia, see section 8.1 *supra*.

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by the federal constitution. The constitution declares that judicial powers both at federal and state levels are vested in the courts.<sup>141</sup> Besides, the Constitution guarantees every citizen right of access to justice. It is stated ‘every one has the right to bring a justiciable matter to and to obtain a decision or judgment by, a court of law or any other competent body with judicial power.’<sup>142</sup> This seems to define broadly the scope of judicial power. It suggests that not all disputes are within the scope of judicial power. Judges or other bodies with judicial power decide only justiciable matters, those that arise from actual cases and are capable of settlement by legal methods. Furthermore it states that the federal Supreme Court shall have the highest and final judicial power over *federal matters*.<sup>143</sup> It also states that the State Supreme Court shall have the highest and final judicial power over state matters. The Constitution then vaguely leaves one to wonder as to what constitutes federal matters, which seem to be the key for the allocation of jurisdiction between federal and state courts.

This rather vaguely stated principle of federal and state matter is somehow defined under the proclamation that establishes federal courts. As per this proclamation the *common* jurisdiction of federal courts is stipulated as follows: federal courts shall have jurisdiction over, firstly, ‘cases arising under the Constitution, federal laws and international treaties.’<sup>144</sup> Secondly, over *parties* specified in federal laws<sup>145</sup> and Article 5 enumerates federal courts shall have jurisdiction over the following cases, making the parties more specific: ‘cases to which a federal government organ is a party; suits between persons permanently residing in different regions; cases regarding the liability of officials or employees

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141 Art. 79 (1).

142 Art. 37 (1).

143 Art. 80 (1).

144 Art. 3 of Proclamation No. 25/1996, Federal Courts Proclamation, *Federal Negarit Gazeta*, 2<sup>nd</sup> Year No. 13, Addis Ababa, 15 February 1996.

145 Art. 3(2).

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of the federal government in connection with their official responsibilities or duties; cases to which a foreign national is a party.’ The federal courts also have jurisdiction over *places* specified in the constitution or in federal laws. Article 3 sub 3 specifies that federal courts shall have judicial power in places specified in the constitution or in federal laws and traditionally all cases arising in Addis Ababa and Dire Dawa fall into this category. According to the new proclamation that sets up parallel federal courts across the country, federal courts will also exercise jurisdiction over cases arising in other places of the country.

As can be seen, the proclamation allocates subject matter jurisdiction to federal courts on the basis of three grounds: *laws*, *parties* and *places*. Under the first paragraph federal courts assume judicial power over cases arising under the Constitution, federal laws and international treaties. This goes a long way in illustrating what constitutes federal matters. However, one immediately encounters a problem. According to one author, despite the lack of definition of what constitutes a federal matter ‘we can presume that all cases that arise or claims that are based on federal law may be called a federal matter and the rest may be categorized as state matter.’<sup>146</sup> Yet this rules out the possibility of *shared* judicial power. If we look at other provisions of the proclamation that define the respective original, civil<sup>147</sup> and criminal<sup>148</sup> jurisdiction of the federal Supreme

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146 Abebe Mulatu, *supra* note 107 at 127.

147 Art. 5 of Proc. 25/96 enumerates the civil jurisdiction of federal courts as follows: cases to which the federal government organ is a party; suits between persons permanently residing in different regions; cases regarding the liability of officials or employees of the federal government in connection with their official responsibilities or duties; cases to which a foreign national is a party; suits involving matters of nationality; suits relating to business organizations registered or formed under the jurisdiction of federal government organs; suits regarding negotiable instruments; suits relating to patent, literary and artistic-ownership rights; suits regarding insurance policy and application for *habeas corpus*.

148 Art. 4 enumerates the criminal jurisdiction of federal courts as follows: offences against the constitutional order or against the internal security of the state; offences against foreign states; offences against the law of nations; offences against the fiscal and economic interests of the federal government; offences regarding counterfeit currency; offences regarding forgery of instruments of the federal government; offences regarding the security and freedom of communication services operating within more than one region or at international level; offences against the safety of aviation; offences regarding foreign nationals; offences regarding illicit trafficking of dangerous drugs; offences falling under the jurisdiction of courts of different regions or under the jurisdiction

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Court, federal High Court and federal First Instance Courts,<sup>149</sup> the phrase ‘federal laws’ is given a very wide definition under Article 2(3) of Proclamation 25/96 as ‘laws of the federal government include all previous laws in force which are not inconsistent with the constitution and relating to matters that fall within the competence of the federal government as specified in the constitution.’ Accordingly, all laws enacted by virtue of Article 55 of the federal Constitution by the HoPR are federal laws. Besides all other laws enacted by previous regimes that are not repealed or inconsistent and so long as they fall within the competence of the federal government, are also by virtue of Article 2(3) of Proclamation No. 25/96 federal laws. As a result, the penal law remains federal law. The labor code as well as the commercial code are also federal laws. While this is the general clue as to what constitutes federal law, the proclamation that defines the civil and criminal jurisdiction of federal courts lists *only a fraction* of the offences or cases to be adjudicated by federal courts.<sup>150</sup> In any case, one cannot safely conclude that the proclamation exhaustively enumerated the jurisdiction of federal courts and as noted, we know for certain that state courts do adjudicate cases arising from federal laws in their competence as state courts, not in their delegated function.

The question then is whether what is defined under Proclamation No. 25/96 is only *exclusive* federal jurisdiction and as to whether there is a shared/concurrent judicial power between federal and state courts? If so, do state courts have jurisdiction to try federal cases as a result of this concurrent jurisdiction and can those cases be appealed before the federal Supreme Court. One author has stated

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of both the federal and regional courts as well as concurrent offences and offences committed by officials and employees of the federal government in connection with their official responsibilities or duties.

149 See also Arts. 8, 9-15 of Proc. No. 25/96 in addition to those mentioned in note 148.

150 Arts. 4, 5. A good example is that the bulk of labor cases and commercial cases save those mentioned under Art. 5 and as a matter of state court practice the bulk of penal offences other than those expressly mentioned under Proc. 25/96 are adjudicated by state courts, not even in their delegated function but in their competence as state courts.

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‘state courts not only adjudicate on matters that arise under state law but also on cases that arise under federal laws.’ Abebe argues that those federal cases not mentioned by Proclamation 25/96 belong to ‘exclusive state jurisdiction because a federal matter by virtue of this proclamation is narrowly defined.’<sup>151</sup> He writes, matters not specifically mentioned under the proclamation as falling under the federal court jurisdiction are presumed to fall under exclusive state jurisdiction. The rest of the federal laws, which are not enumerated, are then understood to be within the jurisdiction of state courts. The point, however, is that it is difficult to think federal courts are prohibited from adjudicating what is inherently their subject matter. Not every case arising from federal law, as the Constitution suggests, is within the jurisdiction of federal courts. While what is stated in the proclamation constitutes exclusive federal powers, the balance rightly is adjudicated by the state courts as they do exercise shared powers but not as exclusive state powers. The notion of exclusive state power, in the context suggested by Abebe, rules out what is inherent jurisdiction of federal courts. Hence the better view is to consider the bulk of federal cases adjudicated by state courts as shared, not as exclusive state matter and what is defined by Proclamation 25/96 is the exclusive federal matter.

If we agree that what is defined in Proclamation 25/96 is only exclusive federal matter, then the next question is who adjudicates all other cases arising from federal laws and on what capacity. We earlier noted that in the United States federal courts almost exclusively deal with matters of federal law and matters raising constitutional interpretation, whereas state courts deal primarily with matters of state law, but state supreme courts also hear cases raising issues of both federal and state law. Central to this is of course the fact that constitutional

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151 Abebe, *supra* note 107 at 130.

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interpretation is decentralized. The question in our case then is whether the state courts in doing so undertake a delegated function, or is it a shared jurisdiction as suggested above? The constitutional provision adds to the confusion in this regard.

The Constitution delegates to state supreme courts and state high courts the function of federal High Court and federal First Instance Court respectively.<sup>152</sup> That is, the Constitution speaks of delegation until the HoPR decides to set up lower federal courts across the country, implying the revocable position of the delegated power.<sup>153</sup> The Amharic version, however, is less explicit implying a given authority, not necessarily a delegated one.<sup>154</sup> On the other hand Article 79(7) speaks of concurrent power rather than a delegated one, and the same term is employed under Article 80 which outlines rather more the concept stipulated under Article 78(2).

Despite the apparent confusion in the use of terms delegated or concurrent power, this writer contends that the delegated function of state courts is restricted to exclusive federal matters rather than to shared federal powers. Until such time as the HoPR establishes federal courts throughout, state courts have delegated power to adjudicate exclusive federal cases as defined by the proclamation. But state courts have concurrent/shared, not delegated power over other federal matters not mentioned under the proclamation. As far as shared power is concerned they do not need any delegation. The proclamation has not exhaustively listed all federal

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152 Art. 78(2).

153 The text of Art. 78(2) in full reads: 'Supreme federal judicial authority is vested in the Federal Supreme Court. The House of Peoples' Representatives may, by a two-thirds-majority vote, establish nationwide, or in some parts of the country only, the federal High Court and First Instance Courts it deems necessary. Unless decided in this manner, the jurisdictions of the federal High Court and of the First Instance Courts are hereby delegated to the State courts.'

154 The Amharic version of Art. 78(2) partly reads: *...Gudayu be zih Akuhan Kaltewesene ye federal Keftegnana ye Megemeria Dereja Fird betoch siltan le Kilil firdbetoch tesettewal*. The notion of delegation is missing.

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matters and whatever is not included in the proclamation belongs to state courts and in doing so they exercise shared judicial power with federal courts.

The trouble once again, however, is that a decision of a state supreme court on such shared, not delegated powers, as a matter of *practice* cannot be appealed before the federal Supreme Court and the latter does not seem to have realized that it is divested from reviewing all federal cases arising from federal laws.<sup>155</sup> The appellate power of the federal Supreme Court is explicitly stated under Article 80(6) ‘decision rendered by a state Supreme Court on federal matters are appealable to the federal Supreme Court’ and appeal cases from state courts exercising *delegated* federal jurisdiction to a higher court in the hierarchy are stipulated under Article 80 (4) and (5).<sup>156</sup>

There is then a bit of confusion between what is stated under the Constitution, the proclamation and state court practice. The way out seems to argue that the delegated function of state courts in adjudicating federal cases is related to exclusive federal matters as defined by Proclamation 25/96 in which appeal to the federal Supreme Court is expressly permitted. The proclamation does not exhaustively define federal matters and even if defined the state courts continue to adjudicate federal matters. These powers should be viewed as part of the shared judicial power between federal and state courts and because on federal matters, not limited to exclusive federal ones, the federal Supreme Court has the highest judicial power (Article 80 sub 1), appeal should be allowed when there are grounds of appeal. Note that the Supreme Court’s appellate power is not restricted

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155 There is no legal basis for such practice but it appears that it is based on a confusion emanating from lack of clarity in the respective jurisdiction of federal and state courts.

156 The anomaly is that the federal Supreme Court by way of *cassation* does review even cases arising from state laws, a much wider power not enumerated expressly under Art. 80 of the constitution. Yet it does not exercise appeal power on shared judicial power. A homicide case decided by the state Supreme Court that is a federal case cannot be brought before federal Supreme Court by way of appeal but only by way of cassation after proving a basic error of law.



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to exclusive federal matters. It is quite difficult to understand why the Supreme Court's power is restricted in practice only to *Cassation*, in all cases other than exclusive federal matters.

The Constitution provides that the decisions of state high courts exercising jurisdiction of federal First Instance are appealable to state Supreme Court and<sup>157</sup> the decisions of state Supreme Courts on federal matters are appealable to federal Supreme Court.<sup>158</sup> This gives the federal Supreme Court a final appellate judicial authority over federal matters.<sup>159</sup> However, first, the final appellate jurisdiction of the federal Supreme Court has been limited to federal cases that are originally decided by state Supreme Courts in their appellate (delegated) jurisdiction in variation of state high court decisions. That is, the federal Supreme Court is excluded from reviewing appeal federal matters that were originally decided by state high courts and affirmed by state supreme courts.<sup>160</sup> The federal Supreme Court as a matter of practice has also no power to review federal matters decided by state courts in the exercise of shared judicial powers. The only way for the federal Supreme Court is the power of cassation when it discovers a basic error of law. Yet, such power of cassation is not limited to federal matters. As indicated below, it even extends to cases arising from state matters, so long as there is a fundamental error of law. Here one notices the fundamental contradiction: the federal Supreme Court trying to compensate its supposed to be power through the cassation clause.

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157 Art. 80 sub 5.

158 Art. 80 (6).

159 Art. 80(6).

160 Art. 9 (2) of Proc. 25/96 stating the appellate jurisdiction of the Federal Supreme Court over decisions of the federal High Court rendered in its appellate jurisdiction in *variation* of the decision of the federal First Instance Court. This further limits the federal supreme court jurisdiction even on exclusive federal matters.

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**The Power of Cassation**

Unlike other federal constitutions the Ethiopian Constitution indeed seems to take the principle of dual court structure seriously. According to the Constitution, the federal Supreme Court shall have the highest and final judicial power over *federal matters*,<sup>161</sup> whereas the state Supreme Court shall have the highest and final judicial power over state matters.<sup>162</sup> In this regard it appears, as far as state matters are concerned there is no appeal from state courts to federal courts.<sup>163</sup> However, the assertion that state matters end within each respective state is not without difficulties. The federal Supreme Court has found ways and means of reviewing state Supreme Court decisions even when the case does not involve *federal law*. While in the United States there are dual courts, the state supreme courts serve as a state's court of last resort for appeals in civil and criminal cases. As noted already, if a case does not involve federal law, then the state Supreme Court issues the final and determinative ruling in the case. Could one state this with equal force in Ethiopia? As noted already, the appeal power of the federal courts is limited to only exclusive federal cases. Which means that even the bulk of the federal cases, shared powers as this author calls them, end in the state courts. In a very contradictory fashion, however, the federal Supreme Court reviews by way of cassation, cases decided by the state Supreme Court that one could hardly categorize as federal cases, if it discovers a basic error of law.<sup>164</sup>

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161 Art. 80(1).

162 Art. 80(2).

163 The basis of this view is that in the previous regimes cases involving ordinary civil and criminal matters had to be brought to the capital by way of appeal in a centralized and unitary structure and that practice caused a lot of inconvenience and cost in terms of access to justice. The constitution wanted to break this trend by expressly deciding that state matters should end at the state Supreme Court level implying that there is no appeal to the federal courts.

164 For a case to be ripe for cassation it should not only be a final decision but the final decision must also contain an error of law that is 'basic.' This is a very vague ground. Some consider a case to have contained a basic error of law if there exists a wrong construction in a provision of law with a likely outcome of reversing the decision of the court which was final. The federal Supreme Court considers an error as basic if there is a decision without any legal justification; without comprehending the spirit of a given rule; in violation of a clear provision of law or of a legal principle; applying irrelevant law; misinterpreting a legal rule; framing an issue which the pleadings or oral arguments of the parties have not raised; failing to consider an issue which the pleadings or oral arguments of the parties have raised; awarding a greater amount to a party than he was legally

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Could one consider the cassation cases on ordinary civil and criminal cases, which should have been dealt with by the state courts, as falling within the ambit of Article 80 of the federal Constitution? Should it not be limited to federal laws and cases with a view to guaranteeing uniformity of interpretation of federal laws? The relevant provisions state ‘notwithstanding the provision of sub-article 1 and 2 of the article:

- A. the federal Supreme Court has a power of cassation<sup>165</sup> over *any final court decision* containing a basic error of law;
- B. the state Supreme Court has power of cassation over any final court decision on *state matters* which contain a basic error of law.<sup>166</sup>

If one considers the wording of A and B above, in the latter, the power of cassation is explicitly stated on state matters, in the former it does not limit the power of cassation of the federal Supreme Court. It does not specify the federal Supreme Court’s cassation power to federal matters. It simply says ‘over any final court decision.’ The introductory paragraph of Article 80 sub 3 and the omission seem to suggest that although appeal from a state Supreme Court on state matters is not allowed as matter of right, the federal Supreme Court can review state Supreme Court decisions by way of cassation, if such decisions contain a basic error of law. It gives one the impression that the federal Supreme Court has the power to review all final decisions rendered by any court throughout the country.

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entitled to; failing to award part of the amount a party was legally entitled; giving an order unwarranted by the main decision; lacking jurisdiction of the subject matter of the dispute and in almost all cases emphasized that such error would finally have the potential to reverse the outcome of the decision. See Muradu Abdo, *Some Questions Related to the Cassation Powers of the Federal Democratic Republic of Ethiopia Supreme Court: A Comparative and Case Oriented Study* (LL. B Thesis, AAU Law Faculty, 1998, Unpublished): 113-114.

<sup>165</sup> Cassation is a means by which any final decision of any court containing a basic error of law is reviewed by the cassation division of the federal Supreme Court. The latter does not necessarily quash a final decision containing a basic error of law and substitute it by a new judgment as it may remand the case to the lower court whose decision has been reviewed, particularly if the lower court has not disposed the merit of the case. Muradu, *supra* note 164 at 161.

<sup>166</sup> Art. 80(3).

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After all, Article 80(3 a) provides ‘Notwithstanding the provisions of sub-articles one and two’ the federal Supreme Court has the power of cassation over any final court decision. Which again could be construed to mean that although the state Supreme Courts have a final say over state matters, by way of exception, the federal Supreme Court may review by way of cassation decisions of state courts on state matters. The minutes of the Constitutional Assembly also suggest that the federal Supreme Court has the power of cassation not only over federal matters but also on state matters and even more interestingly the federal Supreme Court reviews state matters in which the state Supreme Court has rendered a final decision by way of cassation.<sup>167</sup> Furthermore, a study indicated that in the years between 1996-1998, 1,121 cases came from the state Supreme Courts to the federal Supreme Court for cassation and this constituted fifty per cent of the workload of the cassation division of the federal Supreme Court.<sup>168</sup> The cases by and large relate to possessory actions with respect to immovables; titles related to immovables; filiations and adoption; division of matrimonial property and breach of contract. These are undoubtedly matters that fall within the jurisdiction of state courts. Besides, some of the cases were already reviewed by the cassation division of the state Supreme Court and hence constituted, what one may call, cassation within cassation.<sup>169</sup>

There is a contrary view that holds that the federal Supreme Court cannot review even in cassation state matters as it takes away the jurisdiction of the state supreme court. The cassation division may rightly review cases decided by regional supreme courts and high courts on matters delegated to them but does not

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<sup>167</sup> Minutes of the Constitutional Assembly, v. 5 *Hidar* 21-24, 1987 E.C discussion on the same article.

<sup>168</sup> See Muradu, *supra note* 164: 113-120.

<sup>169</sup> It is also surprising that the jurisdiction of the cassation division of the federal Supreme Court has never been challenged on the ground of lack of jurisdiction over state matters. See Muradu Abdo, *supra note* 164, pp. 44-45.

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have the power of cassation over cases relating to state matters or over cassation decisions on state matters. In short, practice should not justify the wrong interpretation of the law. Ethiopia has adopted a dual court structure and the practice distorts the structural set-up of the courts. This approach forces one to interpret ‘any court’ under Article 80 as any federal court or any other court rendering a final decision on federal matters. By the same logic Article 10(3) of Proclamation 25/96 also needs qualification and hence be limited to the delegated function of the state courts.<sup>170</sup> Furthermore, opening up the process endlessly increases legal uncertainty, as the winner has to wait until the losing party gives up. Execution of judgment then has to wait for a long period of time.

A more convincing argument for this view could perhaps be made from the principle of federalism. When a matter is assigned to belong to a state jurisdiction it is based on the view that the matter is of local rather than of national importance. It is because it is felt that the case allows for regional variation as opposed to uniformity. If so, the practice of the federal Supreme Court to review state cases, that is matters intended to end within the jurisdiction of the state because they are of local importance, under its cassation power, is contradictory to the federal idea. The current practice of the federal Supreme Court, however, indicates that the federal Supreme Court does review any state matter so long as it is convinced that there is a basic error of law involved. The ambiguity at constitutional level and this contradictory trend is further reinforced by another proclamation that stipulates the power of cassation of the federal Supreme Court over ‘final decisions of the regional Supreme Court rendered as a regular division or in its appellate jurisdiction.’<sup>171</sup> There is still a question whether this is

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170 Article 10(3) of Proc. 25/96 reads: ... The federal Supreme Court, shall have the power of cassation over final decisions of the regional Supreme Court rendered as a regular division or in its appellate jurisdiction.

171 Art. 10 (3) of Proc. 25/96.

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warranted in view of the position taken under Article 80(3) but the Supreme Court is using this power to guarantee a uniform interpretation of laws across the states. As can be seen from the experience of other federal Supreme Courts there is a need for guaranteeing uniformity regarding some cases and that function can only be guaranteed through the federal Supreme Court. However, as noted previously, the function of guaranteeing uniformity is often limited to federal laws, and not to state laws. This important qualification is missing in the Ethiopian situation but the Supreme Court has somehow found a way out to discharge this role, extending its scope beyond what is desired. That is to say, the power of cassation of the federal Supreme Court which should have been limited to only federal matters goes further to incorporate even state matters. Otherwise the Ethiopian Supreme Court stands to be the weakest in terms of jurisdiction, except for cassation power. It can interpret the constitution but cannot declare the law unconstitutional. It is also not the highest appellate court comparable to the ones in the Indian or European federations as its powers are limited to exclusive federal cases.

#### **7.4 CONCLUSION**

For reasons explained in the first section of this chapter, the Ethiopian Constitution vested the power to interpret the Constitution and to review the constitutionality of laws in the HoF, rather than in the regular judiciary. Reform in this regard does not seem feasible in the near future and hence the discussion focused on analyzing the provisions of the Constitution and the new laws that define the scope and powers of the HoF and the CCI. Thus we see the first mark of restriction on judicial power. Second, as we mentioned in several parts of the study, the judicial atmosphere as well is not very comforting either. Apart from its

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own institutional weaknesses related to undue delay and integrity of the judges, its jurisdiction has been restrained. All these things added up together, created a tense judicial atmosphere and hence a high degree of 'judicial timidity.' Thus the role of the judiciary in the delicate process of enforcing the constitution and federal integration is far from satisfactory. Strangely enough, despite the existing diversity and wide powers of the states on the one hand and centralized federal system in practice on the other, only a few cases on intergovernmental conflicts have been brought before the HoF. Thus its role has so far been modest. This is certainly because of the congruence in the party system at federal and state level. The present calm situation is expected to change with a change in the political party configuration at federal and state level.

#### Review Questions

1. Why do you think continental systems opt for constitutional courts instead of supreme courts for adjudicating constitutional issues?
2. What main differences exist between Supreme Courts and Constitutional Courts?
3. Is there any role for Ethiopian Courts (at federal and state level) in interpreting the constitution? Why or why not?
4. Do you agree with the practice in which the federal Supreme Court's cassation power over state matters? Do not you think that this contradicts with the federal principle as the latter allows regional variation to exist over state matters?

SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

## **Chapter Eight**

### **Summary, Conclusions and Recommendations**

In this concluding chapter we sum up the findings and attempts to draw some overall conclusions. The epilogue to this chapter, briefly reflects on the prospects for the federal system and on the most recent developments in Ethiopia in the second half of 2005 and the aftermath of the election- which was outside the time frame taken in the other chapters of this study, but which are of such importance as to deserve a few remarks. First we recapitulate the research questions which we formulated at the beginning of this study.

#### **8.1 THE CENTRAL ISSUES ADDRESSED**

The main question addressed in this study was how best to accommodate the various ethno-linguistic groups in Ethiopia and to describe how the existing federal system has fared in this regard. We did so with a view also to enable ourselves to find ways of determining how best to restructure the constituent states with a view to establishing a more viable federal system.

The constitutional arrangement, which has officially taken the form of a federal structure since 1995, tries to address the concern of the various ethno-linguistic and religious groups. This in turn entails an investigation not only of whether the federal system as it exists in form is optimal but also its limitations in practice. How are the legislative and executive powers between the federal and state governments divided and what does this suggest on the centralization trend that was prevalent in the last decade? Is the centralization tendency something that



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emanates from the Constitution or is it something that evolved from the political practice?

Of particular concern is whether the federal system provides sufficient means for guaranteeing shared functions to the constituent units? In this regard what is the role of second chambers in legitimating federal government and the process of policy-making? A related matter is whether the federal system is entrenched with relevant institutions for enforcing federal laws and policies through out its territory?

With regard to several of these questions we have ventured into a comparison with the nation-state federations such as the United States and Germany, and more intensively with other multicultural federations as these can provide a better alternative for the multicultural reality of Ethiopia.

## **8.2 FINDINGS**

In the first part of Chapter One, we sketched the historical background and development of Ethiopia's political system. Reflecting thereupon in part two of that chapter, we concluded that the main challenge for the Ethiopian state centers around its ability to craft a state that is united but that at the same time recognizes diversity. It is a question of building unity from diversity from a multicultural state. It is for this reason that federalism as an ideology and federation as a political institution incorporating both unity and diversity, while at the same time imposing a limit on both, makes it attractive for Ethiopia.

#### SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

Given Ethiopia's long existence as a *de facto* federal system, albeit under a monarchy, its diverse ethno-linguistic and religious groups and taking into account the fact that the Ethiopian state was in crisis for most of the 20<sup>th</sup> century mainly because of the concentration of power and resources at the center, as well as because it failed to accommodate the diverse groups into the political process, in the end only multicultural federalism remains as a defensible option to hold Ethiopia together. Federalism not only permits the existence of multiple identities under a single political union but also transcends the fixation with the nation-state and its limits in dealing with diversity. Federalism also breaks the politics of exclusion, as power sharing is inherent to it thereby creating opportunities for absorbing the contenders for power into the political process.

In Chapter Two we next explored the various elements of federal systems and of federalism. We found that a federation must comprise at least two orders of government, a constitutional division of powers which, however, does not stand in the way of a desire for a common unity which predominates the forces of diversity, a supreme written constitution which cannot be amended unilaterally by one of the orders of government, an institution for umpiring the federation and federal units in their relation, processes and institutions to facilitate intergovernmental collaboration in those areas where governmental responsibilities are shared or overlap, and representation of state interests in the federal policy-making process. These general features, however, are moderated by the extra-constitutional factors that explain the divergent pathways of the federations.

Chapter Three studied the role and function of second chamber in federations. We found that the failing of the Ethiopian Constitution in establishing a legislative

#### SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

second chamber, but only a non-legislative chamber to represent the states, runs the risk of concentration of power at the center, to the exclusion of the states, and consequently leaves the states in isolation. Thus, the Constitution fails to ensure the constituent units' proper place in the institutions of power sharing as well as in the process of policy-making at federal level and by doing so it betrays the federal idea significantly.

Chapter Four is devoted to the context of multicultural federations but with a focus on Ethiopia.

Nigeria seems to have preferred to break down the dominant ethnic groups into several sub-units. So far the balance between the north and the south, the limits on the application of the federal character as well as the dominant role of the military hindered its success. India, while featuring centralized federalism, has over the years moderated its impact because of the dynamic in the party system, the pluralistic approach towards language and the state reorganization. The study of Swiss federalism as well illustrates a number of favorable factors for religious and linguistic integration. Distinct from nation-state federations, Switzerland renounced the idea of creating a one culture, one language nation-state. Instead, it has designed from the very beginning the path of a multicultural federation with peaceful co-existence of its diversities. The fact that there existed a diversity that cuts across the boundaries of the cantons contributed considerably to the existence of shifting alliances over different issues. The political institutions at federal and cantonal level too are favorable for power sharing. We concluded that for a multicultural federation to be stable it needs to create a multicultural state in which there is political integration of different religious and language groups without destroying particular identities, but also the institutions for power sharing do matter in integrating diversity into the political process.

## SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

Chapter Four considers the Ethiopian federal experience more closely, by highlighting the specificities of the Ethiopian federal system, among which the unicameral legislature, the right of state formation and secession for nations and nationalities, which are the abstract (instead of historical) fundamental entities, the presence of ‘mother states’ for some of them and the problems this leads to, particularly for ethnic minorities within the states (witness the cases of Gambela, Benishangul-Gumuz and Harar), all of which is exacerbated by resource constraints. We concluded that these specificities have tended to reinforce centrifugal, rather than centripetal aspects of the federal form of government.

Chapters five, Six and seven discuss a number of formal aspects of the Ethiopian Constitution concerning the division of powers in comparative perspective, and uncovers the gap between the formal arrangements in the Constitution and the practice so far.

Chapter five concerns the division of legislative powers within the federation. It highlights the Constitution’s emphasis of self-rule rather than shared rule, the sovereignty and reserve powers of the regions, the absence of a ‘necessary and proper’ clause and arrangements for shared powers, while in practice the system is strongly centralized, mainly through the party system.

Chapter Six studied the division of executive powers, while paying particular attention to forms of executive co-operation. It considered the advantages and disadvantages of a dual structure of the federal system versus a version of executive federalism in which states execute federal decisions, in light of the weakness of mechanisms for enforcing federal laws and policies in Ethiopia.

#### SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

Reliance on political party structures and party discipline seem feasible in the light of the present resource and man power constraints, but it is very unreliable when there is a tension between government and party structure, as the 2001 events make clear.

Chapter seven is mainly about the institution for adjudicating conflicts within and between levels of government. As intergovernmental and interstate conflicts are bound to occur in any federal system, such an institution plays a crucial role in demarcating the boundary of the respective organs in an impartial manner. It is this organ that interprets and enforces the supreme law, the constitution. For historical and political reasons, the Ethiopian Constitution vested this power in the HoF, rather than the regular judiciary. The latter's limited jurisdiction, its own institutional weaknesses related to delay of cases and integrity of the judges and the tense judicial atmosphere contributed for a high degree of 'judicial timidity.' Despite the existing diversity and wide powers of the states on the one hand and centralized federal system in practice, only a few cases on intergovernmental conflicts have been brought before the HoF. This is certainly because of the congruence in the party system at federal and state level. Thus the role of the HoF has so far been moderate.

### **8.3 OVERALL CONCLUSIONS**

What overall conclusions can one draw from these findings with regard to the central question how the federal system in Ethiopia has fared in accommodating diversity, and what recommendations would follow? We attempt to answer this question in a series of points which we arrange under four headings.

## SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

### **8.3.1 The Accommodation of Diversity**

1. In terms of the main tenets of the Ethiopian federal system, federalism and accommodation of diversity, the framers choice of multicultural federalism is a measure in the right direction to the extent that it attempts to integrate historically marginalized groups and establishes constituent units whose boundaries coincide with at least some of the major nationalities. Such a measure has not only ensured, at least so far, the survival of the Ethiopian state but also localized conflicts.

2. However, the federal system has some structural limitations. Its main limitation lies in the overemphasis on self-rule and the corresponding lack of institutions for power sharing (mainly but not exclusively at legislative or policy-making level) for the contending groups at federal and state levels. Federalism is about sharing power and resources. In the context of multicultural societies, it is also a means for accommodating diversity and for enhancing peaceful coexistence of diverse groups at different levels. Seen from this angle, the crisis in some of the constituent states suggests how fragile the regional governments are even after the decade of federal experience. In some of the multi-ethnic constituent states genuine power sharing among the diverse and contending groups and a regional government that is acceptable to all the groups is the only viable solution to bring stability to these regions. So far the attempt by the federal government has been limited to shifting its alliance from one group to the other without bringing an acceptable solution to all the groups.

#### SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

3. A consequence of the strict application of the nationalities right to self-determination, that is, keeping the nationalities and ethno-linguistic groups separate within their own territorial units, is the issue of local minorities, distinct from the majorities that dominate the political process at constituent units level.

#### *Recommendations*

- •To address the issue of local tyranny the establishment of second chambers at *constituent units level* that take care of the interests of local minorities or indigenous people, on the one hand and a lower house that represents the interests of every citizen on the other, is vital.
- •In this regard, to balance between the rights of the citizen and of minorities the strengthening of the federal and state institutions in charge of enforcing human rights is also a prerequisite. This is also necessary if the tension between constitutional form suggesting one political and economic community on the one hand and an ‘ethnic’ federal system emerging from reality on the other is to be addressed. Moreover, this is the way to enhance interstate mobility of labor and capital and the way to facilitate federal integration. This way federalism becomes not only a means for accommodation of linguistic and cultural diversity but also a means for forging unity from diversity.

#### **8.3.2 Reorganizing the Constituent Units: Three Options**

From the perspective of federal studies, the issue of structuring the constituent groups is crucial. Given the shortcomings mentioned and studied in the previous

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chapters, alternatives must be considered. There are two basic options and a third combining the first two.

The first is to grant ‘mother states’ to the nationalities, the second to use the historic provinces as a basis for restructuring the constituent units. The first option is, on the whole that of the EPRDF and ethnic based opposition parties such as SEPDC and ONC, while many of the other opposition parties (though not always very articulate on the point) converge more to the second option. On these options we make the following remarks

1. Taking into account Ethiopia's political and historical context as well as the experience of multicultural federations like India and Switzerland, structuring the constituent units in a manner that reflects the essential attributes of the existing diversity and with a view to ensuring self-rule is a point that is worth emphasizing. As the Swiss federation demonstrates, the cantons protect language, religion and regionalism (cantonalism): essential diversities that define the Swiss people. Post independence India also demonstrates the fact that territories should reflect major diversities that define the people inhabiting the state. Unless that is taken into consideration, the federation can slide into crisis. Addressing the ‘question of nationalities’ is thus a step in the right direction. Yet seen from the angle of comparative law as well as from the Ethiopian context itself, this is only a part of and not the complete solution to the problem. Overall, blanket enforcement of territorial federalism of the American type that assumes a homogenous society is incompatible with the context of multicultural federal systems like Ethiopia.

#### *Recommendations*



#### SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

- •National self-determination as a solution to the nationality question, while it might deal with the question of diversity, needs to be taken not separately but along with the political and economic factors that the instrumentalists have rightly emphasized (see Chapters One, Five and Seven).
- •Restructuring of the constituent units, while the wishes of the people should as well be at the forefront, should be with the objective of bringing administrative convenience, political symmetry and minimizing the threat to the center (*cf* the Oromo and Somali extreme parties that may according to political developments decide either to remain within federal Ethiopia or secede), for it is the goal of federalism to forge unity in diversity short of secession.
- •As is particularly evident from the Swiss experience of accommodation of diversity (see Chapter four), the reorganization of constituent units should also take into account factors that cut across the boundaries of the constituent units. Among other things we can think of three or more Amhara states and equally four or more Oromia and Somali states. It is possible to provide nationalities with institutional avenues at local, regional and federal level, different levels of decision-making that make the nationalities to, what Lidija Basta calls, ‘politically consume their diversities.’ This will enable not only the translation of diversity into the political process but also to break through the boundary of ‘the mother states.’

2. Somewhere in between the two options (the use of historic provinces as a basis for restructuring the constituent units versus the granting of ‘mother states’ to the

## SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

nationalities), there is an emerging third position in the internal debate, which is inclined to consider the granting of ‘mother states’ only to those nationalities that have been mobilized and fought for it while applying a different criterion for the other regional states. This was partly the essence of the asymmetry pointed out in chapters five and seven of this study. In such circumstances, it may be wise to rethink the federal system and set-up an asymmetric federal system. In a way this is not an earth-shattering discovery. The federal system in practice is asymmetric in many respects. As has been demonstrated at length in chapter seven, the constitutional principle ‘Member states ... [of the Federation] ... shall have equal rights and powers’ is compromised to a considerable extent in relation to some of the member states. The fiscal competence of the states, the court structure, their representation in the second chamber, the political implications of Articles 46/47 of the Constitution (constituent states for some and not for all), the system of intergovernmental relations and the way federal laws and policies are enforced in the states (extensively discussed in chapter seven) are clear evidence of an already existing political asymmetry. This could be done for a transitory phase and until such time the constituent states shall demonstrate some level of institutional competence to manage their own affairs. In a way this is a matter of harmonizing constitutional form with practical reality by enhancing the power of the federal government with respect to some of the constituent states and accordingly diminishing some of their autonomy.

*Recommendation*

- The option to introduce as a transitory measure an asymmetric federal system in order to address problems of institutional competence caused by resource constraints, deserves serious consideration.

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**8.3.3 Power Sharing**

Certainly, not all federations give equal political expression to all forms of diversity. It appears, however, that the greater the diversity in a federation, the greater the need to find institutions as a means of articulating such diversity in the domestic political system. It is actually at this point that one observes significant differences among federations and this seems to explain (although it is not the only reason) why some federations do better in minimizing tension among groups than others.

1. An overall assessment of Ethiopia's federal structure suggests that it emphasizes more self-rule than shared-rule. This is manifested in a number of ways and in light of the constitution's commitment to national self-determination, once again, we need to note that not only should the two be brought into balance but the federal system should also be counterbalanced by hammering on the institutions for power sharing. The granting of 'mother states' may be important in terms of concrete recognition to diversity but the recognition and promotion of diversity is a halfway solution to the problem. What is important is the *political expression of diversity at an aggregate level*. In other words, providing concrete political solutions to the claims of the diverse groups which go beyond a mere promotion of linguistic and cultural diversity. Several studies have indicated that diversity as such is not in itself a threat to integration but it becomes a fertile ground for federal instability if the political system is not able to give it political expression. The federal arrangement by territorializing the state concretizes self-

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rule and as some critics indicate, ‘fragment’ the state but there is one important aspect that is missing. It fundamentally fails to integrate what it ‘fragments.’

There is, of course, the legal framework of Article 39 (3) of the Constitution, which provides for the equitable representation of the states at federal and state level as well as the composition of the ruling party (that is a coalition of parties from different nationalities) which looks like typical of consociational ethnic accommodation, that is, the principle of power sharing among ethnic leaders at federal level. However, not only is its application limited in practice but it also fails to include all of those concerned in the process of policy-making.

Power sharing is perhaps the key area of intervention to break the crisis discussed extensively in chapter one. One general pattern discernable throughout the emergence of the modern state and that still seems to prevail is the problem of fixation in the Ethiopian discourse with the politics of ‘zero sum game.’ In a divided society like Ethiopia we cannot afford to have ‘winners and losers.’ It is important to emphasize that at federal level, none of the nationalities taken alone constitute a majority. This fact is probably an important explanation for the ensuing political crisis and instability that reigned in the country for a long time. There seems to be a constant rivalry to control the center by any one of the groups to the exclusion of others. The point is that in the absence of a dominant majority, the alternative to maintain federal stability is power sharing at different levels. The hard lesson one gets, for instance, from present day Switzerland with divided societies is simply that unless the major contenders of power are in some manner absorbed into the political process and made to consume it, there is no end to the polarization. Apart from the linguistic, self-rule and cultural pluralism trend set since 1991, genuine power sharing remains the only alternative available to end

#### SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

the ‘zero sum game,’ to enhance the legitimacy of the government and to transform the culture of exclusion to a culture of inclusion.

#### *Recommendations*

- •The Federal system in Ethiopia lacks sufficient institutional mechanisms for guaranteeing shared functions to the constituent units. The emphasis on self-rule should be complemented by at least: shared policy-making at the center, in the civil service, in the executive and the judiciary.
- •A legislative second chamber (HoF) at federal level, perhaps with some veto powers on key issues which affect the interest of the states is called for.

2. The division of executive powers and executive co-operation, which we discussed in Chapter Six, are very important from the point of view of power sharing arrangements as instruments for accommodating diversity.

Once one accepts the point that one aspect of the distinction between confederation and federation is the fact that in the latter, the federal government has direct authority and the institutional mechanisms to enforce its laws and policies, the lack of constitutionally entrenched institutional avenues available in Ethiopia must lead to the conclusion that formally speaking the federal government seems to be very weak. In practice, however, the federal government has found several ways of influencing the state governments, thereby facilitating the enforcement of federal laws and programs: namely through the former *Kilil Guday Zerf* and the present Ministry of Federal Affairs, the party structure and the process of policy-making.

## SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

From the internal split in the TPLF and its effect on the ruling party and government institutions, it is easy to observe that party channels cannot suffice. Formal mechanisms for intergovernmental relations, separate from the party structure are, therefore, key conditions for the stability of the federation.

### *Recommendations*

- •Institutional mechanisms for intergovernmental relations should be permitted to evolve in the form of autonomous government bodies which will survive regardless of party bickering.
- •It is also important to revise the establishing law that sets up the Ministry of Federal Affairs with a view to broadening its functions covering the whole federal territory.
- •In the short run, the executive federalism is to be preferred. Under circumstances of lack of resources and trained manpower, one must minimize the unnecessary duplication of agencies and resources by sharing certain institutions such as administrative services and courts. This arrangement has also some other advantages: state machinery might adapt federal laws and policies to local circumstances during enforcement, and because of the difficulty in demarcating federal and state powers this arrangement provides room for flexibility, and may thus be an important factor for maintaining federal unity during the early stages of the federation.
- •But where states are themselves unable to take care of their own affairs, let alone enforce federal matters (e.g. Afar, Somali and Gambela) due to a chronic lack of resources and manpower, it may have to be the *federation*

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which executes federal laws and policies. In other constituent states, one has to work out the responsibility of both governments, i.e. the level of supervision by the center, finance and conditions for intervention, if necessary.

- •In the long run, however, the dual system with its co-operative complement is better. This is for the following reasons:
- States do not influence much of the federal decision-making process, therefore they might not be co-operative in implementing it. It is difficult to trust the state agents under such circumstances.
- The efficiency of federal law and policy depends on the state administration and carries with it the risk that the laws and federal programs may remain merely paper tigers. As a result federal programs could be frustrated.
- The presence of a federal structure parallel to the state machinery provides a second alternative for the citizen to look for amidst the linguistic and religious diversities prevalent in the states. Due to the existence of shared powers, if one of the institutions fails to address complaints, one may resort to the other.
- The need for uniformity in some fields and affairs is another good reason.
- A dual executive structure is believed to reinforce the autonomy of the legislative body. It assures the government of the authority to implement and enforce its own legislation, which might otherwise prove meaningless.

#### **8.3.4 The Paradox between Constitutional Form and Federal Practice**

In the previous chapters we have found a paradox between generously granted constitutional powers for the states versus a centralized federal system in

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operation. This centralizing tendency was illustrated in previous chapters along two lines, firstly the process of policy-making, the party system in general and the existing system of intergovernmental relations in particular, and secondly the 2001 party crisis, the Ethio-Eritrea War and the federal intervention law, which only seemingly are isolated incidents. This suggests that the explanation for the centralization trend in Ethiopia has to be sought at a political rather than a constitutional level, although there are certain possibilities for centralizing tendencies, for instance with regard to fiscal resources which are concentrated at the federal level (see section 3.5 in Chapter Three). This trend is certainly one of the crucial challenges to the evolution of autonomous constituent units.

#### 8.4 EPILOGUE: IS THERE A FUTURE FOR MULTICULTURAL FEDERALISM IN ETHIOPIA?

The large role which must be attributed to the political party running the federation since its inception, naturally leads to the question of the prospects of the federation. Because of the confederate legal structure, which until the present has been under the firm control of the ruling party (in a way an anomaly with the federal principle of division of power and multiple centers of decision-making), a change in the party system may result in a significant change in the federal outcome. It is true that if an opposition controls (parts of) the political space there are many possible scenarios.

There are those who argue that once the ruling party loses control of the federal system, the federal system will wither away with it. Indeed, in many federations that relied more on a centralized party system than on the ‘federal compact and federal institutions,’ the withering away of the party has led to the withering away



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of the federation. However, the Indian federal experience offers another more positive scenario. Here the weakening of the once dominant Congress party was expected by many to lead to a reform of the federal system in favor of an increase in state power. Yet, there has been no significant change to the system despite the fact that several different parties ruled India by turn. This seems to counterbalance the ‘withering away’ hypothesis somehow.

In Ethiopia, since the May 2005 election, the accommodation of diversity is no longer limited to the accommodation of nationalities but should also encompass the emerging political diversity.

This diversity, apart from the ruling coalition, roughly consists of a coalition of forces which are pro-center but perhaps with some decentralizing features on the one hand, and federalist forces with some policy alternatives distinct from that of the ruling party, on the other. While the possibility of such pro-center forces dominating both federal and state governments cannot be ruled out in the near future, the emergence of pro-center coalition parties seem to be rather reinforcing claims of ardent ethno-nationalist and pro-federal forces in response. In line with this, the centralizing tendency that was prevalent within the ruling party is now strongly challenged by its own coalition partners who have controlled the constituent units and who seem to be afraid of the return to the pre-1991 epoch of ‘national oppression.’

What is certain is that the ruling party is no longer the one and only real force it used to be after the previous two elections (1995 and 2000). In the two previous terms, the democratization process was more or less a formal exercise as the opposition parties, for one reason or another, were missing through out.

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This time however, despite the gloomy post election crisis and the lack of tolerance and accommodation among the political elite on both sides of the political spectrum, in some sense, the May 2005 election and its outcomes seem to have taken Ethiopian politics one important step forward. For the first time in its entire history significant numbers of opposition party members participated in the election and joined both the federal and regional parliament. But this was not without some setbacks. The CUD (a coalition of four parties, *Keste Demena* (Rainbow Ethiopia), AEUP and EDUP (all claim to be multinational but are predominantly from the hard core Amhara elite except for some nominal presence) and little known Ethiopian Democratic League (EDL)), although initially appeared as vibrant opposition, later went into crisis following the election and its outcome.<sup>504</sup> The CUD alleging that the ruling party has rigged the election and committed election fraud decided not only to boycott the parliament<sup>505</sup> but also decided to remove the ruling party by calling its supporters for all kinds of "colored revolution" along that of Ukraine and Georgia.<sup>506</sup> This led to violent demonstrations in June and November 2005 that resulted in loss of life and destruction of property, imprisonment of the principal leaders of the CUD

<sup>504</sup> The National Election Board stated that the ruling party and its allies secured 347 in a parliament with a total seat of 547 and declared it as a winner. The CUD secured 109 while the UEDF 52 seats. 11 seats went to an Oromo opposition while 1 for an independent candidate. See NEBE announces official results at <http://electionsethiopia.org/Whats%20new40.htm> as accessed on June 15, 2006.

<sup>505</sup> The third five year tenure of the newly elected parliament was officially inaugurated on Monday October 10 2005 when the HoPR and the HoF held their joint meeting, followed by separate assemblies heralding their first regular sessions. Majority of the members of the CUD boycotted the new legislature's first sitting but 93 of them later joined the HoPR. Members of the UEDF and other smaller opposition members, however, joined Parliament from the outset.

<sup>506</sup> It is worth noting that all international election observers although indicated election irregularities in several election poles they never declared the irregularity was grave enough to *have changed the outcome of the election*. They instead urged all parties to accept the outcome gracefully. See for instance the Final Statement on the Carter Center Observation of the Ethiopia 2005 National Elections, September 2005. For the statement of the chairman of the CUD and its intention to change government by force see Ethiopian Review Sept. 18, 2005 'CUD will not enter parliament, Hailu Shawel Declared' at [http://ethiopianreview.homestead.com/001NewsSep18\\_2005\\_Hailu\\_Shawel...as](http://ethiopianreview.homestead.com/001NewsSep18_2005_Hailu_Shawel...as) visited on 10/21/2005; also Ethiopia's opposition CUD leader calls for Public Protests at [http://www.sudantribune.com/article.php3?id\\_article=12184](http://www.sudantribune.com/article.php3?id_article=12184) as visited on 10/24/2005.

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on allegations of the attempt to commit crimes of treason and Genocide, deteriorating human rights situation and a political atmosphere more or less reminiscent of the upheavals we had in 1974 and 1991.<sup>507</sup> Thus, despite an openly contested multiparty third parliamentary election, Ethiopia's political process did not result in happy outcome to all parties. Never the less given Ethiopia's political history and authoritarian political culture, the results of the election should not be seen as a total failure.

In some sense, the May 2005 election and its outcomes seem to have taken Ethiopian politics one important step forward. As already mentioned, for the first time in its entire history significant numbers of opposition party members have joined both the federal and regional parliament. At federal level their size has increased from 12 to 173 (31.8 percent). In the Amhara Regional Council the opposition has won 107 seats (36.1%) in the 294 seats parliament. In Oromia Regional Council the opposition has 150 (27.9%) of the 537 seats parliament. In the SNNPRS the opposition has 76 of the 348 seats in parliament. In Addis Ababa the Opposition (CUD) won 137 (99.3%) in the 138 seats parliament.<sup>508</sup> Regrettably, the CUD has failed to take over the Addis Ababa Council based on the allegations of election fraud, parliamentary procedures being hostile to the opposition and due to the arrest of its top leadership. The federal parliament has

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<sup>507</sup> Post election political developments led to polarization of opinions including those who were considered to be objective observers for long. Leading among Western scholars that have fallen into this trap include Christopher Clapham who in his recent piece openly took pro-opposition stand urging the International Community to accelerate the Transition (whatever that means!) see Comments on the Ethiopian crisis written on mid Nov. 2005 at [http://www.ethiomeia.com/fastpress/Clapham\\_on\\_Ethiopia\\_crisis.html](http://www.ethiomeia.com/fastpress/Clapham_on_Ethiopia_crisis.html) and Jon Abbink who despite an apparent attempt to stick to principles endorsed unconditionally a rather very controversial and partial report of EU delegation led by Ms Ana Gomes who even months after the crisis continued to openly side with the opposition forgetting her responsibility to remain *impartial like other observers* and hence was labeled by many as Hanna Gobeze as if she is the sister of the Red Terror suspect Negede Gobeze (for the record it must be stated here that the final report of the EU Election Observation Mission incorporates a precautionary statement issued by the EU Commission that among other things include "has not been adopted or in any way approved by the EU Commission nor the accuracy of the data verified."). See J. Abbink, "Discomfiture of Democracy? The 2005 Election Crisis in Ethiopia and its Aftermath" *African Affairs*, 105/419 (2006) p.187. For a more objective assessment of the post election crisis see Terrence Lyons "Ethiopia in 2005: The Beginning of a Transition?" *Center for Strategic and International Studies* No. 25 January 2006.

<sup>508</sup> All figures are from the Ethiopian National Election Board Web site <http://www.electionsethiopia.org/Election%20Results.html> as accessed on June 15, 2006.

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(as of early May 2006) handed over administration of the federal capital to a one year caretaker administration. Except the set back in Addis Ababa the new political environment some how seems to have transformed members of the opposition from insignificance to a formidable force at federal and state level with some potential impact in the decision making process. For instance, in the Amhara regional state in order to amend the regional Constitution (a process that requires three-fourth majority vote) to postpone local elections the ruling party had to negotiate with the opposition in order to secure the necessary majority.<sup>509</sup> This is a major test and a great opportunity especially for opposition parties to articulate their positions and influence the decision making processes than ever before.

Seen from comparative perspective, the post election crisis is not without some parallels in history. Indeed it has some resemblance with what happened in the US and Switzerland in the 19<sup>th</sup> century, with some major qualification. While in the US and Switzerland the tension resulted because confederate forces were not willing to give way to the emerging weaker federal government, in Ethiopia, on the other hand, pro-center forces seem to be attempting to reverse the emerging federal process. In the two older federal systems, the federal forces some how dominated the scene and the notion of “sovereignty of the states” gave way to a stronger federal system but it remains to be seen in Ethiopia (depending on balance of forces) how this will evolve in the coming years.

One great obstacle in the operation of the federal system and that is often reflected on both sides of the political spectrum (that is the ruling party and the opposition) partly the result of deep rooted authoritarian tendency but partly the result of what

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<sup>509</sup> Interview with the Speaker of the House of the Amhara Regional Council Her E. Dr. Misrak June 7 2006, Adama. See also Proc. No. 59/2001-The Revised Constitution of the Amhara National Regional State Art. 118.

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one may call the “Ethiopian factor” is the *militant political culture* (events of the Red Terror, trends of centralization in the decade old federal experiment, and the latest violent clashes in June and November 2005 clearly manifest this tendency) that stands in sharp contrast to the *federal political culture*. While in the latter, parties and major actors are expected to work together towards the achievement of their common goals respecting their differences (that is what federalism is all about), this has not been the case for long in Ethiopia. Each of the major actors in the political process consider the other as “enemy” and do not trust one another and hence could not evolve as political partners with some common goals. Nor is there any trend to respect areas of differences. It is simply a sad situation of “you think my way or you will be eliminated.”

Besides, the crucial difficulty of the absence of strong institutions for enforcing federal laws and policies will make itself felt. If a viable federal system is to survive, the implementation of the above recommendations on institutional reinforcement is essential, because intergovernmental conflict will accompany political diversity and party incongruence between federal and state governments. The relevant institutions will have to work on the basis of the rule of law, more than on the basis of a common party ideology.

The new situation also makes mediating and adjudicating institutions which until recently have not been established – such as the Human Rights Commission and the Ombudsman – or whose role has remained modest – such as the House of Federation and Council of Constitutional Inquiry – all the more important. All of these now have to face the new developments in a non-partisan manner.

#### SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

Once the militant political culture on both sides of the political spectrum is tamed, a negotiated political settlement acceptable both to the ruling party and the opposition on some of the contentious issues which we have indicated above, such as the relevance of multicultural federalism, the basis for restructuring the constituent units, some degree of asymmetric federalism, at least in the short run, striking some balance between centripetal and centrifugal forces and accordingly establish institutions that reflect such a negotiated outcome, seems a precondition for a stable federal system.

Summing up, it is submitted that Ethiopia's choice for multicultural/national federalism is a step in the right direction as it has opened a new political space for the different groups and has diffused the various conflicts to the local level making them less a threat to the center. But its success hinges on many factors. Firstly, the existence of a *political will* to operate in a politically diverse atmosphere is vital given the lack of a dominant majority, on the one hand and the ethno-linguistic and emerging political diversity, on the other. In other words the culture of respect and open accommodation of political and identity differences is an important infrastructure of federalism. It is a sign of commitment and demonstration of respect to others. Secondly, while ensuring self-rule to the nationalities is a step in the right direction, this measure needs to be complemented by institutional arrangements that give effect to power sharing schemes to the various actors at federal, regional and local levels. Equally important is the strengthening of the several institutions particularly, the respect for the autonomy of the regions, second chambers at federal and regional state level as well as the mediating and dispute handling institutions is vital for ensuring the rule of law and for enhancing shared rule. Thirdly, the protection of minorities in the constituent units in a manner that strikes proper balance between the nationalities right to self-rule and the free

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movement of labor and capital is a matter of necessity, if one is to give effect to the notion of 'building one political and economic community' stipulated in the constitution. Last but not least, the negotiated settlement at a constitutional level among the political forces on at least some of the contentious issues is a matter that will significantly contribute towards federal stability.

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### **Constitutions**

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Assefa Fiseha graduated in 1995 from Addis Ababa University, Faculty of law, with *distinction*. Since then he was a lecturer at the Faculty of Law, Ethiopian Civil Service College where he also served as deputy Dean, and Dean to the same Faculty. He has traveled, participated in and presented research papers at a number of national and international conferences in the field of constitutional law. Assefa completed his graduate study (LL.M) at the University of Amsterdam, Faculty of Law in 2001. Since October 2001, he was a candidate for a PhD at the Faculty of Law, University of Utrecht and earned his PhD in 2005. Some of his publications include: Federation and the Threat of Local Tyranny: The case of Ethiopia, *Horn of Africa* v. XXI (2003): 63-87; Federalism and the Adjudication of constitutional Issues: The Ethiopian Experience, *Netherlands International Law Review* v. LII:1 (2005): 1-30; Federations and Second Chambers, *Indian Journal of Politics* v. XXXIX: 3 (2005): 87-127, Federalism in Ethiopia in Particular and in Multicultural Societies in General, *Recht in Afrika* v. 1 (2006): 1-31, 'Theory versus Practice in the Implementation of Ethiopia's Ethnic Federalism,' in David Turton ed., *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective* (Oxford: James Currey, 2006): 131-164. Email: assefafish@yahoo.com