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The applicability of Intergovernmental Tax Immunity under Ethiopian federation: A comparative study

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ACRONYMS

- ADP - amhara democratic party
- EPRDF – Ethiopian people's revolutionary Democratic Party
- FDRE - federal democratic republic party
- GERD - grand Ethiopian renaissance dam
- HOF - house of federation
- IGR - intergovernmental relation
- IGTI - intergovernmental tax immunity
- MoFA – ministry of federal affairs
- ODP - Oromo democratic party
- USA - united states of America

ABSTRACT

A comprehensive understanding of intergovernmental tax immunity is developed in western federation such as USA, Canada and Australia even though the scope of the doctrine is varies from federation to federation but the objective is mainly similar in all federation. The doctrine is being operational part of a federal system on which the intergovernmental relationship is based. From its nature, federal system is not only stands for the distribution of powers between federal and state governments, but also requests relations between the two in order to ensure coordination and effective achievements of powers and responsibility divided. It is a boldly held view that the intergovernmental tax immunity in Ethiopia legal system are meant to be one of the principles which guaranteed under the constitution. The nature of dualist federalism needs the proper implementation of policies, and laws by providing legal frameworks to maintain their economic interests in equal manner. Intergovernmental tax immunity mainly enshrined to protect the center and states from different social, economic and political burden which might distracting the proper functioning of the two tier of the government power of taxation. But the Ethiopian federation is not suitable to implement the doctrine. Other federations postulated proper and necessary clause for the central government so as to enable it efficient and functional to do its task. But the Ethiopian federation is vague, i.e. whether the constitution provide proper and necessary clause or recognize federal supremacy is absurd at theoretical as well as in practice. Therefore, the application of intergovernmental tax immunity is absurd too, it needs further theoretical clarification.

Key word – proper and necessary clause, intergovernmental tax immunity, reciprocity, Ethiopia

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CHAPTER- ONE

INTRODUCTION OF THE STUDY

1. THE PROBLEM AND ITS APPROACH

1.1. Back ground of the study

McCulloch v. Maryland case is regarded as the foundation stone of the broad doctrine of implied governmental immunities which, until well into this century, severely limited the exercise of both State and federal power in the United States. The action was brought by the State of Maryland against a cashier of the Baltimore branch of the Bank of the United States to recover penalties imposed by a State statute for the issue of bank notes without the payment of specified taxes. It was held that the Bank was a validly created instrumentality of the United States, and that the States lacked the power to levy a tax upon it.[1]

The principle of intergovernmental tax immunity is one of judicial creation. It denies the State's legislative competence to interfere with federal activities even where, as a matter of general statutory interpretation, the State law can be construed as intending to apply to the federal government and its activities.[2] The implication arises, not to protect federal legislation, which will generally prevail over State legislation, but to protect federal executive activity which has not been conferred with legislative immunity from State laws.[3] In the US constitution, intergovernmental tax immunity is a doctrine that prevents the federal and state governments from interfering on each other's autonomy using their respective taxation powers.

Intergovernmental tax immunity is quite common for federal structures and constitutions to with a view of reducing the limitation of intergovernmental Relations. One can take the development of intergovernmental tax immunity in the United States to highlight the issues surrounding the doctrine. In the US, the limitation of intergovernmental tax immunity grew out of a series of cases in which the US Supreme Court defined and redefined the limits of intergovernmental tax

[1] *Ronald Sackville,The doctrine of immunity of Instrumentalities in the united states and Australia: a comparative analysis,Melbourne University Law Review, VOLUME 7,2010 p. 19*
[2] *Nicolee Dixon, limiting the doctrine of intergovernmental Immunity, Queensland University of Technology Law Journal, 2010,p.1*
[3] *ibid*

immunity.[4] At first, the doctrine was used by the US Supreme Court to prohibit the Federal Government from imposing taxes on income derived from state bonds, extending the immunity even to those who made contracts with the states.[5]

The doctrine rocketed on a fairly straight course for more than 100 years. During that time, the United States Supreme Court invalidated a number of state and local tax statutes that directly, and often rather indirectly, impacted the federal government. Under this expansive view of the Supremacy Clause, state and local taxes were struck if the economic incidence of the tax fell, even slightly, on the United States government.[6] The extent of intergovernmental tax immunity has been relaxed in later cases. Under the modern doctrine of intergovernmental immunity, the states can impose taxes on private persons who do business with the US federal Government and the federal Government can do the same, even though the financial burden of the tax falls indirectly upon the states or the federal Government. As long as the tax does not discriminate against those who do business with either the Federal Government or the states, the tax will stand constitutional scrutiny.[7]

It is now almost two and half decades since the federal structure is set up in Ethiopia by the adoption of the Transitional Charter in 1991 and the subsequent ratification of the Federal Democratic Republic of Ethiopia (FDRE) Constitution in 1995. The Constitution has also distributed the fiscal decision making powers between the federal government and the nine regional States. The theory of fiscal federalism involves the assignment of responsibilities and functions between the federal governments and the sub-national governments and the assignment of revenue powers.[8]

The Ethiopian Constitution is fairly explicit about intergovernmental tax immunity. In Article 100(3), it states that neither the Federal Government nor the Regional States can impose taxes on

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[4] *Federal Tax Course, CCH Editorial Publication, Chicago, 2000, p.118*

[5] *See Pollock vs. Farmers Loan and Trust Co., 157 U.S. 429 (1895), quoted in Federal Tax Course, pg. 119*

[6] *Rob Gunning, Into And Out Of The Bog: The Intergovernmental Tax Immunity Doctrine, Willamette Law Review, 2005, Pg. 151*

[7] *Federal Tax Course, supra note 4, p. 118-119*

[8] *Abu Mages, Fiscal Federalism and its Discontents, Fiscal Federalism and Its Discontents: Theory and Policy, [Paper prepared for the 3rd EAF-EARO/CADPR-WMU International Symposium on Ethiopian Development Studies, June 17-18, 2005, Addis Ababa, Ethiopia], Western Michigan University, 2005 p. 4.*

each other's property, **unless the property is a profit-making enterprise**.[9] However, it can be argued that the modality of revenue assignment in the Ethiopian Constitution already precludes the possibility of most cases of intergovernmental taxation in Ethiopia. Although, FDRE Constitution saves profit-making federal or state government enterprises from intergovernmental tax immunity, it is unlikely that these enterprises will become the subject of taxation, as the Federal Government has been assigned the power to levy and collect most taxes for instance, income tax, profit sales tax, and excise tax which accrued from their respective enterprise. There are other taxes which needs to be governed by the respective government enterprises among other things, capital gains tax, turn over tax, tax on dividend, royalty on small and medium scale mining operation and may extend to the other undesignated taxes are part and parcel of the doctrine. It is not clear if Regional States may challenge the central government on the basis of intergovernmental tax immunity because, there is no provision or precedent to delimit proper and necessary clause. Due to this, the scope of incidental power of central government may be perplexed. There are many federal government profit motive instrumentalities that has been functionalizing with in the state jurisdiction without taxing them, due to this reason, state shall reckon to rectify this noncompliance.

This paper rests up on the intergovernmental relation of the FDRE constitution with regarding to Ethiopian intergovernmental tax immunity. This being so, making an Interpreting any specific provision in the constitution is not an easy task rather; it needs deep investigation and analysis on such area. This research tries to discuss the issue at hand in a detailed manner as much as the literatures that are accessible allow to do so.

1.2. Statement of the Problem

It is vivid that the principle of intergovernmental tax immunity is enshrined under art 100 sub article 3 of the FDRE constitution. Pursuant to this provision, it dictated that, the federal government has enumerated and specified power. Similarly, the states are also granted with residual power which is provided under art 51 and 52 of the FDRE constitution. Digging in to the constitutional provisions will help us to know how the FDRE constitution is full of ambiguity and difficult to understand the theoretical standing on certain issues. Usually, our laws have unique futures on many legal frame works. Actually, according to art 100(3) of the FDRE

[9] *art 100 sub 3 of the Constitution of the Federal Democratic Republic of Ethiopia,' Proclamation No. 1/1995, Federal Negarit Gazetta, 1st Year No. 1, Addis Ababa, 21 August 1995*

constitution, the federal instrumentality has no power to execute a federal profit motive function on the states territory and vice versa. The taxing power of the two tires of the governments has been provided in the constitution under art 96, 97 and art 99 respectively. They also have a concurrent power of taxation in which both of them can levy on the same tax base.

As I have mentioned earlier, the principle of Intergovernmental tax immunity is well articulated under art 100 sub 3, unfortunately however, this prominent doctrine has been ineffective and nothing has been enforced through this provision in our federal system as far as I know. One can raise a question why regions have challenge the constitutionality of commercial bank establishment at their territory. The United States federation has been held an intense debate on this regard, whereas it's not the case under Ethiopian federation. The states do administer and enforce the federal function without delegation until this time, which contributed the lions share for the questioning existence of the real dual executive federalism which was hoped for in our federation. The federal instrumentalities such as Telecommunication, bank, custom duty, and hydroelectric plant and other profit motive instrumentalities are executed with in the states territory without taxing them. For instance the Grand Ethiopian Renaissance Dam (GERD), if the precedent continued in this way the project also immunized from taxation without take in to considerate regional interest from the project. The states are reluctant to the doctrine; they are not even willing to challenge the federal government. Some regions are dependent to the federal government budget granting on the basis of policy strategy. Presumably, they might fear to raise such constitutional issues to maintain their subsidies.

This study, therefore, revolves around such a theoretical challenges and practical difficulties of intergovernmental tax immunity in Ethiopia and strives to find possible option to redress the problems faced in reality with regard to the principle.

Research Questions

To supplement the statement of problem that is raised previously, the research would attempt to answer, at least, the questions which are listed here under illustratively.

- What is meant by intergovernmental tax immunity (implied power doctrine)?
- What are the experience of USA, Australia and Canada and lessons could Ethiopian federation derived from their federation.

- What is the nature and scope of intergovernmental tax immunity adopted by the FDRE constitution?
- What is the practical relevance and a potential challenges to the doctrine (IGTI)?

1.3. Objectives of the Study

The main objective of this research is to demonstrate the existing problems on implementation of the constitutional rights of the regional states and also demonstrates the states' rights in relation to their autonomy on taxation area in order to negotiate with the federal counterpart. With this general objective in mind, the study does also, inter alia, have the following specific objective;

- To endeavor to extract a lesson from other countries practice on intergovernmental tax immunity dictum.
- To discuss the legal regimes of Ethiopia on intergovernmental tax immunity.
- To explore the relevance and potential challenges to the doctrine.
- To solicit a possible recommendation to make the principle so as to be functional.

1.4. Scope of the Study

The research is limited to discussing the application of intergovernmental tax immunity principle in the Ethiopian intergovernmental relation and so Art 100 (3) of the FDRE constitution is the center of my discussion. It will evaluate some legal indictors such as proper and necessary clause to advance the reckoning of the regions in order to justify their claim as soon as possible. It would be the focal points of the study. But, the study will not deal with all federal countries literature; the research may only picked out three federations to make the study comprehensive and matured.

1.5. Significance of the Study

The research, being specifically devoted to discuss intergovernmental tax immunity with relation to the Ethiopian intergovernmental relation .It would be of great help to refer to the experience of other federal countries on intergovernmental tax immunity and comparison would be made to the Ethiopian legal system. Generally, the study would be vital for readers on the one hand, as means for understanding the constitutional rights of the states to their territorial autonomy and on the other hand the readers will also be aware as to how the federal government has used its unconstitutional power to safeguard its interest and the reader mean while detect the political and economic dependency of the states.

1.7. Research Methodology

The study will employ doctrinal research method. Accordingly, it will analyze the theoretical challenges of applicability of intergovernmental tax immunity. The experience of USA, Canada and Australia will be dealt with. Their experience will be reviewed because they are world longest standing example of a federal system of governance and there are also stiff challenges on its applicability. Above all, the FDRE Constitution and other relevant laws will be point of discussion.

1.8. Limitations of the Study

Probably the most cumbersome limitation of this study is finding a comprehensive study and academic literature in relation to the topic with related to Ethiopian case. All in all, it will be difficult to address all my ambitions owing to the time.

1.9. Organization of the study

The paper is divided in to five chapters after this introduction; Chapter two is there to review the existing literatures that magnify the theoretical and conceptual framework of intergovernmental tax immunity. It is particularly interested in introducing the theoretical points that would be discussed in a better detail in the subsequent chapters.

Chapter three is particularly concerned in reviewing the experience of the federal countries on the intergovernmental tax immunity and a separate chapter is given for this experience because it is helpful in getting a clear picture of such prominent issue.

From chapter four onwards the paper will directly considers the Ethiopian system as it is stipulated in the FDRE constitution about intergovernmental tax immunity. An attempt is also made in discussing as to whether the Ethiopian legal implementation is in conformity with the principles of intergovernmental tax immunity. And will discuss the evaluation of the principle of intergovernmental tax immunity under Ethiopian federal structure by postulating the subjected instrumentalities.

The final chapter would communicate the findings of the study and some recommendations there from.

CHAPTER TWO

DEVELOPMENT AND CONCEPTUAL UNDERSTANDING OF INTER GOVERNMENTAL TAX IMMUNITY

2. Introduction

Needless to mention that a discussion on intergovernmental tax immunity is not addressed effectively and clear understanding on the preliminary principles underlying intergovernmental relation and the need for tax immunity under the Ethiopian legal scholars, and as a result this part of research will devote to explore its developmental scheme.

2.1. The concept Intergovernmental tax immunity doctrine: its definitional futures

It is obvious that federalism could be one tool of decentralizing power to sub national entities. As such, the economic and political justifications that are forwarded for decentralization can also hold true in federal arrangements that are primarily concerned in devolving powers mainly from the central to the sub national governments.[10]In modern fiscal system, the tax revenue is the backbone of governmental public finances.[11] Constitution as a guideline in understanding the functions of governmental organs comprises basically the issue related to sources of revenue which enables to cover the expenses and each level incur in discharging their expenditure needs.

Tax is one of the main sources of public revenue; most countries' constitutions regulate the taxation system in diverse ways. The constitutions of some countries set particular principles of taxes and some others only set general rules of taxes. The administration of taxation aspect also depends on the structure or form of the states. The federal states usually and as a matter of a federal feature sets decentralized system of taxation in the constitutional text.[12]The power to tax is one of the most important incidents of sovereignty. In a system of government that in theory recognizes the sovereignty of the states as well as of the federation of those states, it is inevitable that conflicts will arise from attempted taxation of governmental instrumentalities.

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[10] *Jonathan Rodden, Gunnar E. Eskeland, and Jennie Litvack, Fiscal Decentralization and the Challenge of Hard budget Constraints, Introduction and Overview, the MIT Press, London, England, 2003.p.7*

[11] *Dixwell, L. P. the Place of Consumers' Excises in the Tax System, Electronic Law Journal vol 1, - JILT Basu - University of Warwick, 2004, p. 2*

[12] *Yonas Girma Adimassu,& Assoc. Prof. Dr. ÜmitSüleyman ÜSTÜN, A Review of Constitutional Principles Regarding Taxation: Ethiopian and Turkish Perspective,2017,pg.4*

In the federal systems various forms of fiscal arrangements between the national and lower levels determine the way in which taxes are allocated and shared among the various levels of government, and how funds are transferred from one level to another. Thus, intergovernmental relations, both vertical (between levels of government) and horizontal (within levels) are important for the development and operation of an efficient and effective public sector.[13]

The way intergovernmental fiscal systems are organized varies from country to country. These differences partly reflect historical and geographical characteristics of each country, the degree of heterogeneity of the population and the extent of government intervention in the economy. Given this diversity, how questions of inter-governmental structures and functions are resolved in practice will often differ from country to country. Although the diversity complicates broad generalization, reference to the experiences of other countries is often the only guide available. Despite its limitations, such experience may provide useful lessons in assessing the potential strengths and weaknesses of intergovernmental fiscal systems in any country.[14]

2.2. Defining Intergovernmental Tax Immunity

The doctrine of intergovernmental tax immunity is one of judicial creation.[15] That prevents the federal government and individual state governments from interfering on each other's sovereignty. It is also referred to as a supremacy close immunity or simply federal immunity from the state law. At first the doctrine of intergovernmental tax immunity was used by the U.S. Supreme Court to prohibit the Federal Government from imposing taxes on income derived from state bonds, extending the immunity even to those who made contracts with the states.[16] It is derived from the Marshall Court's decision in McCulloch v. Maryland (1819), with "The power to tax involves the power to destroy" dictum. The court ruled unanimously that state may not regulate property or operations of the federal government. In that case, Maryland state law subjected banks not chartered by the state to restrictions and taxes. In McCullloch's case, state law had attempted to impose these restrictions on the second bank of the United States. The presiding judge of the case at hand was justice martial, he ruled in a way that if a state had a

[13] *ibid*
[14] *Odd-Helge Fjeldstad, Intergovernmental fiscal relations in developing countries; A review of issues, 2001,pg.2*
[15] *Nicolee Dixon, supra note 2, ibid*
[16] *Pollock v. Farmers Loan & Trust Co., 157 U.S. 429 (1895)*

power to tax a federal incorporated institution, thereby awkward the intent and purpose of congress. This would make the states superior to the federal government.[17]

In other words, it served as a limitation on states to impose taxes on those who made contracts with the Federal Government. This limitation was gradually relaxed in Different scenarios. The extent of intergovernmental tax immunity has been relaxed after the McCulloch's case. Under the modern doctrine of intergovernmental tax immunity, the states can impose taxes on private persons who do business with the Federal Government and the Federal Government can do the same, even though the financial burden of the tax falls indirectly upon the states or the Federal Government. As long as the tax does not discriminate against those who do business with either the Federal Government or the states.[18]

The field is remains to be heavily litigated because the commercial use of government property is expanding rapidly. Government owned property generally is exempt from state and local taxation. Oftentimes, however, private parties contract with governmental entities to use otherwise tax-exempt property for a wide variety of private purposes. These possessory interests include: the use of publicly owned rangeland for private grazing purposes; the use of mountainous national forest land by ski resorts; the use of national parks, municipally owned airports, and sports arenas by concessionaires; and the use of federally owned property by defense contractors. Publicly owned property is also increasingly being leased for more pedestrian purposes, with private parties leasing government-owned buildings for warehouse, office, and research park space.[19]

There will be an inevitable intervention between the federal government and states or among the states themselves while exercising their powers. That is why the doctrine has come in to the picture.

2.3. Relevance and goal of the doctrine

All the constitutional limitations on sovereign powers of taxation, the current limitations on state taxation of federal instrumentalities appear the most formalistic, the most divorced from their original purposes. John Marshall devised federal tax immunity in order to safeguard federal

[17] *McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819)*
[18] *Supra note 6 p.2*
[19] *John A. Swain, the Taxation of Private Interests in Public Property: Toward a Unified Theory of Property Taxation, UTAH L. REV. 421, 421, 2000, p.21*

operations from potentially destructive state taxation.[20] Parts of the opinion seem to say that state powers of taxation, by the very nature of the federal system, do not extend to federal instrumentalities. The Bank, reasoned Marshall, was a creature of federal law, and its operations of federal law.[21] Maryland's effort to tax the Bank's operations amounted to the assertion of a state power to frustrate the operation of federal law an effort prohibited by the supremacy clause.

The importance of intergovernmental tax immunity is analyzed in different dimension. First, the doctrine is put as a limitation on the power of taxation with in the federation in a way that the very nature of federalism manifests dualism approach in a modern sort of political, social, cultural and economic frame work with in one country. Even though, the federation has difference in their nature of formation but one thing that need to be clear is within a modern federation there has to be independent and sovereign state and federal government. Hence, the sovereignty is manifested through its separation of power. Power of taxation is among those powers.

Mainly both the states and federal government have their own power of taxation to build their treasury and this power has been regulated by their constitution and other subsidiary laws. But sometimes the enforcement stage may create controversy. Usually the controversy has been managed by putting the federal supremacy close and reflected this clause in their legal system. This is the mechanism in which most federal supremacy clause. At this time state may think their sovereignty is distracting. To settle this expected fear the court developed implied power doctrine by testing the standard of proper and necessary close.[22]This doctrine has been envisaged under the US constitution too.

Secondly, the doctrine also plays a pivotal role to make confidentiality within the federation. Confidentiality in a sense that, the state can be protected from the federal tyranny, which means the federal government, is precluded to impose the tax on states if the tax had been levied to ensure states policy objectives if it devises to maintain the state objectives on the federal boundary. The third importance of the doctrine is to make states capable to expand and formulate

[20] *Maureen Mahoney, Federal Immunity from State Taxation: A Reassessment; university of Chicago Law Review vol.45:ISS. 3, 1978, pg.695*
[21] *ibid*
[22] *U.S. constitution. art.I, sec 8, clause. 18, Stipulated the necessary and proper clause.*

their policy framework without impediment which might face opposition on the side of the federal government, in such stances they call it *reciprocity*.

Lastly, the doctrine can limit the state from the imposition of excessive percentage on federal instrumentalities. Because if they get permission to impose on the instrumentalities, the percentages will also be regulated by their own will. Therefore, the federal government can enter in a revengeful and distractive policy framework.

The doctrine has been tempered considerably by an increasing tendency of the Supreme Court to refrain from striking down legislation without first examining its practical implications. Sackville regards this as a "willingness of the Supreme Court to allocate law-making competence rationally between the federal government and the States according to their legitimate spheres of interest.[23] The Court using this approach decides if the activity is predominantly one of State concern or federal concern. In addition, it will apparently examine the practical effect of the State legislation to determine its impact on the federal activity.[24]

2.3.1. Goals of the tax immunity doctrine

The doctrine is intended to maintain certain goals such as;

a. Accommodating State and Federal Interests

The purpose of intergovernmental tax immunities is to prevent one sovereign from interfering with the governmental functions of another. Any sound judicial doctrine of immunities must assure this, but it must also take into account countervailing state interests.[25]Recognition of immunity necessarily restricts a state's taxing power. Any doctrine of intergovernmental tax immunity represents a balance between one sovereign's power to tax and the taxed sovereign's need for the immunity.[26] In Marshall's view, the only reliable means of safeguarding one sovereign from the possibly destructive powers of another was legislative representation.[27]

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[23] *R Sackville 'The Doctrine of Immunity of Instrumentalities in the United States and in Australia: A Comparative Analysis 1969, p 63.*

[24] *City of Dubuque Bridge Commission v Board of Review for City of Dubuque 317 US 686.*

[25] *Maureen Mahoney, supra note 20, pg.717*

[26] *Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926), the Court observed: The limitation upon the taxing power of each, and so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other, and that limitation cannot be so varied and extended as seriously to impair either the taxing power of the government imposing the tax... or the appropriate exercise of the functions of the government affected by it.*

[27] *The only security against the abuse of (the taxing) power, is found in the structure of the government itself.*

b. Institutional Consideration

The further consideration of an immunity doctrine flow from institutional limitations of the judiciary. First, the immunity standard, like most judicial doctrines, must be capable of easy application.[28] The second goal is related to the first, a judicial immunity doctrine should ensure as far as possible that important questions of state-federal relations are decided by the proper forum.[29]

2.3.2. Criticisms of the Doctrine of Intergovernmental Immunity

The doctrine of intergovernmental immunity has suffered a great deal of criticism because of the broad scope that has been given to it. In addition to this, there has been a degree of confusion regarding the vague exceptions that have been created to confine the extent of the immunity in particular instances. In the case of ordinary State regulation or control of federal government activities the scope of the federal government's immunity is unclear. The United States Supreme Court has not shown any consistency in approach and has sometimes taken a broad view of the doctrine. It appears that federal activities have been given immunity from State laws unless the State law concerns a mere "incidental matter".[30] The doctrine cannot, therefore, be easily confined to federal activities that are exclusive to the government or which are "uniquely governmental functions.

The scope of activities in which the Commonwealth (Austria) can engage and, consequently protect From State legislation, has significantly expanded with the increasingly liberal approach to Commonwealth legislative powers taken by the High Court during recent years. The Uniform Tax cases[31]demonstrate the potential power of the Commonwealth to control the States by virtue of the Court's broad interpretation of the Commonwealth's fiscal powers in the areas of taxation and tied grants under their law. The implications of the approach seen in these cases give even less credence to the necessity of any immunity favoring the Commonwealth. The States' legislative capacity has been significantly eroded by the growth in Commonwealth power and their position within the federation subsequently diminished. To deny the States the ability to

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[28] *Maureen Mahoney, Supra note 9 pg.719*

[29] *ibid*

[30] *Johnson v Maryland (1920) 254 US 51, where the Court reversed the conviction of a Post Office employee for driving a mail truck without possessing a State license.*

[31] *South Australia v Cth (1942) 65 CLR 373; Victoria v The Commonwealth (1957) 99 CLR 575.*

bind the Commonwealth by a general non-discriminatory law would appear to undermine their position further.[32]

The broader view of intergovernmental immunities would provide the federal government with immunity from State laws in respect of its general "governmental activities." The Commonwealth would be immune from State legislation no matter how far removed the activity may be from its own prerogative powers and from, what will later be called, its "uniquely governmental functions.[33]

However, despite the fact that the Commonwealth possesses sufficient power to protect its activities from State laws and that, as seen above, there is considerable criticism regarding the scope of the intergovernmental immunities doctrine, there are varying degrees of support for the existence of federal government immunity in the courts of both Canada and the United States. This indicates that other federations have found it necessary to immunize at least some federal government activities from State laws. If it is accepted that there exists a concept of intergovernmental immunity in favor of the federal government, the objections to its existence should have some bearing on the limits which should be drawn on the scope of that immunity. It is the writer's view that its scope should be necessarily confined.[34]

2.4. The uniquely governmental function parameter

Many of the criticisms relating to the artificiality of the distinction between "essential" and "non-essential" functions of government arose in cases concerning the applicability of the "shield of the Crown" to a particular statutory public authority.[35]Whilst it is inherently difficult to determine which are the "essential functions of government," as was attempted to be done in some earlier cases,[36]room does exist for isolating certain governmental activities which, apart from the prerogative, could be described as "unique." The functions envisaged are of a type that only the government can or should pursue. Examples of such include activities connected with maintaining a defense force and with naval and military defense, implementing system,

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[32] *NicoleeDixon,Supra note 2, pg.13*

[33] *Ibid pg. 21, a "uniquely governmental" function is the ability to control and regulate society and provide for the administration of civil order. Obviously it is possible to point to many governmental activities in which the government has traditionally been involved and contend that such could equally or even more effectively be carried on by the private sector; for instance, road and bridge buildings are among other things*

[34] *ibid*

[35] *Townsville Hospitals Board (1982) 149 CLR 373.*

[36] *Melbourne Corporation v The Commonwealth (1947) 74 CLR 31*

maintaining a police force, administering environmental protection legislation, regulating and maintaining the provision of social services such as pensions and benefits,[37] measures to preserve public health and the regulation of banking and corporate activities. These activities are examples of the government's control and regulation of society.

The crucial point is that when it is determined as a matter of statutory construction that the Crown is bound by State legislation, the Constitutional question as to whether immunity is attracted should depend upon whether the particular entity is acting in pursuit of an "executive prerogative" or is executing some "uniquely governmental" function. It would follow that the "particular entity" would generally be the executive arm of the government itself. Very few statutory corporations of a commercial nature could be said to be engaging in unique governmental activities even though their-object may be the pursuit of some significant social responsibility. It is not suggested that these activities are not governmental, the point is that they are not a unique feature of government, i.e., activities which are only appropriate to the government. These activities could therefore be subject to State regulation.[38]

Many commercial activities engaged in by the Commonwealth, even where operated as a monopoly for the "public good," are not "uniquely governmental" and should not attract the immunity doctrine. However, where the commercial activity is ancillary or incidental to the pursuit of the "uniquely governmental" function, such as contracting to purchase supplies for the armed forces, those activities could be given the cloak of immunity if the overall function would be severely burdened.[39]

If the immunity is confined in the manner suggested the issue becomes, firstly, whether the activity being performed is either within an "executive prerogative" or is "uniquely governmental" and, secondly, whether the federal government would be prevented or impeded in performing such a function or whether the law destroys or curtails in any substantial manner the exercise of that function. Sometimes the Commonwealth activity in question may be of a purely commercial nature and would not prima facie give rise to the narrow immunity. However, it is submitted that the court should determine whether this commercial activity is one which is

[37] *West v Commissioner of Taxation (NSW) (1937) 56 CLR 657.*
[38] *Supra note 2, pg. 22*
[39] *Ibid.*

ancillary to some "executive prerogative" or "uniquely governmental" function.[40]If so, then it will be entitled to the immunity if it is being interfered with to the requisite degree.

If, for example, the federal government is entering into a contract for the purchase of military equipment or food for its defense requirements then the activity of entering into a contract, although one that ordinary subjects can perform, is incidental to its "executive prerogative" or its "uniquely governmental" functions. One must then consider whether the State law attempting to regulate the activity prevents or impedes the defense function or substantially destroys or curtails the exercise of that function. If the Commonwealth wishes to use its fleet of Commonwealth cars in private hiring activities this is not an activity that is of itself within the "executive prerogative" or is "uniquely governmental". It is necessary to consider the activity as a whole (the carriage of executives and public servants on official duties) to determine if it is "uniquely governmental" rather than that part being regulated (the private hiring activities) and to then decide whether the private hiring business is ancillary or incidental to that main activity. However, it is arguable that the activity of carrying executives and public servants on official duties is not within the "executive prerogative" or "uniquely governmental" sphere either.[41]

[40] *Court of Queensland in Shaw v Coco (1991) 102 ALR 75.*
[41] *Supra note 2, pg. 25.*

CHAPTER THREE

FOREIGN EXPERIENCES ON INTERGOVERNMENTAL TAX IMMUNITY

3. INTRODUCTION

Federations may devise their own system to regulate the business of intergovernmental tax immunity. Soliciting the experience of some federal countries on the issue at hand is important to compare the matter with the Ethiopian system and helps to make the doctrine visible, if any. For this purpose, the experience of USA, Canada and Australia will be discussed in this chapter. A separate discussion of the experiences of such countries in this chapter is believed to give a better picture of the experience of a given country on implied power doctrine or intergovernmental immunity at a time so that we could see what lessons to extract for Ethiopian federation.

To give a somehow comprehensive system of the experience of each country, an attempt is made to briefly discuss how implied power doctrine is designed to implement intergovernmental tax immunity. After this it has been communicated, the chapter also has a final important section to deal with the possible lessons that Ethiopia could draw from the comparative experiences.

Nb. *This chapter tries to figure out the practice of other federations, at this juncture it should be pointed out that the US jurisprudence is a prominent one. The reason why I opted to deeply discuss the United States experience is, because the US legal system realizes a better development in this regard, the principle was articulated by them for the first time, whereas, the other two federal countries (Australia and Canada) seem to have transplanted the principle from the US legal system. So discussing their point of analysis is redundancy, and would be better to focus on their institutional response to the doctrine*.

3.1. United States of America (USA)

The study of the development of the doctrine of implied powers in the USA is a study of the development of US federalism. The implied doctrine became a main tool for shaping a new form of federal relations. American federalism evolved over the centuries with the doctrine of implied powers. When the external, political, social or economic circumstances pushed for a change in the relations between the federal structures and the states, the necessary and proper clause served

them perfectly. Thus, the justice played a primary role in the process of recreating the form of federalism.[42]

Because the doctrine of implied powers was born in united states, the story had already begun in the eighteenth century when the constitution of the USA was drafted and ratified, and was the time when the necessary and proper close, the constitutional embodiment of the doctrine of implied powers and textual justification, was created. In those discussions we can truck some crucial arguments as regarding the doctrine itself and the version of federalism that different readings of the doctrine brought. But to understand the discussion of implied powers and federalism in the American context, we must take a closer look at the arguments presented during the first years of existence of the American federal republic.[43]The bank bill case and McCulloch v Maryland are the key opinions in understanding notion of powers in American constitutionalism. Both sides of the constitutional conflict delivered their most elaborate reasoning and chief justice martial presented an opinion that not only became a starting point of discussions about federal powers in the USA until the present day, but also is one of the milestones of the American case law system.[44]

3.1.1. Necessary and Proper clause

Article I enumerates the powers of Congress, and the Necessary and Proper Clause affirms that Congress has not only its enumerated powers but also the incidental powers that are necessary for executing those powers.

"Unfortunately, no one, including the constitutional framers, knows the point of the phrase 'necessary and proper.[45]

More than two centuries, no clause of the U.S. Constitution has been more central to debates over federal power than the Necessary and Proper Clause. The discussion about implied powers in United States must start with the necessary and proper clause of the US constitution.[46]This

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[42] *Milosz Hodun, Doctrine of implied powers as a Judicial tool to build federal policies, comparative study in the European union and the united states of America, school of law, Reykjavik university,2014, pg. 8*
[43] *id, pg.61*
[44] *id,*
[45] *Mark A. Graber, Unnecessary and Unintelligible, 12 Const. Comment. 167, 168 (1995).*
[46] *The term necessary and proper close was coined in 1926 by associate justice Louis Brandeis, writing for the majority in the Supreme Court decision in Lambert v yellowley (272 US 581(1926)). In its ruling on the case, the*

close is the only base of implied powers in USA. The necessary and proper close allows the congress "to make all laws which shall be necessary and proper for carrying in to execution the power, and all other powers vested by this constitution in the government of the United States, or any department or officer thereof".[47]The correct way to interpret the clause was the subject of debate initiated by two of the founding father, alexander Hamilton and James madison. The debate reflected the difference between the two different concepts of the federal government held by the framers of the constitution. The supporter of the new constitution wanted to grant the government all the adequate powers to achieve its delegated ends and to create a government more functional than the one created under the articles of confederation. On the opposing side, there was greater concern about the states right and limited government that would not hegemonies the people and the local government. The language of the clause is ambiguous. It clearly grants the congress possesses some powers not expressly mentioned in the constitution, but it is not clear how broad those powers are. It can be interpreted very broadly or very narrowly. Both constructions had strong supporters and enemies, just like the vision of federal government they represented.[48]

"Those who object to the (Necessary and Proper Clause) as a part of the Constitution . . . have they considered whether a better form could have been substituted?[49]

The commission on detail added the necessary and proper clause to the constitution without discussing it with the rest of the constitutional convention. It was not the subject of any discussion from its initial proposal to the convention final adoption of the constitution. What is known from the legislative history of the clause is the first wording thereof, proposed by gunning Bedford and rejected by the committee. This first version suggested that congress has the power to legislate in all cases for the general interest of the union, and also in those to which the state are separately incompetent, or in which the harmony of the united states may be interrupted by the exercise of individual legislation.[50] This means that the convention rejected without discussion a clear proposal of an open-ended grant of powers to the congress, and instead opted

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court upheld a law restricting medicinal use of alcohol as a necessary and proper exercise of power under the 18th amendment, which had established prohibition.

[47] *Art 1, section 8, close 18 of the US constitution 18th amendment*

[48] *Milosz Hodun, pg. 65*

[4949] *The Federalist No. 44, at 299, 303 (James Madison) (Jacob E. Cooke ed., 1961).*

[50] *James Madison, notes of debates in the federal convention of 1787(Ohio university press 1987) p.303.*

for enumeration of particular powers which would later became the necessary and proper clause.[51]

The interesting issue is before Hamilton and Madison started disagreeing about the meaning of the necessary and proper clause, they publicly supported the clause and passionately fought the arguments of the opponents of the constitution. Under the common pen name "publius" in the federalist, they offered a defense line for the clause.[52] They both believed that the clause adds nothing new to the enumerated powers of the congress. The main argument of the anti-federalist was that the almighty of the clause will give no ends to the federal government powers. This is why it was called by many an anti-federalist; *sweeping clause*[53] the main fear was that the clause would permit the government to invade the area of powers of the states, especially in the territory of taxation. Anti-federalist where claiming that with the sweeping clause, congress could pass a law preventing the state governments from collecting taxes, if it was a necessary and proper tool to effectuate federal collection. Some even feared that the clause would be a tool for abolishing state government entirely.[54] Hamilton focused in federalist no.33 on taxation, to ensure that the clause did not threaten the states competence in that field. He also argued that the necessary and proper clause included no powers beyond what was implicit in a fair reading of other enumerated powers.[55] He stated that;

What is a power, but the ability or faculty of doing a thing? What is the ability to do a thing but the power of employing the means necessary to execution? What is a legislative power but a power of making laws? What are the means to execute legislative power but laws? What are the proper means to executing such a power but necessary and proper laws?[56]

3.1.2. Arguments on the initiation of the first Bank

Hamilton and Madison drafted further and further apart with regards to the necessary and proper clause during the bank bill debate. This debate became an intellectual foundation for the

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[51] *Milosz Hodun supra note 42,*
[52] *Alexander Hamilton, the federalist no.33; James madison, the federalist no. 44(first published 1787-88,Jacob E. cooke (ed) 1961)*
[53] *Gary Lawson, Patricia B. granger, the "proper" scope of federal power; a jurisdictional interpretation of the sweeping clause, (1993) 43 DUKE Law journal 267.*
[54] *Herbert stering, the complete anti-federalist, especially; essay of an old Whig: essay of Brutus; the documentary history of the ratification of the constitution, statement of George Manson 1981, p.151*
[55] *The federalist no. 33 p.204*
[56] *James Madison, pg.204*

development of the doctrine of implied powers in the 19th, 20th and also 20 first century. The statesmen involved in that debate guaranteed the highest level of legal and political debate. Their arguments have served both supporters and enemies of a strong central government in all stages of US federalism history. And they play the same role in the present debate.[57]

In 1791 a national bank was proposed to the first congress by secretary of treasury Hamilton. It provoked one of the hottest political debates of its times. The bank proposal was passionately opposed by James Madison. He delivered a speech that began with "a general review of the advantages and disadvantages of banks" and finished with a clear denial of congress authority to pass the bill.[58] Whatever meaning this clause may have none can be said to give unlimited discretion to the congress.[59]

Madison argued that the bank was not necessary and proper. He found the preamble of the bank bill diffuse and too flexible, and therefore could not agree on giving congress the authority to grant the bill as he was against the principles of enumerated powers and limited government. He could not agree that the bank would carry the enumerated powers in to execution. Rather, he claimed the bank would only facilitate the exercise of governmental powers. He also reflected on the extended chain of means and ends to achieve an object.[60] On the other hand, supporters of the bank argued that it was justified as incidental to the power to lay and collect taxes, duties, imposts and exercise, to pay the debts and provide for a common defense and general welfare as such. He explained that the taxing power cannot be used to reach general goal. " to understand these terms in any sense, that would justify the power in question, would give the congress an unlimited power; would render nugatory the enumeration of particular powers; would supersede all the powers reserved to the state governments.[61] It could do so only when exercising one of the enumerated powers. Madison believed also that congress should use only direct and incidental means to achieve constitutional ends.

Finally, Madison believed that there would always be some assessment as to whether the means chosen by the government were essential to the pursuit of enumerated ends. Restriction of

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[57] *Milosz Hodun , pg.66*
[58] *Annals of congress (joseph Gales1791) 1945.*
[59] *Annals of congress, 1899.*
[60] *Milosz Hodun, pg.67*
[61] *ibid*

liberties of the people could be accepted only when necessary and the level of necessity should be proved.

Hamilton started his argumentation in favor of the banks, with the suggestion that the United States possess the power of the sovereign in relation to those objects entrusted to its care.[62] And as such, the union has a right to employ all the means requisite, and fairly applicable, to the attainment of the ends of such power, and which are not precluded by restriction and exceptions specified in the constitution, or not immoral, or not contrary to the essential ends of political society.[63] Then concludes that the creation of a corporation is a means available to a sovereign. The only question that must be asked is weather the means has "a natural relation to any of the acknowledged objects or lawful ends of the government.[64]

Hamilton argued that the grammatical and popular sense of the word "necessary" often means no more than needful, requisite, incidental, useful, or conducive to. It is a common mode of expression to say that it is necessary for a government or person to do this or that thing, when nothing more is intended or understood than the interest of the government or person being required, or will be promoted by the doing of this or that thing.[65]

The Supreme Court finally addressed the constitutionality of a congressionally chartered bank in the famous McCulloch v. Maryland. The role of McCulloch in American judicial history cannot be overestimated, as this was the first interpretation of the necessary and proper clause delivered by the Supreme Court. It is not only that, the importance of the decision is even greater because it was written by chief justice marshal, a principal founder of the US system of the constitutional law. The arguments, legal reasoning and rhetoric of the decision are praised even nowadays. This is why i have to analyze this opinion in minute detail in order to understand the very basics of the doctrine of implied powers in the United States. Chief justice Marshall, who gave us the meanings of the word "necessary" pointed at the link between powers and sovereignty and crated a means-to-end test. The then time discussion brings an axis of rearrangement of the doctrine of implied powers in the upcoming periods of federalism. McCulloch is also crucial in

[62] *Opinion of Alexander Hamilton on the constitutionality of the national bank(23 February 1791)http://press pubs.uchicago.edu/founder/documents/a-8-18s11.html>accesed 3 September 2018.*
[63] *ibid*
[64] *ibid*
[65] *ibid*

understanding the role of the judiciary in the process of determining the scope of the doctrine and American federalism in general.[66]

3.1.3. Interplay with the commerce clause

The necessary and proper clause tells congress that it can additionally make any law it believes it needs to make in order to carry out enumerated powers. The power to enact necessary and proper law is inextricably linked with the enumerated powers. The commerce clause is an example of enumerated powers. Not only that, it became the most important power when paired with the necessary and proper clause from a historical and practical perspective. The commerce clause has historically been viewed as both a grant of congressional authority and as a restriction on states powers to regulate. The meaning of the word commerce is a source of much controversy, because some argue that the clause refers very broadly to commercial and social intercourse between citizens of different states (and within states). This makes the clause potentially very powerful, especially when paired with the necessary and proper clause.[67]

Defining the scope of enumerated powers belongs to the area of constitutional interpretation. The court defined the power to regulate commerce among the states in Gibbons v. Ogden.[68] It construed the power very broadly as regards all the linguistic parts of that provision. The meaning of commerce includes also navigation; the meaning of "among the states" includes all commerce involving more than one state, the power to regulate more than one state and the power to regulate the interstate aspect of that commerce and, finally, the plenary authority to determine the rules under which the commerce may be conducted. What is more, the power to regulate commerce encompasses very broad ends. This has implications for the effective scope of the necessary and proper clause, and changed commerce to be a balancing point for federalism.[69]

The commerce clause addresses the ends that congress may pursue, but paired with the necessary and proper clause, it addresses the means congress may employ in pursuit of enumerated end, the only limitation being that those means are both necessary and proper. It generally makes no real difference if the regulation of activity that is not itself commerce is analyzed under the necessary

[66] *Milosz Hodun, pg.71*
[67] *Ibid, pg.84*
[68] *Gibbons v. Ogden 22 US 1(1824)*
[69] *Ibid.*

and proper clause or directly under the commerce clause.[70]In both cases the court would refer to the same ends as addressed by the commerce clause and the same ends as addressed by the necessary and proper clause, regardless if these were mentioned explicitly or presumptively.[71]

3.1.4. The McCullloch's precedent

The first extension of McCulloch v. Maryland was made by Marshall C.J. himself in Weston v. Charleston,[72] in which a city property tax was held invalid insofar as it applied to United States bonds. The step thus taken from McCulloch was a large one, as the tax in Weston was in no way discriminatory, applying generally to personal property; nor was it levied on a government instrumentality but on the individual owning the bonds. Marshall C.J. reasoned that the borrowing of money was an essential governmental function and the taxing of the contract was a burden on the exercise of that function by the supreme authority, bearing in mind that the power to tax was the power to destroy.[73] Consequently the case was one for the application of the McCulloch principle that;

The states have no power, by taxation, or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress, to carry into execution the powers vested in the general government.

These all above stated sequence are leads to the doctrine of intergovernmental tax immunities, a doctrine which the Supreme Court has found in the federal structure of government created by the Constitution.[74] The core of this doctrine is that the federal government may not tax the states, and the states may not tax the federal government.

As we inferred from the case, 80% of the stock of the Bank was held by private parties, the key question in defining the scope of intergovernmental immunities is whether the object of taxation

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[70] *Gary Lawson, David kopel, the PPACA in wonderland(2012) 38 American journal of law and medicine 3http://www.bu.edu/law/fuculty/scholarship/workingpapers/documents/LawsonGkoppelD0211912rev.pdf accessed 06 September, 2018*

[71] *ibid*

[72] *(1829) 2 Pet. 449.*

[73] *The dissenting judgment of Thompson J., 'If the right to impose the tax exists, it is a right which in its nature knows no limits.*

[74] *Earlier cases derived the immunity of states from federal taxation from the tenth amendment, see, e.g., Collector v. Day, 78 U.S. (11 Wall.) 113 (1871), Federal immunity from state taxation is often derived from the Supremacy Clause of art. 5. See, e.g., United States v. County of Fresno, 97 S. Ct. 699, 700, 702 (1977).*

is "so assimilated by the Government as to become one of its constituent parts.[75] In the absence of either constitutional text or any well-defined theory justifying the immunity, this question is not easily answered.

After Collector v. Day,[76] an 1871 decision holding the salary of a state judge immune from federal taxation, the scope of intergovernmental immunities gradually expanded until in 1928 royalties on federal patents were held immune from state taxation."[77] Thereafter, the scope of the immunity was drastically reduced by a series of Supreme Court decisions."[78] But something of the doctrine of intergovernmental tax immunities remains, as the Court made clear in the course of denying the State of New York immunity from federal taxation on sales of mineral water from state-owned mineral springs.[79] Chief Justice Stone, speaking for four members of the Court, cited as examples of what would remain immune from federal taxation the "State's capitol, its State-house, its public school houses, public parks, and its revenues from taxes or school lands.[80]

3.2. Australia

Intergovernmental negotiations in Australia have been primarily driven by the financial dependency of the states on the Commonwealth, rather than by shared policy interests or concurrent responsibilities.[81] This asymmetry in bargaining power ensures the Commonwealth is able to achieve many of its objectives in areas of concurrency or state jurisdiction, with or without the cooperation of the states.

Firstly I need to give some blue print in order to consider the general position of the Crown and the circumstances under which the Crown in right of the Commonwealth can be bound by Commonwealth legislation and by legislation of a State Parliament. With this background it is then possible to examine the High Court's development of the doctrine of intergovernmental immunity and to attempt to identify its limits.

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[75] *United States v. Township of Muskegon, 355 U.S. 484, 486 (1958).*
[76] *78 U.S. (11 Wall.) 113 (1871).*
[77] *Long v. Rockwood, 277 U.S. 142 (1928).*
[78] *Fox Film Corp. v. Doyal, 286 U.S. 123 (1932), overruled Long v. Rockwood, 277 U.S. 142 (1928), and Graves v. New York ex. rel. O'Keefe, 306 U.S. 466 (1939), overruled Collector v. Day, 78 U.S. (11 Wall.) 113 (1871).*
[79] *New York v. United States, 326 U.S. 572 (1946).*
[80] *Ibid.*
[81] *Mary-Ann McQuestin, Shelley Woods, the tension between intergovernmental relations and cooperative federalism, 2Department of Politics and Public Policy, Griffith University Brisbane, 4111, Australia, August 2010,p.1*

3.2.1. The Crown

In Australia, executive power vested in Her Majesty is exercisable by the Governor-General in right of the Commonwealth[82] and by the Governor in right of the several States.[83] In reality, the day to day executive and administrative activities of the government are carried out by Ministers, their respective departments of State and the officers therein. In this paper, the expression "the Crown" will be used interchangeably with "the executive" or even "the government" when describing the executive arm of the government.[84]

The Crown enjoys immunity from statutory control unless the particular statute purports to bind it expressly or by necessary implication.[85] This immunity has been given statutory effect in some Australian jurisdictions. The provisions in such enactments have been interpreted as doing no more than merely restating the common law position that the Crown can still be bound by express words or by necessary implication.[86]The decision of the High Court in Bropho v Western Australia[87] sets out the relevant principles to be applied in determining whether a particular piece of legislation should be construed so as to bind the Crown in right of the enacting legislature. The Court said that it was necessary to consider the purpose, policy and subject matter of the Act to ascertain whether it was intended that the Crown should be bound. A reference to the Crown in a State statute is, as a matter of construction, taken to mean the Crown in right of the enacting legislature only unless the statute expressly or by necessary implication intends that the reference is to the Crown in the right of another jurisdiction. If the Act expressly or by necessary implication purports to bind the Crown in another right, then the Crown in that other right will be bound.[88]

Once it has been determined that, as a matter of statutory construction, an enactment does bind the Crown in the right of another jurisdiction, it would seem that the Crown is consequently bound and that this is the end of the matter. However, where a State law purports to bind the Crown in right of the Commonwealth, statutory construction is only a preliminary question.

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[82] *Constitution of the Commonwealth, section, 61.*
[83] *7 Australia Act 1986.*
[84] *Ibid*
[85] *Bradken Consolidated Ltd v Broken Hill Pty Ltd (1979) 145 CLR 107 at 116; Minister for Works (WA) v Gulson (1944) 69 CLR 338 at 363.*
[86] *Kaye v Attorney-General (Tas) (1956) 94 CLR 193 at 204; cf Re Silver Bros Ltd [1932] AC 514 at 523 where the view was taken that it was narrower than common law and left less room for arguing Crown immunity.*
[87] *(1990) 171 CLR 1.*
[88] *Minister for Works (WA) v Gulson (1944) 69 CLR 338; Commonwealth v Rhind (1966) 40 AUR 407.*

Various High Court decisions have made it necessary to then consider the legislative competence of the State legislature to enact a law which purports to bind the Crown in the right of the Commonwealth. This further step has not been taken in situations where Commonwealth legislation purports to bind the State Crown as there is no question of the Commonwealth's legislative competence to do so.[89]

3.2.2. Pre-1920

Prior to the decision in the Engineers 'case,[90] the High Court had developed a broad doctrine of implied immunities. In D 'Emden v Peddler[91] it denied that the States could fetter, control or interfere with the free exercise of the legislative or executive power of the Commonwealth, asserting that the Commonwealth was sovereign within the ambit of its authority. However, as the concept of the "federal balance" began to prevail over the earlier view of Commonwealth sovereignty, the earlier doctrine was given reciprocal operation.[92] Thus, the doctrine eventually limited the ability of each government in the federation to control the activities and functions of other governments.[93]

3.2.3. The Engineers Principle

In the Engineers' case the High Court considered the argument that neither the Common wealth nor the States could legislate so as to control the other.[94] It was said that;

"...laws validly made by authority of the Constitution, bind, so far as they purport to do so, the people of every State considered as individuals or as political organisms called States - in other words, bind both Crown and subjects".[95]

3.2.4. State Legislation and the Commonwealth Government

It should be mentioned at the outset that State laws which discriminate against Commonwealth functions or activities will be invalid without any need to resort to the concept of

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[89] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (the Engineer's case) (1920) 28 CLR 129 pg. 153.*
[90] *ibid*
[91] *(1904) 1 CLR 91 at 110*
[92] *The Federated Amalgamated Government Railway and Tramway Service Association v The New South Wales Traffic Employees Association (the Railway Servants' case) (1906) 4 CLR 488.*
[93] *Baxter v Commissioner of Taxation (NSW) (1907) 4 CLR 1078.*
[94] *Supra note 81, pg.144*
[95] *Ibid pg. 153.*

intergovernmental immunity.[96]Engineers and *Melbourne Corporation*[97]members of the High Court recognized that the Commonwealth should be immune from discriminatory burdens imposed by State legislation as much as the States were immune from discriminatory Commonwealth legislation.

3.2.5. The "Cigamatic Principle"

The facts in The Commonwealth of Australia v Cigamatic Pty Limited (in Liq.)[98] It was claimed that the company, in liquidation owed the Commonwealth certain unpaid amounts of sales tax and amounts under the Post and Telegraph Act 1901-1961. Chief Justice Dixon made reference to an exception from the general rule that the Commonwealth could not be bound by such State laws. The principle that emerges from the majority judgments is that State parliaments have no power to deprive the Commonwealth of a prerogative or fiscal right of government nor regulate or control legal rights and duties between the Commonwealth and its people. However, the case has been interpreted more broadly so as to give the Commonwealth Government a more general immunity from State laws.[99]

A federal government immunity have a number of criticisms that can be made about the broad scope that has been allowed to it, it is clear that the High Court has recognized that the doctrine does indeed exist in Australia.[100]

3.3. Canada

The mutually exclusive powers contained in the Canadian Constitution are distributed between the Dominion Parliament and the Provinces.[101]In Australia the Commonwealth is assigned a list of powers, largely contained in section 51, which are concurrent with State power. Justices in each jurisdiction have been prompted to explain the respective decline in State power and continuance of relatively wide Provincial power on the basis of the concurrent power between the federal and State parliaments in Australia and lack thereof in Canada.[102]

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[96] *West's case; Shaw v Coco (1991) 102 ALR 75*
[97] *(1947) 74 CLR 31*
[98] *(1962) 108 CLR 372*
[99] *Nicolee Dixon,pg.10*
[100] *ibid*
[101] *These powers are provided under Sec. 91 and 92 respectively*
[102] *Rand J in Murphy v Canadian Pacific Railway Co [1958] SCR 626 at 640-41 v McFarlane (1925) 36 CLR 171 at 215-216 where His Honor sought to draw support from various decisions of the Privy Council refusing to allow the claim for Dominion immunity.*

The first major Canadian decision to assert federal immunity was the Supreme Court of Canada's decision in Gauthier v The King[103] where it was found that the section of the provincial Act attempting to bind the Crown was not, as a matter of construction, intended to restrict the Crown in right of the Dominion. The case could therefore have been decided on this threshold point of statutory construction.

However, there are some dicta to the effect that apart from the question of construction provincial legislation could not bind the Dominion government. Since this decision the Canadian Courts have been somewhat inconsistent in their treatment of the issue. Most of the decisions have come from Provincial courts. There has been a wavering between allowing a broad immunity to the federal government.[104]While, on other occasions, restricting the immunity to the federal government's prerogative rights.[105] On the other hand, the Privy Council's decision in Dominion Building Corporation v The King.[106]Seems inconsistent with the whole concept of there being any intergovernmental immunity.[107] Further, in a more recent case involving a federal banking instrumentality it was held that the Bank was bound by a lien established by the Provincial legislation in favor of the Workers' Compensation Board.[108]

Overall, the approach of the courts has appeared somewhat inconsistent. Nevertheless, there does appear to be a general recognition by the Canadian courts of there being immunity for activities of the federal government, although the extent of that immunity is unclear, particularly when considering government instrumentalities and enterprises.

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[103]*(1919) 40 DLR 353 (SCC)*

[104] *Bowers v Hollinger etal [946] 4 DLR 186 (Ontario High Court) "there is no power in the Province by any of its enactments to bind the Crown in right of the Dominion."*

[105] *Ottawa Public School Board v Ottawa [1953] 1 DLR 692 "the Province has no jurisdiction to deal with the prerogative of the Crown in right of the Dominion."*

[106]*(1933)AC533.*

[107] *The Privy Council held, as a matter of statutory construction, that the relevant provincial legislation applied to the federal Crown and gave no consideration was as to whether there was room for an implication of intergovernmental immunity. Nor was there any mention of Crown rights, privileges or prerogatives although that point was not argued before the Privy Council.*

[108]*Federal Business Development Bank v Hillcrest Motor Inn Inc (1989) 51 DLR (4th) 464*

CHAPTER FOUR

The doctrine of intergovernmental tax immunity under Ethiopian federation

4. Introduction

Writing or rewriting of constitutions is not a rare phenomenon in Africa. What is rare is implementation, at least to the satisfaction of most of their peoples. The quest for more constitutional practice is what is often called for, more than the quest for a new constitutional writing.[109] In the context of Ethiopia, the issue of the making and legitimacy of constitutions is no less important. Ethiopia has adopted a new constitution in 1995; in fact, the constitution was adopted in the constituent assembly on the 8th of December 1994. It came into "full force and effect" as of the 21st of August 1995.[110]

Under this chapter the research would like to focus on the institutional set up of Ethiopian intergovernmental relation and try to see whether the current defacto federation has a room for the intergovernmental tax immunity. And it implies its effectiveness in our justice system. In addition to that, before dealing with the tax immunity it is necessary to discuss the Ethiopian federal stracture of intergovernmental relation, unless otherwise, it would be dificult to revolve with in the ambit of intergovernmental tax immunity without understanding our federal set up.

Intergovernmental relation is one of the definig futures of federations.[111]In a nut shell, federal polities are defined as systems where two or more orders of the government each with constitutionaly defined powers(legislative, executive, judicial and finantial powers) exersise genuine authonomy and act directly on the citizen.[112] Although the constitutional division of powers between the federal government and the state is the central point in federations, we find, however, that the deviding line between the two powers is never clear. Shared (joint) powers

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[109]*Tsegaye Regassa, The making and legitimacy of the Ethiopian constitution: towards bridging the gap between constitutional design and constitutional practice, Institute of Federalism and Legal Studies, Ethiopian Civil Service College, Addis Ababa, Ethiopia,pg.87*

[110] *See the Proclamations to Pronounce the Coming into Effect of the Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/ 1995, Federal Negarit Gazeta, Year 1, No.1*

[111]*Ronald watts, comparing federal systems, 2nd edin.,(montrial and kingston:quens university, 1999) p.7*

[112]*Assefa Fiseha, the system of intergovernmental relation in ethiopian institution and guidlines, Addis ababa january 2009, p.98*

represent the meeting point of the two levels of governments, otherwise considered to be exersising execlusive federal and state powers.[113]

4.1. The nature and scopes of intergovernmental tax immunity under FDRE constitution

Intergovernmental tax immunity under the FDRE constitution is enshrined under the final chapter of the document as directives. The doctrine seems to be the replica of the chief justice marshal decision on the bank of Maryland, it got acceptance by many federation and Ethiopian constitutional framers was transplanted the doctrine under art 100(3). The nature of the doctrine is different with federation to federation on its nature and scope of application.

The provision was devised to maintain certain objectives. Countries seek a modality which the intergovernmental relation can compromise to sustain their exclusive interest. The very purpose of this doctrine also has maintained the vertical interrelationship without discriminatorily affect one level of government. Federal government may have willing to open affaires on states matter, than the states need not be imped. Because, the very aim of federalism is established a common interest at the center (shared rule) and decentralized the power to sub-unities (self-rule), in such scenario federal prerogatives shall execute their powers with in state freely for common interest. For example, federal courts can establish in state to entertain the federal matters, no state can enact discriminatory laws on federal prerogatives. There are various office has been opened in to different regional state, they are free of any charge. Not only offices individual will also execute the federal function within states. Hence, the tax exemption can also apply to individuals. Art 100 /3/ seems dictates that,´ "between federal and states instruments" it does not say any-thing whether it has between states to states (horizontal) or personals

Other federation justified the tax immunity via referring it with .proper and necessary clause. In the US federation certain incidental power needs to be qualified by such measurement. The congruence shall give proper justification for its new programs. If the new program (incidental power) has proper for functioning the common objectives and of the program is necessary to achieve that objective, it said to be the federal instrumentality is got state exemption from different kinds of taxes but it is difficult to postulate such parameters in Ethiopia federation, because, it is arguable on the phrase of proper and necessary clause. However, throughout this time several affairs have been effectuated with in states territory. But the US parameters (proper

[113] *Ibid, p.100*

and necessary clause) cannot apply in Ethiopia case. For example, in US federation states cannot levy taxes on federal prerogatives. If its function is proper and necessary to implement its holistic objective even if the prerogative is profit making. The courts have in a position to delimit which is proper and when and how it will be necessary. Before the initiation of the programs the congress shall lodge prior notice to the court.

When we come to the Ethiopian federation, courts have been paralyzed to adjudicate constitutional dispute. However, HoF has entitled the power of adjudicate constitutional dispute. Before, scrutinize the body's deficiency, it is important to see who can a power to say it is proper and necessary mostly federal government self-proclaimed its program. The role of HPR in this regard overwhelming. Perhaps one of the legacies of parliamentary federation is having strong law making organ (parliament) this may accord the Ethiopian federation to be center leading federation.

Ethiopian federal(center) prerogatives of different enterprises are established with in state like custom duty, telle, commercial bank, hotels, and other power project like mining, hydroelectric project, these are directly subjected to state taxation by art 100(3) except the HPR allege the proper and necessary dictum. However, there is no expressly provided clause under FDRE constitution unless it developed through analogy. Hence, those enumerated instrumentalities are susceptible to state taxation. They are profit motives, no one can justify their "proper and necessary" parameter (no law) so, that, there is no grounds to states can be to exempted from their tax statute. FDRE constitution gave an absolute power to states to levy whatever taxes on those instrumentalities. May be custom duty, telle, power generating plant, banks etc are very important instrumentalities to the common interest of necessary and proper but FDRE constitution lack such parameter and its needs to be constitutional interpretation.

4.3. What lessons could Ethiopia take from foreign experience in relation to intergovernmental tax immunity?

This research has been devoted to discuss, under chapter two issues concerning the practice of intergovernmental tax immunity principle at foreign experience, such as USA, Australia, and Canada. Now therefore, I would like to examine the Ethiopian federal system responses.

4.3.1 "Necessary and Proper Clause" under FDRE constitution

I already have referred the US system with regards to proper and necessary clause. To recall, Article I, clause 18 of the United States constitution technically known as the *necessary and proper clause,* is the origin of the theory of implied powers. According to this clause; the Congress is empowered to make all laws which shall be deems necessary and proper for carrying out (executing) those enumerated powers and all other powers vested by the constitution or any department or officer thereof. As briefly discussed before, In the famous case of *McCulloch* v. *Maryland* chief justice Marshal incorporated the doctrine of implied powers to settle an issue whether the Congress could incorporate a federal National Bank or not. The chief justice constructed the necessary and proper clause and the gist of implied power of Congress.[114]The constitution of FDRE has not expressly used an expression comparable with the "necessary and proper clause" as in the United States. Some tends to argue that, such constitutional muteness should not in any way leads us to the conclusion that the federal government is not empowered to exercise implied powers. Rather, with the view of saving the center from the adventurous task of interpreting the general constitutional provisions dealing with its mandate, the HPR may issue subsidiary comprehensive laws that will make life easier and secures its functional existence. Thus, there is the possibility of arguing that, even if the constitution is silent about the federal implied powers, it is logical to confer the center with such authorities from the pragmatic point of view.[115]There are some provisions which give the center, in fact confusingly, to *establish* and *implement* national standards and basic policy criteria for various essential matters such as health and education. From this it may be argued that, the constitution also have a tendency of giving a *necessary and proper clause* defense to the center, at least to take the enterprise of channeling the constituent units with some policy directions.[116]

The destiny of Ethiopian intergovernmental tax immunity principle is similar with intergovernmental relation without having strong institution for intergovernmental relation; it would be nonsense to deal with both the applicability and institutional responses to this principle. The constitution is clear that it authorize the states to formulate and execute social and development policies, strategies and plans of

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[114] *This clause enunciated a big debate in American legal jurisprudence among the federalist and anti-federalist group. After the justice martial pronouncement of this clause, intergovernmental tax immunity was crafted. Many countries were initiated to transplant the US precedent. Ethiopian constitution (FDRE) also borrowed this doctrine and provided under art 100(3).*

[115] *Kalkidan kassaye, Center - State Relations in the Ethiopian Federal Setup: Towards Coercive Federalism, A dissertation submitted to the school of law of Addis Ababa university, in partial fulfillment of the requirements for the degree of master of laws (LL.M constitutional and public law), December 2010. p.74*

[116] *Article 51(2) of the FDRE Constitution.*

the state within the overall federal framework. As a result, the states have wide powers of policy making. In federal-states intergovernmental relations, one mechanism in which the federal government uses to influence states autonomy is through the use of policy making. The states copy the federal policies and harmonization of federal laws and policy by the state is widespread, mainly due to the party congruence and decision making structure and states capacity and expertise to bring their own that are different from the federal. At any time the federal government can obtain various kinds of immunity, not only tax immunity, any sort of assistance are being ready made with in the states.

Art.100 (3) of the Federal Constitution notes, "Neither the State nor the Federal Government shall levy and collect taxes on each other's property unless it is a profit making enterprise." Unlike the shared tax arrangement, which grants authority to impose certain percent of tax rate on the federal tax base, article 100 (3) refers to two ways of taxation power (top-down and bottom-up) on profit making enterprises. The Federal Government levies custom duties and 10 percent surtax on states' enterprises. The states, so far, have neither imposed tax nor fees on the Federal Government-owned enterprises, although Federal enterprises like Ethio-telecom, Ethiopian Power Corporation, Ethiopian Sugar Corporation, Hotel enterprises, mining enterprises, Ethiopian Aviation Enterprise etc… make wealth by using the land-based resources of the states and some of them produce environmental pollution.[117]

According to article 100(3) of the FDRE constitution the intergovernmental tax immunity principle may not be applicable for profit motive enterprises. To determine the scope of the principle, the consideration which needs to be taken is not who is the owner of the enterprise's rather it should the objective and purpose of the establishment. At this assertion, we can understand that those who open enterprises such as industries, hotels, and other instrumentalities with in states territories. Because those enumerated instrumentality has run in government capacity. This may create a danger to those who run by private capacity. This is against the economic principle in a way that it would have faced high discrepancy on the bargaining power between them. Let say for instance, comparing commercial bank of Ethiopia with other private banks are impossible, the commercial bank have acquired a privilege from government in order to execute at every sort of transaction. Though, the federal

[117] *Ghebrehiwet Tesfai Baraki,the practice of fiscal federalism in Ethiopia: a critical assessment 1991-2012: an institutional approach, Presented to the Faculty of Economics and Social Science at the University of Fribourg, April 14, 2015,p. 229*

executives have granted the tax immunity from states, therefore the constitution precluded the states from taxing on the land usage of those executive bodies.[118]

4.4. The horizontal (interstate) applicability of intergovernmental tax immunity

The doctrine of intergovernmental tax immunity is a dynamic concept; other federations are extended its scope of applicability. In the succeeding years the principle of federal immunity was enlarged and expanded, but it was not until 1870 that the constitution arose and a federal tax was questioned because it applied to an instrumentality of a state. This case, Collector v. Day, involved the application of the federal income tax law to the salary of a state probate judge. The court refused to sustain the tax, holding that the principle of tax immunity was reciprocal as between the federal government and the state. In the case at hand, Justice Frankfurter stated that the commerce clause "does not merely forbid a state to single out interstate commerce for hostile action.[119] A state is also having the effect of impeding the free flow of trade between states. To scrutinize this problem the US and Ethiopian legal system put a mechanism to rectify the concomitant problem.

The place of reciprocity in the application of the doctrine under FDRE constitution is, since the inception of the federal of the federal income tax, income from interest on municipal bonds has been exempt from federal income taxes. The exemption of privilege originated in chief justice marshal recognition that "the power to tax involves the power to destroy. Within the framework of a federal government, the fear that one government may obstruct the operation of the other early led to the assumption that there was a reciprocal immunity, both salaries to employee's and interests to bond holder paid by state and local government were exempt from federal government were exempt from state and local income tax.

The FDRE constitution with related to Interstate tax relation has provided under art 100(2). The theoretical background of this provision meant to be the tax laws which enacted by states shall not be burdensome to the other states. From the outset, such tax laws must granted to the federal government taxing power likewise custom duty. The objective of this principle is, the tax which levied on by a given state shall execute only by that state boundary. Because interstate tax may susceptible to impedes

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[118] *The English version of art 100 of FDRE constitution use the term "directives of taxation" whereas the Amharic use "principle of taxation" off course the Amharic is prevailed over the English version as stated under art 106 of the same constitution. Even though there is a difference between them, the defacto intergovernmental relation could undermine the Amharic version. Every intergovernmental relation has been executed through party affiliated relationship. There were not bases their cooperation pursuant with the spirit of the constitution.*

[119] *423 U.S. 276 (1976).*

on sister states functionality. The broader interpretation of this principle can be, states may not be enact a discriminatory tax system to their counterpart. According to art 51(12) of the FDRE constitution, the power to control, lead has the power of the federal government and every dispute shall entertained by this provision as soon as possible.

Let say, what if TIRET is initiated to conduct business activity in tigray region? Does the Amhara regional state has a legal ground to raise interstate immunity from taxation? The issue is therefore; can a state tax another state? What does the silence of the constitution in this regard indicate? Does this provision mean that there is less likely that one state has an affair in another state?

Art 100(3) is regulated to avert the intergovernmental relation on taxation. It is nothing to do with horizontal relationship. and also the same is true in other federation such as, Australia Canada and US. I.e. it will be up to agreement of states. As far as I know, it is obvious that, ODP and ADP are opened their office at benishangul gumuz capital assosa. The region has been relief them from paying royalty tax in order to promote their function. This shows that, as long as their function is business profit neutral, they can do their task likewise the federal government.

As stated here in above, as per art 51(12) of the FDRE constitution, the federal government has a power to regulate interstate commerce relation. Accordingly, TIRET corporate also seems to be governed by this provision and it will subject to federal taxation power as long as the corporation is profit motive. The silence of the constitution (100(3)) is nothing to do with interstate commerce relation.

4.5. The practical relevance and potential challenges to the doctrine: Ethiopian federation

Most importantly the research has been focused on the scrutinizing the problems of Ethiopian federation with regard to IGTI. The reason is pretty much clear, in Ethiopian context, without having well-articulated intergovernmental relation is maintained in our defacto federal practice, dealing with the intergovernmental tax immunity may considered as *cart before the horse*. For these reason, most academic scholars have been concentrated on the intergovernmental relation. The constitutional tax immunity is neglected throughout the age of Ethiopian federation. The interplay of intergovernmental relation and intergovernmental tax immunity is perplexing. But the Ethiopian federation doesn't bother to such perplexity. Nowadays, the federal government has increased the intruding of its power on states mater. Some says the current system of government has resembled with the unitary type. I can

certainly say that the principle of checking and balance has been absurd. This overall role of the executive organ is manipulated against the constitution. The constitutionality of Ethiopian dualist federal system also has been quashed through mere directives of the prime minister or someone else.

The challenges of the intergovernmental tax immunity are on system of the intergovernmental relation per see. The Ethiopian federation is proposed at the center and goes down to the state ruling party through top-down approach. This kind of hierarchical flowing may not fix the defects of Ethiopian intergovernmental relation; rather it could exacerbate the inherent problem. The official said, we don't follow the tail of the community the Amharic substitution said to be (*yehizib chira aniketelim)*this are the hidden reality of Ethiopian democracy. This official conspiracy vividly can show as how the Ethiopian democracy is going through an infant stage. Before achieving the substantive discourse of federalism, the state should provide the procedural transparency of the very principle of democracy. Without democracy we cannot deal about the merit of federalism or federal states immunity. So as to make the Ethiopian federation to be effective, the above procedural error shall be dismantled from the Ethiopian legal arena. The mechanisms might be, promoting the institutionalization of democratic instruments. It can be through providing independent judiciary, establishing civil society, maintaining strong impartial media coverage, formalizing the essence of checks and balance with in the main governmental organs and their subsequent bodies.

The relevance of the doctrine is similar with federation for example, in the US, Canada, and Australian federation. The doctrine is intended to maintain certain goals. Such as accommodating state and federal interests, which the same is true in Ethiopian federation, the purpose of art 100 (3) is to prevent one's sovereignty from interfering with the governmental functions of another. Hence, any justifiable intergovernmental tax immunity must assure this objective. But it must also, take in to account countervailing state interest. The recognition of art 100(3) necessarily restricts a state's taxing power. It represents a balance between one sovereign's power to tax and the taxed sovereign's need for the intergovernmental tax immunity.

Finally, the paper would not certain about whether there are issues which decided before with related to IGTI in Ethiopia neither vertically nor state to federal. That means, it can say that, state can avail the doctrine. That is why Ethiopian federation is meant to be an infant. The reason is related with system of IGR itself, it lack institutional back up to enforce the doctrine for future claimant.

CHAPTER FIVE

Conclusion and recommendation

5.1. Conclusion

Now it has been almost three decades since the Ethiopian federal system has been put into practical reality. The 1995 constitution, which is the turning point from the traditionally dominant centralization trend of nation building has officially endorsed the ethnic federal re-structuring in the country by declaring the establishment of a federal and democratic republic and establishment of nine regional states thereby affirming that, sovereign power should reside with the 'nations, nationalities and peoples' of Ethiopia. Nevertheless, as this study tried to underscore, the federalization process is not as such a well debated and all-embracing since the options provided by political actors has not been well considered.

Foundationally, as chapter three has tried to briefly point out the other countries perspective in relation to intergovernmental tax immunity, their intergovernmental relation is so much visible, their policy frame work is articulated under their constitutional stipulation. Moreover, these countries are the best example to shape our intergovernmental relation and could lead us in coming up with an intergovernmental tax immunity on the basis of legally established manner and to avoid federal intervention on state taxable areas arbitrarily.

I have tried to reveal; the states are not in a position to formally implement their own priorities and policies. All the countries main policies and strategies are designed at the central committee's level of the leading party without proper consultation of the public at large. The fact that an ever centralizing government is in power at the federal level and the fact that the states, owing to low level of economic development, depends much on federal government. Resource has made it unclear as to how far the federalism has managed to strike a fair balance between state autonomy and the need to preserve the unity of the polity. Writers such as Assefa Fisefa, consider the Ethiopian intergovernmental relation as the least developed and the least understood dimension of federalism Due to the existence of highly centralized political culture. We can add that, the less attention was given during constitutional making as to how the respective level of government can cooperate, and integrate in the discharge of its function. Under Ethiopian federal-states relation the issue of autonomy is also analyzed. Thus, intergovernmental relations

are informal and party channel which leads to federal government and its executive institution domination. Federal executive institution such as Ministerial and agency relation to respective states bureau and agencies, party channel relation, informal relation through conferences and workshops organized by federal alone characterizes Ethiopian current intergovernmental relations. This clearly stated the fact that federal-states relations organized by federal executive institution and party channel have influence on the latter's autonomy and it will trigger the diminishing of states constitutional power.

Constitutionally speaking, the legally established organ bestowed in order to discharge the intergovernmental relation and it also plays the role of judiciary on settlement of constitutional dispute is the house of federation. This organ is mandated to facilitate feasible co-operation between the two tiers of the government. But when we see its performances it is not entrusted to do a constitutionally granted power, the competency is also debatable for constitutional scholars to reach at a consensus whether or not Ethiopia has functional second chamber. The debate also continued time to time even today. Moreover, certain practices would also tell as that of the Ethiopian federation has been amazingly manipulated by one party influence and some says *democratic centralism*.[120]

5.2. Recommendation

After examining the backward trend of intergovernmental relationship and IGTI in Ethiopia, which is basically based on coercive techniques of collaborations, and with the view of realizing genuine federal structure that gives enough political space for the federal bargainers and hasten the country's transition towards democracy, in the following , I would like submit a possible recommendation:

1. Just like the US constitution, The FDRE constitution shall be amended to Put an express provision to provide necessary and proper clause so as to enable the intergovernmental tax immunity to become functional, on the other hand, it can be

[120] *As Assefa noted, Democratic centralism is a vague concepts which generally implies that decisions are often reached at top executive party officials level and flow directly to the grass root party members. The idea of Democratic Centralism, its derived from the Soviet communism, which reveals the aspect of a political trend that is characterized by centralized decision making without or little involvement of the electorate. All the Deliberations and decisions of state affairs are concluded in camera or behind the walls without the active participation of the populace; usually at the top party level. Decisions always follow a top-down approach.*

interpreted (implied) art 51(2) of the constitution to construe the clause so as to give an effect to entertain art 100(3) of the FDRE constitution.

2. It is a known fact, in which the Ethiopian second chamber has been playing a modest role beginning from the formative stage. States have less control over law legislated by the federal government and this is because Ethiopia has no second chamber with law making function in the areas of shared policy making. There is a huge academic and political debate on the lack of real legislative power to the House of the Federation that the system is an exclusion of states interest at the federal level in policy making. It is possible to argue that the arrangement may have unenthusiastic consequence in preserving the interest of the states especially where there is unmitigated party competition in the two orders of government because of absence of institutional forums in which states reflect their interest in national policy making. Throughout this time (two and half decades) it entertained little number of concrete cases only. The members are not qualified to maintain the state interest because they are a combination of every ethnic group (membership doesn't entails from qualification of individuals, some of them are religious leaders, elders and may even can be illiterate)

I would suggest that, Ethiopian federation needs an institution in order to implement intergovernmental relation effectively. Furthermore, The role of constitutional adjudication shall be diverted to the Supreme Court cassation division likewise the US model. Federal and state disputes on economic interest can only be decided by court of law. Perhaps, it could be impossible to protect the state's economic interest by mere establishment of second chamber; rather it should amend the constitution so as to bestow the second chamber to have a law making power as well as effective adjudicative power.

3. It should avoid the inter dependency of party channel with in party affiliate bodies and come up with the true federalist state. We have had established a symbolic federalism; it is far from the inherent manifestation of shared rule and self-rule dictum. due to close and party channel based, in the absence of well-organized institution, federal-states intergovernmental relations leads states to directly apply federal laws and policies. Till now, the relationship has been held through the

federal executive crafted body called *kililgudayzerf* or ministry of federal affairs (MOFA). It is associated with securing the willingness of the regional governments to be part of the political process at the center and to assist some of the regions in terms of capacity building and good governance which also continued to date as its primary concern. This body may advance the interrelation ship between the two tiers of the government. The *defacto* recognition of this body has leaded our system in to unitary form of government. At this juncture, it would be important to question as to why the federal government seeks to relief from states taxation to its enterprises since it has already taken their power unconstitutionally. The states are already under the supervision of the executive hands of the federal government with no possible way to challenge the coercion of federal unconstitutionality form of policy implementation. The regional governments must build up their regional affairs departments that are now almost nonoperational with the intent to challenge undue federal interventions and to have the opportunity of setting agenda's with the federation and with their fellow regional states.

The practice implies that, the federal government has indorsed its policy to the states and states will implement it. For this reason, I can certainly be sure that it contravenes with the duality of Ethiopian federation. To be frank, with relation to this issue the FDRE constitution can be considered ineffective. The central government has its own provided enumerated power to execute on its behalf; the state may not have to be keen to willing to do non- essential federal functions on their territories. With the exception of a necessary and proper clause to carry out the function of the congress. Postulating dualist federalism is significant role to implement self- rule. The constitutional rights for the states to formulate and implement plans and policies are severely diminished by the fact that state governments, which are under leading party hegemony, follow the federally designed policies and plans. Although the states in Ethiopia are both financially weak, it is first of all the centralized party structures which undermine the state’s ability to act independently from the federal.

The country's overall policy is designed at the federal by different formats and its direct implementation is through ruling political party. Among others, the five years development plan, Grand Renaissance Dam Project and its process, the Business process reengineering package, Development and Transformation Plan, the Millennium Development Goals, usually comes from the center. The federal symmetry of financial assistance to emerging region may not solve the unavailability of those stated regions with in the federation; rather, granting territorial autonomy to their jurisdiction may settle different concomitant problems.

First, in the past two and half decades, the emerging states have not changed their distinctive name. Still they have been called emerging; nothing has changed with them except some progress has come into picture. The dependency might be overcome by making them autonomous and policy maker on their interest. For instance, benishangul gumuz regional state is among those known emerging region, the region is naturally gifted by various natural resources. But the resources have been extracted through illegal ways, the region administrators don't bother about the marketing of local revenue source, they have accustomed themselves with the federal grant so as to fulfill their annual expenditure. But imagine, if art 100(3) of the constitution was an effective provision, not only telle, commercial bank, other mini federal enterprise's, or the grand Ethiopian renaissance dam (GERD) will solely cover vast coverage of states treasury through contesting the federal government to make profit enterprise within their territory and levy land fee unless otherwise the federal government alleges to the necessary and proper clause. Of course no room for the federal government has to sustain its allegiance, because there is no express indication of the clause in our constitution and it could lead the states advantageous.

All in all, establishing the visible intergovernmental relation is inevitable solution to establish the express recognition and implementation of proper and necessary clause doctrine, hence, nothing could be perplex in federalist state. The equality of bargaining power between the two tiers of the government could envisage to the economic, political and social competition among their jurisdiction. Furthermore, the autonomy of the states could be also alleviating. It doesn't have a

chance to be fragmented in any sort of political fluctuation. The current Ethiopian federalism cannot resolve the intergovernmental fiscal disputes specially. Intergovernmental taxation. Ethiopian legal system can't be relieved from the autocratic hangover. Undoubtedly, it is expected to make a comprehensive reform to realize well-articulated and democratically manifested federal system.

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